

Consistency with state regulations

- 7.37 While offering no objection to the current premises accreditation program Queensland Health suggested that the criteria to meet such accreditation be consistent with current legislative requirements, particularly those dealing with the recording and storage of Schedule 7 poisons.
- 7.38 Queensland Health argued that this would reduce the impost on businesses and facilitate any future model whereby industry accreditation could be used to supplement or replace current State and Territory legislation in this area.
- 7.39 Mabon's argued that the proposed update of the definition of Agvet chemicals to be targeted for accreditation will clarify for both distributors and consumers those products which carry a greater risk. Mabon's noted that this would put these products and their risks in line with Australian Standards and Farm Safety aspirations.

Definition of new targets

- 7.40 The NRA, AFFA, Queensland Health and Mike Barrett & Associates supported the new target for agricultural and veterinary chemicals.

Scope of new targets

- 7.41 Virbac noted that since the Agsafe's inception it has supported the intent and principal objectives of Agsafe. Virbac stated that its eligible staff and premises have been accredited and that it has encouraged the resellers of its farm chemical products to adopt and maintain Agsafe accreditation. However, Virbac opposed any move for Agsafe to extend the scope of the scheme through the definition of the new target. Virbac argued that the intent of the Agsafe scheme has been to improve storage and advice in relation to farm chemicals. Virbac contended that the definition of the proposed new target differs from the intent of the original scheme by extending its scope beyond farm chemicals.
- 7.42 By example Virbac contended that Agsafe recently sought to impose trading sanctions on a veterinary pharmaceutical wholesaler with several manufacturers meeting and committing to not recognise any Agsafe sanctions against the wholesaler (except for farm chemicals if above the placarding limit). Virbac argued that this illustrates that Agsafe is attempting to restrict competition outside the farm chemicals area. Virbac contended that this competitive threat extends beyond veterinary pharmaceutical wholesalers to other industry participants.
- 7.43 Virbac argued that the Agsafe's scheme should be limited to farm chemicals and not extended to encompass all veterinary products which are Schedule 5, 6 and 7 poisons. Virbac suggested the new target be amended to stipulate that it applies only to veterinary chemicals which are intended for use exclusively on commercial farming enterprises.

- 7.44 Virbac further argued that the new target be amended to ensure the Agsafe focus would be to target agricultural and veterinary chemicals in containers above 1L/Kg in declared content.
- 7.45 The Veterinary Manufacturers and Distributors Association (VMDA) argued that in the originally negotiated agreement with Agsafe it was agreed that the thrust of the Agsafe program would be towards farm chemicals, that is, primarily the broad acre agricultural chemicals, as this was determined as the greatest potential hazard due to the high volumes used. The VMDA stated that veterinary products were to be exempted from the scheme due to the low hazard generally posed by their manner of use and the higher degree of control through the specialised distribution chain. The VMDA argued that the proposal to extend the scheme to encompass section 5 of the Agricultural and Veterinary Code 1994 does not recognise this agreed exemption. Additionally the VMDA noted that the proposal seeks to extend the premises accreditation to cover storage of any hazardous material.
- 7.46 The VMDA argued that the proposal would confer influence over the industry to an organisation to which few VMDA members belong. The VMDA argued that the proposal would not constructively improve the storage of its products. Further, the VMDA contended the basis of the proposal is to improve the funding base of Agsafe and exert control over sectors of the industry that do not belong to the Avcare Association.
- 7.47 The VMDA noted that its organisation, consisting primarily of Australian based manufacturing and distributing organisations does conduct training programs specifically modified from the Agsafe personnel training schemes to address animal health issues and products. The VMDA noted that this training is carried out by an Agsafe accredited trainer. In addition, the VMDA noted it has produced and has had assessed by the Therapeutic Goods Authority, and other agencies, a Code of Good Wholesaling Practice, for Veterinary Ethical Products. The VMDA argue that all its members comply with, and have received copies of, the Code.

Consistency with state regulations

- 7.48 AFFA noted that the proposed update of the definition of chemicals to be covered by accreditation seeks to better align Agsafe coverage of agvet chemicals to be consistent with those defined by the *Agricultural and Veterinary Chemicals Code Act 1994* and the *Agricultural and Veterinary Code Regulations*. AFFA supported the proposed coverage on the grounds that it applies a risk management approach relevant to the hazards of various types of agvet chemicals and the associated storage, handling and supply arrangements required for risk management purposes.
- 7.49 The HDWA argued that while it is desirable for people handling these substances to be made aware of any risk, the labelling, packaging and placarding requirements required for these substances are supposed to address these requirements. In this context the HDWA contended that it is difficult to

see the benefit to the public of any further restrictions which may be applied under this proposal.

- 7.50 In regard to the substances to be included in Schedule 7, the HDWA stated there is a duplication of existing licences which are required under the *Poisons Act 1964*. The HDWA argued this imposes a cost to the industry with no offsetting public benefit. The HDWA argued that the accreditation process does not produce any greater compliance with the requirements set out in legislation. However it does, it argued, involve a cost to the industry, which must ultimately be passed on to the end user and the public where the user is a primary producer.
- 7.51 The HDWA stated that from a public health perspective any education program which improves knowledge of chemicals and any risks associated with their handling and storage is supported. From this perspective the HDWA did not object to the Agsafe proposal for agvet chemicals included in Schedules 5 and 6. However they did not support those chemicals included in Schedule 7. The HDWA argued that Agsafe should consult with the HDWA should it wish to pursue co-regulation where an accreditation training program is used as a basis of holding a licence to sell agricultural and veterinary chemicals included in Schedule 7.

Anti-competitive detriments

- 7.52 AFFA did not consider that any anti-competitive detriment would be likely to arise from the proposed update. AFFA contended that there is a clear differentiation between the products that are to be targeted and those excluded from accreditation requirements. Therefore AFFA argued, it is expected that any premises or personnel dealing with comparable products would be on an equal competitive footing with respect to the implementation of the accreditation scheme.

8. Issues arising out of the Draft Determination

- 8.1 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 application for authorisation Nos A90680 & A90681 on 29 August 2001. Copies of the draft determination were distributed to the applicant, all parties who made submissions and other interested parties.⁴
- 8.2 In accordance with section 90A of the TPA, the Commission invited any interested parties to notify it if it wished the Commission to hold a pre-decision conference in relation to the draft determination. No interested party requested that the Commission hold a pre-decision conference.
- 8.3 Interested parties were also provided with a further opportunity to provide submissions in relation to the draft determination. The Commission received additional submissions from the VMDA on the draft determination.

Veterinary Manufacturers and Distributors Association

- 8.4 The VMDA provided an initial submission in relation to the draft determination on 19 November 2001. The VMDA reiterated its earlier position that the Agsafe scheme should be confined to farm chemicals and that the proposed changes would confer influence over the veterinary industry to an organisation to which few VMDA members belong.
- 8.5 Agsafe and the VMDA met on 23 January 2002, in an effort to resolve the differences between the two organisations highlighted in the VMDA's 19 November 2001 submission. As a result of this meeting the VMDA provided the Commission with a further submission on 1 February 2002, in which it noted its support for the broad principles of the Agsafe program. The VMDA also noted that it had received assurances that the Agsafe program would exclude from the scope of accreditation all veterinary pharmaceutical products supplied from point of manufacture through to veterinary practice.
- 8.6 However, the VMDA continued to oppose the proposed abolition of the threshold volume for dangerous goods for premises accreditation for veterinary chemicals. The VMDA considered that the current threshold should remain to ensure that any sanctions that may be imposed are confined to bona fide storage of commercial quantities of hazardous farm chemicals.
- 8.7 The VMDA also argued that non-commercial packs of 1kg/litre or less of veterinary products, which may or may not be designed as farm chemicals when packed in larger commercial containers, should also be exempt from the

⁴ Copies of the Commission's draft determination are available from the Commission's website at www.accc.gov.au.

program. The VMDA argued that this would ensure that the focus of the program remained with the accreditation of personnel and premises relative to commercial quantities of hazardous farm chemicals.

