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Mr Gavin Jones
Director, Competition Exemptions
Australian Competition and Consumer Commission
Level 35, 360 Elizabeth Street
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Dear Mr Jones

Paintback – application for authorisation AA1000536-1 – response to interested party submissions

As you know, we act for Paintback Limited (**Paintback**).

We refer to Paintback's application for authorisation AA1000536-1 dated 27 November 2020 (**application**) and the interested party submissions received by the Australian Competition and Consumer Commission (**ACCC**) from the New South Wales Environment Protection Authority (**NSW EPA**) dated 16 February 2021 and Nick Favot Painting (**NFP**) dated 29 January 2021. This letter responds to those interested party submissions.

Capitalised terms in this letter have the same meaning as in Paintback's application.

Confidentiality

Material in this letter that has been **highlighted in red** contains confidential and commercially sensitive information. Subject to the below, that information must not be disclosed to any third party without Paintback's express written consent. Paintback:

- acknowledges that there is no restriction on the internal use, including future use, that the ACCC may make of the information consistent with the ACCC's statutory functions;
- consents to the disclosure of confidential information to the ACCC's external advisors and consultants on the condition that each such advisor or consultant will be informed of the obligation to treat the information as confidential; and
- acknowledges that the ACCC may disclose confidential information to third parties (in addition to its external advisors and consultants) without Paintback's consent if compelled by law or in accordance with section 155AAA of the CCA.

Response to EPA submission

The NSW EPA's submission is largely focused on the ways in which, on its view, the Scheme may be improved. At the outset, Paintback notes that the relevant assessment to

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be undertaken by the ACCC is whether the proposed conduct would result in a net public benefit, and not whether an alternative scheme is conceivable which, in the view of an interested party, would be more to its advantage. The NSW EPA's submission may also suggest that the funds raised by the Levy are not being appropriately allocated. In that context, Paintback notes that it is a not-for-profit entity regulated by the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**ACNC Act**), and all of the funds raised by the Levy are applied to further the key elements of the Scheme in order to achieve the public benefits set out in Paintback's application.

1. Paintback should bear the “full cost” of waste paint recovery in NSW

(a) Financial coverage

The NSW EPA's submission states that the Scheme does not cover the full costs of waste paint recovery in NSW because the NSW EPA currently pays all staging costs (i.e., set up, collection and transport costs) of CleanOut events, with Paintback paying disposal costs. The NSW EPA appears to assume that it is, or should be, a fundamental principle of the Scheme that all public costs associated with waste paint recovery (at least in NSW) will be borne by Paintback. However, that is not correct and the scope of the Scheme is ultimately a matter for Paintback.

As the NSW EPA concedes, Paintback already covers over 50% of its relevant costs in NSW, and the fact that the NSW EPA may continue to bear other costs associated with waste paint recovery should not detract from that. Put another way, the benefits to government recognised in respect of Paintback's activities should not be discounted on the basis that the NSW EPA considers that a scheme in which Paintback covers a government's full cost of waste paint recovery would be better.

In the above context, the NSW EPA's proposed condition that additional ACCC approval be required in the event the Scheme / Levy is not covering the full paint recovery and disposal costs of each state is misconceived and unnecessary.

(b) Geographic coverage

The NSW EPA's submission suggests that the Scheme should be extended to cover all (or a significantly higher proportion of) NSW Community Recycling Centres (**CRCs**).

In response, Paintback notes the following.

- In addition to CRCs, the Scheme is offered at non-CRC locations such as commercial waste depots and at Paintback's mobile collection events. Paintback also collaborates with regional waste networks, such as Netwaste, to facilitate additional further events. These non-CRC locations and events help to provide efficient coverage of regional and remote areas. In 2019/20, there were 7 such sites operating, representing a mix of commercial waste depots and local government transfer stations that do not participate in the EPA NSW CRC scheme. Paintback estimates that approximately 2.4 million people, or 32% of the NSW population, lives within 20km of these sites.
- In relation to CRCs specifically, Paintback continues to expand the network in NSW, which now comprises 24 CRCs with 79% of the NSW population within 20

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km of those sites (an increase from 20 CRCs and approximately 70% of the NSW population within 20 km in 2019/20). Through its partnership with the Shoalhaven CRC, Paintback also services an additional 9 sites run by the City of Shoalhaven.

