



Australian
Competition &
Consumer
Commission

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: 28 July 2016

Authorisation numbers: A91493
A91494

Commissioners: Sims
Schaper
Cifuentes
Court
Featherston
Keogh

Summary

The ACCC has decided 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. The ACCC grants authorisation until 18 August 2026.

The application for re-authorisation

1. On 9 April 2015 Job Futures Ltd (now CoAct¹) applied for the revocation of authorisations A91084 and A91085 and their substitution with new authorisations A91493 and A91494 for the ones revoked. CoAct sought 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 CoAct.
2. CoAct also sought interim authorisation, to among other things, enable it to commence issuing subcontract agreements to its subcontractors that contain certain non-compete provisions while the ACCC was considering the substantive application for re-authorisation. On 28 May 2015 the ACCC granted interim authorisation.²
3. On 31 July, 2015, the ACCC issued a draft determination³ proposing to grant re-authorisation to CoAct and its members for 10 years. CoAct members Bridging the Gap Inc and Marillac Ltd requested that the ACCC hold a conference in relation to the draft determination. A conference was held on 11 September 2015.
4. Following the conference, CoAct requested that the ACCC defer consideration of its final decision until after CoAct had put proposed changes to its membership charter to a member vote at a meeting in mid-2016. The ACCC agreed to do so.
5. On 20 June 2016, CoAct made a further submission to the ACCC, making one amendment to its application, relating to the non-compete provisions. This is explained below in 'The conduct'.

The applicant

6. 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. CoAct partners with its members to deliver services, usually under contract to an external head contractor/ purchaser. The funding body contracts CoAct, which in turn subcontracts its members. In other instances, CoAct may partner with its members to provide services.

¹ In June 2015, Job Futures Ltd adopted the new trading name CoAct. In this determination, the term CoAct is used throughout to also refer to Job Futures Ltd.

² Interim authorisation also had the effect of suspending the operation of A91084 and A91085 which were due to expire on 30 June 2015.

³ Subsection 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

7. CoAct is a not-for-profit company limited by guarantee. It is made up of members which are not-for-profit organisations. In November 2015, in order to manage conflict of interest issues, changes were made to CoAct's constitution to enable a greater number of independent (i.e. non-member) board directors.
8. CoAct 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).
9. CoAct states that the value of its contracts across the various government programs in 2014-15 was \$75 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).

The conduct

10. The conduct for which CoAct seeks re-authorisation is set out in Attachment A and summarised below:

Collective tendering conduct

- Allows CoAct 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 CoAct will tender and in which members will deliver services.

Concluding agreements with non-compete clauses

- Allows CoAct to require its members to only participate in a tender to provide jobactive services (or any successor program to jobactive) as a subcontractor to or partner with CoAct, unless CoAct gives its prior consent.⁴
- Allows CoAct to require its members that have entered into an agreement to tender as a partner for a specific contract with CoAct to not tender for that same contract to supply the services in its own right against CoAct, without CoAct's prior consent.
- Allows CoAct to require its members that have entered into a subcontract with it to not compete in their own right against CoAct for that same or any successor program (in any location in Australia), without CoAct's prior consent or exercising its right to withdraw (charter clause 3.4; and see subcontract clause 22 – under which, if a subcontractor does not want to continue on with the work

⁴ In its original application, CoAct sought to extend this provision to cover any contracts held by CoAct.

as a CoAct subcontractor next time it comes up for tender, the subcontractor has to provide CoAct with 18 months' notice before the end of the program).

11. The conduct is reflected in provisions of CoAct's template subcontracts with its members and its membership charter, including the following:
 - clauses of CoAct's charter that relate to collective tendering, particularly clause 2, which outlines, among other things, the criteria CoAct may apply in deciding which members will be nominated in a tender bid as a subcontractor
 - charter clauses relating to prohibitions on and the consequences of a CoAct member tendering against CoAct and vice-versa, being
 - Clause 3 'Tender against CoAct'
 - Clause 4 'CoAct and Members Right to Tender – New Business'
 - Clause 8 'Use of Confidential Information'.
12. Together, the conduct as summarised above and set out in Attachment A is referred to in this determination as the Conduct.

