

**Application for Revocation of A30194 and its  
Substitution by A90871**

**Lodged by**

**Agsafe Ltd**

**Date: 18 September 2003**

**Authorisation No:**  
A90871

**Public Register No:**  
C2003/485

**Commissioners:**  
Samuel  
Martin  
McNeill

## **Executive Summary**

### **The authorisation process**

A key objective of the *Trade Practices Act 1974* (the Act) is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.

The Act recognises that compliance with the competition provisions of the Act may not always be consistent with the most efficient social outcome. It therefore allows the Commission to grant immunity from the Act for anti-competitive arrangements or conduct in certain circumstances.

One way businesses may obtain immunity is to apply for what is known as an 'authorisation' from the Commission. Broadly, the Commission may 'authorise' businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.

The Commission conducts a comprehensive public consultation process before making a draft decision and ultimately a final decision to grant or deny authorisation.

### **Revocation and substitution of authorisations**

Broadly, upon receiving an application to do so, the Commission may grant an application to revoke an existing authorisation and granting a substitute authorisation when the benefit from the conduct proposed to be authorised (that is, under the substitute authorisation) outweighs the detriment.

Before the Commission may grant an application to revoke an existing authorisation and grant a substitute authorisation, it must conduct the same public consultation process as it would conduct for a new application for authorisation. This process involves informing interested parties about the application for revocation and substitution and inviting submissions in response to it. The Commission then issues a draft determination and invites interested parties to lodge further submissions in response to it and/or call a conference to discuss the draft. The Commission then issues a final determination.

### **Existing authorisation**

On 2 September 1998, the Commission granted authorisation to application A30194 relating to an agreement between Avcare Ltd (Avcare), the Veterinary Manufacturers and Distributors Association (the VMDA), the National Farmers' Federation (the NFF) and the Australian Local Government Association (the ALGA). Authorisation was granted for a period of five years and is due to expire on 29 September 2003.

The agreement established the *drumMUSTER* program, an industry waste reduction scheme for the collection and recycling of empty agricultural and veterinary chemical containers that is financed by a levy imposed on chemical manufacturers. The *drumMUSTER* program is implemented by Agsafe Ltd (Agsafe), a subsidiary of Avcare. The program is a component of the Industry Waste Reduction Agreement

which aims to reduce waste at source, and reduce the weight of packaging going to landfill.

Agsafe applied for two minor variations during the period of authorisation, both of which the Commission considered would result in public benefits. Essentially both minor variations sought to extend the scope of the scheme to allow participation by non-Avcare and VMDA members, and to extend the eligibility of containers which hold products of a non-hazardous nature.

### **Current application**

In summary, the current application seeks to revoke A30194 and substitute it with a new authorisation in the same terms as authorisation A30194, including the minor variations for an additional period of five years.

The Commission has sought submissions from interested parties and the applicant in order to assess the public benefits and detriments of the conduct the subject of the application.

Having considered the application and submissions from the applicant and interested parties, the Commission concludes that in all the circumstances the making and giving effect to the proposed arrangement is likely to result in some benefit to the public and that benefit will outweigh the detriment to the public constituted by any lessening of competition that is likely to result from the arrangements.

The proposed scheme centres around an agreement by manufacturers to impose a levy on non-returnable containers. This may give rise to a very low level of anti-competitive detriments in the form of a minimal pass through of the additional cost (in the form of increased prices) and a reduction in the scope for collection and inspection agencies to negotiate the terms of their contracts with Agsafe. Given the relative size of the levy – ranging between 0.2% and 0.8% of the wholesale prices, the Commission considers that any realised detriment is likely to be very small.

The Commission considers that this very low level of anti-competitive detriment is outweighed by the public benefits associated with environmental protection namely:

- encouraging users of veterinarian and agricultural products to buy refillable, water soluble, cardboard or paper containers;
- encouraging manufacturers of veterinarian and agricultural products to sell their products in refillable, water soluble, cardboard or paper containers; and
- the implementation of a scheme to improve the environment by providing for appropriate disposal of unwanted empty containers of agricultural and veterinary products.

The Commission grants authorisation to application A90871 for a period of five years from the date on which the authorisation comes into force.

