



Determination

Application for revocation of A91382 and the substitution of
authorisation AA1000429

lodged by

AgStewardship Australia Limited

in respect of

the imposition of a levy on the sale of agricultural and veterinary
chemicals

19 December 2018

Commissioners:

Sims

Keogh

Rickard

Court

Featherston

Summary

The ACCC has decided to grant authorisation to enable AgStewardship to administer and collect a levy of six cents per litre/kilogram on the sale of agricultural and veterinary chemicals by participating manufacturers. The levy is used to fund the drumMUSTER and ChemClear programs which provide for the collection of agvet chemical containers and safe disposal of agvet chemicals. The ACCC has authorised a levy of four cents per litre/kilogram since 1998. In this application, AgStewardship proposes to increase the levy from four cents to six cents per litre/kilogram, but otherwise the levy and programs are the same as those previously authorised.

The ACCC acknowledges the range of views expressed by industry participants about the way the programs are operating and should operate in future. Submissions show overwhelming support for the continuation of the programs, and recognise the benefits achieved for the community to date. However, while chemical manufacturers, environmental protection authorities, local government associations and some grower groups support the proposal to increase the levy, a number of grower groups expressed strong concerns with the increase. They are not persuaded that such an increase is necessary or justified, and are not satisfied with the consultation AgStewardship conducted when it proposed the increase, nor with the supporting financial information and future plans provided to them. These groups asked that the ACCC either delay its decision to reauthorise the programs, or if authorisation is granted, to authorise a continuation of the status quo.

The ACCC acknowledges the strength of the concerns expressed and strongly encourages AgStewardship to conduct further consultation before enacting the levy increase in July 2019; to work closely and transparently with farmers and other stakeholders to ensure improved understanding of the programs; to provide clear information about future plans, and to take into account stakeholder views to ensure that the programs remain effective and relevant in adapting to changing conditions.

The ACCC notes that some of the concerns of stakeholders arise due to the increased use of Intermediate Bulk Containers (IBCs), which are not included in the scheme. The ACCC understands that the size and nature of IBCs makes it difficult to include these within AgStewardship's recycling programs, but there are also a number of other schemes in place for the return and reuse of these containers. The ACCC encourages all relevant stakeholders to investigate solutions for the return and reuse of IBCs.

While these steps by AgStewardship are important to address the concerns of some stakeholders about the level of consultation and information provided by AgStewardship, the ACCC does not consider it appropriate to delay its decision in relation to the application for re-authorisation. A four cent levy has been authorised for 20 years, and the programs have yielded clear public benefits that are expected to continue into the future. This will be the first increase in the levy in that time. Having conducted two rounds of public consultation on the current application, the ACCC is satisfied, based on all available information, that the likely public benefits of the proposed conduct, including the increased levy, outweigh the likely public detriments.

The ACCC grants authorisation until 10 January 2024.

1. The application for authorisation revocation and substitution

- 1.1. On 21 August 2018, AgStewardship Australia Limited (**AgStewardship**) lodged an application to revoke authorisation A91382 and substitute authorisation AA1000429

(referred to as re-authorisation) with the Australian Competition and Consumer Commission (the **ACCC**). Re-authorisation will allow AgStewardship to impose a levy of six cents per litre/kilogram on the sale of agricultural and veterinary chemicals by participating manufacturers, in order to fund programs which provide for the collection of agvet chemical containers and disposal of agvet chemicals (the **programs**) (together, the **Conduct**). Authorisation was sought for a further five years. This application for re-authorisation was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (the **CCA**).

- 1.2. On 9 November 2018 the ACCC issued a draft determination proposing to grant authorisation for a further five years. A conference was not requested in response to the draft determination.
- 1.3. The ACCC can grant authorisation, which provides businesses with legal protection for arrangements that may otherwise risk breaching the competition law, provided the arrangements are likely to result in a net public benefit or, in some cases, are unlikely to substantially lessen competition.

2. The Conduct

- 2.1. AgStewardship seeks re-authorisation on behalf of itself and its members, namely Croplife Australia Limited, Animal Medicines Australia Limited, National Farmers' Federation Limited, The Veterinary Manufacturers and Distributors Association Limited, and the manufacturers and suppliers of chemicals that impose the levy on the sale of their agvet chemicals (the **participants**) (including new participants who agree to impose a levy in support of the programs during the term of the authorisation).

