



# Draft Determination

Application for authorisation AA1000476  
lodged by  
Battery Stewardship Council  
in respect of  
the Battery Stewardship Scheme  
Authorisation number: AA1000476

14 July 2020

Commissioners:

Keogh

Rickard

Court

Ridgeway

## Summary

The ACCC proposes to grant authorisation to enable the Battery Stewardship Council (BSC) to establish and operate a national stewardship scheme for managing all types of end of life batteries except for automotive lead-acid batteries and batteries that are currently included in a stewardship or recycling scheme.

The aim of the proposed voluntary scheme is to provide for the appropriate disposal and re-use of end of life batteries. The scheme will involve the imposition of a levy on imported batteries (to be passed on to consumers in battery prices) which will be used to fund rebates for recyclers at the collection, sorting and processing stages. Members of the scheme would be required to only deal with other members of the scheme (excepting current ongoing arrangements).

The ACCC considers the scheme is likely to result in public benefits in the form of significant environmental benefits, increased public awareness of battery disposal and re-use, and supporting increased research and development.

The ACCC considers the scheme is likely to result in some public detriment through the trading restrictions for participating businesses. However, this detriment is partly mitigated by the exceptions to the obligation on members of the scheme to only deal with other members and the ability for businesses to join the scheme without charge.

The ACCC notes that the scheme is generally likely to encourage consumers to hold on to batteries for subsequent collection and recycling. Where this may involve button batteries,<sup>1</sup> the ACCC is concerned this may add to the safety hazard of small children ingesting them and conflicts with the ACCC's advice to consumers to dispose of button batteries immediately.

BSC has advised that it intends to further address button battery safety as a priority as it develops the operational procedures for the scheme. The ACCC is keen to ensure that BSC progresses these steps as a matter of priority, starting with operational procedures that promote the immediate disposal of button batteries, consistent with the current regulatory advice to consumers. Ideally these operational procedures would be completed before the ACCC makes a final determination about whether to grant authorisation. Provided the BSC takes appropriate steps to address button battery safety, the ACCC considers that the scheme is not likely to result in significant public detriment by increasing the likelihood of button battery safety incidents.

The ACCC invites submissions from BSC and interested parties on this issue and, in particular:

- whether operational guidelines addressing button battery safety ought to be developed before the ACCC makes a final decision about whether to grant authorisation; and/or
- the merits of imposing a condition of authorisation requiring BSC to promote awareness of button battery hazards and mitigation measures.

Overall, the ACCC considers that the public benefits of the scheme are likely to outweigh any public detriment.

The ACCC proposes to grant authorisation for five years.

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<sup>1</sup> For the purpose of this draft determination, button cell batteries and coin cell batteries are both referred to as 'button batteries'.

## 1. The application for authorisation

- 1.1. On 18 March 2020, the Battery Stewardship Council (**BSC**) lodged application for authorisation AA1000476 with the ACCC. BSC is seeking authorisation for five years to implement a national stewardship scheme for all types of end of life batteries, except for automotive lead-acid batteries and batteries that are already captured by existing stewardship or recycling schemes (**Eligible Batteries**).<sup>2</sup> This application for authorisation AA1000476 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.2. The ACCC may grant authorisation which provides businesses with legal protection for arrangements that may otherwise risk breaching the law but are not harmful to competition and/or are likely to result in overall public benefits.

### The Proposed Conduct

- 1.3. BSC proposes to establish a voluntary, industry-led stewardship scheme to enable responsible management of all types of used batteries, to be named the 'Battery Stewardship Scheme' (**the Scheme**). The Scheme is described in detail in the '**Scheme Design**' provided with BSC's application for authorisation<sup>3</sup> and has three essential features:
  - a) a levy imposed on battery imports, to be passed through the supply chain to the consumer as a visible fee
  - b) enterprise to enterprise agreements to reduce a free rider problem. That is, preventing companies in the supply chain from receiving the benefits of the Scheme without contributing to the cost of it, and
  - c) a rebate to cover the cost of collection, sorting and processing of end of life batteries.
- 1.4. BSC submits that the objectives of the Scheme are to:
  - a) increase resource recovery and recycling and minimise the environmental, health and safety impacts of end-of-life batteries in Australia
  - b) achieve a net benefit for the broader recycling system by removing a potentially significant contaminant
  - c) ensure that the whole supply chain participates in the stewardship of batteries in the Australian market
  - d) develop an efficient and innovative domestic battery recycling industry
  - e) create new job opportunities, including jobs with social outcomes, and

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<sup>2</sup> BSC considers that an effective market exists for the recycling of used lead-acid batteries without the need for further subsidy and therefore has excluded these batteries from the Scheme. Batteries that are already subject to pre-existing stewardship schemes include embedded batteries that would fall under the National Television and Computer Recycling Scheme (NTRCS) and MobileMuster recycling scheme (such as those included in mobile phones, portable computers, and televisions). However BSC has indicated that the rebate will be available to participants in existing schemes in order to facilitate rapid expansion of the collection network.

<sup>3</sup> The Scheme Design is Attachment A to BSC's application for authorisation dated 13 March 2020.

- f) foster a circular economy where batteries are recovered for recycling and reused to make batteries or other products.

1.5. BSC is seeking authorisation to establish and operate the Scheme as described in the Scheme Design and summarised in paragraphs 1.9 to 1.28 (**the Proposed Conduct**). The Proposed Conduct will be, or is likely to be engaged in, by a range of organisations across the battery supply chain and members of the Scheme will undertake certain commitments as outlined below.

