



Australian
Competition &
Consumer
Commission

Determination

**Application for revocation of authorisation
A90871 and its substitution by
authorisation A90963**

lodged by

Agsafe Limited

in relation to its Industry Waste Reduction Scheme

Date: 24 August 2005

Commissioners:

Samuel
Sylvan
King
McNeill
Martin
Willett

Authorisation no. A90963

Public register no. C2005/525

Executive Summary

On 18 March 2005, Agsafe Limited (Agsafe) lodged an application with the Australian Competition and Consumer Commission (the ACCC) for revocation of authorisation A90871 and replacement with substitute authorisation A90963 on behalf of itself, Avcare Limited (Avcare), the Veterinary Manufacturers and Distributors Association (the VMDA), the National Farmers' Federation (the NFF) and the Australian Local Government Association (the ALGA), the members of those associations and any agricultural or veterinary chemical manufacturers who are not members of Avcare or the VMDA but who agree to participate in the proposed arrangements.

The proposed arrangements

Agsafe have operated the *drumMUSTER* program, which provides for the collection of unwanted, empty Agricultural and Veterinary (AgVet) chemical containers, since February 1999. The program is funded by a four cents per litre or kilogram levy on AgVet chemicals paid for by participating manufacturers of AgVet chemicals¹. Agsafe initially received authorisation from the ACCC for these arrangements under authorisation A30194 in September 1998. The arrangements were later granted revocation and substitution by the ACCC under authorisation A90871 in August 2003.

Agsafe's current application for revocation and substitution seeks to integrate its ChemClear program, which provides for the collection of unwanted registered AgVet chemicals, into its current authorisation. Broadly, Agsafe seeks substitute authorisation to allow:

- Avcare, the VMDA, the NFF and the ALGA to enter into a new Memorandum of Understanding to be called the Industry Waste Reduction Scheme (the IWRS agreement)
- the establishment of an IWRS advisory committee to oversee the administration of both the *drumMUSTER* and ChemClear programs
- the IWRS advisory committee, the *drumMUSTER* program and the ChemClear program to be funded by a four cents per litre or kilogram levy (the IWRS levy) charged on the content of eligible² chemical containers and funded by chemical manufacturers, and
- the transfer of reserve funds gathered from the existing *drumMUSTER* levy to finance the ChemClear program.

¹ All members of Agsafe participate as a condition of membership. VMDA members may choose to participate while other AgVet chemical manufacturers may opt-in to the program.

² The IWRS levy is charged on AgVet chemicals manufactured by members of the IWRS agreement packaged in non-returnable containers.

Assessment of benefits and detriments

The ACCC considers that some anti-competitive detriment is likely to occur if substitute authorisation is granted. This detriment is likely to arise, in part, because some purchasers of eligible AgVet chemical products will not be able to access the ChemClear program without further cost. To the extent that this results in a situation where some purchasers subsidise the ChemClear program for others, an anti-competitive detriment may arise.

However, the ACCC considers that there are a number of issues which may serve to mitigate this possible detriment, including:

- the number of purchasers affected is likely to be low and
- all purchasers are likely to receive greater services than they would have in the absence of a substitute authorisation.

The ACCC also considers that, to the extent that the levy may be set at a level that is too high to reflect the cost of operating the *drumMUSTER* and ChemClear programs, some anti-competitive detriment may arise.

The ACCC also considers that the proposed substitute authorisation is likely to generate a public benefit above that of the likely counterfactual. The ACCC considers that these benefits will arise from:

- improved farm occupational health and safety by providing for the removal of unwanted and potentially hazardous AgVet chemical stockpiles and
- efficiencies gained by offering a nationally co-ordinated collection program.

Following consideration of the arguments advanced by Agsafe and interested parties, and despite the mitigating factors referred to above, without addressing concerns as to the level of the levy, the ACCC would not be satisfied that the public benefits likely to result from the proposed arrangements would outweigh the potential anti-competitive detriments of those arrangements.

Conditions

C1 Agsafe is to engage an independent auditor to:

- 1. assess the cost of operating the drumMUSTER and ChemClear programs**
- 2. assess the level of the levy in light of these costs and other sources of funding, including existing reserve funds and**
- 3. to make recommendations as to the appropriate level of the IWRS levy.**

This assessment is to be completed and provided to the ACCC no later than two weeks after the effective date of this authorisation.

C2 To the extent that the independent audit recommends that the IWRS levy should be set below its current level, Agsafe is to implement its findings no later than 31 December 2005.

With the imposition of these conditions, the ACCC would be satisfied that the public benefits of the proposed arrangements would outweigh their potential anti-competitive detriments.

Determination

The ACCC therefore grants substitute authorisation, subject to conditions, until 31 December 2008.

Interim authorisation

The ACCC granted conditional interim authorisation to Agsafe for the proposed arrangements at the time of issuing its draft determination on 6 July 2005. Interim authorisation was granted on condition that Agsafe implement an independent audit of the IWRS levy. Interim authorisation will continue to apply until such time as the final determination takes effect.

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1 Introduction

- 1.1 The Australian Competition and Consumer Commission (the ACCC) is the Australian Government agency responsible for administering the *Trade Practices Act 1974* (the TPA). A key objective of the TPA is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.
- 1.2 The TPA, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’. Broadly, the ACCC 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.
- 1.3 The ACCC conducts a comprehensive public consultation process before making a decision to grant or deny authorisation. Upon receiving an application for authorisation, the ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this. The TPA requires that the ACCC then issue a draft determination in writing proposing either to grant the application (in whole, in part or subject to conditions) or deny the application. In preparing a draft determination, the ACCC will take into account any submissions received from interested parties.
- 1.4 Once a draft determination is released Agsafe Ltd (Agsafe), or any interested party, may request that the ACCC hold a conference. A conference is generally called by a party dissatisfied with the ACCC’s decision and provides interested parties with the opportunity to put oral submissions to the ACCC. The ACCC will also invite written submissions on the draft.
- 1.5 The ACCC then reconsiders the application taking into account the comments made at the conference and any further submissions received and issues a written final determination. Should the public benefit outweigh the public detriment the ACCC may grant authorisation. If not, the authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the public benefits and decrease the detriment.

2 Background to the application

- 2.1 Agsafe is a wholly owned subsidiary of Avcare Ltd (Avcare), a trade association of companies which produce agricultural and veterinary (AgVet) chemicals. Agsafe operates an accreditation scheme for persons and businesses involved in the transport, handling and storage of AgVet chemicals, and administers the **drumMUSTER** and ChemClear waste reduction programs. The **drumMUSTER** program can be broadly described as an AgVet chemical container collection scheme while ChemClear is a program for the collection and disposal of unwanted AgVet chemicals.
- 2.2 The current application for revocation and substitution lodged by Agsafe is essentially an extension to a series of previous authorisations and minor variations granted to Agsafe by the ACCC since 1998. The current application however, seeks to further expand Agsafe's existing authorisation by incorporating the previously unauthorised ChemClear program in its authorisation. A short history of Agsafe's **drumMUSTER** and ChemClear programs is provided below.