The Levy

- 2.2. Participants voluntarily agree to impose a levy on the supply of agvet chemicals. The levy is charged on products for crop production and on-farm animal health chemicals which are sold in non-returnable metal and plastic containers between one litre/kilogram and 205 litres/kilograms. Participants remit the proceeds of the levy to AgStewardship which uses them to fund the programs. Since it was first authorised in 1998, the levy has been charged at a rate of four cents per litre/kilogram. AgStewardship now proposes to increase the levy to six cents per litre/kilogram.

The Programs

- 2.3. The programs funded by the levy are drumMUSTER and ChemClear. The drumMUSTER program has been authorised by the ACCC since 1998 and involves the collection and recycling of used containers for crop production and on-farm animal health chemicals. Eligible containers are cleaned of residue by farmers and delivered to one of more than 800 collection sites across Australia, to be sent for recycling.
- 2.4. The ChemClear program has been operating since 2003 and involves the collection and disposal of unwanted crop production and veterinary chemicals. It focuses on collecting obsolete chemicals which may be out of date or superseded, or are unused due to changes in cropping and animal management practices or regulations. Under the program, Group 1 chemicals – i.e. those on which the levy has been paid (displaying the drumMUSTER logo) - are generally eligible for free collection. The disposal of Group 2 chemicals attracts a fee but the cost is subsidised under the program. Group 2 chemicals include those sold by manufacturers not participating in the scheme (i.e. on which the levy has not been paid), chemicals which are unknown,

unlabelled, mixed, expired for more than two years, or have been de-registered for more than two years.

3. The Applicant

- 3.1. AgStewardship is a not-for-profit organisation which acts as a fund-holding body for the levies raised. AgStewardship was established in October 2008 as part of a new governance structure for the drumMuster and ChemClear programs.
- 3.2. Previous to this, funds for the programs were held by AgSafe, which also managed and administered the programs. AgSafe was established in 1993 as an industry-led not-for-profit organisation following a commitment to product stewardship by the Board of Agricultural and Veterinary Chemical Association (now CropLife Australia). AgSafe now manages and administers the programs under contract to AgStewardship.

Members

- 3.3. AgStewardship also seeks authorisation on behalf of its members, National Farmers' Federation, CropLife Australia, Animal Medicines Australia, and the Veterinary Manufacturers and Distributors Association.
- 3.4. The National Farmers' Federation is the peak national body representing farmers and agriculture.
- 3.5. CropLife Australia represents the developers, registrants, manufacturers and formulators of plant science solutions for use in agriculture and the management of pests in other settings.
- 3.6. Animal Medicines Australia represents registrants, manufacturers and formulators of animal health products.
- 3.7. The Veterinary Manufacturers and Distributors Association represents manufacturers, importers, registrants and distributors of all classes of veterinary medicines and animal health products.

Participants

- 3.8. Participants in the programs are those manufacturers and suppliers of agvet chemicals who agree to impose a levy on the chemicals they sell.
- 3.9. AgStewardship considers that the participation level of agvet manufacturers represents over 90 per cent of the total volume of eligible containers of agvet chemicals sold in Australia to primary producers. AgStewardship advises that the number of participants in the programs continues to increase.

4. Background

- 4.1. The drumMUSTER program has been authorised by the ACCC since September 1998, funded by the four cent per litre/kilogram levy. The ChemClear program has been authorised since March 2005. The Conduct has been re-authorised a number of times, including at times minor changes to the Conduct (such as a 2011 expansion of the definition of "containers" which are accepted under the programs).
- 4.2. Most recently, authorisation was granted on 29 January 2014 (A91382) until 19 February 2019.

- 4.3. In the 2016/2017 financial year, the levy raised around \$3.8million.
- 4.4. AgStewardship advises the current levy collected is insufficient to cover its costs of operating, but that it has been able to utilise reserves accumulated mainly from the early years of the levy being in place to fund more recent shortfalls in operational costs. AgStewardship advises that, if CPI was applied to the levy across the years since the levy was introduced, the rate today would be close to 7 cents per litre/kilogram, and that the cost of recycling containers and processing chemicals has also increased over time relative to CPI.
- 4.5. AgStewardship submits the proposed increase in the levy is necessary because the current levy is unsustainable for a range of reasons including:
- the cost of recycling each container is higher than the levy collected on that container. The program covers the cost of the containers collected, though only because collection rates are lower than, or equal to, 50% of containers sold with the levy applied
 - the costs of disposal of chemicals have increased considerably
 - remote collections have an extremely high unit cost and these cannot be considered with the levy at the current rate
 - AgStewardship is likely to experience pressure on its reserves in future years and will likely not be sustainable
 - relevant infrastructure requires upgrading
 - research is needed in relation to changes in container design and suitability for recycling.
- 4.6. AgStewardship advises that an increase in the levy will result in an increase to the total funds received, and that it expects to utilise these funds to:
- meet the price increases from contracted services (such as recycling processors)
 - increase marketing of the program to lift the return rates on chemical containers (from 48% of eligible containers in 2016-17 to 58% in 2019/20)
 - increase collections for ChemClear eligible products
 - invest in additional infrastructure for collection sites and refurbishment of current drum cages
 - fund IT improvements to streamline payments
 - increase promotion of the programs
 - undertake research into emerging trends in packaging and recycling
 - provide additional collections to remote areas
 - continue to develop relationships with community groups and resellers to improve collection rates.