**Interim authorisation**

The Commission grants interim authorisation in the same terms as this determination, until the date this determination comes into effect, taking into account the appeal provisions of the Act.

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## **1. Application**

- 1.1. The Australian Competition and Consumer Commission (the Commission) is the Commonwealth agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.
- 1.2. The Act recognises that compliance with the competition provisions of the Act may not always be consistent with the most efficient social outcome. It therefore allows the Commission to grant immunity from the Act for anti-competitive conduct in certain circumstances.
- 1.3. One way businesses may obtain immunity is to apply for what is known as an ‘authorisation’ from the Commission. Broadly, the Commission may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.4. The Commission conducts a comprehensive public consultation process before making a decision to grant or deny authorisation.
- 1.5. Upon receiving an application for authorisation, the Commission invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.6. The Act requires that the Commission then issue a draft determination in writing proposing to either grant the application (in whole, in part or subject to conditions) or deny the application. In preparing a draft determination, the Commission will take into account submissions received from interested parties.
- 1.7. Once a draft determination is released, the applicant or any interested party may request that the Commission hold a conference. A conference provides interested parties with the opportunity to put oral submissions to the Commission in response to a draft determination. The Commission will also invite interested parties to lodge written submissions on the draft.
- 1.8. The Commission then reconsiders the application, taking into account the comments made at the conference (if one is requested) and any further submissions received, and issues a written final determination.

### **Authorisation A30194**

- 1.9. The Commission granted authorisation A30194 on 2 September 1998. Broadly, the authorisation related to an agreement between Avcare Ltd (Avcare), the Veterinary Manufacturers and Distributors Association (the VMDA), the National Farmers’ Federation (the NFF) and the Australian Local Government Association (the ALGA).

- 1.10. The agreement established the *drumMUSTER* program, an industry waste reduction scheme for the collection and recycling of empty agricultural and veterinary chemical containers that is financed by a levy imposed on chemical manufacturers. The *drumMUSTER* program is implemented by Agsafe Ltd (Agsafe), a subsidiary of Avcare. The program is a component of the Industry Waste Reduction Agreement which aims to reduce waste at source, and reduce the weight of packaging going to landfill.
- 1.11. The participants in the *drumMUSTER* program vary from industry associations, manufacturers, distributors, farmers, collection agents, and are assisted by administrative support staff who manage the *drumMUSTER* program.
- 1.12. The program commenced in 1999, with the first levy collections received in February 1999, and with inspector training and drum collections beginning in May 1999.
- 1.13. The levy imposed on farm chemical users is four cents per litre or kilogram on eligible crop production and on-farm animal health products sold in non-returnable chemical containers over one litre or kilogram in content. The levy funds the *drumMUSTER* program and is available to reimburse participating councils for all agreed costs incurred in running a *drumMUSTER* collection.
- 1.14. At the time of granting authorisation in September 1998, the Commission considered that the program gave rise to the following public benefits:
  - encouraging users of veterinarian and agricultural products to buy refillable, water soluble, cardboard or paper containers;
  - encouraging manufacturers of veterinarian and agricultural products to sell their products in refillable, water soluble, cardboard or paper containers; and
  - the implementation of a scheme to improve the environment by providing for appropriate disposal of unwanted empty containers of agricultural and veterinary products.
- 1.15. The Commission also considered that the program gave rise to the following anti-competitive detriment:
  - the scheme centres around an agreement by manufacturers to impose a levy on non-returnable containers; and
  - collection and inspection agencies have less scope to negotiate the terms of their contracts with Agsafe.
- 1.16. During the authorisation the program was varied to enable the participation in the program of agricultural and veterinary chemical manufacturers who are not members of either Avcare or VMDA but who agreed to participate in the *drumMUSTER* program, and extending the eligibility of containers for

collection to include containers which have held products of a non-hazardous nature.

- 1.17. Authorisation A30194, as varied, will expire on 29 September 2003. A copy of the authorisation, and the minor variations, is attached.

