



Australian
Competition &
Consumer
Commission

Draft Determination

Application for revocation of authorisations
A91084 and A91085 and substitution of new
authorisations A91493 and A91494

lodged by

Job Futures Ltd, trading as CoAct,

in respect of

collective tendering and
non-compete arrangements

Date: 31 July 2015

Authorisation numbers: A91493
A91494

Commissioners: Sims
Rickard
Schaper
Cifuentes
Court
Featherston
Walker

Summary

The ACCC proposes to grant re-authorisation to Job Futures Ltd, trading as CoAct, and its members to enable them to collectively tender for government and other contracts and to agree to certain 'non-compete' provisions, for 10 years.

Next steps

The ACCC will now seek submissions in relation to this draft determination before making its final decision. The applicants and interested parties may also request that the ACCC hold a pre-decision conference to discuss the draft determination.

The application for re-authorisation

1. On 9 April 2015 Job Futures Ltd (Job Futures) applied for the revocation of authorisations A91084 and A91085, which expired on 30 June 2015, and their substitution with new authorisations for the ones revoked. Job Futures is seeking re-authorisation, for a further 10 years, to enable it to continue to participate, on behalf of its member organisations, in tenders to provide services to disadvantaged and unemployed people on behalf of government and other organisations; and to require members to agree to restrictions on competing with Job Futures.
2. Job Futures also sought interim authorisation, to among other things, enable Job Futures to commence issuing subcontract agreements to its subcontractors that contain certain non-compete provisions while the ACCC is considering the substantive application for re-authorisation. On 28 May 2015 the ACCC granted interim authorisation (see paragraphs 70 and 71).
3. In June this year Job Futures adopted the new trading name of CoAct. In this draft determination, the term Job Futures is used throughout to also refer to CoAct.

The Conduct

4. The conduct for which Job Futures seeks re-authorisation is set out in **Attachment A** and summarised below:

Collective tendering conduct

- Allows Job Futures to collectively tender on behalf of its members for government and other contracts to provide services that assist disadvantaged and unemployed people gain access to social and economic opportunities. This includes agreeing the territories for which Job Futures will tender and in which members will deliver services.

Concluding agreements with non-compete clauses

- Allows Job Futures to require its members that have entered into a subcontract with it to not compete in their own right against Job Futures for that same or any successor program (in any location in Australia), without first obtaining Job Futures' prior written consent or exercising its

right to withdraw (proposed charter clause 3.4; and see proposed subcontract clause 22 – under which, if a subcontractor does not want to continue on with the work as a Job Futures subcontractor next time it comes up for tender, the subcontractor has to provide Job Futures with 18 months' notice before the end of the program).

Actions on a subcontracted member giving notice

- Where a subcontracted member gives notice of its intention to tender or deliver services in its own right, Job Futures may restrict the member's access to information during the remaining contract period and may require the member to continue to deliver services in good faith in accordance with the subcontract until the end of the service period.

Concluding agreements restricting members who are not subcontractors

- Allows Job Futures to prevent members that are not, at the relevant time, subcontractors, from competing against Job Futures in relation to contracts (or successor program contracts) that are held by Job Futures, unless Job Futures has notified members that it does not intend to tender or has given its consent to the member.
5. The conduct is also reflected in provisions and proposed provisions of Job Futures' template subcontracts with its members and its Membership Charter, including the following:
- existing clauses of Job Futures' charter that relate to collective tendering, particularly clause 2, which outlines, among other things, the criteria Job Futures may apply in deciding which members will be nominated in a tender bid as a subcontractor (Job Futures does not propose to change these clauses substantially from existing provisions)
 - charter clauses relating to prohibitions on and the consequences of a Job Futures member tendering against Job Futures and vice-versa (Job Futures proposes to change these clauses, subject to its members ratifying the changes at its Annual General Meeting), being
 - Clause 3 'Tender against Job Futures Ltd'
 - Clause 4 'Job Futures Ltd and Members right to tender'
 - Clause 8 'Use of confidential information'.
6. Together, the conduct as summarised above and set out in **Attachment A** is referred to in this draft determination as the Conduct.

The applicant

7. Job Futures, now trading as CoAct, was established in 1997 to provide a vehicle for community-based not-for-profit providers of services to compete effectively for funding in the area of programs for unemployed and other disadvantaged people and to bid collaboratively for contracts. Job Futures partners with its members to deliver services, usually under contract to an external head contractor/purchaser. The funding body contracts Job Futures, which in turn subcontracts its members.

8. Job Futures is a not-for-profit company limited by guarantee. It is made up of members which are not-for-profit organisations. Its current board consists of six member directors and two independent directors appointed by the board.
9. Job Futures states that it has become one of the largest providers of Australian Government-funded employment contracts. It states that it has 31 member organisations delivering programs in more than 220 sites across Australia. As at the end of 2014, it was in the top five or 10 providers, by number of contracts, under the following Australian Government programs:
 - jobactive (starting 1 July 2015, managed by the Australian Government Department of Employment)
 - Job Services Australia (JSA, the predecessor program to jobactive, concluding 30 June 2015) and
 - Disability Employment Services-Disability Management Service and Disability Employment Services-Employment Support Service (DES-DMS and DES-ESS, managed by the Australian Government Department of Social Services).
10. Job Futures states that the value of its contracts across the various government programs in 2013/14 was \$69 million. To put this in perspective, the program expenses of the single largest outsourced Australian Government jobs program of recent years, JSA, were about \$1.5 billion for 2014/15.

