

6 September 2017

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Ms Marie Dalins
Director
Adjudication
Merger and Authorisation Review Division
Australian Competition & Consumer Commission
Level 35, 360 Elizabeth Street
Melbourne VIC 3000

Dear Marie,

**Application for Authorisation A91583 and A91584 – LPO Group Ltd
Australia Post Response to Draft Determination**

Thank you for the opportunity to provide input in relation to the Draft Determination, issued by the Australian Competition and Consumer Commission (**ACCC**) on 16 August 2017 (**Draft Determination**).

Although we do not oppose the Applications for Authorisation, there are some matters that we wish to draw to the ACCC's attention, or correct, as any Final Determination will be a matter of public record.

1 Australia Post neither supports nor opposes the Authorisation

1.1 In the Draft Determination, the ACCC observed Australia Post had submitted it:¹

"... does not support the applications and that authorisation is not required to facilitate consultation, that the scope of the authorisation will be misunderstood by licensees, and that any 'boycott' may be abused by the Applicants."

1.2 Australia Post is concerned its position in respect of the Applications may be misconstrued as a result of this comment by the ACCC in the Draft Determination. Australia Post's position was correctly stated in its submission dated 26 May 2017 (the **May Submission**). In the May Submission, it was made clear that:²

"[Australia Post...] does not wish to be seen to be actively opposing the Applications, but welcomes the opportunity to assist the ACCC in its assessment of them. We see our primary role as providing additional context to the Applications, correcting any inaccuracies in the LPOG Submissions and assisting the ACCC to understand the operation of the licensed post office network."

¹ ACCC, *Draft Determination – Application for authorisation A91583 & A91584 lodged by LPO Group Ltd & Ors*, 16 August 2017 (**Draft Determination**), [33].

² Australia Post, *Submission to ACCC in response to Application for authorisation A91583 & A91584 lodged by LPO Group Ltd & Ors*, 26 May 2017, [1.4].

1.3 This 'neutral' position was restated in our submission of 8 August 2017 (the **August Submission**) and during subsequent correspondence and discussions with the ACCC. Australia Post considers its role is principally to provide factual information to help the ACCC in understanding the issues relevant to the ACCC's assessment.

1.4 We would be grateful if the ACCC reflected this position in the Final Determination.

2 Future with and without test

2.1 In the Draft Determination, the ACCC has concluded the likely future state without the Authorisation can be summarised as follows:³

- *Australia Post will continue to offer largely standard form contracts to LPOs. There is limited ability for individual LPOs to have input into such contracts.*
- *Each LPO will have the opportunity to approach Australia Post to individually negotiate contractual terms of the LPO Agreement; however, the ACCC understands that to date, Australia Post has used its discretion not to do so.*
- *The circumstances of some LPOs will continue to trigger the inclusion of additional contractual terms into their LPO Agreements. These terms are incorporated as 'special conditions' to the LPO Agreement.*
- *There is limited ability for LPOG to represent its members on issues relevant to these contracts. Under the terms of the Consultative Agreement between LPOG and Australia Post, matters discussed during consultation with Australia Post will be treated as confidential by LPOG (and POAAL) and not disclosed to its members. LPOs will have little if any involvement during the consultation process between Australia Post and LPOG.*

2.2 We do not believe it is reasonable to suggest or imply that there will be a material difference in the form of contract between Australia Post and the licensed post offices (**LPOs**) in the future with the Authorisation, compared to the future without the Authorisation. In both scenarios, the standard form Licensed Post Office Agreement (**LPO Agreement**) will continue to apply.

2.3 We also wish to correct the statement that Australia Post has not individually negotiated with LPOs or allowed them to have input into the LPO Agreement. As set out in the August Submission, Australia Post provided a number of examples where LPOs have negotiated with Australia Post individually, including as part of the annual review process, which led to aspects of the LPO Agreement being revised. POAAL, in its submission of 30 May 2017, also stated that:⁴

*"POAAL notes that Licensees can negotiate individually with Australia Post, **and over 30% of Licensees** have exercised that right and have negotiated Special Conditions in their individual LPO Agreements"*
[emphasis added]

2.4 Finally, we do not believe it is reasonable to assert as fact that there is limited ability for LPOG to represent its members on issues relevant to the LPO Agreement. LPOG and POAAL

³ ACCC, Draft Determination, [42].