- More broadly, Paintback is a national scheme and, since its inception, has had the geographic objective of having 85% of the population within a suitable distance from a collection site (indeed, Paintback notes that the NSW EPA participated in the working group that developed the Scheme, and supported that design and its objectives in its submissions to the initial ACCC authorisation process). Paintback is exceeding this objective on a national basis. Paintback believes that its aim to achieve an 85% population coverage nationally strikes an appropriate balance between extending the Scheme as broadly as possible and ensuring that the Scheme is economically efficient. There are diminishing returns to increasing coverage – for example, the addition of the further 4 CRCs in NSW resulted in 20 km coverage to only an additional 9% of the population.
- In the above context, Paintback estimates that it would cost approximately 60% to 70% of the costs of covering metropolitan Melbourne or Sydney to cover the remaining CRCs in NSW (or approximately 20% of the population) – which tend to be in geographically disparate regional areas with low populations that generate comparatively low volumes of waste paint. Paintback does not consider that would be an efficient use of funds raised by the Levy.

(c) *Product coverage*

The NSW EPA submits that the scope of the Scheme should be broadened to include the disposal of aerosols and other non-eligible paint-related waste (i.e., bycatch) on the basis that the volumes of these waste products are increasing.

In relation to the issue of aerosols in particular, Paintback's application contemplates that these may be included in the Scheme in the future. However, as noted, significant further work would be required before their inclusion could be implemented (as well as potentially an increased Levy).

In relation to bycatch, Paintback is already responsible for the safe disposal of large volumes of bycatch that arise through the everyday operations of the Scheme (including bycatch collected from NSW CRCs). Incidentally, one of the reasons why it may be difficult to include aerosols in the Scheme is that doing so would be likely to significantly increase volumes of bycatch (e.g., non-paint aerosols like deodorants and cooking oils).

The NSW EPA's proposed condition that the Scheme cover a wider range of paint products within the next two years is therefore also misconceived and unnecessary.

2. *Paintback's servicing (when measured per capita) varies between states*

The NSW EPA states that, on a per capita basis, Paintback's servicing of each state is highly variable, with NSW and the Northern Territory receiving the "lowest contributions" from the Scheme.

It is not clear what "contributions" the NSW EPA is referring to. Again, Paintback is designed to be a national Scheme. State boundaries are relevant to the Scheme only

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insofar as it is necessary for Paintback to engage with various state and local government bodies, and comply with differing regulatory requirements, to pursue its objectives. The Scheme is otherwise designed to be harmonised across states and territories. It is not an intention of the Scheme to “subsidise” particular states or territories; rather, Paintback seeks to allocate the pool of Scheme contributions efficiently across states and territories in the context of waste paint collection benchmarks.

If by “contributions” the NSW EPA is referring to the costs expended by Paintback in delivering the Scheme, then contrary to the NSW EPA’s submission there is not significant variation in Paintback’s servicing between NSW and other states and territories. In particular, the NSW EPA’s contention that NSW receives one of the “lowest contributions” is misconceived. **Table 1** below sets out its collection cost expenditure by jurisdiction.

Table 1 – Paintback collection costs by state/territory				
State	FY2018 (Actual)	FY2019 (Actual)	FY2020 (Actual)	FY2021 (Forecast)
[CONFIDENTIAL]				

[CONFIDENTIAL]

As Table 1 above shows, NSW has not received one of the “lowest contributions” amongst states over recent years. In fact, in 2019/20 NSW received the second-highest spend of all states and is forecast to have the highest collection and disposal expenditure in 2020/21. On a cost per kilogram basis, setting aside the more remote regions such as the Northern Territory and Tasmania, NSW had the highest collection cost per kilogram

[CONFIDENTIAL].

Further, additional spending by Paintback should be taken into account. For example, in 2020, NSW received a disproportionately large marketing contribution. Paintback has invested approximately [CONFIDENTIAL] in NSW from 2017/18 through to the first half of 2020/21, which represents 35% of Paintback’s total national marketing spend, compared to NSW’s population share of 32%. This investment has resulted in increased public

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awareness of, and intention to use, the Scheme. To illustrate, in market research of 2,000 respondents nationally conducted in February 2021, Paintback found that 23% of people in NSW had heard of the Scheme (second highest to South Australia, and against national awareness of 20%), 14% of NSW respondents had used Paintback (being the highest proportion of any state and compared to a national usage of 11%), and NSW had the highest intention to use Paintback (71%). In view of these outcomes, the recognised public benefits accruing under the Scheme are as strong and compelling in NSW as in any other state or territory.

