



20 September 2016

## **REDISA's Reply**

to

Treasury's and the DEA's Draft Response Document of 7 September 2016

and

Submissions made at the meeting of the Standing Committee on 7 September 2016

### **Introduction**

1. Treasury and the DEA have made allegations, both orally and in the Treasury's Draft Response Document, concerning REDISA at the meeting of the Standing Committee on 7 September 2016. These allegations are demonstrably not true<sup>1</sup> and REDISA is ready to provide the required proof.
2. But most of these allegations have no bearing on the Committee's principal task, which is to decide on section 13(2) read with Part III of Schedule II of the Bill ('the tyre levy provisions'). Accordingly the thrust of this reply is to concentrate on one issue only: whether the Committee should recommend that the Bill be submitted to the National Assembly as is or that the tyre levy provisions are deleted.
3. But before that issue is addressed it is necessary to address certain misconceptions concerning industry waste management plans and extended producer responsibility organisations (PROs), such as REDISA, particularly in so far as these plans and organisations perform public functions.

### **Misconceptions**

#### *Misconception as to the nature of the REDISA Plan*

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<sup>1</sup> Since these allegations have been made regarding REDISA's performance and governance, REDISA has in an appendix to this Reply responded in summary form to the allegations. If required it will supply the necessary documentation to back its response.

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#### **RECYCLING AND ECONOMIC DEVELOPMENT INITIATIVE OF SOUTH AFRICA**

**Offices:** 4<sup>th</sup> Floor Sunclare Building, 21 Dreyer Street, Claremont, 7708 Postal **address:** PO Box 23217, Claremont, 7735 South Africa

**Contact Number:** +27 (087) 35-REUSE [73873] **Email:** customersupport@redisa.org.za

**Website:** [www.redisa.org.za](http://www.redisa.org.za)

**Directors:** H Erdmann | C Kirk | S Davidson | K Maroga | Dr. B Tapela | X Qubeka | E Sisulu  
REDISA NPC Reg. 2010/022733/08



4. The REDISA Plan is based on the National Waste Management Strategy published by the DEA in November 2011.<sup>2</sup> That Strategy emphasises the well-established waste management principles of extended producer responsibility (EPR), private sector participation and co-regulation. This is what it says:

*Industry is expected to proactively take responsibility for the waste generated throughout the cycle of the product. Mechanisms to so include industry waste management plans and extended producer responsibility programmes...Private service providers play key roles in all stages of waste management, including in waste service delivery and recycling...An expansion of waste services to un-serviced communities will require municipalities to explore alternative service delivery mechanisms including public private partnerships. The private sector is encouraged to actively engage in making universal service provision a reality and growing a green economy. (Paragraph 4.2)*

5. EPR requires producers of waste to take responsibility for the proper disposal of waste. This means that, in the tyre industry, manufacturers and importers of tyres, and the consumers that use them, should be accountable for how they are dealt with when they become waste.
6. In an EPR model, a private party is appointed to administer a waste plan approved and monitored by government. The plan sets required targets, reporting and administration requirements and the fee that may imposed on subscribers. Government retains a monitoring role to ensure compliance with the plan, retaining the right to withdraw its approval of the plan for material non-compliance.
7. In accordance with the conception of co-regulation and the policy and the text of the National Environment Management: Waste Act, 2008 (Waste Act). The Act contemplates that the *private sector* takes responsibility for waste management in the form of a plan or an extended producer responsibility scheme, which is private sector financed and private sector run.<sup>3</sup>

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<sup>2</sup> The Strategy is published on the REDISA site: [www.redisa.org.za](http://www.redisa.org.za)

<sup>3</sup> Chapter IV Part 7 which deals with industry waste management plans specifically targets the private sector for the preparation of industry waste management plans in the form of particular persons, categories of persons (such as manufacturers) or industry that generate waste to submit a plan. The Minister may even give directions for an 'independent person' to do so. In the event that the private sector does not submit a plan, the Minister can turn to an organ of state to do so – see section 29.



