

Mr Gavin Jones
Director Adjudication
Australian Competition and Consumer Commission (ACCC)
By email
Cc: Mr Ben Janover, Analyst

Dear Mr Jones

5th July 2024

Re: Tyre Stewardship Australia (TSA) – ACCC Draft Determination and Interim Authorisation

The Australian Tyre Recyclers Association (ATRA) is pleased to make the following comments on the ACCC TSA Draft determination and interim authorisation for scheme AA10000655.

In particular, ACCC has requested feedback on the following two issues:

- *Whether there is a need for more consistency and transparency in TSA's data reporting and how this could be achieved.*
- *To what extent participation in the Scheme requires commitments that go beyond what is required by law and therefore results in public benefit.*

ATRA SUBMISSION

This following is submitted in issue headings focused on where ATRA believes the ACCC final determination can best ensure a more transparent, ethical and effective authorisation for the tyre stewardship scheme.

In particular this submission addresses:

- Data reporting – Consistency and Transparency
 - Collection rate reporting
- Scheme Governance
 - Independent Scheme Reviews
- Scheme improvements – Going Beyond the Law

ATRA POSITION:

ATRA supports the re-authorisation of the Scheme and is pleased the ACCC has engaged so thoroughly in developing this initial, draft, position. ATRA hopes the following comments can further strengthen the ACCC position and ultimately the Scheme to the benefit of participants, the community and environment.

FUTURE PRIORITY FOCUS

ATRA notes the primary market failure in the used tyre sector remains off the road (OTR; mine sector) tyres. In this regard we note the Draft determination comment that:

'... considering the low participation rates and significant impediments that still exist in relation to OTR EOLTs, to the extent the Conduct can grow the collection and recovery rates of OTR EOLTs via investing in relevant research and development over the next 3 years, this would have the potential to significantly increase TSA's ability to achieve the claimed environmental public benefit.'

ATRA would support this proposition as being a needed focus for TSA but also possibly Federal regulatory attention. It is clear voluntary moves are being made by sectors of the mining industry to address their waste/ resource recovery sustainability obligations. This is welcome and the industry is responding with improved infrastructure to manage this material. Ultimately, it may also be useful for the mining sector to have some form of stewardship program to further advance this work, capture free riders etc

But as a key focus for attention, given the success in collection of passenger and commercial tyres, enhanced recovery of OTR's is in urgent need of policy focus.

SUMMARY

1. TSA must be required to publicly correct the record of previous misleading statements associated with the unsubstantiated notion that tyre 'dumping' had increased.
2. The ACCC must require of TSA that 'collection' rates for used tyres are reported upon as a specific, individual reporting category, as distinct from recovery, landfilling, etc.
3. The ACCC draft provides insufficient clarity and guidance to TSA regarding recycling sector Board roles and involvement in the Scheme.
4. There are a range of additional ('beyond the law') considerations TSA could adopt to drive greater Scheme outcomes and we have outlined some initial thoughts on these.

DATA TRANSPARENCY AND REPORTING

The Draft asks a question of respondents, in two parts, as to whether, *'there is a need for more consistency and transparency in TSA's data reporting and how this could be achieved'*.

ATRA believes both transparency and consistency of a set of agreed data points is essential for the credibility of the Scheme and the industry more broadly. ATRA made substantive representations in our original submission to the ACCC regarding inaccurate data presentations by TSA that we believe still require public correction.

ATRA contends that TSA has not used the data provided by Scheme participants (namely recyclers) and therefore the privilege associated with ACCC authorisation, in the manner the TSA guidelines and requirements stipulate.

ATRA asserted in some detail in its initial review submission that TSA had represented data provided to TSA by recyclers under the arrangement of the Scheme guidelines in a manner that could be perceived to be misleading in nature.

It's clear from the draft determination that the Commission acknowledges that *'TSA's data reporting may not be sufficiently transparent and consistent'* noting that *'it has needed to make additional data requests to TSA to obtain a fulsome understanding of outcomes from the Scheme'*¹.

Nevertheless, many policy makers and industry observers are of the view that TSA's previous unsubstantiated contention that *'Australia's dumped tyre pile is getting bigger'*, and which was amplified by an associated and coordinated media campaign in major mainstream media, remains a fact.

This statement has never been substantiated by TSA.

¹ Draft Determination – paragraph 4.105

In response to the assertion that TSA had changed reporting protocols and made misleading statements publicly, TSA submitted to the ACCC:

- *TSA has commenced a third-party peer review of its data management which is expected to be published in mid-2024.*
- *TSA has always reported 'landfilling' as 'not recovered', which is standard for waste reporting in Australia. TSA submits its reporting of increased illegal dumping is backed by credible data and information from external sources, including direct engagement with local governments and data sets².*

If this data exists ATRA has never been provided with it, despite having requested any detailed data from TSA on numerous occasions.

