

5 April 2024

Our ref: BJH KBWI 199118

Mr Gavin Jones
Australian Competition and Consumer Commission
Level 17, Lonsdale Street
MELBOURNE VIC 3000

Via email: ben.janover@accc.gov.au;
miriam.kolacz@accc.gov.au;
david.hatfield@accc.gov.au

Ben Hamilton
Partner

Kurt Wicklund
Senior Associate

Reference: AA1000655

Dear Mr Jones

Tyre Stewardship Australia's (TSA) response to ACCC's request for further information dated 21 March 2024

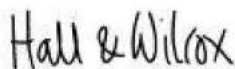
Thank you for progressing the assessment of Tyre Stewardship Australia Limited's application for authorisation (AA1000655) (**Application**).

We confirm receipt of your request for further information dated 21 March 2024 (RFI) and enclose our client's responses to the RFI as Schedule 1 to this letter (**Response**).

Please note that the Response is submitted to clarify the matters raised by the ACCC in its RFI and is not intended to vary the terms of the Application.

Please let us know if you have any further queries.

Yours faithfully

A handwritten signature in black ink that reads 'Hall & Wilcox' in a cursive, script font.

Hall & Wilcox

Schedule 1

Tyre Stewardship Australia's (TSA) response to the Australian Competition and Consumer Commission's (ACCC) request, date 21 March 2024, for further information to progress TSA's application for authorisation AA1000655 (the Application).

Thank you for providing TSA with the opportunity to provide further information, in response to specific questions from the ACCC, regarding the Application.

The Application is made in respect of certain conduct undertaken by TSA in administering the Tyre Product Stewardship Scheme (**Scheme**) pursuant to the Guidelines for the Scheme (**Guidelines**) that might contravene certain provisions of the *Competition and Consumer Act 2010* (Cth) (**proposed conduct**).

The ACCC request for further information has six parts:

- 1. Apparent conflict of interest on TSA's Board**
- 2. Public benefits with and without the proposed conduct**
- 3. Incorporation of the mining sector into the Scheme**
- 4. Complete data sets**
- 5. Promoting broader participation**
- 6. Dealing with non-accredited participants**

The TSA response to each of these six parts is provided below, based on our summary of the questions posed by the ACCC.

1. Apparent conflict of interest on TSA's Board

The TSA Board engaged Landell¹, an independent organisation with expertise in probity and governance, to conduct a review and provide a report on issues of governance and conflicts of interest associated with TSA Board membership.

The TSA Board received the 'Landell Report' in November 2020. As requested, TSA has provided a copy of the Landell Report at **Annexure A: Landell, TSA: Conflict of Interest and Governance Considerations Associated with Board Membership, 12 November 2020**.

TSA would be pleased to discuss the Landell Report with the ACCC if clarification of any element is required.

¹ <https://www.landell.com.au/>

2. Public benefits with and without the proposed conduct

a) TSA comment on the proportion of end-of-life tyres (EOLT) likely to be recycled over the 3-year duration (of the proposed Authorisation) in the absence of the proposed conduct.

TSA anticipates that in the absence of the proposed conduct, the relative proportion of EOLT likely to be recycled over the three-year period will stagnate and potentially decline. TSA anticipates that recovery for waste-to-energy would increase.

In respect to reasons for the decline in recycling, as examples, in the last five years:

- TSA has seen an estimated increase of almost 50% in the production and domestic use of recycled rubber derived from EOLT such as rubber crumb and granules (excluding steel recovered from processing tyres). This increase in recycling into products used in Australia can be attributable partially to the \$9 million investment by TSA in market development and campaigns promoting products using tyre-derived materials.
- TSA has been actively engaging with the mining sector with the goal of increasing the recovery for recycling of EOLT, and in the absence of the proposed conduct, this momentum would be diminished.

While it is difficult to predict the ramifications of the absence of the proposed conduct, the impacts may also include:

1. Push towards higher value markets will diminish as lower order markets become the norm.
2. A failure to secure high value markets and continued reliance on export may result in negative social and environmental consequences should offshore markets stop or diminish over time.
3. Support for small to medium tyre collector and recycling operators to disappear potentially impacting competition.
4. New and emerging technology investments may choose not to enter the Australian market.
5. Greater opportunity for poor practices across all tyre categories to occur resulting in greater costs to the community.
6. Diminished drive to address the specific challenges of rural and remote areas of Australia.

b) TSA data (specified as a percentage of EOLTs, EPU, and tonnes) on the proportion of the total of the EOLT generated that was collected by accredited participants, for the financial years 2021/22 and 2022/23. And what proportion of those collected by accredited participants went to an environmentally sound use, and what happened to the remainder that did not.

See Table 1 below for this information.

Table 1: Proportion of EOLT collected by accredited participants and went to an environmentally sound use

Proportion EPU/tonnes	2020/21	2021/22	2022/23
% of total EOLT generated that was collected by participants	47%	44%	46%
% of EOLT collected by participants that then went to an environmentally sound use	92%	83%	81%
Remainder (Assumes 0% dumping from accredited participants).	8% Landfilled, <1% Stockpiled for processing in following year and mass balance losses	16% Landfilled, ≈1% Stockpiled for processing in following year and mass balance losses	18% Landfilled, ≈1% Stockpiled for processing in following year and mass balance losses

*Please note that percentage of EPU is the same as percentage of tonnes, as both are units of weight.

c) TSA information on the cost associated with ensuring an environmentally sound use of EOLT, and comment on whether, and why, this cost would increase in the absence of the proposed conduct.

