



Job Futures Ltd –
application for the revocation of authorisations A91084 and
A91085 and their substitution with authorisations A91493 and
A91494 – interim authorisation decision
28 May 2015

Decision

1. The Australian Competition and Consumer Commission (the ACCC) has decided to grant interim authorisation in respect of the application for re-authorisation lodged by Job Futures Ltd on 9 April 2015 (see attachment for the terms of interim authorisation).
2. Under a government contract awarded to Job Futures, it is required to commence delivery of its services from 1 July 2015. Interim authorisation will enable Job Futures to issue subcontract agreements to its subcontractors that contain certain non-compete provisions. It also has the effect of suspending the operation of the current authorisations which expire on 30 June 2015 and granting interim authorisation in substitution while the ACCC considers the substantive application for re-authorisation (see paragraph 11).
3. Interim authorisation commences immediately and remains in place until it is revoked or the date the ACCC's final determination comes into effect.
4. The ACCC notes that there are some key differences between the arrangements previously authorised and those proposed under the current re-authorisation and interim authorisation (see paragraph 8). Job Futures advised it has consulted with its members on the proposed changes to its Membership Charter; 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 Membership Charter and for Job Futures to determine whether to incorporate new clauses in its subcontracts before its November AGM.

The application for re-authorisation

5. Job Futures was established in 1997 to provide a vehicle for community-based non-profit providers to share resources and build capacity to compete effectively for funding in the area of employment and related programs; 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.
6. Job Futures states that it has become one of the largest providers of Australian Government-funded employment programs (with its contracts valued at \$69 million in

2013/14). 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, 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 Security Services).
7. Job Futures is currently authorised (until 30 June 2015) to allow it to develop collective tender arrangements for the purpose of bidding for government funding for employment services; and for certain non-compete arrangements. Under these authorisations Job Futures submitted a tender for the Government's employment services 2015-2020 contract. The results of tender were announced on 31 March 2015 and Job Futures was awarded business for the new service called jobactive.
8. On 9 April 2015, Job Futures applied to the ACCC for re-authorisation of these arrangements, with some amendments. The differences relate to:
- reducing the time period for the requirement for Job Futures' members to commit to subcontracting with Job Futures, from six years to five
 - removing Job Futures' ability to take away and redistribute up to 30 per cent of a subcontracted member's work if that member indicated, in effect, that it was going to tender against or outside the Job Futures system
 - removing the current 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 in that location
 - 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'.
9. As set out in the attachment, interim authorisation covers the first two proposed changes in paragraph 8, regarding commitment period and work reallocation. However, interim authorisation does not cover the proposed changes in relation to tendering where a member has pre-existing business and the restriction on access to information. To enable the ACCC to more fully consider the effect of these proposed changes, interim authorisation is granted to terms consistent with the existing provisions.

The authorisation process

10. Authorisation provides protection from legal action for conduct that may otherwise breach the competition provisions of the Competition and Consumer Act 2010 (the CCA). Broadly, the ACCC may grant authorisation if it is satisfied that the benefit to the public from the conduct outweighs any public detriment, including from a lessening of competition. The ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

Interim authorisation

11. Section 91 of the CCA allows the ACCC to grant interim authorisation without making a decision on the merits of the application. In the case of an application for re-authorisation, the ACCC may suspend the operation of the authorisation sought to be revoked and grant an authorisation that is expressed to be an interim authorisation in substitution for the authorisation suspended.¹
12. The ACCC will only grant interim authorisation in appropriate circumstances. In many circumstances it is not appropriate to do so because interim authorisation allows an applicant, for a limited period, to engage in conduct before the ACCC has been able to fully assess whether the conduct satisfies the authorisation test.

Consultation

13. The ACCC sought submissions from about 70 parties potentially affected by, or otherwise interested in, this application, including customers, Job Futures' members, other suppliers and industry peak bodies. The ACCC received 13 submissions from Job Futures' members and industry peak bodies, all in general support of re-authorisation and interim authorisation.
14. However, one Job Futures member, Marillac, supported most aspects of the application but opposed the grant of interim authorisation in respect of the proposed change that relates to the ability of Job Futures to compete against its members in tendering for new services in a location where that tender is likely to damage the pre-existing business of a member in that location. As part of its application for re-authorisation, Job Futures is proposing to remove the current prohibition against it tendering in these circumstances. The ACCC will consider this issue as part of its assessment of the substantive application. Job Futures has said it will not undertake tendering for new services before the ACCC finalises its assessment of the application for re-authorisation.
15. Further information in relation to the application for re-authorisation, including public submissions received by the ACCC as this matter progresses, may be obtained from the ACCC's website www.accc.gov.au/authorisations

Reasons for decision

16. In granting interim authorisation, the ACCC notes that:
 - In 2008 it assessed non-compete provisions applying to Job Futures' members and concluded that:
 - there was some benefit from the arrangements – to the extent that they underpinned the operation of Job Futures' co-operative model and facilitated the entry and ongoing operation of smaller service providers
 - they would give rise to some detriment but would enable Job Futures to deliver the benefits of its operational model.
 - The non-compete clauses for which Job Futures now seeks authorisation are generally less restrictive than the currently authorised provisions. This suggests that detriment might be mitigated further. Similarly, with regard to the specific likely effect on Job Futures' members of granting or not granting interim authorisation, members would benefit from a grant of interim authorisation that involved less-restrictive provisions.
 - Granting interim authorisation is unlikely to permanently alter the competitive dynamics of the market. Rather, granting interim authorisation is more likely to

¹ Section 91(2)(f) of the Competition and Consumer Act.

maintain the status quo than not granting. Under the recently awarded Government contract, Job Futures will commence service delivery from 1 July 2015. Given that Job Futures' operating model relies on non-compete restrictions, the interim authorisation will enable Job Futures to sub-contract and give effect to such provisions after the existing authorisation expires on 30 June 2015, which will allow for an orderly continuation of existing arrangements.

- Job Futures' competitors are unlikely to be greatly affected by the ACCC's decision to grant interim authorisation. Job Futures is one of many contractors in the market and many other contractors are larger than it. Providers have won their contracts through a market-based competitive tendering process in competition with a Job Futures entity operating essentially the same business model as it proposes to operate under interim authorisation.
- Job Futures' major customer, the Department of Employment, wants services provided from 1 July 2015. It and its client-base, which includes disadvantaged and vulnerable people, would be inconvenienced if there were any problems with Job Futures' subcontractors smoothly taking on their responsibilities from that date.

Reconsideration of interim authorisation

17. The ACCC may review the interim authorisation at any time. The ACCC's decision in relation to the interim authorisation should not be taken to be indicative of whether or not the final authorisation will be granted.

Attachment – details of clauses subject to interim authorisation

Concluding agreements with non-compete clauses

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

- 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 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

- 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: draft Master Subcontract Agreement that Job Futures supplied with its 9 April 2015 re-authorisation 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.

Collective tendering conduct

- 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.