Previous authorisations

11. In 1998 the ACCC granted authorisation to Job Futures to allow it to tender collectively on behalf of its members for an Australian Government contract to supply employment services. The ACCC authorised the conduct for two tender rounds, with authorisation expiring in 2002 (and with conditions about certain dispute-resolution procedures). Job Futures and its members went on to engage in similar arrangements, participating in further tender rounds.
12. In 2008 Job Futures again sought authorisation to tender collectively on behalf of its members for government services contracts and to enter into agreements with its members containing non-compete arrangements. The ACCC granted authorisations, A91084 and A91085, until 30 June 2015.
13. Differences between this application for re-authorisation and the previously authorised arrangements include:
 - a reduction in how long Job Futures' members must commit to subcontracting with Job Futures, from two contract periods (equalling, for example, a total of six years under the now-ending JSA) to one contract period (for example, five years under the new jobactive contract)
 - the removal of Job Futures' ability to take away and redistribute up to 30 per cent of a subcontracted member's work if that member has indicated that it is going to tender independently
 - the removal of the prohibition against Job Futures tendering for new services in a location where that tender is likely to damage the pre-existing business of a member
 - changing the restriction on an exiting member's access to information

- from being expressed as information ‘other than that required for the member to deliver its contracted services’
- to information ‘other than that considered by Job Futures Ltd to be necessary for that organisation to deliver its contracted service’.

14. Job Futures advises that it has consulted with its members on the proposed changes to its Membership Charter, which include the proposed change with regard to tendering where a member has pre-existing business (the third dot point above); and that it will bring these proposals to its Annual General Meeting in November this year. It is a matter for Job Futures’ members to decide whether they support implementing the proposed changes to the charter.

Consultation

15. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process. The ACCC invited submissions on Job Futures’ application from about 70 parties potentially affected by or otherwise interested in these applications, including customers, Job Futures’ members, other suppliers and industry peak bodies. The ACCC received 10 submissions from Job Futures’ members and three submissions from industry peak bodies, all in general support of re-authorisation.

16. However, one Job Futures member, Marillac, supported most aspects of the application but opposed authorisation in respect of the proposed change that relates to the ability of Job Futures to compete against its members in a location likely to damage the pre-existing business of a member. This issue is considered in the public detriments section.

ACCC assessment

17. The ACCC’s assessment of the Conduct is in accordance with the relevant net public benefits tests contained in the *Competition and Consumer Act 2010* (the CCA).¹ The ACCC has taken into account:

- the application and submissions received from the applicant and interested parties
- other relevant information available to the ACCC, including previous assessments
- the likely future without the Conduct for which authorisation is sought.² In particular, the ACCC considers that, without the Conduct that is the subject of authorisation, it is likely Job Futures’ members would
 - have to bid individually for tenders
 - have greater freedom to bid for contracts that Job Futures holds, within their practical capabilities. The ACCC acknowledges that smaller providers might find it harder to win the same work if not participating in Job Futures (see paragraph 20).

¹ Subsections 90(5A), 90(5B), 90(6), 90(7) and 90(8) of the CCA.

² For more discussion see paragraphs 5.20-5.23 of the ACCC’s Authorisation Guidelines.

- the relevant areas of competition impacted by the Conduct: While the ACCC does not consider that it is necessary to reach a definitive view on the precise area of competition in this matter, the ACCC notes that the Conduct affects the provision of government-funded programs or services at the local and/ or regional and/ or nationwide level. Job Futures submits that:
 - Price competition is not a current feature of the market. Each of the recent major Australian Government contracts has been tendered on the basis of fixed prices and it is not expected that this will change.
 - Under the JSA, jobactive and DES, providers are contracted to deliver in specific regions and allocated a specific proportion of available client referrals in that area. Providers are able to service up to 130 per cent of this contracted business share or may receive as low as 70 per cent of contracted share. The government has the contractual right to change the share of referrals based on performance.
 - In its review of the Australian Government's Job Network in 2002, the Productivity Commission considered that competition occurred at two levels: at the point the government awards contracts; and between providers who compete with each other on performance during the life of the contract.³
- that membership of Job Futures is voluntary. Where organisations conclude that the benefits of Job Futures membership do not outweigh the costs, they can elect not to be Job Futures members and can bid for tenders individually. Furthermore, organisations join in the knowledge that the Membership Charter can change, subject to a special resolution of members
- that Job Futures' Constitution, Membership Charter and subcontracts provide for procedures to resolve disputes between Job Futures and members, including external mediation and arbitration
- that Job Futures has requested authorisation for 10 years.