TSA analysis indicates that the current ‘displayed’ cost associated with ensuring an environmentally sound use of an EOLT to a consumer is just under \$8 per EPU (see Table 2 below). In the absence of the proposed conduct, it is expected that the cost associated with ensuring an environmentally sound use would be relatively stable, in accordance with inflation.

As context, all EOLT impose a cost. There are costs associated with resource recovery², and costs associated with those tyres that are not recovered (unrecovered).

In respect to resource recovery, there are many different situations and management options, and these differ in terms of their costs.

At the present time, over 70% of tyres processed for recovery are to produce a tyre derived fuel for energy applications in Asia. It is reasonable to assume that, in the current operating environment, this is the most cost effective and efficient resource recovery pathway.

The cost for this and other recovery pathways is reflected primarily in ‘disposal charges’ imposed by a tyre retailer when the public and businesses exchange their old tyres for new tyres. The tyre retailer then pays an EOLT collector or recycler to pick up the EOLT.

Alternatively, where a larger business generates EOLT onsite, they will directly engage an EOLT collector or recycler to pick up the EOLT at a cost for collection, which primarily reflects the gate fee charged at a tyre reprocessing facility.

² [Australian standard for waste and resource recovery data and reporting \(dcceew.gov.au\)](https://www.dcceew.gov.au) Resource recovery is defined as activities that culminate in the reprocessing of wastes into products or secondary materials that are returned to productive use, including for energy. May include collection, sorting, reprocessing and/or energy recovery. For data reporting purposes, the quantity of waste allocated to the fate ‘resource recovery’ is the sum of the quantities allocated to waste reuse, recycling, and energy recovery.

TSA analysed a sample of tyre retailer disposal charges³ indicating that for a passenger tyre (car) the mean disposal charge was just under \$8, and ranged from \$4 to \$15, depending on where you are in Australia (see Table 2 below). It should be noted that some tyre retailers may offer the disposal at no additional charge, but it is assumed that the disposal charge is factored into other line items.

Table 2: Current EOLT disposal charges by retailer to consumer

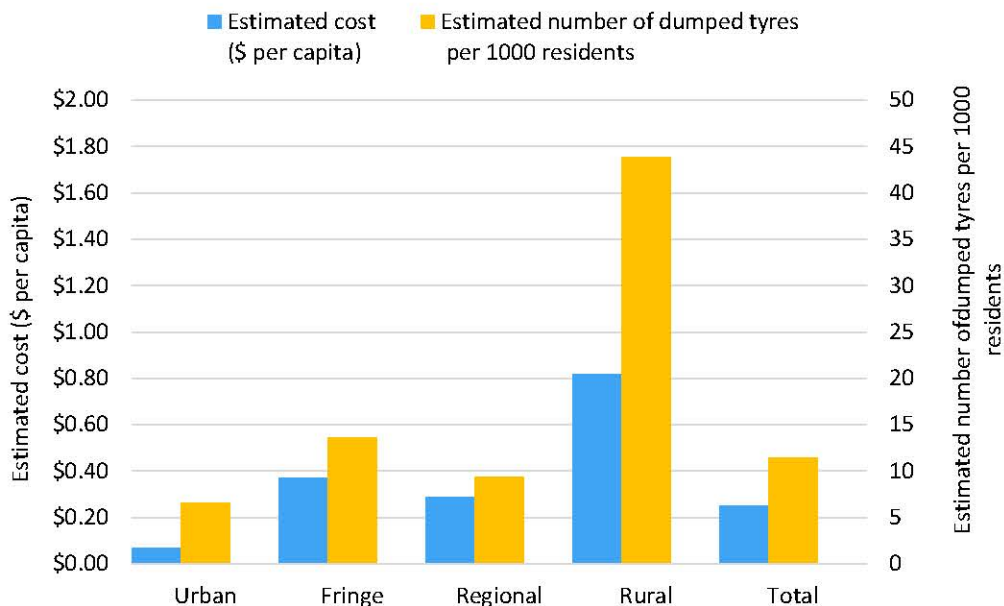
Tyre Type	Disposal Cost ⁴	Sample Min	Sample Max
Car	\$7.62 (\$6.54, \$8.70)	\$4	\$15
SUV	\$10.99 (\$8.87, \$13.11)	\$3	\$21
Light Truck	\$18.35 (\$13.93, \$22.77)	\$12	\$25
Truck	\$20.29 (\$15.22, \$25.36)	\$15.50	\$30

In respect to unrecovered EOLT, dumping and illegal stockpiling is ultimately paid for by the community and the impact is felt disproportionately across different communities.

A soon to be released TSA commissioned report on the cost of dumping and stockpiling on councils and other land holders, shows on average councils spend about \$22 for every dumped tyre they clean up. This cost is often in addition to what a consumer has already paid to a tyre retailer for an expected responsible disposal. In 2022-23, about 300,000 tyres were cleaned up by councils at an estimated total cost of circa \$6m.

