Australian Competition & Consumer Commission

Final Determination

Application for Revocation of A90548 and its Substitution by A90854

lodged by

Refrigerant Reclaim Australia Limited

to extend the current refrigerant gas recovery program to include Synthetic Greenhouse Gases (HFC and PFC refrigerants).

Date: 7 May 2003

Authorisation no:
A90854

Public Register no:
C2002/1567

Commissioners
Fels
Bhojani
Jones
Martin
McNeill
Willet

Executive Summary

On 29 July 1994, Authorisation A90548 was granted by the Australian Competition and Consumer Commission (the Commission) to the Association of Fluorocarbon Consumers and Manufacturers Inc (AFCAM) to establish a reclamation scheme in the Australian market for ozone-depleting refrigerant gases, in particular HCFCs and CFCs.

On 4 October 2002, Refrigerant Reclaim Australia Limited (RRA) lodged an application under section 91C of the Trade Practices Act 1974 for a revocation and substitution of A90548. The proposed substitute authorisation, A90854, would be identical to A90548 except as regards to the refrigerant gases included in the scheme, which RRA proposes be extended to include synthetic greenhouse gases (HFC and PFC refrigerants) along with ozone depleting substances.

RRA applied for interim authorisation for the extension of the scheme to commence before summer season 2002/2003. The Commission granted interim authorisation on 6 November 2002.

The Commission understands that ozone depleting substances are currently being replaced by synthetic greenhouse gases (along with other alternatives) in the refrigerant and air conditioning industry.

The Commission invited interested parties to make submissions regarding the revocation of A90548 and substitution of an authorisation in the terms proposed by RRA. Nine submissions were received from interested parties. Seven submissions supported the extension of the current reclamation scheme. Two submissions expressed objection to the proposed substitute authorisation.

A draft determination proposing to revoke Authorisation A90548 and grant a substitute authorisation, A90854 was issued on 26 February 2003. Ten submissions were received from interested parties regarding the draft determination. Eight were in support of the application (two submissions were received from the same organisation). Two submissions, both by the same organisation, were received objecting to the draft determination. Greenchill Technology Association requested a pre-decision conference to discuss the draft determination. The pre-decision conference was held in Canberra on 11 April 2003.

Having consulted with interested parties and taking into account their submissions, the Commission is satisfied that an authorisation in identical terms to authorisation A90548, however extended to include synthetic greenhouse gases, would generate a public benefit outweighing any anti-competitive detriment.

As a result, the Commission revokes Authorisation A90548 and grants a substitute authorisation, A90854, as sought by RRA for five years from the date on which the authorisation comes into force.

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1. Introduction

Authorisations

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 a greater choice for consumers in price, quality and service.

1.2 The Act, however, recognises that competition may not always be in the best public interest. 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. The Commission conducts a comprehensive public consultation process before making a decision to grant or deny authorisation.

Revocation and substitution of authorisations

1.4 Additionally under the Act, 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.

1.5 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.

The current application

1.6 On 26 July 1994, the Commission issued a final determination granting authorisation A90548. The authorisation is described in Chapter 3.

1.7 On 4 October 2002, Refrigerant Reclaim Australia Limited (RRA) submitted an application to the Commission for revocation and substitution of authorisation A90548 and interim authorisation. The application is described in Chapter 4.

1.8 On 28 October 2002, the Commission wrote to a range of interested parties seeking their views on the application. Nine submissions were received.

1.9 On 6 November 2002, the Commission granted interim authorisation to RRA.

1.10 On 26 February 2003, the Commission issued a draft determination proposing, subject to any pre-determination conference requested and further submissions, to revoke Authorisation A90548 and grant a substitute authorisation, A90854, as sought by RRA for five years from the date on which the authorisation comes into force.

1.11 The Commission consulted interested parties inviting them to make submissions regarding the draft determination and/or request a pre-decision conference. Ten submissions were received. Greenchill Technology Association requested a pre-decision conference. The pre-decision conference was held in Canberra on 11 April 2003. The issues raised at the pre-decision conference are outlined in Chapter 6 of this determination.

2. Background

Refrigerant Reclaim Australia Limited

2.1 RRA is an industry-sponsored body for recovery of refrigerant gases in Australia. RRA submits, and the Australian Greenhouse Office supports, that it is the only organisation in Australia currently capable of recovering and destroying used gas at the end of its useable life, and has also confirmed that there are no similar schemes operating in the refrigeration and air-conditioning industry in Australia.

2.2 The following parties are members of RRA:

- Australian Fluorocarbon Council (AFC)
- Air conditioning and Refrigeration Equipment Manufacturers Association (AREMA)
- Air conditioning and Refrigeration Wholesalers Association (ARWA)
- National Association of Retail Grocers of Australasia (NARGA)
- Refrigeration & Air Conditioning Contractors Association (RACCA)
- Vehicle Air conditioning Specialists of Australasia (VASA)
- Atofina (Australia) Ltd
- GSA Industries Pty Ltd
- Rhodia (Australia) Ltd
- Mr Kevin Finn
- Mr Alan Woodhouse.

2.3 RRA is governed by a Board of Directors either appointed or elected from each sector with representation from:

- importers
- wholesalers
- contractors
- end users.

Refrigerant gases

2.4 Refrigerant gases are fluorocarbon substances and other substances used for the purposes of air conditioning and/or refrigeration, whether existing alone or in a mixture.

2.5 Ozone depleting gases, hydro chlorofluorocarbons (HCFCs) and, until their phase-out on 1 January 1996, chlorofluorocarbons (CFCs), used as refrigerants are subject to the levy under the current authorisation granted in 1994. The levy arrangements are discussed at Section 3.