8. This co-regulation is the environmental law equivalent of public/private partnerships in which government services are contracted to be performed by private parties either paid directly by government or by the users of the services directly. Although the procurement and manner in which the PPP is entered into by a government or municipal department is regulated by the PFMA and the MFMA, the manner in which the private party's performance, however, is regulated is through the PPP agreement. This is analogous to the process of approval of industry waste management plans by the Minister under the Waste Act with the conditions of the Minister's approval and the plan, itself, constituting the manner in which the PRO's performance is to be regulated.
9. The aim is to develop a sustainable circular economy in terms of which waste becomes an economically valuable commodity – hence the statement in the Preamble to the Waste Act that 'waste under certain circumstances is a resource and offers economic opportunities' and REDISA's motto of "Waste into Worth".
10. The REDISA Plan is regarded as being exemplary of its type, and has received international recognition as being an innovative measure in the implementation of a circular economy.<sup>4</sup>

*Misconception: REDISA is not subject to government control*

11. There is a misconception that REDISA is not subject to government control. It is subject to government control through a range of instruments in much the same way as private parties are regulated in public/private partnerships.
12. In a co-regulation framework, government control is exercisable by regulation (such as the Waste Tyre Regulations), the approved Plan which sets out the performance, administration and reporting requirements, and the conditions of the approval itself (contained in the letter of approval).
13. In this regard, the Minister retains control of the Plan and the conditions of approval. She has oversight over the implementation of the Plan and the power to require information and explanations and, if necessary, to amend the Plan and the conditions of approval.

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<sup>4</sup> See Annexure A.



14. REDISA currently reports on a monthly basis to the DEA. A copy of the latest such report is attached). Audited statements are submitted to the Department and to the Minister on an annual basis.
15. Moreover, because REDISA is a juristic person performing a public function (ie the waste management of tyres), it is subject to the Promotion of Administrative Justice Act, 2000.
16. Accordingly any alleged deficit in its governance or accountability, which is denied, is more properly resolved by amending the regulations, the Plan and the conditions of approval – all available to the Minister in terms of the Waste Act and the Waste Tyre Regulations.
17. It certainly is not achieved by requiring PRO's, such as REDISA, to be made subject to the Public Finance Management Act, 1999. That would be completely at odds with the policy, purpose and text of the Waste Act and the whole conception underlying public/private partnerships and other forms of co-regulation.

*Misconception: The moneys are public monies and therefore subject to the PFMA*

18. Treasury complains that the *"current arrangements are problematic"* because they fall *"outside the Public Finance Management Act with limited or very little accountability to government"*.
19. As set out above, the fact that funds fall outside the *direct* administration of the State is the consequence of government policy, the nature of industry waste management plans and EPRO under the Waste Act (as well as international best practice). As stated above, this regulatory framework and the engagement of industry or private parties on its behalf to develop industry waste management plans is not conceptually different from the whole idea underlying PPP.
20. The allegation that there is *"limited"* or *"very little accountability"* is without foundation. REDISA itself is externally audited and has to date received unqualified audit reports. Those reports are submitted to the DEA annually.
21. The REDISA business model is at once an EPRO collecting its fees or charges from users of the service, with the approved plan regulating the performance by the private party. This is what has allowed it to be so effective in such a short period of time.