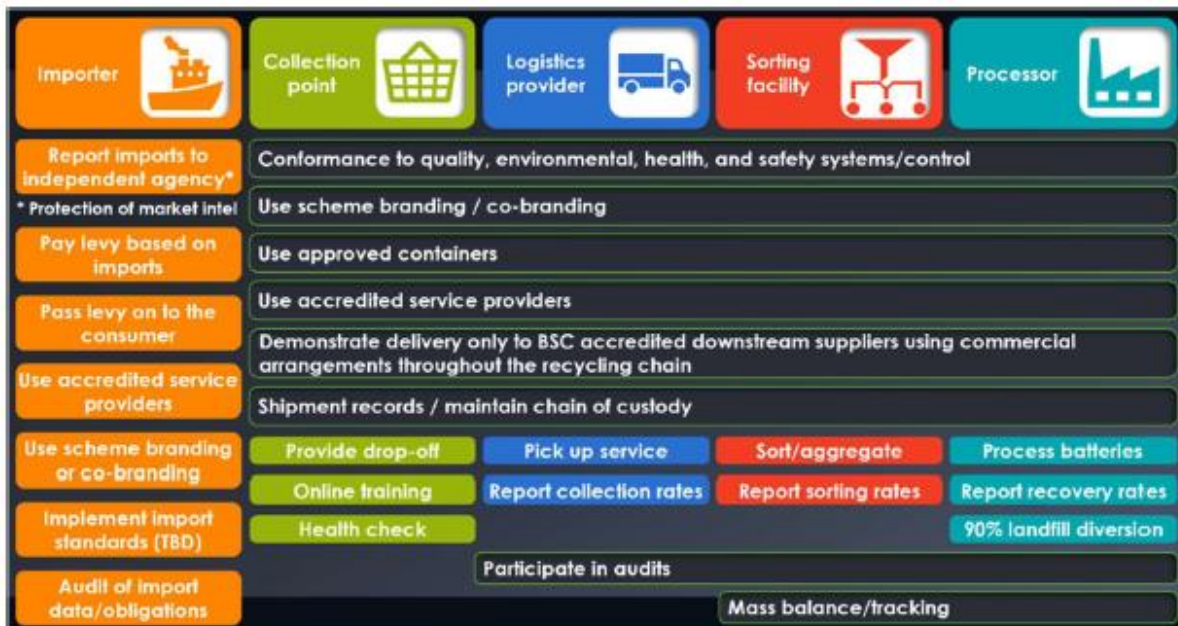
### Rationale for Scheme design

- 1.6. BSC’s intention is to bring battery supply chain companies together to significantly reduce the volume of batteries being disposed of as waste to landfill and maximise resource recovery by increasing collection and recycling rates and developing a domestic battery reprocessing capacity.
- 1.7. The aim of the Scheme is to improve the environment by providing for appropriate disposal and re-use of end of life batteries as well as better education of the industry and research into productive, efficient and effective uses of end of life batteries.
- 1.8. Currently, BSC considers the most significant barrier to an effective battery recycling regime is the cost of the collection and sorting of batteries. The Scheme has been designed to use most of the revenue collected from the levy to fund a rebate to businesses that undertake the collection, sorting and processing of batteries in order to offset the cost of these activities. This system is intended to encourage entities currently involved in collections for other recycling schemes to expand to participate in the Scheme, and for new entrants to become involved in the market.

### How the Scheme will work

1.9. The figure below summarises the obligations that will be imposed under the Scheme, sorted by each relevant stage in the battery supply chain.

**Figure 1: Summary of Scheme Obligations**



Source: BSC, Scheme Design, page 13.

1.10. The key aspects of how the Scheme will operate in practice are summarised in the following sections.

***a) A visible levy imposed on battery imports passed to consumers***

1.11. The Scheme will primarily be funded by imposing an annual levy on all imported Eligible Batteries which will be reviewed annually. The cost of this levy will be passed through the supply chain to consumers in a transparent manner as a visible fee.<sup>4</sup> The levy will be calculated based on the weight of batteries imported.

1.12. For reference, the levy will initially be set at \$0.04 per equivalent battery unit (EBU)<sup>5</sup> and is expected to raise \$22m annually.<sup>6</sup> BSC proposes to review the levy rate annually and make adjustments as necessary to ensure the Scheme is operating on a cost-recovery basis. Changes to the levy would only be implemented following consultation with Scheme members.

1.13. Figure 2 sets out the indicative levy payable for common battery types in the first year.

**Figure 2: Indicative levy payable**

Battery	Average weight	Example EBU	Indicative levy
AAA Alkaline	10	.44	\$0.02
AA Alkaline	23	.97	\$0.04
AA Rechargeable	24	1	\$0.04
9V Alkaline	42	1.8	\$0.07
C	64	2.7	\$0.11
D	113	4.7	\$0.19
Button cell	2	.1	\$0.00
Lantern 6V	574	24.1	\$0.96
Power tool	741	31.2	\$1.25
Mobile phone battery	60	2.5	\$0.10
Laptop/tablet battery	343	14.4	\$0.58
Light industrial battery	361	15.2	\$0.61
e-Bike	2769	116.5	\$4.66

Source: BSC, Scheme Design, page 24.