2.6 Synthetic greenhouse gases, being hydro fluorocarbons (HFCs), per fluorocarbons (PFCs) and sulfur hexafluoride (SF6), are particularly potent greenhouse gases and are used in a number of industrial applications and emitted as a by-product of industrial activity.

2.7 The refrigerant and air conditioning industry uses ozone depleting substances. However they are replacing these over time with synthetic greenhouse gases.

Australian air-conditioning and refrigeration industry

2.8 The Australian air conditioning and refrigeration industry involves the following applications:

- automotive air conditioning
- domestic refrigeration
- residential air conditioning
- commercial refrigeration and air conditioning, and
- industrial refrigeration and air conditioning – chemical, manufacturing and petrochemical refineries

The refrigerant and air-conditioning gases are used in air conditioning and refrigeration equipment in all of the above sectors.

2.9 All relevant refrigerant gases are imported, largely from Europe and the United States.

Australian international obligations – protection of ozone layer

2.10 As a signatory to the *Vienna Convention for the Protection of the Ozone Layer 1985* and the *Montreal Protocol on Substances that Deplete the Ozone Layer 1987 (the Montreal Protocol)*, Australia has made an international commitment to control the consumption and production of ozone depleting substances. Responsibility for implementing this control is shared between the Commonwealth, State and Territory Governments.

2.11 The *Montreal Protocol* is concerned with substances that deplete the ozone layer and the Montreal Protocol industries are those industries which use or used ozone depleting substances, some of which are being replaced with synthetic greenhouse gases. The corresponding term 'non-Montreal Protocol industries' refers to those industries which have never used ozone depleting substances but routinely use or emit synthetic gases. The refrigeration and air conditioning industry is considered a Montreal Protocol Industry.

Commonwealth legislation – protection of ozone layer

2.12 The Australian refrigeration and air-conditioning industry is regulated by the *Commonwealth Ozone Protection Act 1989* and various State and Territory Ozone Protection Acts. Under the present arrangements, the Commonwealth Act controls the import, manufacture, licensing procedures and export of ozone depleting substances. The State Acts are not uniform and do not mirror the Commonwealth Act, tending instead to look at end-user controls such as sale, distribution, storage facilities, use and the prohibition of gas release into the atmosphere.

Greenhouse Gas Abatement Program

2.13 The Greenhouse Gas Abatement Program (GGAP) is a Commonwealth Government initiative to assist Australia in meeting its national and international commitments to reduce greenhouse gas emissions. The objective of GGAP is to reduce Australia's net greenhouse gas emissions by supporting activities that are likely to result in substantial emission reductions or substantial sink enhancements, particularly in the period 2008 – 2012. Under Round 1 of the GGAP, RRA received funding of $280,000 from the Commonwealth Government to extend the existing recovery program for ozone depleting substances to recover, reclaim and destroy used HFCs.

Western Australian legislation – ozone and greenhouse gases

2.14 State Legislation in Western Australia (Environmental Protection Act 1986 – Environmental Protection (Ozone Protection) Policy Approval Order 2000) mandates the recovery of, amongst other refrigerants, all fluorocarbon refrigerants - both ozone-depleting and synthetic greenhouse gases.

3. Authorisation A90548

3.1 On 29 July 1994, Authorisation A90548 was granted by the Commission to the Association of Fluorocarbon Consumers and Manufacturers Inc (AFCAM) to establish a reclamation scheme in the Australian market for ozone depleting refrigerant gases, in particular HCFCs and CFCs.

3.2 AFCAM's arrangements were authorised for a period of ten years.

3.3 The existing RRA program, which has involved the imposition of a $1 per kilogram levy on CFCs (until 1996 when import ceased) and HCFCs, has been in place since 1994.

3.4 Under the scheme, importers and manufacturers add a $1 levy to the cost of each kilogram of refrigerant gas sold to users (for example, fridge or air conditioning manufacturers). This charge may be passed onto consumers in the retail price of the product. These funds are remitted to a trust fund, and used to encourage and facilitate the recovery and recycling of reprocessable gases. They are also used to encourage storage and pay for the safe destruction of unreprocessable gases. The aim of the scheme is to help protect the earth's ozone layer, and consequently, help better the environment. Participation in the scheme is voluntary.

3.5 RRA pays rebates to both refrigeration contractors and refrigeration wholesalers who recover and return refrigerant. These rebates are intended to compensate for the costs incurred in recovering and returning refrigerant, and are based on financial analysis of costs undertaken and periodically reviewed by Pricewaterhouse Coopers.

3.6 AFCAM applied for the original authorisation as RRA did not exist at that time, and could not be established until the authorisation was granted.

3.7 Authorisation A90548 was granted under subsection 88(1) to make and give effect to a contract, arrangement or understanding which may have the purpose or effect of substantially lessening competition, within the meaning of section 45 of the Act.

4. Application for revocation and substitution

4.1 On 4 October 2002 RRA lodged an application under section 91C of the Act for a revocation and substitution of A90548. The application for revocation and substitution was made on behalf of and with the consent of AFCAM, the body to whom authorisation A90548 was granted.

4.2 The proposed substitute authorisation, A90854, would be identical to A90548 except as regards the refrigerant gases included in the scheme, which RRA proposes be extended to include synthetic greenhouse gases (HFC and PFC refrigerants) along with ozone depleting substances (CFCs and HCFCs).

4.3 Synthetic greenhouse gas refrigerants will attract an identical levy to that currently placed on ozone depleting substance refrigerants. Consistent with the current scheme, participation in the scheme is voluntary.

4.4 RRA applied for interim authorisation for the extension of the scheme to commence before summer season 2002/2003. The Commission granted interim authorisation on 6 November 2002.

4.5 RRA has requested authorisation for a period of ten years.

4.6 The Commission issued a draft determination on 26 February 2003 proposing to revoke Authorisation A90548 and grant a substitute authorisation, A90854 as sought by RRA for a period of five years from the date on which the authorisation comes into force.