Previous authorisations

13. In 1998 the ACCC granted authorisation to CoAct 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). CoAct and its members went on to engage in similar arrangements, participating in further tender rounds.
14. In 2008 CoAct 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.
15. The main differences between this application for re-authorisation and the previously authorised arrangements are:
 - a reduction in how long CoAct members must commit to subcontracting with CoAct, 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 CoAct's 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 CoAct 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 CoAct to be necessary for that organisation to deliver its contracted service'.

16. At the time of lodging the application, CoAct's members had not voted on the proposed changes to the membership charter, which include the proposed change with regard to tendering where a member has pre-existing business (the third dot point above). It was planned to bring these proposals to the Annual General Meeting in November 2015.
17. Following concerns raised by members and at the ACCC conference held after the ACCC's draft determination, CoAct conducted further consultation with its members and a revised set of amendments to the membership charter were considered at a special general meeting on 8 June 2016, at which the members resolved to adopt the revised membership charter.

Submissions received by the ACCC

18. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process. Copies of public submissions may be obtained from the ACCC's website www.accc.gov.au/authorisationsregister.

Prior to the draft determination

19. The ACCC invited submissions on CoAct's application from about 70 parties potentially affected by or otherwise interested in these applications, including customers, CoAct's members, other suppliers and industry peak bodies. The ACCC received 10 submissions from CoAct's members and three submissions from industry peak bodies, all in general support of re-authorisation.
20. However, one CoAct member, Marillac, opposed the proposed change that relates to the ability of CoAct to compete against its members in a location likely to damage the pre-existing business of a member, while it supported other aspects of the application. This issue is considered in the public detriments section.

Following the draft determination

Interested parties

21. The ACCC received further public submissions in response to the draft determination from three CoAct members and one industry peak body.
22. Bridging the Gap, a CoAct member, agreed with the majority of the draft determination but raised an objection similar to the non-compete issue raised by Marillac. It also raised concerns which related to CoAct's participation in a tender for the Australian Apprenticeship Support Network (AASN) together with another CoAct member. B JL Connecting Communities (BJL) raised similar concerns.
23. CoAct member ACSO, which originally supported the application, raised a number of concerns following the draft determination. In addition to the issue raised by Marillac, ACSO also raised concerns with the proposed changes allowing CoAct to pursue new business outside of employment services and the expansion to the non-compete provisions preventing members from tendering in their own right for contracts held by CoAct.
24. Jobs Australia, a peak industry body of which CoAct is a member, which also originally supported the application, commented on the issue raised by Marillac. It noted that there was significant change occurring in the area of disability services and that it was not yet

clear whether a CoAct model would offer the same benefits that it does in employment services. Without disagreeing with the ACCC's ultimate finding in favour of authorisation, it felt that this issue warranted closer attention.

The Applicant

25. CoAct made submissions in response to the issues raised by interested parties. It stated that it was continuing its consultation with members regarding changes to the membership charter, which at the time were yet to be put to a member vote.
- CoAct agreed that there was uncertainty about how disability services would be provided and that once that was settled, it would consult with members to decide if the collective tendering model would bring value to the service and the members.
 - CoAct submitted that widening the non-compete provisions to any contracts held by CoAct would protect members who choose to tender with CoAct in all areas where the network has agreed that there is value in collective tendering.
 - In relation to the concerns expressed about CoAct moving into new business areas, CoAct submitted that removing the prohibition on it tendering in a location where that is likely to damage the pre-existing business of a member is appropriate because the clause makes it difficult for CoAct to achieve its strategic objectives aimed at strengthening the network as a whole by tendering for suitable new business. CoAct also supported its proposed change to enter in to new business areas and stated that it would work with members to reach agreement on processes for new business and collective tendering opportunities and the wording of the relevant clauses in the membership charter.
 - In relation to the concerns expressed around CoAct's tendering for the AASN, CoAct considered that these were matters to be discussed and resolved by the Board and the members.