The report also shows regional and rural councils face transport costs that are prohibitive to EOLT recycling, and often store tyres while awaiting resources or new waste facilities resulting in a hidden cost yet to be paid. As can be seen in the Figure 1 below, rural councils face much higher costs per capita compared to more populated regions in Australia.

Figure 1: Estimate cost and number of dumped tyres per capita



³ Based on a sample size of 65 disposal charges covering all states and a range of metro and regional areas (Internal analysis).

⁴ Sample Mean & 95% Confidence Interval for Population Mean

In addition, dumping also results in non-market costs, such as reduced enjoyment, amenity, and the actual effects of fires, which are 'paid' by the community. The amenity impact on the Australian community, based on willingness to pay to avoid the issue, is much larger than the financial costs of clean-up, and is estimated at \$100m each year.

d) TSA comment on the practical implications for TSA if the proposed conduct is not authorised.

If the proposed conduct is not authorised, the TSA Board will seek advice and determine the next steps for the organisation. Notwithstanding, it is reasonable to assume that, in the absence of authorisation to undertake the proposed conduct, TSA would be unable to continue to operate.

3. Incorporation of the mining sector in the Scheme.

a) TSA comment on its engagement with the mining sector to overcome impediments to off-the-road (OTR) tyre recovery and recycling, progress on the implementation of a national ban on OTR onsite disposal at mining sites and plans for increasing the participation of the mining sector in the Scheme.

TSA has led engagement with the mining sector in relation to overcoming impediments to OTR EOLT stewardship. As examples, by year:

- In 2020:
 - TSA released a report [Mining Industry – Off the Road Used Tyre Analysis](#), analysing estimated volumes and challenges associated with OTR EOLT recovery in Australia.
- In 2022:
 - Seven (7) OTR tyre importers commenced contributing a levy (amount set as per the Guidelines) for tyres within their segment.
- In 2023 and 2024:
 - TSA released its final report [Tipping the Balance – The business case for a circular economy for Australia's off-the-road tyres, conveyors, and tracks](#), is the first comprehensive analysis of the Australian OTR sectors (including agriculture, construction, industrial and aviation) consumption of OTR tyres, conveyor belts and tracks, generation at their end of life and geographical spread, along with key barriers and challenges to their recovery.
 - TSA commenced its OTR Tyre and Conveyor Belt Sustainability Hub, with the first two events in Western Australia. The inaugural NSW Hub occurred in March 2024 and was supported by the NSW EPA. These events included mining companies listening to presentations from current and aspiring OTR EOLT sector providers such as recyclers.

TSA supports a national ban on onsite disposal of OTR EOLT, however, to avoid unintended outcomes, TSA believes that this should be done via a staged approach, in terms of volumes and timing, which aligns with the capacity and capability of collectors and recyclers to manage the new supply.

Engagement with the mining sector, to increase their participation in the Scheme, is an ongoing priority for TSA, including in respect to advocacy and market development.

TSA is currently undertaking, as examples, the following actions as part of its plan to increase its support for mining sector participation and OTR EOLT outcomes:

- Establishing a new OTR Tyre and Conveyor Belt Hub (annual workshop series) in Queensland.
- Continuing with existing OTR Tyre and Conveyor Belt Hubs in WA and NSW.
- Undertaking further research on the composition of OTR tyres to dispel market concerns.
- Engaging with global technology leaders that have demonstrated OTR EOLT solutions.
- Continuing to support, through market development funds, resource recovery options for the mining sector that meets this segment's needs for ESG and circularity options.
- Continuing to seek a stronger stewardship approach for all tyres (including OTR and conveyor belts) to address the broad market failures.

b) TSA information on the inclusion of mining companies on the Industry Consultative Group.

TSA has not expanded the ICG to include mining companies. Consultation with the mining sector has been undertaken, further to the findings of the Tipping the Balance report that the OTR sector is highly concentrated (e.g., Pilbara WA is 49% of the tonnes of OTR generated in Australia), on a state-based, and place-based manner, with relationships developed with individual mining companies.

c) TSA information on whether the Market Development Fund has supported mining specific projects, or projects that advance the participation of the mining sector and the recovery of OTR tyres.

Further to the investment in the mining sector outlined above (see 2a) the following provides an overview of market development fund projects completed and commenced specifically targeting mining OTR tyres and projects where outcomes are applicable to products developed from all tyres including OTR tyres. The ability to focus on OTR-specific market development projects has increased since OTR tyre importers began contributing in 2022 (see 2a).

Projects applicable specifically to OTR tyres

TSA has invested \$219,000 in three market development projects specifically for OTR tyres with two projects completed and one active project. The two completed projects prove the use of recycled rubber products from OTR EOLT in asphalt and spray seal applications.

Projects applicable to all tyre types including OTR

TAS has invested \$2.9 million across 19 market development projects with 14 projects completed and five active projects. Projects range from research projects demonstrating performance of products containing recycled rubber in the lab and in application, through to manufacturing infrastructure to produce more recycled rubber products. Projects covered applications in roads, mining, civil infrastructure, and manufacturing.