The Applicant's response

- 8.8 The applicant argued that the exclusion of veterinary chemicals, of which significant numbers are hazardous substances and dangerous goods, from the proposal to abolish the dangerous goods threshold level for accreditation, would cause a significant breakdown in the safety chain implemented from point of manufacture through point of sale and similarly disrupt flow on effects to the end user.
- 8.9 The applicant argued that the requirements for compliance for small premises were not onerous requiring nothing more than compliance with relevant safety standards. Further, introduction of a distinction between minor and major storage premises will allow resources to be allocated more appropriately on the larger risk stores.
- 8.10 Further, the applicant argued that implementation of hazardous substances regulations on a national basis required that a hazardous identification and risk assessment be conducted at each workplace.
- 8.11 With respect to the VMDA's argument that an exemption be granted to non commercial packs of 1kg/litre or less of veterinary products which may or may not be designed as farm chemicals when packed in larger commercial containers, the applicant contended that anecdotal evidence suggested that small size products are actually treated with less care than larger size products.

9. Commission evaluation

- 9.1 The Commission's evaluation of the application is in accordance with the statutory tests outlined in section 4 of this determination. As required by the tests, it is necessary for the Commission to assess the likely benefit and detriment, including the effects on competition, resulting from the proposed arrangements.
- 9.2 Authorisation is sought for Agsafe's accreditation scheme (including several changes to the scheme previously authorised by the Commission) which requires premises involved in the transport, handling, and storage of agricultural and veterinary chemicals which are hazardous substances to be accredited. Authorisation is also sought for a Code of Conduct which outlines the requirements for compliance with the accreditation program and for the ability to apply trading sanctions to premises which fail to meet accreditation standards.
- 9.3 The Applicant claimed that a number of public benefits result from its agvet chemical industry accreditation scheme, the proposed changes to the scheme and observance of the Code of Conduct. These public benefit claims can be divided into two categories: first those claims submitted in relation to the existing scheme (as previously authorised by the Commission), and secondly those relating to the proposed changes to the scheme. However, it should be noted that many of the public benefits claimed in relation to the proposed changes to the scheme are in fact claims about how the public benefits claimed in relation to the existing scheme may be more fully realised.
- 9.4 Concerns regarding any anti-competitive detriments of the scheme can similarly be divided into those concerns relating to the existing scheme, as previously authorised by the Commission, and those relating to the proposed changes to the scheme.

Effect on Competition

Ability to impose trading sanctions

- 9.5 The Agsafe scheme provides that premises found not complying with the accreditation standards are prohibited from purchasing from or supplying to Agsafe members (see paragraphs 5.16 – 5.19).
- 9.6 The Applicant argued that continued success of its program depends significantly on its ability to sanction the small number of firms that continue to refuse to meet their accreditation obligations.
- 9.7 The HDWA was the only interested party to object to Agsafe's ability to apply trading sanctions to firms that do not meet accreditation standards. The HDWA supported the concept of co-regulation and the underlying philosophy of improved use of farm chemicals. However, given that a legislative structure

exists in Western Australia for the control of farm chemicals it did not support the accreditation obligations, including the imposition of trading sanctions, of the Agsafe program.

Commission evaluation

- 9.8 Broadly, the Agsafe scheme provides that premises found not complying with accreditation standards are prohibited from purchasing from or supplying to Agsafe members. The Applicant has submitted that continued success of the Agsafe program relies significantly on its ability to sanction firms which do not meet their accreditation obligations.
- 9.9 The Applicant contends that it is the threat of sanctions, rather than their imposition, that is the cornerstone of ensuring compliance with accreditation standards. The Applicant notes that while full compliance levels amongst premises on first inspection are in the order of 60%, invoking a sanctions warning brings compliance levels up to 80% within 6 weeks of Agsafe issuing the assessment report.
- 9.10 The Commission notes that since 1993 sanctions have been applied to 56 firms and currently sanctions apply to only 5 of the 1455 firms covered by the accreditation program.
- 9.11 However, the anti-competitive detriments of the imposition of sanctions are potentially very significant. Ultimate loss of accreditation would result in one of the heaviest penalties which can be applied to a firm, the inability for it to trade in the industry. Other potentially anticompetitive effects of the scheme arise from the impact on firms who have to face costs in bringing their premises to the requisite standard, by individuals whose entry into the industry is constrained by the need to satisfy the accreditation criteria and by any reduction in competition as a result of firms leaving the industry (see paragraphs 8.22 – 8.43). The potential anticompetitive effects of the scheme could be reflected in increases in price, more restrictive choice of product, and a lower level of service.
- 9.12 The possible use or misuse of sanctions as a means to gain commercial competitive advantage is the core element of the Agsafe scheme of concern to the Commission. The Commission would be concerned if Agsafe's power to impose sanctions were misused to create commercial gain for some firms in the industry. It is crucial, when such stringent sanctions can be imposed, that the procedures for invoking them are based on objective criteria administered in a fair and reasonable manner with adequate provision for appeal to an independent body.
- 9.13 The Commission notes that prior to trading sanctions being imposed on a premises a 3 stage warning process is followed, during which the premises has the opportunity to demonstrate a commitment to rectifying any non-compliance with the terms of the accreditation program. As evidenced by the small number of premises to which trading sanctions are ultimately applied, this process, in the vast majority of cases, resolves any concerns regarding compliance with the

program. However, the Commission considers the possibility of sanctions being ultimately applied essential to this success.

- 9.14 In the event that trading sanctions are ultimately applied, the firm the subject of the sanctions has recourse to an external appeals process. The Commission notes that to date, no party has had cause to avail themselves of this appeals mechanism.
- 9.15 The imposition of trading sanctions by Agsafe is also the subject of annual, independent, external monitoring. The Commission notes that the most recent monitoring report found that no complaints against Agsafe's sanctions process had come to its attention. It is a condition of this authorisation that this monitoring continues to occur annually (see section 10).
- 9.16 The Commission is satisfied that the complaints handling procedure, together with the inclusion of an independent appeals mechanism is fair and has in-built safeguards which ensure independence and allow for natural justice and procedural fairness for firms operating under the scheme.
- 9.17 The Commission is satisfied that sufficient safeguards exist against the possible misuse and attendant anti-competitive detriment of Agsafe possessing the discretion to interpret and enforce a wide range of legislative standards. The existence of an appeal procedure, an industry conciliator, an external monitoring committee and a specialist premises accreditation committee all provide safeguards against misuse. Further, the above bodies' committees include representatives from the regulatory bodies empowered to implement the relevant legislative standards. Finally Agsafe's practice of seeking advice from the relevant regulatory bodies concerning the formulation and interpretation of the various standards reduces the potential anti-competitive effect.
- 9.18 The Commission further notes that Agsafe is a non-profit independent subsidiary of Avcare and consequently is not in a position to derive any commercial advantage from use of the sanctioning process.
- 9.19 The Commission considers that the ability to impose sanctions provides a real incentive to promote the safe handling, transport and storage of Agvet chemicals. The Commission also notes that staff employed in the industry, through the Agsafe training program (see paragraphs 5.5 – 5.8), receive effective training in the areas of safety and compliance requirements.
- 9.20 The Commission notes that trading sanctions are rarely applied in practice. However, as noted, the Commission considers the possibility of sanctions being applied an effective means of ensuring compliance with the accreditation program. Further, where sanctions are applied, this only occurs after the premises has been given ample opportunity to rectify any shortcomings in its handling, transport and storage procedures.
- 9.21 The Commission notes that this application applies to Agsafe directives in accordance with the accreditation scheme and Code of Conduct. It does not in any way extend to firms acting without the authority of Agsafe either individually or collectively to refuse to deal with others. In certain

circumstances such conduct may give rise to actions under the TPA. Further, as stated in past Commission authorisations of the Agsafe scheme, should evidence of the scheme being operated for the purpose of anti-competitive conduct rather than for the objectives for which it has been established, this may form the basis for a revocation of the authorisation under s.91B of the TPA. In the 10 years the scheme has been operating no such concerns have come to the Commission's attention.