<sup>4</sup> BSC has advised that the specifics of how the levy will be made visible to consumers is a matter requiring further consultation with retailers and importers, and is intended to be settled during the first six months of the implementation of the Scheme. BSC currently envisages that joint BSC and retailer promotions will be made at the point of sale, website promotions and information, product packaging and other marketing means could be used to inform and educate consumers about the levy. (BSC's response to ACCC request for information, 22 May 2020)

<sup>5</sup> An EBU is 24 grams, or roughly the weight of a AA battery.

<sup>6</sup> Scheme Design, page 17.

1.14. BSC proposes that the levy would initially only apply to companies who import more than 1,000 EBU per annum. Entities that are not importers or do not meet the minimum import threshold can obtain full membership rights by paying an annual fee (which will initially be set at \$1,000) or associate membership with no membership fee and no voting rights. The membership fee for full membership is intended for non-levy paying members.<sup>7</sup>

### ***b) Enterprise to enterprise agreements***

1.15. Members of the Scheme are required to make a series of commitments, including to only contract for the supply of battery-related goods and services with other accredited members to the Scheme (where possible) using enterprise to enterprise contracting (**the EtoE Requirement**).<sup>8</sup>

1.16. For example, participating battery suppliers would only sell Eligible Batteries to wholesalers that are participating in the Scheme and those wholesalers would only sell the Eligible Batteries to retailers that are also participating in the Scheme.

1.17. BSC submits the EtoE Requirement is intended to encourage participation in the Scheme and remove the ability for companies to free-ride.<sup>9</sup> The Scheme provides an exception to this requirement in circumstances where members have current contractual arrangements with non-accredited parties; in such circumstances, members can deal with the relevant non-member business(es), but must ensure that all end of life batteries generated are provided to an accredited battery recycler for environmentally sound disposal.<sup>10</sup>

1.18. BSC also submits that some further exceptions to the EtoE Requirement would be applied in the first two years of the Scheme where, due to the circumstances of a member of the Scheme, it is not possible or commercially viable for the member to contract with another member for the required transaction.<sup>11</sup>

### ***c) Other member commitments***

1.19. To obtain accreditation under the Scheme, each member will be required to make a series of general commitments relevant to all supply chain participants<sup>12</sup> and specific commitments relevant to its role in the supply chain (i.e. depending on whether it is a government agency, supplier, retailer, collector or processor).<sup>13</sup> A snapshot of these commitments is provided in Figure 1, above.

### ***d) Rebate to recyclers***

1.20. BSC anticipates that approximately 80% of the collected revenue from the levy and membership fees will be returned as a rebate to recyclers.<sup>14</sup> The rebate is intended to reduce barriers to entry to the battery recycling market by making battery recycling more profitable at the collection, sorting and processing stages. A full breakdown of BSC's anticipated expenditures is provided in figure 3

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<sup>7</sup> Scheme Design, page 39.

<sup>8</sup> Scheme Design, page 46.

<sup>9</sup> Scheme Design, page 13.

<sup>10</sup> Scheme Design, page 46.

<sup>11</sup> BSC's response to ACCC's request for information, 22 May 2020

<sup>12</sup> Scheme Design, Appendix 3.

<sup>13</sup> Scheme Design, Appendix 4.

<sup>14</sup> Scheme Design, page 17.

**Figure 3: Indicative full year expenditure (%)**

Administrative costs	Marketing costs	Accreditation	Auditing	Collection rebate	Sorting rebate	Processing rebate
7%	5%	2%	6%	50%	15%	15%

Source: BSC, Scheme Design, page 22.

- 1.21. BSC proposes to offer \$2.50/kg for battery collection in metropolitan areas, \$3.50/kg in regional and remote areas (to account for increased costs and logistics), \$1/kg for sorting, and \$1/kg for processing.<sup>15</sup> BSC submits that these rebate rates have been set at a level below current program costs (which are based on a 3% collection rate) to recognise that costs per kg are expected to fall as the volumes of batteries increases. Rebate rates will be reviewed annually by BSC.
- 1.22. Rebates will not be payable for the collection, sorting or processing of existing battery stockpiles.

### ***e) Initiatives to promote responsible treatment of end of life batteries***

- 1.23. BSC considers it essential that consumers be made aware of the Scheme, drop-off options in their area and the importance of battery recycling. In order to raise awareness, it is proposed that co-branding of marketing materials and containers be implemented. BSC also intends to design an education program to inform students and the community about batteries and the risks and benefits of recycling.
- 1.24. BSC proposes that members only use battery collection bins that meet Scheme standards and transport compliance requirements. It is also envisaged that BSC could work with industrial partners to establish a recognisable system of containers that meets designated environmental, health and safety standards.<sup>16</sup>
- 1.25. BSC submits that its campaign around awareness of battery safety and responsible disposal will be carefully crafted to provide a safe collection regime.

### ***f) Market research and development***

- 1.26. BSC proposes to undertake market research and development activities to foster innovation and efficiencies as well as facilitating the rapid scaling up of infrastructure necessary to significantly increase the recycling rate for household batteries and facilitate a higher proportion of onshore processing.

### ***g) Other operational matters***

- 1.27. BSC intends to allocate a portion of its budget towards conducting audits and other compliance activities.<sup>17</sup>
- 1.28. BSC will develop performance measures for the Scheme and reporting protocols. The Scheme aims to collect as many batteries as possible, rather than a set percentage. However, recyclers will be required to meet a minimum diversion rate from landfill, which will be set at >90% for most types of batteries.

