



Australian
Competition &
Consumer
Commission

Determination

Applications for authorisation

lodged by

Job Futures Ltd on behalf of its members

in respect of

**collective tendering for government employment services contracts
and 'non-compete' arrangements**

Date: 18 September 2008

Authorisation no.: A91084 & A91085

Public Register no.: C2008/478

Commissioners: Samuel
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King
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Willett

Summary

The ACCC grants authorisation for Job Futures to collectively tender on behalf of its members for government employment services contracts and to enter into agreements with its members containing ‘non-compete’ arrangements.

The authorisation process

The Australian Competition and Consumer Commission (ACCC) can grant immunity from the application of the competition provisions of the *Trade Practices Act 1974* (the Act) if it is satisfied that the benefit to the public from the conduct outweighs any public detriment. The ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

Background

Job Futures was established in 1997 in order to provide a vehicle for its members – namely, community based non-profit organisations – to share resources and build capacity to compete effectively for government funding to deliver employment and related programs to the community. Membership of Job Futures has grown from 19 service providers in 1997 to 51 members today.

Job Futures’ current members broadly fall into the following groups: local community based employment and training organisations which are generally based in a region or sub region; Aboriginal organisations delivering employment and similar services; and larger charitable organisations that provide a wide range of services to the community, of which employment programs are a smaller part.

Job Futures works with its members to deliver government funded employment service programs to communities through subcontracting arrangements. The dominant purchaser of these services is the Australian Government. The Australian Government’s Job Network employment program provides the greatest share of funding and has approximately 99 service providers under contract (of which Job Futures is one).

In 1998, the ACCC granted conditional authorisation to allow Job Futures to collectively tender on behalf of its members for an Australian Government contract to supply employment services in areas where it had members and to subcontract members any work it was successful in bidding for. The previous authorisation expired in 2002.

The applications for authorisation

On 25 March 2008, Job Futures, on behalf of itself and its members, lodged applications for authorisation A91084 and A91085.

Under application for authorisation A91085, Job Futures seeks authorisation to allow it to develop collective tender arrangements for the purposes of bidding for government funding for the provision of employment services.

Under application for authorisation A91084, Job Futures sought authorisation for its ‘non-compete arrangements’. That is, an arrangement between its members that it will tender on their behalf on condition that:

- members not tender for the same or a similar program while under subcontract to Job Futures
- Job Futures will not tender for new contracts against a member organisation where they have historically provided that program in that location.

On 26 June 2008, the ACCC issued a draft determination proposing to grant authorisation to application A91085 (collective tendering) and to deny authorisation to application A91084 (the non-compete arrangements). The ACCC was concerned that the non-compete arrangements were unnecessarily restrictive and were likely to have the effect of indefinitely discouraging members from ever tendering separately to Job Futures.

On 22 August 2008, Job Futures provided the ACCC with a revised version of the non-compete arrangements. These revised arrangements:

- require member organisations to commit to remaining within the arrangements for at least two full contract terms or two tenders (i.e. six years)
- require organisations that wish to exit the arrangements after the initial six year term to give Job Futures Ltd notice no later than 18 months prior to the end of that six year term
- entitle Job Futures Ltd to restrict an exiting organisation's access to information other than that required for it to deliver its contracted services
- entitle Job Futures to allocate up to 30 per cent of the exiting member's contracted services to another member, provided that this does not reduce the exiting member's remaining business share in an ESA to an amount less than it specified in the initial tender process as its minimum bid in that ESA. In other words, the exiting member has already determined that this amount is sufficient for it to remain viable.

Public benefits

The ACCC is satisfied that the central coordination of tendering by Job Futures provides public benefits by reducing administration costs and enabling smaller providers of employment services to enter the Job Network and remain viable. The ACCC recognises the public benefit in having smaller community based organisations participating in the Job Network, particularly as a result of their diversity in approach and local focus in delivering these services. Further, the ACCC also recognises the benefits of having smaller non-profit organisations providing employment services to disadvantaged people in places where larger for-profit organisations do not operate.

The ACCC is of the view that there is some benefit from Job Futures' revised non-compete arrangements – to the extent that it underpins the operation of its cooperative model and facilitates the entry and ongoing operation of the smaller service providers.

Public detriments

The ACCC considers the central coordination of tendering by Job Futures is unlikely to result in significant public detriment. This is due to strong competition between a large number of employment services providers and the fact that prices for the provision of employment services are effectively set by the Australian Government.

The ACCC considers that the revised non-compete arrangements will give rise to some detriment but will enable Job Futures to deliver the benefits of its operational model without the significant restrictions imposed upon members under the previous non-compete arrangements.

Balance of public benefits and detriments

The ACCC considers the public benefits of the collective tendering arrangements are likely to outweigh any public detriment.

On balance, the ACCC considers that the public benefits of Job Futures' revised non-compete arrangements are likely to outweigh the public detriments.

Length of authorisation

The ACCC notes that the typical duration for employment services contracts has been three years. For example, the ACCC understands that DEEWR will shortly be conducting a tender process for employment services contracts that will commence on 1 July 2009 and expire on 30 June 2012.

The ACCC considers that it would be appropriate to review the operation of the collective tendering arrangements towards the end of two three-year contract periods. The ACCC grants authorisation for these arrangements until 30 June 2015.

The ACCC considers that it would be appropriate to review the operation of the non-compete arrangements towards the end of two three-year contract periods and before the commencement of any subsequent contract period. Accordingly, the ACCC grants authorisation for these arrangements until 30 June 2015.

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List of abbreviations

ACOSS	Australian Council of Social Service
The Act	<i>Trade Practices Act 1974</i>
CFI	Community First International Ltd, formerly Community First Inc
CSSA	Catholic Social Services Australia
DEETYA	Australian Government Department of Employment, Education, Training and Youth Affairs
DEEWR	Australian Government Department of Education, Employment and Workplace Relations
ESA	Employment Service Area
NESA	National Employment Services Association
PEP	PEP Community Services Inc

1. Introduction

Authorisation

- 1.1 The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.
- 1.2 The Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.
- 1.3 The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.4 The ACCC conducts a public consultation process when it receives an application for authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.5 After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.
- 1.6 Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.
- 1.7 The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.

The application for authorisation

- 1.8 On 25 March 2008 Job Futures Ltd (Job Futures), on behalf of itself and its members, lodged applications for authorisation A91084 and A91085 with the ACCC.

- 1.9 Job Futures originally sought authorisation for an arrangement between its members (both current and future) to permit Job Futures to:
- tender on behalf of members for government contracts to provide services that assist unemployed and disadvantaged people to gain work, on condition that members will not tender for the same or similar program on their own account, while delivering that program or a similar program under subcontract to Job Futures. Job Futures will also not tender for new contracts against a member organisation where they have historically provided that program in that location (A91084) (the ‘non-compete arrangements’) and
 - develop co-operative tendering arrangements, which include agreements as to the price that will be tendered and the price paid for services provided by members to Job Futures, and agreements as to the territories in which members and Job Futures will tender to deliver services (A91085).
- 1.10 These arrangements are currently reflected in the following documents: Job Futures Members Rights and Responsibilities and National Office Charter Service, membership application form and the subcontract agreement between Job Futures and its member organisations. Authorisation has not been sought for the documents but rather the arrangements or conduct described in paragraph 1.9.

Interim authorisation

- 1.11 At the time of lodging the applications for authorisation, Job Futures sought interim authorisation to cover the preparatory work for a request for tender expected to be issued by the Australian Government Department of Education, Employment and Workplace Relations (DEEWR) in the second half of 2008 for a number of employment service contracts.
- 1.12 On 22 April 2008 the ACCC granted interim authorisation on slightly different terms to those proposed by Job Futures.
- 1.13 The ACCC granted interim authorisation to allow Job Futures to:
- prepare tender proposals with members of Job Futures (members) under which Job Futures will subcontract work to members and lodge such tenders on behalf of members. Proposals may include agreements as to the price that will be tendered and the price paid for services provided by members to Job Futures, and agreements as to the territories in which members and Job Futures will tender to deliver services, with respect to the upcoming tender expected to be released in the second half of 2008, by DEEWR for employment service contracts, including:
 - Employment Services Contract (Job Network)
 - Employment Services Funding Deed (Personal Support Program, Job Placement Education and Training, Disability Employment Network (uncapped), Green Corps)
 - Remote Services Deed and
 - Australian Apprenticeship Access Program.
(collectively referred to as the “Employment Contracts”)

- allow a member to participate in the preparation of a tender proposal in relation to an Employment Contract on condition that the member agrees not to tender directly on its own behalf for that Employment Contract.
- 1.14 The ACCC did not grant interim authorisation to allow Job Futures to terminate a subcontract with a member in relation to an existing Employment Contract where that member has proposed or intends to tender directly on its own behalf for a future Employment Contract.

Draft determination

- 1.15 On 26 June 2008 the ACCC issued a draft determination proposing to grant authorisation to allow Job Futures to collectively tender on behalf of its members for government employment services contracts.
- 1.16 The ACCC proposed not to grant authorisation to Job Futures for its non-compete arrangements as they stood at that time.
- 1.17 The ACCC invited interested parties to comment on the appropriate duration of authorisation.

Revised non-compete arrangements

- 1.18 On 22 August 2008 Job Futures provided the ACCC with revised non-compete arrangements that sought to address the concerns raised in the draft determination. In brief, these new arrangements would:
- require member organisations to commit to remaining within the arrangements for at least two full contract terms or two tenders (i.e. six years)
 - require organisations that wish to exit the arrangements after the initial six year term to give Job Futures Ltd notice no later than 18 months prior to the end of that six year term
 - entitle Job Futures Ltd to restrict an exiting organisation's access to information other than that required for it to deliver its contracted services
 - entitle Job Futures to allocate up to 30 per cent of the exiting member's contracted services to another member, provided that this does not reduce the exiting member's remaining business share in an ESA to an amount less than it specified in the initial tender process as its minimum bid in that ESA. In other words, the exiting member has already determined that this amount is sufficient for it to remain viable.

Chronology

1.19 Table 1.1 provides a chronology of significant dates in the consideration of this application.

Table 1.1: Chronology of applications for authorisation A91084 and A91085

DATE	ACTION
25 March 2008	Application for authorisation lodged with the ACCC, including an application for interim authorisation.
9 April 2008	Closing date for submissions from interested parties in relation to the request for interim authorisation.
22 April 2008	The ACCC granted interim authorisation on slightly different terms to those proposed by Job Futures.
24 April 2008	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
16 May 2008	Submission received from Job Futures in response to interested party submissions.
26 June 2008	Draft determination issued.
17 July 2008	Closing date for submissions from interested parties in relation to the draft determination.
18 July 2008	Submission received from Job Futures in response to the draft determination.
22 August 2008	Submission received from Job Futures proposing revised non-compete arrangements.
29 August 2008	Closing date for submissions from interested parties in response to revised non-compete arrangements.
18 September 2008	Determination issued.