Compliance obligations

- 9.22 Under the existing scheme all Agsafe members are required to pay a membership fee (currently \$300). In addition the Agsafe basic training course (required for personnel accreditation) also incurs a fee of between \$350 and \$500 dollars. Some premises may also incur costs in meeting the necessary standard for premises accreditation.
- 9.23 The Applicant noted that the accreditation program may produce some detriment through the costs incurred in meeting the necessary standards. However, they noted that this cost should decline as premises become more compliant and the time taken to accredit the premises is reduced.
- 9.24 The Applicant further noted that a reduction in the premises accreditation threshold may impose an additional impost on smaller businesses not previously covered by the program.
- 9.25 Several interested parties noted that smaller retailers should be responsible managers of chemical products, although they expressed concerns that the additional costs of accreditation for businesses dealing in small amounts of chemicals (due to the proposed reduction in the premises accreditation threshold) may be such that they chose not to trade in the Agvet chemical industry, thus restricting access to products for users. Additionally, interested parties raised concerns that the cost of compliance may also act as a barrier to entry to the industry and place smaller competitors at a competitive disadvantage.

Issues arising out of the draft determination

- 9.26 To address concerns regarding the cost and compliance obligations on smaller business resulting from the abolition of the premises accreditation threshold the Applicant proposed the introduction of a simple two tier structure to distinguish between those premises covered by the existing scheme and those who would be covered by the abolition of the premises accreditation threshold (see paragraphs 5.34 to 5.39).
- 9.27 Under the proposed changes to the scheme those premises captured by the existing threshold would be classified as Major Storage premises and be required to pay a joining fee of \$370 (new premises) and an annual fee of approximately \$300. Those premises not captured by the existing threshold would be classified as Minor Storage premises and be required to pay an annual fee of approximately \$100. These premises will not be required to pay a joining fee.

9.28 Under the proposed changes the compliance obligations on Minor Storage premises would also be significantly lower than that for Major Storage premises. The Applicant argued that the proposed compliance obligations on Minor Storage premises are common sense, practical and not onerous.

Commission evaluation

9.29 Potential anti-competitive outcomes from the Agsafe scheme could arise from the requirement for premises to pay an annual registration fee and the cost of meeting premises and personnel accreditation standards. These requirements could constitute a barrier to entry to the industry, particularly to smaller firms. Similarly the cost of satisfying these criteria may result in firms leaving the industry.

9.30 Any anti-competitive detriment is likely to be more pronounced under the proposed changes to the premises accreditation threshold as many small businesses not previously covered by the scheme will now require premises accreditation.

9.31 Against this, some form of fee is necessary in order for the scheme to be financially viable.

9.32 In past determinations the Commission concluded that it did not consider it unreasonable for those organisations whose premises are inspected to pay the costs of inspection. Similarly, the Commission did not consider it unreasonable that these firms pay the cost of meeting accreditation standards.

9.33 The Commission notes that non-Agsafe members have the option of complying with the premises accreditation requirement by obtaining certificates of inspection from all relevant regulatory authorities, in which case there will be no Agsafe charge for accreditation.

9.34 The Commission's major concern with the compliance obligations of the Agsafe scheme is the compliance burden that the reduced premises accreditation threshold may place on small businesses which up until now have not been covered by the scheme.

9.35 The Applicant has argued that a high proportion of the major buying groups premises which have less than placardable quantities of dangerous goods (eg Elders Limited, Wesfarmers Dalgety Limited, IAMA, CRT and IHD) already have premises accreditation.

9.36 Similarly, CRT/Town & Country noted that a large number of their members who stock dangerous goods below the existing threshold already have premises accreditation. Further, they argued that the financial impact on their members of the premises fee (currently \$300) if the minimum threshold was lowered would not be considered unwarranted.

9.37 However, as noted above, several interested parties expressed concerns that the additional costs of accreditation for businesses dealing in small amounts of

chemicals may be to the detriment of these firms remaining/entering the industry.

- 9.38 The Commission raised the issues of the accreditation fee and compliance obligations applying to smaller premises with Agsafe. Agsafe indicated that it was proposing to introduce a sliding fee scale to assist smaller stores requiring accreditation under the new threshold based on the degree of risk at the premises. Several submissions expressed support for this proposal.
- 9.39 The amendments to the application to introduce Major and Minor Storage premises accreditation discussed above are designed to achieve this. The Commission considers that these amendments address these concerns by reducing the compliance burden, both in terms of fees payable and obligations imposed in order to receive accreditation, on small premises previously did not require accreditation in order to supply agvet chemicals, whilst ensuring that these premises comply with relevant safety standards.
- 9.40 The Commission also notes the argument put forward in several submissions that smaller firms should not be exempted from the Agsafe program. Several interested parties argued that any premises or personnel dealing with comparable products should, regardless of size, be on an equal competitive footing with respect to the implementation of the accreditation scheme.
- 9.41 The Commission also notes the situation described in Agsafe's supporting submission where some premises manipulate their stock levels so as to fall below the current threshold for premises accreditation, which indicates that the current premises threshold arrangements could be unintentionally producing an anti-competitive detriment to those premises meeting the obligation.
- 9.42 It has also been put to the Commission that while the new threshold could result in a number of smaller businesses ceasing to market agricultural chemicals that given the widespread availability of these products, it is unlikely the public would suffer in price terms.
- 9.43 It is important to note that although licences may not be required for many of the premises who would now be captured by the scheme, companies are still required by State and Territory laws to comply with certain standards when storing agvet chemicals. The compliance costs associated with these obligations would (or at least should) be incurred regardless of the operation of the Agsafe scheme.
- 9.44 Further, the Commission considers the premises accreditation fee necessary for the financial viability of the scheme.
- 9.45 The Commission recognises that the obligation on all premises, both those covered by the current scheme and those that will be brought under the scope of the scheme by the proposed changes, to meet premises and personnel accreditation requirements may result in some limited anti-competitive detriment to the industry.

- 9.46 However, the Commission considers the anti-competitive detriments of these obligations limited by the structure of the industry, which is characterised by a large number of agvet chemical retailers the vast majority of which are unlikely to be detrimentally affected by these obligations, particularly as the obligations of Agsafe accreditation mirror various regulatory safety requirements. To the extent that these obligations may force some premises to cease stocking agvet chemicals the Commission does not consider that, given the number and scope of retailers stocking these products, end users will be detrimentally affected, either in terms of price or availability of supply. However, as stated in the Commission's previous authorisations, if fees, and other associated costs of compliance were to rise to such a level that they impacted upon competition the Commission would reconsider the authorisation.
- 9.47 The Commission also notes any premises likely to cease supplying agvet chemicals due to accreditation obligations would in all likelihood be premises which are not complying with relevant safety standards in the first instance.