Pre-decision conference

26. A pre-decision conference was requested by Bridging the Gap and Marillac to discuss the draft determination. The conference was held in Perth, Canberra, Melbourne and Sydney by video conference facilities on 11 September 2015. A record of the conference may be obtained from the ACCC's website www.accc.gov.au/authorisationsregister.
27. The primary issues raised at the conference were concerns about CoAct directly subcontracting and moving into new areas of business—it was alleged that CoAct had 'breached' its ACCC authorisation⁵ as well as its membership charter.
28. During the conference, CoAct advised that it was undertaking further consultation with members about proposed changes to its membership charter and subsequent to the conference, CoAct requested the ACCC to defer consideration of its final decision until after CoAct had put the proposed changes to its members. The ACCC agreed to this request and wrote to interested parties on 21 October 2015 outlining the anticipated process leading to the ACCC's final determination.

⁵ On the aspect of a 'breach' of the authorisation, the ACCC 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.

29. On 20 June 2016, CoAct advised the ACCC that, following the conference, a set of revised amendments to the membership charter was put to the vote of members at a special general meeting held on 8 June 2016. The members resolved by special resolution (requiring 75 per cent support) to adopt the revised membership charter. In line with the approved amendments, CoAct sought to make one change to its re-authorisation request regarding the non-compete restrictions. CoAct reversed the proposed change to expand the non-compete provisions preventing members from tendering in their own right for any contracts held by CoAct and reverted to limiting this restriction to jobactive services.

Following the amendment to the application

30. In response to this change, the ACCC received one submission, from Marillac, who, while supporting most aspects of the application, reiterated its previously submitted concerns with the change to CoAct's non-compete restrictions. This issue is considered in the public detriments section.

ACCC assessment

31. 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).⁶ 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.⁷ In particular, the ACCC considers that, without the Conduct that is the subject of authorisation, it is likely CoAct's members would
 - have to bid individually for tenders
 - have greater freedom to bid in their own right for jobactive contracts (and other contracts that they would otherwise be providing under the CoAct umbrella) within their practical capabilities. The ACCC acknowledges that smaller providers might find it harder to win the same work if not participating in CoAct (see paragraph 36).
- 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. CoAct 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.

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

⁷ For more discussion see paragraphs 5.20-5.23 of the ACCC's Authorisation Guidelines.

- 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.⁸
- that membership of CoAct is voluntary. Where organisations conclude that the benefits of CoAct membership do not outweigh the costs, they can elect not to be CoAct members. Furthermore, organisations join in the knowledge that the membership charter can change, subject to a special resolution of members
- that CoAct's constitution, membership charter and subcontracts provide for procedures to resolve disputes between CoAct and members, including external mediation and arbitration
- that CoAct has requested re-authorisation for 10 years.

Public benefit

32. Public benefit is not defined in the CCA. 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 principal elements ... the achievement of the economic goals of efficiency and progress.⁹

33. CoAct submits that:

- A rationalisation of the provision of employment services 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 CoAct and its members have increased competition and diversity 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.
 - Since 2008, CoAct 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 CoAct's sites were rated at 3 stars or above, which CoAct says means it had the highest average performance profile of providers with 60 or more sites.
- CoAct manages contracts centrally, providing a single point of contact for government and an efficiency benefit to government. For example, CoAct

⁸ Job Futures cites paragraphs 3.10 to 3.11 of this report, available at <http://www.pc.gov.au/inquiries/completed/job-network>

⁹ 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.

members have agreed that CoAct will manage all jobactive claims. CoAct 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.
- Since the pre-decision conference, CoAct submits that it has successfully tendered with a group of members for Transition to Work services, while some other members chose to tender in their own right or in other partnerships. CoAct also submits that it is likely that there will be another Disability Employment Services tender in 2017 in a form similar to the current contract and that CoAct’s collective tendering model will continue to bring value and benefit in this area of the network’s operations.

ACCC conclusion on public benefits

34. The ACCC considers that the collective-tendering by CoAct 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.
35. 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. CoAct’s arrangements can also help here.
36. 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.
37. For example, the smaller providers may not be able to cover the required service territory or service types on their own. Further, CoAct 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 CoAct 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.¹⁰

38. 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 CoAct, when those individual providers may not be able to win tenders in their own right.