2. Background to the application

Employment services

- 2.1 In the 1996-97 Budget, the Australian Government announced a new framework for the delivery of labour market assistance. The new system was implemented on 1 May 1998 and included the development of a contestable market for publicly funded employment placement services. This involved establishing a national tender process for the delivery of labour market services.¹
- 2.2 DEEWR, through this tendering process, purchases employment and related services from a network of government and non-government organisations. It is responsible for contract management, administration and monitoring the providers of these services. The employment and related services which DEEWR has purchased include:
- Job Network, which assists hundreds of thousands of Australians find jobs each year
 - Disability Employment Network, which provides specialised employment assistance to people who, because of their disability, require ongoing support in the open labour market
 - Community Work Coordinators, responsible for managing the Work for the Dole Program and the Community Work Program
 - Pre-employment assistance services, through the Personal Support Program and the Job Placement, Employment and Training Program
 - Vocational Rehabilitation Services which combine vocational rehabilitation with employment assistance and
 - Other complementary or more targeted employment services, such as Harvest Labour Service, Green Corps, Voluntary Work Initiative and the New Enterprise Incentive Scheme.²
- 2.3 Since these employment services were contracted out in 1998 there have been a number of employment service contracts which have been put out for tender for the programs listed in paragraph 2.2. Current contracts for employment services expire on 30 June 2009.

¹ Job Network evaluation – stage one implementation and market development
<http://www.workplace.gov.au/workplace/Programmes/JobNetwork/JobNetworkevaluation-Stageoneimplementationandmarketdevelopment.htm>

² Request for Tender for Job Network Services 2007 – 2009, Department of Employment and Workplace Relations, p 2.

Employment services review³

- 2.4 In January 2008, the Minister for Employment Participation, the Hon Brendan O'Connor MP, commenced a review of employment services. The Government consulted a wide range of stakeholders including employment service providers, employers and welfare agencies. A new employment services model has been proposed in a recently released discussion paper.⁴
- 2.5 Public consultation on the proposed new employment services model commenced on 19 May 2008. Written submissions on the proposed new model closed on 12 June 2008.
- 2.6 An Exposure Draft of Purchasing Arrangements for the new employment services 2009-2012 was released on 1 August 2008 with submissions closing on 29 August 2008. A request for tender to provide employment services is expected to be released in the near future with a view to the new contracts commencing on 1 July 2009.
- 2.7 The proposed new model will combine seven employment service contracts into one, integrating the Job Network, Work for the Dole, Personnel Support Program, Green Corps, Job Placement, Employment and Training Program, Harvest Labour Services, the New Enterprise Incentive Scheme and the Remote Bundled Services.
- 2.8 The proposed new employment services model is being adopted to:
- enable more tailored assistance for job seekers
 - increase early assistance to the most disadvantaged job seekers
 - better meet the skills needs of employers
 - enhance opportunities for work experience
 - introduce a more work like compliance system and
 - streamline programs and processes to reduce the burden of administration and red tape which will cut the costs for service providers.
- 2.9 Under the proposed model job seekers will continue to make their first contact with Centrelink. Centrelink will undertake an assessment and place the job seeker into one of four streams based on their level of disadvantage.

³ The information in this section was derived from the Future of Employment Services in Australia available at <http://www.workplace.gov.au/NR/rdonlyres/AF3F953B-8A0C-4C97-B00B-3A128C6D9E26/0/DiscussionPaperfactsheet.pdf>

⁴ Department of Education, Employment and Workplace Relations, *The Future of Employment Services in Australia, A Discussion Paper*, May 2008.

- 2.10 Job seekers will work with their provider to develop an Employment Pathway Plan that will take into account the needs and skills of the job seeker and will identify the assistance required to secure sustainable employment. Job seekers will be required to participate in work experience, training or other activities as agreed as part of the Employment Pathway Plan.
- 2.11 The proposed new model will reward providers who engage effectively with employers to meet labour demands. Outcome fees will give greater weight to the jobs gathered and filled by providers and performance measures will reflect this fee structure. As part of the tender process, service providers will be required to set out their strategies to assist businesses, including small businesses, in meeting their labour needs.
- 2.12 To address labour shortages in particular industries and regions, employers, groups of employers, employer associations and unions will be able to tender to provide employment brokerage. These brokers will work with training organisations and employment service providers to skill up job seekers in the areas of greatest need.
- 2.13 An external reference group will be established to provide advice on a performance management system that will take account of the new emphasis on skills development, training and the needs of employers.

Job Futures

- 2.14 Job Futures was established in 1997 for the purpose of preparing a tender to the former Australian Government Department of Employment, Education, Training and Youth Affairs (DEETYA) in respect of government labour assistance programs. At the time, the Australian Government had adopted policies to reform labour market assistance programs, which included the provision of labour market assistance on a competitive basis.
- 2.15 Job Futures was founded to facilitate current and future members' entry into, and performance in, programs that assist disadvantaged people move into sustainable employment.⁵
- 2.16 In 2006/07 Job Futures delivered employment programs under contract to the Australian Government Department of Employment and Workplace Relations, the Australian Government Department of Education, Science and Training, the Victorian Department of Justice and the Queensland Department of Education and the Arts.
- 2.17 Job Futures was established in order to collaboratively bid for and deliver services.⁶ It operates on a subcontracting model. It secures funding (principally from government) and then subcontracts delivery of services to its member organisations. Job Futures acquires services from its members on the basis that they will not tender for the same or similar services on their own behalf.⁷

⁵ The Charter, p 1.

⁶ Job Futures' application for authorisation (A91084-A91085), Attachment 1, p 2.

⁷ Job Futures' covering letter to the application for authorisation (A91084-A91085), p 1.

Membership of Job Futures

- 2.18 Job Futures is governed by a Board of Directors. The Board comprises six representatives elected annually by members and up to two additional non-member Directors by the Board.⁸
- 2.19 In order to be eligible for full membership, applicants must have a demonstrated capacity to support the objects of Job Futures and be a non-profit organisation. Applicants must also agree to be bound by the membership policy adopted by the Board, the Constitution of Job Futures, the subcontract agreement and the Job Futures Membership Charter.⁹
- 2.20 In considering applicants for membership, the Board takes into account the following factors:
- non-profit status
 - evidence of effective governance
 - financial viability
 - consistency of organisational goals with those of Job Futures
 - extent to which proposed member's operations are or may be in competition with or complementary to Job Futures' existing operations and
 - ability to contribute to the future performance and growth of Job Futures.¹⁰
- 2.21 Applicants who are refused membership to Job Futures may utilise a dispute resolution procedure which is set out in the Constitution, provided the applicant lodges with Job Futures as security an amount of money which is sufficient to cover all reasonably anticipated costs and expenses of Job Futures in relation to the mediation.¹¹ The dispute resolution process involves mediation administered by the Australian Commercial Disputes Centre before having recourse to arbitration.¹²
- 2.22 Job Futures currently has 47 members and four associate members located across urban, regional and remote Australia. The current members of Job Futures are listed at Appendix 1 to this draft determination. Job Futures advises that its membership broadly falls into the following groups:
- Local community based employment and training organisations which are generally based in a region or sub region. Approximately 75 per cent of members fall within this category. For example, MTC Work Solutions delivers employment and training programs primarily in Inner Western and South Western Sydney, and Community Employment Options delivers disability specific and general employment programs in Rockhampton, Maryborough and Hervey Bay.

⁸ Clause 16.3 of the Constitution.

⁹ The Charter, p 1.

¹⁰ Clause 9.2 of the Charter.

¹¹ Clause 9.1.6

¹² Clause 24.1 of the Constitution.

- Aboriginal organisations delivering employment and similar services. These organisations represent 15 per cent of members.
 - Larger charitable organisations where, in most cases, employment services represent only a small part of their wider social program. These organisations include Anglicare Tasmania, Brotherhood of St Laurence and Melbourne City Mission.
- 2.23 The operations of Job Futures are funded via an annual membership fee and a service fee which applies to contracts held by Job Futures.¹³ The current membership fee is \$5500 in the first year and \$3300 per annum thereafter. In most cases the service fee is set at five per cent of contract value.
- 2.24 Membership of Job Futures ceases for a number of reasons including, but not limited to, the member resigning, the member being expelled pursuant to clause 11.3 of the Constitution or ceasing to be a non-profit entity.¹⁴ The Board may expel a member from Job Futures if the member:
- is in breach of a provision of the Constitution¹⁵
 - is in breach of a provision of the Job Futures Membership Charter
 - commits any act or omission which, in the opinion of the Board, is unbecoming of a member or prejudicial to the interests of Job Futures
 - fails, for a period of six months, to meet its obligations with respect to payment of any amount in excess of \$1000 owing to Job Futures.¹⁶
- 2.25 A meeting of the Board must be called to consider expulsion of a member.¹⁷ The affected member will be given not less than 14 days notice of such a meeting. The Board is also required to inform the member of the possible breach and provide the member with the text of any proposed resolution relating to the expulsion of the member.¹⁸ The member will also be given the opportunity to provide an oral or written submission to the Board.¹⁹
- 2.26 A resolution of the Board to expel a member requires a two-thirds majority of those directors who attend and vote on the resolution.²⁰ If a resolution is passed to expel a member, the member will be notified in writing without delay of the Board's decision.²¹
- 2.27 If the member provided a submission to the Board, the member may give written notice to Job Futures no later than seven days after the member received notification of the

¹³ Clause 9.2 of the Constitution.

¹⁴ Clause 11.1 of the Constitution.

¹⁵ Certain provisions of the Constitution were amended by resolutions passed by members at a general meeting on 2 May 2008.

¹⁶ Clause 11.3 of the Constitution.

¹⁷ Clause 11.3.3 of the Constitution.

¹⁸ Clause 11.3.4 of the Constitution.

¹⁹ Clause 11.3.5 of the Constitution.

²⁰ Clause 11.3.8 of the Constitution.

²¹ Clause 11.3.7 of the Constitution.

resolution of the Board, to elect to have the matter of expulsion considered by Job Futures at a general meeting.²²

2.28 Prior to calling a general meeting, the Board may determine that the affected member must first provide reasonable security to Job Futures to cover the cost of convening and holding the general meeting. If the members in the general meeting confirm the resolution of the Board, then Job Futures will retain from the security the amount which was incurred in convening and holding the meeting, and any balance will be returned to the member. If the security is not adequate to cover the costs, then the excess of the costs over the security shall be paid immediately by the member to Job Futures.²³

2.29 For the purpose of confirming or rejecting the resolution passed by the Board, the resolution of members must be passed by a majority of those members present and voting. If the members in the general meeting confirm the resolution of the Board, then the member concerned will be expelled immediately.²⁴

2.30 Where it is alleged that a member breached the Job Futures Membership Charter and a meeting of the Board has been called to consider the expulsion of the member, the Board may:

- suspend the members' right to receive information which in the opinion of the Board pertains to any tender being or proposed to be made by a member in its own right and
- suspend the members' right to participate in meetings in which it is proposed to discuss information, policies, strategies and tender formulation

pending the outcome of the meeting of the Board or general meeting of members to expel a member.²⁵

The contractual relationship between members and Job Futures

2.31 Set out below is the contractual relationship between Job Futures and its members as it stands at the time of authorisation. On 22 August 2008 Job Futures provided the ACCC with a revised set of arrangements. Job Futures advises that these new arrangements may require some amendments to its Membership Charter.