4.7 The Commission invited interested parties to make further submission in relation to the draft determination, and gave interested parties the opportunity to call a pre-decision conference to make oral submissions regarding the draft determination.

4.8 Greenchill Technology Association requested that a pre-decision conference be called to discuss the draft determination. The pre-decision conference was held in Canberra on 11 April 2003. The issues raised at the pre-decision conference are outlined in Chapter 6 of this determination.

5. Submissions received prior to draft determination

The applicant

Public benefit

5.1 In its application, RRA, submits that benefits flowing from RRA's activities are well recognised. In particular, RRA submits that both Environment Australia and the Australian Greenhouse Office recognise the critical role provided by the organisation in facilitating the effective implementation of Government environmental policy.

5.2 The application states that both Environment Australia and the Australian Greenhouse Office recognise and support RRA's intention to extend its operations to include synthetic greenhouse gases. Under the Government's Greenhouse Gas Abatement Program, RRA has been awarded a grant of $280,000 to assist with the extension of its activities.

5.3 It is estimated that the extension of the current scheme to synthetic greenhouse gases will involve an annual reduction in greenhouse gas emissions from the refrigeration and air conditioning industry of 170,000 tonnes CO_2 equivalent by 2008, rising to 260,000 tonnes by 2012[1]. RRA state that this constitutes a significant contribution to Australia meeting the reduction targets set out in the Kyoto Protocol, in line with Commonwealth Government policy.

5.4 RRA submits that HFC recoveries under the proposed scheme are anticipated to be 10 tonnes in the first year of operation and will grow over time at the rate of 10 tonnes per annum resulting in an annual collection of 130 tonnes in 2012. RRA states that the impact on global warming equivalent emissions through recovering HFCs is significant as they exhibit considerable potency. RRA states that current industry understanding has these refrigerants making up 100% of future use; however this may change as further alternatives are invented. RRA submits that the per annum reduction in global warming equivalent emissions will total 260,000 tonnes of CO_2 in 2012.

5.5 RRA states that because the HFC recovery program will be ongoing throughout the many years of product use, the cumulative results will become quite substantial. In the early years of operation it is anticipated that the cumulative reduction in emissions will equate to 1.8 million tonnes of CO_2.

5.6 RRA also states that it has been operating for eight years and has a proven track record in that since 1994 it has recovered more than 7000 tonnes of ozone-depleting substances, which otherwise would have been emitted to the atmosphere.

5.7 RRA states that the refrigeration and air-conditioning industry is intent on establishing this program so it survives for the installed life of the refrigerants

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[1] A CO_2 equivalent of 2000 has been used.

covered. The benefits of the program will naturally increase over time and will be further impacted by other initiatives.

5.8 RRA submits that the program is an effective application of the polluter-pays principle, whereby the $1 levy represents the environmental costs of the product, and is included in the overall price at each level in the supply chain. Previously, this cost was not included, externalising the environmental costs on the community at large.

Public detriment

5.9 RRA states that any potential public detriment is limited to overall price increases due to the imposition of the levy; however the price impact of the imposition of the levy is negligible.

5.10 In relation to the effects on competition, RRA submits that the refrigerant gas industry is highly competitive, with prices to users being influenced by factors such as size and timing of order, current world prices, other business between the parties and existing commercial relationships. RRA continues by stating that the existing RRA program has had little, if any, effect on competition. The extension of the program to include HFCs would similarly be expected to have minimal effect on competition.

Interested parties

5.11 The Commission sought submissions from a wide range of interested parties when the application for revocation and substitution was lodged. Nine submissions were received.

In support of the application

5.12 **Environment Australia (EA)** supports the application for revocation and substitution.

5.13 EA submits that the recovery and disposal of waste refrigerants by RRA is a key element in the Australian phase-out of ozone depleting substances. It states that the extension of RRA's charter to include the synthetic greenhouse gases is a responsible and welcome initiative.

5.14 The submission states that the preferred alternative to ozone depleting substances within industries traditionally regulated under the *Montreal Protocol of Substances that Deplete the Ozone Layer* is the synthetic greenhouse gases.

5.15 The submission also states that EA, in cooperation with the Australian Greenhouse Office, is pursuing a similar reform for greenhouse gases, for similar reasons, to the *Ozone Protection Act 1989*. Detailed Regulatory Impact Statements have been developed to determine the most appropriate method of implementing that policy. These will be submitted to Government for approval and legislative action as required.

5.16 EA submits that without these parallel initiatives from RRA and EA, there is a high likelihood that the phase-out of ozone depleting substances, critical to the

recovery of the stratospheric ozone layer, could result in an exacerbation of global warming.

5.17 EA states that the RRA product stewardship scheme has been promoted internationally as a model for the implementation of recovery operations overseas. It considers that the current application will ensure that the twin environmental challenges of ozone depletion and global warming are managed responsibly and effectively by an industry body that has contributed greatly to assisting Government action in these areas.

5.18 **Australian Greenhouse Office (AGO)** supports RRA's application to extend their current refrigerant recovery program to include HFC and PFC refrigerants as well as ozone depleting substances.

5.19 AGO submits that through the Greenhouse Gas Abatement Program, it is supporting the air-conditioning and refrigeration industry to reduce HFC and PFC emissions. In particular, a grant has been provided to RRA to assist in the recovery and destruction of HFC and PFC refrigerant gases. Without this capacity to destroy gases recovered by refrigeration technicians, these gases are likely to be emitted to the atmosphere. As RRA has stated in its application to the Commission, at this point in time, it is the only organisation in the air-conditioning and refrigeration industry that has the capacity to undertake this destruction work.