## Arguments for proposing the deletion of the tyre levy provisions

### *The constitutional argument*

22. There are principally three constitutional arguments – the first is that the REDISA fee is not a tax; the second is there was no prior consultation; and the third is that no legitimate government purpose is served to cut off REDISA's funds on 1 October in circumstances when no alternative funding has been provided.
23. The constitutional arguments have been aired. Treasury is strongly of the view that the imposition of the levy is constitutional and the Committee's legal counsel appears to be of the same view. Two Senior Counsel appointed by REDISA have independently advised REDISA to the contrary.
24. It takes the matter no further to rehash these arguments in reply, other than to make three brief points:
  - 24.1. On the issue of whether the REDISA fee is a tax, note should be taken that the only leg that Treasury now relies on is that of compulsion. The Committee is again referred to regulation 6(3) of the Waste Tyre Regulations<sup>5</sup> where a tyre producer must either submit a plan for approval or register with an existing approved plan. They do not have to register with the REDISA Plan, the producers can seek to have a plan of their own approved.
  - 24.2. On the issue of consultation, REDISA does not deny that it has met with Treasury in the last few months. It nevertheless maintains its stance that there has been a failure to consult. The decision to change the funding model was taken prior to February 2015, when the decision taken by the Treasury and DEA was announced by Minister Nene. Consultation *after* a final decision has been taken does not constitute consultation for the purposes of the rule of law.
  - 24.3. Although Treasury has consulted with the tyre manufacturers and importers, it has not consulted with the small businesses and

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<sup>5</sup> Regulation 6(3): 'A tyre producer operating on the date of the commencement of these regulations must *either* – (a) prepare and submit to the Minister, an integrated waste tyre management plan within 60 days..., *or* (b) register with an existing integrated industry waste tyre management plan approved by the Minister...'. See the same choice being given to new producers in regulation 6(4).



processors that are dependent on REDISA NPC that have a vital interest in the matter.

25. The deletion of the tyre levy provisions from this Bill will allow for a more considered response to the constitutional issues and a proper consultative engagement with all interested parties. Nothing prevents the Minister from re-introducing the same provisions in a similar Bill in 2017. At least then, there will have been an opportunity for proper consultation and appropriate alternative funding in place.

*Impact of cutting off the funds on 1 October*

26. It is evident from the Treasury submissions that there will be no alternative funding for the period 1 October 2016 to 1 April 2017 and that there is no guarantee what funding, if any it will receive, after 1 April 2017<sup>6</sup>. As has been stated already, the REDISA Plan is predicated on a 5 year cycle, the second cycle of which was to begin at the end of 2017.
27. It bears repeating that REDISA NPC has established a complex and large network of contractual relations. Its Board is subject to the Company's Act, which requires directors not to carry on business recklessly, with gross negligence or trade under insolvent circumstances - section 22. They become personally liable for the loss, damages and costs sustained by it in terms of section 77 of the Act if they allow REDISA to conduct its business in this way or allow it to trade under insolvent circumstances.
28. Treasury has boldly stated, based on figures from Feb 2016, that REDISA has reserves that allow it to continue through to 1 April – a calculation done on the basis of dividing its reserve by its monthly operating costs. This allegation is factually wrong.
29. Treasury's simplistic financial assessment does not take into account that, as a matter of prudence in the absence of certainty as to future funding, the Board of REDISA, under advice of its accountants and lawyers, will have to take the following measures as of 1 October 2016:

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<sup>6</sup>In this regard it is not correct that REDISA has not submitted a business plan – it set out a detailed business plan at its meeting with Treasury on 19 July 2016. A copy of the minutes and the presentation of the plan will be made available. Moreover the DEA and Treasury are in possession of the REDISA Plan that sets out the business plan for its first five years, and the audited financial statements for 2013, 2014 and 2015.