Conclusion

- 9.48 The Commission considers that the Agsafe scheme may result in some lessening of competition. However, for the reasons outlined, the Commission considers the anti-competitive detriments as a result of the proposed scheme limited. In particular, in respect of the Commission's major concern, Agsafe's power to impose trading sanctions, the Commission considers that appropriate safeguards are in place to ensure that these powers are not employed to the detriment of competition in the market for agvet chemicals.

Public Benefits

- 9.49 The Commission's assessment of the public benefits of the proposed arrangements is divided into two categories: firstly those claims submitted in relation to the existing scheme (as previously authorised by the Commission) and secondly those relating to the proposed changes to the scheme. However, as noted above, many of the public benefits claimed in relation to the proposed changes to the scheme are in fact claims about how the public benefits of the existing scheme may be more fully realised.
- 9.50 The public benefits of the existing Agsafe scheme generally are considered directly below. Subsequent sections consider in more detail the public benefits of the personnel and premises accreditation schemes as previously authorised by the Commission. Finally, the public benefits flowing from the proposed changes to the premises accreditation threshold and chemicals covered by the scheme are considered.

The Agsafe scheme (as previously authorised)

- 9.51 In previous authorisations the Commission accepted that the Agsafe scheme provided for the safe transport, handling and storage of agvet chemicals which

would result in benefits to users, the industry and its employees and the community generally.

- 9.52 The Applicant contended that the public, the environment and overseas trade may be at risk unless:
- agricultural and veterinary chemicals are stored, handled and transported in accordance with statutory regulations and standards;
 - all individuals who sell or offer advice on agricultural and veterinary chemicals have received proper training in the principles of safe, effective and legal use of the products; and
 - there is due regard for the protection of the environment in these and any other activities relating to agricultural and veterinary chemicals which may be developed from time to time.
- 9.53 The Applicant argued that its program assists in achieving these outcomes. The Applicant argued that industry co-regulation as a means of strengthening compliance has particular merit, particularly for the prevention of accidents. While legal proceedings and subsequent prosecution are, they claimed, effective threats they are costly and do not prevent accidents. The Applicant noted that there is already significant regulatory recognition of the Agsafe accreditation program which, it argued, attains an effective compliance outcome at low cost.
- 9.54 The vast majority of interested parties who provided submissions in relation to the application supported the existing Agsafe program.

Commission evaluation

- 9.55 The Commission notes the widespread support amongst parties who provided submissions for the existing program, which the Commission notes, has been running successfully for 10 years. No interested party raised any significant concerns regarding the operation of the scheme in general.
- 9.56 Agsafe has developed considerable expertise in the interpretation of the relevant statutory provisions. This expertise comes from having interpreted such standards for over 10 years since the initial authorisation was granted. It is also the Commission's understanding that Agsafe regularly seeks the advice of State and Commonwealth regulatory bodies concerning correct interpretation of particular legislative standards. This advice can also be supplemented by advice from the external monitoring committee which includes members from a wide range of regulatory bodies.
- 9.57 The Commission finds the comments of CRT/Town with respect to the operation of the Agsafe scheme since its inception particularly relevant. CRT/Town & Country argued that the requirement of training and accreditation of all staff who handle agricultural and veterinary chemicals and the requirement from premises which stock agricultural and veterinary chemicals to be accredited ensures that staff are educated to provide proper advice and

recommendations which are strictly in accordance with the product label. CRT/Town & Country argued that having an industry wide program ensures that other companies do not compromise this responsibility. CRT/Town & Country contended that authorisation has allowed the industry as a whole to enforce compliance in a manner that has been cost effective and exerted a positive influence on people's behaviour.

- 9.58 CRT/Town & Country believed that Agsafe accreditation has led to premises which are better equipped and managed to prevent incidents and to respond to them. They contended that the Agsafe industry standard has brought together all relevant regulations and standards and presented them in a form which facilitates implementation by CRT/Town & Country members. CRT/Town & Country argued that Agsafe assessment has led to a better understanding and adoption of safety measures than prosecution would have achieved.
- 9.59 The Commission accepts that there is a public benefit in uniformity in the levels of chemical storage and handling throughout Australia. As noted in the Commission's previous determination there is broad agreement on the desirability of Australia wide uniformity in the legislative framework within which the industry operates. Uniformity of self-regulatory codes, especially in national industries which operate across state borders, is an equally important economic consideration. Given state government interests in promoting or giving legislative backing to industry codes, steps should be taken to ensure a national focus on the development of self-regulation.
- 9.60 It appears that the Agsafe accreditation scheme has increased compliance with existing state laws. Figures submitted by Agsafe indicate that at the program's inception, 48% of premises met the relevant premises accreditation standard. Agsafe submitted that within 4 years of the program's introduction this figure had increased to 80%. Agsafe noted that it is continuing to work, including through the proposed changes to the scheme, to achieve 100% compliance. As these laws themselves are directed to advancing the public benefit, then measures which increase the level of compliance must also be seen as advancing the public benefit.
- 9.61 The Applicant noted that a number of exemptions to regulations issued to premises (both general and individual) by regulatory authorities have Agsafe accreditation as a condition of the exemption. The Victorian WorkCover Authority have a general conditional exemption from the Victorian agricultural chemical retail industry.
- 9.62 The Applicant argued that the Agsafe accreditation program allows regulatory authorities to use their own resources more efficiently. For example, in Victoria the requirement to hold a licence to sell by retail (Schedule 7 licence) was dropped because the Department of Health observed that the Agsafe accreditation program was providing equivalent safety requirements and duplicating licensing requirements.
- 9.63 The Applicant submitted that some regulatory authorities, for example the DMEWA, have audited Agsafe accredited premises against industry standards

and have found that there is an improvement in overall compliance. For example, the Applicant submitted that DMEWA statistics show compliance levels for Agsafe exceed those of the industry for placarding (59% versus 44%) and for secondary containment (89% versus 44%). The Applicant further noted the comments of the Chief Inspector of Dangerous Goods in Western Australia, Mr Ken Price, that prosecution does not generate the effect, for example, in preventing accidents, that the Agsafe program can.

- 9.64 The Commission considers that such acceptance of the program by state regulators is indicative of the regard in which the Agsafe program is held as well as of the program's success in promoting the safe transport, handling and storage of agvet chemicals.
- 9.65 It should be noted that accreditation of premises must recognise any easements or exemptions from State or Territory regulatory authorities which apply to that premises. This was a condition of the Commission's previous authorisations where it was stated that:

As a condition of authorisation the Commission requires that where an exemption in respect of premises has been granted by the relevant authority for dangerous goods and the granting of exemption conflicts with accreditation requirements, the exemption shall apply and accreditation shall not be withdrawn or suspended if the matter relating to the exemption is the only reason for non-compliance with the standard for premises.

- 9.66 It is a condition of this authorisation that this remains the case (see section 10).
- 9.67 The Commission accepts that the Agsafe scheme, through promoting uniformity in the levels of chemical storage and handling, compliance with state agvet chemical storage and handling regulations, its education and training program and through the imposition of trading sanctions as a last resort, provides for the safe transport, handling and storage of agvet chemicals which results in benefits to users, the industry and its employees and the community generally. The Commission also accepts that there is a public benefit in Australia-wide uniformity in the storage of agvet chemicals which the scheme promotes.

Staff accreditation

- 9.68 Accreditation training applies to those who sell, advertise, recommend, or handle agvet chemicals.
- 9.69 The criteria for personnel accreditation are the successful completion of the agvet chemical training course, at least one year's experience in the agvet chemical industry, and a commitment to comply with the obligations in the Code of Conduct. Accredited personnel must also complete one unit of on-going training every three years.
- 9.70 The Applicant contended that approximately 1000 people enter the industry annually. Consequently, they argued, Agsafe training and accreditation must continue to ensure the current level of awareness of regulations and duty of care is maintained.