4. Complete data sets

TSA performance against the key performance indicators, as set out in paragraph 62 of the ACCC 2018 determination, in consistent terms, and exact figures, in a table. Underlying figures have been rounded, meaning percentages may not exactly align.

KPI	Metric	18/19	19/20	20/21	21/22	22/23
1a) Tyre Importer Market Share	Tyre imports – total tyres (applicable to levy) (EPU)	64,135,000	70,155,000	75,587,000	55,930,000	63,739,000
	Tyre imports – TSA (EPU)	17,609,000	17,801,000	19,193,000	27,271,000	36,071,000
	Market share of all imported tyres (% of EPU)	27%	25%	25%	49%	57%
	Tyre imports – OTR tyres applicable to levy (EPU)	-	-	-	10,527,000	18,502,000
	Tyre imports – TSA OTR tyres (EPU)	-	-	-	7,160,000	15,866,000
	Market share of imported OTR tyres (% of EPU)	-	-	-	68%	86%
	Tyre imports – passenger and truck tyres applicable to levy (EPU)	41,239,000	41,522,000	46,824,000	45,403,000	45,237,000
	Tyre imports – TSA passenger and truck tyres (EPU)	17,609,000	17,801,000	19,193,000	20,110,000	20,206,000
	Market share of imported passenger/truck tyres (% of EPU)	43%	43%	41%	44%	45%
1b) Vehicle Manufacturer/Importer Market Share	Vehicle sales – total	-	951,000	1,042,000	1,020,000	1,125,000
	Vehicle sales – TSA	-	47,000	83,000	69,000	74,000
	% of New Vehicle Sales	0%	5%	8%	7%	7%
1c) Tyre Retailer Market Share	Total passenger tyres sales (EPU)	17,880,000	17,075,000	19,810,000	18,505,000	23,669,000
	TSA tyre retailer passenger tyre sales (EPU)	11,885,000	12,050,000	11,083,000	11,984,000	10,609,000
	% of EPU	66%	71%	56%	65%	47%*
1d) Tyre Recycler Market Share	Tonnes processed by TSA recyclers	187,000	175,000	173,000	169,000	199,000
	Tonnes processed by non-TSA recyclers	10,400	9,200	7,200	9,000	31,600
	% of tonnes	95%	95%	96%	95%	86%
2) Volume of EOLT collected by Scheme accredited participants	Tonnes	238,000	220,000	246,000	235,000	250,000
3) Volume of EOLT exported via TSA accredited tyre recyclers and collectors that have been verified as going to environmentally sound use increases annually	Exported by scheme participants (tonnes)	177,000	162,000	189,000	143,000	156,000
	Exports by scheme participants that were subject to FEMV program (tonnes)	-	16,000	12,000	12,000	24,000
	% verified	0%	10%	6%	8%	15%

4) Percent of EOLT that are going to environmentally sound use	% of tonnes	69%	72%	68%	63%	58%
5) Users seeking accreditation through the TSA website and general website traffic increases annually	Organic and direct visitors to TSA website	37,271	25,012	26,819	48,194	144,000
6) Growth of the demand for Australian tyre-derived material associated with market development activities promoted, funded and/or supported by TSA	Number of completed market development projects funded	12	20	36	44	54
	Number of market development projects committed/contracted to be funded	19	23	12	12	9

* The method for calculating the retailer market share KPI was refined in 22/23 FY based on improved data from retailers.

5. Promoting broader participation

TSA has set targets for participation in the Scheme by tyre retailers and importers. TSA's Annual Report FY 2022/23 states that 57% of tyre importers and 47% of tyre retailers are participants of the Scheme, which is below TSA's targets of 80% and 75%, respectively.

TSA promotes broader participation in the Scheme through its marketing and communication efforts, and through its direct engagement and advocacy. It should be noted that as a voluntary arrangement, TSA is unable to compel organisations to participate.

Strategies to increase contribution and participation in the scheme have included, and continue to include:

- Frequent and direct conversations with non-accredited contributors and participants, including working with the Department and Minister's office, encouraging participation in the Scheme.
- Direct promotion of TSA accredited retailers and contributors to consumer – radio, newspaper, digital, trade magazines and events.
- Industry engagement activities.
- Working with peak bodies such as the MTAA, Capricorn, and VACC which represent independent tyre fitters.

6. Dealing with non-accredited participants

- a) **Please explain how TSA monitors whether and how accredited participants are dealing with non-accredited participants and provide any data TSA has on how frequently this occurs.**

Accredited retailers and local governments are required to only deal with accredited collectors. In exceptional circumstances the provision to use non-accredited collectors is allowed, where they enter contractual arrangements that are consistent with the objectives of the Scheme.

On the infrequent occasion where a retailer or local government applies for accreditation using a non-accredited collector, evidence is required to demonstrate the use is consistent with the objectives of the Scheme. This includes demonstrating why using an accredited collector is not a viable option.

If considered satisfactory and approval is granted, it is a condition of accreditation that the retailer or local government then become subject to and comply with the same commitments as all accredited retailers, which includes monthly reporting to TSA of how many EOLT are generated and who is collecting the EOLT. This reviewed periodically by TSA staff.