Paintback also undertakes significant R&D in NSW. In that respect, in collaboration with the NSW EPA, Paintback has initiated a two-year to produce closed loop recycled content packaging in partnership with Pact Group and Cleanaway (where plastic pails collected through NSW CRCs are to form part of the feedstock used in the pilot). This represents an investment in NSW over the life of the pilot of approximately [CONFIDENTIAL]. Paintback has also trialled alternative collection models in NSW, for example through trade stores, to ascertain if there are more optimal ways to engage with the public to increase collections.

Finally, the NSW EPA states that it would like to “ensure that NSW taxpayers are getting a fair deal” pursuant to the Scheme. However, NSW taxpayers as a group bear no costs in relation to the Paintback Scheme; rather, it is consumers of in-Scheme paint who do so nationally via payment of the Levy.

3. Paintback’s projections to increase NSW collections volumes are optimistic

The NSW EPA states that Paintback’s projections to increase the volumes of waste paint collected in NSW by 36% (or 660 tonnes) in 2020/21 “appear optimistic”.

Paintback does not consider these projections to be “optimistic”. In fact, Paintback’s volumes collected in the six months to 31 December 2020 in NSW were 1,430 tonnes and, accordingly, Paintback has recently increased its projected volumes for NSW for 2020/21 from 2,449 tonnes to 2,640 tonnes.

The latest projections are based on a number of factors such as the number of current Paintback sites (30), new sites to be established and events held, and Paintback’s projected additional spending to increase participation (e.g., marketing and advertising spending).

4. There should be greater transparency around the Scheme

The NSW EPA states that “there is currently no transparency around the income received from paint sales in NSW and the corresponding expenditure on paint recovery in NSW”, and suggests that conditions be imposed on Paintback to provide detailed state-by-state reporting of funds collected and invested.

Paintback agrees that transparency is important. In particular, Paintback considers it important for governments and the public to be informed about the operation of the Scheme so that they can have confidence that the Scheme is achieving its objectives. It is for that reason that Paintback regularly publishes, in its annual reports and elsewhere, information including:

- Scheme population coverage;

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- the number of Paintback sites (and growth in site numbers) and mobile collection events held;
- waste paint volumes collected (including volumes collected from mobile collection events) and growth in volumes collected;
- paint product packaging volumes collected and the percentage recovered for reuse in Australia;
- research and development projects and trials;
- brand awareness and Scheme satisfaction;
- marketing and advertising campaigns and their outcomes; and
- service provider and partnership information.

Notwithstanding the above, the NSW EPA has asked for various conditions to be placed on the authorisation. Each of those is considered in turn below.

- (a) *Transparency in paint levy income and expenditure including requirements to publicly report a breakdown of: (a) income and expenditure for each state; (b) expenditure on paint recovery and disposal; (c) expenditure on research and development; (d) expenditure on education, awareness and promotional activities; and (e) administration costs*

Greater transparency in respect of Paintback's financial information is unnecessary to safeguard the recognised environmental public benefits accruing from the Scheme (e.g., in the form of reduced landfill disposal or stockpiling of waste A&D paint and developing improved resource recovery outcomes through research and development), and indeed would involve significant public detriments that would compromise the effectiveness (and potentially the existence) of the Scheme.

- **Protecting commercially sensitive information is necessary for a voluntary product stewardship scheme.** Scheme participants are competitors in the supply of A&D paint and, as such, the sharing of commercially sensitive information between them should be limited. Paintback has structured its operations, reporting and meeting formats to protect the confidentiality of each participant's involvement. Processes have also been established to ensure that no participant has access to financial or other records that contain commercially sensitive information of any other participant. For instance, the existing confidential auditing process under the Scheme appropriately balances the need to ensure that the Levy is recovered from Scheme participants with the need to ensure that commercial-in-confidence information about participants' sales is not disclosed to one another, as others may gain a competitive advantage from access to that information. As the ACCC is aware, in its application for authorisation A91504 in 2015, Paintback emphasised that participants would provide commercially sensitive information regarding their A&D paint sales on a confidential basis and this was noted in the ACCC's final determination.
- **Manipulation of proposed public reporting would threaten key participants' involvement in the Scheme.** The importance of maintaining confidentiality,

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including in respect of financial information, is recognised in the Paintback Constitution and Paintback’s agreements with each participant, which specifically state that “[Paintback] acknowledges and agrees with each Scheme Participant that any information disclosed to it...is confidential information, and as such, must not be disclosed or used by [Paintback]..., except for calculating the Scheme Participant’s Levy Contribution”. Participation in the Scheme is voluntary and, for that reason, participants need confidence that their participation in the Scheme does not expose them to the risk that their own commercially sensitive information may be disclosed to their competitors, customers and/or suppliers. If Paintback’s financial information is disclosed, third parties may be able to manipulate that information in such a way that it would disclose the commercially sensitive information of participants. **[CONFIDENTIAL]**.