### **Current application**

- 1.18. This document is a determination in relation to application for revocation of A30194 and substitution with authorisation A90871 (the Application) lodged with the Commission by Agsafe Limited (Agsafe), a subsidiary of Avcare Limited.
- 1.19. Agsafe made the application under section 88(1) of the Act<sup>1</sup> on behalf of itself, the NFF, Avcare, VMDA and ALGA, the members of those associations, and agricultural and veterinary chemical manufacturers who are not members of either Avcare or VMDA but who agree to participate in the *drumMUSTER* program. The Application seeks authorisation for these parties to enter into and give effect to arrangements that constitute the *drumMUSTER* program, an industry waste reduction scheme of agricultural and veterinary chemical containers, including an agreement between manufacturers of agricultural and veterinary chemicals to charge a common levy to finance the scheme.
- 1.20. Agsafe was requested by the *drumMUSTER* Advisory Committee on behalf of the NFF, Avcare, VMDA and ALGA, the members of those associations and agricultural and veterinary chemical manufacturers who are not members of either Avcare or VMDA, but who agree to participate in the *drumMUSTER* program.
- 1.21. The proposed substitute authorisation, A90871, would be identical to A30194 and include the minor variations made during the course of the authorisation but would extend until 29 September 2008.

### **Interim authorisation**

- 1.22. In lodging an application for authorisation, applicants may request that the Commission grant interim authorisation under section 91(2) of the Act to the conduct for which authorisation is sought.
- 1.23. The consideration of granting interim authorisation in relation to application A90871 is discussed at paragraph 6.26 to 6.27.
- 1.24. The Commission grants interim authorisation in the same terms as this determination, until the date this determination comes into effect, taking into account the appeal provisions of the Act.
- 1.25. A chronology of the Commission's assessment of the application is below.

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<sup>1</sup> The application has also been considered under the Competition Code.

**Table 1 - Chronology of the Commission's assessment of application A90871**

<b>Date</b>	<b>Action</b>
17 April 2003	Agsafe lodged an application for the revocation and substitution of authorisation A30194.
24 April 2003	The Commission requested further information from Agsafe.
23 May 2003	Agsafe provided the Commission with further information.
27 May 2003	The Commission provided interested parties with an opportunity to make a submission on the application by 18 June 2003.
19 June 2003	The Commission provided Agsafe with copies of the submissions received from interested parties and invited Agsafe to comment on those submissions.
31 July 2003	Agsafe responded to the submissions from interested parties.
14 August 2003	The Commission issued a draft determination.
29 August 2003	Closing date for submissions from interested parties
18 September 2003	Interim authorisation granted
18 September 2003	Final Determination issued by the Commission

## **2. Submissions prior to the draft determination**

- 2.1. Agsafe provided a submission in support of its application. The Commission also sought submissions from interested parties in relation to the application. These submissions are held on the Commission's Public Register and are discussed in more detail, where relevant, at Section 6 of this determination.

### **Applicant's supporting submission**

#### *Public benefits*

- 2.2. Agsafe claimed that a number of public benefits will flow from the re-authorisation of the *drumMUSTER* program. Broadly, Agsafe contended that the program will:
- reduce the number of non-returnable containers being distributed;
  - reduce the amount of packaging used through encouraging manufacturers to adopt alternative containers such as re-fillable packs;
  - encourage the users of agricultural and veterinary chemicals to purchase refillable or environmentally friendly containers;
  - ensure that non-returnable crop production and animal health chemical containers have a defined route for disposal that is socially, economically and environmentally acceptable;
  - aims to recover 66% of the chemical containers sold annually and reduce the weight of chemical container waste going to landfill by 68% (compared to 1990).
- 2.3. Agsafe provided survey and program performance data in support of these public benefits, which is discussed further at section 6 of this determination.

#### *Anti-competitive detriment*

- 2.4. Agsafe submitted that the anti-competitive detriment likely to flow from the scheme will arise from:
- the imposition of a levy on the containers included in the scheme; and
  - the decreased scope of collection and inspection agencies to negotiate the terms of their contracts with Agsafe.