5. Consultation

- 5.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Conduct.

- 5.2. The ACCC invited submissions from more than 40 potentially interested parties including AgStewardship members, government bodies and industry associations.
- 5.3. Prior to the draft determination, the ACCC received submissions from:
- CropLife Australia
 - Animal Medicines Australia
 - National Farmers' Federation
 - Victorian Farmers Federation
 - Queensland Farmers' Federation
 - WAFarmers
 - Grain Producers Australia
 - AgForce Queensland Farmers Limited
 - NSW Environment Protection Authority
 - Environment Protection Authority Victoria
 - South Australian Environment Protection Authority
 - Australian Local Government Association
 - Local Government NSW
 - Western Australian Local Government Association.
- 5.4. AgStewardship member organisations - CropLife Australia, Animal Medicines Australia, and the National Farmers' Federation – provided submissions in support of the application (although the National Farmers' Federation noted its members had a significant appetite for a number of improvements to the programs).
- 5.5. While all other interested parties supported re-authorisation, including the increase to the levy, a number raised issues or concerns with the arrangements and suggested possible improvements to the programs or the need for greater transparency or information.
- 5.6. For example, the Victorian Farmers Federation conditionally supported the levy increase, subject to some concerns around grower oversight and transparency by AgSafe being addressed, and WAFarmers supported the need for additional information to be provided ahead of any increase to the levy. In addition, the Australian Local Governments' Association raised concerns that the increase in the levy would be insufficient to fund all of the improvements intended by AgStewardship.
- 5.7. The ACCC invited submissions in response to the draft determination. Nine submissions were received.
- AgStewardship members, CropLife and Animal Medicines Australia, reaffirmed their support for the application, including the two cent per litre/kilogram increase. CropLife expressed the view that those raising concerns with the levy increase prior to the draft determination may be confused about the purpose of the authorisation process, and noted that improvements to the programs have

been undertaken following engagement with interested parties directly by AgStewardship and Agsafe.

- Queensland Farmers' Federation and Primary Producers SA expressed support for the application, including the levy increase.
- AgStewardship member organisation, National Farmers' Federation,, submitted that, while its membership was very supportive of the programs, it considered further detail was needed in the business plan to justify the proposed levy increase. NFF proposed the ACCC delay its final determination to permit time for NFF members to be satisfied with the justification for the levy increase.
- WA Farmers opposed the draft determination and supported the continuation of a levy of four cents per litre/kilogram until an improved business case could be provided to industry stakeholders. It also submitted that a two cent per litre/kilogram increase in the levy was likely to be inadequate for the continuation of the programs in an efficient manner.
- NSW Farmers supported the continuation of the levy and programs, but opposed the proposed increase in the levy because it believed the increase was not justified. NSW Farmers proposed the ACCC authorise the levy at four cents per litre/kilogram until AgStewardship could demonstrate stakeholder support for an increase, following a period of stakeholder engagement and consultation and the provision of evidence that an increase in the levy will result in the benefits claimed by AgStewardship.
- Grain Producers Australia expressed general support for the programs and an increase in the levy, but said there needs to be greater transparency regarding the running of the programs and more information regarding a business strategy. GPA also said it has dealt directly with CropLife and drumMUSTER to put in place the mechanisms required for GPA members to support the levy increase.

5.8. AgStewardship provided a further submission in response to issues raised in these submissions.

5.9. The issues raised by interested parties and AgStewardship's submissions are addressed in further detail below.

5.10. Public submissions by the Applicant and interested parties are on the [ACCC's Public Register](#) for this matter.

6. ACCC assessment

6.1. The ACCC's assessment of the Conduct is carried out in accordance with the relevant authorisation test contained in the CCA.

6.2. The Applicant has sought re-authorisation for Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the CCA and may substantially lessen competition within the meaning of section 45 of the CCA. Consistent with subsections 90(7) and 90(8) of the CCA,¹ the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).