Background to the **drumMUSTER** program

Original authorisation (A30194)

- 2.3 The need for a nationally co-ordinated strategy for the safe disposal of AgVet chemical containers was raised as part of the Senate Select Committee Inquiry on Agriculture and Veterinary Chemicals in 1990. In March 1993, the Standing Committee on Environment Protection established a task force with membership from Australia, New Zealand, Victoria, New South Wales, Queensland and Western Australia to develop a strategy for the safe disposal of AgVet chemical containers.
- 2.4 The recommendations of the task force led to the commencement of a pilot container collection program in the Wimmera region of Victoria in late 1996 conducted by Avcare. The pilot program was expanded nationally by an Industry Waste Reduction Agreement (IWRA) between Avcare, the Veterinary Manufacturers and Distributors Association (the VMDA), the National Farmers' Federation (the NFF) and the Australian Local Government Association (the ALGA). On 2 September 1998 the IWRA was granted authorisation A30194 by the ACCC.
- 2.5 The IWRA established the **drumMUSTER** program, which provides for the collection and recycling of empty AgVet chemical containers through a network of collection and storage facilities operated or administered by participating councils. The stated aim of the **drumMUSTER** program is to both reduce waste at its source and reduce the weight of packaging going into landfill. The **drumMUSTER** program commenced in February 1999 with inspector training and drum collections beginning in May of that year.

- 2.6 The ***drumMUSTER*** program is funded by a levy placed on manufacturers of AgVet chemicals. The levy is set at four cents per litre/kilogram on AgVet chemicals stored within non-returnable containers over 1 litre or kilogram in content. Funds from the levy are available to participating councils for all agreed costs incurred in running a collection service under the ***drumMUSTER*** program.
- 2.7 At the time of granting authorisation A30194 in September 1998, the ACCC considered that some anti-competitive detriment may arise by allowing the proposed arrangements to take place, most notably:
- an agreement between manufacturers to impose a levy on non-returnable containers may increase the price of AgVet chemicals and
 - the arrangements may provide less scope for collection and inspection agencies to negotiate the terms of their contracts with Agsafe.
- 2.8 However, the ACCC considered that the ***drumMUSTER*** program was likely to give rise to a number of public benefits, including:
- encouraging users of AgVet chemicals to buy them in refillable, water soluble, cardboard or paper containers
 - encouraging manufacturers of AgVet chemicals to sell their products in refillable, water soluble, cardboard or paper containers and
 - providing for the appropriate disposal of unwanted empty containers of agricultural and veterinary products which may provide environmental benefits.
- 2.9 Consequently, the ACCC was of the view that the potential anti-competitive detriment flowing from the arrangements was outweighed by the potential public benefit, and granted authorisation for a period of five years.

Minor variations to A30194

- 2.10 The ***drumMUSTER*** program initially included only hazardous chemical products manufactured by members of Avcare, who were obliged to participate as a condition of membership, and by participating members of the VMDA. In August 2000, Agsafe applied to the ACCC for a minor variation to A30194 to extend the coverage of the arrangements to chemical manufacturers who were not members of either of these bodies. The minor variation was granted in November 2000 and allowed AgVet manufacturing companies to opt-in without the need for membership of either Avcare or the VMDA.
- 2.11 In June 2002, Agsafe applied for a second minor variation to A30194 when it sought to:
- extend the ***drumMUSTER*** program's eligibility criteria to containers of non-hazardous AgVet chemicals, at the discretion of each manufacturer

- allow for the collection of containers of less than one litre in content and
- allow manufacturers to display a notice on invoices, indicating that purchasers have been charged for levied products.

2.12 This application for minor variation was granted by the ACCC in August 2002.

Application for revocation of A30194 and its substitution by A90871

- 2.13 In April 2003, Agsafe applied to the ACCC for revocation of A30194 and its substitution with A90871 to, in effect, extend the period of the original authorisation. A90871 was applied for on the same terms as A30194 and included the minor variations granted during the period of the original authorisation.
- 2.14 In its assessment of A90871 the ACCC again considered that the arrangements may create similar anti-competitive detriment as those considered in the original application, including detriments caused by the **drumMUSTER** levy and collection agencies having less scope to negotiate their contracts with Agsafe.
- 2.15 Similarly, the ACCC considered that, insofar as the **drumMUSTER** program helps to address a situation where the market fails to take into account negative externalities of industry conduct, such as the cost of environmental protection, the program may constitute a public benefit.
- 2.16 On 14 August 2003, the ACCC again accepted that a net public benefit was likely to arise from the **drumMUSTER** program and granted the substitute authorisation for a further five years.

Background to the ChemClear program

- 2.17 In 2000, the Australian Government sponsored a one-off scheme for the collection and disposal of unwanted farm chemicals known as ChemCollect. This scheme resulted in the collection of approximately 1700 tonnes of chemical waste from farms. In order to prevent a repeat build-up of rural chemicals, Agsafe launched its ChemClear program, an agreement between Avcare, the VMDA and the NFF for the collection of unwanted registered rural chemicals.
- 2.18 An industry collection fee of one cent per litre of chemical material was introduced in April 2004 for the ongoing funding of ChemClear. This fee is imposed on supplier and stakeholder members in accordance with their obligations under the ChemClear agreement. The ChemClear arrangements are not currently the subject of an authorisation.

Application for a minor variation of authorisation A90871

- 2.19 On 21 January 2005, Agsafe applied to the ACCC for a minor variation of authorisation A90871. In short, Agsafe sought a minor variation to allow reserve funds generated from its **drumMUSTER** levy to be used to fund Agsafe's

ChemClear program and to amalgamate ***drumMUSTER*** and ChemClear under a single administrative framework. The ACCC denied the application on the basis that it did not represent a minor variation but it represented a material change to what was authorised in A90871.

Current application for the revocation of A90871 and its substitution by A90963

- 2.20 Following the ACCC's decision to deny Agsafe's application for minor variation, Agsafe lodged an application to revoke authorisation A90871 and replace it with substitute authorisation A90963. Broadly, this application seeks to allow the ChemClear program to be financed by reserve funds already collected under the ***drumMUSTER*** program, and to amalgamate the administration of the two programs. The current application is discussed further in section 3.

3 Agsafe's application and supporting submission

- 3.1 On 18 March 2005, Agsafe lodged an application with the ACCC for revocation of authorisation A90871 and replacement with substitute authorisation A90963 on behalf of itself, Avcare, the VMDA, the NFF and the ALGA, the members of those associations and any agricultural or veterinary chemical manufacturers who are not members of Avcare or the VMDA but who agree to participate in the proposed arrangements.
- 3.2 The application was made pursuant to section 91C of the TPA for an authorisation under that subsection:

to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or may have the likely effect, of substantially lessening competition within the meaning of section 45 of the TPA and

to give effect to a provision of a contract, arrangement or understanding where the provision has, or may have, the effect of substantially lessening competition within the meaning of section 45 of the TPA.

- 3.3 A copy of Agsafe's application and their submission in support is available from the public register maintained by the ACCC. The main issues are outlined below.

The proposed arrangements

- 3.4 Agsafe proposes:
- that Avcare, the VMDA, the NFF and the ALGA enter into a new Memorandum of Understanding to be called the Industry Waste Reduction Scheme (the IWRS agreement)
 - to establish an IWRS advisory committee to oversee the administration of both the **drumMUSTER** and ChemClear programs
 - that through the IWRS advisory committee, the **drumMUSTER** program and the ChemClear program be funded by a four cents per litre or kilogram levy (the IWRS levy) charged on the content of eligible³ chemical containers and funded by chemical manufacturers and
 - to transfer reserve funds gathered from the existing **drumMUSTER** levy to finance the ChemClear program.

³ The IWRS levy is charged on AgVet chemicals manufactured by members of the IWRS agreement packaged in non-returnable containers.