<sup>15</sup> Scheme Design, pages 18 - 21.

<sup>16</sup> Scheme Design, page 16.

<sup>17</sup> Scheme Design, page 28.

## 2. Background

### Current state of battery recycling

- 2.1. Batteries (of all types) remain on the priority product list of the *Product Stewardship Act 2011* (Cth)<sup>18</sup> and the Environment Department has identified that ‘only about 10% of end of life batteries produced each year are recycled in Australia.’<sup>19</sup>
- 2.2. BSC submits that in 2019 it was estimated that 22,000 tonnes of batteries under 5kg were sold into the Australian market. In the same period, 18,500 tonnes of waste batteries were generated, 90% of which went to landfill, adversely impacting on the environment and public health and safety.<sup>20</sup>
- 2.3. The 2019 National Waste Policy Action Plan has indicated an intention for all Governments to develop a common approach to restrict the disposal of priority products and materials in landfill, starting with lithium ion batteries and e-waste by 2021.<sup>21</sup> The Victorian government banned all e-waste, including all batteries, from landfill from 1 July 2019.<sup>22</sup>

## 3. Consultation

- 3.1. A public consultation process informs the ACCC’s assessment of the likely public benefits and detriments from the Proposed Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties including major industry associations, manufacturers, retailers, recyclers, consumer groups, and state and federal government representatives.<sup>23</sup> The ACCC received ten submissions from interested parties in relation to the application. In addition, BSC’s application included 43 letters of support for the current design of the Scheme from a range of organisations, some of whom also made submissions directly to the ACCC during the public consultation period.<sup>24</sup>
- 3.3. The ACT Minister for Environment and Waste Reduction (**Chris Steel MLA**), WA Minister for Environment, disability services and electoral affairs (**Stephen Dawson MLC**), Woolworths Group Limited (**Woolworths**), South Australian Environment Protection Agency and Green Industries SA (**SAEPA and GISA**), Consumers’ Federation of Australia (**CFA**), and Australian Battery Industry Association (**ABIA**) all broadly support the Scheme. Broadly speaking, these parties consider the Scheme will:
  - improve consumer access to safe and responsible options for recycling batteries and awareness of the impacts of end of life battery disposal,

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<sup>18</sup> The Product Stewardship Act 2011 requires the Department of the Environment and Energy to publish an annual list of classes of products the Minister has identified as priorities for possible accreditation or regulation.

<sup>19</sup> Department of Agriculture, Water and the Environment, 2020-21 Product list, <https://www.environment.gov.au/protection/waste-resource-recovery/product-stewardship/legislation/product-list-2020-21>.

<sup>20</sup> Application for Authorisation, page 10.

<sup>21</sup> Australian Government, ‘National Waste Action Plan 2019’, page 14, <https://www.environment.gov.au/system/files/resources/5b86c9f8-074e-4d66-ab11-08bbc69da240/files/national-waste-policy-action-plan-2019.pdf>.

<sup>22</sup> Sustainability Victoria, ‘e-Waste’, <https://www.sustainability.vic.gov.au/Campaigns/eWaste>.

<sup>23</sup> A list of the parties consulted and the public submissions received is available from the ACCC’s public register [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

<sup>24</sup> The following interested parties provided a letter of support to BSC and a submission to the ACCC: Consumers’ Federation of Australia, Woolworths Group and the WA Minister for Environment, disability services and electoral affairs.



- support a circular economy where batteries and their resources are recycled,
  - increase the use of resources that are currently wasted, and
  - lead to new job opportunities and reduced contamination.
- 3.4. The Consumer Electronics Suppliers Association (**CESA**) supports a battery recycling program that has measurable environmental benefits but it did not express a view on the Scheme.
- 3.5. Techtronic Industries Australia (**TTI**), 'Marcus' (who expressed a preference for his surname not to be published) and Lighting Council Australia (**LCA**) oppose the Scheme and raise the following concerns.
- (a) The scope of the Scheme is too broad and the following types of batteries should be excluded – lithium ion batteries, embedded batteries, button batteries and all lead acid batteries.
  - (b) The EtoE Requirement is burdensome.<sup>25</sup>
  - (c) Proprietary Technology - battery cells and electronic circuits designed to manage batteries may contain intellectual property that must be protected.<sup>26</sup>
  - (d) Safety issues - stockpiling of batteries in anticipation of the Scheme poses a safety risk if those batteries have not been properly handled.<sup>27</sup>
- 3.6. BSC lodged submissions on 11 May 2020 and 22 May 2020 responding to issues raised by interested parties. BSC's key responses are outlined below.
- (a) Scheme scope and exclusion of battery types - BSC submits that the exclusion of various batteries by chemistry type or technology was opposed by a majority of industry and local governments and at a Meeting of Environment Ministers a policy decision was made that all batteries were to be included in the Scheme.
  - (b) The purpose of the EtoE Requirement is to enable individual companies to give expression to their commitment to the circular economy for batteries by using their market position to influence other companies that they interact with on a regular commercial basis.
  - (c) The primary mechanism to handle protection of propriety technology is the contractual arrangements between manufacturer, retailer and recycler. BSC has included a specific requirement for accreditation under the Scheme that technology be disposed of in a manner agreed between the relevant parties.
  - (d) Safety issues - BSC provided an additional submission on 22 June 2020 in response to a request by the ACCC for a more detailed response on how it proposes to address the potential safety risk of young children ingesting button batteries where the Scheme results in those types of batteries being stored in the home before collection and recycling. BSC's response is discussed under Public detriments at paragraphs 4.27 - 4.30 below.