If the disclosure of Paintback’s financial information causes participants to form the view that their commercially sensitive information may be disclosed to (or discernible by) third parties, there is a real chance that this would trigger participants to withdraw from the Scheme. Paintback’s sole source of income is the Levy as paid by participants. A reduction in the number of participants would therefore have a significant impact on Paintback’s ability to fund waste paint recovery services, leading to a loss of confidence in, and the potential failure of, the Scheme. As the ACCC concluded in authorisation A91504, in the absence of the Scheme a single paint manufacturer would be unlikely to unilaterally impose a levy to fund waste paint recovery services as this would place it at a price disadvantage (and even if it did, the resulting scheme would focus narrowly on the collection and disposal of A&D paint produced by that single paint manufacturer).

- **Disclosure of Paintback’s financial information would give rise to risks in its commercial negotiations and agreements.** There are limited viable substitutes for the services Paintback acquires from third parties to collect unwanted paint from collection sites and deliver that paint to treatment facilities (e.g., due to regulatory requirements and high barriers to entry in supplying these services). The disclosure of Paintback’s financial information would cause detriment in the following ways:
 - **[CONFIDENTIAL]**;
 - publication of Paintback’s financial information, when combined with published collection volume data, would provide specific pricing information on a national and state-by-state market basis to prospective tenderers on the amounts paid to incumbent suppliers, which would prevent Paintback from achieving an optimum pricing position at future tenders, thereby disadvantaging Paintback’s commercial contract negotiations. Paintback’s inability to maintain competitive tension during commercial negotiations and to secure competitive pricing from suppliers will reduce the amount of funding that Paintback will have available to invest in specialist research and direct to the development of new technologies to turn waste paint into valuable products;
 - **[CONFIDENTIAL]**;

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- the publication of Paintback’s financial information would seriously constrain Paintback’s capacity to fulfil its charitable purpose through the resultant higher operating costs; and
- finally, the publication of Paintback’s financial information, when combined with published collection volume data, would provide other acquirers of waste paint collection services – including interested parties such as the NSW EPA – with information about the prices at which Paintback acquires those services, which they would not otherwise be privy to.

Accordingly, the publication of Paintback’s financial information has the potential to cause detriment to Paintback, its participants and service providers. The Australian Charities and Not-for-profits Commission’s current determination is that these matters should not be made public (notwithstanding that an intent of the ACNC Act is to promote transparency) for similar reasons, including that they are commercially sensitive and have the potential to cause detriment, and that the public interest in disclosing those matters does not outweigh the likely adverse effect of disclosure.

(b) Transparency on the processing/disposal outcomes achieved with the paint

It is not clear what information the NSW EPA is requesting in terms of its suggestion that there should be greater transparency on the processing/disposal outcomes achieved with paint.

To the extent the NSW EPA is referring to recovery rate information, Paintback considers that greater transparency on recovery performance would be desirable.¹ However, Paintback is currently unable to publish precise data on recovery performance because it is reliant on service providers for that data, and is determining the most effective way to provide an acceptable level of assurance in respect of its service providers’ activities. Paintback is in discussions with its auditors about how to improve this situation.

(c) Transparency on the outcomes on research and development work, including publicly reporting summaries and findings of all research projects

Paintback already publicly reports on its progress on R&D outcomes in its annual reports. For example, its Annual Review 2019/20 explains that, among other research, Paintback undertook technical trials using Plastech prototype technology to melt high paint content plastic shred to form a new composite polymer (and is awaiting the next generation of this technology to improve economies of scale). Further information beyond that already published by Paintback is not available, either because Paintback is still completing research on an R&D project (i.e., a final report has not yet been completed) or is subject to an NDA in respect of that information.