Request for interim authorisation

- 3.5 As part of its application, Agsafe also applied for interim authorisation to allow it to begin the implementation of the IWRS agreement immediately. On 20 April 2005, the ACCC postponed its decision on interim authorisation, citing its concern over whether it was appropriate to allow funds accumulated for an authorised purpose to be applied to a purpose that had not been fully considered by the ACCC.
- 3.6 More generally the ACCC considered that the information provided by Agsafe was not sufficient to conduct a preliminary assessment of the matter and that Agsafe had not demonstrated that the urgency of the occasion justified a grant of immunity without an assessment of the merits of the arrangement.

Agsafe's submission in support of its application

- 3.7 Agsafe submits with regard to the proposed arrangements, that there will be no change to the operation or management of either the *drumMUSTER* or ChemClear programs. Agsafe submits further that the overall intention of the current application is to restructure the financing of both waste reduction programs to reduce the overall cost. The IWRS levy will remain at four cents per litre/kilogram on eligible AgVet chemical containers. The IWRS levy is expected to raise \$3.2 million annually with the *drumMUSTER* program expected to cost \$2.5 million to run annually and ChemClear expected to cost \$500 000 to run each year.
- 3.8 Agsafe submits that the IWRS reserves are to be maintained equivalent to \$3.2 million or one years funding. If the reserves fall below this during the term of the IWRS agreement an IWRS top-up fee sufficient to maintain the reserves will be charged on manufacturers of AgVet products. Participating members of Avcare and the VMDA will be obliged to pay this IWRS top-up fee while other parties to the IWRS agreement (non-Avcare and VMDA) will have the option of paying.
- 3.9 Agsafe submits that it is unlikely that such a fee will be charged during the term of the current IWRS agreement. According to projections provided by Agsafe, which take into account the potential for an increase in container collections, the IWRS reserves are likely to stand at approximately \$4.5 million at the end of the current IWRS agreement (it is projected that the reserves will be depleted by approximately \$800 000 per annum). If these projections are accurate, the IWRS top-up fee will not be used by Agsafe as the reserves will not fall below \$3.2 million.
- 3.10 From the information provided by Agsafe, it is clear that the IWRS Levy top-up fee is not included in the IWRS memorandum of understanding for which it is seeking authorisation. Any immunity extended from a potential grant of substitute authorisation A90871 will not extend to the top-up fee.

Public benefits claimed by Agsafe

- 3.11 Agsafe submits that an increase in overall benefits to the public will result from the proposed changes. Agsafe states that the IWRS agreement provides advantages for the public and chemical users by promoting high standards for the environment, health and safety. Agsafe also claims that there will be an overall reduction in cost to end users in the order of \$500 000 per year due to a more efficient allocation of resources.
- 3.12 Agsafe submits that the proposed arrangements will result in a number of further benefits which fall broadly into the categories of:
- benefits of the *drumMUSTER* program
 - benefits from amalgamating the administration of the DrumMUSTER and ChemClear programs
 - benefits of the ChemClear program

Benefits of the *drumMUSTER* program

- 3.13 Agsafe submits that the *drumMUSTER* program has resulted in a number of benefits to the environment. Agsafe claims that placing a levy on non-returnable AgVet chemical containers will encourage users of such products to purchase them in refillable, water soluble, cardboard or paper containers and encourage manufacturers to package their products in such containers.
- 3.14 Agsafe further submits that the *drumMUSTER* program provides for the appropriate collection and disposal of unwanted empty AgVet chemical containers.

Reduced weight at source

- 3.15 Agsafe submits that a 2003 audit carried out by Avcare found that over the past twelve years there has been an increase of 80 per cent in the volume of crop production and animal health product used, indicating an increase in the overall amount of packaging used for transportation and storage of such products. Agsafe states that, since 1999, the amount of AgVet product sold in refillable or bulk containers has increased by 40 per cent.
- 3.16 Agsafe states further that over the past twelve years the number of non-returnable AgVet chemical containers sold in Australia has decreased by approximately 790 000 units.

Recovery of chemical containers

- 3.17 Agsafe submits that 31 per cent of eligible drums sold were recovered under the *drumMUSTER* program in 2003 – 2004. Agsafe states that whilst this is a

creditable performance in the five years since the program started, there is still much to be done to achieve the targeted 67 per cent recovery rate.

- 3.18 Agsafe states that market research has shown that the major concerns in relation to the **drumMUSTER** program amongst farmers in low collection areas are the lack of notification of collections and inconvenient collection times. Agsafe submits that, in an effort to remedy this, they have engaged more regional field officers and conducted a series of council forums to improve awareness.
- 3.19 Agsafe have advised the ACCC that a major national promotion utilising television, rural radio and print media will be undertaken to coincide with upcoming collection periods as a way of encouraging potential users to utilise the program.

A defined route for disposal

- 3.20 Agsafe submits that plastic containers collected under the **drumMUSTER** program are recycled rather than being sent to land-fill. Agsafe submits that six million containers weighing 9 000 tonnes have been collected since the **drumMUSTER** program's inception in February 1999 with 456 councils providing collection services. Geographically, these councils represent 97 per cent of locations where eligible AgVet chemicals are sold.
- 3.21 Agsafe submits that 99 per cent of plastic packaging eligible for collection under the **drumMUSTER** program is composed of high molecular weight HDPE (High Density Polyethylene) which is increasingly being recognised as a valuable material for recycling. Agsafe claims that the value of this material is enhanced by access to a consistent flow of material as provided by the **drumMUSTER** program.

Research

- 3.22 Agsafe states that a portion of the **drumMUSTER** levy is used for research which is aimed at acquiring the information it needs to overcome any issues that may prevent AgVet chemical purchasers from using of the **drumMUSTER** program.

Benefits from amalgamating the administration of the two programs

- 3.23 Agsafe submits that an IWRS advisory committee will be responsible for running the **drumMUSTER** and ChemClear programs. Agsafe submits that replacing the current administrative arrangements, where the two programs are administered separately, with a single administration will result in an improved utilisation of resources, allowing for joint promotion of the **drumMUSTER** and ChemClear programs and a more streamlined management structure.

Benefits of the ChemClear program

Improved occupational health and safety practices

- 3.24 Agsafe submits that by providing a service for the safe removal and disposal of unwanted chemicals from properties under the ChemClear program, it is providing for a safer farm workplace and is acting to reduce the risk of contamination to the environment.

Potential anti-competitive detriments of the proposed arrangements

The levy on eligible agricultural and veterinary chemical containers

- 3.25 Agsafe submits that the main costs associated with the implementation of the IWRS agreement are; the reimbursement of councils for the construction of compounds; the cost of promoting the **drumMUSTER** and ChemClear programs; the cost of inspecting eligible containers; and costs associated with the actual collection.
- 3.26 Agsafe claims that a survey of farmers in both high and low **drumMUSTER** participation areas found the levy to be of relatively minor concern with 8.8 per cent ranking the levy as one of their three main concerns with the **drumMUSTER** program. Agsafe also claims that AgVet chemicals usually cost between \$5 and \$20 a litre, and that the IWRS levy will only represent a potential increase of between 0.8 and 0.2 per cent.
- 3.27 Agsafe submits that the fact that end users will pay a levy is not itself anti-competitive. Agsafe claims that in the absence of the scheme, there would be no incentive for end users to purchase products packaged in returnable containers.