Public detriment

39. Public detriment is also not defined in the CCA 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.¹¹

40. Previously, the ACCC considered that the central coordination of tendering by CoAct was unlikely to result in significant public detriment because of the 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.¹²

Reduction in competition from collective tendering

41. 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 34 to 38), CoAct's collective tendering is likely in many ways to provide a better and more cost-effective offering for government customers than the services CoAct members could generally individually offer. In some cases, individual members may not be able to provide services on their own.
- CoAct has used its basic model for many years and the ACCC has not received information that this has had an anti-competitive effect. There is strong competition between a large number of employment service providers and CoAct is one of many parties competing for government services contracts. CoAct 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 Conduct has little potential to affect prices in these areas of competition.

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

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

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

Non-compete clauses

42. CoAct 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.

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

- a member must not tender to supply jobactive services (or any successor program to jobactive) in its own right, without CoAct's prior written consent (charter clause 3.2)
- a member which has entered into an agreement to tender as a partner for a specific contract with CoAct must not tender for that same contract to supply the services in its own right, without CoAct's prior written consent (charter clause 3.3)
- a member which has subcontracted under CoAct must not tender in its own right for that same or successor program, without CoAct's prior written consent or exercising its right to withdraw (charter clause 3.4; and see subcontract clause 22 – under which, if a subcontractor does not want to continue on with the work as a CoAct subcontractor next time it comes up for tender, the subcontractor has to provide CoAct 18 months' notice before the end of the program).

44. The restrictions that CoAct proposes to apply when it is pursuing new business are discussed from paragraph 57 below.

45. CoAct 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 [CoAct] 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 [CoAct] 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 [CoAct], in circumstances whereby [CoAct] and the other members may be severely disadvantaged in a competitive tender process.

...

Without the 18 months' notice period, [CoAct] 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 [CoAct] to tender which would result in less competition. The arrangements assist in mitigating the risks to [CoAct] of loss of critical mass, enabling it to identify and develop new members with which to bid or to consolidate its operations elsewhere.

46. 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 CoAct 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 CoAct 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 CoAct 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 CoAct tendering for new contracts against a member in a territory where that member has historically provided programs.

47. In 2008 the ACCC concluded that the non-compete arrangements would give rise to some detriment but would enable CoAct to deliver the benefits of its operational model.

48. CoAct 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. CoAct 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.

49. With regard to how the non-compete restrictions have worked in practice, CoAct states that, under the Job Services Australia contract:

- None of CoAct's subcontractors notified an intention to withdraw from arrangements with CoAct and to tender in their own right.
- Two subcontractors notified CoAct that they did not wish to continue delivering services through CoAct after the end of the contract but that they did not intend to tender for the new contract. CoAct 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, CoAct identified an alternative provider with whom to tender.

ACCC views on the proposed non-compete clauses

50. The ACCC considers that, on their face, CoAct's 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').

51. Since the ACCC's draft determination, CoAct has reversed its proposal to widen the scope of the non-compete provisions in charter clause 3.2 from being limited to jobactive services to any contracts held by CoAct. The non-compete provisions are therefore now more limited in scope.

52. Participation in CoAct 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 jobactive contracts or other contracts that they might otherwise provide in partnership with, or under subcontract to, CoAct.
53. CoAct members have passed a special resolution (that is, with at least 75 per cent support) to enact the membership charter containing these non-compete clauses.
54. The ACCC also notes that CoAct's constitution, membership charter and subcontracts provide for procedures to resolve disputes between CoAct and its members, including external mediation and arbitration.
55. Further, the non-compete clauses for which CoAct now seeks authorisation are less restrictive than the currently authorised provisions in two ways.
- The length of time CoAct members must commit to subcontracting with CoAct is reduced, 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).
 - CoAct's 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 has been removed.
56. The ACCC considers that any potential detriment might therefore be mitigated further. CoAct members will benefit from having less onerous restrictions on them competing for contracts that CoAct 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 CoAct tendering in competition with a member ('new business')

57. CoAct is also proposing to amend clause 4.1 of its membership charter on pursuing new business opportunities (defined as 'a contract for business which CoAct has not previously held in any areas/regions of Australia'). The previous clause 4.1 read:

[CoAct] 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.

58. CoAct proposes to delete this clause and this change has been ratified by members. CoAct submitted:

A key role of [CoAct] 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 [CoAct] 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 [CoAct's] 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 [CoAct] to consult with its members and take individual members' interests into account in any decisions.

59. CoAct further advised that, where CoAct might be looking for new business that is also in a member's traditional sphere, that member is free to bid independently and against CoAct.