9.71 The Commission received no negative comments on the staff accreditation program.

Commission evaluation

9.72 The Commission notes that the aims of the personnel accreditation program are to ensure that those persons who handle agricultural and veterinary chemicals in the distribution chain (manufacture through to sale):

- understand relevant safety and regulatory requirements;
- can fulfil appropriate duty of care obligations; and
- can provide to end-users appropriate advice on chemical use, consistent with legal obligations and with advice from Departments of Agriculture or Primary Industries.

9.73 The Commission has commented extensively on the public benefits of the staff accreditation and training program in previous authorisations. The Commission notes that in its public consultation process in relation to this application no negative comments on the staff accreditation and training program were received.

9.74 In previous authorisations the Commission accepted that the Agsafe scheme provided for the safe transport, handling and storage of farm chemicals which would result in benefits to users, the industry and its employees and the community generally. The Commission also accepted that the training course conducted by Agsafe further enhanced these public benefits.

9.75 As stated in earlier Commission determinations, it can only be beneficial for the industry and the community to increase the level of knowledge and skill of staff employed in the industry. Similarly, the staff employed at accredited premises will benefit from training, particularly in relation to safety issues. In fact the scope of the scheme goes further. Agsafe provides farmer education training manuals containing relevant sections of the farm chemical training manual together with extra sections on the safe use of chemicals on the farm for the benefit of end users of agvet chemicals.

9.76 The maintenance of these levels of knowledge and skill has other benefits including more efficient application of agvet chemicals by farmers and higher levels of safety in their transportation, handling, and use.

Premises accreditation (as previously authorised)

9.77 The premises accreditation program is designed to ensure that all storage premises for agvet chemicals minimise risk to persons, property and the environment by complying with:

- relevant Australian Standards; and

- relevant legislation in areas such as registration and use of agricultural and veterinary chemicals, occupational health and safety, and transport and handling of agvet chemicals.
- 9.78 Premises accreditation requires that premises which store, handle or sell agvet chemicals which exceed Worksafe placarding limits comply with relevant Federal and/or State regulatory requirements.
- 9.79 The Applicant argued that there currently exists a plethora of requirements, regulations, controls and conditions relating to premises which store and sell agvet chemicals, with requirements for licences, permits and related criteria varying from state to state. The Applicant argued that this lack of uniformity can lead to confusion within the industry disadvantaging both sellers and customers.
- 9.80 The Applicant stated that since its inception the premises accreditation program has been effective in identifying, simplifying and communicating regulatory information to the industry. Further, regulators have also benefited from being able to use Agsafe for communicating their compliance programs.
- 9.81 The Applicant noted that at the onset of external assessments, regulatory compliance was observed to be in the order of 48 per cent of premises (covered by the scheme). The Applicant stated that four years later, approximately 80 per cent of premises are found to be compliant with the industry standard. The Applicant stated that this indicates the value of the premises accreditation program in improving compliance levels and also indicates there is a need to ensure that the program continues in order to obtain 100 per cent compliance.
- 9.82 AFFA raised concerns that it had received anecdotal reports raising concerns at the level of adherence to the accreditation standards among accredited premises. AFFA argued that it would be concerned if some premises or groups were found to be benefiting from shortfalls in assessments. AFFA argued that there is a need for more open and effective external monitoring of compliance, and reporting of the findings of monitoring. AFFA contended that it may be necessary to review the current monitoring arrangements and adopt a more externally operated process.
- 9.83 The HDWA stated that during the period March 1996 to November 1998 it officers visited 209 stores licensed to sell poisons included in Schedule 7 of the Poisons Act, many reputedly accredited by Agsafe. The HDWA stated that 49% of these stores did not comply with the storage requirements set out in the poisons regulations, and 81% did not comply with record keeping requirements.
- 9.84 The HDWA also argued that in Western Australia legislation controls do exist and that the Agsafe scheme adds an additional level of industry imposed control with all its associated costs and lack of accountability.

Commission evaluation

- 9.85 The Commission considers that the criteria set down by Agsafe for accreditation of premises are reasonable, requiring as they do no more than an observance of the regulations imposed by statute.

- 9.86 The public benefit which results from accreditation is that owners of premises covered by the scheme will be required to comply with legislative requirements which in themselves are based on promoting public interest. It is important that the scheme's requirements for premises have the requisite degree of certainty for those who will be affected by it. The Commission considers that any detriments in this respect are minimal particularly in view of the appeals procedure (see paragraphs 8.14- 8.17). This procedure will ensure that those denied accreditation or who have accreditation withdrawn can in the last resort appeal to an independent conciliator.
- 9.87 The legislation governing the use of agvet chemicals is complex and the Commission regards it as essential that Agsafe inform all organisations of the obligations they may have as a result of the schemes. The Commission notes that Agsafe provides all premises with extensive information packages detailing their obligations both under legislation and under the Agsafe program. Agsafe also provides extensive information about how these obligations can be met.
- 9.88 The Commission notes that the Agsafe accreditation scheme covers both Avcare members and non-members. Agsafe follows the same inspection procedures for non-members as for members. If the non-member fails to meet the Agsafe accreditation standard then it will have the same rights of appeal as Agsafe members against refusal of accreditation, including final recourse to an independent conciliator. If the non-member refuses to allow Agsafe the right to inspect premises, such refusal will provide grounds for Agsafe to deny accreditation and ultimately to apply sanctions, subject to the appeal procedure.
- 9.89 In the present application it is proposed to preserve the choice available to persons who are not members of either Avcare or Agsafe but who are involved in the storage and handling of agvet chemicals. Agsafe and Avcare members have no choice in the provider of accreditation; they must have their premises assessed by an Agsafe independent external assessor. However, non-members of Agsafe and Avcare have three alternatives:
- assessment by Agsafe independent external assessor;
 - present to Agsafe copies of current certificates of inspection by all relevant regulatory authorities demonstrating full legal compliance with the licensing requirements; or
 - an assessment by a third party agreed to by both Agsafe and the non-member organisation.
- 9.90 As a result persons who are not members of either Avcare or Agsafe will be required to obtain accreditation but not be restricted in obtaining it for their premises through Agsafe accreditation.
- 9.91 AFFA and the HDWA have raised concerns regarding the level of compliance with the Agsafe accreditation scheme.
- 9.92 It should also be noted that Agsafe acknowledges that its accreditation program has not yet achieved 100% compliance. However as noted above, Agsafe is

continuing to work, including through the proposed changes to the scheme, to achieve 100% compliance.