⁴ POAAL, *Submission to the ACCC in response to Application for authorisation A91583 & A91584 lodged by LPO Group Ltd & Ors*, 30 May 2017, [5].

are both currently able to represent their members in negotiations with Australia Post, and there is no limitation on this ability. This also regularly occurs.

3 Material cost savings

3.1 Australia Post maintains the view it expressed in the May Submission that:⁵

- *Under the current arrangements, licensees already have the benefit of joint negotiations and cost sharing for all consultations.*
- *The proposed authorisations would not have a material effect on licensee's ability to collectively negotiate and share the costs of such negotiations.*
- *Most negotiations conducted by individual LPOs relate to their specific circumstances, rather than some global concern.*

3.2 At present, where there are efficiencies and cost savings to do so, licensees cost share and jointly negotiate with Australia Post. However, where negotiations are related to an individual LPO, these matters are negotiated separately between the relevant LPO and Australia Post.

3.3 Australia Post considers that in the future with or without the Authorisation there are unlikely to be **additional, material** cost savings. Indeed we expect the Authorisation may create additional costs to licensees, particularly if LPOG creates unrealistic expectations concerning the outcome of negotiations. We therefore query whether it is correct for the ACCC to conclude so decisively that:

“the proposed collective negotiations are likely to result in a public benefit in the form of transaction cost savings compared to a situation where the LPOs attempt to negotiate individually with Australia Post under their LPO Agreements. By reducing the costs of negotiating for all parties, it is likely that more contractual issues can be addressed, because each party can obtain the benefit from negotiating these issues at less cost to itself, resulting in more comprehensive and efficient contracts of greater benefit to all parties.”⁶

3.4 It appears the above conclusion is based on a counterfactual where the parties would negotiate 2,881 individual contracts.⁷ Such a counterfactual is not accurate. With and without the Authorisation, the standard form LPO Agreement will apply and not individual contracts (as set out at paragraph [42] of the Draft Determination).

3.5 Finally, in the Draft Determination, the ACCC observed that Australia Post had submitted that, *“most negotiations relate to the LPOs' individual circumstances, rather than issues of global concern.”*⁸ Australia Post notes that in the May Submission (quoted at paragraph 3.1 of this letter) it stated, *“most negotiations **conducted by individual LPOs** relate to their specific circumstances”* [emphasis added]. It is important to recognise that most negotiations between Australia Post and LPOs relate to issues across the LPO network and therefore are negotiated on a collective basis by LPOG and POAAL, and Australia Post. Only a small number of negotiations between Australia Post and an LPO relate to that individual LPO's circumstances.

⁵ Australia Post, *Submission to ACCC in response to Application for authorisation A91583 & A91584 lodged by LPO Group Ltd & Ors*, 26 May 2017, [5.1(b)].

⁶ ACCC, Draft Determination, [50].

⁷ ACCC, Draft Determination, [49].

⁸ ACCC, Draft Determination, [48].

4 Fees and commissions

4.1 We wish to make it clear that while “*the **structure** of fees, discounts and commissions have not changed*”⁹ since the 1990s, the Applicant’s implication to the ACCC that the **level** of fees, discounts and commissions have not changed over time is incorrect.

4.2 The fact is that the level of fees, discounts and commissions has changed over time and these changes have been to the benefit of licensees. For example, whilst letter volumes have decreased significantly over the past three years – the increase in parcels has not offset this decrease – licensees have had the benefit of a 36% increase in fees, discounts and commissions over the same period. It is difficult to identify another industry example where volumes are dropping significantly but fees, discounts and commissions are not decreasing in line with the drop in demand.

4.3 In the Draft Determination, the ACCC summarised that the Applicants submitted:

“... in an environment where contracts are not negotiated, fees, commissions and discounts provided for under the LPO Agreement have not been sufficient to provide LPOs with fair and reasonable remuneration.”

4.4 Australia Post makes the following observations on this issue:-

- (1) It is misleading for the Applicants to characterise the status quo as one where there is no meaningful negotiation between licensees and Australia Post. The history of negotiations between Australia Post and licensees clearly demonstrates that this is not the case.
- (2) Under the LPO Agreement, licensees receive the benefit of attaching the Australia Post brand to their business and the fees, discounts and commissions are set to adequately compensate LPOs for the economic cost of providing products and services. As stated in the May Submission, the argument that Authorisation will allow LPOs to address the “financial sustainability” issues that some face somewhat misrepresents the nature of the LPO arrangement. In particular, Australia Post stated that:¹⁰

“... [t]he “LPO model” is not a business model, it is a business arrangement where Australia Post enables licensees to provide services and sell products as part of their own businesses. As previously observed, most licensees operate other businesses in conjunction with the LPO activities. LPOs are paid fees in consideration of the LPO Activities. Australia Post does not subsidise LPO Businesses more broadly.”