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<sup>25</sup> Submission from TTI and Marcus.

<sup>26</sup> Submission from TTI.

<sup>27</sup> Submissions from TTI and Chris Steele MLA.

3.7. Public submissions by the Applicant and interested parties are on the Public Register for this matter.

## 4. ACCC assessment

- 4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. The Applicant has sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsection 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).

### Relevant areas of competition

- 4.3. To assess the likely effect of the Proposed Conduct, the ACCC will identify the relevant areas of competition likely to be impacted. In this case, the ACCC considers that the relevant areas of competition are likely to be:
  - Importing of batteries (and devices with embedded batteries)
  - Wholesale sale of batteries
  - Retail sale of batteries
  - Collection, logistics, sorting and processing of end of life batteries.

### Future with and without the Proposed Conduct

- 4.4. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.
- 4.5. Essential features of the Scheme (as identified by BSC and noted at paragraph 1.3 a) to c), above) require authorisation. As such BSC's proposed battery stewardship scheme could not be implemented unless the Proposed Conduct is authorised.
- 4.6. BSC submits that without an industry-led scheme for all batteries, a 'trend toward a fragmented system of state-based approaches will continue [resulting in] higher costs, market confusion, and increased reporting and compliance requirements.'<sup>28</sup>
- 4.7. BSC also notes that:
  - batteries may be subject to inclusion in the NTCRS, or a separate government-regulated stewardship scheme
  - there may be new barriers to exporting batteries imposed by the Federal Government by 2030, reduced access to recycling services in China, hesitance of exporters to transport certain types of flammable batteries, and the introduction of e-waste landfill bans by some state governments.<sup>29</sup>

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<sup>28</sup> Scheme Design, page 10.

<sup>29</sup> Scheme Design, page 11.

- 4.8. Submissions from interested parties and BSC suggest that some importers and retailers have commenced their own recycling and collection schemes, however the vast majority of batteries that do not fall under other stewardship schemes are not recycled, and are either dumped in landfill or exported.
- 4.9. The ACCC considers that, without the Proposed Conduct, BSC would not proceed with the Scheme. As a result, signatories to the Scheme, and other related parties would in the short term continue to operate their recycling schemes as they currently do, with some parties offering recycling and end of life services, but the majority of end of life batteries ending up in landfill or otherwise disposed of.

## Public benefits

- 4.10. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and 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.*<sup>30</sup>

- 4.11. The ACCC has considered the following public benefits:

- environmental benefits,
- increased public awareness of battery disposal and re-use, and
- supporting increased research and development.

## Environmental benefits

- 4.12. BSC submits that the environmental objectives of the Scheme include: increasing resource recovery and recycling rates of end of life batteries, removing a potentially significant contaminant, developing an efficient and innovative domestic battery recycling industry, and fostering a circular economy where batteries are recovered for recycling and reused to make new batteries or other products.
- 4.13. The ACCC recognises that the disposal of batteries to landfill results in long-term leaching of toxic chemicals into soil and water resources. The ACCC accepts that the Scheme seeks to avoid this significant environmental harm to land and water resources and the need for costly remediation.
- 4.14. The ACCC considers that the environmental harm caused by disposing of batteries to landfill and the costs of recycling batteries are not currently reflected in their price. Responsibility for managing disposal of batteries currently fall to local governments. Consequently, there is a lack of commercial incentive for Australian businesses to take adequate steps to promote the environmental disposal of end of life batteries. The levy and rebate system proposed under the Scheme is likely to better align the price of batteries with the cost of their responsible disposal and increase the incentive for businesses to facilitate their recycling.
- 4.15. The ACCC considers that the Proposed Conduct is likely to increase the number of batteries that will be appropriately recycled and as such, is likely to result in significant environmental benefits.

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<sup>30</sup> *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

## **Increased public awareness of battery disposal and re-use**

4.16. BSC considers it essential that consumers be made aware of the Scheme brand, drop-off options in their area and the importance of battery recycling. To this end, BSC proposes a number of measures including:

- a website that will include a list accredited members, information on the benefits of the Scheme and an easy and accessible on-line accreditation and reporting portal;
- involving participating businesses in co-branding of marketing materials and containers; and
- a school education program (leveraging off existing state-based education programs) linked to an incentive program where schools that participate in battery collections could receive credits toward educational materials and possible other infrastructure.

4.17. The ACCC considers there is likely to be a public benefit from increasing public awareness about the impacts of inappropriate end of life battery disposal and encouraging participation in the Scheme. Increased awareness among consumers in conjunction with the availability of convenient collection facilities is also likely to contribute to the environmental benefits from the Scheme.

## **Supporting increased research and development**

4.18. An aim of the Scheme is to increase market research and development in relation to issues such as innovation in collection and processing, health and safety controls, processing efficiencies, technology development and developing recycling solutions for emerging battery chemistries.<sup>31</sup>

4.19. BSC states that governments and industry in Australia are investing in significant innovation activities through research funding with the aim of facilitating a viable circular economy for batteries within Australia.<sup>32</sup> In particular, the Commonwealth Government has recently awarded \$3,317,500 for a research hub to focus on small-scale processing of materials produced from waste batteries and \$25,000,000 for a research centre to address industry-identified gaps in the battery industries value chain.<sup>33</sup> BSC considers that the Scheme will provide the industry with certainty for investment and encourage innovation.