Negotiations with councils on contractual terms

- 3.28 Agsafe states that councils are required to enter into a service agreement with Agsafe, the main principles of which are non-negotiable. Agsafe claims however, that flexibility in negotiations has increased since the program began and this has resulted in a more flexible claims process than existed at the inception of the program.

Coverage of the **drumMUSTER** and ChemClear programs

- 3.29 Agsafe submits that the **drumMUSTER** program allows for the collection of chemical containers that contain eligible chemicals manufactured by parties to the IWRS agreement. Eligible chemicals include all registered AgVet chemicals (as defined by the APVMA⁴), dairy chemicals, liquid fertilisers and adjuvants. If these chemicals are sold in non-returnable containers they will attract the four cents per litre or kilogram IWRS levy.

⁴ Australian Pesticides and Veterinary Medicines Authority

- 3.30 The ChemClear program provides a fully subsidised collection and disposal program for unwanted registered AgVet chemicals (defined by Agsafe as Group 1 chemicals) manufactured by the parties to the IWRS agreement. Other products that attract the IWRS levy, such as dairy chemicals, liquid fertilisers and adjuvants (defined by Agsafe as Group 2 chemicals) will be eligible for subsidised collection under the ChemClear program but purchasers of such chemicals will have to pay an additional fee for their disposal.

4 Interested party submissions

- 4.1 The ACCC sought submissions from a wide range of interested parties and those received are summarised below. Submissions received fell into three main categories, submissions from parties to Agsafe's proposed IWRS agreement, submissions from government bodies and submissions from AgVet chemical manufacturers. Complete copies of all submissions are available on the ACCC's public register and on its website.

Submissions received from parties to the Agsafe agreement

- 4.2 The following parties to the Agsafe IWRS agreement lodged submissions with the ACCC:

- The National Farmers' Federation
- Avcare Ltd
- The Veterinary Manufacturers and Distributors Association Inc

The National Farmers' Federation

- 4.3 The NFF submits that it support Agsafe's application for revocation and substitution, stating that the proposed changes to the current arrangements will lead to benefits for both farmers and the general public.

- 4.4 The NFF submits that the proposed arrangements will provide farmers and users of AgVet chemicals with benefits by:

- providing a more integrated stewardship program for the collection of cleaned chemical drums and unwanted AgVet chemical products which will lead to improved service delivery and environmental outcomes
- providing a transparent, concrete and consolidated funding arrangement for both the **drumMUSTER** and ChemClear programs
- providing greater efficiency in the use of funds raised by the IWRS levy through the implementation of a streamlined and cost effective management structure and
- ensuring the funding principles of the original **drumMUSTER** agreement are reinforced, while the ultimate cost to farmers and chemical users is minimised.

Avcare Ltd

- 4.5 Avcare submits that it supports Agsafe's application for revocation and substitution, noting that the aim of the proposed IWRS agreement is to ensure that the industry and farmers can gain from efficiencies derived from running two waste reduction programs at the least cost to manufacturers and suppliers of AgVet

chemicals and least cost to farmers and ultimately consumers of agricultural products.

- 4.6 Avcare submits that major cost savings can be realised within the supply chain:
- through administrative efficiencies from combining the management of the ChemClear and **drumMUSTER** programs
 - through utilisation of existing communication channels which can be used to educate and reinforce the message of proper disposal systems for unwanted and obsolete chemicals and disposal of returnable containers
 - by ensuring farm practices will comply with quality assurance programs
 - by providing best practice waste management tools to ensure farmers meet the standards required for trade and
 - through the provision of a low cost waste management and disposal program which will assist in agricultural sustainability.
- 4.7 Avcare further submits that the public will benefit from a lower cost collection program for unwanted chemicals and a higher rate of return on non-returnable containers

The Veterinary Manufacturers and Distributors Association Inc

- 4.8 The VMDA submits that it supports both the **drumMUSTER** and ChemClear programs and Agsafe's application for revocation and substitution.

Submissions received from Government departments

- 4.9 The ACCC received submissions from the following state and federal government departments:
- Tasmanian Department of Primary Industries, Water and Environment
 - Australian Government Department of Agriculture, Fisheries and Forestry
 - Queensland Environmental Protection Agency
 - Australian Government Department of the Environment and Heritage
 - Queensland Department of Primary Industries and Fisheries
 - Northern Territory Department of Business, Industry and Resource Development
- 4.10 These submissions generally support Agsafe's proposal to amalgamate the **drumMUSTER** and ChemClear programs under the IWRS agreement on the grounds that it will provide for an improved allocation of resources.

- 4.11 These submissions also express support for the proposed arrangements on the grounds that they will provide a benefit for the environment and fulfil an important stewardship role. Generally, these submissions state that:
- integrating the ChemClear and *drumMUSTER* programs into the IWRS agreement will provide a more practical stewardship process that will allow the industry to build on the success of the *drumMUSTER* program
 - the IWRS agreement will help reduce the creation of hazardous waste sites by offering farmers a safe method of disposal for AgVet chemicals and
 - the safe removal of AgVet chemicals from farm properties will limit the extent to which these chemicals can impact upon the health of the environment and of rural communities.

Victorian Department of Primary Industries

- 4.12 The Victorian Department of Primary Industries (the VDPI) submits that chemical users who have to pay an additional fee for disposal under the ChemClear program (users of Group 2 chemicals, chemicals manufactured by companies outside of the IWRS agreement and obsolete chemicals) may subsidise the ChemClear program for those chemical users who can obtain the services of the program without extra charge (users of Group 2 chemicals).
- 4.13 The VDPI submits that if Group 1 chemicals are favoured by a subsidy, it may give an unfair advantage to the chemical companies that produce Group 1 chemicals as they may receive a rebate for taking back unwanted chemicals and potentially repackage and resell the unwanted chemicals at a profit. The VDPI claims that this may unduly affect competition in the chemical product market.

Submissions received from AgVet chemical Manufacturers

- 4.14 The following AgVet chemical manufacturers provided the ACCC with submissions:
- Fort Dodge Australia Pty Ltd
 - Intervet Australia Pty Ltd
 - Virbac Australia Pty Ltd
 - Du Pont (Australia) Ltd
 - Schering-Pough Animal Health
 - IDH Pty Ltd
 - Monsanto Australia Ltd

- 4.15 These submissions uniformly support the proposed arrangements, noting that industry and farmers will gain from efficiencies brought about by the amalgamation of the two waste reduction programs.
- 4.16 The AgVet chemical manufacturers submit that merging the two programs will provide the additional benefits of:
- streamlining the administration process of the two programs
 - optimising the utilisation of resources in carrying out the programs' objectives
 - providing a solution for both the recycling of single trip containers and the collection and disposal of obsolete rural chemicals
 - assisting in the maintenance of quality assurance and in meeting international best practice guidelines and
 - fulfilling extended producer responsibilities and meeting the industry's social and environmental responsibilities.
- 4.17 They further submit that a grant of authorisation will bring about efficiencies that would not otherwise be provided in the market for the safe collection and disposal of AgVet chemicals and containers.