### **Submissions from interested parties**

- 2.5. Submissions supporting the application were received from:
- Virbac;
  - Australian Retailers Association;
  - Australian Pesticides & Veterinary Medicines Authority;

- Veterinary Manufacturers and Distributors Association (Inc); and
  - NSW Environment Protection Authority (EPA (NSW)).
- 2.6. Broadly, the submissions endorsed the public benefits claimed by Agsafe as flowing from the *drumMUSTER* program.
- 2.7. Some of the comments provided by interested parties are summarised below:
- The continuity of the program has significant proven public benefit described by *drumMUSTER*;
  - The *drumMUSTER* program has operated effectively to help reduce environmental burden arising from disposal of containers used for agvet chemicals, and to reduce wastage of material used in the containers, and the benefits outweigh the cost involved in the program;
  - The *drumMUSTER* program was commended for its achievements to date, which were considered to be significant achievements;
  - The *drumMUSTER* program makes an important contribution to beneficial environment outcomes by reducing the volume of chemical containers that enters the national waste stream; and
  - In some instances the users of program-eligible containers in the majority of local government areas in urban and remote regions of NSW have limited access to *drumMUSTER* collection services.

#### **Applicant's response to submissions**

- 2.8. Agsafe provided a response to comments in relation to the limited access by some eligible participants by stating that *drumMUSTER* has undertaken steps to overcome this problem by signing collection agreements in some urban areas to increase the amount of collection agencies in these areas.
- 2.9. Agsafe also stated that there are initiatives currently underway in Western Queensland, Northern Territory, north eastern Western Australia, and in remote Western Australia to increase the amount of collections in these areas. Agsafe contends that these initiatives will assist in relieving the concerns of interested parties in relation to limited collections for eligible users.

### **3. Issues arising out of the draft determination**

- 3.1 Before determining an application for authorisation the Commission is required to prepare a draft determination stating whether or not it proposed to grant authorisation to the application and summarising its reasons. The Commission released a draft determination proposing to grant authorisation on 14 August 2003. Copies of the draft determination were distributed to the applicant, parties who made submissions and other interested parties.<sup>2</sup>
- 3.2 Under section 90A of the Act, a person may request that the Commission hold a pre-decision conference in relation to the draft determination. The Commission did not receive a request for a conference in relation to this application.
- 3.3 Interested parties were given the opportunity to comment on the Commission's draft determination through written submissions. The Commission did not receive any submissions following the release of the draft determination; however, letters supporting the decision in the draft determination were received.

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<sup>2</sup> Copies of the Commission's draft determination are available from the Commission's website at [www.accc.gov.au](http://www.accc.gov.au)

## **4. Statutory test**

- 4.1. Under section 91C of the Act, the Commission may make a determination revoking an existing authorisation and granting a substitute authorisation at the request of the party to whom the authorisation has been granted, or another person on behalf of such a party.
- 4.2. In order for the Commission to grant a substitute authorisation, the Commission must consider the substitute authorisation in the same manner as the standard authorisation process.
- 4.3. This initially involves informing interested parties about the application for revocation and substitution and inviting submissions in response to it. After considering any submissions the Commission prepares a draft determination. It then invites interested parties to call a pre-decision conference and/or lodge further submissions in response to this draft. Finally, the Commission issues a determination in writing either revoking the authorisation and granting a substitute authorisation or deciding not to revoke the authorisation.
- 4.4. The Commission must not make a determination to revoke and substitute an authorisation unless it is satisfied that the substitute application would be likely to result in a public benefit outweighing the detriment to the public constituted by any lessening of competition that would be likely to result from the substitute authorisation (usually referred to as the anti-competitive detriment).
- 4.5. The statutory test which the Commission must apply in this case in considering whether or not it would be prevented from making a determination granting the new authorisation is set out in subsections 90(6) and 90(7) of the Act.
- 4.6. In relation to the making of the arrangement, subsection 90(6) provides that the Commission shall not make a determination under subsection 88(1), unless it is satisfied in all the circumstances that the provision of the proposed arrangement would result, or would be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed arrangement were made.
- 4.7. In relation to giving effect to the arrangement, subsection 90(7) provides that the Commission shall not make a determination under subsection 88(1) unless it is satisfied in all the circumstances that the arrangement has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the arrangement.