¹ See subsection 91C(7).

Relevant areas of Competition

- 6.3. To assess the likely effect of the Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.
- 6.4. Consistent with the ACCC's view during previous assessments of earlier applications, the ACCC considers the areas of competition relevant to its assessment of the application for re-authorisation are:
 - the manufacture and wholesale supply of agvet chemicals
 - the distribution and sale of agvet chemicals products in Australia, and
 - the collection and recycling of agvet chemical waste.

Future with and without the Conduct

- 6.5. In applying the authorisation test, the ACCC compares the likely future with the Conduct that is the subject of the authorisation to the likely future in which the Conduct does not occur.
- 6.6. The ACCC considers that without an agreement by participating manufacturers and suppliers to impose the levy to subsidise the programs, AgStewardship is likely to discontinue the services offered by the programs.
- 6.7. Farmers have various legal obligations to responsibly dispose of unused chemicals and empty chemical containers. However, prior to the introduction of the drumMUSTER and ChemClear programs, the cost and inconvenience of responsible disposal resulted in many more containers and unused chemicals ending up in landfill, being dumped, burned, buried or stockpiled on farms. These disposal methods pose public safety and environmental risks.
- 6.8. Given that farmers would continue to have legal obligations to responsibly dispose of unused chemicals and chemical containers, the ACCC considers that, in the absence of the programs, the collection services required to responsibly dispose of chemicals and chemical containers are likely to be provided on a commercial basis to councils or to end-users, but these may not be provided in the short term and/or may be provided at a higher cost or inconvenience to end-users. While a regulatory response may be developed by government, the ACCC considers this would take some time to develop and implement.

Public benefits

- 6.9. The CCA does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.²

- 6.10. AgStewardship submits that the Conduct is likely to result in public benefits including environmental benefits and economic efficiencies, as discussed below.

² Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

6.11. A number of interested parties, while supportive of the continuation of the programs and recognising that they result in public benefits, requested improvements to the programs and increased transparency for stakeholders regarding the operation of the programs.

6.12. The ACCC's assessment of the public benefits follows.

Environmental benefits

6.13. AgStewardship submits the continuation of the programs will result in public benefits through the provision of an effective pathway for the appropriate disposal of empty agvet containers and hazardous chemicals, thereby reducing the harmful environmental and health impacts from improper disposal and improving resource management through recycling of waste material. AgStewardship submits this is consistent with state and federal government aims to reduce plastics in landfill and with Australia's international obligations concerning the management of hazardous waste. The programs have collected more than 12 million drums and around 300 tonnes of agvet chemicals under the current authorisation.

6.14. Interested parties support the continued operation of the programs and recognise that they result in environmental and health-related benefits.

6.15. The ACCC considers that the Conduct is likely to continue to result in significant environmental benefits by increasing the volume of hazardous chemicals and containers which are safely disposed of, through the provision of free or subsidised collection services.

Economic efficiencies

6.16. AgStewardship submits that the Conduct will continue to result in economic efficiencies both by providing a coordinated, Australia-wide service (compared to farmers and/or councils acquiring collection services in rural and remote areas from commercial operators), and by lowering compliance costs for government through the operation of effective voluntary programs.

6.17. The ACCC considers the Conduct is likely to result in continued public benefits by reducing the transaction costs for councils and users (compared to a situation in which each user or council must source their own collection services). Further, that the Conduct will continue to reduce the costs that would otherwise be incurred by governments if they had to expend greater resources to enforce compliance with regulations regarding the disposal of hazardous materials in the absence of the programs. These cost efficiencies represent a further source of public benefit.

Improvements to the program

6.18. A number of interested parties have submitted that AgStewardship should use the additional funds raised from the increase in the levy to improve its programs in various ways, including:

- by expanding the frequency and geographic location of collection sites (particularly in more remote areas)
- by expanding the scope of containers or chemicals collected under the programs to adapt to changes in agvet chemical use (in particular increasing use of Intermediate Bulk Containers (IBCs), discussed in further detail below)

- upgrading of infrastructure in some areas
- promoting the programs more broadly and providing end-users with more education.