Public benefits

18. Job Futures submits, among other things, that:

- A rationalisation of the employment services market has favoured larger providers who are able to exploit economies of scale to deliver high-volume, comprehensive services. For example, the new jobactive program involves much larger service regions. The arrangements between Job Futures and its members have increased competition and diversity in the marketplace by enabling smaller community-based non-profit organisations to combine their resources to build their capacity to be more effective in delivering services; and to compete effectively for programs that they would not have the capacity to compete for alone.

³ Job Futures cites paragraphs 3.10 to 3.11 of this report, available at <http://www.pc.gov.au/inquiries/completed/job-network>

- Since 2008, Job Futures has enabled 11 new service providers to enter the mainstream employment services market
- According to the JSA December 2014 'star ratings', 94 per cent of Job Futures' sites were rated at 3 stars or above, which Job Futures says means it had the highest average performance profile of providers with 60 or more sites.
- Job Futures manages contracts centrally, providing a single point of contact for government and an efficiency benefit to government. For example, Job Futures' members have agreed that Job Futures will manage all jobactive claims. Job Futures states that it:
 - provides software so that members can track performance and manage service delivery
 - analyses performance and provides benchmarking information
 - manages quality and compliance across its network through a single framework – for example, it helps members meet the Department of Employment's quality-assurance framework
 - provides centralised tender writing services, in the context that many small community organisations find the cost of tendering prohibitive and/ or lack the capacity to develop successful bid strategies and write persuasive, evidence-based tender responses.

19. The ACCC considers that the collective-tendering by Job Futures on behalf of its members is likely to result in transaction-cost savings. An individual service provider negotiating with government would incur transaction costs, such as the time and resources needed to prepare tender bids; and perhaps legal and other expert-advice costs. The government would also incur transaction costs in dealing with individual suppliers. Collective tendering can spread these costs and remove duplication. The ACCC similarly accepts that small providers may not be able to dedicate as many resources to dealing with the compliance burden of, for example, writing bids for and then reporting under complex government contracts. Job Futures' arrangements can also help here.

20. The Conduct is also likely to enable smaller providers, who may not be of the necessary scale to tender individually, to continue to provide services under government contract. As noted in our 2008 determination, the ACCC accepts that smaller, local providers can offer diverse approaches and not-for-profit providers may be prepared to operate where for-profit operators do not. For example, the smaller providers may not be able to cover the required service territory or service types on their own. Further, Job Futures is likely to be able to respond better to initial tenders and deal better with ongoing reporting and compliance requirements than the smaller providers generally could on their own, because of the resources Job Futures has. Customers (government departments) have the power to monitor the performance of service providers, including through requirements in their contracts. There can therefore be a degree of pressure maintained on all providers to perform to the required standards and to be efficient and effective in service delivery.⁴

⁴ See Jobs Australia's submission of 1 May 2015, available on the ACCC's public register at www.accc.gov.au/authorisationsregister

Summary of public benefits

21. In summary, the ACCC considers that the Conduct, compared with members individually tendering to provide services, is likely to result in public benefits from:

- lower transaction costs for the government and service providers
- maintaining a level of competition and diversity in the provision of government-funded employment services by enabling smaller providers to be aggregated under Job Futures, when those individual providers may not be able offer an attractive product on their own.

Public detriments

22. In its 2008 determination, the ACCC considered that the central coordination of tendering by Job Futures was unlikely to result in significant public detriment.

This is due to strong competition between a large number of employment service providers and the fact that prices for the provision of employment services are effectively set by the Australian Government.⁵

Reduction in competition from collective tendering

23. While collective tendering can lessen competition and efficiency by reducing the number of competing suppliers in the market, in this case, the ACCC does not consider the reduction in competition to be significant. In particular:

- As discussed (see paragraphs 19 to 20), Job Futures' collective tendering is likely in many ways to provide a better and more cost-effective offering for government customers than the services individual Job Futures' members could generally offer. In some cases, individual members may not be able to provide services on their own.
- Job Futures has used its basic model for many years and the ACCC has not received information that this has had an anti-competitive effect. Job Futures is one of many parties competing for government services contracts. Job Futures' members, individually and collectively, represent a small proportion of the suppliers of employment and other social-support services.
- Prices for the provision of employment services are effectively set by the Australian Government. The ACCC considers that the proposed conduct has little potential to affect prices in these areas of competition.

Non-compete clauses

24. Job Futures has proposed restrictions on competition from its members that differ between its 'existing business', which at this stage is, for example, employment and 'disability-employment' services (helping people with a disability find employment), and 'new business' into which it might expand: for instance, accommodation.

⁵ A91084 and A91085 Job Futures determination, 18 September 2008, available at www.accc.gov.au/authorisationsregister

25. In relation to existing business, Job Futures has sought authorisation for, in summary, non-compete clauses requiring that:

- a member must not tender to supply services in its own right for contracts that are held by Job Futures (including successor contracts), without Job Futures' prior written consent (proposed charter clauses 3.2 and 3.3)
- a member which has subcontracted under Job Futures must not tender in its own right for that same or successor program, without Job Futures' prior written consent or exercising its right to withdraw (proposed charter clause 3.4; and see proposed subcontract clause 22 – under which, if a subcontractor does not want to continue on with the work as a Job Futures subcontractor next time it comes up for tender, the subcontractor has to provide Job Futures 18 months' notice before the end of the program).