2.32 The new arrangements will require members to commit to remaining with Job Futures for at least two full contract terms or two tenders (i.e. six years). Should the member no longer wish to deliver the services to Job Futures beyond that, it must notify Job Futures no later than 18 months before the end of that six year term.

2.33 At this time, the member may have up to 30 per cent of its contracted business reallocated to another member organisation. Job Futures will not exercise this right if the member's remaining business share in an ESA would be less than the amount it specified in the initial tender process as its minimum bid in that ESA.

The subcontract agreement

²² Clause 11.3.9 of the Constitution.

²³ Clause 11.3.12 of the Constitution.

²⁴ Clause 11.3.10 of the Constitution.

²⁵ Clause 11.4.3 of the Constitution.

2.34 When Job Futures develops a tender the Board makes a decision (based on standard criteria) as to which member or members will be subcontracted in a particular location. If Job Futures is successful in being awarded a contract to deliver services, it subcontracts the specified member organisations. A standard subcontract for the delivery of services is entered into between Job Futures and each member. The current standard subcontract agreement includes the following clause:

Job Futures acquires the services from the subcontractor on condition that the subcontractor does not, during the term of the agreement, supply, offer to supply or tender to supply services of a type being supplied by the subcontractor to Job Futures pursuant to this agreement as set out in Schedules 1 to 8 on its own individual account or through a related body corporate to:

- (a) the customer; or
- (b) another supplier of such services to the customer.²⁶

2.35 The current subcontract agreement between members and Job Futures is for the period 1 July 2006 to 30 June 2009. It is anticipated that a new subcontract agreement, containing a similar clause, will be developed in preparation for the 2009–2012 financial year contract period.

2.36 The Job Futures Membership Charter and the Membership Application Form also reflect this condition in the subcontract agreement. The provisions in the Charter are discussed below.

*Job Futures Membership Charter*²⁷

2.37 The Board is responsible for determining and communicating to members the criteria for inclusion of members as a nominated subcontractor or partner in a Job Futures tender. The criteria include, but are not limited to:

- past performance in delivering the program/service
- demonstrated capacity to deliver the program/service in the area for which the tender is proposed and
- demonstrated local linkages including mechanisms for promoting engagement of the local community.²⁸

2.38 Any member that meets the required criteria has the right to be included in the relevant tenders, provided that their inclusion would not significantly damage the rights and interests of another member of Job Futures.²⁹

2.39 A member affected by a decision of Job Futures to select a subcontractor or partner may seek review of the decision through a Board disputes committee, which will consider any request for review within 3 business days of receipt.³⁰

2.40 Job Futures may require that a member participating in a tender pay a levy to cover the costs of developing the tender.³¹

²⁶ Clause 22.3 of the subcontract agreement dated June 2006.

²⁷ The Charter was passed by members of Job Futures at a general meeting on 2 May 2008.

²⁸ Clause 2.1 of the Charter.

²⁹ Clause 2.3 of the Charter.

³⁰ Clause 2.4 of the Charter.

- 2.41 The Job Futures Membership Charter states that it is a fundamental condition of membership of Job Futures that a member is entitled to continue to receive the benefits of membership on the basis that it is acting in concert with, and on a co-operative basis with, its fellow members.³²
- 2.42 Members must only participate in a tender to provide Job Network services (or any successor program to Job Network) as a subcontractor to or partner with Job Futures, unless the prior written consent of Job Futures has been obtained.³³
- 2.43 A member that has entered into a subcontract with Job Futures to deliver a program or services must not tender, in its own right, for that same, or any successor program, whilst remaining as a member of Job Futures, unless prior written consent of Job Futures has been obtained.³⁴
- 2.44 A member that submits a tender in contravention of clauses 3.2 and 3.3 of the Charter (as outlined in paragraphs 2.42 and 2.43 above) is acting in a manner prejudicial to the interests of Job Futures and its members, and is liable to forfeit its membership.³⁵
- 2.45 A member affected by a decision of Job Futures to refuse consent may seek review of the decision through a Board dispute committee, which will consider any request for review within three business days of receipt of the request.³⁶
- 2.46 The Charter states that Job Futures will not submit a tender to deliver new services in a location where that tender is likely to damage the pre-existing business of a member organisation in that location.³⁷
- 2.47 The Charter provides that members have the right to compete directly against other members when tendering for business in their own right.³⁸

Previous authorisation

- 2.48 In September 1997 Job Futures lodged application for authorisation A90625 in relation to the provision of employment services to DEETYA. At that time, Job Futures was comprised of 19 service provider members.
- 2.49 On 8 April 1998 the ACCC granted conditional authorisation to allow Job Futures to tender with DEETYA for a contract to supply employment services in areas where members of Job Futures are located and to subcontract to members any work it was successful in bidding for.
- 2.50 Underpinning the authorised arrangements was the requirement that members contracted to deliver a service were not to tender for that or similar service while the subcontract was in place.³⁹

³¹ Clause 2.5 of the Charter.

³² Clause 3.1 of the Charter.

³³ Clause 3.2 of the Charter.

³⁴ Clause 3.3 of the Charter.

³⁵ Clause 3.4 of the Charter.

³⁶ Clause 3.6 of the Charter.

³⁷ Clause 4.1 of the Charter.

³⁸ Clause 4.2 of the Charter.

³⁹ Job Futures' supplementary submission in support of the application for authorisation (A91084-A91085), 16 May 2008, p 1.

- 2.51 The authorisation granted was subject to a condition that the arrangements were to include a review process in respect of applications for membership.
- 2.52 Authorisation expired on 30 November 2002. Job Futures and its members have continued to engage in similar arrangements without authorisation since that time and have participated in tender rounds in 2003 and 2006.

Recent developments

- 2.53 The ACCC understands that two of Job Futures' member organisations who are subcontracted to it – PEP Community Services Inc (PEP) and Community First International Ltd, formerly Community First Inc (CFI) – are currently seeking a declaration that clause 22.3 of the subcontract agreement (previously described at paragraph 2.34 of this determination) is a restraint of trade and unlawful both at common law and pursuant to the Act. This matter was initially listed for hearing in the Supreme Court of Western Australia and has now been transferred to the Federal Court of Australia.⁴⁰

PEP Community Services Inc and Community First Inc submission in response to draft determination, 17 July 2008, p 2.

3. The application for authorisation

3.1 Job Futures originally sought authorisation for an arrangement between its members to permit Job Futures to:

- tender on behalf of members for government contracts to provide services that assist unemployed and disadvantaged people to gain work, on condition that members will not tender for the same or similar program on their own account, while delivering that program or a similar program under subcontract to Job Futures. Job Futures will also not tender for new contracts against a member organisation where they have historically provided that program in that location (A91084) (the non-compete arrangements) and
- develop co-operative tendering arrangements, which include agreements as to the price that will be tendered and the price paid for services provided by members to Job Futures, and agreements as to the territories in which members and Job Futures will tender to deliver services (A91085).

3.2 These arrangements are reflected in the following documents: Job Futures Members Rights and Responsibilities and National Office Charter Service, membership application form and the subcontract agreement between Job Futures and its member organisations. The ACCC notes that on 2 May 2008, members at a general meeting passed a resolution endorsing the Job Futures Membership Charter which largely replaces the Members Rights and Responsibilities and National Office Charter Service.

3.3 On 22 August 2008 Job Futures provided a submission to the ACCC that proposed new non-compete arrangements (A91084). In brief, these arrangements would:

- require member organisations to commit to remaining within the arrangements for at least two full contract terms or two tenders (i.e. six years)
- require organisations that wish to exit the arrangements after the initial six year term to give Job Futures Ltd notice no later than 18 months prior to the end of that six year term
- entitle Job Futures Ltd to restrict an exiting organisation's access to information other than that required for it to deliver its contracted services
- entitle Job Futures to allocate up to 30 per cent of the exiting member's contracted services to another member, provided that this does not reduce the exiting member's remaining business share in an ESA to an amount less than it specified in the initial tender process as its minimum bid in that ESA. In other words, the exiting member has already determined that this amount is sufficient for it to remain viable.

3.4 Job Futures originally sought authorisation for five years. Job Futures submits that in order to give effect to the revised arrangements, it is now seeking authorisation for eight years. Authorisation has not been sought for the documents but rather the arrangements or conduct.

- 3.5 The arrangements potentially raise concerns under the anti-competitive conduct provisions of the Act. Consequently, Job Futures has lodged the application for authorisation with the ACCC. In particular, Job Futures seeks authorisation of its arrangements between its members to the extent that they may constitute:
- an exclusionary provision within the meaning of section 45 of the Act (A91084)
 - a provision having the effect of substantially lessening substantially lessening competition within the meaning of section 45 of the Act (A91085).
- 3.6 Broadly, an exclusionary provision exists where the proposed contract, arrangement or understanding is made by businesses (at least two of whom are competitors) for the purpose of preventing, restricting or limiting the supply of services to particular persons or classes of persons by all or any parties to the contract, arrangement or understanding.
- 3.7 Job Futures' application is made on behalf of itself and current and future members. Under section 88(6) of the Act, any authorisation granted by the ACCC is automatically extended to cover any person named in the authorisation as being a party or proposed party to the conduct.

4. Submissions received by the ACCC

Submissions from Job Futures

- 4.1 Job Futures provided a supporting submission with its application for authorisation and has since provided three supplementary submissions.

Submissions from interested parties

- 4.2 The ACCC sought submissions from around 60 interested parties potentially affected by the application, including private providers of employment services, community based organisations, industry associations and relevant Commonwealth and state government departments which have a role in the provision of employment services.

- 4.3 The ACCC received public submissions from the following members of Job Futures, all of which support the applications for authorisation:

- Larrakia Nation Aboriginal Corporation
- Highlands Support Services Inc
- Community Employment Options Inc
- Inner West Skills Centre Inc
- Mount Isa Skills Association Inc
- Heidelberg Training and resource Centre (trading as Employment Focus)
- Westgate Community Initiatives Group Inc
- JobCo. Employment Services Inc
- Tangentyere Job Shop
- Education Centre Gippsland
- Bridging the Gap
- First Choice Employment

- 4.4 The above listed members of Job Futures all noted that the market for government funded employment services is competitive. In their view, it has become harder for small to medium sized organisations to enter and retain a place in this market – particularly in the Job Network. They submit that Job Futures’ collaborative arrangements enable them to deliver quality services while retaining local focus and identity. Without the arrangements, these member organisations would not be able to access resources such as on line reporting tools and training and support.

- 4.5 The ACCC also received submissions in support of the application for authorisation from Jobs Australia Limited, Australian Council of Social Service and the National Employment Services Association.

- 4.6 In contrast, the ACCC received a joint submission from PEP and CFI. In their view, the original non-compete arrangements had the effect of shielding subcontractors from competition, and limiting the potential of better performing subcontractors to grow both within and outside the Job Futures model. As previously discussed, both PEP and CFI have initiated proceedings against Job Futures in Western Australia, alleging that their respective subcontracts are a restraint of trade and unlawful both at common law and pursuant to the Act.
- 4.7 The ACCC received public oral submissions from Catholic Social Services Australia (CSSA), Ostara and DEEWR. Records of these discussions can be found on the public register.
- 4.8 The ACCC invited comment from interested parties on the revised non-compete arrangements proposed by Job Futures. A submission in relation to this proposal was received from PEP and CFI.
- 4.9 The views of Job Futures and interested parties are outlined below and in Chapter 6 of this draft determination. Copies of public submissions are available from the ACCC website (www.accc.gov.au) by following the 'Public Registers' and 'Authorisations Public Registers' links.