Additionally, TSA conducts an audit program with its participants. Self-Assessment Questionnaires are sent to all retail participants (with a selection of sites physically visited by an auditor each year) and TSA conducts annual compliance audits of all accredited collectors and recyclers. The audits review Scheme commitments, which include the verification of data reported and whether downstream customers are accredited.

Probity and Governance Advisory

Tyre Stewardship Australia (TSA)
Conflict of Interest and Governance Considerations Associated with Board
Membership

Author Lexton Gebert and Shhobaa Palan
Date 12 November 2020
Our Reference LC3856

MELBOURNE

ADELAIDE

BRISBANE

CANBERRA

All correspondence to:

PO Box 24071
Melbourne VIC 3001

Email
info@landell.com.au

Telephone
03 9600 0055

landell.com.au



Table of Contents

1	Important Note	3
2	About Landell.....	3
3	Executive Summary.....	4
3.1	Scope of Landell Engagement.....	4
3.2	Issue 1	4
3.3	Issue 2	4
3.4	Other Strategic Issues	5
	INTRODUCTION	6
4	Scope of Advice.....	6
5	Methodology	6
5.1	Step One: Document Review and Research.....	6
5.2	Step Two: Stakeholder Consultation	7
5.3	Step Three: Draft and Final Report.....	7
	ANALYSIS AND FINDINGS	8
6	Conflict of Interest Overview	8
7	Examination of Issue 1	8
7.1	Actual Conflict of Interest.....	8
7.2	Potential Conflict of Interest.....	9
7.3	Perceived Conflict of Interest.....	9
8	Examination of Issue 2	10
8.1	Actual Conflicts of Interest	10
8.2	Potential Conflicts of Interest.....	11
8.3	Perceived Conflicts of Interest.....	11
8.4	Confidentiality	11
9	Additional Findings	12
9.1	Corporate Governance Role of Recyclers.....	12
9.2	Board Composition and Diversity	12
	CONSOLIDATED RECOMMENDATIONS.....	13
9.3	Recommendations for Immediate Implementation	13
9.4	Strategic Recommendations.....	13
	Annexure A: List of Interviewees	14



1 Important Note

No wrongdoing whatsoever is being suggested in this report. Conflicts of interest need to be examined very dispassionately and objectively, using scenarios that relate to the facts at hand. However, illustrating issues and raising possible scenarios is in no way suggestive of actual circumstances, or of any wrongdoing having occurred.

Where the term “the Director” is used, it is referring to the situation at hand. The term “a Director” denotes hypothetical examples.

When Landell was briefed for this assignment, we were not made aware of the name of the Board member or their organisation, and this fact remains unknown to Landell.

2 About Landell

Landell (landell.com.au) is a management consultancy specialising in providing probity and governance advisory services to the not for profit sector, Commonwealth, Victorian and local governments since 1999.

In the not for profit sector, we have worked with organisations such as headspace, the Australian Red Cross Blood Service, National Disability Services, PHNs, and others.

Note that Landell is not a law firm and does not provide legal advice.



3 Executive Summary

3.1 Scope of Landell Engagement

One of TSA's Board members whose organisation is a tyre importer has recently advised TSA that the organisation is considering a potential investment into the recycling of end-of-life tyres (EOLT). Landell has been engaged to examine conflict of interest and governance issues in the event this development progresses, particularly regarding:

- **Issue 1:** Is there a one-off conflict of interest associated with being a TSA Board member as well as being a tyre recycler or an applicant for an accreditation administered by TSA? If so, what is the most appropriate means of managing the conflict?
- **Issue 2:** If accreditation is (or is not) attained by the TSA Board member, is there an ongoing conflict of interest associated with the Board member also being a tyre recycler or an accredited recycler? If so, what is the most appropriate means of managing the conflict?

3.2 Issue 1

Conclusion: Conflict of interest exists, even prior to an accreditation application being made. Consideration may be given to the Board member standing down immediately.

Oversighting management of an accreditation scheme whilst also applying for accreditation is a one-off actual and perceived conflict of interest. It may be possible to mitigate the **actual** conflict of interest through a conflict of interest management plan without the Board member resigning. Prior to an application, the conflict may be argued to be only **potential**, however if the application process is considered to include matters antecedent to an application and/or if the organisation may be considered to already be a (non-accredited) recycler, then an actual conflict of interest exists and action is urgently required.

A conflict of interest management plan is unlikely to mitigate important aspects of the **perceived** conflict of interest – particularly in relation to a Board member acquiring knowledge prior to an accreditation application being made. The perception of insider knowledge is exacerbated where a new type of accreditation is involved where there may be first mover advantage – in this case off the road (OTR) tyres. Accusations could be made that the Board member has influenced TSA's strategic direction for its commercial benefit.

For these reasons, consideration may be given to the Board member standing down immediately. For the avoidance of doubt, it is recommended that all other Board members confirm whether or not their organisation, or a related entity, is involved (or is considering involvement) with tyre recycling.

3.3 Issue 2

Conclusion: Fundamental and wide-ranging conflicts of interest exists. Recyclers with active commercial interests in the Australian market should not be Board members.