26. The restrictions that Job Futures proposes to apply when it is pursuing new business are discussed from paragraph 39 below.

27. Job Futures says its non-compete clauses aim to protect the network and its ability to deliver public benefits. It states, for example:

In a tender process Job Futures and its member partners invest heavily (financially and Intellectual Property e.g. online tools and delivery models) in tender preparation. Due to the [overlap] of end of contract and a new tender, if a member was to tender against [Job Futures] and remain a member it would be able to access these services and may utilise such confidential information and know-how, without the knowledge of the other members or of Job Futures Ltd, in circumstances whereby Job Futures Ltd and the other members may be severely disadvantaged in a competitive tender process.

...

Without the 18 months' notice period, Job Futures Ltd would not be able to find an alternative provider/s to ensure coverage of the large employment regions across which the services are now delivered. This could have disastrous impact on other members in the same region if full coverage cannot be offered and possibly making it impossible for Job Futures Ltd to tender which would result in less competition. The arrangements assist in mitigating the risks to Job Futures Ltd of loss of critical mass, enabling it to identify and develop new members with which to bid or to consolidate its operations elsewhere.

28. In 2008, the ACCC authorised 'non-compete' clauses including those:

- that require members to not tender or deliver services on their own behalf for at least two full contract terms (being no more than six years)
- that require members that wish to tender or deliver services on their own behalf after the initial six years to give Job Futures notice no later than 18 months before the end of that six-year term
- Where a member gives notice of its intention to tender or deliver services on its own behalf:
 - that entitle Job Futures to restrict a member's access to information during the remaining contract period other than that required for the member to deliver its contracted service and
 - that entitle Job Futures to allocate up to 30 per cent of the member's contracted services to another member, provided that this does not reduce the member's remaining business share in an Employment Services Area (ESA) to an amount less than it

specified in the initial tender process as its minimum bid in that ESA.

- that contain provisions prohibiting Job Futures tendering for new contracts against a member in a territory where that member has historically provided programs.
29. In 2008 the ACCC concluded that the non-compete arrangements would give rise to some detriment but would enable Job Futures to deliver the benefits of its operational model.
30. Job Futures acknowledges that it could be argued that its arrangements reduce the range of organisations competing for government tenders by restricting members' rights to tender in multiple bids and sometimes regions. Job Futures submits, however, that any such effect is far outweighed by the increased diversity that arises through it enabling new organisations to enter the market, including as specialist providers, and through helping small not-for-profit organisations stay in the market.
31. With regard to how the non-compete restrictions have worked in practice, Job Futures states that, under the Job Services Australia contract:
- None of Job Futures' subcontractors notified an intention to withdraw from arrangements with Job Futures and to tender in their own right
 - Two subcontractors notified Job Futures that they did not wish to continue delivering services through Job Futures after the end of the contract but that they did not intend to tender for the new contract. Job Futures said it chose not to apply any penalties other than these two organisations not having access to information regarding the tender. In one of the service areas, Job Futures identified an alternative provider with whom to tender.
32. The ACCC considers that, on their face, Job Futures' proposed non-compete conduct and clauses could result in a lessening of competition compared with members having greater freedom to also bid individually and therefore result in potential detriments. However, to the extent that these provisions underpin the arrangements and align the incentives of members, they are integral to delivering the public benefits of the arrangements (recognised earlier, under 'Public benefits').
33. Participation in Job Futures is voluntary and where organisations conclude that the benefits of membership do not outweigh the costs, they can, for example, elect not to become members and bid individually for contracts that Job Futures holds. This is likely to mitigate any potential detriment.
34. Organisations joining Job Futures do so with the knowledge that the Membership Charter can change, subject to a special resolution of members (that is, by 75 per cent of members present and voting in a general meeting). This is particularly relevant to the discussion of new business from paragraph 39 below.
35. Consistent with our 2008 determination, the ACCC continues to consider that the Job Futures operating model is likely to deliver public benefits, as outlined in that section above. This model includes organisations committing to certain non-compete restrictions where they conclude their benefits exceed their costs.

36. The ACCC also notes that Job Futures' Constitution, Membership Charter and subcontracts provide for procedures to resolve disputes between Job Futures and its members, including external mediation and arbitration.
37. Further, the non-compete clauses for which Job Futures now seeks authorisation are less restrictive than the currently authorised provisions in two ways. Job Futures proposes to:
- reduce how long Job Futures' members must commit to subcontracting with Job Futures, from two contract periods (equalling, for example, a total of six years under the now-ending JSA) to one contract period (for example, five years under the new jobactive contract)
 - remove Job Futures' ability to take away and redistribute up to 30 per cent of a subcontracted member's work if that member has indicated that it is going to tender independently.
38. The ACCC considers that any potential detriment might therefore be mitigated further. Job Futures' members will benefit from having less onerous restrictions on them competing for contracts that Job Futures holds; and competition in the market may be increased if the organisations have marginally more freedom to compete. That is, they can act independently after one contract term rather than two and, in these circumstances, do not face the disincentive to exiting of losing up to 30 per cent of their work under an existing contract.