5.20 AGO also submits that HFC and PFC refrigerants are extremely potent greenhouse gases, and limiting the emission of these gases will play a role in Australia meeting its target under the Kyoto Protocol, thereby contributing to international efforts to address the issue of global warming.

5.21 **New South Wales Environment Protection Authority (NSW EPA)** supports the proposed extension of the levy.

5.22 NSW EPA submits that they are aware that RRA's application to operate a voluntary industry levy is broadly consistent with current Commonwealth proposals to introduce a licensing and levy system for importers and manufacturers of synthetic greenhouse gases used by the Montreal Protocol industries. The Commonwealth has been in consultation with States and Territories on these matters and the NSW Government is awaiting further information from the Commonwealth to assess its support for possible implementation options.

5.23 NSW EPA notes the potential significant environmental benefits associated with RRA's proposal to extend the voluntary industry levy to cover synthetic greenhouse gases.

5.24 **The Department of Environmental Protection (Western Australia)** supports the application as they believe it will result in a favourable environmental outcome.

5.25 **Air Conditioning & Mechanical Contractors' Association of Australia (AMCA)** also submits they have no objection with the Commission approving the application that has been lodged by RRA.

5.26 **Motor Trades Association of Australia (MTAA)** submits they have no objection to the proposed revocation and substitution to extend the current program to cover synthetic greenhouse gases.

5.27 **Vehicle Air-conditioning Specialists of Australasia (VASA)** supports the RRA initiative.

5.28 VASA submits that by extending the RRA activities to include synthetic greenhouse gases (HFC and PFC refrigerants), VASA does not see an anti-competitive motive.

5.29 VASA also submits that all stakeholders should be mindful of the major environmental benefits which far outweigh any other issue in this particular case.

In opposition to the application

5.30 **Greenchill Technology Association Inc (Greenchill)** is concerned that insufficient grounds exist to grant authorisation to the agreements as currently proposed.

5.31 Greenchill submits that the scheme is failing in the objective of controlling emissions of ozone depleting substances.

Change in market circumstances

5.32 Greenchill submits there has been substantial change in material circumstances within the refrigerant market since the original authorisation was granted, including the decommissioning and replacement of a lot of CFC plants, a more diverse range of refrigerant alternatives and increasing scientific evidence of the need to constrain global warming emissions.

5.33 The submission additionally states that the refrigerant and air conditioning industry is in the early stages of undergoing a further dramatic transition in respect of the types of refrigerant gases used by the industry, and that this transition is being delayed by efforts of the fluorocarbon industry to preserve their market share by delaying the acceptance of the need, and practicability, of the wider use of natural refrigerants.

5.34 Greenchill questions whether it is appropriate for recovered refrigerants to be reused, stored for future reuse, or sold because, Greenchill states, it is certain that most of the refrigerants that are recovered and not directly returned for destruction will end up in the atmosphere eventually.

Discussion regarding claimed public benefits

5.35 Greenchill acknowledges that to some extent, a public benefit does result from the provision by RRA of a means by which the industry can comply with current state legislation and regulations prescribing the emission of fluorocarbon refrigerants to the atmosphere.

5.36 Greenchill contends that the claimed benefit to the public likely to result from the proposed agreements is far outweighed by the detriment to the public arising from lessening of competition within the industry that has resulted to date from the operation of RRA, and that is likely to result from the new proposed arrangements.

5.37 Greenchill submits that a crucial point is that any public benefit resulting from the operation of the RRA scheme is very small due to the small quantity of refrigerant reclaimed, particularly in comparison to the much larger, and increasing volume of fluorocarbon refrigerant released into the environment by Australia. As a result, Greenchill submits, that any public benefit arising from the scheme is necessarily very small, particularly in comparison to the far greater public benefits that could be achieved by more independent actions by Australian industry.

5.38 The submission states that reclamation of fluorocarbon refrigerant is a necessary task, but in practice contributes very little to reduction of emissions of potential industrial greenhouse gases and that any claims of public benefit need to be closely assessed on the basis of the proportion of total actual and potential emissions that such activities may expect to abate.

5.39 Greenchill concludes its analysis of the benefits to the public of protecting the environment through the capture of greenhouse gases by stating that although there is significant doubt about the accuracy of the figures provided by RRA to establish that a public benefit from a reduction in emissions of fluorocarbons will be delivered by the proposed arrangements, whatever the amount turns out to be after further investigations, it is very small in both absolute terms and relative to total annual emissions.

Alleged anti-competitive conduct

5.40 Greenchill states that the primary effect of the authorisation on the refrigerant market will be the extent to which the unwarranted environmental advantages conferred by the scheme on fluorocarbon refrigerants delays the impending transition to natural refrigerants.

5.41 Greenchill submits that by granting the authorisation the Commission will be giving a marketing/competitive advantage to an environmentally harmful industry over an environmentally less harmful industry. Greenchill continue by explaining that while this may not be determinative of itself, combined with the anti-competitive detriment, and the need to address poor performance of the existing scheme, the case for a negative determination is compelling.

5.42 Greenchill also submit that RRA are making misleading and deceptive claims regarding refrigerant gases with the aim of lessening competition in the refrigerant market.

Recommendations

5.43 Greenchill submits that enforcement of the legislative requirements is very poor and financial incentive to comply with the scheme is demonstrably inadequate. Greenchill suggests substantially increasing the rebate paid for returned refrigerant, and an associated increase in the levy in order to fund this.

5.44 Greenchill suggests that there is a need for a more comprehensive review of the operation of the arrangement over the past ten years and that identifying potential improvement that could be made to assist the scheme to come closer to achieving its objectives would be a prudent requirement.

5.45 Greenchill states that the long-term public interest is best served by environmentally less harmful industries being able to compete fairly with environmentally more harmful ones. Greenchill suggests that the better course is for the RRA scheme not to receive unconditional authorisation so that those companies which are selling an environmentally more harmful product have to make a real effort to reduce the impact they have on the environment in a scheme based on full cost recovery of all fluorocarbon emissions.