5. The net public benefit test

- 5.1 The ACCC may only grant authorisation where the relevant test in section 90 of the Act is satisfied.

Application A91084

- 5.2 Job Futures lodged application for authorisation A91084 under section 88(1) of the Act to make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act.
- 5.3 The relevant test is found in section 90(8) of the Act.
- 5.4 Section 90(8) states that the ACCC shall not authorise a proposed exclusionary provision of a contract, arrangement or understanding, unless it is satisfied in all the circumstances that the proposed provision would result or be likely to result in such a benefit to the public that the proposed contract, arrangement or understanding should be authorised.

Application A91085

- 5.5 Job Futures lodged application for authorisation A91085 under section 88(1) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act. The relevant tests for this application are found in sections 90(6) and 90(7) of the Act.
- 5.6 In respect of the making of and giving effect to the arrangements, sections 90(6) and 90(7) of the Act state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
- the provision of the proposed contract, arrangement or understanding would result, or be likely to result, in a benefit to the public and
 - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision concerned was given effect to.

Application of the tests

- 5.7 There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).

- 5.8 The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same. The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition but the test under section 90(8) is not so limited.⁴¹
- 5.9 However, the Tribunal has previously stated that regarding the test under section 90(6):
- [the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.⁴²
- 5.10 Consequently, when applying either test, the ACCC can take most, if not all, public detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.
- 5.11 Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is also applicable to section 90(7) of the Act.

Definition of public benefit and public detriment

- 5.12 Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:
- ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.⁴³
- 5.13 Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:
- ...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.⁴⁴

Future with-and-without test

- 5.14 The ACCC applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and public detriment generated by arrangements for which authorisation has been sought.⁴⁵

⁴¹ *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers’ Boycott Authorisation* [2006] ACompT9 at paragraph 67.

⁴² *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

⁴³ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

⁴⁴ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

⁴⁵ *Australian Performing Rights Association* (1999) ATPR 41-701 at 42,936. See also for example: *Australian Association of Pathology Practices Incorporated* (2004) ATPR 41-985 at 48,556; *Re Media Council of Australia (No.2)* (1987) ATPR 40-774 at 48,419.

5.15 Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.

Length of authorisation

5.16 The ACCC can grant authorisation for a limited period of time.⁴⁶

Conditions

5.17 The Act also allows the ACCC to grant authorisation subject to conditions.⁴⁷

Future and other parties

5.18 Applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:

- persons who become party to the contract, arrangement or understanding at some time in the future⁴⁸
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.⁴⁹

Authorisation for future conduct

5.19 Authorisation granted by the ACCC can only provide protection from court action from the date it commences – in other words, the ACCC cannot grant authorisation retrospectively.⁵⁰

⁴⁶ Section 91(1).

⁴⁷ Section 91(3).

⁴⁸ Section 88(10).

⁴⁹ Section 88(6).

⁵⁰ Section 88(12).

6. ACCC evaluation

- 6.1 The ACCC's evaluation of Job Futures' collective tendering and non-compete arrangements is in accordance with the net public benefit test outlined in Chapter 5 of this draft determination. As required by the test, it is necessary for the ACCC to assess the likely public benefits and detriments flowing from these arrangements.

The market

- 6.2 The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant market(s) affected by that conduct.

- 6.3 Job Futures submits that the market which it currently operates in is:

...the market for public funding of programs aimed at assisting disadvantaged people gain work, sustain employment or increase their skills in order to achieve better pay and conditions.⁵¹

- 6.4 The ACCC agrees with Job Futures that the provision of government funding for employment programs is one area of competition which is relevant to the assessment of the collective tendering arrangements. The ACCC also considers that the provision of employment services to eligible job seekers is also relevant to its assessment of the collective tendering arrangements. The features of these areas of competition are discussed below.

The provision of government funded employment programs

Submissions received prior to the draft determination

- 6.5 The main supplier of funding for employment programs is the Australian Government. The ACCC understands that some state governments also fund employment programs. For example, Job Futures has been successful in securing a contract with the Victorian Government for the provision of employment services to job seekers leaving prison subject to correctional orders.
- 6.6 As previously discussed, the Australian Government, through DEEWR, puts out a request for tender for the provision of employment services. The requests for tenders generally occur every three years.
- 6.7 There is a diverse range of organisations which compete to provide government funded employment services. Some are large commercial organisations which operate at the national level or provide services to a number of regional areas. Such commercial organisations include Sarina Russo Job Access (Australia) Pty Ltd, Job Find Centres Australia, IPA Personnel Pty Ltd and MAXNetwork Pty Ltd.

⁵¹ Job Futures' supporting submission to the application (A91084-A91085), 25 March 2008, Attachment 3, p 13.

- 6.8 There are also a number of non-profit organisations which compete for funding to provide government employment programs. Some interested parties suggested that non-profit organisations will often choose to operate in locations where there is insufficient return on investment to attract the private sector.⁵²
- 6.9 Some non-profit organisations operate at a national level such as Mission Australia and Salvation Army Plus. Others are small community based organisations which tend to provide employment services on a local basis. Some interested parties suggested that local community based organisations play an important role in the delivery of employment services as they have a good understanding of the needs of local job seekers and employers.⁵³
- 6.10 DEEWR divides Australia into 19 Labour Market Regions that closely align with Centrelink customer service centre boundaries and the boundaries of Australian Bureau of Statistics labour force regions. For administration purposes, each Labour Market Region is further divided into Employment Service Areas (ESAs). There are currently 137 ESAs which also correspond closely to one or more of the Centrelink customer service centres. For example, the Perth labour market region is divided into the following ESAs: Central Perth; East Metro Perth; Kwinana/Rockingham, North Metro Perth; South East Metro Perth and South West Metro Perth.
- 6.11 Job Futures submits that competition for public funding of employment programs occurs at the national level as:
- DEEWR ranks all sites against other sites and allocates a ‘star rating’ based on the percentile ranking of each site as against all others.
 - Competition between providers occurs on an ongoing basis throughout the contract to improve the national ranking at the site and the Employment Service Area level. The sites with a high national ranking are eligible to be allocated additional market share, while sites with a poor national ranking face the possible loss of business share and
 - Providers can tender to deliver services anywhere in the country based on their experience and performance.
- 6.12 The ACCC notes that for the Job Network star ratings released in February 2008, star ratings were awarded to Job Network members within each Employment Service Area. For example, Job Futures was awarded four and a half stars for the site located in Belmore within the Canterbury/Bankstown Employment Service Area and three and a half stars for the site located in East Sydney within the Inner City/Eastern Suburbs Employment Service Area.⁵⁴
- 6.13 Providers rated at two and a half stars or less are at risk of having part of their business reallocated to high performing providers within that ESA.
- 6.14 For the previous tender, providers could bid for all, or a portion of the total percentage of business available within an ESA. Providers were also able to bid to provide

⁵² For example, see submission from Jobs Australia dated 23 April 2008.

⁵³ For example, submission from the Australian Council of Social Service dated 23 April 2008; submission from Jobs Australia dated 23 April 2008

⁵⁴ Job Network Star Ratings February 2008, pp 4 and 6.

services for all eligible job seekers (a generalist bid) or bid to provide services for a specialist client group.⁵⁵

- 6.15 For the request for tender for Job Network Services 2007-2009 DEEWR evaluated tenders against the following selection criteria:
1. Job Network service delivery strategies, performance management and governance of the organisation in the Labour Market Region.
 2. The experience, performance and outcomes in the delivery of Job Network or similar services in the ESA or a similar ESA.
 3. Local strategies and capabilities to promote, sustain and enhance the delivery of Job Network services at an ESA level.⁵⁶
- 6.16 While providers can tender to deliver employment services anywhere across Australia, the structure of the previous tender suggests that providers compete for government funding at the ESA level. Providers may also compete for government funding within a labour market region. In particular, the ACCC notes that in the previous request for tender DEEWR stated that it may give preference to providers who can tender for services across a number of ESAs in a particular region.
- 6.17 The ACCC notes that tendering and contracting for future employment services will continue to be undertaken on the basis of geographical areas. DEEWR has stated that a review of current ESAs will be undertaken so these areas better reflect natural labour markets and align more closely to ABS statistical areas.⁵⁷
- 6.18 Job Futures advises that many employment service contracts are tendered on the basis of fixed price. For employment contracts based on a fixed price, the fee structure is set on the basis of the service provided and the outcome achieved by the employment provider.
- 6.19 There appears to be strong competition amongst providers for the provision of government funding for employment programs. For example, for the 2006–2009 contract period, the majority of the Job Network contracts were extended from the previous period. For the remaining five per cent of Job Network contracts, 112 organisations tendered and DEEWR offered these contracts to 22 organisations.⁵⁸ For the Job Placement, Employment and Training program, 146 organisations tendered for the entire business available under the program and 105 organisations tendered for the Disability Employment Assistance program.
- 6.20 The ACCC considers the primary relevant area of competition is between employment service providers at the ESA level.

⁵⁵ Request for Tender for Job Network Services 2007 – 2009, Department of Employment and Workplace Relations, p 59.

⁵⁶ Ibid, pp 65 - 66.

⁵⁷ *The Future of Employment Services in Australia – A Discussion Paper*, Department of Education, Employment and Workplace Relations, May 2008, p 21.

⁵⁸ *Employment and Related Services Purchasing Outcomes 2006 – Overview*; available at http://www.workplace.gov.au/NR/rdonlyres/B1B972E9-8F19-4FA2-BFDC-2F3883CDF39D/0/Purchasing_Overview_factsheet.pdf

Submissions received in response to the draft determination

- 6.21 Job Futures disagrees with the ACCC's view in the draft determination that the primary relevant area of competition is at the ESA level. While acknowledging that competition does occur locally, particularly in the short term, Job Futures submits that when considering the sector as a whole, competition is national.
- 6.22 Job Futures notes that star ratings do not reflect performance within the ESA, but rather performance against all other Job Network sites across the country. Job Futures submits that:
- Where an organisation has a 2 star ranking DEEWR may cancel the contract to deliver at that site and call an open tender. It is the national competition to achieve star ratings which is important to the prospects of winning future contracts rather than performance against local providers.⁵⁹
- 6.23 Job Futures acknowledges that in the tender process only the organisations that have indicated an interest in delivering the program in a specific area are ranked against each other. Job Futures submits, however, that their capacity to deliver includes an assessment of the provider's national service delivery strategies and their performance at the local, LMR and national basis.

The provision of employment services to eligible job seekers

- 6.24 The provision of employment services to eligible job seekers is likely to occur locally at the ESA level or across a number of closely linked ESAs as job seekers will select a provider within their local area.
- 6.25 As noted earlier there is a wide range of providers who offer employment services to eligible job seekers. There are generally a number of providers within each ESA which offer employment services to eligible job seekers.
- 6.26 Centrelink has a role in assisting job seekers to determine what employment service best suits their needs. Centrelink also provides job seekers with information about providers in their local area, including those providers which may have expertise in assisting specific client groups.

