

Regarding Job Futures Ltd A91493 & A91494
Request for amendment to re-authorisation application
Resolution of membership issues pertaining to the application

In June 2015 Job Futures Ltd adopted the trading name of CoAct to better reflect the breadth of operations of our member network and the value delivered to communities across Australia.

As the company has now been using the trading name for 12 months, we consider it fitting to use CoAct (as appropriate) in correspondence with the ACCC, to assist relevance to both current and future readers.

1. Request for amendment to re-authorisation application

In its application of 9 April 2015¹ Job Futures Ltd sought ACCC authorisation to include in its agreement with members that are not at the relevant period subcontractors, provisions requiring that 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 Ltd (other than contracts or successor programs program contracts regarding which Job Futures Ltd notifies the members that it does not intend to tender), unless the prior written consent of Job Futures Ltd has been obtained.

Following further consultation with our members this request is now withdrawn.

CoAct now requests authorisation:

To include in its agreements with members a requirement that:

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.

This is as per Clause 3.2 of the Membership Charter and has been an accepted requirement since the set-up of the network and underlies previous ACCC authorisations. See section 3.2.1 below for further detail.

All other aspects of the application, as reflected in the ACCC Draft Determination², are unchanged.

CoAct considers that the requested amendment in no way detracts from the ACCC's finding that the relevant net public benefit test, as applied to CoAct's collective tendering model and related non-compete clauses, continues to be met.

2. Key issues and further member consultation

The key issues raised by members pertaining to the ACCC authorisation were:

¹ Job Futures Ltd Application for Revocation and Substitution and Request for Interim Authorisation 9 April 2015

² ACCC Draft Determination A91493, A91494 31 July 2015

- The widening of non-compete clause 3.2 in the Membership Charter from the main employment program to cover all contracts held by CoAct;
- CoAct’s role in regards to new business; the need for greater clarity regarding the growth strategy; communication with members regarding opportunities; management of potential issues.

In the past eight months extensive consultation on these matters has been carried out through the Member Committee and with all members both written and verbal (telephone and face to face).

This culminated in a revised set of amendments to the Membership Charter.

At a Special General Meeting held on Wednesday 8 June 2016, the members resolved to adopt the amended Membership Charter.

3. Application for authorisation

3.1 Collective Tendering (A91493)

There is no change to the request for authorisation which is fully supported by the membership.

We would just highlight the following:

In our response to the ACCC dated 2 September 2015³, we noted that while in the past few years there have been changes in the operating environment, there continue to be opportunities where the collective tendering model brings value to the service and CoAct members, and results in public benefit.

Since the pre-determination conference, CoAct 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.

While final details have yet to be released, it is now fairly certain that there will be another Disability Employment Services tender in 2017, in a form similar to the current contract. CoAct’s collective tendering model will therefore continue to bring value and benefit in this area of the network’s operations.

3.2 “Non-Compete” arrangements (A91493)

3.2.1 Agreements with members regarding core employment services program

Since inception of the Company, CoAct members have accepted that that they will only hold and tender for the core employment services contract through CoAct. This restriction protects the collective and supports the achievement of public benefit.

Clause 3.2 in the 2008 Membership Charter stated:

“Members of Job Futures must only participate in a tender to provide Job Network services (or any successor program to Job Network) as a subcontractor to or partner with Job Futures, unless the prior written consent of Job Futures has been obtained.”

³ Job Futures Response to Interested Parties Submission following release of Draft Determination 2 September 2015

In the original application to the ACCC and initial amendments to the Charter, it was proposed to widen this clause to *“any contracts (or successor program contracts) that are held by Job Futures”*, in order to make available the protection afforded through the ACCC authorisation to all members who choose to tender with CoAct for future contracts, be they in employment or other agreed areas. However, some members considered this too restrictive.

Following further consultation, at the CoAct Chairs and CEOs Forum in November 2015, it was agreed that the changes in the operating environment and so CoAct’s working relationships with members, require flexibility for members in how they decide to tender, and for CoAct.