Submissions received after the draft determination

- 4.18 The ACCC received a submission in relation to its draft determination from the Queensland Department of Primary Industries and Fisheries (DPIF). The DPIF submitted its support for the proposed conditions, stating the IWRS levy has been set at too high a level. The DPIF also submitted its support for the expansion of the ChemClear program, as it is important for farming communities and the environment.
- 4.19 The DPIF however, objected to the IWRS being referred to as a waste reduction program, as the ChemClear program is a waste disposal scheme rather than a program for the reduction of waste. The ACCC considers that the title of the IWRS is unlikely to raise concerns as the *drumMUSTER* program does act to reduce waste by recycling containers. Consequently, the ACCC does not consider that the title will affect its assessment of the application.
- 4.20 Agsafe responded to the DPIF's submission, stating that an increase in take-up of the *drumMUSTER* program and the introduction of the ChemClear program are likely to lead to an increase in the cost of operating the IWRS.
- 4.21 The ACCC also received submissions in support of the draft determination from the Australian Pesticides and Veterinary Medicines Authority and the VMDA.

5 Statutory provisions

- 5.1 Under section 91C of the TPA, the ACCC may grant an application to revoke an existing authorisation and grant 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. The ACCC may also initiate an application for revocation and substitution in certain circumstances.
- 5.2 In order for the ACCC to grant an application to revoke an existing authorisation and grant a substitute authorisation, the ACCC must consider the substitute authorisation in the same manner as the standard authorisation process.

The statutory tests

- 5.3 In assessing an application made under section 91C of the TPA, the relevant tests Agsafe must satisfy for the substitute authorisation to be granted are outlined in sections 90(6) and 90(7) of the TPA.
- 5.4 Under section 90(6) of the TPA, the ACCC may grant authorisation in respect of a proposed contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:
- the contract, arrangement or understanding would result, or be likely to result, in a benefit to the public and
 - 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 contract or arrangement were made and the provision concerned were given effect to.
- 5.5 Under section 90(7) of the TPA, the ACCC may grant authorisation in respect of a contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:
- the contract, arrangement or understanding has resulted, or is likely to result, in a benefit to the public and
 - 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 provision.

The public benefit test

- 5.6 In deciding whether it should grant authorisation, the ACCC must examine the detriments of the arrangements or conduct, particularly those arising from any lessening of competition, and the public benefits arising from the arrangements or conduct and weigh the two to determine which is greater. This is referred to as the ‘public benefit test’.

- 5.7 Should the public benefits or expected public benefits outweigh the detriments, the ACCC may grant authorisation. If this is not the case, the ACCC may refuse authorisation or, alternatively, the ACCC may grant authorisation subject to conditions as a means of ensuring that the public benefit outweighs the detriment.
- 5.8 Public benefit is not defined by the TPA. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:
- ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.⁵
- 5.9 Similarly, public detriment is not defined in the TPA but the Tribunal has given the concept a wide ambit. It has stated that the detriment to the public includes:
- ...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.⁶
- 5.10 The ACCC also applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and any detriment generated by arrangements for which authorisation has been sought.
- 5.11 Under this test, the ACCC compares the public benefit and detriments generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the counterfactual.

Other relevant provisions

- 5.12 Section 88(10) of the TPA provides that an authorisation may be expressed so as to apply to or in relation to another person who becomes a party to the proposed arrangements in the future.
- 5.13 Section 91(1) of the TPA allows the ACCC to grant authorisation for a specific period of time.
- 5.14 Section 91(3) allows the ACCC to grant authorisation subject to conditions.

⁵ *Re 7-Eleven Stores; Australian Association of Convenience Stores Incorporated and Queensland Newsagents Federation* (1994) ATPR ¶ 41-357 at 42677

The Tribunal recently followed this approach in *Qantas Airways Limited* [2004] ACompT 9, 16 May 2005

⁶ *Ibid* at 42683.

6 ACCC assessment – Relevant markets

- 6.1 The first step in assessing the public benefits and anti-competitive detriments of the proposed arrangements for which authorisation is sought is to consider the relevant market(s) in which those arrangements occur.
- 6.2 The ACCC may use market analysis to identify and measure the public benefit and anti-competitive detriment resulting from arrangements for which authorisation has been sought. However, depending on the circumstances, the ACCC 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 the scope of the defined market.

ACCC's assessment of the relevant market

- 6.3 Authorisation application A90963 relates to an arrangement whereby AgVet chemical manufacturers agree to impose a levy on the volume or weight of AgVet chemicals sold. The ACCC considers that the primary market that may be effected by this conduct is:
- the market for the manufacture and wholesale of AgVet chemicals.
- 6.4 The ACCC also considers that the conduct may have an effect on the markets for:
- the distribution and sale of AgVet chemical products in Australia and
 - AgVet chemical and container collection and processing services.

The market for the manufacture and wholesale of AgVet chemicals

- 6.5 As the proposed arrangements relate to a group of AgVet chemical manufacturers agreeing to pay a levy for each litre or kilogram of product sold, the market for the manufacture and wholesale of AgVet chemical products is likely to be the primary market effected by the proposed arrangements.
- 6.6 This market features a number of participants, many of whom are large multinational firms that manufacture and sell AgVet chemicals (e.g. crop protection chemicals, animal health products and vaccines). These manufacturers produce and distribute a variety of different chemicals such as pesticides, fertilisers and animal vaccines.
- 6.7 A large proportion of the participants in this market are members of Avcare. Avcare is the owner of Agsafe (and a signatory to the IWRS agreement) and has sixty-three member companies that manufacture around 90 per cent of crop protection chemicals and 75 per cent of animal health chemicals⁷ sold in Australia.

⁷ Avcare 2003-2004 annual summary

Collectively, these businesses represent the largest portion of the market for the manufacture and wholesale of AgVet chemicals in Australia.

- 6.8 The ACCC considers that new entrants to the market are likely to face high start-up costs. A new entrant is likely to incur costs either from purchasing a licence from a patent holder, which would allow it to produce a particular product, or from the research and development of new AgVet chemical products. New entrants are also likely to face high costs associated with setting up manufacturing facilities and distributing their products.
- 6.9 The ACCC therefore considers that the significant features of the market for the manufacture and wholesale of AgVet chemicals include:
- a number of large manufacturers that produce various AgVet chemical products (including fertilisers, pesticides and animal vaccines) and
 - high barriers to entry

The market for the distribution and sale of AgVet chemicals

- 6.10 As noted above, under the proposed arrangements, manufacturers will agree to pay a levy to Agsafe for the operation and administration of the IWRS agreement. The cost of this levy is likely to be added to the price of AgVet chemicals sold by the manufacturer, and may eventually be passed on to the end users of these chemicals. For this reason, the ACCC considers that the market for the distribution and sale of AgVet chemicals is likely to be relevant to its assessment.
- 6.11 The ACCC notes that features of the market for the distribution and sale of AgVet chemicals include:
- the presence of several large firms, which account for the bulk of sales in the market (Elders Ltd, Landmark Holdings Ltd, Ruralco Holdings Ltd and IHD Pty Ltd)
 - a number of smaller retailers of AgVet chemicals, with operations confined to a local area and
 - competition between these large incumbent firms.

The market for the collection and processing of AgVet chemicals and their containers

- 6.12 The ACCC considers that the market for the collection and processing of AgVet chemicals and their containers may be relevant to its assessment. Agsafe's bargaining position with councils and the operators of disposal facilities may be improved by virtue of its role in administering the IWRS agreement and controlling the distribution of the IWRS levy's funds. This may give Agsafe greater control over what ultimately appears in these contracts.