Being responsible for overseeing management of the ongoing compliance of recyclers whilst also being one of those recyclers is an actual and perceived conflict of interest. TSA could seek to implement a conflict of interest management plan to address this, however the following factors are considered to be too problematic for this to be a realistic solution:



- The identified conflicts of interest are fundamental and ongoing, across a wide range of the Board's business. A conflict of interest management plan would be impractical to implement, due to the wide-ranging nature of the conflicts.
- The Board is privy to a lot of sensitive recycler data and strategy and there is a risk that participating recyclers and other stakeholders lose confidence in TSA.

Other tyre importer Board members' organisations may also be considering becoming recyclers and as such there is an argument that a clear precedent must be set on this occasion and used as the model for managing similar scenarios in the future.

3.4 Other Strategic Issues

We have identified a number of other strategic issues for the Board's consideration, including:

- **Board composition:** All Board positions are currently not filled, and the Board composition is relatively homogenous. Consideration should be given to achieving a more diverse Board composition that increasingly focuses upon essential skillsets.
- **Formally Involving Recyclers:** Whilst it is not recommended that recyclers involved in the Australian industry in Australia should be Board members, bolstering consultative mechanisms for recyclers is recommended.
- **Constitutional Change:** To give effect to matters raised in this report and remove some areas of ambiguity, TSA Constitutional change may be required. For example, TSA's Constitution allows for "A minimum of 1 and up to 2 representatives from the tyre recycling industry...", yet, as highlighted, such representatives would very often be subject to a conflict of interest. Also, if a trend develops for importers to also become recyclers, then the designated Board composition in the Constitution (i.e. four or five Directors must be from members who are tyre importers) may be impossible to fill with appropriate candidates.



INTRODUCTION

4 Scope of Advice

Landell was engaged by Tyre Stewardship Australia (TSA) in October 2020 to undertake an independent probity and governance review in relation to a potential conflict of interest involving one of TSA's Board member organisations (a tyre importer). The Board member organisation involved has indicated that it may wish to become a recycler of EOLT. Given that TSA administers the accreditation scheme, two key issues arise from these circumstances:

- **Issue 1:** Is there a one-off conflict of interest associated with being a TSA Board member as well as being a tyre recycler or an applicant for an accreditation administered by TSA? If so, what is the most appropriate means of managing the conflict?
- **Issue 2:** If accreditation is (or is not) attained by the TSA Board member, is there an ongoing conflict of interest associated with the Board member also being a tyre recycler or an accredited recycler? If so, what is the most appropriate means of managing the conflict?

This Report sets out the methodology used to undertake the review, the findings and key recommendations. As requested by TSA, our advice is provided in a neutral or general fashion, so that it has applicability beyond the case at hand, including:

- broader considerations about the appropriateness of types of organisations or sectors being involved with TSA's Board; and
- important developments, such as TSA's current application for Commonwealth funding to expand the scheme it administers to conveyor belts and earth-moving off the road (OTR) vehicles.
- considering the impact on the Scheme (ie. existing participants' confidence in remaining accredited, providing TSA data or sharing information on future investments).

5 Methodology

The following methodology was employed to inform our key activities and deliverables:

5.1 Step One: Document Review and Research

Landell undertook research relating to PSO governance models and other aspects of our advice, and reviewed TSA obtained data in relation to other Product Stewardship Organisations (PSOs). We reviewed:

- Product Stewardship Schemes (Viable voluntary and co-regulated PSO schemes exist only in Australia and New Zealand. For this reason, we conducted minimal overseas-based research.)
- Canadian Institute of Governance Policy Brief
- TSA Stakeholder Contact Lists
- Constitution Act 2001
- TSA Conflict of Interest Policy



- TSA Board Confidentiality Policy
- TSA Annual Report

5.2 Step Two: Stakeholder Consultation

Structured interviews were undertaken with the key stakeholders shown in Annexure A.

5.3 Step Three: Draft and Final Report

Landell prepared a draft report for TSA review, and allowed for up to two rounds of revisions to the report prior to finalisation.



ANALYSIS AND FINDINGS

6 Conflict of Interest Overview

Identifying and managing conflicts of interest requires discussion, clarifying questions and a strong sense of integrity. The Board member has shown integrity by raising the issue.

Under sections 182 and 183 of the *Corporations Act 2001 (Cth)*, Directors must not use their position or use information gained through their position as a director to obtain an advantage for themselves or a third party. It is not suggested that the Director concerned will gain a personal benefit, rather the benefit relates to the third-party tyre importing company that employs the director, and/or any related recycler entity that the importing company may establish.

Various industry bodies such as the Australian Institute of Company Directors concur on the three types of conflict for which directors should be self-assessing:

- Actual conflict, where a director is likely to gain a personal advantage for themselves or a related entity or person, because of their position as a director.
- Potential conflict, where a process has been set in train that, in the future, may create a conflict of interest.
- Perceived conflict, where others may reasonably perceive a conflict, and that perception may create a risk for the organisation with regards to reputation or financial assets.