4.5 As the ACCC stated in the Draft Determination, the industry has changed since the LPO Agreement was first introduced. This is undeniable. However, the disruption facing the industry as a whole has not impacted LPOs disproportionately, it has impacted Australia Post and LPOs alike. To counteract the impact of digital disruption, it is important for both Australia Post and individual licensees to take steps to invest in other ancillary businesses. Having another line of business is critical to survival in the longer term. For example, Australia Post has focused on expanding its parcels business, its digital offerings and its ecommerce products.

⁹ ACCC, Draft Determination, [51].

¹⁰ Australia Post, *Submission to ACCC in response to Application for authorisation A91583 & A91584 lodged by LPO Group Ltd & Ors*, 26 May 2017, [5.1(c)].

4.6 Additional reasons put forward in the Draft Determination to support the ACCC's conclusion (at paragraph [68]) that the Authorisation will increase the "quality of input into contracts" are:

- *access to relevant industry information and increased input into contractual negotiations provides a mechanism through which the negotiating parties can identify and achieve greater efficiencies in their businesses¹¹; and*
- *to the extent that LPOs are more likely to participate in collective negotiations and have greater input into the terms of a new or varied LPO Agreement, issues such as the financial sustainability of rural LPOs are more likely to be addressed.¹²*

4.7 It is incorrect to assert that the Authorisation will facilitate access to relevant industry information. LPOs are entitled to access information currently and can use that to support their positions, either individually or collectively through the associations, in negotiations with Australia Post.

4.8 The experience of Australia Post with various representative bodies over the history of the LPO network causes us to query whether LPOs are "more likely to participate in collective negotiations" and therefore, "issues such as the financial sustainability of rural LPOs are more likely to be addressed". We note that not only do rural LPOs already participate in collective negotiations through membership of LPOG or POAAL, but where particular rural LPOs face issues that relate to them and not the majority of LPOs these issues tend to be better addressed individually or in small groups.

5 Public Detriment

5.1 It is not obvious from the Draft Determination whether the ACCC has given any weight to the public detriment concerns.

5.2 In the May Submission and the August Submission, Australia Post outlined that the collective boycott:

"may lead to coordinated threats of withholding postal or other services. The authorisation may give licensees the false impression that they are entitled to abandon certain obligations under their LPO Agreement or refuse to adhere to the annual fee review process."¹³

5.3 To mitigate against this potential detriment arising, Australia Post submitted that the authorisation should be:

"subject to strict conditions and limitations making it clear that the boycott only extends to a renegotiation of the LPO Agreement and does not empower licensees to boycott the performance of services or general adherence to the terms of the LPO Agreement."¹⁴

5.4 In the Draft Determination, the concerns raised by Australia Post are not referred to at all by the ACCC in considering the potential public detriment. Further, despite noting that the scope of the exclusivity arrangements needs to be clarified, the ACCC also noted that it

¹¹ ACCC, Draft Determination, [65].

¹² ACCC, Draft Determination, [66].

¹³ Australia Post, Submission to ACCC in response to Application for authorisation A91583 & A91584 lodged by LPO Group Ltd & Ors, 26 May 2017, [5.2].

¹⁴ Australia Post, Submission to ACCC in response to Application for authorisation A91583 & A91584 lodged by LPO Group Ltd & Ors, 26 May 2017, [5.2].

*“considers that the risk of detriment arising from the potentially broad scope of negotiations is low”.*¹⁵

- 5.5 The ACCC has requested further information on the scope of authorisation. Consistent with May Submission, Australia Post submits that the scope of authorisation should be limited to the annual review process.
- 5.6 To the extent that the ACCC is minded to grant Authorisation to “material changes” implemented by Australia Post in addition to the annual review process, the scope of authorisation should be limited to material changes **that affect the LPO network as a whole**. We note this appears consistent with the scope that is proposed by LPOG in its latest submission of 9 August 2017.

6 Next steps

- 6.1 We welcome the opportunity to discuss our submission with you in further detail.

Yours sincerely,



Makarla Cole

Head of Post Office Partnerships & Channel Management

¹⁵ ACCC, Draft Determination, [80].