- 9.93 Given the nature and scope of the Agsafe accreditation program and the resources available to implement it, it cannot be expected that every premises covered by the program will be in adherence with all accreditation standards at any one time. However, to the extent that any premises are benefiting from shortfalls in the assessment program this would negate the public benefits of the Agsafe scheme.
- 9.94 The Commission notes that the sample undertaken by the HDWA included premises not accredited by Agsafe. The HDWA did not provide any figures on compliance levels amongst premises accredited by Agsafe against those who are not accredited. The Commission also notes that the most recent independent monitor's report found, in relation to premises accreditation, that the level of non-compliance among smaller firms (ie those not currently covered by the scheme) was high.
- 9.95 Agsafe has also submitted that on first inspection, only 25% of premises will pass every item on their checklist. However, Agsafe argued it is through its follow up program that greater compliance is achieved. Agsafe submitted that compliance levels increase to 75% within the 30 days given to rectify items following issue of a report.
- 9.96 The level of adherence to accreditation standards is monitored annually by an independent external monitor. As noted above (para 8.15) it is a condition of this authorisation that this external monitoring remains an annual event. No concerns were raised in the most recently released monitor's report in submissions from interested parties regarding the level of adherence to accreditation standards.
- 9.97 The Commission notes that Agsafe actively encourages state regulators to monitor its accreditation program. As noted above a recent audit was carried out by DMEWA. Where concerns with the accreditation program have been raised, as with the DMEWA audit, Agsafe has worked together with the regulator to rectify these problems. The Commission is not aware of any concerns being brought to Agsafe's attention regarding compliance with the accreditation program which it has not sought to work through with the appropriate body.
- 9.98 The figures quoted by the HDWA tend to indicate that compliance with existing legislation is a problem in some areas. To the extent that state regulators are for whatever reason failing to ensure compliance with appropriate regulations for the handling, transportation and storage of Agvet chemicals, this would indicate a greater necessity for an accreditation scheme such as that run by Agsafe.
- 9.99 The Commission notes the argument of the HDWA that in Western Australia controls do exist and that the proposal adds an additional level of industry imposed control with all its associated costs. However as noted above the Commission considers that the criteria set down by Agsafe for accreditation of

premises are reasonable, requiring as they do no more than an observance of the regulations imposed by statute.

Proposed changes to premises accreditation program

- 9.100 It is proposed that premises accreditation be extended from those premises which stock Worksafe placarding levels of dangerous goods to all premises which stock any quantity of agvet chemicals, sold for commercial purposes, which are hazardous substances.
- 9.101 Under the proposed changes those premises captured by the existing threshold would be classified as Major Storage premises. Those premises captured by the proposed abolition of the threshold (ie those premises previously outside the scope of the scheme) would be classified as Minor Storage premises.
- 9.102 Under the proposed changes the compliance obligations on Minor Storage premises would be significantly lower than for Major Storage premises (whose obligations would remain as under the existing program). The applicant argued that the proposed compliance obligations on Minor Storage premises are common sense, practical and not onerous.
- 9.103 The Applicant noted that premises which stock less than Worksafe placarding levels of dangerous goods are still subject to regulations (including dangerous goods regulations). There are a number of regulations which are invoked regardless of the quantity of substances which are kept, in particular hazardous substances (more than 95% of agvet chemicals are classified as hazardous substances), poisons regulations and dangerous goods which exceed minor storage levels (yet are below Worksafe placarding). The Applicant argued that the industry and community is at risk posed by those premises which stock even small quantities of these products.
- 9.104 Additionally the Applicant submitted that currently many premises which stock hazardous goods exceeding Worksafe placarding levels for a short time escape the Agsafe system.
- 9.105 CRT/Town & Country supported the proposed change to the current authorisation which would permit Agsafe to take action on all premises which store agricultural and veterinary chemicals which are defined as hazardous substances. They argued that the current threshold for premises accreditation based on Worksafe placarding level is becoming less applicable to the industry as less than 30% of agricultural and veterinary chemicals are now classified as dangerous goods.
- 9.106 AFFA considered that the proposed change is likely to result in a net public benefit because of the underlying need for all businesses to comply with government regulation. AFFA argued that the scheme may potentially assist some businesses to comply with hazardous substances legislation thereby providing a benefit to the premises affected and the public.

- 9.107 Virbac argued that the current threshold was adequate. Virbac also asserted that the proposed reduction in the threshold was a revenue generating exercise for Agsafe.
- 9.108 The VMDA strongly opposed any extension of the sanctionable powers of Agsafe. The VMDA argued that the essence of the granting of the original powers was to reinforce and to complement regulations put in place, eg WorkSafe placarding limits, as those limits are deemed by the authorities to be the lowest actionable limits necessary.
- 9.109 The NFF argued that the proposed changes do not outline what requirements will be enforced on small businesses. The NFF noted that through the National Occupational Health and Safety Commission (NOHSC) project "Simplifying the Safe Use of Farm Chemicals" the NFF, Avcare and others are in the process of clarifying the implementation of the Hazardous Substances Regulations with regard to registered agricultural chemicals. The NFF argued that the outcome of this project should be known before these regulations become entrenched into the Agsafe agreement.
- 9.110 The NFF further noted that the expansion of the Agsafe program from 1450 to 2000 premises represents a very significant increase. The NFF did not believe that the proposed changes have clearly outlined the extent of small businesses that will be caught by the expansion. The NFF questioned whether for example the expansion of the program will effect gardening sections in hardware stores and how it will effect premises that sell hazardous substances that are not registered agricultural chemicals such as fertilisers. For example, it was the NFF's understanding that ammonium fertilisers are considered hazardous substances.

Issues arising out of the draft determination

- 9.111 The VMDA continued to oppose the proposed abolition of the threshold volume for dangerous goods for premises accreditation for veterinary chemicals. The VMDA considered that the current threshold should remain to ensure that any sanctions that may be imposed are confined to bona fide storage of commercial quantities of hazardous farm chemicals.
- 9.112 The VMDA also argued that non-commercial packs of 1kg/litre or less of veterinary products, which may or may not be designed as farm chemicals when packed in larger commercial containers, should also be exempt from the program. The VMDA argued that this would ensure that the focus of the program remained with the accreditation of personnel and premises relative to commercial quantities of hazardous farm chemicals.

Commission evaluation

- 9.113 The Commission notes that the premises accreditation program is designed to ensure that all storage premises for agvet chemicals minimise risk to persons, property and the environment by complying with:
- relevant Australian Standards; and

- relevant legislation in areas such as registration and use of agricultural and veterinary chemicals, occupational health and safety, and transport and handling of agvet chemicals.
- 9.114 The proposed changes to the premises accreditation threshold seek to expand the scope of premises which will be covered by the scheme. The Commission notes that the proposed changes do not impose any obligations on premises in addition to those currently required by regulation (except for the accreditation fee, see paragraph 8.40). The proposed changes will not result in any obligation being imposed on premises that were previously free from regulation. The Commission notes that while the proposed changes will broaden the scope of premises covered to include many smaller premises (Agsafe estimate in the vicinity of 400 premises not previously covered by the scheme will now be included) only premises stocking agvet chemicals for commercial purposes will be covered.
- 9.115 The Commission notes that Agsafe consulted extensively with industry and state regulators both in developing the proposed changes and prior to submitting them for authorisation. 74% of industry respondents supported some reduction in the premises accreditation threshold with 57% supporting the threshold submitted for authorisation.
- 9.116 The Commission notes that several interested parties have raised concerns that some premises with high stock levels currently submit inaccurate manifests to Agsafe to remain below the WorkSafe placarding levels and hence avoid the requirement for accreditation. To the extent that some premises are avoiding their premises accreditation obligations this would compromise the public benefits of the Agsafe scheme – the safe use of agvet chemicals and Australia wide uniformity in the storage of agvet chemicals – previously identified by the Commission, as well as placing those premises who are meeting their obligations at a competitive disadvantage.
- 9.117 A reduced premises accreditation threshold will reduce ambiguity about who is covered by the scheme as well as the complexities involved in determining if a premises falls within the threshold. This will make it more difficult for those premises avoiding the requirement for accreditation through providing inaccurate information regarding stock levels to do so.
- 9.118 Similarly, the requirement of the current scheme that larger premises comply with premises accreditation obligations may place them at a competitive disadvantage compared to smaller premises which do not face such compliance obligations. A reduced premises accreditation threshold would ensure that all premises storing agvet chemicals to be sold for commercial purposes are subject to the same accreditation obligations. Such a reduction should improve competition and improve industry risk management.
- 9.119 The Commission notes that CRT/Town & Country have submitted that a large number of their members who stock dangerous goods below the existing threshold already have premises accreditation. The Applicant submitted that a high proportion of the other major buying groups premises which have less than

placardable quantities of dangerous goods (eg Elders Limited, Wesfarmers Dalgety Limited, IAMA, and IHD) also already have premises accreditation.

