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Marie Dalins
Director
Australia Competition and Consumer Commission
Level 35, 360 Elizabeth Street
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Dear Ms Dalins

Authorisation A91583 & A91584 submitted by LPO Group Limited (LPOG) - response to Australia Post's submission dated 6 September 2017

As you know, we act for LPO Group (LPOG) in relation to LPOG's applications for authorisation for its members to engage in collective bargaining and a limited collective boycott of Australia Post.

We refer to:

- the ACCC's Draft Determination published on 16 August 2017; and
- Australia Post's submission dated 6 September 2017.

On behalf of LPOG, we attach for the ACCC's consideration a supplementary submission reiterating and clarifying LPOG's position as necessary in order to assist the ACCC in the preparation of its final determination on the Application.

If there are any further concerns or questions regarding the Application, please do not hesitate to contact us.

Yours sincerely



Ayman Guirguis
Partner

enclosure

**Authorisation Applications
A91583 and A91584
LPO Group Limited**

Supplementary submission

Date: 28 September 2017

The ACCC published its Draft Determination on 16 August 2017, proposing to approve LPO Group Limited's (LPOG) applications for authorisation for its members to engage in collective bargaining and a limited collective boycott of Australia Post (**the Application**).

In response to the Draft Determination, Australia Post made a further submission on 6 September 2017 (**Australia Post Submission**).

LPOG proposes to make a further submission in response to the Australia Post Submission, for the purpose of reiterating and clarifying as necessary LPOG's position and to assist the ACCC in the preparation of its final determination on the Application.

Exclusivity arrangements

LPOG seeks final authorisation to engage in collective negotiations with Australia Post on behalf of its members, in relation to:

- Australia Post's annual review of payments under the LPO Agreement; and
- any material changes implemented by Australia Post outside of the annual review process.

LPOG also seeks authorisation to engage in a limited collective boycott of Australia Post, whereby members of LPOG who form part of the collective bargaining group voluntarily agree not to negotiate individually with Australia Post while collective negotiations are ongoing.

In the Draft Determination published on 16 August 2017, the ACCC referred to the proposed collective boycott activity as "exclusivity arrangements" or an "exclusivity provision."

At paragraph 5 of the Australia Post Submission, it states that the proposed exclusivity arrangements *"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."*

LPOG considers that it has already responded at length to this particular concern at page 5 of its supplementary submission dated 9 June 2017 and in its submission dated 27 July 2017. LPOG's submission dated 9 August 2017 also further clarifies the scope of the exclusivity arrangements sought under the Application.

By way of summary of LPOG's previous submissions on this issue, LPOG rejects Australia Post's submission that the authorisation will precipitate threats, coordinated or otherwise, of the withdrawal of postal services. The exclusivity arrangements sought by LPOG and contemplated in the Draft Determination clearly operate only to prevent individual LPOs in the collective bargaining group from negotiating with Australia Post while collective negotiations are ongoing. The exclusivity arrangement will only apply in relation to the issues that are the subject of collective negotiations. In addition, individual LPOs remain entitled to opt-out of the collective negotiations to undertake negotiations on an individual basis with Australia Post.

Given the above, LPOG agrees with the ACCC's assessment at paragraph 81 of the Draft Determination that the proposed collective negotiations and exclusivity arrangements are unlikely to result in public detriment.

"Material changes"

LPOG agrees with the ACCC's view at paragraph 80 of the Draft Determination the *"risk of detriment arising from the potentially broad scope of negotiations is low."* The only apparent public detriment identified by Australia Post in its submission dated 6 September 2017 is the risk of co-ordinated threats to withhold services, which, for the reasons discussed above, LPOG rejects as neither a material nor meaningful risk. Accordingly, LPOG considers that it is unnecessary to impose further limits on the scope of negotiations under the authorisation.

Notwithstanding the above, and in response to the statement by the ACCC at paragraph 80 of the Draft Determination that it seeks additional clarity of the scope of the collective negotiations, LPOG recognises that it may be of benefit to provide further clarification as to the circumstances outside of the annual review process in which LPOG proposes to collectively negotiate with Australia Post; namely, to clarify what changes implemented by Australia Post amount to "material changes."

As per LPOG's submission dated 9 August 2017, the "material changes" for which LPOG seeks to collectively negotiate do not include modifications to the standard form LPO Agreement where those modifications relate to the specific circumstances of individual LPOs.

LPOG considers that "material changes" are changes in a fact, circumstance or condition which would have a substantial likelihood of impacting the viability of the LPO network. Accordingly, "material changes" would include, but are not limited to, the following:

- the commencement of any new product or service of Australia Post requiring, either directly or indirectly, additional investment by LPOs;
- the discontinuation or modification of any product or service of Australia Post where the total sales or fees payable to LPOs from such a product or service exceed ten percent of the gross sales of or fees payable to the LPO on an annual basis;
- any initiative by Australia Post that is likely to result in the termination, or failure to renew LPO Agreements or closure of LPOs amounting to more than one percent of all LPO network, regardless of location;
- changes in the business, operations, capital or control of Australia Post which would reasonably be expected to have a significant adverse effect on the value or price of LPOs;
- any significant change to the limitations or restrictions on the goods or services which LPOs are able to supply under the LPO Agreement; and
- the loss of a primary supplier of Australia Post resulting in the inability to obtain products of a similar function, quality and cost.