5.46 Greenchill submits that the RRA scheme lacks transparency making it impossible for the public to ascertain which companies are recapturing the most greenhouse gases and which are capturing the least.

5.47 Greenchill suggests that a replacement scheme should be run by a neutral body, independent of the exclusive control of the fluorocarbon industry.

5.48 Greenchill suggests that a fairer alternative to the RRA scheme and for a new, or modified, program to be established. Greenchill suggests that any scheme that is approved should only be granted authorisation on the conditions that:

- the amounts recovered must be published in a publicly accessible format each year (for example, on the internet, public notices and media releases)
- the scheme's recoveries and finances be independently audited, and
- an annual report published each year, and submitted to the Minister for the Environment for tabling in the Federal Parliament.

5.49 Greenchill concludes by stating that the only way to be certain that the anti-competitive effect of authorisation will not outweigh its public benefits is for the Commission to only grant authorisation if RRA's program is based on the concept of full cost recovery. This means setting the levy at a level that will be sufficient to recover and dispose of all HFCs, in order to fund a rebate for returned refrigerant that succeeds in reclaiming a much larger percentage of recoverable refrigerant, and to be sure of avoiding the unacceptably high rates of venting of refrigerant.

5.50 **Queensland Environment Protection Agency (QLD EPA)** submits that RRA's proposed action is premature as the Commonwealth's proposal to regulate end-use of synthetic greenhouse gases is still in development and no regulatory impact analysis on its proposals has been published.

5.51 QLD EPA also submits there is insufficient linkage between the public interest and the conduct.

5.52 The QLD EPA made a further submission subsequent to the Commission issuing its draft determination, supporting the Commission's draft determination. Please see paragraphs 6.25 to 6.27 for discussion of the further submission.

6. Issues arising out of the draft determination

6.1 Before determining an application for authorisation the Commission is required to prepare a draft determination stating whether or not it proposes to grant authorisation to the application and summarising its reasons. The Commission released a draft determination proposing to grant authorisation to the application for revocation of A90548 and its substitution by A90854 on 26 February 2003. Copies of the draft determination were distributed to the applicant, parties who made submissions and other interested parties.[2]

6.2 Under section 90A of the TPA, a person may request that the Commission hold a pre-decision conference in relation to the draft determination. The Commission received one request for a conference in relation to this application by Greenchill Technology Association.

6.3 A pre-decision conference was held in the Commission's Canberra office on 11 April 2003. The pre-decision conference afforded interested parties the opportunity to meet with the Commission to discuss the application and draft determination. A copy of the record of the conference is available from the Commission's public register.

6.4 In addition to the pre-decision conference, interested parties were given the opportunity to comment on the Commission's draft determination through written submissions.

6.5 Issues raised at the conference and in written submissions are summarised below.

Written submissions received in support of the draft determination

6.6 **The Australian Institute of Refrigeration, Air Conditioning and Heating Inc (AIRAH)** supports the draft determination made by the ACCC.

6.7 AIRAH submits that they are of the view that RRA's activities, in establishing and operating a national product stewardship system for ozone depleting refrigerants, stands as possibly the best example of this type of organisation in the world. AIRAH states that through its operations, RRA has managed to prevent the emission of significant amounts of ozone depleting refrigerants to the atmosphere, producing a substantial public benefit with minimal, if any, anti-competitive detriment.

6.8 AIRAH is firmly of the opinion that, as the industry moves away from ozone depleting refrigerants and adopts environmentally preferable but nevertheless imperfect substitutes, synthetic greenhouse gases, it is essential that the high standards of product stewardship are maintained. AIRAH states that whilst synthetic greenhouse gases are not as environmentally damaging as ozone

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[2] Copies of the Commission's draft determination are available from the Commission's website at www.accc.gov.au.

depleting substances, it is important that the lessons learnt across the industry during the 1980's and the 1990's are not forgotten, and that the emissions of these substances to atmosphere is minimised. An important element in this program is the collection of surplus synthetic greenhouse gas refrigerants, and their safe destruction.

6.9 AIRAH state that RRA has an excellent history of achievement in this area, and is clearly the best equipped organisation to take on this critical task. In AIRAH's view it is essential that the industry take all practicable steps to minimise the emissions of all fluorocarbon to atmosphere. In its submission, AIRAH state that RRA's activities in the product stewardship of ozone depleting substances mean that it is ideally equipped to carry on this excellent work in regard to synthetic greenhouse gas refrigerants.

6.10 It is emphasised in AIRAH's submission that there is strong support for the RRA program by relevant authorities, including Environment Australia and the Australian Greenhouse Office.

6.11 AIRAH conclude their submission by stating that they fully support the draft determination and look forward to providing whatever assistance is appropriate to RRA in the establishment of this important program.

6.12 **The Airconditioning and Refrigeration Manufacturers Association (AREMA)** submit that they have long recognised the need for proper stewardship of refrigerants.

6.13 AREMA state that the extension of RRA's activities to include synthetic greenhouse gases used as refrigerants is a logical and responsible development of that organisation's role, and state that it would be irresponsible for industry not to undertake this initiative.

6.14 AREMA submit that RRA's approach to the issue of synthetic greenhouse gas use in the airconditioning and refrigeration industry will duplicate its successful, world-recognised activities in minimising the emissions of ozone depleting refrigerants.

6.15 AREMA state that they agree with the Commission's recognition and support for the extension of RRA's activities, as set out in the draft determination. AREMA believes that the public benefit flowing from the minimisation of all fluorocarbon emissions is clear and substantial, and that any anti-competitive effects are negligible.