ATRA notes:

- The fact that *TSA has always reported 'landfilling' as 'not recovered'* has no bearing on clarifying the basis for the misleading TSA media release that stated, 'Australia's dumped tyre pile is getting bigger'. The categorisation of 'landfilling' and 'not recovered' is not the issue here.
- The real issue is that TSA is claiming not recovered and landfilled as equating to 11.3 million tyres being **dumped**. TSA has provided no basis for the statement that *Australia's dumped tyre pile is getting bigger and equates to 11.3 million car tyres being stockpiled, illegally dumped, landfilled, or hidden in warehouses, on industrial sites, unsuspecting landowners' properties, and even national parks³.*

The TSA submission to ACCC actively contradicts the media release statements that TSA has made. In one of the requests for further information from ACCC ⁴, *TSA submits that this increase (less tyres going to an environmentally sound use) is likely due to a combination of factors including lower gate fees at regional landfills, greater clean ups of contaminated stockpiles at regional transfer stations, reduced access to shipping containers and significant price increases for shipping containers during and post COVID lockdowns.*

In this statement, TSA again demonstrates that it has no justifiable basis to claim that 11.3 million tyres are being dumped, as the accompanying headlines its coordinated media campaign implies. If in fact the data is correct around 10M of these tyres are in fact being legally landfilled and not 'dumped', though policy makers and observers have been led to an alternate conclusion.

Evidence of TSA misleading reporting of data is contained no-less than in the Federal Department of Climate Change, Energy, Environment and Water (DCCEEW)⁵ submission to the ACCC's TSA reauthorisation consultation. The submission states:

² <https://www.accc.gov.au/publicregisters/authorisations-and-notifications-registers/authorisations-register/tyre-stewardship-australia-limited-0>.

³ <https://www.tyrestewardship.org.au/news/media-release-new-data-reveals-a-worrying-trend/>

⁴ TSA's response to ACCC request for further information, 30 April 2024, p 10, available at: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/tyre-stewardship-australia-limited-0>

⁵ <https://www.accc.gov.au/system/files/public-registers/documents/Submission%20by%20the%20Australian%20Government%2C%20Department%20of%20>

- Unrecovered tyres: the estimated gap in recovery of passenger, bus and truck tyres of 3 per cent represents a significant number of tyres remaining outside the recycling system, equating to around 11.3 million tyres illegally dumped or stockpiled.

In fact, 3% of the passenger, truck and bus market is likely to be around 10% of that figure at around 1.3M tyres. TSA's misleading communications have unequivocally led to policy makers misunderstanding the degree of 'market failure' evident in the industry.

Importantly, policy makers are being urged by TSA to 'act' on this unsubstantiated assertion of increased dumping and the apparent 11.3M tyres lost to the environment, with some form of market/ regulatory intervention.

ATRA acknowledges that TSA will have a *third-party peer review of its data management which is expected to be published in mid-2024*. However, this does not change the fact that misleading data and accompanying alarmist and misleading headlines have been publicised in a media release by TSA and re-published in media at least 7 times. ATRA contends that TSA has a duty, through this Determination process, and as the ACCC endorsed steward to publicly set the record straight as it has given no valid and justifiable reason for its public misrepresentations of data.

ATRA therefore reiterates our firmly held belief that TSA should be required by ACCC to fully publicly withdraw the misleading statement and correct the record. To allow this statement to stand would seem to allow an ACCC authorised scheme to engage in misleading conduct, presenting an apparent 'market failure' that has no basis in fact and could result in unnecessary market intervention by regulators.

On this basis, ATRA asserts a condition of the Authorisation must be that:

TSA is required to publicly correct the record of previous misleading statements and media releases associated with the unsubstantiated notion that tyre 'dumping' had increased that has evidently skewed policy makers perceptions of tyre market performance, which has undermined confidence in the services that Australia's recyclers provide.

COLLECTION RATES MUST BE COMMUNICATED

With reference to the ACCC request that interested parties provide feedback regarding '*whether there is a need for more consistency and transparency in TSA's data reporting and how this could be achieved*', ATRA specifically requests the following to be considered by the ACCC.

Given the importance to policy makers and the broader public understanding collection rates of used tyres and thereby understanding the degree of illegal disposal (i.e. dumping and potentially some stockpiling), ACCC should require of TSA that collection, landfilling, stockpiling and recovery rates (as separate and unique categories) are all clearly outlined in all future public communications of TSA data.