30. It will have to immediately halt any new expenditure with the effect that it will not be able to meet its targets under a Plan with a five year duration, which targets include continuing to create jobs, establishing small businesses and to meet its environmental obligations;
31. It cannot renew existing contracts for the collection, storage and remediation of waste tyres with similar implications for jobs, businesses and the environment;
32. It will have to put aside a part of its reserve to pay for the cancellation costs of any of its contracts that continue beyond its estimated period of operation, which will radically shorten the period for it to continue operating in the short term. This also has the undesirable outcome that funds which should be applied to rolling out a waste tyre processing programme will have in fact to be applied to winding up the programme;
33. It will be obliged under the Labour Relations Act to initiate retrenchment proceedings in respect of its employees or those employed by its service providers, a process which, because it will involve more than 100 employees, will involve a minimum of three months. Since the employees employed at head office are critical to the administration of the Plan, their retrenchment will effectively mean the closure of REDISA NPC and the management company.
34. Treasury advises that this issue may be resolved by REDISA putting forward a business case<sup>7</sup> to receive an appropriation in April 2017 (not necessarily the funds which will be channelled through the DEA). In the first instance REDISA' approved business model does not permit this kind of funding. Secondly, there is no certainty that even if REDISA put forward such a case it will receive funding, and to what extent – which means that no long term planning is possible. Thirdly, the State funded model is in any event contrary to Government's stated policy of co-regulation for waste beneficiation programmes which found the existing REDISA Plan.
35. The impact of cutting off the fee will be to lead to REDISA NPC having to discontinue operations by the end of the year but certainly before March 2017 at the latest. In these circumstances, REDISA (whatever the criticisms that may exist which can only be dealt with in ways other than cutting off its funding) argues that the impact of imposing the levy on, and cutting off

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<sup>7</sup> In this regard, the allegation that it has not submitted its business plans for 2017 is strongly denied. See footnote 5 above.



its funds from 1 October 2016 will lead to the demise of tyre recycling in South Africa. Treasury's blithe statement that there are sufficient reserves to see REDISA through until the latter part of 2017, when alternative funding may be made available, fails to take into account reality.

## **Conclusion**

36. REDISA NPC accordingly requests the Standing Committee to consider the risks associated with the implementation of the levy from 1 October 2016 when no good reason has been advanced as to why it should not be reintroduced in April 2017 or at the end of the Plan's first five-year cycle in December 2017.
37. REDISA accordingly asks the Committee not to recommend the passage of the tyre levy provisions at this stage. The re-introduction of the similar provisions next year will at least have the fee tax dispute settled (the dispute having been referred to the Davis Tax Committee), and the question of alternative funding clarified if the decision is made not to persist with the current fee based model (which REDISA respectfully contends is the correct approach).



## ***Appendix*** ***Performance and governance allegations***

### *Introduction*

38. Treasury, but more particularly the DEA, has made wide-ranging allegations and criticisms of REDISA's performance and accountability in its draft Response Document.
39. There is also the less than subtle innuendo that the funds, which REDISA receives, are not accounted for and therefore being abused and mismanaged.
40. These allegations are devoid of factual substance.
41. REDISA is indeed appalled that allegations of this nature, which are contradicted by facts previously presented to Treasury and the DEA, should find their way into their Response.
42. It is clear from the hearings that Committee members appear to have accepted these incorrect allegations as fact, which leads to the risk that the Committee's decision may be based on fundamental factual misapprehensions.
43. In essence the criticisms and allegations concern the following critical areas:
  - 43.1 REDISA's performance in terms of the Plan;
  - 43.2 Insufficient transparency and accountability of the money collected and spent by REDISA;
  - 43.3 The failure of REDISA to supply the DEA with documentation and information.

### *Performance*

44. REDISA is fully compliant with the terms of its appointment as per Minister's letter of 29 November 2012. A copy of the approval letter is attached<sup>8</sup>.

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<sup>8</sup> Annexure B.



45. REDISA is also in compliance with its Plan, and has met and exceeded its approved Plan objectives. The Minister has publicly expressed her approval and support for what REDISA is doing.
46. To date some 44 detailed monthly reports meeting DEA requirements have been presented to the DEA since inception of the Plan in 2013. These will be made available to the Committee if required. A copy of the latest report on 30 June 2016 submitted to DEA is attached.<sup>9</sup>
47. As the June report indicates, these reports deal with many of the issues in respect of which allegations of the non-delivery of information have been made. The allegations of non-performance are of recent origin and incomprehensible given the amount of information that has been supplied over the years to the DEA. We don't deal with all the allegations (primarily because they are vague and never referred to us for investigation and response).
48. To counteract the loose charges of non-performance, REDISA has instructed Price Waterhouse Coopers to conduct an audit of its performance requirements under the Plan. A summary of its findings in respect of the performance targets is attached.<sup>10</sup>
49. There are two allegations that demonstrate an inexplicable change of attitude towards REDISA:
  - 49.1 DEA accuses REDISA of a deviation of the Plan by establishing the Product Testing Institute in Nelson Mandela Bay (which is the centre of tyre manufacturing in South Africa). The institute is being set up to provide research and performance testing on tyres to ensure they meet ever better standards of performance and durability. This is clearly in the interests of reducing waste tyres. South Africa has no capacity at present to conduct testing of this nature. At the request of the DEA on 16 September 2013 a report by Dr. Ziboneni Godogwana was submitted to the PTI on 6 December 2013.<sup>11</sup> No objection was raised and the expenditure on the PTI has been included in the annual audited financial statements forwarded to the DEA each year.
  - 49.2 Another example of a misguided criticism is the complaint that REDISA exports waste tyres. The DEA has mistaken demand for capacity – all local