The counterfactual

- 6.27 As noted in Chapter 5 of this draft determination, in order to identify and measure the public benefit and public detriment generated by conduct, the ACCC applies the 'future with-and-without test'.

Submissions received

- 6.28 PEP and CFI (the two Job Futures members which are currently involved in litigation in the Federal Court, alleging that the non-compete arrangements are restraints of trade and are unlawful) submit that:

Job Futures have also been operating pursuant to their model without authorisation since 2002 with success. This is unlikely to change with or without an authorisation.⁶⁰

⁵⁹ Job Futures submission, 11 July 2008, p 2.

- 6.29 CSSA and Ostara are organisations providing similar services to Job Futures to members that are non-profit employment service providers.⁶¹ Neither of these organisations have non-compete arrangements and have been able to operate successfully for extended periods of time. Both, however, noted that the risk of having member organisations tender in competition with them is growing and that some kind of restriction on this occurring (at least within a reasonable period of time) may be necessary in the future

ACCC's view

- 6.30 Without the collective tendering arrangements, the ACCC considers it likely that many of Job Futures' members will find the cost and process of tendering on their own to be prohibitive. This is supported by a clear trend within Job Network over time of a decreasing number of smaller providers and an increasing market share for larger providers.
- 6.31 In light of the proceedings in the Federal Court in relation to Job Futures' non-compete arrangements, the ACCC considers that Job Futures is unlikely to give effect to these arrangements without authorisation.
- 6.32 If the collective tendering arrangements were authorised but not the non-compete arrangements, Job Futures submits that its long term viability is at risk because it depends on retaining a critical mass of contracts and being able to contract members to deliver these. The ACCC considers that there is a real possibility that this may be the case over time.

Public benefits

- 6.33 An assessment of the public benefits likely to result from both elements of Job Futures' collective tendering arrangements follows.

Collective tendering for employment services

Increased efficiency and ability to provide comprehensive services

Submissions received

- 6.34 Job Futures submits that the proposed arrangements allow members to improve efficiency and provide more comprehensive services. In particular, Job Futures notes that the arrangements allow members to combine their resources and build capacity in order to be more effective in delivering employment services.⁶²

⁶⁰ Kott Gunning submission, on behalf of PEP Community Services and Community First, 11 April 2008, p 2.

⁶¹ The role of these organisations is discussed more fully in the *Similar organisations* section of this Draft Determination

⁶² Job Futures' supporting submission to the application (A91084-A90185), 25 March 2008, Attachment 4, p 16.

6.35 In this regard, Job Futures advises that in 2006-07 it delivered national and state based employment services to the value of around \$62 million, of which approximately \$57 million was passed on to members through subcontract agreements.⁶³

6.36 Further, Job Futures advises that it has adopted common processes and systems. In particular, Job Futures submits that it:

...manages the contracts centrally, providing a single point of contact for purchasers.⁶⁴
...has enhanced the capacity of its members to successfully tender for employment services through provision of centralised tender writing services.⁶⁵

6.37 Job Futures submits that it provides a range of services to its member organisations, including:⁶⁶

- it employs staff to assist member organisations effectively deliver employment services – for example, Job Futures’ staff analyse performance and provide benchmarking information within the network, advise on practice improvements, facilitate networking between member organisations, conduct site visits and audits, assist in forecasting revenue and provide training and contractual advice
- it provides training and networking opportunities for staff working on contracts, including both face to face and web-based
- it has developed customised software that allows member organisations to track performance against key performance criteria.

6.38 Jobs Australia supports the objective of Job Futures, which is to ensure that small to medium sized locally-based community organisations retain their capacity to provide services. In particular, it submits that:

Job Futures subcontracting helps smaller organisations to manage the complexity of contracts and helps enable them to participate in the delivery of employment services.⁶⁷

6.39 In addition, Jobs Australia considers sharing Job Future’ resources through a central network also assists smaller community-based organisations operate effectively. In particular, it submits:

Many of the locations serviced by Job Futures members are in regions with relatively small labour markets and where commercial viability would be in doubt...Without this support [from Job Futures], it is probable that the Commonwealth would need to find more expensive alternatives to deliver services to rural, regional and remote parts of Australia than is currently the case.⁶⁸

6.40 Similarly, the Australian Council of Social Service (ACOSS), the peak council of non-government community organisations, submits that the complexity of employment service contracts is growing. It is of the view that this increasing complexity, and associated administrative requirements for providers, has made it difficult for smaller community based organisations to survive on their own.⁶⁹

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid, p 17.

⁶⁶ Ibid, pp 16-17.

⁶⁷ Submission from Jobs Australia, 23 April 2008, p 2.

⁶⁸ Ibid, p 2.

⁶⁹ Submission from the Australian Council of Social Service, 23 April 2008, p 2.

6.41 In this regard, ACOSS believes:

...Job Futures has made a unique contribution to the sector. Through participation in Job Futures up to 50 organisations at any given time are able to participate in the provision of various employment and related services, supported by a larger network of providers and the capacity of a national office.⁷⁰

6.42 The National Employment Services Association (NESA) also believes that Job Futures 'has enhanced the capacity of its members to successfully tender for employment services through provision of centralised tender writing services.'⁷¹

6.43 The various public submissions received from members of Job Futures note that the contractual and performance management arrangements that operate in relation to government funded employment services are complex and changing. They believe the collaborative arrangements allow them to provide employment services in their local area and access resources through Job Futures (for example, on line reporting tools and training) which they would otherwise not have access to.

ACCC's view

6.44 The ACCC considers that the central coordination of tendering by Job Futures on behalf of its members reduces the administrative costs associated with responding to such a request for tender by a member organisation on their own. The ACCC notes the submissions of member organisations that without the collaborative arrangement, individual service providers are unlikely to be financially viable enough to participate in the national tender process and therefore provide employment services in their local communities. The ACCC is of the view that sharing training, performance management and other resources through Job Futures also generates efficiencies.

Facilitates entry of small community based organisations

Submissions received

6.45 Job Futures submits that the arrangements have increased competition by facilitating the entry of small community based organisations into the employment service market. Job Futures considers that without the arrangements it is unlikely that smaller organisations would have capacity to be able to compete to provide employment programs.⁷²

6.46 In particular, Job Futures submits that the employment services sector is difficult for new providers to enter. Job Futures believes this is demonstrated by the fact that:

...since 2002, only 9 new Job Network Providers have entered the market. During the same period Job Futures enabled 10 organisations to enter the market for delivery of Job Network as sub contractors for Job Futures.⁷³

⁷⁰ Ibid, p 3.

⁷¹ Submission from the National Employment Services Association, 24 April 2008, p 2.

⁷² Job Futures' supporting submission to the application (A91084-A91085), 25 March 2008, Attachment 4, p 18.

⁷³ Ibid.

6.47 Further, Job Futures notes that it is also heavily involved in remote areas of Australia. In particular, it is the largest provider of employment services under the Remote Services Funding Deed. By way of example, Job Futures submits:

In most locations these are local Aboriginal owned and controlled organisations. Building the capacity of these organisations to deliver effective services in their own communities increases the chance that local people will engage, and has spin off effects for the wider services delivered by those organisations.⁷⁴

6.48 Both NESAs and Jobs Australia agree that the Job Futures' collective tendering arrangements have facilitated the entry of small community based organisations in the employment services market. In turn, job seekers benefit from a diverse employment services market which includes small community based organisations.

6.49 In particular, Jobs Australia submits that:

The community non-profit sector has an important role in delivering Commonwealth Government employment programs. Typically agencies in the sector have very strong local support and linkages within their communities to enable them to tailor their services to the needs individuals and organisations in their communities.⁷⁵

6.50 Similarly, ACOSS notes that being established from and grounded in the local community or a specific user group (such as Indigenous Australians), these smaller providers have a good understanding of the needs of local jobseekers and employers. ACOSS also considers that small community based groups help prevent an over concentration of market share in the hands of a few employment service providers. Further, ACOSS believes that as the number of employment service providers has declined over the years, there is also evidence that suggests the practices of employment service providers are becoming more standardised. Therefore, fostering diversity and innovation is important to counter this trend.⁷⁶

6.51 CSSA is also a strong advocate for smaller organisations participating in the Job Network. In particular, it believes that services should be tailored to the needs of the people in local communities, and that smaller organisations provide diversity and flexibility that larger, single service companies find it difficult to provide.⁷⁷

6.52 A number of member organisations of Job Futures provided examples of tailored local employment programs which are currently being delivered under the Job Futures' arrangements, including:

- ECG Learning and Development – delivering a Correctional Services Employment Placement Program for Men in the Latrobe Valley, which builds upon a strong relationship between Correctional services Victoria and the Victoria Police.⁷⁸
- Employment Focus – is currently working with the Box Hill Baptist Church to establish a new Flexible Learning Centre to provide job skills to disadvantaged people in the community.⁷⁹

⁷⁴ Job Futures' supplementary submission, 16 May 2008, p 4.

⁷⁵ Submission from Jobs Australia, 23 April 2008, p 2.

⁷⁶ Submission from Australian Council of Social Service, 23 April 2008, p 2.

⁷⁷ Record of oral submission from Catholic Social Services Australia, 23 May 2008, p 1.

⁷⁸ Submission from ECG Learning and Employment, 4 April 2008, p 2.

⁷⁹ Submission from Employment Focus, 11 April 2008, p 2.

- Community Employment Options – is currently delivering a local Coastal Recovery program. This is a local collaborative landfill venture with the local council as the host employer.⁸⁰

6.53 DEEWR advises the ACCC that it recognises there is benefit in having a diversity of providers of employment services to the Australian public. In its employment services discussion paper of May 2008, it states that the ‘the Government wants to ensure that, in the transition to the new model, the expertise of specialist providers is retained.’⁸¹

ACCC’s view

6.54 As previously discussed, the ACCC considers that without the collaborative tendering arrangements and access to Job Futures’ national network of resources, it is likely that many smaller community-based organisations would not have the capacity to deliver government funded employment programs.

6.55 The ACCC accepts that smaller community-based organisations are well placed to deliver employment programs tailored to the needs of their local communities. To the extent that Job Futures’ collective tendering arrangements help to ensure a greater diversity of providers of employment services, the ACCC considers this to be a benefit to the public.

The non-compete arrangements

Submissions received

6.56 Job Futures submits that its ability to provide services to its members on a cost effective basis relies on a critical mass of contract value, which in turn relies on the non-compete arrangements:

Significant reduction in the value of contracts held by Job Futures would mean that services currently provided would be reduced.

Loss of contracted business impacts on the crucial mass of contracts that Job Futures Ltd needs to deliver support services to its members. Particularly if those organisations exiting the organisation were medium-large contract holders, the sustainability of the model would be at risk.⁸²

6.57 Other organisations, such as CSSA and Ostara, agree that it is vital to maintain a critical mass of membership that delivers sufficient scale to keep administrative costs down to a reasonable level for providers to remain viable.