Removal of prohibition on Job Futures tendering in competition with a member ('new business')

39. Job Futures is also proposing to amend clause 4.1 of its Membership Charter on pursuing new business opportunities (in effect, currently those outside employment services). The current clause 4.1 reads:

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.

40. Job Futures proposes to replace the clause with the following:

4.1 In assessing new business opportunities that align with Job Futures Ltd strategic objectives, Job Futures Ltd will take into consideration potential impact of these opportunities on the current activities of members and benefit to the network as a whole.

4.2 Job Futures will notify members of its intent regarding tendering for new business opportunities to enable feedback to inform the tender decision and resolution of any potential issues.

41. On the proposed change to clause 4.1, which is subject to final ratification by members at the November 2015 AGM, Job Futures has submitted that:

A key role of Job Futures Ltd is to identify suitable new business and open up opportunities for its members. At the same time, members are entitled to a level of comfort that Job Futures Ltd will be mindful of the interests of individual member organisations, while acting in the best interests of the network as a whole. It is proposed that the clause in the Membership Charter (4.1) restricting Job Futures Ltd ability to tender for contracts where its members have historically provided services in that area in their own right be removed...Program changes, regional boundary changes and the move to bigger contracting regions have made this clause impractical. The proposed

replacement clause...requires Job Futures Ltd to consult with its members and take individual members' interests into account in any decisions.

42. Job Futures has further advised that, to paraphrase:

- Where Job Futures might be looking for new business that is also in a member's traditional sphere, that member is free to bid independently and against Job Futures.
- If Job Futures were to win that new business against an incumbent member, in the event that the member sought to and was in a position to win it back in the next tender round, the member could not bid without Job Futures' prior written consent.

43. Job Futures' member Marillac submits that, while it supports most aspects of Job Futures' application, it would oppose re-authorisation if Job Futures replaced clause 4.1 with the proposed new clauses.

44. Marillac objected to the proposal because:

- the proposed amendments are likely to have a distortive effect on the current market
- there is a likelihood of financial detriment to Marillac
- the proposed amendments may significantly impact the ability of other members to viably operate in their regions and
- the current clause is fair and equitable and results in a net public benefit.

45. Marillac submits, among other things, that the market for disability support services, which is its core offering, is becoming increasingly competitive. Allowing Job Futures to compete with its members in this area is likely to cause detriment to many Job Futures members, including Marillac. Marillac said the proposed amendments discriminated against it. It said its core disability-services offering contributed a significant proportion of its income. Job Futures encroaching on its historical service offering would be significantly detrimental to its operations.

46. Marillac said that the Job Futures model facilitated the entry of smaller community-based organisations into the employment services market. If Job Futures could compete with its members, competition was likely to become more concentrated. Lastly, Marillac submits that:

The success of the current arrangements [has] been due to the ability of Job Futures and members to work as a collective, sharing information and resources to reach a common goal. In this regard, should Job Futures have the ability to compete with individual members there is a significant risk that it could use its access to information and knowledge relating to the operations of individual members in a competitive tender, which may severely impact the effectiveness of the tender process with external parties and diminish the competitiveness of the market.

47. In response, Job Futures submitted, among other things, that:

...the current tendering/ delivery environment has seen a move by the major funder (the Department of Employment) to large Employment Services Regions, making the application of the current clause linked to service location impractical. The results of the

jobactive tender demonstrated that, on the whole, only those organisations that could provide full coverage of a region were successful.

Consequently in this new environment, the application of [clause 4.1] by one member could potentially lead to an unfair and inequitable result to several other Job Futures members. That is, a member who has historically delivered a service in its own right at one or two locations in a small area of what is now a much larger Region could prevent Job Futures tendering for that service on behalf of other members who are located in other parts of the same Region and wish to submit a collective tender to secure business, even if the individual member on its own could not provide full coverage and so has little chance of success. Such blocking of Job Futures' opportunity to tender with its members would then limit competition.

48. Job Futures said the Department of Social Services could align its contract areas with jobactive next tender and other programs have moved to large regions. Another scenario might be that future government contracts may not be for, say, separate employment and disability services; but for more personalised care packages. Job Futures' Membership Charter needed to be applicable to all business. If members were not satisfied with a decision, they could complain to Job Futures and its constitution has a subsequent dispute-resolution process.
49. In 2008 and in this draft determination, the ACCC has concluded that a Job Futures operating model incorporating restrictions on the ability of members to compete for contracts that Job Futures holds or successors to those contracts is likely to result in public benefits. However, the ACCC does not consider that Job Futures needs to prohibit itself from tendering against members for new business to realise those same public benefits:
 - To the extent that such a prohibition would reduce the potential for or actually reduce competition, this would constitute a public detriment.
 - Participation in Job Futures is voluntary. Where organisations conclude that the benefits of Job Futures membership do not outweigh the costs, they can elect not to become members or to renounce membership.
 - Members are able to decide to leave Job Futures with no notice required and with no penalty to compete against Job Futures if the latter were to target, as a new business opportunity, a member's traditional business sphere.
50. According to the new clauses 4.1 and 4.2 Job Futures has proposed, when considering new business opportunities, it would take into account the impact on members and notify members of its intentions. A member aggrieved by a proposal by Job Futures to compete against a member can, under Job Futures' constitution, raise their concerns with Job Futures and seek mediation with an external provider and arbitration.
51. Organisations may have joined Job Futures at a time when Job Futures' area of operation was limited to employment services and its Membership Charter provided that it would not compete against a member in its traditional area of business.
52. However, the ACCC considers that:
 - Job Futures' arrangements provide for procedures to resolve disputes between Job Futures and members, including external mediation and arbitration.