7 Examination of Issue 1

Issue 1: Is there a one-off conflict of interest associated with being a TSA Board member as well as being a recycler in the Australian market or an applicant for an accreditation administered by TSA? If so, what is the most appropriate means of managing the conflict?

7.1 Actual Conflict of Interest

An actual conflict of interest may be present if the Director is confronted with the dilemma arising from two competing interests; their role as a Board member providing oversight of the accreditation process and the relationship of their company (or a related entity) that submits an application for accreditation.

The Director has indicated that their organisation is considering pursuing delivering recycler services and accreditation for OTR tyres. As such, there is a clear actual conflict of interest associated with the Director's Board role (i.e. overseeing accreditation, market development and strategy) and the interests of the company they represent. If a narrow view is taken that the application process commences when an application is lodged, this conflict can be managed by redaction of all Board information pertaining to the matter, removal of the Director's involvement in relevant Board deliberations and ensuring the Director has no knowledge of the accreditation process relating to the application.

However if the Director's company or related entity is considered to be "in the recycling business" prior to it making an accreditation application (which logically must be the case), then an actual conflict of interest arises at an earlier point in time, regardless of the accreditation status of the Director's company. This is because the Director has access to competitor recycler information and has up-to-date knowledge of TSA's accreditation and compliance management systems and investment in future markets.



8 Examination of Issue 2

Issue 2: If accreditation is attained by the TSA Board member, is there an ongoing conflict of interest associated with the Board member also being an accredited recycler? If so, what is the most appropriate means of managing the conflict?

8.1 Actual Conflicts of Interest

Being responsible for overseeing management and the ongoing compliance of recyclers whilst also being one of those recyclers (or a related entity) amounts to an ongoing, actual conflict of interest. Board members have a fiduciary responsibility to act in the best interests of TSA. This includes actively devising and implementing initiatives to improve the practices and performance of recyclers. A Board member who is an accredited¹ recycler is commercially conflicted against this agenda.

Examples of actual conflicts of interest include:

- TSA sets standards required of recyclers. A recycler who is a Board member is conflicted to champion for lesser or lower-cost standards.
- TSA promotes innovation and industry development. A recycler who is a Board member may be motivated to not effectively embrace or promote innovation opportunities, due to having invested in its own particular technology, in which it has a commercial interest in maintaining or increasing its market share.
- TSA monitors recycling industry trends. A recycler who is a Board member may gain valuable commercial information and insights about its competitors.
- TSA undertakes education, awareness and information activities. A recycler who is a Board member may be motivated to place disproportionate emphasis upon its own recycling solution.
- TSA accredits and suspends recyclers. A recycler who is a Board member may be motivated to limit competition by biasedly opposing accreditation or unquestioningly supporting suspension decisions pertaining to competitors.
- TSA audits recyclers. A recycler who is a Board member may also gain valuable commercial information and insights about its competitors through this process. The Board member may also gain familiarity with auditing processes (e.g. flags that trigger audits) and use the information to benefit their company.
- TSA issues funding. A recycler who is a Board member may also be a funding applicant or seek to question funding to other organisations that may competitively disadvantage their company.

TSA could seek to implement a conflict of interest management plan to address the abovementioned conflicts, however the following factors are considered to be too problematic or impractical for this to be a realistic solution:

- Conflicts of interest are fundamental and ongoing, across a wide range of the Board's business. Hence, significant portions of the Board's records may have to be redacted and the Board member may have to absent him/herself from a relatively significant portion of the Board's business.

¹ Or even a non-accredited recycler – see Sections 7.1 and 7.2.



- The Board is privy to a lot of sensitive recycler data and strategy and there is a risk that participating recyclers and other stakeholders may lose confidence in TSA, resulting in leakage or momentum loss from this voluntary scheme.
- Other tyre importer Board members' organisations may also be considering becoming recyclers and as such there is an argument that a clear precedent must be set on this occasion and used as the model for managing similar scenarios in the future. The impracticalities described above of one importer also being a recycler would be compounded should other importers also pursue this vertically integrated business model.

8.2 Potential Conflicts of Interest

TSA's Conflict of Interest Policy adopts a conservative approach whereby Directors must raise any potential conflicts of interest. Some of the above examples of actual conflicts of interest may also fall into the category of potential conflicts, where the circumstances giving rise to a conflict may occur in the future, as illustrated by the following case study.

A key priority for TSA is to facilitate the development of markets for Australian tyre-derived product (TDP). Firstly, a Director who is a recycler could potentially achieve commercial gain by having access to Board information relating to research and development investments and competitor information. This could involve new and novel technologies that may have first mover advantages or create commercial competition against the Director's company. Secondly, if the Director's company had made a significant investment in building a recycling plant for a particular TDP, the Director would be in a conflicted position and may be motivated by self-interest to oppose the new technology.

Our stakeholder interviews confirmed that the above scenario is realistic.

8.3 Perceived Conflicts of Interest

Even with risk mitigation policies and protocols in place, a perceived conflict of interest may still be present from the perspective of the Tyre Product Stewardship Scheme (TPSS) participants and the industry in general.

