

**Australian Competition
&
Consumer Commission**

PRE-DECISION CONFERENCE

Minutes

**Applications for revocation and substitution A91493-A91494
lodged by Job Futures Ltd**

11 September 2015

The information and submissions contained in this minute are not intended to be a verbatim record of the pre-determination conference but a summary of the matters raised. A copy of this document will be placed on the ACCC's public register.

**Pre-Decision Conference:
Applications for revocation and substitution A91493-A91494
lodged by Job Futures Ltd**

11 September 2015

Australian Competition and Consumer Commission Offices located in Perth, Canberra, Sydney and Melbourne by video conference facilities.

Attendees:

Australian Competition and Consumer Commission

Jill Walker, Commissioner (in Perth)

Richard Chadwick, General Manager, Adjudication Branch (in Canberra)

Lyn Camilleri, Director, Adjudication Branch (in Melbourne)

Tess Macrae, Assistant Director, Adjudication Branch (in Melbourne)

John Rouw, Senior Project Officer, Adjudication Branch (in Melbourne)

Tanya Dunne, Deputy General Counsel (in Melbourne)

Anthony Hilton, Director, Enforcement Western Australia (in Perth)

Bec Warwick, Investigator, Enforcement Western Australia (in Perth)

Job Futures

Jenni Mack, Chair (in Perth)

Matt Little, CEO (in Melbourne)

Maureen Kam, Company Secretary (in Sydney)

Bridging the Gap

Evan Parker, Chairman (in Perth)

Colin Kerr, Previous CEO (in Perth)

Les Hayward, Board Member (in Perth)

Marillac

Kristian Dauncey, CFO (in Melbourne)

Anne Bavington, CEO (in Melbourne)

BJL (Balga Job Link)

Desiree Walsh, CEO (in Perth)

Interact

Andrew James, CEO (in Melbourne) (observing)

ACSO

Karenza Louis-Smith, CEO (in Melbourne)

Remberto Rivera, Chief Financial Information Officer (in Melbourne)

Conference commenced: 10.35 Western Standard Time

Submissions received from interested parties are available at:

<http://registers.accc.gov.au/content/index.phtml/itemId/1185963/fromItemId/278039>

Commissioner Walker welcomed attendees, made some introductory remarks outlining the purpose of the conference, declared the pre-decision conference open and invited Mr Parker of Bridging the Gap, and Mr Dauncey of Marillac, who called the conference, to address the conference.

Concerns about Job Futures directly subcontracting and moving into new areas of business

Mr Evan Parker (Chairman, Bridging the Gap) submitted that Job Futures has breached its previous authorisation without seeking ACCC approval, which was granted on the basis that central coordination of tendering assists small providers to participate in Job Network. Mr Parker submitted that Job Futures has also breached its membership charter and cannot be trusted to meet its obligations in the future. Further, amendments to the authorised conduct should not be allowed and unless the issues can be sorted out, authorisation should not be granted.

Mr Parker submitted that Bridging the Gap pays tens of thousands of dollars to be a member of Job Futures so that Job Futures can win contracts and distribute them to members. However, Mr Parker said Job Futures has made a strategic decision to contract for themselves (i.e. with member, Busy at Work) against its members and open new offices, perhaps in order to create revenue for Job Futures or perhaps the Job Futures model is broken. Mr Parker submitted that it advised Job Futures that it would not be tendering for this contract but that it would be great for another member to get it. Job Futures then asked for Bridging the Gap's contacts in the area.

Mr Parker considered that members previously supported how Job Futures was operating and the money made went back into the local community. However Bridging the Gap has lost three contracts and 80 per cent of its revenue such that it is in a difficult financial position (closing five offices and 75 staff made redundant).

Mr Parker submitted that Busy at Work has opened nine offices in WA and that the next contract would go to this 'partnership', rather than Bridging the Gap.

Mr Parker submitted that a new contract came in this week and Job Futures has said that it is unsure what to do about it. Members feel like on the one hand they cannot compete with Job Futures and are also not getting contracts from Job Futures.

Mr Parker conceded that the strategic approach needs to adapt but also that the network needs to build employer connections. Members are the ones that have these broad connections and this is the strength of the organisation.

Mr Parker submitted that the dispute resolution process is not working and the network could be destroyed.

Mr Les Hayward (Board Member, Bridging the Gap) submitted that Job Futures documentation (emails etc) did not mention Busy at Work or that Job Futures would become a sub-contractor in conflict with members. The contract was drawn up some time before members were made aware. Mr Hayward does not support Job Futures becoming a tenderer and bringing in an outside party, preventing other members from tendering.

Commissioner Walker clarified that an authorisation cannot be breached (unless the party does not comply with a condition of authorisation); rather, it is permissive—it allows, but does not require the party to engage in the authorised conduct. Commissioner Walker noted the submissions that the member charter had been breached, and that Job Futures had not conducted itself consistently with the spirit of the authorisation.

Mr Kristian Dauncey (CFO, Marillac) supported reauthorisation but not in its entirety, especially with respect to the proposed changes to clause 4.1 of the membership charter.