7 ACCC assessment – Future with-or-without

- 7.1 As stated in section 5, the ACCC applies the ‘future with-or-without test’ established by the Tribunal to identify and weigh the public benefit and anti-competitive detriment generated by arrangements for which authorisation has been sought.
- 7.2 Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to make a reasonable forecast about how the relevant markets will react if authorisation is not granted. This forecast is referred to as the counterfactual.
- 7.3 In this instance, the ACCC considers there to be two possible counterfactuals:
- Agsafe withdraws its funding of the ChemClear program, resulting in the program’s cancellation or
 - Agsafe continues to fund the ChemClear program without authorisation.
- 7.4 In the situation whereby Agsafe withdraws its funding from the ChemClear program, the *drumMUSTER* program would in all likelihood continue to operate but the ChemClear program would likely be wound up.
- 7.5 In a situation where Agsafe continued to fund the ChemClear program without authorisation, the program may be at risk of breaching the TPA.
- 7.6 Therefore, the ACCC considers that the likely counterfactual if the substitute authorisation is not granted is that Agsafe will withdraw funding from the ChemClear program, resulting in the cancellation of the program. The ACCC notes that under this counterfactual, the *drumMUSTER* program will continue to operate under authorisation A90871.
- 7.7 The ACCC considers that, while many AgVet chemical users are likely to organise their own means of disposal of such chemicals, there is a greater likelihood of appropriate disposal with the ChemClear arrangements.

8 ACCC assessment – evaluation

- 8.1 In order to grant a substitute authorisation to the proposed arrangements, the ACCC must be satisfied that those arrangements would result in a benefit to the public that outweighs any detriment to the public constituted by any lessening of competition arising from the arrangements.
- 8.2 There must also be a nexus between the claimed public benefits and the proposed arrangements for which substitute authorisation is sought. In other words, the benefit must flow from the proposed arrangements.
- 8.3 The following assessment will first consider the extent to which the proposed arrangements may give rise to any detriments and then balance these against the potential public benefits of the proposed arrangements.
- 8.4 It is important to note that, under the future with-or-without test outlined in section 7, the ACCC will compare the likely public benefit and anti-competitive detriment of the proposed arrangements, the factual situation, against those that may arise under the counterfactual situation in which a substitute authorisation is not granted. If a public benefit or detriment is likely to arise regardless of whether substitute authorisation is granted, it will not be considered as offering an additional benefit or detriment for the purpose of the public benefits test.
- 8.5 In the context of its assessment of possible detriment, the ACCC will also consider whether it may be some form of review mechanism is needed to ensure that the IWRS levy is not set at a level that is too high, taking into account the cost of running the *drumMUSTER* and ChemClear programs.

Analysis of the anti-competitive detriment

- 8.6 The ACCC considers that the proposed conduct may raise concerns of anti-competitive detriment. The areas of concern which will be assessed for their potential to cause anti-competitive detriment in this section are:
- the IWRS levy
 - the IWRS levy top-up fee
 - the inability of some purchasers to access the ChemClear program without further cost
 - the ability of Group 1 chemical producers to gain a competitive advantage by reselling unwanted AgVet chemicals and
 - negotiations with councils on contract terms
 - Uncertainty regarding the level of the IWRS levy

The IWRS levy

- 8.7 The application for substitute authorisation A90963 centres around an agreement between various manufacturers of AgVet chemicals to pay a levy based on the volume or weight of AgVet chemicals sold. If the cost of this levy were passed on through the supply chain it may result in a higher price for purchasers of AgVet chemicals, resulting in a higher cost of production for primary producers, which may ultimately flow on to the price of agricultural products paid by consumers. To the extent that the IWRS levy has the effect of creating distortions in consumer pricing it is likely that an anti-competitive detriment will arise.
- 8.8 Agsafe submits that, in most cases, AgVet chemicals are priced at between \$5 and \$20 per litre. This being the case, a four cents per litre levy placed on these products would only represent a cost increase of between 0.8 and 0.2 per cent. Therefore, any cost increase associated with the imposition of the IWRS levy is likely to be relatively minor. Agsafe also submits that a survey of farmers found that only 8.8 per cent of those questioned ranked the levy as being one of their three main concerns with the *drumMUSTER* program.
- 8.9 The ACCC considers that, under the likely counterfactual, purchasers of AgVet chemicals will continue to pay a levy to fund the *drumMUSTER* program. It is likely that, in this situation, purchasers of AgVet chemicals will face a similar price for these products as in the factual situation where the substitute authorisation is granted.

The IWRS levy top-up fee

- 8.10 As discussed in section 3, Agsafe propose to implement a top-up fee if the IWRS levy's reserves fall below \$3.2 million during the period of the IWRS agreement. This top-up fee would be paid by participating members of Avcare and the VMDA, who would be obliged to pay, while other parties to the IWRS agreement will be asked to contribute.
- 8.11 The ACCC considers that the top-up fee would not be covered by the proposed substitute authorisation, as it is not included in the IWRS memorandum of understanding. The ACCC considers that, were Agsafe to find itself in a position where it needed to utilise the top-up fee, it may need to seek a substitute authorisation under 91C of the TPA if it considered that the top-up fee may constitute a contravention of the TPA.

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

- 8.12 As noted in section 3, Agsafe submits that all registered AgVet chemicals⁸ (Group 1 chemicals) will be eligible for collection and disposal at no additional

⁸ AgVet chemicals that are registered with the Australian Pesticides and Veterinary Medicines Authority

cost under the ChemClear program, while other AgVet chemicals which attract the IWRS levy such as dairy chemicals, liquid fertilisers and adjuvants (Group 2 chemicals) will be eligible for subsidised collection, but purchasers will have to pay for the cost of disposal.

- 8.13 The ChemClear program will also allow for the subsidised collection of AgVet chemicals produced by manufacturers that are not a party to the IWRS agreement. As with Group 2 chemicals, the cost of disposal is negotiated between the collection agency and the purchaser.
- 8.14 The ACCC considers that there may be some detriment caused insofar as purchasers of Group 2 chemicals are subsidising the use of the ChemClear program by Group 1 chemical purchasers. The ACCC considers that, in this circumstance, purchasers of Group 2 chemicals may be subsidising the use of the ChemClear program for purchasers of Group 1 chemicals who can access the ChemClear program without additional cost. This being the case, and to the extent that some purchasers are funding a service which they cannot access, an anti-competitive detriment may arise.
- 8.15 The ACCC considers however, that as the majority of AgVet chemical sales are made up of Group 1 chemicals and most purchasers that pay the IWRS levy are likely to be able to access the IWRS at no extra cost, any such detriment is likely to be minimal. The ACCC further considers that as many of the Group 2 chemicals are non-hazardous, and can be disposed of on-farm, the requirement for third party disposal of these chemicals is likely to be low.
- 8.16 The ACCC also considers that, under the likely counterfactual, no purchaser of Group 1 or Group 2 chemicals will be able to access the ChemClear program as it will no longer operate. These purchasers are still likely to pay the IWRS levy but may need to organise chemical collection and disposal on an ad hoc basis without levy funds.
- 8.17 The likely factual situation is one where, while some purchasers of AgVet chemicals that attract the IWRS levy will have to pay an additional cost for disposal, all purchasers will have access to a subsidised collection and transportation service.
- 8.18 The ACCC therefore considers that any anti-competitive detriment that may be caused by the inability of some purchasers to fully access the ChemClear program is likely to be minimal.

The ability of Group 1 chemical manufacturers to gain a competitive advantage by reselling unwanted AgVet chemicals

- 8.19 The VDPI submits that manufacturers of Group 1 chemicals may gain a competitive advantage over other chemical manufacturers as they may be able to

repackage and resell unwanted Group 1 chemicals retrieved from the ChemClear program and also receive funding from the IWRS levy.