Considering that a perceived conflict of interest may adversely impact the confidence in the governance of the Board of Directors and ultimately reduce the participation of tyre recyclers and other stakeholders in the TPSS, it is imperative that all perceived conflicts of interest are assessed with a high degree of scrutiny.

Assuming that the actual conflicts identified in Section 8.1 could be adequately managed, nevertheless this may have minimal impact upon industry perceptions in relation to all of the cited examples. To ameliorate this, TSA could invest further in other measures aimed at addressing perceptions, such as regular independent third-party probity audits aligned with robust industry standards for managing conflicts of interest. Whilst this may reduce (i.e. not remove) the risk of perceived conflict by providing confidence to the industry, such a process would be out of proportion to the most straightforward mitigation – namely discontinuance of the Director's Board role.

8.4 Confidentiality

Issues of confidentiality are closely aligned with the perceived conflict of interest issues discussed above in relation to both Issue 1 and Issue 2. For example, the Director may become privy to commercially sensitive information about other recyclers. The Director has a responsibility to maintain confidentiality pertaining to such information. However, there is a high risk that the industry may **perceive** that the Director could use such information to disadvantage competitors or gain an advantage for their company.



9 Additional Findings

9.1 Corporate Governance Role of Recyclers

A sound corporate governance framework equips the organisation with the necessary management processes to achieve its strategic goals, while complying with policies and legislation. The framework is underpinned by the organisation's constitution. In relation to TSA, its Constitution allows for a minimum of 1 and up to 2 representatives from the tyre recycling industry. The TSA Constitution also provides that "Each Director must comply with the *Corporations Act 2001 (Cth)* in relation to the disclosure of the Director's interests". These two provisions are somewhat conflictual – that is, somebody who is involved with tyre recycling may invariably be automatically conflicted. It is noted that only one of the two possible representatives of the tyre recycling industry have been appointed to the Board, presumably due to the difficulty associated with identifying appropriate, non-conflicted candidates.

Potential TSA Constitutional change may recognise the inherent conflict associated with tyre recyclers in the Australian market, proscribe their participation as Directors and provide for:

- Overseas tyre recycling industry representatives not involved in the Australian market, who may attend Board meetings remotely through an online platform; and
- Recycling industry experts in non-tyre related markets (Australia or overseas).

In relation to tyre recyclers in the Australian market, they participate in an Industry Consulting Group (ICG) comprising recyclers, retailers, tyre importers and other stakeholders. The ICG meets quarterly and provides advisory services to TSA. The ICG would be an ideal mechanism if it was changed to be a recycling forum, or perhaps a sub-group of the ICG could have a recycling-specific focus.

Recommendation: TSA explore ways to convert the ICG to a recycling specific forum or make changes to it that would incorporate a recycling focus.

Recommendation: TSA identify overseas expertise in the tyre recycling industry who do not have Australian commercial interests as candidate Board members.

9.2 Board Composition and Diversity

The TSA Constitution provides for between 8 and 12 Directors, with a minimum of 2 and up to 3 independent Directors. The other 6 to 9 Directors must be drawn from tyre importer members (4 to 5), the tyre recycling industry (1 to 2), and the tyre retail industry (1 to 2). The independent Directors are a clear minority and all other Directors are from the industry. It is understood that the Board has served TSA very well, particularly in the establishment and early years of the voluntary scheme. A commitment to reviewing the future Board composition may enable TSA to continue to progress its agenda.

Recommendation: The TSA Board should develop a strategy to:

- **Achieve more diverse Board membership; and**
- **Move towards augmentation of the Board using skills-based criteria for identifying Board members, in conjunction with the industry-based criteria for Board membership that has served TSA well to date.**



CONSOLIDATED RECOMMENDATIONS

The following are the consolidated recommendations arising from this report:

9.3 Recommendations for Immediate Implementation

- **Recommendation:** Recyclers with commercial interests in the Australian market should not be eligible for membership to the TSA Board. This should be adopted as a formal TSA policy.
- **Recommendation:** Directors whose organisations or related entities become involved with recycling should declare the matter as soon as their organisation commences exploring recycling. An appropriate event or point in time can then be identified as a trigger for the Director standing down from the Board.
- **Recommendation:** TSA identify overseas expertise in the tyre recycling industry who do not have Australian commercial interests as candidate Board members.

9.4 Strategic Recommendations

- **Recommendation:** The TSA Board should develop a strategy to:
 - achieve more diverse Board membership; and
 - Move towards augmentation of the Board using skills-based criteria for identifying Board members, in conjunction with the industry-based criteria for Board membership that has served TSA well to date.
- **Recommendation:** TSA explore ways to convert the ICG to a recycling specific forum or make changes to it that would incorporate a recycling focus.
- **Recommendation:** To give effect to the above recommendations, wherever necessary, amendments should be made to the TSA Constitution and policies.



Annexure A: List of Interviewees

Lina Goodman, CEO, Tyre Stewardship Australia

David Spear, Tyre Stewardship Australia Chair

Russ Martin, CEO, Global Product Stewardship Council

Warren Overton, CEO, TechCollect

Karen Gomez, CEO, Paintback

Rachel Burgess, Assistant Secretary (Acting), Waste Policy and Reform Branch, Federal Department of Agriculture, Water and The Environment