4.20. The ACCC notes that there is considerable scope for research and development concerning recycling of batteries and the development of associated technologies. It is also apparent that these activities are already occurring and would likely continue in the absence of the Scheme.

4.21. However, the ACCC accepts that initiatives by BSC to increase the commercial incentive to undertake battery recycling activities and growing public awareness are likely to indirectly increase innovation, research and development activities.

4.22. Accordingly, the ACCC considers that the Proposed Conduct is likely to result in a public benefit by supporting increased levels innovation, research and development activities concerning end of life batteries.<sup>34</sup>

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<sup>31</sup> Application for Authorisation, page 11.

<sup>32</sup> Scheme Design, page 16.

<sup>33</sup> Scheme Design, page 31.

<sup>34</sup> Scheme Design, pages 5, 14.

## ACCC conclusion on public benefit

4.23. The ACCC considers that the Proposed Conduct is likely to result in public benefits in the form of:

- significant environmental benefits,
- increased public awareness of battery disposal and re-use, and
- supporting increased research and development.

## Public detriments

4.24. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

*...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.*<sup>35</sup>

4.25. The ACCC has considered the following public detriments:

- safety issues,
- trading restrictions for participating businesses,
- increased Eligible Battery prices, and
- compliance burden.

## Safety issues

4.26. Interested parties are concerned that:

- The Scheme is likely to encourage consumers to hold on to batteries for subsequent collection and recycling. This may pose a safety hazard to young children and conflicts with the ACCC's advice for consumers to dispose of button batteries immediately.
- The possible introduction of the Scheme has already led to stockpiling of batteries (which, in the case of lithium ion batteries, poses fire risks).

## Button batteries

4.27. BSC makes the following points in relation to button batteries.

- The primary intent of the proposed Battery Stewardship Scheme is to ensure safe management and recovery of all battery types, including button batteries. This broad scope has been agreed by all governments in Australia.
- BSC is aware of the ACCC's recent consultation paper on regulatory options to improve button battery safety.<sup>36</sup>
- BSC will not be proposing or endorsing any significant at-home storage of button batteries but rather a preference for immediate disposal through collection for recycling.

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<sup>35</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

<sup>36</sup> ACCC, Button battery safety – Assessment of regulatory options – Consultation Paper, <https://consultation.accc.gov.au/product-safety/button-battery-safety-consultation-paper/>

- BSC intends to further address button battery safety as a priority as it develops its operational procedures (which is expected to take three to six months and may commence during our authorisation process).
- While the Scheme's objectives appear to necessitate the retention of batteries for later recycling, in the case of button batteries BSC would seek to take a risk-based approach. BSC recognises that button batteries present profoundly serious risks for children (highest priority), a risk to households as they can ignite if short circuiting occurs and are still inappropriately stored in the home or disposed of in rubbish bins and recycling receptacles, both of which may be accessible to children.
- BSC intends that the Scheme will build on the existing work by regulators and industry to prepare a button battery stewardship strategy to identify safe recovery procedures and increase educational material to increase awareness of button battery hazards and mitigation measures. BSC intends to allocate revenue from the proposed levy to be allocated to, inter alia, community and school education on battery safety and correct disposal of end of life batteries for recycling and research and/or development of child resistant packaging for use in the home.

4.28. Button battery safety is a key part of the ACCC's Product Safety Priorities for 2020 and the ACCC is currently pursuing regulatory options to prevent injuries and deaths to children caused by button batteries.<sup>37</sup>

4.29. In this context, the ACCC shares the concerns of interested parties that the Scheme may increase the likelihood of all types of end of life batteries being stored in the home before being collected and recycled. This outcome conflicts with the ACCC's advice to consumers that button batteries should be disposed of immediately to minimise the hazard that they pose to young children.

4.30. While BSC has expressed a preference for 'immediate disposal through collection for recycling'<sup>38</sup>, it submits that precisely how consumers will be encouraged to dispose of button batteries will not be settled until the Scheme's operational design stage.

4.31. The ACCC considers that the Proposed Conduct has the potential to result in significant public detriment by increasing the safety hazard posed by storing button batteries in the home if BSC did not take adequate steps to address this issue. However, the ACCC also considers that this potential detriment may be addressed by BSC actively dealing with the issue.

4.32. The ACCC notes that BSC acknowledges the safety hazard and has outlined proposed steps for addressing it. The ACCC is keen to ensure that BSC progresses these steps as a matter of priority, starting with operational procedures that promote the immediate disposal of button batteries, consistent with current regulatory advice to consumers.

4.33. Ideally, these operational procedures would be completed before the ACCC makes a final decision about whether to grant authorisation.

4.34. However, if this is not possible, then the ACCC may consider imposing a condition of authorisation which requires BSC to promote awareness of button battery hazards and mitigation measures. For example, a condition of authorisation might require BSC and

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<sup>37</sup> ACCC, 2020 Product Safety Priorities, [https://www.productsafety.gov.au/system/files/1513\\_2020%20Product%20safety%20priorities\\_FA%20WEB.pdf](https://www.productsafety.gov.au/system/files/1513_2020%20Product%20safety%20priorities_FA%20WEB.pdf)

Scheme members to promote the immediate disposal of end of life button batteries by consumers consistent with the advice set out in the 'Safety Warning Notice (button batteries)' published by the Assistant Treasurer on 30 March 2019 and refrain from providing education or public messaging under the Scheme that is inconsistent with the advice set out in the Safety Warning Notice.

