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By email

Gavin Jones
Director, Merger & Authorisation Review
Australian Competition and Consumer Commission
Level 17, 2 Lonsdale St
MELBOURNE VIC 3000

Email: Adjudication@acc.gov.au, Gavin.Jones@acc.gov.au, Miriam.Kolacz@acc.gov.au,
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Dear Mr Jones

AA1000415 - Recyclers SA – further submission in response to Draft Determination

We refer to:

- Statewide Recycling's (**Statewide**) interested party submission dated 27 April 2018 (**Submission**);
- the Draft Determination published by the ACCC on 22 June 2018 in relation to Recyclers SA's application for authorisation (**Draft Determination**);
- our letter to the ACCC regarding the Draft Determination dated 13 July 2018; and
- our telephone conversation on Tuesday, 17 July 2018.

The ACCC has invited a further submission from Statewide in relation to the importance of the conditions (or basis) expressed in the ACCC's Draft Determination and identified in Statewide's 13 July letter. In particular, whether Statewide submits that the conditions identified should be attached as formal conditions to the authorisation, or whether it is sufficient that they be expressed as a basis for any authorisation granted.

Statewide welcomes the opportunity to assist the ACCC, and sets out its position below.

Summary

Statewide submits that there are compelling reasons why the conditions should be formally attached to any authorisation granted, including:

- Without formal compliance with the conditions expressed as a basis for the proposed grant of authorisation in the Draft Determination, Statewide submits that there would not likely be any public benefit arising from the proposed conduct and there is an increased likelihood of significant public detriment. Accordingly, the statutory test for authorisation would not be met; and

- Irrespective of whether the statutory test is satisfied with or without formal conditions, consistent with the Tribunal's finding in *Re Medicines Australia*,¹ there are compelling reasons why formal conditions should be imposed. This includes to ensure that sufficient support is provided to smaller depots to understand and enforce their rights, promote overall compliance with the conditions and basis for authorisation, to prevent inadvertent non-compliance by Recyclers SA members, and to promote and improve public scrutiny and confidence.

Conditions

As set out in its 13 July letter, Statewide submits that any authorisation proposed should contain formal conditions in line with those already expressed in the Draft Determination, namely:

- limit the collective negotiations to operational matters which the depots do not compete,² and ensuring there is not wholesale sharing of information between collection depots (**Subject Matter Condition**);³
- ensure that the arrangements are truly voluntary to enter into by collection depots as well as super collectors (**Voluntary Condition**);⁴
- ensure that Recyclers SA's members who have a conflict of interest will recuse themselves from any discussion, negotiations, or advice in relation to collective negotiations with super collectors, save to the extent that they as a depot owner will be informed of the outcome of such discussions, negotiations and advice. Such recusals will be recorded in minutes of any meetings⁵ and records of discussions taken place will be redacted and kept confidential from the Directors of Flagcan and CDS (**Conflict Conditions**);⁶ and
- ensure the bargaining group includes equal and across the board representation of depots (with the exclusion of those with a conflict of interest) (**Equal Representation Condition**).⁷

Without the above conditions, the test for authorisation would not be satisfied

Each of the above conditions form an important basis for the proposed grant of authorisation contained within the Draft Determination. Statewide submits that absent compliance with any or all of these conditions, the Application will not be result in any public benefit and will likely result in significant public detriment and anti-competitive effects.

The Draft Determination considers that there is likely to be some benefit by way of reduced transaction costs in relation to the issues in common between the depots and more effective input by smaller depots into contracts. However, these public benefits are only likely to arise if the Voluntary Condition, Conflict Condition and Equal Representation Condition are complied with and given effect to as, amongst other things:⁸

¹ *Re Medicines Australia Inc* [2007] ACompT 4 at [359]-[360], [365]

² Draft Determination at [35], [97].

³ Draft Determination at [93].

⁴ Draft Determination at [100]-[101]

⁵ Draft Determination at [38], [106]-[108].

⁶ Draft Determination at [106].

⁷ Draft Determination at [38], [113].

⁸ Draft Determination at [69], [77]-[78].

- The conduct is not likely to reduce transaction costs, rather, there is a risk it would increase transaction costs for smaller collection depots;⁹
- The conduct is not likely to provide strong or equal representation of smaller depots, nor reflect the interests of smaller depots, if there is no Equal Representation Condition; and
- The conduct is likely to detriment smaller depots if participation is not truly voluntary (eg, if larger members are to, by some means, exert pressure on smaller depots through misrepresentations or other means to participate in the negotiations), as these smaller depots would be contributing to the costs of larger depots with more complex commercial requirements.¹⁰

Furthermore, Statewide submits that (including for the reasons set out in the ACCC's Draft Determination)¹¹ absent compliance with the mitigating factors of the conditions expressed above, there is likely to be significant public detriment arising from the proposed conduct. In particular:

- The collective negotiation would likely result in reduced competition if the Subject Matter Condition and Voluntary Condition is not complied with;¹²
- A conflict of interest issue is likely to arise if the Conflict Conditions and Equal Representation Condition are not complied with;¹³ and
- Smaller depots are likely to suffer during the course of collective negotiations absent compliance with the Equal Representation Condition.¹⁴

Formal conditions are necessary to promote and ensure compliance

Statewide submits that there are compelling reasons to ensure that formal conditions are imposed and clearly set out to promote and ensure the effectiveness and compliance with the basis proffered for authorisation.