- 4.8. Subsection 88(10) of the Act states that an authorisation under subsection 88(1) may be expressed so as to apply to or in relation to another person who subsequently becomes a party to the proposed arrangement.

## **5. Market definition**

- 5.1. The Commission's evaluation of the Application is in accordance with the statutory test outlined in Section 4 of this determination. As required by the test it is necessary for the Commission to assess and weigh the likely public benefit and detriment from the proposed conduct.

### **The relevant market**

- 5.2. Defining the markets affected by arrangements proposed for authorisation assists in assessing public benefit and public detriment from any lessening of competition from the arrangements. However, depending on the circumstances, the Commission may not need to comprehensively define the relevant markets as it may be apparent that a net public benefit will or will not arise regardless of this definition.
- 5.3. In considering the issue, the Commission has identified two relevant areas of competition. They are:
- competition amongst manufacturers of agricultural products and animal health products in relation to the manufacture and wholesale of those products; and
  - competition amongst distributors in relation to the supply of agricultural products and animal health products.
- 5.4. In this matter, the Commission is of the view that it is not necessary to comprehensively define the relevant markets. In this respect, it is the Commission's view that its assessment will not be overly affected by the possible variations in precise market definition.

## **6. Commission evaluation**

- 6.1. The Commission's evaluation is in accordance with the statutory tests outlined in Part 4 of this determination.
- 6.2. In order to identify and measure the benefits and detriments that arise from proposed conduct, it is useful for the Commission to apply the "future with-and-without test" that was first established by the Australian Competition Tribunal. This requires a comparison of the situation that would, or would be likely to, exist in the future if the authorisation were granted, with the situation if the authorisation were not granted.
- 6.3. The Commission has had regard to the "future with-and-without test" in considering claims of public benefit and detriment as detailed below. The Commission is of the view that without authorisation, the *drumMUSTER* program would cease to operate and users of the relevant agricultural and animal health products would dispose of containers on an ad hoc basis and with significantly less rates of return.

### **Public benefits**

- 6.4. A number of public benefits were claimed by Agsafe in their submission to the Commission.
- 6.5. The Commission is of the view, that where the market fails to take into account negative externalities of industry conduct, for example the costs associated with environmental protection, there may exist a public benefit in correcting such failure. In this case, the Commission accepts that absent the proposed arrangements, the pricing of the relevant chemicals fails to take into account the negative externalities associated with the disposal or environmental impact of the packaging of those products. The Commission therefore believes arrangements which correct, or correct to a certain extent, these failures are likely to constitute public benefits.

### *Reduced weight at source*

- 6.6. Agsafe submitted that an Avcare audit found that over the past eight years there has been an 80% increase in the volume of crop production and animal health products sold.
- 6.7. Agsafe claims that there has been around a 55% reduction in the weight of packaging that would otherwise have ended up in the environment without the industry *drumMUSTER* program and industry waste reduction agreement initiatives.
- 6.8. Agsafe submitted that since 1999 there has been a surge in the percentage of product being delivered in refillable or bulk containers, and that there has been a reduction in non-returnable container sales by 750,000, the greatest of which is for 20L containers which Agsafe submits are down by 660,000.

#### *Defined route for disposal*

- 6.9. Agsafe submitted that 429 Councils now participate in the program in locations which represent around 97% of where the containers are sold. Agsafe indicated that the program intends to seek participation from the remaining 198 Councils as appropriate, but note that some of the sales for containers in these Councils are less than 500 annually.

#### *Recovery of chemical containers*

- 6.10. Agsafe submits that 26% of drums sold were recovered in 2001/2. Agsafe and *drumMUSTER* stated that they recognise that whilst this is a credible performance in the four years since the program started, there is still much to be done to achieve the targeted 67%.

#### *Improved occupational health and environmental practices*

- 6.11. Agsafe submits that 30% of the liquid volume now being delivered in refillable or bulk containers means that end users have to dispense products through closed distribution systems which minimises occupational exposure.
- 6.12. Agsafe states that a portion of the *drumMUSTER* levy is used for research whereby *drumMUSTER* aims to acquire the information needed to overcome barriers that prevent program implantation and result in improved safety and environmental practices.