- 9.120 The VMDA has noted that the existing threshold reflects current regulations regarding Worksafe placarding limits and therefore should be maintained. However, as noted above, some premises which fall within the existing threshold may be avoiding their premises accreditation obligations. Additionally, while Worksafe placarding standards only apply above certain limits, other regulations apply to all premises stocking agvet chemicals classified as hazardous substances, regardless of size. As noted, premises accreditation requires no more than compliance with these regulations.
- 9.121 The NFF expressed concerns that the proposed changes do not clearly outline the extent of premises which will be caught by the expansion, for example gardening sections of hardware stores and sellers of fertiliser.
- 9.122 The Commission notes that expansion of the Agsafe program does not target these types of premises, but rather is limited to agricultural and veterinary chemicals that are sold for commercial purposes. The program excludes products sold for domestic use. The Commission further notes that chemicals such as fertilisers, which are not agvet chemicals as defined by the Agricultural and Veterinary Chemical Code are not covered by the Agsafe program.
- 9.123 The Applicant stated that it is not expected gardening stores will become part of the program unless they sell products to commercial users. The Applicant noted that gardening stores who do sell to commercial users would already be included in the program in any event. The Applicant noted that there are a few hardware stores which sell agvet chemicals to commercial end users and are consequently covered by the program.
- 9.124 The NFF contended that the outcomes of the NOHSC project “Simplifying the Safe Use of Farm Chemicals” should be known before changes to the Agsafe program are contemplated.
- 9.125 The Commission notes that the NOHSC program is primarily aimed at simplifying implementation of hazardous substances legislation for agvet chemicals users and does not directly apply to suppliers and resellers covered by the Agsafe program. It is anticipated that the outcomes of this project will compliment the Agsafe accreditation program as well as the ChemCert and Managing Farm Safety Programs for the end users of agvet chemicals. The Commission also notes Agsafe’s intention to incorporate relevant training material developed from the NOHSC project in their training resources with a view to resellers becoming better equipped to make end users generally aware of their obligations relating to OH&S and farm chemicals.
- 9.126 Virbac has contended that the proposed reduction in the threshold is a revenue generating exercise for Agsafe. The Commission notes that Agsafe is a non-profit organisation. Revenue derived from the current accreditation program is directed at covering the cost of the accreditation program and part of Agsafe’s overheads. Agsafe’s premises accreditation program is the subject of external

monitoring the results of which are reported to the Commission. The Commission is also provided with a copy of Agsafe's annual report including financial statements. The Commission is satisfied that the expansion of the Agsafe accreditation program is justified on public benefit grounds and is not designed as a revenue generating exercise for the Applicant.

- 9.127 The Commission considers that expansion of the premises accreditation program to capture all premises which stock quantities of agvet chemicals sold for commercial purposes, which are hazardous substances, will enhance the safety of agvet chemical storage, which represents a significant public benefit.

Definition of new targets

- 9.128 In addition to those chemicals already covered by the scheme it is proposed that accreditation now target those agvet chemicals which are defined in the Agricultural and Veterinary Chemicals Code 1994 Section 4 (agricultural chemical product) and Section 5 (veterinary chemical product) and Section 7 and 8 of the Agricultural and Veterinary Chemical Code Regulations. However, certain chemicals within these classifications will be exempt from the scheme (see paragraph 5.29).
- 9.129 The Commission's previous authorisation was based on the definition of agricultural and veterinary chemicals in section 4(1) of the *Commonwealth Agricultural and Veterinary Chemicals Act, 1988*. This legislation has now been repealed, hence the need for a new definition of agvet chemicals.
- 9.130 The Applicant argued that under the proposed changes the definition and scope of chemicals targeted remains basically the same except that wetters and adjuvants (included in the Agvet Code) are now proposed to be included in the scope of the Agsafe program. The Applicant argues that while dairy cleansers are included in the new definition it is proposed to exclude them from the scope of Agsafe accreditation.
- 9.131 The National Registration Authority, Queensland Health and Mike Barrett & Associates supported the new target for agvet chemicals.
- 9.132 AFFA noted that the proposed update of the definition of chemicals to be covered by accreditation seeks to better align Agsafe coverage of agvet chemicals with those chemicals defined by the *Agricultural and Veterinary Chemicals Code Act 1994* and the *Agricultural and Veterinary Code Regulations*. AFFA supported the proposed coverage on the grounds that it applies a risk management approach relevant to the hazards of various types of agvet chemicals and the associated storage, handling and supply arrangements required for risk management purposes.
- 9.133 Virbac contended that the definition of the proposed new target differs from the intent of the original scheme by extending its scope beyond farm chemicals.
- 9.134 Virbac argued that the Agsafe's scheme should be limited to farm chemicals and not extended to encompass all veterinary products which are Schedule 5, 6 and 7 poisons. Virbac suggested the new target be amended to stipulate that that it

applies only to veterinary chemicals which are intended for use exclusively on commercial farming enterprises.

- 9.135 The VMDA argued that the proposal would confer influence over the veterinary industry to an organisation to which few VMDA members belong.
- 9.136 The VMDA argued that in the originally negotiated agreement with Agsafe it was agreed that the thrust of the Agsafe program would be towards farm chemicals, that is, primarily the broad acre agricultural chemicals, as this was determined as the greatest potential hazard due to the high volumes used. The VMDA stated that veterinary products were to be exempted from the scheme due to the low hazard generally posed by their manner of use and the higher degree of control through the specialised distribution chain. The VMDA argued that the proposal to extend the scheme to encompass section 5 of the Agricultural and Veterinary Code 1994 does not recognise this agreed exemption.
- 9.137 The VMDA noted that its organisation, consisting primarily of Australian based manufacturing and distributing organisations, does conduct training programs specifically modified from the Agsafe personnel training schemes to address animal health issues and products. The VMDA noted that this training is carried out by an Agsafe accredited trainer. In addition, the VMDA noted it has produced and has had assessed by the Therapeutic Goods Authority, and other agencies, a Code of Good Wholesaling Practice, for Veterinary Ethical Products. The VMDA argue that all its members comply with, and have received copies of the Code.
- 9.138 In regard to the substances to be included in Schedule 7, the HDWA stated there is a duplication of existing licences which are required under the Poisons Act 1964. The HDWA argued this imposes a cost to the industry with no offsetting public benefit. The HDWA argued that the accreditation process does not produce any greater compliance with the requirements set out in legislation. However it does, they argued, involve a cost to the industry which must ultimately be passed on to the end user, and to the public where the user is a primary producer.
- 9.139 Consequently, the HDWA did not support the inclusion of those chemicals included in Schedule 7 in the scheme. The HDWA argued that Agsafe should consult with the HDWA should it wish to pursue co-regulation where an accreditation training program is used as a basis for holding a licence to sell agricultural and veterinary chemicals included in Schedule 7.

Commission evaluation

- 9.140 The Commission notes that the legislation from which the definition of chemicals covered by the program used until now is drawn, the *Agricultural, and Veterinary Chemicals Act 1988*, has been repealed. The authorisation previously granted by the Commission related specifically to this definition. At that time the Commission noted that should that legislation be repealed, as was foreshadowed at the time, the Commission would have to reconsider what was an appropriate definition.