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<sup>9</sup> Annexure C.

<sup>10</sup> Annexure D.

<sup>11</sup> Annexure E.



demand for waste tyres is currently being met (and expanded). In order to prevent local accumulation of waste, a portion of partly processed waste tyres is exported to countries such as India where further accredited waste beneficiation takes place. Since the objective of the Plan is to reduce the waste tyre problem in South Africa, it is difficult to understand the criticism of this conduct.

50. In the circumstances all background information and documentation to support REDISA's job creation figures, establishment of SMME's and processing facilities have been reported to the DEA, and have been confirmed by the PWC independent audit referred to above. It is therefore not understood upon what factual basis the allegation of failure to meet performance targets has been made by the DEA.

*Insufficient transparency and accountability*

51. It is difficult to understand this criticism because, as stated above under the Minister's approval of the Plan, REDISA has to report on a monthly basis and each year submit its audited statements to the Department.
52. Since the Plan has been operation, REDISA has submitted 44 reports, which reports contain the tonnage of tyres collected, stored and remediated, the number of jobs created and the number of small businesses established. The first time that these figures have ever been questioned was in June this year – and this despite having provided DEA with all the documentation and given its appointed service provider access to its records.<sup>12</sup>
53. Likewise Kusaga Taka (KT), the management company appointed by REDISA, is externally audited and has received unqualified audit reports as to its financial administration of funds. The cost to the Plan of KT as administrator of the Plan has been benchmarked against international norms taking into account the complex requirements of administering a waste management plan at the same time as nurturing and establishing small businesses and job creation. The provision for a management company is contained in the approved Plan itself – see clause 28 of the Plan<sup>13</sup>. It specifically provides for the management of REDISA's operations through an external management company for a period of 5 years to ensure a high level of skill and continuity.

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<sup>12</sup> The allegations that documentation has not been provided to the DEA or its service provider is false. Thousands of pages of documents have been made available over the last few months. An index of documents sent to the DEA through its service provider is attached as Annexure G.

<sup>13</sup> A copy of the Plan is available [www.redisa.org.za](http://www.redisa.org.za).



54. KT is a private company that provides a management service to REDISA NPC. It employs 128 employees to manage a very large and intricate enterprise and has developed a computer programme to administer and monitor hundreds of small businesses in the process of collection, transport, storage and remediation of tyres. This has always been clear from the monthly reports and annual financial statements.
55. For the DEA to now allege that it does not know what KT does as Plan administrator is absurd given the detailed level of reporting it receives as referred to above.
56. The Minister has the power to review the Plan at any time and if the Minister was concerned as to manner in which the Plan was being implemented or the failure to submit documentation, the Minister would have exercised that power.
57. Moreover, any systemic failure of transparency or accountability – there is none – is capable of being corrected by a review initiated by the Minister under section 34 of the Waste Act or regulation 12 of the Waste Tyre Regulations
58. Given REDISA's exemplary financial administration and performance, and the transparency success of its activities, it is difficult to see what factual basis justifies the proposed change in the funding model to the extent that change is intended to address alleged spurious grounds lack of governance.

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