6.19. AgStewardship has advised that it intends to use the additional funds to:

- cover increases in the costs of running the programs
- support improvements in infrastructure to fill identified gaps in the network of collection sites, especially in remote areas
- engage with local community groups to conduct 'pop-up' collection days where local council collection points are not accessible to ensure all primary producers have access to container collections
- improve collection site safety
- improve processing by allowing the segregation of collected products by type
- conduct research and development into the inclusion of a wider range of plastic containers in the drumMUSTER program
- increase the frequency of ChemClear collections to three times a year
- develop an app to allow the real-time capture of collection data, thus improving AgSafe's reporting and ability to coordinate container collections more efficiently
- enhance security and useful life of container cages
- expand marketing and communications to key stakeholder farming organisations, rural communities and schools, including raising awareness in rural communities of programs by some container manufacturers for the return of containers not included within the scope of the drumMUSTER program (such as Intermediate Bulk Containers)
- enhance its website and back end database to improve communications, marketing and tracking
- encourage non-participants to join the program
- re-establish an advisory committee of participants to ensure greater participant representation, oversight and transparency.

6.20. The ACCC notes that AgStewardship has committed to implementing many of the improvements suggested by interested parties through the proposed levy increase. The ACCC accepts that the improvements suggested by interested parties are likely to result in even greater public benefits, but they all come at a cost. For AgStewardship to implement all of the suggested improvements, it would likely need to obtain additional funding, for example through further increasing the levy, or reducing other services it provides.

6.21. The ACCC has decided not to impose conditions on the authorisation to provide further changes to the programs. The ACCC expects that AgStewardship will regularly review where it is spending its funding within its programs, including taking the views of its members and other interested parties into account. Given the ongoing level of

concern from some grower groups, we encourage AgStewardship to work through these issues directly with its member organisations and other stakeholders. The ACCC considers that the continued support of farming groups and farmers is important to the success of the programs.

Transparency

- 6.22. The ACCC considers that providing a level of transparency and accountability around the collection and spending of funds is important to ensure that claimed public benefits actually arise.
- 6.23. A number of interested parties requested greater transparency and/or reporting in relation to the Conduct, including:
- reporting of collection rates by site or by state
 - providing a detailed business case for the levy increase
 - detailing the strategic direction for the programs over the period of re-authorisation.
- 6.24. The ACCC notes that, in the case of the drumMUSTER and ChemClear programs, both of which have been running for a long period, all interested parties support their continuation. The ACCC notes the reporting required under the agreement between AgSafe and AgStewardship, which ensures that AgStewardship member organisations will have visibility over collection data, future plans and financial matters. The ACCC also notes that some data on collections – on a national, state and local level – is currently already available on the drumMUSTER and ChemClear program websites.
- 6.25. In addition, AgSafe provides reports to AgStewardship (comprising member organisations National Farmers' Federation, CropLife, Animal Medicines Australia, and the Veterinary Manufacturers and Distributors Association), containing collection data by state, collection costs, issues and recommendations, marketing activity and result, WHS reports, campaigns scheduled and annual reconciliation of collections (as required under the terms of the agreement between AgStewardship and AgSafe). AgSafe personnel will also present to the AgStewardship Board as required and facilitate the newly re-established drumMUSTER Advisory Committee, to include grower groups, local government associations and manufacturers.
- 6.26. AgStewardship also advised it intends to develop an application to collect real-time data of drums entering cages, which will allow drumMUSTER to keep accurate and up to date records of the number of containers in cages at any one time.
- 6.27. On this basis, the ACCC is satisfied that there are measures in place to ensure that the use of the funds acquired through the collection of the levy is reasonably transparent. However, the concerns of a number of interested parties in this regard seem to indicate that there is room for improvement in the way these measures are implemented and/or communicated to stakeholders. The ACCC encourages AgStewardship to take steps to improve its implementation and communication of these measures.

Proposed increase in the levy

- 6.28. A number of grower groups raised concerns about transparency, oversight and improvements to the program and have proposed that the levy be maintained at four

cents per litre/kilogram until such time as their concerns have been addressed by AgStewardship.