- A member can renounce membership at will, albeit it may have to continue to honour responsibilities under a subcontract.
- Job Futures has long had objects in its constitution broader than providing only employment services, and its Constitution provides for changes to the Membership Charter to be by special resolution (that is, by 75 per cent of members present and voting in a general meeting).⁶ It is also apparent that Job Futures has the ability and incentive to diversify beyond employment services.
- Job Futures' members, individually and collectively, represent a small proportion of the suppliers of relevant services and so Job Futures' relationships with its members ultimately do not have a great effect on the competitive dynamics of their wider markets.

53. The ACCC proposes to authorise the Conduct that includes the amendments to charter clause 4.1 that Job Futures has presented. As stated earlier, it is a matter for Job Futures' members to decide whether they support implementing the proposed changes to the charter.

54. Job Futures has also proposed changing the restriction on an exiting member's access to information:

- from being expressed as information 'other than that required for the member to deliver its contracted services'
- to information 'other than that considered by Job Futures Ltd to be necessary for that organisation to deliver its contracted service'.

55. No members have raised concerns with this change with the ACCC.

56. The ACCC does not consider the change significantly alters the balance of public benefit and detriment in this matter; while it may lessen some ambiguity. The ACCC proposes to authorise the Conduct and provisions that include this change. Under Job Futures' constitution aggrieved members can raise their concerns with Job Futures and subsequently seek external mediation and arbitration.

Summary of public detriments

57. The ACCC considers that the application is unlikely to result in significant public detriment. This is due to strong competition between a large number of employment service providers and the fact that prices for the provision of employment services are effectively set by the Australian Government. Job Futures' members, individually and collectively, represent a small proportion of the suppliers of employment services.

58. The non-compete clauses, while they may give rise to some potential detriment, underpin the operation of Job Futures' co-operative model and facilitate the entry and ongoing operation of smaller service providers.

⁶ Clause 2.1 Objects of Job Futures' Constitution reads: The only objects for which the Company is established are to conduct such benevolent and charitable services as are considered desirable to relieve poverty, unemployment, economic hardship, misfortune, destitution, suffering sickness, distress or helplessness of any person or group in Australia.

Balance of public benefit and detriment

59. The ACCC considers that the conduct is likely to result in the public benefits of:

- maintaining a level of competition and diversity in the provision of government-funded employment services by enabling smaller providers to continue to provide services under government contract and
- transaction-cost savings.

60. The ACCC does not consider the reduction in competition from Job Futures' collective tendering to be significant. With regard to the non-compete conduct and clauses, the ACCC considers that:

- Due to the relatively small size of Job Futures in the market for the provision of employment or other social-support services, the strong competition between providers and the fact that prices are effectively set by the Australian Government, there is unlikely to be significant public detriment.
- The non-compete clauses underpin the operation of Job Futures' co-operative model, which is likely to result in public benefits.
- Participation in Job Futures is voluntary, which is likely to mitigate detriment.
- The non-compete clauses for which Job Futures now seeks authorisation are less restrictive than the currently authorised provisions and so the organisations have marginally more freedom to compete.

61. For the reasons outlined in this draft determination, the ACCC is satisfied the proposed conduct is likely to result in a benefit to the public that would outweigh the likely detriment to the public including the detriment constituted by any lessening of competition. Accordingly the ACCC is satisfied that the relevant net public benefit test is met.

New members

62. The ACCC proposes, consistent with previous decisions, that the re-authorisation extends to allow Job Futures to take on new members to participate in proposed collective tendering.

63. As is the case with all authorisations, the ACCC can revoke an authorisation where there has been, among other things, a material change of circumstances since it granted the authorisation.⁷ For example, if an organisation with a much larger market presence sought to join Job Futures, the ACCC could assess whether this affected the proposed conduct's benefits and detriments.

⁷ Section 91B CCA

Length of authorisation

64. Job Futures seeks re-authorisation for 10 years. Where arrangements have already been in place for a period of time, the ACCC may consider it appropriate to grant authorisation for an extended period. Given the ACCC's conclusion on the balance of public benefits and public detriments and the fact that the ACCC has authorised Job Futures' conduct twice before over a long period, the ACCC is proposing to grant re-authorisation for 10 years.

Draft determination

The application

65. Job Futures has lodged an application, under subsection 91C of the CCA, for the revocation of authorisations A91084 and A91085 and the substitution of new authorisations (A91493 and A91494) for the ones revoked. Job Futures made the application using a Form FC, Schedule 1 of the Competition and Consumer Regulations 2010. Job Futures seeks re-authorisation for Conduct as set out in **Attachment A**.
66. Job Futures is seeking re-authorisation because the Conduct may be exclusionary, may contain a cartel provision or may have the purpose or effect of substantially lessening competition.
67. Subsection 90A (1) requires that, before determining an application for authorisation, the ACCC shall prepare a draft determination.