Mr Dauncey submitted that, but for Job Futures, Marillac would not have become involved in employment services. Marillac expects employment services are likely to remain a small part of Marillac's business. It was not made clear to members that Job Futures may expand beyond employment services into services delivery, including disability services. He considered that Job Futures becoming a direct provider is a fundamental change. Mr Dauncey submitted that Job Futures should stay with the format that brings small providers together.

Mr Dauncey submitted that Job Futures wanted to know how Marillac had been successful in its first 18 months and to share this with other members. Marillac provided a lot of business information to Job Futures, including about its person-based approach. Marillac is concerned that Job Futures will use the information and Marillac may have issues operating in the profitable space of disability because it does not have the same resources and history of information that Job Futures has. This will reduce competition.

Mr Dauncey submitted that Marillac is a strong diverse organisation that expects to continue to grow with the large amount of new work arising from the National Disability Insurance Scheme (NDIS). There will be 450,000 people using the NDIS on individual contracts and the intention is that individuals can shop around for their provider. Mr Dauncey submitted that if an organisation were to lose a tender bid, the organisation would need to get Job Futures' permission to compete for that contract in the future if Job Futures were to move into this area.

Mr Dauncey submitted that the changes to Clause 3, which expand the non-compete provisions relating to member organisations from employment services to services in general, create a major problem for Marillac. The NDIS will be characterised by a large number of dispersed contracts and the clause would require extensive cross checking of client lists before Marillac could offer to provide services to individual clients under the NDIS.

Mr Dauncey submitted that Job Futures has not been open and transparent and members do not have confidence that disputes will be handled correctly, quickly and in a fair way.

Ms Desiree Walsh (CEO, Balga Job Link (BJL)) submitted that the intention of any authorisation should be to enable small organisations to better tender for work at a national level. Ms Walsh submitted that Job Futures should exercise these powers in the way intended but that currently it is in contravention of the authorisation by subcontracting to itself.

Ms Walsh submitted that Busy at Work ended up forming an alliance with Job Futures in Perth. Ms Walsh submitted that Job Futures could not have applied for this contract as B JL is the member that has the north metro Perth knowledge (Job Futures used information provided by B JL in good faith, without asking B JL's permission). Job

Futures denied BJL natural justice by rejecting the suggestion that BJL tender for this contract, even though BJL was at least as qualified as Busy at Work.

Ms Walsh submitted that local businesses are best placed to offer services to their local community; BJL does not have the resources to tender nationally. BJL considers that Job Futures has a duty to ask local members what the impact will be of not being included in a tender, such as by calling affected members; this only occurred after the decision had been made. The Busy at Work tender worked in Queensland because it is a local member, but Job Futures also facilitated Busy at Work to enter as a non-local member in Perth.

Ms Walsh submitted that even if Job Futures had got the complementary contracts (to the apprenticeship tender) in these regions, the downside would be much higher from bringing in an outside member into an existing member's region.

Ms Walsh submitted that Job Futures' processes have fallen down and Job Futures has offered itself work rather than offering it to its members. Ms Walsh suggested that Job Futures relies on the knowledge and status of its members, and the proposed changes can pit members against each other.

Ms Walsh noted that the role of Job Futures and its Board is to support and seek tenders for members; however Job Futures has moved out of its usual work and is operating in its own right, including its involvement in apprenticeships. Ms Walsh questioned the ability of the board to vote on the apprenticeships matter, as in her view more than 50 per cent of the board had an interest and so it did not have a quorum.

Ms Karenza Louis-Smith (CEO, ACSO) is a former Board member of Job Futures and supports the work of Job Futures in education and training and employment. Ms Louis-Smith submitted that only 5 per cent of ACSO work is in employment services. While ACSO has improved its business by learning from other members, ACSO can afford to walk away from Job Futures (unlike many other member organisations).

Ms Louis-Smith noted that diversification is important for Job Futures in order to win new business. However Ms Louis-Smith submitted that ACSO is struggling with the proposed non-compete clauses 3.2 and 3.3 (as well as 4.1) of the membership charter because the parameters of 'business' / 'services' are not defined. Ms Louis-Smith does not want Job Futures to compete against ACSO when ACSO can't compete against Job Futures. This is at odds with the real world where parties compete for current and future tenders. If these clauses are introduced, ACSO may reluctantly decide to leave Job Futures.

Ms Louis-Smith agreed with some of the comments about Job Futures' involvement in the NDIS made by Mr Dauncey. Ms Louis-Smith considered that members should not be pitted against each other (for example in WA) or tear each other apart and should instead come together to share knowledge.

Ms Jenni Mack (Chair, Job Futures) submitted that the authorisation (including proposed clauses 3.2, 3.3 and 4.1) is for the protection of the collective to seek tenders and considers that Job Futures is part of the collective. Ms Mack suggested that the non-compete clauses are intended to protect the intellectual property of members, to ensure the model works and ensure the benefits of collective tendering. Job Futures has received advice that it has not breached its charter or the existing authorisation.