- 6.29. The National Farmers' Federation proposed that the ACCC delays its final determination until NFF's members can be satisfied with the strategic direction of the programs, and with a solid justification for an increase in the levy. NFF submits that the financial statements provided by AgStewardship indicate sufficient reserves for the program to continue in its current form for at least three years without increasing the levy.
- 6.30. NSW Farmers submits that the proposed 50 per cent increase in the levy is not justified, and calls for further evidence to demonstrate how increasing the levy to six cents will result in improved drum collection, improved infrastructure and better communications. NSW Farmers calls for the ACCC not to grant the proposed increase in the levy from four cents per litre/kilogram until AgStewardship can demonstrate stakeholder support for any levy increase.
- 6.31. WAFarmers opposes the ACCC's draft determination (proposing to approve the increase in the levy) and insists that the ACCC maintain the levy at four cents per litre/kilogram until an improved business case is provided to industry stakeholders for further analysis. WAFarmers submits there are sufficient financial reserves for the program to continue at four cents per litre/kilogram for a further three years. WAFarmers therefore proposes that the ACCC re-authorise the levy for a further three years at four cents per litre/kilogram. WAFarmers does not regard an increase of 2 cents to be adequate for the running of efficient programs and says a thorough review and overhaul is required.
- 6.32. Grain Producers Australia was dissatisfied with the draft determination as it considered it did not give sufficient consideration to the concerns of farming groups, and advises it has engaged directly with CropLife and AgSafe to put in place mechanisms to ensure greater accountability to farmers, and provide Grain Producers with the information required in order for its members to support the increase in the levy.
- 6.33. The reasons given by AgStewardship which necessitate the increase in the levy are set out in paragraphs 4.4 and 4.5 above.
- 6.34. In relation to the suggestion by some interested parties that the increase in the levy be delayed, AgStewardship submits that it has contingent liabilities in relation to containers on which the levy has been paid but which have not yet been presented for collection, which require it to forecast cash reserves four years in advance. Further, AgStewardship submits it anticipates a reduction in income from the levy relative to previous periods, due to the expected continuation of dry conditions in the eastern states. AgStewardship submits that, if the levy continues to be collected at four cents per litre/kilogram, the resulting decline in reserves would be such that AgSafe would need to reduce operations under the programs beginning in early 2020.
- 6.35. The ACCC notes that the increase to the levy constitutes a 50% increase and the concerns of interested parties who considered the need for the increase had not been adequately explained. However the ACCC considers that as the first increase in 20 years, this increase is consistent with cost increases over time and that it is a very small proportion of the total cost of the chemical products to which it is applied (at 0.01% on average). The ACCC also notes that AgStewardship advises the levy increase is not sufficient to fund the collection and recycling of all containers and chemicals on which the levy is applied. The ACCC recognises that AgStewardship, in deciding to increase the levy and the magnitude of the increase, has had to balance a

range of factors including resistance of some parties to any increase, rising costs over time, and calls for greater levels of services and other improvements.

ACCC conclusion on public benefits

6.36. The ACCC considers that the Conduct is likely to result in continued significant public benefits from:

- environmental benefits through the provision of an effective pathway for the appropriate disposal of empty agvet containers and for hazardous chemicals
- economic efficiencies from reducing transaction costs for councils and users, and reducing the costs incurred by governments to enforce compliance with regulations regarding the disposal of hazardous materials.

6.37. The ACCC notes that a number of interested parties submitted that improvements to the programs are likely to increase the likely public benefits. The ACCC notes that AgStewardship is already working with stakeholders on improvements to the programs and encourages AgStewardship to work closely and transparently with farmers and other stakeholders. The ACCC considers that the continued operation of the programs is likely to result in significant benefits and has decided not to impose conditions on the authorisation to provide further changes to the programs.

Public detriments

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

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.³

6.39. AgStewardship submits the Conduct will result in minimal public detriments.

6.40. Interested parties raised a number of issues of concern, including that some users could not access drumMUSTER or ChemClear services, that the requirement to pay for the disposal of Group 2 chemicals under the ChemClear program was a disincentive to appropriate disposal of these chemicals, and that non-eligible containers were being dumped near collection points creating problems for local councils.

6.41. The ACCC's assessment of the public detriments follows.

Cost to participating companies and end-users

6.42. AgStewardship submits that end users of agvet products may be impacted by the proposed levy increase as it will increase marginally the price paid for the agvet chemicals, but that the cost of the levy is negligible and in most cases represents less than 0.01% of the total purchase price of agvet chemical products.

6.43. The ACCC notes that any levy will, by its nature, impose some costs on those who pay it. In this case the price increase to end users as a result of the levy is likely to be very small, and that manufacturers may partly or wholly absorb the levy in order to compete

3 Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

with non-participating manufacturers. QFF submits that it anticipates manufacturers will continue to price match competitors who operate outside the levy.

- 6.44. Many manufacturers have agreed to participate in the scheme and raise funds through the levy to subsidise programs that seek to address the negative environmental effects that may otherwise result from their products and packaging if there were no collection service provided by the programs. That is, the levy provides for manufacturers and end users to contribute to and reduce the full costs of using the chemicals (i.e. including the 'externality' costs of inappropriate disposal of excess chemicals and containers). In this way the effect of the levy on prices is to better reflect the true cost and thereby improve the efficiency of use of the chemicals.