The net public benefit test

68. For the reasons outlined in this draft determination, the ACCC is satisfied:
- pursuant to sections 90(5A), 90(5B), 90(6) and 90(7) of the CCA, that in all the circumstances the conduct for which authorisation is sought is likely to result in a public benefit that would outweigh any likely detriment to the public constituted by any lessening of competition that would be likely to result.
 - Pursuant to section 90(8) of the CCA, that in all the circumstances the conduct for which authorisation is sought is likely to result in such a benefit to the public that the proposed conduct should be allowed to take place.

Conduct which the ACCC proposes to authorise

69. The ACCC proposes to revoke authorisations A91084 and A91085 and substitute new authorisations A91493 and A91494 for the ones revoked. The proposed re-authorisation is for the conduct described in **Attachment A**. The proposed authorisation extends to Job Futures and to current and future members of Job Futures, in respect of current and future target customers that agree to participate in the conduct.

Interim authorisation

70. As part of its re-authorisation application lodged on 9 April 2015, Job Futures sought interim authorisation for its proposed conduct. On 28 May 2015 the ACCC granted interim authorisation, effective from that date, in the terms detailed in the public decision document of that date that is available from www.accc.gov.au/AuthorisationsRegister
71. That interim authorisation remains in place. Job Futures has been required to deliver services under the jobactive contract from 1 July 2015 and the interim authorisation is intended to enable Job Futures to issue subcontract agreements to members that contain non-compete provisions. The interim authorisation suspends the operation of the current authorisations.

Next steps

72. The ACCC now seeks submissions on the draft determination. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the CCA.

Attachment A

Conduct which the ACCC proposes to authorise

Collective tendering conduct

That Job Futures may make and give effect to agreements with members that contain provisions:

- allowing for the development of co-operative tendering arrangements for government and other contracts that assist disadvantaged and unemployed people gain access to social and economic opportunities, including the development of skills and sustainable work
- agreeing as to the price that will be tendered by Job Futures on behalf of its Members
- agreeing as to the price paid for the services provided by Members under contracts with Job Futures
- agreeing to the territories for which Job Futures will tender and in which Job Futures and its Members will deliver services
- enabling Job Futures and its Members to enter into agreements in relation to specific tender opportunities which require the Member organisation to participate in that specific tender with Job Futures.

Concluding agreements with non-compete clauses

That Job Futures may make and give effect to agreements that contain provisions:

- requiring that a member that has entered into a subcontract with Job Futures will not, during the term of the Principal Agreement Period or any Extended Service Period that has been accepted, supply, offer to supply or tender to supply the Services or similar services in its own right, through another person or as part of a consortium or other partnership to a Principal or another supplier of the Services or similar services to the Principal, except:
 - by written agreement of Job Futures or
 - where the member provides notice of its intention to withdraw from tendering arrangements with Job Futures no later than 18 months before the end of the Relevant Contract Period.
- providing that, unless written consent has been given by Job Futures, an organisation that enters into a contract with another party for the provision of all or part of the same services for which it is contracted by Job Futures during the period of that subcontract is in breach of its contract with Job Futures and its conditions of membership of Job Futures.

Actions on a subcontracted member giving notice

That where a subcontracted member organisation gives notice (as above) of its intention to tender or deliver services in its own right, through another person or as part of a consortium or other partnership:

- Job Futures may restrict an exiting member's access to information during the remaining contract period, other than that considered by Job Futures to be necessary for that organisation to deliver its contracted service
- Job Futures may require the organisation to continue to deliver services in good faith in accordance with the subcontract until the end of the service period.

Concluding agreements restricting members who are not subcontractors

That Job Futures may make and give effect to agreements with members that include provisions applicable to members that are not, at the relevant time, subcontractors, which require that such a member will not tender to supply services in its own right, through another person or as part of a consortium or other partnership for any contracts or successor program contracts that are held by Job Futures (other than contracts or successor program contracts regarding which Job Futures notifies the members that it does not intend to tender), unless the prior written consent of Job Futures has been obtained.

Defined terms

(Reference: Master Subcontract Agreement accompanying Job Futures' application)

- **Extended Service Period** means one or more periods of time from the end of the Service Period set out in the Principal Agreement, unless otherwise varied by the Department and Job Futures.
- **Principal** means the contracting party with Job Futures in a Principal Agreement as specified in the relevant Schedule to a subcontract.
- **Principal Agreement Period** means the period for which a contract is offered.
- **Relevant Contract Period** means the period of the head contract under which the services are provided.
- **Services** means the services or activities to be provided by the Subcontractor to Job Futures under the relevant Schedule and more particularised in a Work Order.