Consultation v negotiation

At paragraph 2.4 of the Australia Post Submission, Australia Post asserts that *"LPOG and POAAL are both currently able to represent their members in negotiations with Australia Post, and there is no limitation on this ability."* At paragraph 3.1, Australia Post reiterates its prior submission that *"licensees already have the benefit of joint negotiations and cost sharing for all consultations."*

In contradiction to Australia Post's characterisation of the status quo, LPOG considers that absent the immunity from potential action under the Competition and Consumer Act provided by the authorisation of the proposed conduct, LPOG is unable to engage in meaningful negotiations with Australia Post on behalf of its members. As outlined in the Application and LPOG's supplementary submission dated 9 June 2017, LPOG's current engagement with Australia Post is limited, in both form and substance, to consultation rather than negotiation.

Australia Post's consultations with LPOG to date have amounted to little more than a procedural requirement with no actual effect on Australia Post's decision-making, rendering them effectively meaningless. LPOG has previously provided a documented account of the consultation process in its submission dated 9 June 2017.

As set out in LPOG's submissions dated 9 June 2017 and 21 June 2017, LPOG's ability to effectively represent its members is also presently significantly circumscribed by the confidentiality requirements in the Consultation Agreement between LPOG and Australia Post. The confidentiality requirements prevent LPOG from discussing the matters raised in its consultations with Australia Post.

LPOG reiterates that in the event that authorisation is granted, LPOG will seek to amend the terms of the Consultation Agreement in order to enable the ongoing exchange of information between LPOs, LPOG and Australia Post in the course of any collective negotiations. This is an example of a substantive change to the terms of engagement between LPOG and Australia Post contemplated by the authorisation.

In respect of the issue of transaction costs, LPOG agrees with the ACCC's conclusion at paragraph 50 of the Draft Determination 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."*

By way of example, LPOG notes that the proposed collective negotiations will enable LPOG to obtain the benefit of third party experts to assist with the negotiations in representation of all participating LPOs, resulting in significant additional transaction cost savings.

The question of LPO viability

The Australia Post Submission at paragraph 4.4 states that under the LPO Agreement, *"fees, discounts and commissions are set to adequately compensate LPOs for the economic cost of providing products and services."*

As set out at length in the Application, LPOG submits that the present remuneration rates in place under the LPO Agreement are inadequate having regard to the costs borne by LPOs. The recent increases in the rates paid by Australia Post to LPOs (which only occurred following the Senate Inquiry) have fallen far short of compensating LPOs for their actual costs, particularly with respect to the time required to undertake transactions.

As identified in the first report conducted by Partners in Performance International Pty Ltd (**the First PIP Report**), the direct costs incurred by LPOs in providing certain products and services, including most notably parcel processing, materially exceeded the revenue received by LPOs for those transactions.

The First PIP Report also concluded that smaller, lower volume LPOs were not earning sufficient revenue from Australia Post to cover the costs of running a small business, raising broader questions about the continued financial viability of LPOs under the current LPO Agreement.

With respect to LPO viability, the Australia Post Submission submits at paragraph 4.4(2) that *"most licensees operate other businesses in conjunction with the LPO activities"* and suggests at paragraph 4.5 that LPOs should *"take steps to invest in other ancillary businesses"* as *"having another line of business is critical to survival in the longer term."*

In LPOG's view, Australia Post's characterisation of ancillary businesses as a panacea does not engage with the commercial realities affecting the viability of LPOs.

In the first instance, as set out at section 3.2 of the supporting submission to our Application, the majority of the 56% percent of LPOs classified by Australia Post as operating "in conjunction" businesses sell only a limited range of complementary products in conjunction with their Australia Post related activities. Those LPOs remain reliant on Australia Post product and services for the vast majority of their revenue.

Australia Post itself has never consistently taken the position that LPOs should be deriving a significant proportion of their business revenues from non-Australia Post related activities, in order to effectively subsidise their Australia Post related activities. In 2005, Australia Post commenced a "100% standalone" campaign with New South Wales LPOs (and to a more limited extent in other States), requiring that LPOs deemed "standalone" supply only Australia Post related products and services and excluding other revenue streams from valuation consideration when LPOs are seeking to assign their businesses to new licensees. In addition to the financial pressures and limited access to required capital suffered by many LPOs, LPOG considers that the likelihood of LPOs opening and operating sustainable ancillary businesses is also limited by the prohibition on the sale of competing products in the LPO Agreement.

LPOG is well aware that Australia Post has also suffered the effects of digital disruption. Its concern is that the LPO Agreement does not fairly share the costs of broader industry changes between LPOs and Australia Post, for example, by not providing greater scope for LPOs to increase their revenue streams by offering for sale goods or services that may more broadly be characterised competitive with those offered by Australia Post, thereby threatening the financial viability of LPOs.

LPOG reiterates the concern that if LPOs are not financially viable or sustainable in the medium to long term, there is a real risk that LPOs, particularly those in rural and remote areas, may be forced to close - with the community dislocation that such closures may bring. In some cases, LPOs are the only face of Government in the communities they serve, providing for Government services such as Medicare and Centrelink. Further, they are, in some communities, the only high street provider of retail banking services and for payment services generally.

LPOG is happy to discuss with the ACCC any issues arising from this submission or its application more broadly if it would assist the ACCC.