¹ Paintback notes that Green Industries SA (GISA), in its submission received by the ACCC on 5 February 2021, also calls for the publication of recovery rate information, in particular, the “total quantity of paint sold in Australia to ascertain the relative percentage of paint that is collected and processed through this scheme to determine the scheme’s effectiveness”. However, the metric proposed by GISA is not appropriate because most paint sold is ultimately used and so is not recyclable/recoverable. Paintback considers that a recovery rate based on the volumes of paint collected under the Scheme is the most meaningful and simple metric.

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Response to NFP submission

Paintback's response to NFP's submission is set out below.

1. *The Levy should only apply to paint users that can fully take advantage of the Scheme*

NFP appears to suggest it should not pay the Levy unless it can fully take advantage of the Paintback Scheme. However, the Scheme's purpose is to ensure that, more broadly, paint users pay for the costs associated with properly disposing of waste paint. As the ACCC noted in Authorisation A91504, "[b]y ensuring that most consumers pay closer attention to the full cost of the affected products to society, the levy should result in a more efficient allocation of resources throughout the economy" (at p. i) and "[t]o the extent that consumers pay closer to the full social cost of A&D paint, the price increase that may occur due to the levy is likely to signal a more efficient allocation of resources in the economy" (at p. 10). To the extent that NFP suggests an alternative Scheme in which users pay to dispose of their waste paint, such a Scheme would be relatively ineffective for the obvious reason that volumes collected would be much lower than under the current Scheme where funding for that disposal is obtained from the Levy.

Further, Paintback re-iterates that the relevant assessment to be undertaken by the ACCC is whether the proposed conduct would result in a net public benefit, and not whether an alternative scheme is conceivable which, in the view of an interested party, would be more to its advantage.

2. *Volume disposal limits at Paintback sites have prevented NFP from accessing the Scheme*

It is stated that "[o]ne of the main reasons [NFP] cannot and has never used this service is because Paintback accepts a maximum of 100 litres in volume per visit. REGARDLESS IF THE PAINT BUCKETS ARE FULL OR EMPTY".

In respect of the 100 litre limit, this requirement is in place to strike a balance between ensuring:

- that the Scheme is compliant with maximum capacity regulations in the *Australian Code for the Transport of Dangerous Goods by Road & Rail* (such that people using the Scheme do not need a licence to transport waste paint) and state/territory site licensing restrictions;
- equity of access to participants; and
- administrative simplicity.

In respect of equity of access, increasing or removing the 100 litre limit may result in participants disposing of large volumes of waste paint that necessarily limit the volumes that can be disposed of by others, or volumes beyond the capacity of a site (thereby preventing other participants from using that site until the volumes are cleared). In other words, the 100 litre limit services to efficiently allocate scarce capacity amongst users of the Scheme. The 100 litre limit also balances the interests of households and trade painters so that both can reliably access the Scheme (by contrast, non-Paintback local

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government transfer stations typically only accept 20 litres of waste paint per drop-off and do not accept trade-generated waste).

Further, the 100 litre limit applies whether paint buckets are full for safety and risk management reasons (e.g., should a spillage event occur whilst waste paint is being transported).

The Scheme is as accessible to NFP as it is to any other person. In particular, trade painters with relatively high waste paint volumes (including volumes that have been accumulated over a lengthy period of time) will often use the Scheme to dispose of their waste paint by splitting their volumes and delivering them to Paintback sites over time and that same approach is open to NFP. Illustrating ease of access, the vast majority of trade painters are satisfied with the Scheme in its current form: in a survey of 300 trade painters undertaken by Paintback in June 2020, 90% of respondents indicated that they were satisfied with the Scheme and 98% indicated that they would use it again.

3. *In the absence of the Scheme, the Levy funds could be applied to alternative uses*

Finally, it is suggested that in the absence of the Levy NFP could have used those funds in a number of alternative ways (e.g., to help offset costs associated with supplying Enviro Washes or employing a fulltime workplace health and safety officer). Paintback accepts that there are alternative uses of the money that is being collected by way of the Levy, some of which may also have public benefits. However, that should not detract from the fact that the use of the Levy to fund the Scheme clearly has various public benefits previously recognised by the ACCC (and, in any event, NFP provides no evidence that, in the absence of the Levy, it would have applied those funds to those alternative uses).

Please let us know if the ACCC requires any further information regarding any aspect of the above.

Yours sincerely



Alistair Newton
Partner