- 8.20 In response to this submission, Agsafe have noted that chemicals collected under the ChemClear program will not be returned to their manufacturers for resale and that a secondary market for such chemicals will not be formed from AgVet chemicals collected as part of the ChemClear program.
- 8.21 The ACCC considers that, as manufacturers will not have access to AgVet chemicals collected under the ChemClear program, there will not be any scope for them to resell these products in a secondary market. As such, the ACCC does not consider that manufacturers of Group 1 AgVet chemicals will gain a competitive advantage over other manufacturers by capitalising on any potential secondary market for AgVet chemicals.

Negotiations with councils on contract terms

- 8.22 Under the proposed arrangements, funds from the IWRS levy will be used by Agsafe to re-imburse local councils for their role in administering collection and storage services as part of the IWRS agreement. Agsafe is likely to have a significant advantage over councils in contract negotiations by virtue of its control of these funds and is likely to have significant discretion as to the terms and conditions that appear in such contracts.
- 8.23 Agsafe submits that it is a requirement of participation in the IWRS agreement that councils enter into service agreements with Agsafe, the main principles of which are non-negotiable. Agsafe notes that dealings with councils have improved and become more flexible since the inception of the **drumMUSTER** program, especially with regards to the claims process.
- 8.24 Generally, the ACCC considers that an anti-competitive detriment may arise in a situation where granting authorisation to a particular party allows them to improve their bargaining position to such an extent that they can dictate the terms and conditions of their contracts without input from the other negotiating party.
- 8.25 In this circumstance, the ACCC considers that local councils may be put at a disadvantage by Agsafe's strong bargaining position, which may result in Agsafe having a substantial degree of control over the contract terms and conditions. The ACCC notes however, that the IWRS agreement is unlikely to be successful if Agsafe is unable to exercise a degree of control over the use of the funds raised under the IWRS levy. The ACCC further notes that participation in the IWRS agreement is not compulsory for local councils, and that it is unlikely that a local council would enter into a contract unless it were in their interest to do so.
- 8.26 The ACCC also considers that local councils are likely to face the same bargaining position with Agsafe under the likely counterfactual, as Agsafe is likely to maintain its control over the re-distribution of funds from the current **drumMUSTER** levy.

- 8.27 Therefore, the ACCC considers that the proposed arrangements may result in Agsafe retaining a strong bargaining position, but that Agsafe is likely to retain this position with-or-without substitute authorisation, and an additional detriment is unlikely to occur above that of the counterfactual.

Uncertainty regarding the level of the IWRS levy

- 8.28 The ACCC considers that at the time of the **drumMUSTER** program's inception it was unlikely that Agsafe could have confidently predicted an appropriate price for the IWRS levy given that many of the costs associated with the program would have been unknown at that stage. The cost of operating the **drumMUSTER** program was, and remains, linked to the actual number of containers collected and, as program participation rates for chemical users was unknown at program inception, Agsafe would not have been in a position to precisely determine the cost of operating the **drumMUSTER** program.
- 8.29 The ACCC considers that, as the **drumMUSTER** program has been operating for six years, it may be an appropriate time to consider what procedures can be put in place to ensure that the IWRS levy is set not set at a level above that needed to fund the IWRS agreement. The ACCC is aware that Agsafe has accumulated significant financial reserves from the IWRS levy over the life of the **drumMUSTER** program. This could indicate that the IWRS levy was originally set at a level which may have been above the cost of running the program. To the extent that the authorised arrangements have resulted in an over collection, public detriment may have resulted.
- 8.30 The ACCC notes that the proposed introduction of the ChemClear program into the IWRS agreement is likely to give purchasers of eligible AgVet chemical products access to additional services at no additional cost. This increase in services is likely to lead to a situation where the IWRS levy reflects the cost of operating the two programs more closely than it currently appears to be.
- 8.31 However, based upon the information currently before it, the ACCC is not in a position to assess whether the IWRS levy will be set at an appropriate level by virtue of a change in the level of services offered under the IWRS agreement. Consequently, the ACCC considers that, to the extent that the levy may be set at a level that is too high to reflect the cost of operating the **drumMUSTER** and ChemClear programs, an anti-competitive detriment may arise.

Conclusion on the anti-competitive detriment

- 8.32 For the reasons outlined above, the ACCC considers that a grant of substitute authorisation may give rise to some additional anti-competitive detriments over that of the counterfactual inasmuch as some purchasers of AgVet chemicals that attract the IWRS levy will not be able to fully access the ChemClear program without further cost. The ACCC also considers that some anti-competitive

detriment may arise to the extent that the levy may be set at a level that is too high to reflect the cost of operating the **drumMUSTER** and ChemClear programs.

Analysis of the public benefit

Benefits of the drumMUSTER program

- 8.33 The ACCC considers that, as the existing **drumMUSTER** program will continue to operate with-or-without the substitute authorisation, any public benefits attributed solely to the **drumMUSTER** program will not be increased or decreased by the ACCC granting or denying the current application. Consequently, the ACCC considers that only the public benefits, if any, arising from the currently unauthorised ChemClear program will effect its assessment of the public benefit.

Benefits from amalgamating the drumMUSTER and ChemClear programs

- 8.34 Agsafe submits that the proposed amalgamation of the administration of the ChemClear and **drumMUSTER** programs will result in efficiencies to management, reduced cost and increased allocative efficiency when compared to the current situation of operating two separate waste reduction programs under different administrative frameworks.
- 8.35 The ACCC considers that while this may be accurate, it is important to note that under the likely counterfactual it is considered that Agsafe will only operate the **drumMUSTER** program and that the ChemClear program will no longer operate. In this circumstance, Agsafe will manage the **drumMUSTER** program under a single administration. The ACCC considers that the cost of operating the **drumMUSTER** program is likely to be, at most, the same as operating the amalgamated IWRS agreement.
- 8.36 The ACCC considers that Agsafe's submission of cost savings are unlikely to represent a benefit to the public in excess of that offered under the likely counterfactual.

Benefits of the ChemClear program

- 8.37 Agsafe states in its submission that the collection of unwanted AgVet chemicals from farms will provide a public benefit as it will facilitate a safe means of disposal for users and prevent a build up of hazardous chemicals on rural properties. Agsafe submits that such a build up presents a risk to the health and safety of farm employees while the *Tasmanian Department of Primary Industries, Water and Environment* claims such build up presents a significant problem for growers.
- 8.38 The ACCC considers that, to the extent that, absent the substitute authorisation, stored AgVet chemicals would either be disposed of in an incorrect manner or would pose a health risk to farm owners and employees, the implementation of a

scheme for their safe removal and disposal is very likely to generate a public benefit.

- 8.39 The ACCC also considers that, insofar as the ChemClear program negates the need for purchasers of eligible AgVet chemicals to organise their own collection and disposal services on an ad hoc basis, and to the extent that a nationally co-ordinated chemical collection program will provide efficiencies when compared to a situation where each purchaser is individually responsible for organising for the collection and disposal of their unwanted AgVet chemicals, a significant public benefit is very likely to occur.

Conclusion on the public benefits

- 8.40 The ACCC considers that, for the reasons above, the proposed arrangements are likely to result in some public benefits over those generated by the counterfactual.