4.35. The ACCC invites submissions from BSC and interested parties on the following issues:

- whether operational guidelines addressing button battery safety ought to be developed before the ACCC grants any final authorisation; and/or
- the merits of imposing a condition of authorisation along the lines outlined in paragraph 4.34 above.

4.36. Provided that BSC takes appropriate steps to address the safety hazard regarding button batteries, the ACCC considers that the Proposed Conduct is not likely to result in significant public detriment by increasing the likelihood of this hazard.

### ***Stockpiling of batteries***

4.37. BSC notes the concerns about safety and potential stockpiles with battery collection and recycling and has identified this as an issue to be addressed in the operational procedures for the Scheme to ensure that risks are mitigated. BSC also notes that a core objective of the Scheme is to improve safety by ensuring that lithium batteries are properly and safely managed.

4.38. The ACCC notes the concerns about stockpiling and recognises that increased stockpiling in the short term in anticipation that in the future a rebate will be paid for collections is an inevitable by-product of developing this type of scheme. However, the ACCC also notes that the rebate will only be available to batteries collected after the introduction of the Scheme and the date that batteries were collected will be checked before rebates are paid. As such, while some consumers may have stockpiled batteries before it was made clear that the Scheme would not pay for such batteries the ACCC considers that any current stockpiling of batteries cannot be entirely attributed to the proposed Scheme.

4.39. The ACCC also recognises the fire risk arising from the storage of lithium ion batteries. However, the ACCC notes that this risk exists whether those types of batteries are stored in the home or disposed of to landfill (as many currently are). Having regard to BSC's submission that a core objective of the Scheme is to improve safety by ensuring that lithium batteries are properly and safely managed, the ACCC does not consider that the Proposed Conduct is likely to result in public detriment by materially increasing the safety risk posed by lithium ion batteries.

### **Trading restrictions for participating businesses**

4.40. The Proposed Conduct would enable BSC to impose an obligation on members of the Scheme to only deal with other Scheme members in the battery supply chain.

4.41. BSC considers that this EtoE Requirement is an essential feature of the Scheme that will address free riders in that participants required to pay a levy contribution are not subsidising non-members.

4.42. BSC submits that any public detriments resulting from the Scheme are not significant because participation in the Scheme is voluntary and some exceptions to the EtoE Requirement will be available to members.

- 4.43. The ACCC recognises that the EtoE requirement is a key feature of the Scheme, designed to promote participation in the Scheme, and therefore is also a key part of delivering the public benefits that are likely to result.
- 4.44. However, the ACCC considers that this requirement is likely to generate some public detriment by preventing non-members from competing in the supply of services to members of the Scheme or themselves obtaining Eligible Batteries. It is likely that this impact would be most prevalent in remote and regional areas where there may be fewer businesses who are members of the Scheme.
- 4.45. The ACCC also considers that the wide range of Eligible Batteries (i.e. all batteries except for lead-acid batteries) and extensive list of battery retailers and suppliers that have already publicly indicated their support for the Scheme will inhibit the ability of non-members to compete, and the impact on non-members is likely to become larger as the Scheme accrues more members.
- 4.46. The ACCC accepts that the extent of this public detriment is partly mitigated by the exceptions to the EtoE Requirement membership process, namely:
- Scheme members will be permitted to complete existing contracts that they may hold with non-members,
  - there is no fee for obtaining accreditation under the Scheme, and
  - in the event that an accredited member is unable to contract with members due to practical difficulties (such as a lack of members in their area) an exception to the restrictive dealing provisions would be provided.<sup>39</sup>

### **Increased Eligible Battery prices**

- 4.47. Generally, an agreement by competitors to charge a uniform fee is likely to lessen competition relative to a situation where each business individually makes its own pricing decisions.
- 4.48. The Scheme intends to introduce a levy which is factored in to supply costs and ultimately added to battery prices at the point of sale. BSC intends that this levy is clearly identified to consumers as a visible levy, rather than silently incorporated into the cost by importers or retailers.
- 4.49. Although the implementation of the Scheme will result in an increased cost to consumers purchasing batteries, BSC suggests that at a rate of \$0.04 per EBU it will represent a very small proportion of the sale price of Eligible Batteries. Based on BSC's list of batteries and equivalent battery units (Figure 2)<sup>40</sup> an Eveready Gold 20 Pack would increase by \$0.80, an approximate 6% increase in cost,<sup>41</sup> while an e-bike with a 3.8kg battery would increase in cost by \$6.35, an approximate 1% increase in cost.<sup>42</sup>
- 4.50. The ACCC considers that battery importers do not have an incentive to act unilaterally to impose a levy to fund the collection of end of use batteries. Therefore to achieve the

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<sup>39</sup> BSC Response to ACCC request for information, 15 May 2020, <https://www.accc.gov.au/system/files/public-registers/documents/ACCC%20to%20Applicants%20requesting%20further%20information%20-%2015.05.20%20-%20PR%20-%20AA1000476%20BSC.pdf>

<sup>40</sup> Scheme Design, pages 41-45.