Accordingly, it was agreed to return to the wording of the original Clause 3.2 with just an update to the name of the relevant program (Job Network to jobactive). This has resulted in the request for amendment to the ACCC authorisation application.

The IP of CoAct and members who choose to tender with CoAct for contracts other than jobactive continues to have some protection through the provisions of clauses 3.3 and 3.4 of the Membership Charter.

3.2.2 Omission of “Prohibition” clause from the authorisation and deletion from Membership Charter

Clause 4.1 in the 2008 Membership Charter stated:

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

In the proposed amendments to the Membership Charter this clause was deleted and omitted from the authorisation application.

The reason, and indeed the need, for this omission has been fully demonstrated in CoAct’s initial and subsequent submissions to the ACCC. In summary, the clause was open to interpretation and misunderstanding, and legal advice considered it unable to be effectively applied. In the past, some members have tried to use it to disadvantage CoAct and other members.

As foreshadowed in the initial ACCC application, there are indications that in the upcoming Disability Employment Services tender, tendering will move from multiple Employment Services Areas to larger Employment Regions as per the jobactive model. As outlined previously, the application (if successful) of the old clause by one member could potentially lead to less competition and an unfair and inequitable result to other CoAct members.

The deletion of this clause from the Charter has now been approved by the members.

3.2.3 CoAct’s role regarding new business

A company’s core documents need to support the strategic direction of the organisation. The Membership Charter, written and adopted in 2008, had no reference to CoAct’s role regarding new business and our future direction.

At the November 2015 Chairs and CEOs Forum there was strong support for CoAct’s role in identifying new business opportunities for employment and complementary services and the development of a network-wide growth plan in close collaboration with members. The work on the growth plan has been taking place concurrently with the Charter consultations.

The proposed clauses in Section 4 of the Membership Charter were revised accordingly to reflect the agreed role of CoAct and address the key issues raised by members – purpose of new business; assessment of opportunities; communication to members; resolution of potential issues.

The focus of the current growth plan, as agreed with members, is employment related. CoAct will continue to work closely with members as we develop the plan further.

These amendments were approved. **See Appendix 1** CoAct Membership Charter, 8 June 2016.

3.2.4 Use of Confidential Information

In the draft Membership Charter provided to the ACCC in April 2015, it was proposed to make changes to this Section 8 regarding use of confidential information to better align with the wording in the subcontract. In order to keep the discussion focussed on the key issues, it was decided not to proceed with these amendments.

4. Other matters

4.1 Governance

CoAct has policies and processes in place to manage conflict of interest issues at the Board level in line with the Constitution and good governance best practices. However, with a changing market and members having the flexibility to choose how they tender for different contracts, the incidents of conflict of interest for member directors have risen and will continue to occur, with resultant challenges in managing information and at times ensuring a quorum. In addition, the growth strategy endorsed by the members would be enhanced by a wider pool of Board candidates with specific relevant skills.

To address these issues, at the Chairs and CEOs Forum in November 2015 the CoAct Board proposed Constitutional changes to enable an independent majority of board directors, a change that was supported by the members. Also proposed was an increase in terms from 2 years to 3 years with a maximum tenure of 9 years in line with contemporary best practice standards. No director is assured re-appointment. There is a rigorous appraisal process in place.

The approach agreed was *“Independent directors will comprise no more than a simple majority of directors”*, with a requirement for a minimum of two member directors. (Rules 16.2.2 and 16.2.4)

Should the members at any time be dissatisfied with the arrangements, Clause 12 of Job Futures Ltd Constitution includes provisions for members to call a meeting and propose a resolution.

The amended Constitution was adopted by the members at the Special General Meeting on 8 June 2016. (**See Appendix 2** Job Futures Ltd Constitution 8 June 2016).

4.2 Development of Guiding Principles

At the Special General Meeting the members also voted in favour (with no objections) of an ordinary resolution in support of the ongoing development of guiding principles to reflect the enduring collaborative intent of the network and align with the strategic direction.

There is no timeframe for the completion of this work which will include further consultation with members. Any future adoption would require a minimum 75% support of the members.