6.58 Job Futures submits that it will not be able to assist new entrants (one of its critical objectives) if subcontractors are allowed to exit after one three-year period of successful performance:

If organisations can use Job Futures to get into the Job Network market, perform well and then tender on their own, ongoing the Company has no base upon which to tender effectively either to retain that contract or to secure a place for new organisations in the market.

⁸⁰ Submission from Community Employment Options Inc, 24 April, p 2.

⁸¹ Department of Education, Employment and Workplace Relations, *The Future of Employment Services in Australia, A Discussion Paper*, May 2008, p 27.

⁸² Job Futures’ supplementary submission, 16 May 2008, p 5.

Employment services contracts are generally entered into for a 3 year period, with possibility for extension. In order to harness the value of its successful entry into an area, Job Futures needs to be able to retain that presence for at least the initial period (3 years plus any extensions) and a subsequent period (assuming that the sub contractor has performed well over these periods).⁸³

6.59 Job Futures also considers there is benefit in having its subcontractors (members) deliver programs in accordance with its model and methods of service delivery and in participating in meetings and workshops across the network.

6.60 The model is founded on shared strategies and practices built over ten years of experience, which Job Futures submits relies on the comfort that parties draw from the non-compete arrangements, that other members will not use their information to compete against them:

The idea that an organisation that is a member of Job Futures can tender outside the network undermines one of the critical strengths of the organisation and one of the things that makes it successful. Member organisations are able to work together to solve performance issues, share their problems and look at how others solve them. They do this in the knowledge that other members will not use the information shared within the network to compete in their own right for these contracts.

...

If member organisations were to see others in the network not as part of the same organisation but as competitors, they would be highly likely to leave Job Futures as soon as they are able in order to protect their own contracted business from encroachment of others within the network.⁸⁴

6.61 Part of Job Futures' model is to enable new, often small, providers to get into the Job Network market by being able to rely on the experience and performance of existing members:

Job Futures relies on being able to tender with a core group of experienced, high performing providers to keep our business and to lend the value of our network to new providers to enable them to enter the market. A number of new organisations have come into Job Network because they tendered as part of Job Futures. It is highly unlikely they could have mounted a credible case without that linkage. They, in effect, 'borrow' the experience and performance of others in the Job Futures network.⁸⁵

ACCC's view

6.62 The ACCC considers there is some benefit from the revised non-compete arrangements enabling Job Futures' cooperative model to operate and to facilitate the entry and ongoing operation of smaller providers.

ACCC conclusion on public benefits

6.63 The ACCC considers the central coordination of tendering by Job Futures provides public benefits by reducing administration costs and enabling smaller providers of employment services to enter the Job Network market and remain viable. It is widely accepted that there are public benefits in having smaller providers participating in Job Network, because of the diversity in approach and particularly local focus that they bring.

⁸³ Ibid, p 6.

⁸⁴ Ibid.

⁸⁵ Ibid, p 2.

- 6.64 The ACCC considers there is some benefit from the revised non-compete arrangements enabling Job Futures' cooperative model to operate and to facilitate the entry and ongoing operation of smaller providers.

Public detriments

- 6.65 An assessment of the public detriments likely to result from both elements of Job Futures' collective tendering arrangements follows.

Collective tendering for employment services

Submissions received

- 6.66 Job Futures submits that the proposed arrangements will result in minimal public detriment as there is significant competition for government funded employment programs from both commercial and non-profit organisations. Further, Job Futures notes that since most of the contracts for which Job Futures tenders are based on fixed prices, the proposed arrangement rarely impacts on the price of employment services.
- 6.67 ACOSS, Jobs Australia and NESAs all note that membership of Job Futures is entirely voluntary, and many non-profit employment services exercise their rights not to take up membership of Job Futures.
- 6.68 ACOSS also submits that contracts for employment services are generally offered by the purchaser at fixed prices to maintain service quality and intensity, and the 'business share' of each provider in a region is allocated by the purchaser based on performance in improving employment outcomes.⁸⁶

ACCC's view

- 6.69 Typically, agreements between competitors which influence the pricing decisions of market participants have the potential to result in allocative inefficiencies. That is, they can move prices away from levels that would be set in a competitive market. This can result in higher prices for consumers and send market signals which direct resources away from their most efficient use.
- 6.70 There appears to be strong competition amongst providers for the provision of government funding for employment programs. The ACCC notes there are a large number of profit and non-profit providers outside of Job Futures which compete to obtain funding to provide employment services.
- 6.71 Further, the ACCC notes that prices for employment service contracts are generally set by the Australian Government in the form of outcome and service fees. Accordingly, the ACCC considers that Job Futures' collaborative tendering arrangements are unlikely to impact the price of employment services and therefore result in minimal public detriment.
- 6.72 However, the ACCC considers that competition between service providers is significantly based on the nature and quality of service. To the extent that the collective tendering arrangements lead to a decrease in service quality, this would result in a public detriment. Given that competition occurs between service providers at the ESA

⁸⁶ Submission from ACOSS, 23 April 2008, p 3.

level to improve their star ratings, the ACCC does not consider it likely to be a significant public detriment generated by the arrangements.

The non-compete arrangements

Submissions received prior to the draft determination

6.73 In relation to the non-compete arrangements, Job Futures submits that these arrangements are necessary to underpin its operation and do not result in significant detriment for its members.

6.74 In particular, Job Futures argues that it should not be viewed as catastrophic for a member organisation if it resigns and Job Futures decides to terminate its subcontract, submitting that:

... it should be taken in the context of the overall nature of the sector in which we work.

It is a feature of our sector that any provider has to manage the risk of loss of a whole contract at certain times and that this will impact on staff and clients. This is the nature of contracting with government, particularly in social service delivery. Contracts may be lost because an organisation fails to win at tender. There is no guarantee that good performance will secure an ongoing right to deliver that program or service, deliver it at the same scale or in the same locations.

... Government policy can mean the abolition of whole programs part way through a contract period (as occurred with the recent closure of CDEP in the Northern Territory) and the loss of some or all of a provider's revenue base.

In this context, the Job Futures sub contract is not exceptionally onerous.⁸⁷

6.75 Further, Job Futures submits that very few of its members rely on Job Futures subcontracts for more than 50 per cent of their revenue.⁸⁸ As a result, loss of a Job Futures subcontract is unlikely to leave that provider with no revenue in the interim period until it has the opportunity to tender for a Job Network contract in the next tender process. Job Futures notes that while Job Network is the largest Commonwealth government funded employments services program, there is a range of other programs that community based non-profit organisations can and do win funding to provide.

6.76 Jobs Australia supports the need for the non-compete arrangements. In particular, it submits:

We understand that for it [Job Futures] to facilitate service delivery in all parts of the country, a high level of cooperation among members of Job Futures, and between the members and its national office is required. Such cooperation could be put at risk if members could compete with Job Futures for contracts or could use the advantages gained as sub contractors to Job Futures to bid in their own right.⁸⁹

6.77 Further, Jobs Australia believes the success of Job Futures relies on it being able to build up critical mass of experienced providers within its subcontractor network. It believes the non-compete arrangements underpins Job Futures' ability to do this.⁹⁰

⁸⁷ Job Futures' supplementary submission, 16 May 2008, p 8.

⁸⁸ Ibid, p 9.

⁸⁹ Submission from Jobs Australia, 23 April 2008, p 2.

⁹⁰ Ibid.

6.78 Similarly, NESAs are of the view that the level of cooperation between the members of the Job Futures network would be undermined if the members could compete with Job Futures for contracts.⁹¹

6.79 In contrast, PEP and CFI note that an existing member who seeks to tender in competition to Job Futures in a future tender round is likely to be in breach of the non-compete arrangements. This could result in significant financial loss for that member. In particular, they submit that:

The termination of membership would consequently entitle Job Futures to terminate presently existing subcontract arrangements with that member...leading to financial loss and limiting the subcontractor's prospects of future tender success.⁹²

Similar organisations

6.80 There are other organisations that undertake a similar role to Job Futures. CSSA has around 20 agencies operating in the Job Network. CSSA advises that maintaining a sufficient size across its membership is critical for it to be able to keep the costs of tendering and contract administration at a viable level.

6.81 If CSSA were to lose members, it states that it would need to quickly increase its size again, or be forced to significantly increase its charges to the remaining members, which would be likely to make them unviable – they are unable to increase their 'prices' to reflect an increase in costs.

6.82 Nevertheless, CSSA does not have a non-compete clause in its contracts with members. Members of CSSA tendering on their own in competition with the group has not been a significant problem in the past, but is becoming more of an issue.

6.83 In discussions with the ACCC, CSSA noted that:

organisations that join groups such as Job Futures or CSSA need to recognise that they can't have their cake and eat it too. In the first few years, new parties benefit from the investment of significant time and effort by the group with previous experience and rely on its broader expertise and systems. It is unfair for members which have grown to the point that they can operate independently to then seek to leave the group and capture those benefits for themselves, rather than provide a return to the group on the investment it has made in them.

CSSA recognises that parties should not be tied to the group indefinitely, but that having joined a group, it is reasonable that they at least be required not to leave and compete against the group for the current and the following tender period. Non-compete clauses are not uncommon in other industries.⁹³

6.84 Ostara is a public company with 25 non-profit member organisations that seek, amongst other things, to provide assistance in finding employment for persons who, by reason of their mental health, are having difficulty finding employment. Ostara coordinates the bidding for and delivery of employment services by its members.

6.85 Similar to Job Futures and CSSA, maintaining critical mass is important for Ostara. If any of its members leave, Ostara seeks to recruit other organisations. In discussions with the ACCC, Ostara noted that it:

⁹¹ Submission from National Employment Services Association, 24 April 2008, p 2.

⁹² Kott Gunning submission, on behalf of PEP Community Services and Community First Inc, 11 April 2008, p 2.

⁹³ Record of conversation with CSSA, 23 May 2008, p 2.

... does not have a non-compete clause with its members – such that members are free to tender on their own and still remain members of Ostara. This has not been a significant issue to date, although it has happened. Members have left and tendered against Ostara – and won.

If a member indicates it does not wish to participate in an upcoming tender through Ostara, it will not be privy to the information about the joint tender.

There is a free exchange of information and experience between Ostara members, with those more experienced helping new entrants get established. The issue of new members benefiting from that process and then leaving to tender on their own has not been a significant issue for Ostara – but that may be because it has not been around as long as similar organisations such as Job Futures. It is an issue that Ostara is starting to look at – particularly the potential need to ensure the intellectual property or proprietary information of the organisation is not unreasonably used by (ex) members in tendering individually.⁹⁴

6.86 Job Futures considers that its non-compete arrangements have been critical to its success and are important in ensuring a sustainable future. Based on publicly available information, Job Futures submits that its contracts are performing better on average than those of CSSA or Ostara. Job Futures suggests that:

The mere existence of other organisations that do not have these same arrangements in place does not demonstrate that the proposed arrangements are not necessary to achieve public benefit over the long term.⁹⁵

Submissions received in response to the draft determination

6.87 On 18 July 2008, Job Futures provided a submission in response to the draft determination which set out the following points:

- Job Futures notes that the current subcontracting arrangements do not include a clause that enables an organisation to give notice that they wish to terminate the subcontract. Job Futures states that this reflects the requirements of the head contract. Job Futures considers that unless there is a change in the head contract which would allow organisations to give notice that they no longer wish to deliver the specified services, it is not practical to have a general right for subcontractors to terminate.
- Job Futures submits that an organisation which intends to depart its subcontract denies Job Futures the ability to use its incumbency to support entry of a new provider to the sector. If this were to occur in the long term, Job Futures considers that it may be effectively locked out of key labour market regions where it has been delivering services for many years.
- Job Futures maintains that the sustainability of the organisation depends on retaining a critical mass of contracts and being able to contract members to deliver these. Job Futures suggests that it may be possible to mitigate the loss for the departing organisation but this organisation should not expect to retain the full value of the contract.