#### *Conclusion*

- 6.13. The Commission considers that the Applicant's above claimed public benefits can be summarised as benefits relating to the environment in terms of reducing the amount of non-returnable chemical containers into the environment through *drumMUSTER* collections. The Commission also considers that the claimed public benefits from the arrangement provides for the future protection of the environment by engaging in research and development to further enhance the program.
- 6.14. The Commission concludes that there are likely to be public benefits flowing from the conduct for which authorisation is sought which constitute environmental protection benefits as submitted by the Applicant.

#### **Anti-competitive detriment**

- 6.15. Whilst the EPA (NSW) noted that the users of program-eligible containers in the majority of local government areas in urban and remote regions of NSW currently have limited access to *drumMUSTER* collection services. However, EPA (NSW) was generally supportive of the program.

#### *Levy on containers*

- 6.16. Agsafe submits that there are costs associated with the implementation of the program, namely reimbursement of councils for construction of compounds, promotion, container inspection costs and for charges by processors to collect the containers.

- 6.17. Agsafe submits that despite the imposition of the levy, that being four cents per litre or kilogram of eligible crop production and on-farm animal health products sold in non-returnable chemical containers over one litre or one kilogram in content, it found that farmers in both high and low *drumMUSTER* participation in the five mainland areas found the levy to be of relatively minor concern.
- 6.18. In regard to the levy paid by farmers and graziers on the collection of relevant containers, the Commission considers that the levy may be either passed on in the form of increased produce prices, or absorbed by those farmers and graziers who are not in the position to be produce price setters, or could be absorbed by either the manufacturers or distributors of animal health and agricultural products. However, the Commission holds the view that the additional costs borne by either the rural produce consumers, farmers or graziers, or manufacturers or distributors of the products, will be minimal and will need to be accepted as a necessary cost to society in an attempt to alleviate an obvious environmental waste problem.
- 6.19. The Commission noted in its consideration of the minor variation in relation to the extension of the eligibility of containers for collection to include containers which have held products of a non-hazardous nature that Agsafe had submitted information which stated that the proportion of the price constituted by the levy of products ranging in price from \$5.00/L to \$20.00/L are between 0.2% and 0.8% respectively. That is, on a chemical which costs \$5.00/L and is distributed in a 20 litre container, at a cost of \$100, the imposition of the levy is an additional \$0.80 on the purchase price.

#### *Negotiations with councils on contract terms*

- 6.20. Agsafe stated that it requires Councils to enter into a Services Agreement with Agsafe, the main principles of which are non-negotiable. However, Agsafe added that dealings with Councils have had to be more flexible than at the inception of the program, mainly in relation to claims processes.
- 6.21. The Commission accepts Agsafe's submission that the negotiations between Agsafe and collection agencies may provide less scope for those agencies to negotiate the terms of their contracts with Agsafe. In addition, the Commission considers that such negotiation processes may lead to the potential for increases in the level of collection fees charged by the agencies, as there will not be competition between them to provide services at competitive prices.
- 6.22. The Commission also notes, however, that the agreement is unlikely to be successful if the imposition of the levy and negotiations with collection agencies is not permitted.

#### *Conclusion*

- 6.23. The Commission accepts that the imposition of the levy does constitute a detriment; however, the Commission considers that the impact to the end-users of the agricultural and animal chemical products, that is farmers, is

negligible given that the average percentage incurred by farmers on products is less than 1% of the purchase price.

- 6.24. In relation to the Applicant's claimed anti-competitive detriment of less scope for agencies to negotiate the terms of their contracts with Agsafe, the Commission considers that any such detriment is likely to be negligible having regard to the Commission's view that the situation without authorisation is that the program would be unlikely to continue.

### **The balance of benefit and detriment**

- 6.25. Having regard to the foregoing, the Commission is of the view that there exist public benefits associated with the continuation of the *drumMUSTER* program and as such those public benefits flowing from the proposed substitute authorisation are sufficient to outweigh the limited anti-competitive detriment.