Balance of public benefits and anti-competitive detriments

- 8.41 The ACCC considers that some anti-competitive detriments are likely to occur if substitute authorisation is granted. This detriment is likely to arise, in part, because some purchasers of eligible AgVet chemical products will not be able to access the ChemClear program without further cost. To the extent that this results in a situation where some purchasers subsidise the ChemClear program for others, an anti-competitive detriment may arise.
- 8.42 However, the ACCC considers that there are a number of issues which may serve to mitigate this possible detriment, including:
- the number of purchasers effected is likely to be low and
 - all purchasers are likely to receive greater services than they would have under the likely counterfactual.
- 8.43 The ACCC also considers that, to the extent that the IWRS levy may be set at too high a level to reflect the cost of operating the *drumMUSTER* and ChemClear programs, some anti-competitive detriment may arise. The ACCC considers that, based upon the information currently before it, it is not in a position to assess the extent to which this detriment may arise.
- 8.44 The ACCC also considers that the proposed substitute authorisation is likely to generate a public benefit above that of the likely counterfactual. The ACCC considers that these benefits will arise from:
- improved farm occupational health and safety by providing for the removal of unwanted and potentially hazardous AgVet chemical stockpiles and
 - efficiencies gained by offering a nationally co-ordinated collection program.

- 8.45 Following consideration of the arguments advanced by Agsafe and interested parties, and despite the mitigating factors referred to above, without addressing concerns as to the level of the levy, the ACCC would not be satisfied that the public benefits likely to result from the proposed arrangements would outweigh the potential anti-competitive detriments of those arrangements.

Proposed conditions

- 8.46 The ACCC considers that an independent assessment may assist Agsafe in ensuring that the IWRS levy is not set at a level that is too high to reflect costs. This assessment should take into account the costs associated with operating the IWRS agreement, the *drumMUSTER* program and the ChemClear program, and how these costs are reflected when setting the IWRS levy. The ACCC considers that such an assessment is likely to alleviate its concern that the IWRS levy may be set at an inappropriate level. Therefore, the ACCC considers it appropriate to impose the following conditions.

- 8.47 **Agsafe is to engage an independent auditor to:**

- 1. assess the cost of operating the drumMUSTER and ChemClear programs**
- 2. assess the level of the levy in light of these costs and other sources of funding, including existing reserve funds and**
- 3. to make recommendations as to the appropriate level of the IWRS.**

- 8.48 **This assessment is to be completed and provided to the ACCC no later than two weeks after the effective date of this authorisation.**

- 8.49 **To the extent that the independent audit recommends that the IWRS levy should be set below its current level, Agsafe is to implement its findings no later than 31 December 2005.**

- 8.50 With the imposition of these conditions, the ACCC would be satisfied that the public benefits of the proposed arrangements would outweigh their potential anti-competitive detriments.

Term of authorisation

- 8.51 As the term of the IWRS memorandum of understanding is three years, the ACCC proposes to grant substitute authorisation, subject to the above conditions, for a period of three years from the time the final determination is granted.

Interim authorisation

- 8.52 On 20 April 2005, the ACCC postponed its decision on whether or not to grant interim authorisation to Agsafe's application for substitute authorisation A90963. The ACCC's reasons for postponing its decision are explained in paragraphs 3.5

and 3.6. The ACCC considers that its initial concerns have now been addressed and, consequently, the matter of interim authorisation has been reconsidered.

- 8.53 The ACCC granted conditional interim authorisation to Agsafe for the proposed arrangements at the time of issuing its draft determination on 6 July 2005. Interim authorisation was granted on condition that Agsafe implement an independent audit of the IWRS levy. Interim authorisation will continue to apply until such time as this final determination takes effect.

9 Determination

The application

- 9.1 On 18 March 2005, Agsafe, on behalf of itself, Avcare, the VMDA, the NFF and the ALGA, the members of those associations and any agricultural or veterinary chemical manufacturers who are not members of Avcare or the VMDA but who agree to participate in the proposed arrangements, lodged an application pursuant to section 91C of the TPA for a revocation of authorisation A90871 and its substitution by authorisation A90963.
- 9.2 The application seeks:
- to make 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 TPA and
 - to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.
- 9.3 Specifically, the parties to the application are seeking authorisation to allow:
- Avcare, the VMDA, the NFF and the ALGA enter into a new Memorandum of Understanding to be called the Industry Waste Reduction Scheme (the IWRS agreement)
 - the establishment of an IWRS advisory committee to oversee the administration of both the *drumMUSTER* and ChemClear programs
 - the IWRS advisory committee, *drumMUSTER* program and ChemClear program to be funded by a four cents per litre or kilogram levy (the IWRS levy) charged on the content of eligible⁹ chemical containers and funded by chemical manufacturers and
 - the transfer of reserve funds gathered from the existing *drumMUSTER* levy to finance the ChemClear program.

Statutory test

- 9.4 For the reasons outlined in this determination, the ACCC is not satisfied that in all the circumstances the making of contracts and the giving effect to the provisions of the proposed arrangements for which authorisation is sought under subsection 91C of the TPA:

⁹ The IWRS levy is charged on AgVet chemicals manufactured by members of the IWRS agreement packaged in non-returnable containers.

- would be likely to result in a benefit to the public and
- that benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the arrangements.

However, the ACCC considers that by imposing certain conditions on the proposed arrangements, the ACCC would be satisfied that the public benefits of the proposed arrangements would outweigh their potential anti-competitive detriment such that they should be allowed to be made and given effect to.

Conduct authorised

9.5 In relation to application A90963 and pursuant to section 91C of the TPA, the ACCC proposes to grant authorisation to allow:

- Avcare, the VMDA, the NFF and the ALGA enter into a new Memorandum of Understanding to be called the Industry Waste Reduction Scheme (the IWRS agreement)
- the establishment of an IWRS advisory committee to oversee the administration of both the *drumMUSTER* and ChemClear programs
- the IWRS advisory committee, *drumMUSTER* program and ChemClear program to be funded by a levy (the IWRS levy) of no more than four cents per litre or kilogram charged on the content of eligible chemical containers and funded by chemical manufacturers and
- the transfer of reserve funds gathered from the existing *drumMUSTER* levy to finance the ChemClear program.

9.6 The ACCC grants the authorisation subject to the following conditions:

C1 Agsafe is to engage an independent auditor to:

1. assess the cost of operating the *drumMUSTER* and ChemClear programs
2. assess the level of the levy in light of these costs and other sources of funding, including existing reserve funds and
3. to make recommendations as to the appropriate level of the IWRS.

This assessment is to be completed and provided to the ACCC no later than two weeks after the effective date of this authorisation.

C2 To the extent that the independent audit recommends that the IWRS levy should be set below its current level, Agsafe is to implement its findings no later than 31 December 2005.

- 9.7 The ACCC grants authorisation to the proposed arrangements until 31 December 2008. In general, authorising arrangements for a limited time period allows the ACCC, at the end of the period of authorisation, to evaluate whether the public benefits upon which its decision is actually made eventuate in practice and the appropriateness of the authorisation in the current market environment.
- 9.8 The ACCC considers that to the extent that the Agsafe, or any other party to whom immunity is provided by the proposed authorisation, acts outside of the authorised arrangements or does not comply with the authorisation, they will not have protection from the TPA in so doing.

Effective date of the determination

- 9.9 This decision is subject to any application to the Australian Competition Tribunal for its review.
- 9.10 This determination is made on 24 August 2005. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 15 September 2005. If an application is made to the Tribunal, the determination will come into force:
- a) where the application is not withdrawn – on the day on which the Tribunal makes a determination on the review or
 - b) where the application is withdrawn – on the day on which the application is withdrawn.