Inability of some users to access the ChemClear program without further cost

- 6.45. The WA Local Government Association submits that AgStewardship should review the eligibility criteria and funding structure of ChemClear to ensure the program adequately incentivises and funds the recovery of both Group 1 and Group 2 chemicals.
- 6.46. Under the ChemClear program, Group 1 chemicals (i.e. those manufactured by members of the programs, on which the levy has been paid) are able to be disposed of without additional cost under the ChemClear program.
- 6.47. However, there is a fee for the disposal of Group 2 chemicals. Group 2 chemicals include those whose manufacturers are not participating in the scheme (i.e. the levy has not been paid), chemicals which have been deregistered or expired for more than two years, and chemicals that are unknown, unlabelled or mixed.
- 6.48. The ACCC notes that many Group 2 chemicals have not been subject to the levy and therefore it is not inappropriate that the programs (which are funded by the levy) do not entirely cover the costs of their disposal. Further, where the levy has been paid but chemicals have expired or been deregistered for more than two years, the additional cost for disposal serves as an incentive for end-users to dispose of chemicals promptly, reducing the hazard they pose on farms. The ACCC notes that AgStewardship is continuing to provide education to all end-users of agvet chemicals about the levy and the safe disposal of chemicals and containers and is working with manufacturers and suppliers of such chemicals to increase coverage of the levy.
- 6.49. In any case, while the ACCC recognises that charging a fee at the point of collection for the disposal of some chemicals under the ChemClear program may result in disincentives for end-users of these chemicals to appropriately dispose of them, the disincentive for appropriate disposal would likely be greater if there were no ChemClear program.
- 6.50. AgStewardship could consider in future whether it could achieve even greater public benefits by offering free collection for Group 2 chemicals (presumably funded by a higher levy), but the fact that it does not currently offer this as a free service does not constitute a public detriment arising from the proposed conduct.

Containers not covered by the programs

- 6.51. A number of interested parties submit that the drumMUSTER program should accept a wider range of agvet chemical containers, such as IBCs and chemical bags. The levy is currently not charged on the sale of these products, and they are not accepted for collection under the programs.

- 6.52. The WA Local Government Association submits that material which is ineligible for collection under the programs is regularly left at council-run collection points with the result that local governments are burdened with the cost of disposing of this material.
- 6.53. WAFarmers has raised particular concerns about the exclusion of IBCs and enviro-drum containers from the program. WAFarmers submits there has been an increased preference from Western Australian farmers for chemicals supplied in these containers, and many return the containers directly to the manufacturer or their supplier. WAFarmers submits that the exclusion of these containers from the program sparks concerns about the relevance of the programs within Western Australia.
- 6.54. NSWFarmers also noted the change in behaviour of users toward larger chemical containers, particularly IBCs, and submitted that AgStewardship had an obligation to do more to justify their request for re-authorisation and to ensure the scheme remains relevant to the needs of end users.
- 6.55. The National Farmers Federation reports a significant appetite within its membership for IBCs and chemical bags to be recycled within the programs.
- 6.56. AgForce Queensland submits AgStewardship should continue to promote proprietary programs for the recycling of IBCs and consider the feasibility of including IBC recycling within the programs.
- 6.57. Victorian Farmers Federation would like to see the programs expanded to include IBCs and to increase the number of manufacturers included.
- 6.58. AgStewardship submits:
- it expects the range of plastic containers accepted by the drumMUSTER program to broaden in the future
 - it will continue to work with manufacturers to encourage more to join the scheme (thus increasing the proportion of containers eligible for collection)
 - AgSafe has an operational policy to include containers from non-participating manufacturers in collections (up to 7%), in order to ensure access to the program and remove confusion for primary producers
 - while the levy is not collected on the sale of IBCs and other returnable drums, many of these are able to be returned to the container manufacturers directly. AgStewardship submits it will work with these returnable programs, as well as liaising with CropLife Australia and reseller networks, to raise awareness of IBC return programs in rural communities.
 - non-returnable IBCs are entering the market place from companies which do not participate in the scheme. Farmer bodies and local government associations have concerns about these containers as there are no clear pathways for the responsible disposal of these containers. Many are sourced directly from overseas by the end user or the manufacturer of generic products. AgStewardship submits it will continue to liaise with CropLife Australia, resellers and farming groups to raise awareness of this issue and encourage end users to only source products from participating companies or those that have their own IBC return program.
 - AgStewardship has proposed to set aside some funding from the increased levy to conduct research into the issues relating to IBCs and work with interested stakeholders to ensure pathways for the responsible disposal of

these containers. AgStewardship advises there are no plans to include the recycling of IBCs within the current programs.