6.16 **Vehicle Airconditioning Specialists of Australia (VASA)** registers its complete approval of the proposed determination. In addition, VASA indicates its support of the Greenhouse Gas Abatement Program.

6.17 VASA concurs that the RRA program has had little, if any, effect on competition.

6.18 VASA states that while there may be a more diverse range of refrigerant alternatives, it does not necessarily fix the problem or address the issue of

global warming emissions. VASA notes that it does not support retrofit of any kind using hydrocarbon gas replacements.

6.19 VASA disagrees with the assertions that there has been a lessening of competition within the industry as a result of the operation of RRA.

6.20 VASA submits that the claim that an expanded authorisation for RRA would delay the impending transition to natural refrigerants assumes that there is some impending transition, and that no such claim can be made (at least with regard to vehicle air-conditioning). In addition, VASA states that currently there is no environmentally less harmful industry as far as the world's vehicle fleet is concerned.

6.21 VASA submits that there is no other safe alternative to HFCs, and that until the GWP of HFCs is zero it must cope with the tested and approved refrigerants at our disposal and do the best it can to manage them and limit their escape.

6.22 VASA states that the brains trust of the world engineering and environmental management are working together on the issue of finding a replacement for the essential air conditioning chore in vehicles.

6.23 VASA further submits that at the world forum on automotive air-conditioning recently held in Brussels, it was clearly indicated that there is no foreseeable move by any manufacturer or component designer towards any equipment which would allow the safe usage of HC refrigerants in any motor vehicle.

6.24 **CSIRO Atmospheric Research (CSIRO)** made a submission to clarify the nature and intention of the RRA sponsorship of CSIRO. CSIRO states that RRA have sponsored CSIRO research for the past decade and that the sponsorship (about $40,000 per year) is philanthropic in nature. CSIRO also states that RRA do not suggest to CSIRO how they should spend the funding and that there is no formal requirement by CSIRO to report to RRA on what they do with the funding or on the outcomes of their research funded by this sponsorship. CSIRO states that it is entirely appropriate that CSIRO, in general, and in particular, CSIRO Atmospheric Research, receive funding from a range of sources, including government, industry and environmental groups. In addition, CSIRO states that the research outcomes of CSIRO are seen by the public-at-large to be honest and balanced, in no small part brought about by a balanced portfolio of research funding sources.

6.25 **Queensland Government Environmental Protection Agency (QLD EPA)** submits that the EPA, on behalf of Queensland Government Agencies, is supportive of the proposed draft authorisation subject to there being no significant financial or economic impact on Queensland.

6.26 QLD EPA states that RRA's activities complement legislation proposed by the Commonwealth Government placing responsibility for produce stewardship on importers of ozone depleting substances (ODS) and SGG.

6.27 QLD EPA suggests that the proposed authorisation should be monitored to ensure industry practice that might otherwise be anti-competitive, does not restrict an emerging competitor from providing services similar to RRA.

6.28 **Department of Environmental Protection, Water and Rivers Commission - Western Australia (WA DEP)** submits that it supports RRA's proposal to include synthetic greenhouse refrigerants in its refrigerant recovery program.

6.29 **Refrigerant Reclaim Australia Limited (RRA)** submits that the RRA program has received international recognition with an award from the United States Environmental Protection Agency, and through the introduction of a system modelled on the RRA program by the Canadian Government.

6.30 In relation to allegations regarding the anti-competitive nature of the RRA program, RRA submits that many experts argue that, in theory, the establishment of a product stewardship program should provide a competitive advantage; however this does not involve behaviour that is inherently anti-competitive. This applies more to consumer markets, where a degree of substitutability exists between products. RRA submits that this is not the case in the refrigeration and air-conditioning market, where equipment is designed for specific refrigerants.

6.31 RRA submits that the product stewardship program instituted by RRA is simply recognition that producers and users have a responsibility to ensure products are used responsibly and their environmental impact, while never zero, is minimised. RRA states that this is increasingly occurring in other industries. RRA submits that it promotes its own activities to maximise the amount of refrigerant returned for destruction. RRA states that they are active only in the fluorocarbon industry and has made no comparative claims about other refrigerants, except to advise that, for safety reasons, it cannot accept flammable refrigerants into its program.

6.32 In relation to Greenchill's concerns that RRA's environmental contribution is minimal, RRA submits the following:

(a) RRA is part of the broader industry response to the environmental challenges presented by ozone depletion and, more recently, global warming.

(b) RRA's role is to take back and safely destroy contaminated and unwanted ozone depleting refrigerants at end of life. Whilst the potential to reclaim recovered refrigerant for resale exists, that process has not been undertaken for some years. Many technicians and equipment owners recover, recycle and reuse refrigerant. The principle of recycling and reuse is broadly accepted as sound practice throughout the community. However, there are many occasions where the refrigerant is either unwanted or too contaminated for recycling. It is in these circumstances that RRA provides a safe, environmentally effective method of disposal using Australian developed technology.

(c) Since the commencement of RRA's operations in 1993, there has been a managed decline in the sale of ozone depleting refrigerants and the growing volumes of refrigerant being recovered. The data upon which this claim is made has been supplied by Pricewaterhouse Coopers from RRA's audited accounts, with the sales number based on levy receipts.

(d) RRA keeps a close watch on global developments in the recovery of refrigerant and the evolution of product stewardship and producer responsibility generally. RRA states that it monitors and maintains contact with a number of programs around the globe, and believes the performance of RRA is equal to current world's best practice.

(e) During the early phase-out period there was a significant demand from industry for the reclamation of particular refrigerants. The reclamation process was undertaken to provide a more orderly phase-out but this process is no longer undertaken.

(f) RRA has had a policy of destroying all recovered refrigerant for some years. The rate of destruction is particularly depended on the availability of the destruction plant. The plant is also used by the National Halon Bank. The volume of product in storage is simply a reflection of plant availability and all product currently stored will be destroyed.