60. The proposed clauses in section 4 of the membership charter were revised following the pre-decision conference and now provide that CoAct will be guided by its growth strategy which will be developed in collaboration with the members and that a member which considers that it is negatively affected by a decision of CoAct regarding a new business decision may seek a review of the decision through a Board disputes committee. There have also been changes to the governance arrangements, including provision for more independent board members to enable an independent majority.
61. CoAct member Marillac, while it supports most aspects of CoAct's application, opposes the change to section 4 of the membership charter.
62. Marillac objects 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.
63. Marillac submits, among other things, that the market for disability support services, which is its core offering, is becoming increasingly competitive. Allowing CoAct to compete with its members in this area is likely to cause detriment to many CoAct members, including Marillac.
64. Marillac said the proposed amendments discriminated against it. It said its core disability services offering contributed a significant proportion of its income. CoAct encroaching on its historical service offering would be significantly detrimental to its operations. Marillac stated that this is likely to impact its ability to fund its broader service offerings, which are often subsidised by the more profitable service offerings, with which CoAct may compete under the change.
65. Marillac said that the CoAct model facilitated the entry of smaller community-based organisations into the employment services market. If CoAct could compete with its members, competition was likely to become more concentrated, due to the cost pressures associated with increased competition. Lastly, Marillac submitted that:

The success of the current arrangements [has] been due to the ability of [CoAct] and members to work as a collective, sharing information and resources to reach a common goal. In this regard, should [CoAct] 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.

66. In response, CoAct 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 [CoAct] 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 [CoAct] 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 [CoAct's] opportunity to tender with its members would then limit competition.

67. CoAct said that the Department of Social Services could align its contract areas with those of jobactive next tender and that other programs have also moved to large regions. It stated that another scenario might be that future government contracts be for more personalised care packages, rather than separate employment and disability services. CoAct considers that its membership charter needs to be applicable to all business and that if members are not satisfied with a decision, they can lodge a complaint to CoAct and use the dispute-resolution process in the constitution.

ACCC views on the removal of the prohibition on CoAct tendering in competition with a member

68. The removal of a non-compete provision will act to reduce any anticompetitive detriment due to the authorised conduct. The ACCC also considers that the ability of CoAct to tender for new business in competition with members who are not tendering under the CoAct umbrella does not necessarily undermine the cooperative CoAct model. In particular,

- CoAct's changes to its membership charter provide for the development of a growth strategy developed in collaboration with its members that will be used to guide the assessment of new business opportunities.
- According to the new clauses 4.1 and 4.2 of the membership charter, when considering new business opportunities, CoAct will take into account the impact on members and notify members of its intentions. A member aggrieved by a proposal by CoAct to compete against a member can, under new clause 4.2 iv., seek a review of the decision through a board disputes committee. There is also a dispute resolution provision in CoAct's constitution, which provides for mediation with an external provider and arbitration.
- There is no longer a change to membership charter clause 3.2 to prevent members competing against CoAct on any contract (other than jobactive) held by CoAct.
- Participation in CoAct is voluntary. Where organisations conclude that the benefits of CoAct membership do not outweigh the costs, they can elect not to become members or to renounce membership.

69. Organisations may have joined CoAct at a time when CoAct's 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. However, the ACCC considers that:

- CoAct's arrangements provide for procedures to resolve disputes between CoAct 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.
- CoAct 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).¹³ At a special general meeting held on 8 June 2016, CoAct members endorsed the changes to its membership charter. It is also apparent that CoAct has the ability and incentive to diversify beyond employment services.

70. CoAct's members, individually and collectively, represent a small proportion of the suppliers of relevant services and so CoAct's relationships with its members ultimately do not have a great effect on the competitive dynamics of their wider markets.
71. The ACCC authorises the Conduct that includes the amendments to charter clause 4.1 that CoAct has presented.
72. CoAct 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 CoAct to be necessary for that organisation to deliver its contracted service'.
73. No members have raised concerns with this change with the ACCC. The ACCC does not consider the change significantly affects or increases the public detriment in this matter; while it may lessen some ambiguity. The ACCC authorises the Conduct and provisions that include this change. Under CoAct's constitution, aggrieved members can raise their concerns with CoAct and subsequently seek external mediation and arbitration.