The ACCC Draft states, '*TSA does not report, or record, data on EOLT collection outside the context used elsewhere in this table. TSA feels it doesn't add any additional value to record collection in the % context of generation.*

[Climate%20Change%2C%20Energy%2C%20the%20Environment%20and%20Water%20-%202020.02.24%20-%20PR%20-%20AA1000655%20TSA.pdf?ref=0&download=y](#)

- a. ATRA fundamentally disagrees with this proposition and would be concerned if ACCC allows this position to stand.
- b. Collection rates must be publicly reported.**
- c. Policy makers and the community are primarily concerned with illegal and dangerous behaviour namely excessive stockpiling and dumping in the environment, to which ATRA has been advised by TSA that this rate has remained stable at 2-3% of the passenger and commercial markets.
- d. Dumping and illegal stockpiling are rightly categorised outside the definition of 'collection' – these illegal activities and the percentage of the total market these practices represent are a considerable focus of any possible policy intervention.
- e. ATRA is concerned, that in seeking to not report on collection rates, policy makers will not have a transparent understanding of the degree to which tyres that are collected are legally or illegally (i.e. dumped) disposed of. And the degree to which used tyres are impacting the environment, community and business and make commensurate policy decisions in response.
- f. As we have previously advised the 'collection' rate of used passenger and commercial tyres – leading to legal outcomes - is amongst the highest of any waste stream in Australia. Policy makers must be accurately informed of this and TSA holds the position of supplying this kind of data to inform policy makers, business and community. This data must therefore be consistent, transparent and accurate and ATRA is concerned TSA's current approach does not reflect these objectives.

SCHEME GOVERNANCE

In ATRA's view the ACCC Draft does not provide specific enough guidance to TSA in relation to recycler sector Board representation and that by leaving this issue for TSA to resolve the status quo will simply be maintained. This would not be dissimilar to the points identified by the ACCC in Determination AA1000409, 24 May 2018 (specifically points 132 and 133). ATRA is concerned that maintaining the status quo will facilitate the ongoing lack of recycling representation on the Board and ineffective industry engagement.

The draft states:

1. *The ACCC recognises that there may be some greater potential for an actual or potential conflict of interest issue to arise in respect of tyre recycler representation on the Board, compared to other categories of participants that have less, indirect benefits from TSA's activities.*

ATRA does not support this proposition. Possible conflicts of interest are not exclusive to recycler interests and existing Board members may be equally as conflicted as recyclers, depending on the nature of the policy or other issue being assessed by the TSA Board.

It's rather the fact of manufacturer dominance of the Scheme, and the fact that importers currently pay the voluntary levy (which is the primary consideration for board seat distribution), that the focus has been on apparent recycler governance issues only.

As an example, manufacturers / importers on the TSA Board have endorsed TSA seeking to prosecute a case for a highly interventionist extended producer responsibility model for Australia, despite grave concerns with these models from the recycling sector. ATRA believes a highly interventionist EPR model (as defined by the examples put forward by TSA in New Zealand, Canada and Italy) would represent a clear conflict of interest as a TSA styled Scheme Coordinator would determine collection prices and who can and cannot operate within such schemes and prescribed geographic zones.

The draft also states;

2. *'the ACCC encourages TSA to find ways to enable greater involvement from all sectors of the industry in the strategic direction of the Scheme, whether by appointing additional Board representatives who hold no active industry roles or via other means, such as targeted consultation.'*

ATRA is concerned the TSA response to this proposal of the ACCC to 'encourage' TSA to act will simply see TSA re-initiate its ineffective 'industry consultative group' (ICG) and continue to result in the non-involvement in the Scheme of the recycling sector.

ATRA is also concerned that the ACCC appears to be taking a position that 'no active industry' participants could be on the TSA Board.

Active industry participation is exactly what is required for TSA. TSA like any other material product stewardship scheme is making various decisions for and about the industry. It's precisely the lack of current real-world knowledge of the industry that has given the actual recyclers such little faith in the organisation for so long.

This is particularly so when considering that TSA states in the 'Application for revocation and substitution'⁶ *In respect of a transition to a Regulated Scheme, TSA submits that: Effective transition will likely require the expertise of TSA to help inform the Minister's decision and may also be required to help re-design the Scheme.* TSA itself states that it will provide expertise to the Minister to re-design the Scheme. It is therefore paramount that broad, industry wide representation is on the Board to ensure a balanced re-design of the Scheme, should that eventuate.

ATRA would reiterate the obvious need for appropriate governance regimes to address any possible conflicts of interest of either manufacturers or recyclers, not simply the exclusion of them.