- *Supporting smaller depots:* as recognised by the Draft Determination, a significant proportion of members of Recyclers SA are small businesses, and there is a significant discrepancy between the position of smaller members and larger members (who are more resourced, sophisticated, and have different interests). Small businesses may not have the resources, representation or know-how to ensure that during collective negotiations their interests are properly taken care of. For example, they may not be aware or clear that they have certain rights which they can enforce against larger members such as the right to be represented in the bargaining group (Equal Representation Condition), rights to redact and retain confidential information, rights to prevent conflicts of interests (Conflict Conditions), and the right to not participate (Voluntary Condition). On the other hand, larger members have incentives to “push the envelope” in relation to these conditions. Enforcing those rights against larger members may also be challenging and difficult for smaller members without a clear statement and expression of conditions to any authorisation. Without formal conditions, as stated in *Re Medicines Australia*,

⁹ Statewide Submission at [4.2]

¹⁰ Statewide Submission at [5.7]

¹¹ Draft Determination at [96]-[101], [106]-[110], [114]-[115].

¹² Statewide Submission at [5.6]

¹³ Statewide Submission at [5.3]

¹⁴ Statewide Submission at [5.8]

the enforcement mechanism is “weak” and “open to lenient interpretation”.¹⁵ If larger members were to act inconsistently with these conditions, smaller businesses would be in a weaker position to ensure compliance without some formal expression of conditions.

- *Promotes compliance:* the conditions expressed above are nuanced and require complex internal compliance steps to be taken that the Recyclers SA, and its members, may not be familiar with, or used to implementing. For example, establishing, communicating and complying with protocols and best practices (such as protecting confidentiality, taking minutes, making redactions). It is even more unclear and subject to interpretation if the conditions or basis were to be expressed only in the reasons for the Final Determination– but not the terms of the authorisation itself, as members will find it difficult to distil what they can or cannot do. There may also be a lack of appreciation of how a matter expressed as the basis of authorisation works in the context of an absence of formal conditions attached to an authorisation. Imposing formal conditions will set out clearly and with reduced scope for interpretation the basis on which authorisation is granted, and the matters that require compliance.
- *Ensures compliance for the duration of the authorisation:* the ACCC has proposed to grant authorisation for a long term of 10 years. During this time, the members, representatives, and management of Recyclers SA may change. There is a real risk that over time there is lost corporate knowledge as to the matters which need to be complied with. Furthermore, future administrations may not consider themselves bound to decisions made by previous administrations. For example, the next administration of Recyclers SA may not appreciate or know what the previous administration represented they would do in terms of their conduct the subject of authorisation – nor understand the potential risks of non-compliance. Expressing the conditions in a formal and clear manner would ensure that future administrations are aware of the scope of the conditions and consequences of non-compliance, and prevent inadvertent non-compliance.
- *Prevents inadvertent non-compliance:* as noted in the Draft Determination,¹⁶ authorisation would not protect parties for any broader coordination in terms of services offered or business operations. However, as a matter of practicality, the conduct proposed to be collectively negotiated is closely related to conduct that is not contemplated to be authorised (eg, the audit mechanisms are very closely related to price). Furthermore, there will now be a collective gathering of competitors in a formal forum in which members will be seeking to collectively work out their position in negotiations. There is a real risk of inadvertent non-compliance, especially having regard to the small-business nature of the members. Expressing the Subject Matter Conditions in a formal manner will allow provide smaller depots with clear guardrails for their conduct.
- *Public scrutiny and confidence:* the conditions are important from Statewide’s perspective to ensure that the authorisation achieves the stated public benefits in the Draft Determination while mitigating the public detriments. From a third party perspective, it is difficult to monitor compliance, and to gather evidence of non-compliance with respect to a number of these conditions (eg, the Conflict Conditions and Voluntary Condition). Third parties like Statewide would have greater confidence that these conditions will be complied with, if formal conditions were imposed.

¹⁵ *Re Medicines Australia Inc* [2007] ACompT 4 at [360].

¹⁶ Draft Determination at [98].

Consistent with ACCC's Draft Determination

We understand that the ACCC has not proposed in its Draft Determination, or set out terms of, formal conditions to be attached to the proposed authorisation. We appreciate that where possible, the ACCC will seek to provide the applicant and interested parties with an ability to comment on proposed conditions,¹⁷ however Statewide submits that a further round of consultation would not be necessary in the present circumstances as:

- The applicant has proffered to the ACCC that it will comply with the conditions, and the basis and importance of those conditions have been sufficiently expressed in the Draft Determination for consultation. These conditions are not new, nor should they come as a surprise to the applicant.
- The formal conditions sought about are consistent with and in the same terms as expressed in the Draft Determination as the basis for authorisation.
- The conditions are amenable to being expressed as formal conditions without material departure from their expression in the ACCC's reasons in the Draft Determination.

We are happy to discuss any further questions the ACCC may have.

Kind regards

A handwritten signature in black ink that reads 'Gina Cass-Gottlieb'.

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¹⁷ Authorisation Guidelines at [8.4].