- 6.59. The ACCC notes that AgStewardship intends to work to include more containers in the programs by continuing to bring more manufacturers into the scheme to address one aspect of this issue.
- 6.60. The ACCC notes the frustration of grower groups and local government associations that IBCs are not included within the programs, given their increasing use and difficulties associated with their disposal.
- 6.61. The levy is not charged on IBCs and the ACCC understands that there are, for the most part, proprietary programs for their return. The ACCC understands that the recycling of IBCs is more costly than the recycling of other chemical containers in the market, and that they are often reconditioned and reused (rather than recycled) by the container manufacturers following their return.
- 6.62. The ACCC considers that AgStewardship is unlikely to be able to find a solution for the return or recycling of any containers (including IBCs) which are sold by non-participating manufacturers or imported directly from overseas, as no voluntary levy can be collected on these containers.
- 6.63. While the ACCC accepts that there are environmental problems and logistical problems for farmers currently associated with the responsible disposal of IBCs, the ACCC does not consider that their exclusion from the programs to be a detriment for the purposes of its assessment. While IBC use is growing, there is still widespread use of smaller containers that this scheme is focussed on addressing.
- 6.64. The ACCC notes the growing problem of the responsible disposal of IBCs and encourages further research and consultation by all stakeholders to develop the most effective and efficient solution or solutions. This may involve various levels of the supply chain including container manufacturers, chemical manufacturers, resellers, grower groups, local government associations and other government agencies.

ACCC conclusion on public detriments

- 6.65. The ACCC considers that the Conduct is likely to result in limited public detriments:
- while it imposes some costs on end users and manufacturers, these largely reflect the costs associated with responsible disposal and recycling, and
 - to the extent the program inadvertently leads to more end users dumping non-eligible containers at, or near, collection sites, this practice is likely to be reduced following proposed changes to the program.

Balance of public benefits and detriments

- 6.66. The ACCC considers that the Conduct is likely to result in public benefits in the form of:
- environmental benefits through the provision of an effective pathway for the appropriate disposal of empty agvet containers and for hazardous chemicals
 - economic efficiencies from reducing transaction costs incurred by councils and users, and from reducing the costs incurred by governments to enforce compliance with regulations regarding the disposal of hazardous materials.

6.67. The ACCC considers that the Conduct is likely to result in limited public detriment, as set out above.

6.68. Therefore, for the reasons outlined in this determination, the ACCC is satisfied that the Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Conduct.

Length of authorisation

6.69. The CCA allows the ACCC to grant authorisation for a limited period of time.⁴ This enables the ACCC to be in a position to be satisfied that the likely public benefit will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefit and detriment that have resulted, after an appropriate period.

6.70. In this instance, the Applicant seeks re-authorisation for a further five years. AgStewardship submits this period allows for a considered approach by all parties to measure the continuing success or otherwise of the program, and to review some of the externalities to the program that may affect its operations.

6.71. The ACCC notes that the levy has been in place since 1998, and that the programs continue to receive broad support. On this basis, the ACCC has decided to grant authorisation for a further five years until 10 January 2024.

7. Determination

The application

7.1. On 21 August 2018 AgStewardship lodged an application to revoke authorisation A91382 and substitute authorisation AA1000429 for the one revoked (referred to as re-authorisation). This application for re-authorisation was made under subsection 91C(1) of the CCA.

7.2. AgStewardship sought authorisation to allow it to continue to impose a levy on the sale of agricultural and veterinary chemicals, in order to fund programs which provide for the collection of agvet chemical containers and disposal of agvet chemicals.

The authorisation test

7.3. Under subsections 90(7) and 90(8) of the CCA, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Conduct.

7.4. For the reasons outlined in this determination, the ACCC is satisfied, in all the circumstances, that the Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Conduct, including any lessening of competition.

7.5. Accordingly, the ACCC has decided to grant authorisation.

⁴ Subsection 91(1)

Conduct authorised

- 7.6. The ACCC revokes authorisation A91382 and grants authorisation AA1000429 in substitution to enable AgStewardship to impose a levy of six cents per litre/kilogram on the sale of agricultural and veterinary chemicals, in order to fund programs which provide for the collection of agvet chemical containers and disposal of agvet chemicals
- 7.7. The Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the CCA or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.
- 7.8. The ACCC grants authorisation AA1000429 until 10 January 2024.

8. Date authorisation comes into effect

- 8.1. This determination is made on 19 December 2018. If no application for review of the determination is made to the Australian Competition Tribunal it will come into force on 10 January 2019.