3. *The ACCC encourages TSA to look at other similar industry organisations and try to find ways to appropriately manage potential conflicts, rather than just avoiding them entirely.*

ATRA notes in this regard that the following stewardship schemes have recyclers on the Board and demonstrate that such perceived conflicts can be managed:

- [Battery Stewardship Council](#): Ben Pritchard, Envirostream (Battery Recycler)
- [Australian Packaging Covenant Organisation](#) (APCO): Lee Smith (Veolia employee) who is nominated by the Australian Council of Recyclers (ACOR).

Will the direction to 'try and find ways' be sufficient to ensure appropriate Scheme governance does transpire? The ACCC has in previous determinations made similar entreaties to TSA but with no effect.

ATRA is concerned the lack of a specific directive from the ACCC will embed the status quo and we would request much greater clarity and certainty to these ongoing issues be provided by the ACCC.

⁶ Tyre Stewardship Australia, Application for revocation and substitution, 4 December 2023, p 5, available at: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/tyre-stewardshipaustralia-limited-0>.

SCHEME REVIEWS – THE NEED FOR GENUINE INDEPENDENCE

ATRA supports the Federal DCCEEW proposition in their original submission (Pt 3.5 of the Draft) and the need for a truly ‘independent’ review of the scheme.

Given the consultants were appointed and managed by TSA and will have invariably been shaped and guided in their conclusions by TSA, ATRA remains unconvinced that the 2020 ARCOONA review meets a criteria of, independence. ATRA remains concerned that any reviews of the Scheme should be, and seen to be, truly ‘independent’. The absence of such independence in Scheme reviews will continue the perception Australia’s TSS is largely unaccountable.

SCHEME IMPROVEMENTS

ACCC has asked: *‘To what extent participation in the Scheme requires commitments that go beyond what is required by law and therefore results in public benefit’*

The following additional objectives on Scheme participants could be required to advance improvements in the industry. ATRA would suggest, given the lack of progress that has occurred in these areas since TSA inception, that these improvements are unlikely to eventuate without ACCC requirements.

1. **Ban all landfilling** of tyres by all participants (with some needed exemptions for legacy stockpiles). A ban to landfill of all used tyres goes beyond the current extremely weak Scheme objectives which state:

All participants in the Scheme must also commit to **contribute** to: *‘elimination of disposal of EOLTs to landfill’*

As previously advised an additional existing Scheme requirement had been to ‘contribute’ to the, *‘elimination of the inappropriate export of baled tyres from Australia’*, and yet this practice was endorsed by TSA until such time as the Federal government intervened and banned it.

There is simply too much lethargy within TSA for the kind of ‘voluntary’ obligations previously prescribed to actually be implemented. Far better is an ACCC requirement to ‘go beyond the law’, in this case that landfilling is banned as a practice for all participants. In addition, the caveat in the current Scheme guidelines that the cost of collection/recycling in regional and remote areas should be a determinant of whether landfilling is permitted as an alternative should be abandoned.

2. **Retailer Objectives:** Halt the supply of new tyres (by manufacturer/ importer participants) to any retailer caught dumping or otherwise illegally disposing of their old tyres.

In the case where a retailer or fleet operator, acquiring new tyres from Scheme importers is determined to have been illegally disposing of their used tyres, TSA should require of the tyre importers to discontinue their supply of new tyres to these businesses. Discontinuing supply of new tyres to unscrupulous retailers caught / prosecuted dumping their old tyres would be a powerful incentive for these handful of rogue operators to discontinue such practices.

3. **Mass balance reporting:** Manufacturers/importers should be required to provide accurate sales data to retailers that can then be cross referenced against their disposal data (volumes collected by licenced recyclers). This would provide an accurate mass-balance and help ensure against illegal disposal.

An important missing component of all state and territory regulators is the difference between inflows and outflows. Regulators have little way of knowing how many tyres a retailer has received vs the volume of tyres disposed of.

A system of recording and reporting on each stores inflow volumes would allow TSA and regulators to cross reference and detect fraudulent reporting and accurately assess whether the waste generator (retailer) has legally disposed of their waste tyres.

4. **Procurement:** A range of sustainable procurement objectives for used tyre products could be built into the Scheme. These may include;

Re-Treads: Requiring all participants (especially local councils) that either operate or procure commercial vehicle services to stipulate the use of re-treaded tyres for their own and contracted bus and trucking fleets.

This would help drive procurement in the truck and bus segment of the market further up the waste hierarchy, as re-treaded tyres substantially reduce the use of virgin material and deliver numerous environmental benefits.

Rubber Crumb: State and Local government participants could be encouraged to buy or have contractors buy, locally manufactured rubber crumb as they prescribe certain quantities of crumb rubber asphalt in their road building programs.

END