Membership Charter clauses

- Existing clause 2 of Job Futures' charter (with the words 'and other stakeholders' added to clause 2.1 (c)):

2. Tendering and contracting

2.1 The Board of Job Futures Ltd is empowered to determine and communicate to members the specific criteria for inclusion of any member as a nominated sub-contractor or formal partner in a Job Futures tender. These criteria may include, but are not limited to:

(a) Past performance in delivering the program/ service

(b) Demonstrated capacity to deliver the program/ service in the area for which the tender is proposed

(c) Demonstrated local linkages including mechanisms for promoting engagement of the local community and other stakeholders.

The Board of Job Futures Ltd will determine and communicate to members the basis upon which any conflicting interests of members in each tender process will be resolved.

2.2 Job Futures Ltd will apply these criteria impartially when selecting a nominated sub-contractor or partner for a Job Futures Ltd tender.

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

2.4 A member affected by a decision of Job Futures Ltd to select a sub-contractor or partner may seek review of the decision through a Board disputes committee which will consider any request within 3 business days of receipt.

2.5 Job Futures Ltd may require that a member participating in a tender pay a specific levy to cover the costs of developing the tender.

2.6 A member which fails to provide the information required for a tender within specified timeframes may be excluded from the tender.

- Charter clauses 3, 4 and 8, as proposed to be amended, relating to prohibitions on and the consequences of a Job Futures member tendering against Job Futures and vice-versa. Strikethroughs indicate proposed deletions and underlining indicates proposed new clauses:

3. Tender against Job Futures Ltd

3.1 It is a fundamental condition of membership of Job Futures Ltd 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.

~~3.2 Members of Job Futures Ltd must only participate in a tender to provide Job Network services (or any successor to Job Network) as a sub contractor to or partner with Job Futures Ltd, unless the prior written consent of Job Futures Ltd has been obtained.~~

3.2 A member must not tender to supply services in its own right, through another person, or as part of a consortium or other partnership for any contracts (or successor program contracts) that are held by Job Futures Ltd (other than contracts or successor program contracts regarding which Job Futures notifies the members that it does not intend to tender), unless the prior written consent of Job Futures Ltd has been obtained.

3.3 A member which has agreed to tender as a subcontractor for a specific contract with Job Futures Ltd must not tender to supply the same services in its own right, through another person, or as part of a consortium or other partnership, unless the prior written consent of Job Futures Ltd has been obtained.

~~3.3 A member which has entered into a sub contract with Job Futures Ltd 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 Ltd, unless the prior written consent of Job Futures Ltd has been obtained.~~

3.4 A member which has entered into a sub contract with Job Futures Ltd to deliver a program or services must not tender, in its own right, or as part of a consortium or other partnership for that same, or any successor program, unless the prior written consent of Job Futures Ltd has been obtained or a member has exercised its right to withdraw from tendering arrangements in accordance with the Sub Contract.

3.5 A member which submits a tender in contravention of sub clauses 3.2, 3.3 or 3.4 is acting in a manner prejudicial to the interests of Job Futures Ltd and its members and is liable to forfeit its membership, in accordance with the provisions of rule 11 of the Constitution.

3.6 Sub clauses 3.2, 3.3, 3.4 and 3.5 are applicable to a tender to deliver the program or services in any location within Australia.

3.7 A member affected by a decision of Job Futures Ltd to refuse consent may seek review of the decision through a Board disputes committee which will consider any request for review within 3 business days of receipt of that request.

4. Job Futures Ltd and Members right to tender

~~4.1 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.~~

4.1 In assessing new business opportunities that align with Job Futures Ltd strategic objectives, Job Futures Ltd will take into consideration potential impact of these opportunities on the current activities of members, and benefit to the network as a whole.

4.2 Job Futures Ltd will notify members of its intent regarding tendering for new business opportunities, to enable feedback to inform the tender decision and resolution of any potential issues.

4.3 Members have the right to compete directly against other members when tendering in their own right for business subject to the conditions of Section 3 of this Charter. Wherever possible, members are encouraged to maximise the strength of the network and collaborate on potential opportunities.

8. Use of confidential information [only first part of clause extracted here]

“Confidential information” includes all performance data (other than publicly available information), financial information, governance information, business strategy, information about innovations, approaches and strategies.

8.1 Confidential information acquired by member organisations through their membership of Job Futures Ltd or delivery of Job Futures Ltd contracts may only be used in the delivery of the sub contract unless Job Futures specifically consents to another use. Except where otherwise provided for in this Membership Charter, a member who uses Confidential Information for purposes other than delivery of a Job Futures Ltd contract is engaged in conduct prejudicial to the interests of Job Futures Ltd for the purposes of clause 11 of the Constitution.

~~8.2 Members are entitled to use information about their own organisation's performance as a sub contractor in their tenders, except where the tender is for a service or program which they currently or previously delivered as a sub contractor to Job Futures Ltd.~~

8.2 Members are entitled to use information about their own organisation's performance as a sub contractor in their tenders, except where:

(i) the tender is for a service or program which they currently or previously delivered as a sub contractor to Job Futures Ltd and

(ii) the member has failed to provide Job Futures Ltd with notice of intention to withdraw from tendering arrangements under the sub contract, and/or failed to obtain written agreement from Job Futures to participate in that tender.

All use of such information must be in accordance with the Sub Contract.

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