⁹⁴ Record of conversation with Ostara, 29 May 2008.

⁹⁵ Job Futures submission, 18 July 2008, p 4.

ACCC's view in the draft determination

- 6.88 Paragraphs 6.89 to 6.104 and 6.111 to 6.115 of the draft determination set out the ACCC's view on the original non-compete arrangements.
- 6.89 In summary, the ACCC considered that:
- the non-compete clause coupled with the DEEWR tendering process is likely to all but completely discourage any members from tendering on their own, outside of Job Futures. This view was supported by some industry participants.
 - the effect of the clause as drafted is that Job Futures members are strongly discouraged from tendering independently not just for the upcoming tender process, but for each process that arises over time.
- 6.90 The ACCC noted that:
- there is a growing likelihood of members of collective non-profit employment service providers seeking to tender outside of their collective and potentially in competition with them
 - on the one hand, to the extent they are necessary, this means Job Futures' non-compete arrangements may become more important to enable its business model to operate and for the benefits it brings to continue to be realised
 - on the other hand, it means the non-compete arrangements may have a greater anticompetitive effect as more members might want to tender separately but are severely discouraged from doing so.
- 6.91 Overall, the ACCC concluded that the non-compete arrangements originally proposed by Job Futures were disproportionately restrictive and anticompetitive. The ACCC noted that there are less restrictive means to deliver much, if not all, of the relevant public benefit.

Revised non-compete arrangements

- 6.92 On 22 August 2008 Job Futures provided the ACCC with a further submission on the non-compete arrangements between Job Futures and its members.
- 6.93 Job Futures noted the ACCC's concerns in the draft determination that the non-compete clauses imposed severe restrictions on members and had significant anti-competitive detriment. Job Futures, in consultation with its members, devised alternative arrangements that seek to address these issues.
- 6.94 Under the revised proposal, members will be required to commit to remaining within the arrangements for at least two full contract terms or two tenders (i.e. six years). Should the member no longer wish to deliver the services to Job Futures beyond that, it must notify Job Futures no later than 18 months before the end of that six year term.
- 6.95 At that time, rather than having its membership terminated, the party will continue to provide some of its contracted services, but:

- Job Futures may reallocate up to 30 per cent of the exiting member's contracted services to another member, provided that this does not reduce the exiting member's remaining business share in an ESA to an amount less than it specified in the initial tender process as its minimum bid in that ESA. In other words, the exiting member has already determined that this amount is sufficient for it to remain viable.
- will have restricted access to Job Futures' information sharing systems. Job Futures advises that the member will continue to have access to information that is necessary for the member to deliver the services effectively.

6.96 Job Futures submits that the 30 per cent reallocation of a member's contracted business is a necessary measure as the sustainability of its model relies on it being able to continue to transfer the value of incumbency to new entrants in the market.

6.97 Job Futures submits that the revised arrangements address the issues raised by the ACCC in the draft determination because member organisations will:

- have the ability to signal their intention to tender outside the arrangements after an initial period
- not suffer any damage to reputation as a result of breaching the subcontract
- be able to retain the subcontract and the benefits of incumbency in the coming tender

6.98 Job Futures has stated that this new proposal seeks to

balance the acknowledged benefits of organisations remaining within the arrangements for two tenders with the desire to enable organisations to exit and tender in their own right within a reasonable timeframe.⁹⁶

Submissions received in response to the revised non-compete arrangements

6.99 PEP and CFI note that under DEEWR's current appraisal process:

... when DEEWR assesses the performance of employment service providers it is Job Futures performance who is rated and checked and not the subcontractor who provides the service on behalf of Job Futures itself. It is then Job Futures who has the advantage over any subcontractor that may wish to exit the arrangement⁹⁷

6.100 PEP and CFI do not agree that Job Futures should have the ability to reallocate up to 30 per cent of an exiting member's contracted services to another member. PEP and CFI submit that Job Futures are attempting to have another member sharing the performance rating of the incumbent member so as to improve its chances of competing successfully against the incumbent.

6.101 PEP and CFI consider that it would be very difficult for an exiting member to compete with Job Futures for new head contracts offered by DEEWR because the member will have no rating history as an entity separate to Job Futures.

⁹⁶ Job Futures submission, 22 August 2008, p 3.

⁹⁷ Job Futures submission, 18 July 2008, p 4.

ACCC's view on the revised non-compete arrangements

6.102 As outlined above and in the draft determination, the ACCC understands Job Futures' submissions that the non-compete arrangements contribute to the sustainability of its business model and the public benefits that that model generates. However, as also set out in the draft determination, the ACCC considers that there are less restrictive means to deliver these benefits.

6.103 Job Futures has sought to respond to the ACCC's views and has revised its non-compete arrangements in consultation with its members. The ACCC considers that the revised non-compete arrangements address many of the competition concerns identified.

Requirement on member organisations to commit to remaining within the arrangements for at least two full contract terms or two tenders.

6.104 The ACCC considers that this proposal gives rise to significantly less detriment than the previous arrangements which had the effect of an indefinite restriction on the ability of subcontractors to exit. Job Futures submits that its sustainability depends on retaining a critical mass of contracts and being able to contract members to deliver these. The ACCC considers that the requirement on a subcontractor to commit to two contract terms or two tenders is not disproportionate to this objective.

6.105 This requirement also reflects the investment made by Job Futures in a new member and provides sufficient time for Job Futures to receive a 'return' on that investment as the member becomes more experienced and capable, and adds to Job Futures' ratings.

Requirement on members that wish to exit the arrangements after the initial six year term to give Job Futures notice no later than 18 months before the end of that six year term.

6.106 The ACCC accepts that this revised proposal reduces the severity of the arrangements. In particular, the ACCC notes that the new notice arrangements appear to allow a member organisation to be in a position to tender in its own right beyond the initial six year term and avoid any damage to reputation as a result of breaching the subcontract.

6.107 Job Futures states that a member organisation which gives notice would be able to retain its subcontract and the benefits of incumbency in the coming tender. However, there are two additional steps which Job Futures may take in relation to the exiting organisation.

Job Futures is entitled to restrict an exiting member's access to information other than that required for it to deliver the contracted services.

6.108 In the draft determination, the ACCC did not accept that there is a significant benefit from the non-compete arrangements through protecting the confidential strategic information of members. In reaching this conclusion, the ACCC noted that other organisations appear to have systems in place that prevent non-participating members from accessing details about an upcoming tender.

6.109 The ACCC considers that the revised arrangements represent a more proportionate response to the issue of information separation.

Job Futures is entitled to allocate up to 30 per cent of an exiting member's contracted services to another member, provided that this does not reduce the exiting member's remaining business share in an ESA to an amount less than it specified in the initial tender process as its minimum bid in that ESA.

- 6.110 Job Futures submits that the sustainability of its business model relies on being able to continue to transfer the value of incumbency to new entrants in the market. Without the proposed arrangements, Job Futures submits that it is more likely to lose the opportunity to secure a new entrant into that location because its existing subcontractor has chosen to tender alone or in partnership with another organisation and Job Futures cannot try to mitigate this loss.
- 6.111 The ACCC has identified some issues with this rationale for the reallocation proposal.
- 6.112 Clearly, incumbency is an asset to any provider seeking a contract in a tender process. However, DEEWR notes that
- the Employment Services 2009-12 is a new generation of employment services with 100% of the employment services business available for tender. As there is no direct correlation between current employment services and the new Employment Services, less emphasis has been placed on past performance than in previous employment services tenders.
Past performance will primarily be assessed on the information provided in a tender. DEEWR may use past performance data as it considers appropriate.
- 6.113 The ACCC also considers that Job Futures may be understating the influence of its scale and reputation in a tender process. While an exiting subcontractor may be able to address the tender selection criteria on the basis of its experience in an ESA, it is relevant to note that Job Futures would have been the party who tendered for, won and held the head contract for that ESA. The ACCC understands that Job Futures could bid for the next contract in that ESA on the basis that it has previously facilitated the successful delivery of services and the strength of its business model is such that it can successfully deliver the services again.
- 6.114 The ACCC acknowledges that Job Futures' revised reallocation proposal gives rise to less potential detriment than the previous proposal to reallocate all of an exiting organisation's contracted services. However, the ACCC would still be concerned if the reallocation proposal were to have a disproportionately restrictive and anticompetitive effect – for example, if the financial consequences of reallocation would be so severe as to dissuade members from ever tendering separately to Job Futures.
- 6.115 In this regard, Job Futures has set out a number of features which are intended to mitigate the potentially harmful effects of any reallocation for subcontractors:
- The right could not be exercised until the last 18 months of a contract with 60 days notice. Job Futures submits that on the basis of a six year contract the maximum value that could be reallocated would be less than eight per cent of total contract value.
 - The right could not be exercised if the exiting member's remaining business share in an ESA would be less than it specified in the initial tender process as its

minimum bid in that ESA. In other words, the exiting member has already determined that this amount is sufficient for it to remain viable.

- The Board is required to take account of any issues about viability or effectiveness of delivery and must not operate outside its overriding obligations to the customer to deliver quality services. In practice this means that the Government must consent to any change.

6.116 In addition, the ACCC notes that:

- Job Futures' subcontracts are typically not the sole source of income for many of its member organisations. Indeed, Job Futures submits that they typically comprise at most 50 per cent of a member organisation's revenue
- the exiting organisation will continue to deliver at least 70 per cent of its contracted services for the remaining 18 months. This provides the organisation with an ongoing opportunity to deliver services which it can use to demonstrate its claims when tendering in its own right

6.117 On balance, the ACCC considers that the reallocation proposal is unlikely to have a disproportionately restrictive effect, particularly when the protections set out above are taken into account.

6.118 Overall, the ACCC is satisfied that the revised non-compete arrangements are a proportionate response to the need for Job Futures to maintain a critical mass of contract value and ensure the organisation's viability in the long term. As such, the ACCC considers that the revised non-compete arrangements are unlikely to result in significant public detriment.

Job Futures will not tender against members

6.119 The non-compete arrangements also restrict competition by Job Futures with members in tendering for new business. The Membership Charter sets out that the Job Futures Board has responsibility for determining which members will be included as a nominated subcontractor or partner in a tender.

6.120 The Board sets out criteria for inclusion, including past performance, demonstrated capacity to deliver and local linkages.

6.121 The Membership Charter goes on to state that:

Any Member that meets the required criteria has the right to be included in the relevant tenders, provided that their inclusion would not significantly damage the rights and interests of another member of Job Futures.⁹⁸

... Job Futures Ltd will not submit a tender to deliver new services in a location where that tender is likely to damage the pre-existing business of a member organisation in that location.