ACCC conclusion on public detriments

74. The ACCC considers that the Conduct 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. CoAct's members, individually and collectively, represent a small proportion of the suppliers of employment services.
75. The non-compete clauses, while they may give rise to some potential detriment, underpin the operation of CoAct's co-operative model and facilitate the entry and ongoing operation of smaller service providers.

Balance of public benefit and detriment

76. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.
77. 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

¹³ Clause 2.1 Objects of CoAct's 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.

- transaction-cost savings.

78. The ACCC does not consider the reduction in competition from CoAct's 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 CoAct 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 CoAct's co-operative model and are necessary to achieve the public benefits as set out above.
- Participation in CoAct is voluntary, which is likely to mitigate detriment.
- The non-compete clauses for which CoAct now seeks authorisation are less restrictive than the currently authorised provisions (and those it originally sought authorisation for in this application) and so the organisations have marginally more freedom to compete.

79. For the reasons outlined in this determination, the ACCC is satisfied the 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.

80. Accordingly, the ACCC has decided to grant re-authorisation.

New members

81. Consistent with previous decisions, the re-authorisation extends to allow CoAct to take on new members to participate in proposed collective tendering.

82. 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.¹⁴ For example, if an organisation with a much larger market presence sought to join CoAct, the ACCC could assess whether this reduced the balance of public benefits and detriments resulting from the Conduct.

Length of authorisation

83. The CCA allows the ACCC to grant authorisation for a limited period of time.¹⁵ This allows the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

84. In this instance, CoAct 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

14 Section 91B CCA

15 Subsection 91(1)

benefits and public detriments and the fact that the ACCC has authorised CoAct's conduct twice before over a long period, the ACCC has granted re-authorisation for 10 years.

Determination

The application

85. CoAct 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. CoAct made the application using a Form FC, Schedule 1 of the Competition and Consumer Regulations 2010. CoAct seeks re-authorisation to allow it and its members to collectively tender for government and other contracts and to agree to certain 'non-compete' provisions (as further detailed below and in Attachment A).

86. CoAct is seeking re-authorisation because the conduct for which authorisation is sought may contain an exclusionary provision, may contain a cartel provision or may have the purpose or effect of substantially lessening competition.

The net public benefit test

87. For the reasons outlined in this 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 conduct should be allowed to take place.

Conduct for which the ACCC grants authorisation

88. The ACCC revokes authorisations A91084 and A91085 and substitutes new authorisations A91493 and A91494 for the ones revoked.

89. The ACCC grants authorisation for the following conduct (as further detailed in Attachment A):

- CoAct collectively tendering 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 CoAct will tender and in which members will deliver services.
- CoAct requiring its members to only participate in a tender to provide jobactive services (or any successor program to jobactive) as a subcontractor to or partner with CoAct, unless CoAct gives its prior consent.
- CoAct requiring its members that have entered into an agreement to tender as a partner for a specific contract with CoAct to not tender for that same contract to supply the services in its own right against CoAct, without CoAct's prior consent.
- CoAct requiring its members that have entered into a subcontract with it to not compete in their own right against CoAct for that same or any successor

program (in any location in Australia), without CoAct's prior consent or exercising its right to withdraw.

90. The authorisation extends to CoAct and to current and future members of CoAct.

91. The ACCC grants authorisations A91493 and A91494 until 18 August 2026.

92. This determination is made on 28 July 2016.

Interim authorisation

93. As part of its re-authorisation application lodged on 9 April 2015, CoAct 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**.

94. 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

95. This determination is made on 28 July 2016. If no application for review of the determination is made to the Australian Competition Tribunal (the Tribunal), it will come into force on 19 August 2016.

Attachment A – Conduct which the ACCC authorises

Collective tendering conduct

That CoAct 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 people to move into sustainable employment and/or provide complementary services that benefit disadvantaged people and strengthen communities
- agreeing as to the price that will be tendered by CoAct on behalf of its Members
- agreeing as to the price paid for the services provided by Members under contracts with CoAct
- agreeing to the territories for which CoAct will tender and in which CoAct and its Members will deliver services
- enabling CoAct 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 CoAct.