### **Interim authorisation**

- 6.26. In lodging an application for authorisation, applicants may request that the Commission grant interim authorisation under section 91(2) of the Act to the conduct for which authorisation is sought.
- 6.27. As noted above, the current authorisation expires on 29 September 2003. Having regard to the Commission's decision to grant authorisation to A90871, the Commission grants interim authorisation in the same terms as this determination, until the date this determination comes into effect, taking into account the appeal provisions of the Act.

## 7. Determination

### The Application

- 7.1. On 17 April 2003, Agsafe lodged an application for the revocation of authorisation A30194 and its substitution by an authorisation that will be in identical terms to authorisation A30194 (as varied) except as to the dates of commencement and expiry of the authorisation.
- 7.2. The application was made under section 88(1) of the Act<sup>3</sup> for an authorisation to make and give effect to a contract or arrangement or arrive at an understanding a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
- 7.3. Agsafe made the application on behalf of itself, the NFF, Avcare, VMDA and ALGA, the members of those associations, and agricultural and veterinary chemical manufacturers who are not members of either Avcare or VMDA but who have agreed to participate in the *drumMUSTER* program. The application seeks authorisation for these parties to enter into and give effect to arrangements that constitute the *drumMUSTER* program, an industry waste reduction scheme of agricultural and veterinary chemical containers, including an agreement between manufacturers of agricultural and veterinary chemicals to charge a common levy to finance the scheme.

### The Statutory Test

- 7.4. The statutory test which the Commission must apply in this case in considering whether or not it would be prevented from making a determination granting the new authorisation is set out in subsections 90(6) and 90(7) of the Act.
- 7.5. In relation to the making of the arrangement, subsection 90(6) provides that the Commission shall not make a determination under subsection 88(1), unless it is satisfied in all the circumstances that the provision of the proposed arrangement would result, or would be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed arrangement were made.
- 7.6. In relation to the giving effect to the arrangement, subsection 90(7) provides that the Commission shall not make a determination under subsection 88(1) unless it is satisfied in all the circumstances that the arrangement has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the arrangement.

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<sup>3</sup> The application has also been considered under the Competition Code.

- 7.7. The Commission is therefore satisfied that the statutory tests set out in sections 90(6) or 90(7) of the Act have been met.
- 7.8. For the reasons outlined in section 6 of this determination the Commission concludes that in all the circumstances the making and giving effect to the proposed arrangement:
- is likely to result in some benefit to the public; and
  - that benefit will outweigh the detriment to the public constituted by any lessening of competition that is likely to result from the arrangements.
- 7.9. Subsection 88(10) of the Act states that an authorisation under subsection 88(1) may be expressed so as to apply to or in relation to another person who subsequently becomes a party to the proposed arrangement.

### **Conduct Authorised**

- 7.10. The Commission grants authorisation to:
- Agsafe, the NFF, Avcare, VMDA and ALGA;
  - the members of those associations; and
  - agricultural and veterinary chemical manufacturers who are not members of either Avcare or VMDA but who have agreed to participate in the *drumMUSTER* program
- to make and give effect to provisions of an arrangement that constitutes the *drumMUSTER* program, an industry waste reduction scheme of agricultural and veterinary chemical containers, including an agreement between manufacturers of agricultural and veterinary chemicals to charge a common levy to finance the scheme, in terms as described to the Commission.
- 7.11. Pursuant to subsection 88(10), the Commission proposes to express its authorisation so as to apply to future members of ALGA, Avcare, NFF, VMDA, and to agricultural and veterinary chemical manufacturers who are not members of either Avcare or VMDA but who later agree to participate in the *drumMUSTER* program.
- 7.12. This decision is subject to any application to the Australian Competition Tribunal (the Tribunal) for its review.
- 7.13. This determination is made on 18 September 2003. If no application for review of the determination is made to the Tribunal, it will come into force on 10 October 2003. If an application is made to the Tribunal, the determination will come into force:
- Where the application is not withdrawn – on the day on which the Tribunal makes a determination on the review; or
  - Where the application is withdrawn – on the day on which the application is withdrawn.

### **Interim authorisation**

- 7.14. The Commission grants interim authorisation in the same terms as this determination, until the date this determination comes into effect, taking into account the appeal provisions of the Act.