Members have the right to compete directly against other members when tendering for business in their own right.⁹⁹

⁹⁸ Clause 2.3 of Job Futures Membership Charter

⁹⁹ Clauses 4.1 and 4.2 of Job Futures Membership Charter

- 6.122 These arrangements clearly lessen the potential for competition between Job Futures members. To the extent these arrangements reduce the potential for or have actually reduced competition, this constitutes a public detriment.

ACCC conclusion on public detriments

- 6.123 The ACCC considers the central coordination of tendering by Job Futures is unlikely to result in significant detriments. This is due to the strong competition between a large number of other providers and the fact that the prices for provision of employment services are effectively set by the Australian Government.
- 6.124 The ACCC considers that the revised non-compete arrangements will give rise to some detriment but will enable Job Futures to deliver the benefits of its operational model without the significant restrictions imposed upon members under the previous non-compete arrangements.

Balance of public benefits and detriments

- 6.125 The ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit that will outweigh any public detriment.
- 6.126 In the context of applying the net public benefit test at section 90(8)¹⁰⁰ of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.¹⁰¹
- 6.127 The ACCC considers the public benefit of the collective tendering arrangements is likely to outweigh the public detriment.
- 6.128 It seems to be generally accepted that there is a growing risk/likelihood of members of collective non-profit employment service providers seeking to tender outside of the collective and potentially in competition with it.
- 6.129 This means Job Futures' non-compete arrangements may become more important to enable its operational model to operate and for the benefits it brings to continue to be realised.
- 6.130 The ACCC considers that the public benefits of Job Futures' revised, less restrictive arrangements are likely to outweigh the public detriments.

Length of authorisation

Submissions received

- 6.131 Job Futures originally sought authorisation for five years. However, Job Futures' revised non-compete arrangements require members to commit to two full contract

¹⁰⁰ The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

¹⁰¹ Re Application by Michael Jools, President of the NSW Taxi Drivers Association [2006] ACompT 5 at paragraph 22.

terms, that is, six years. Job Futures submits that in order to give effect to these new arrangements, an authorisation period of eight years is necessary.

- 6.132 PEP and CFI consider that the length of authorisation should only be for the period necessary to enable preparation for the tender (due to be lodged in October 2008) through to the end of the contract period.
- 6.133 As the contracts proposed to be tendered for by Job Futures and its members would operate from 1 July 2009 until 30 June 2012, PEP and CFI submit that any further tenders beyond that period should be the subject of separate authorisation applications.

ACCC's view

- 6.134 The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.
- 6.135 The ACCC notes that the typical duration for employment services contracts has been three years. For example, the ACCC understands that DEEWR will shortly be conducting a tender process for employment services contracts that will commence on 1 July 2009 and expire on 30 June 2012.

Application A91084

- 6.136 The ACCC considers that it would be appropriate to review the operation of the non-compete arrangements towards the end of two three-year contract periods and before the commencement of any subsequent contract period. Accordingly, the ACCC grants authorisation for these arrangements until 30 June 2015.

Application A91085

- 6.137 The ACCC considers that it would be appropriate to review the operation of the collective tendering arrangements towards the end of two three-year contract periods. The ACCC grants authorisation for these arrangements until 30 June 2015.

7. Determination

The application

- 7.1 On 25 March 2008 Job Futures Ltd (Job Futures), on behalf of itself and its members, lodged applications for authorisation A91084 and A91085 with the Australian Competition and Consumer Commission (the ACCC).
- 7.2 Application A91084 was made using Form A, Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 88(1) of the *Trade Practices Act 1975* (the Act) to:
- make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act.
- 7.3 Application A91085 was made using Form B, Schedule 1, of the Trade Practices regulations 1974. The application was made under subsection 88(1) of the Act to:
- make and give effect to a contract, arrangement or understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
- 7.4 In particular, Job Futures sought authorisation for an arrangement between its members to permit it to:
- tender on behalf of members for government contracts to provide services that assist unemployed and disadvantaged people to gain work, on condition that members will not tender for the same or similar program on their own account, while delivering that program or a similar program under subcontract to Job Futures. Job Futures will also not tender for new contracts against a member organisation where they have historically provided that program in that location (A91084) and
 - develop co-operative tendering arrangements, which include agreements as to the price that will be tendered and the price paid for services provided by members to Job Futures, and agreements as to the territories in which members and Job Futures will tender to deliver services (A91085).
- 1.20 On 22 August 2008 Job Futures provided the ACCC with revised non-compete arrangements that sought to address the concerns raised in the draft determination in relation to application for authorisation A91084. In brief, these new arrangements would:
- require member organisations to commit to remaining within the arrangements for at least two full contract terms or two tenders (i.e. six years)
 - require organisations that wish to exit the arrangements after the initial six year term to give Job Futures Ltd notice no later than 18 months prior to the end of that six year term

- entitle Job Futures Ltd to restrict an exiting organisation's access to information other than that required for it to deliver its contracted services
- entitle Job Futures to allocate up to 30 per cent of the exiting member's contracted services to another member, provided that this does not reduce the exiting member's remaining business share in an ESA to an amount less than it specified in the initial tender process as its minimum bid in that ESA. In other words, the exiting member has already determined that this amount is sufficient for it to remain viable.

The net public benefit test

Application A91084

7.5 For the reasons outlined in Chapter 6 of this draft determination, the ACCC is satisfied that the revised non-compete arrangements for which authorisation is sought are likely to result in such a benefit to the public that the arrangements should be allowed to take place.

7.6 The ACCC has therefore decided to **grant** authorisation to application A91084.

Application A91085

7.7 For the reasons outlined in Chapter 6 of this draft determination, the ACCC considers that in all the circumstances the collective tendering arrangements for which authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements.

7.8 The ACCC has therefore decided to **grant** authorisation to application A91085.

Conduct for which the ACCC grants authorisation

Application A91084

7.9 The ACCC grants authorisation to Job Futures for the following conduct.

- To make and give effect to contracts or arrangements (agreements) with members of Job Futures (members). The agreements may contain provisions:
 - requiring members to remain as members and not tender or deliver services on their own behalf for at least two full contract terms (being no more than a six year period)
 - requiring members that wish to cease being members and tender or deliver services on their own behalf after the initial six year period to give Job Futures Ltd notice no later than 18 months before the end of that six year term.
- Where a member gives notice of its intention to cease being a member and tender or deliver services on its own behalf:

- Job Futures is entitled to restrict an exiting member’s access to information during the remaining contract period other than that required for the member to deliver its contracted service; and
 - Job Futures is entitled to allocate up to 30 per cent of the exiting member’s contracted services to another member, provided that this does not reduce the exiting member’s remaining business share in an ESA to an amount less than it specified in the initial tender process as its minimum bid in that ESA.
- Further the agreements may contain provisions that:
 - prohibit Job Futures tendering for new contracts against a member in a territory where that member has historically provided programs in that territory.

7.10 The ACCC grants authorisation for this conduct until 30 June 2015.

Application A91085

7.11 The ACCC grants authorisation to Job Futures for the following conduct.

- To make and give effect to contracts or arrangements (agreements) with members of Job Futures (members). The agreements may contain provisions:
 - allowing for the development of co-operative tendering arrangements for government contracts to provide services that assist unemployed and disadvantaged people to gain work
 - allowing Job Futures to tender on behalf of members for government contracts to allow members to provide services to assist unemployed and disadvantaged people to gain work
 - agreeing the price that will be tendered by Job Futures on behalf of its members
 - agreeing the price paid for the services provided by members
 - agreeing to the territories for which Job Futures will tender and in which its members will deliver services

7.12 The ACCC grants authorisation for this conduct until 30 June 2015.

7.13 This determination is made on 18 September 2008.

Interim authorisation

7.14 At the time of lodging the application, Job Futures requested interim authorisation for it to carry out the preparatory work for a request for tender to be issued by DEEWR in the second half of 2008 for a number of employment service contracts.

7.15 The ACCC granted interim authorisation on 22 April 2008 to allow Job Futures to:

- prepare tender proposals with members of Job Futures under which Job Futures will subcontract work to members and lodge such tenders on behalf of members. Proposals may include agreements as to the price that will be tendered and the price paid for services provided by members to Job Futures, and agreements as to the territories in which members and Job Futures will tender to deliver services, with respect to the upcoming tender expected to be released in the second half of 2008, by DEEWR for an Employment Contract, including:
 - Employment Services Contract (Job Network)
 - Employment Services Funding Deed (Personal Support Program, Job Placement Education and Training, Disability Employment Network (uncapped), Green Corps)
 - Remote Services Deed and
 - Australian Apprenticeship Access Program.
- allow a member to participate in the preparation of a tender proposal in relation to an Employment Contract on condition that the member agrees not to tender directly on its own behalf for that Employment Contract.

7.16 The ACCC did not grant interim authorisation to allow Job Futures to terminate a subcontract with a member in relation to an existing Employment Contract where that member has proposed or intends to tender directly on its own behalf for a future Employment Contract.

7.17 Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Date authorisation comes into effect

7.18 This determination is made on 18 September 2008. If no application for review of the determination is made to the Australian Competition Tribunal (the Tribunal), it will come into force on 10 October 2008. If an application for review is made to the Tribunal, the determination will come into effect:

- where the application is not withdrawn – on the day on which the Tribunal makes a determination on the review, or
- where the application is withdrawn – on the day on which the application is withdrawn.

Appendix A

List of current members of Job Futures (as at 28 February 2008)¹⁰²

New South Wales

1. Access Community Group Ltd
2. Auswide Projects
3. Counselling and Retraining for Employment (CARE)
4. ET Australia
5. Great Lakes Community Resources Association
6. Hunter Workways
7. Inner West Skills Centre
8. Job Quest
9. MTC Work Solutions
10. Newtrain
11. NorthNet Inc
12. Upper Hunter Community Services
13. Work Ventures
14. YWCA NSW

Victoria

15. Brotherhood of St Lurance
16. Diversitat
17. Djerriwarrh Employment and Education Services
18. Education Centre Gippsland
19. Employment Focus
20. The Essendon Network for Employment and Training (ENET)
21. Finding Futures
22. JobCo
23. Melbourne Citymission
24. New Hope Employment and Training Service
25. WCIG Employment Services
26. Workbridge
27. Workforce Plus

Queensland

28. Community Employment Options
29. Horizon Foundation
30. IMPACT Make you Mark
31. IsaSKILLS
32. JobCare
33. Job Futures – SEQ
34. Nametec

¹⁰² Job Futures' application for authorisation (A91084-A91085), Attachment 6.

Western Australia

35. BJL Connecting Communities
36. Bridging the Gap Inc
37. Community First Inc
38. Co Scope Job Link Inc
39. First Choice Employment
40. Kullarri Employment Services
41. PEEDAC Pty Ltd
42. PEP Community Services

Tasmania

43. Anglicare Tasmania
44. Job Futures: Tasmania

Northern Territory

45. Anangu Jobs
46. Ironbark (NT) Employment and Training Inc
47. Julalikari Council Aboriginal Corp
48. Larrakia Nation Aboriginal Corporation
49. Tangentyere Job Shop
50. Thamarrurr Regional Council

South Australia

51. Anglicare (SA)