Concluding agreements with non-compete clauses

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

- requiring that a member that has entered into an agreement to tender as partner for a specific contract with CoAct must not tender for that same contract to supply the services in its own right, through another person, or as part of a consortium or other partnership, unless the prior written consent of CoAct has been obtained
- requiring that a member that has entered into a subcontract with CoAct 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 prior written agreement of CoAct or
 - where the member provides notice of its intention to withdraw from tendering arrangements with CoAct no later than 18 months before the end of the Relevant Contract Period
- providing that, unless written consent has been given by CoAct, 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 CoAct during the period of that subcontract is in breach of its contract with CoAct and its conditions of membership of CoAct.

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:

- CoAct may restrict an exiting member's access to information during the remaining contract period, other than that considered by CoAct to be necessary for that organisation to deliver its contracted service
- CoAct 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 CoAct 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 jobactive services or any successor program to jobactive, unless the prior written consent of CoAct has been obtained.

Defined terms

(Reference: Master Subcontract Agreement accompanying CoAct's 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

- Clause 2 of CoAct's charter:

2. Tendering and contracting

2.1 The Board of CoAct is empowered to determine and communicate to members the specific criteria for inclusion of any member as a nominated subcontractor or formal partner in a CoAct 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.

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

2.2 CoAct will apply these criteria impartially when selecting a nominated subcontractor or partner for a CoAct 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 CoAct.

2.4 A member affected by a decision of CoAct to select a subcontractor 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 CoAct 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 relating to prohibitions on and the consequences of a CoAct member tendering against CoAct and vice-versa.

3. Tender against CoAct

3.1 It is a fundamental condition of membership of CoAct 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 CoAct must only participate in a tender to provide jobactive services (or any successor program to jobactive) as a subcontractor to or partner with CoAct, unless the prior written consent of CoAct has been obtained.

3.3 A member which has entered into an agreement to tender as a partner for a specific contract with CoAct must not tender for that same contract to supply the services in its own right, through another person, or as part of a consortium or other partnership, unless the prior written consent of CoAct has been obtained.

3.4 A member which has entered into a subcontract with CoAct to deliver a program or services must not tender, in its own right, through another person or as part of a consortium or other partnership, for that same, or any successor program, whilst remaining as a member of CoAct, unless the prior written consent of CoAct has been obtained or the member has exercised its right to withdraw from tendering arrangements in accordance with the Subcontract.

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 CoAct 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 CoAct 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. CoAct and Members Right to Tender – New Business

4.1 The primary aim of new business is to open up opportunities for CoAct members at the same time as developing the sustainability of CoAct.

4.1 In assessing new business opportunities that align with CoAct strategic objectives, CoAct will:

- i. be guided by the Growth Strategy developed in collaboration with members;
- ii. consider the potential impact of these opportunities on the current activities of members, and benefit to the network as a whole;
- iii. notify members of its intent regarding tendering for new business, providing relevant information to enable members to assess the opportunity and provide feedback to inform the tender decision and resolution of any potential issues;
- iv. ensure that a member which considers it is negatively affected by a decision of CoAct regarding a new business decision may seek a review of the decision through a Board disputes committee which will consider any request for review within 7 business days of receipt of that request.

4.3 For the purpose of this Section (4), the term ‘new business’ means a contract for business which CoAct has not previously held in any areas/regions of Australia.

4.4 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 CoAct or delivery of CoAct contracts may only be used in the delivery of the subcontract unless CoAct 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 CoAct contract is engaged in conduct prejudicial to the interests of CoAct 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 subcontractor in their tenders, except where the tender is for a service or program which they currently or previously delivered as a subcontractor to CoAct.

...

Attachment B – Public benefit tests in CCA

Subsections 90(5A) and 90(5B) provide that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision, in the case of subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(5A) 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 were made or given effect to, or in the case of subsection 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

Subsections 90(6) and 90(7) 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 in the case of subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(6) 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 was given effect to, or in the case of subsection 90(7) has resulted or is likely to result from giving effect to the provision.

Subsection 90(8) states that the ACCC shall not:

- make a determination granting:
 - i. an authorisation under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
 - ii. an authorisation under subsection 88(7) or (7A) in respect of proposed conduct; or
 - iii. an authorisation under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
 - iv. an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the

proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

- make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.