Written submissions received in opposition to the draft determination

6.33 **Greenchill Technology Association (Greenchill)** acknowledged the Commission's proposal to limit the duration of the proposed authorisation to five years. Greenchill submits that the refrigerant gas industry is undergoing changes and that it is important that the Commission be able to examine the RRA scheme in light of the changing market conditions and growing scientific concern about the impacts of global warming, as well as changing domestic and international policy responses to the environmental threats posed by fluorocarbons.

6.34 Greenchill notes the establishment of the Natural Refrigerants Transition Board in February 2003, and suggests that a shorter duration for the proposed authorisation to enable changes occurring in the industry to be taken into account.

6.35 Greenchill states that it would be prudent for the Commission to allow for the RRA scheme to be reviewed in light of proposed legislative changes to the Ozone Protection Act 1989, particularly in view of the Government's proposals to extend product stewardship obligations on all fluorocarbon refrigerants imported into Australia. Greenchill submits that these changes will have the effect of greatly increasing the parties involved in refrigerant reclamation, and will introduce a range of mandatory obligations on the industry.

6.36 Greenchill submits that they remain of the view that the RRA scheme will be entirely unsuccessful in providing a means for industry to contribute to reducing synthetic greenhouse gas emissions. Further, Greenchill states that, based upon emission projections provided by the Burnbank Report, the proposed recovery

program will reduce emissions from 6924 Kt in 2010 to 6664 Kt, i.e. growth will be reduced from 332% to about 320%. Greenchill states that in the context of a projected tripling of emissions in synthetic greenhouse gases, any claims about RRA making a contribution to reducing emissions are grossly misleading.

6.37 Greenchill states that to the extent that the scheme legitimises ongoing use of fluorocarbons and fails to assist in the required transition to more environmentally benign substances, it is inaccurate to conclude that the scheme will deliver an environmental benefit. Greenchill submits that at best, it will make a dramatic increase in emissions only slightly less unacceptable.

6.38 Greenchill requests that further consideration be given to imposing conditions upon the authorisation to ensure the need for the scheme is reduced, and not perpetuated. Greenchill suggests that these conditions should include:

(a) that proper records should be kept of the greenhouse gases recovered;

(b) that proper records should be kept of where and how such greenhouse gases are disposed of;

(c) that an independent audit of greenhouse gases recovered and disposed of be undertaken at the end of 4 years; and

(d) that the results of the audit be made available to the public no later than 4.5 years after the date of grant of the authorisation.

6.39 Greenchill further submits that it firmly believes the scheme proposed will be completely ineffective in minimising emissions of environmentally harmful refrigerant gases, and that the public detriment arising from the lessening of competition arising from the unwarranted conferring of an environmental marketing advantage on these environmental harmful refrigerants over more environmentally benign alternatives far exceeds any public benefit that may result from the scheme.

Pre-decision conference

6.40 The following issues were raised at the pre-decision conference:

(a) Greenchill submits that the industry is rapidly changing.

(b) Greenchill argues that the rebate is not sufficiently great to act as an incentive for industry to recover the gases.

(c) Greenchill would like the Commission to impose conditions on the substitute authorisation, such as a high levy, higher rebates and the use of the funds to facilitate the transition towards the use of natural refrigerants.

(d) Greenchill believes it would be more appropriate to review the scheme in 12 or 18 months which would be after the Ozone Protection Act is reformed imposing product stewardship requirements.

(e) Greenchill argues that the scheme has an anti-competitive detriment because it legitimises environmentally unfriendly gases and reduces pressure on industry to take up natural refrigerants.

(f) Greenchill contends that the Commission should reject the notion that the $1 per kilogram levy is a way of externalising costs and that the environmental costs of the use of HFCs is much higher.

(g) RRA advises that in March 2003 RRA increased the rebate from $2.50 to $5 per kilogram, and that the rebate applies to any refrigerant.

7. Statutory provisions

7.1 Under section 91C of the Act, the Commission 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.

7.2 In order for the Commission to grant an application to revoke an existing authorisation and grant a substitute authorisation, the Commission must consider the substitute authorisation in the same manner as the standard authorisation process.

7.3 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.

7.4 The Commission must not make a determination to revoke and substitute an authorisation unless it is satisfied that 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).

8. Evaluation

Public benefit

8.1 The Commission considers that the primary public benefits accepted by the Trade Practices Commission (TPC) in 1994 in relation to A90548 will still flow as a result of the existence of the scheme in the Australian industry.

8.2 The Commission holds the view that a scheme or arrangement which improves the environment benefits the public. The scheme is likely to achieve this by reducing the release of ozone depleting substances into the atmosphere, and thus reducing damage to the earth's ozone layer.

8.3 Promotion of the scheme to alert end-users to the importance of recycling refrigerant gases further enhances the public benefit.

8.4 The Commission understands that ozone depleting substances are currently being replaced by synthetic greenhouse gases (along with other alternatives) in the refrigerant and air conditioning industry.

8.5 It is understood that limiting the emission of synthetic greenhouse gases will play a role in Australia meeting its reduction targets under the Kyoto Protocol. Extension of the current reclamation scheme to recovery and destroy synthetic greenhouse gases will provide a means for industry to contribute to reducing synthetic greenhouse gas emissions. Reducing synthetic greenhouse gas emissions will contribute to efforts to reduce global warming. The Commission recognises that the environmental benefit of reduced synthetic greenhouse gas emissions will result from the extension of current scheme to include synthetic greenhouse gases.

8.6 The Commission notes from submissions by Greenchill in writing and during the pre-decision conference that the refrigerant and air conditioning industry is rapidly changing due to a diverse range of refrigerant alternatives in the market. However the Commission understands that the industry currently continues to use synthetic greenhouse gases as an alternative to ozone depleting substances.