<sup>41</sup> Based on an indicative sale price of \$14.82 per pack from Big W, Officeworks and Chemist Warehouse. The RRP is \$19.99.

<sup>42</sup> Based on an indicative price of \$590.00 for a generic 36V/15.4AH battery pack.



public benefits identified there is a need for importers to reach an agreement to impose a levy.

- 4.51. Further, as discussed, the ACCC considers that to the extent that consumers pay closer to the full cost of the use and disposal of batteries, the price increase that may occur due to the levy is likely to signal a more (rather than less) efficient allocation of resources in the economy.
- 4.52. The ACCC does not consider that agreement to impose the levy increases the likelihood of co-ordination among importers, wholesalers and retailers on price and other areas in which they currently compete.
- 4.53. The ACCC accepts that for most Eligible Batteries the levy would represent a very small increase in the overall retail price. The ACCC considers that the limited increase in Eligible Battery prices, directed at providing for the appropriate disposal and re-use of end of life batteries, is unlikely to constitute a public detriment.

### **Compliance burden**

- 4.54. Interested parties have raised concerns about the costs of becoming members of the Scheme and the administrative burdens it imposes, particularly in relation to reporting and audits.
- 4.55. BSC submits that participation in the Scheme occurs via accreditation, which does not involve payment of fees and is independent of membership of BSC.
- 4.56. However, BSC acknowledges that most accredited parties will seek membership and BSC will be actively encouraging them to join. The scheme design details two categories of membership for BSC – financial membership (\$1,000 per annum or payment of the levy by liable parties) or associate membership (which has no fee).
- 4.57. BSC also acknowledges that accreditation involves a commitment to the proposed safety, tracking and audit programs so that their activities can be verified, and data gathered to understand the manner in which the recycling industry evolves.
- 4.58. Because import levies are intended to be passed on to consumers and businesses can participate in the Scheme without paying a fee, the ACCC considers the direct financial burden of the Scheme for its members is minimal.
- 4.59. The ACCC recognises that reporting requirements and audits impose some administrative burden on participants on the Scheme, particularly smaller businesses. However, the ACCC notes that these measures are intended to enable BSC, government and the wider community to have confidence that the Scheme is performing in accordance with its stated objectives and annual performance measures.
- 4.60. Overall, the ACCC considers that the compliance burden arising from the operation of the Scheme is unlikely to constitute a material public detriment.

### **ACCC conclusion on public detriment**

- 4.61. The ACCC considers that the Proposed Conduct is likely to result in some public detriment through the trading restrictions for participating businesses. However, this detriment is partly mitigated by the exceptions to the obligation on members of the Scheme to only deal with other Scheme members and the ability for businesses to join the Scheme without charge.

- 4.62. Provided that BSC takes appropriate steps to address the safety hazard regarding button batteries, the ACCC considers that the Proposed Conduct is not likely to result in significant public detriment by increasing the likelihood of this hazard.
- 4.63. However, the ACCC invites submissions from BSC and interested parties on whether further steps, such as one of the options outlined at paragraph 4.35 above, should be taken to ensure this is the case.
- 4.64. The ACCC also considers that the Proposed Conduct is likely to result in some public detriment through the trading restrictions for participating businesses. However, this detriment is partly mitigated by the exceptions to the obligation on members of the Scheme to only deal with other Scheme members and the ability for businesses to join the Scheme without charge.

## Balance of public benefit and detriment

- 4.65. For the reasons outlined in this draft determination, the ACCC is satisfied that the Proposed Conduct is likely to result in a significant public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.

## Length of authorisation

- 4.66. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>43</sup> This enables 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.
- 4.67. In this instance, the Applicant seeks authorisation for five years. BSC submits that they expect it will take three years for the Scheme to become fully operational, and a five year authorisation will allow time to observe the impact of the Scheme.
- 4.68. The ACCC considers that BSC's time estimates are realistic and agrees that it is appropriate for the period of authorisation to allow time for the Scheme to be implemented and its effects observed. As such, the ACCC proposes to authorise the conduct for five years.

## 5. Draft determination

### The application

- 5.1. On 18 March 2020, the Applicant lodged application AA1000476 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 5.2. The Applicant seeks authorisation for the Proposed Conduct set out at paragraphs 1.3 and 1.4. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

### The authorisation test

- 5.3. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct would result or be likely to result in a benefit to the public and the benefit would outweigh the

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<sup>43</sup> Subsection 91(1)

detriment to the public that would result or be likely to result from the Proposed Conduct.

- 5.4. For the reasons outlined in this draft determination, and subject to the proposed condition, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 5.5. Accordingly, the ACCC proposes to grant authorisation.

### Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to grant authorisation AA1000476 to enable BSC to establish and operate a voluntary, industry-led stewardship scheme to enable responsible management of all types of used batteries and for current and future members of that scheme to implement it. The ACCC proposes to grant authorisation in relation to the Scheme as described in the Scheme Design attached to the application for authorisation and summarised in paragraphs 1.9 to 1.28. The ACCC proposes to grant authorisation in relation to Division 1 of Part IV of the Act and section 45 of the Act.
- 5.7. The ACCC proposes to grant conditional authorisation AA1000476 for five years.
- 5.8. This draft determination is made on 14 July 2020.

### 6. Next steps

- 6.1. The ACCC now invites submissions in response to this draft determination by 31 July 2020. In addition, consistent with section 90A of the Act, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.