Ms Mack submitted that the spirit of the clauses is unchanged, other than widening to include future contracts and operationalising the ACCC authorisation. Generally, the new clause is less anti-competitive. Job Futures can discuss tweaks to these clauses in the forums with members.

Ms Mack submitted that the market is competitive and so Job Futures is looking to change the model to increase the value of its members by regularly diversifying its business in order to remain competitive. Job Futures works to secure new contracts for members and bring smaller members into new markets. Ms Mack submitted that Job Futures advised its members that it would be tendering (although Busy at Work was not named as it was a competitive tender). This approach worked in Queensland but has not worked in Perth (or NSW) such that Job Futures will need to secure new contracts in Perth (if it had worked in Perth, members would not have these concerns). Ms Mack submits that there are five members working in the Queensland market. The Busy at Work staff are working in the same location as Job Active staff.

However Job Futures could have better communicated to members about the change in strategic direction and needs to consult with members to work through the changes in the wider network. The precise clauses of the membership charter need to be operationally sorted out internally and Job Futures has set up a committee to work through the changes.

Ms Mack submitted that in the interests of the network as a whole, Job Futures is seeking less restrictive conduct because the nature of the market is changing. Governments are moving towards larger tendering (from around 150 employment regions to around 60) and less localised providers. Job Futures needs permission to access a breadth of member data to tender in these large regions. For example, Job Futures entered the apprenticeships space to improve employer awareness of Job Futures.

Ms Mack submitted that Job Futures supports the draft determination and considers that the conduct will benefit the whole network.

Ms Mack disagreed that members are pitted against each other, submitting that Job Futures has a history of working with its members to facilitate outcomes and has successfully resolved conflicts without the need for escalation.

Mr Matt Little (CEO, Job Futures) submitted that Job Futures members need to collectively share their information or it will be the end for Job Futures.

Mr Little considered that Job Futures needs to diversify its work and membership to prevent stagnation, connect with employers, avoid a narrow employment base and ensure future success. He submitted that he had delivered this message to members from 2013.

Mr Little agreed that these processes should be transparent and aligned to strategic objectives. In this regard, Job Futures has provided the necessary notice to members about the apprenticeships, Work for the Dole and other tenders several weeks in advance. Job Futures also offered for members to express concerns, noting however that it is rare in a membership organisation that you will get agreement of all parties (e.g. not realistic to get more than 75 per cent approval). You just need to ensure consultation. The new application includes a requirement for consultation that did not exist previously.

Ms Maureen Kam (Company Secretary, Job Futures) submitted that historically, issues have been solved internally between members. Job Futures applies for the authorisation for itself and its members, so that members are also protected.

Ms Kam submitted that part of the reason for changing clause 4.1 is to assist in finding new opportunities, not to compete with members.

Job Futures moving into disability services

Commissioner Walker noted that Job Futures is moving into disability services and asked about any difference between the public benefits of the conduct with respect to disability services compared with employment services.

Ms Louis-Smith indicated that this requires a lot of thought as it is quite complex and difficult.

Ms Mack submitted that Job Futures has been in disability employment services since 2008 (35 per cent of the total of its services). The market operates very similarly in disability as in other employment services. Ms Mack submits that this sector is talking a lot about the rise of parent co-ops to gain group buying power. Ms Mack considered that the future of the NDIS was speculative at this time.

Deferral of ACCC decision

Commissioner Walker noted that Job Futures is continuing to consult with members about changes to certain clauses of the agreements. Commissioner Walker asked whether the ACCC should defer making a final decision until this is resolved and noted that there was no statutory deadline for this decision.

Ms Mack confirmed whether Job Future would continue to have the necessary statutory protection until that time and what the options would be for the ACCC's possible decisions. Commissioner Walker stated that the interim authorisation would continue to have effect until the ACCC makes its final determination. Depending on the outcome of member deliberations, there may be a need to amend the authorisation application.

Mr Little was concerned about deferring a decision as it may take some time, submitting that the authorisation should not depend on the status of the clause or vice versa.

Ms Mack stated that she did not have a problem with the ACCC deferring its decision.

Mr Parker noted that while he supported the spirit of cooperation, Bridging the Gap has spent a lot of time on this and he was not optimistic about it being resolved since discussions have not succeeded to date. Mr Parker considered that the introduction of the clause should not be delayed further as there are tenders that need to occur in the meantime.

Ms Walsh said that BJL is happy to wait for a decision if Job Futures intends to act in good faith.

Ms Dauncey supported deferring the decision until the clauses have been voted on by members. If Job Futures does not obtain 75 per cent as required, that is the members speaking.

Ms Louis-Smith submitted that Job Futures needs to take members on the journey and then we would probably be able to resolve it.

Commissioner Walker confirmed that no party wished to make any further comments. The Chair closed the conference by noting that parties could provide further submissions to the ACCC by 25 September 2015 and that the ACCC would provide participants with a record of the conference, which would also be placed on the ACCC's public register.

Conference closed at 1.05pm Western Standard Time