8.7 In light of submissions received and discussion at the pre-decision conference, the Commission notes that the RRA program provides a means by which the refrigerant and air conditioning industry can reduce synthetic greenhouse gas emissions which result from its activities. The Commission has formed the view that as synthetic greenhouse gases are currently being used and their use is predicted to increase as the use of ozone depleting substances declines, then a scheme which provides a means by which emissions can be reduced will result in an environmental benefit, and therefore a public benefit.

8.8 The Commission considers that the scheme generates a public benefit because it will facilitate the return of ozone depleting gases and synthetic greenhouse gas, and encourage responsible environmental practices by industry.

Anti-competitive detriment

8.9 Overall, there appears to be negligible anti-competitive detriment.

8.10 While it is accepted that the $1 per kilogram levy may increase prices of goods such as fridges and air conditioners, the Commission is of the view that this affect will be minimal because:

- The proposal is voluntary;
- The $1 levy represents a very small increase in comparison to the total price of the refrigerator. The Commission notes that RRA submits that the impact of this particular levy on the cost of the average refrigerator with a refrigerant charge of 180g and approximate retail price of $1750 is only $0.18 per unit; and
- The competitive nature of downstream markets (eg supply of fridges and air conditioners) would minimise any pass through.

8.11 For these reasons, the Commission does not believe that the price increase will create significant competition detriment.

8.12 With respect to Greenchill's submissions as to the competitive advantage the scheme confers upon hydrocarbon producers, the Commission does not accept that the reclamation scheme significantly impacts on the development of alternative and competitive refrigerants. Any authorisation would not allow hydrocarbon producers to misrepresent the effect of the scheme and, in this respect, the producers of alternative gases should not be disadvantaged and can promote their products having regard to the respective merits of competing products.

8.13 With respect to Greenchill's submissions that the scheme could be improved to allow greater environmental benefits, the Commission notes that it is not its role to decide whether or not the scheme could be improved or whether there were better alternatives, but to decide whether it is satisfied that, in all the circumstances, the scheme as proposed gives rise to a net public benefit. It seems to the Commission that, where hydrocarbon gases are produced and used, there exists merits in operating a scheme to collect and destroy those gases.

8.14 Having said this, the Commission does acknowledge that the industry is undergoing rapid change. The Commission further acknowledges that there exists obvious benefits of reviewing and improving such schemes in the public interest. The Commission therefore encourages RRA to continually assess and improve its practices to ensure that the RRA program reduces the greatest amount of emissions possible. The Commission notes that in determining the rebate, Pricewaterhouse Coopers periodically reviews and analyses costs undertaken by RRA. The Commission suggests that in order to demonstrate the performance of the program, that RRA periodically engage an independent auditor to conduct a performance review of the program identifying inefficiencies and suggesting methods for improvement.

Conclusion

8.15 The Commission is satisfied that an authorisation in identical terms to Authorisation A90548, but extended to include synthetic greenhouse gases (HFC and PFC refrigerants), would generate a public benefit outweighing any anti-competitive detriment, and therefore does not intend to impose conditions upon the authorisation.

8.16 The current authorisation expires in July 2004. Given the remaining authorisation term is relatively short, the Commission believes the substitute authorisation should be granted for the longer term rather than until the expiration date of the current authorisation. Consequently, the Commission grants a substitute authorisation for five years from the date on which the substitute authorisation comes into force. This will allow the Commission to review the authorisation if market conditions and environmental science changes in the medium term.

9. Determination – application for revocation & substitution

The Application

9.1 The Australian Competition and Consumer Commission (the Commission) granted authorisation A90548 on 26 July 1994, in response to an application from the Association of Fluorocarbon Consumer and Manufacturers Inc (AFCAM). Broadly, the Commission authorised AFCAM to establish a reclamation scheme in the Australian market for ozone depleting refrigerant gases, particularly HCFCs and CFCs.

9.2 On 4 October 2002, Refrigerant Reclaim Australia Limited (RRA) lodged an application under section 91C of the *Trade Practices Act 1974* (the Act) for a revocation and substitution of authorisation A90548. The substituted authorisation sought is identical to A90548, except that the reclamation program would also include synthetic greenhouse gases (HFC and PFC refrigerants).

9.3 Interim authorisation was granted to the application on 6 November 2002, pending Commission consideration of the application.

9.4 The Commission issued a draft determination on 26 February 2003 proposing to revoke Authorisation A90548 and grant a substitute authorisation, A90854, as sought by RRA for five years.

9.5 A pre-decision conference was held on 11 April 2003.

The Statutory Test

9.6 Pursuant to section 91C (7) of the Act, and for the reasons outlined in Part 8 of this determination, the Commission is satisfied that the proposed revocation and substitution of Authorisation A90548 is likely to result in public benefits that outweigh the public detriment constituted by any lessening of competition that would be likely to result from the arrangements.

Conduct Authorised

9.7 Accordingly, the Commission revokes Authorisation A90548 and grants substitute authorisation A90854 as sought by RRA.

9.8 This authorisation is identical to A90548, except that the reclamation program also includes synthetic greenhouse gases (HFC and PFC refrigerants).

9.9 The substitute authorisation provides RRA with immunity from the application of section 45 of the Act for the establishment of a reclamation scheme in the Australian market for ozone depleting substances and synthetic greenhouse gases. Under the authorised scheme, importers and manufacturers can enter a potentially anti-competitive agreement to add $1 levy to the cost of each kilogram of refrigerant gas sold.

9.10 Due to the impending expiration of the current authorisation, the Commission grants the substitute authorisation for a period of five years from the date on which the authorisation comes into force.

9.11 This decision is subject to any application to the Australian Competition Tribunal for its review.

9.12 This determination is made on 7 May 2003. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 28 May 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.