- 9.141 The Commission notes that the Applicant consulted extensively with industry on the proposed changes to the definition of chemicals covered by the scheme. 73.6% of respondents agreed with the change to the scope of accreditation targets while 26.4% disagreed.
- 9.142 Virbac and the VMDA have argued that the proposed definition of the new target differs from the intent of the original scheme by extending its scope beyond farm chemicals. They argued that the Agsafe scheme should be limited to farm chemicals and not extended to encompass all veterinary products which are Schedule 5, 6 and 7 poisons.
- 9.143 The Applicant does not consider that the scope of chemicals targeted for accreditation has been broadened by the proposed changes. The Applicant submitted that the only thing that has changed is the reference to the Agvet Code rather than the Commonwealth Act. The Applicant noted that the Agvet Code did increase the scope of chemicals included in the definition, however, noted it increased the number of exclusions in an attempt to restrict the chemicals targeted to those covered by the existing program.
- 9.144 The Applicant noted that it is not intended to extend the scope of the target as far as veterinary chemicals are concerned. However, there remains some uncertainty within the industry regarding those veterinary chemicals covered under the proposed changes to the target.
- 9.145 The public benefit which arises from a clear and mutually acceptable definition of agvet chemicals covered by the scheme is apparent. Not only will the scope of authorisation be confined to legitimate areas but veterinarians will not be required to satisfy premises or personnel accreditation requirements unless they also operate a chemical reseller business. Considering the training in the handling of veterinary chemicals already received by veterinarians such an exemption is sensible.
- 9.146 The Commission notes that products prescribed and/or used by veterinarians where a bona fide veterinarian/client/patient relationship exists are currently excluded from the Agsafe accreditation scheme. It is intended that this exemption remain in place under the proposed changes.
- 9.147 The Commission further notes that Agsafe has, in consultation with industry participants, aimed at addressing these concerns and recognised that wholesalers of veterinary pharmaceutical products which are being supplied to veterinary practices should be outside the scope of the Agsafe scheme. The Commission proposes, in the interest of certainty, to impose a condition of authorisation of the proposed changes to this effect.
- 9.148 The HDWA stated that there is a duplication of existing licences which are required under the Poisons Act 1964 in regard to the substances to be included in Schedule 7 of the proposed new target. The HDWA argued this imposes a cost on the industry with no offsetting public benefit.
- 9.149 Agsafe argued that there is no duplication of restrictions. Rather, it argued there is potential duplication of enforcement activities depending upon how agencies

wish to pursue their enforcement activities. Agsafe also argued that the main enforcement strength of sanctions is not the sanctions themselves but the threat of sanctions. Agsafe contended that this is a more effective preventative measure compared to prosecution which often only occurs following a breach or an incident.

- 9.150 Agsafe contended that inclusion of Schedule 7 requirements in the industry standard and assessment checklists is only a part of the accreditation process and the actual cost for this component to premises is estimated at \$15 per premises (5% of the total cost of premises accreditation). Agsafe further noted that Schedule 7 poisons represent amongst the most potentially harmful products in an agvet chemical store. The proportionate value of the program for this type of substance is consequently greater than for other less dangerous substances.
- 9.151 Agsafe noted that the poisons legislation in each state is nationally consistent with minor variations being based on guidelines from the Australian Health Council. Agsafe also noted that in its liaison with equivalent authorities in Queensland, New South Wales, Victoria, South Australia and the Northern Territory there has been cooperative and mutual recognition to the extent that in Victoria relevant legislation was repealed partly on the strength of Agsafe accreditation.
- 9.152 Ultimately, decisions to take enforcement action against non-compliant premises rest with the relevant state regulator. The Commission recognises that given the position of the HDWA there may be some duplication of the Agsafe accreditation and HDWA enforcement activities. However, the Commission has accepted as a public benefit one of the stated aims of the Agsafe program, to promote Australia wide uniformity in the transportation, storage and handling of agvet chemicals. The Commission considers that the Agsafe program, including the proposed changes to the definition of chemicals targeted, achieves this aim.
- 9.153 The Commission notes widespread acceptance by regulators in most states of the Agsafe program as promoting compliance with poisons legislation. The Commission notes in particular that Victoria has gone as far as to repeal state legislation based in part on the Agsafe accreditation program. The Commission further notes that the cost to premises on any duplication between Agsafe accreditation and HDWA enforcement activities is a minor one.
- 9.154 The HDWA has argued that Agsafe should consult with it should it wish to pursue co-regulation where an accreditation training program is used as a basis for holding a licence to sell agricultural and veterinary chemicals included in Schedule 7. The Commission notes that Agsafe is continuing to liaise with the HDWA on this issue and that discussions to date have agreed that in principles the strengths of the two compliance programs should be integrated and that there should not be duplication. However, the details of this have not been worked out or documented at this stage.
- 9.155 The Commission accepts that a change to the definition of agvet chemicals covered by the scheme is necessary given that the legislation on which the

previous definition was based has been repealed. The Commission does not consider that the definition proposed by Agsafe changes the balance of public benefits and anti-competitive detriments of the arrangements.

Condition of authorisation

C1 Wholesalers of veterinary pharmaceutical products, which are being supplied to veterinary practices, are not to be included in the scope of the Agsafe program.

Conclusion

9.156 For the reasons outlined the Commission considers that there are a number of public benefits arising from the Agsafe program and the proposed changes to the program. In particular, the Commission considers that users of agvet chemicals, and the community generally, will benefit from the safe use of agvet chemicals and Australia-wide uniformity in the storage of agvet chemicals.

Balance of Public Benefit and Public Detriment

9.157 The Commission considers that the anti-competitive detriments of the imposition of trading sanctions on premises failing to meet accreditation criteria are potentially very significant. Ultimate loss of accreditation would result in a heavy penalty for a firm, the inability for it to trade in the industry. Other potentially anti-competitive effects of the scheme arise from the impact on firms who have to face costs in bringing their premises to the requisite standard, by individuals whose entry into the industry is constrained by the need to satisfy the accreditation criteria and by any reduction in competition as a result of firms leaving the industry. The potential anti-competitive effects of the scheme could be reflected in increases in price, more restrictive choice of product, and a lower level of service.

9.158 However, the Commission considers the anti-competitive detriments of these obligations are limited by the structure of the industry, which is characterised by a large number of agvet chemical retailers the vast majority of which are unlikely to be detrimentally affected by these obligations, particularly as the obligations of Agsafe accreditation mirror various regulatory safety requirements.

9.159 The Commission is also satisfied that sufficient safeguards exist against the possible misuse and attendant anti-competitive detriment of Agsafe possessing the discretion to interpret and enforce a wide range of legislative standards.

9.160 Lowering the threshold required for premises accreditation and increasing the scope of chemicals covered by the scheme has the potential to increase the anti-competitive effects of the scheme. However, the Commission is satisfied that allowing for these changes the scheme is still working within regulatory frameworks. At the same time, the Commission accepts that there are significant public benefits flowing from the program generally and from the new limits.

- 9.161 The Commission accepts that the Agsafe scheme, through promoting uniformity in the levels of chemical storage and handling, compliance with state agvet chemical storage and handling regulations, its education and training program and through the imposition of trading sanctions as a last resort, provides for the safe transport, handling and storage of agvet chemicals, which results in benefits to users, the industry and its employees and the community generally. The Commission also accepts that there is a public benefit in uniformity in the storage of agvet chemicals which the scheme promotes.
- 9.162 The Commission considers that the Agsafe scheme will continue to increase compliance with existing and future state regulatory requirements. The Commission does not consider that the program adds to the regulatory requirements in respect of premises. Rather, the Agsafe training program will increase the knowledge and understanding of existing requirements to those engaged in the Agvet chemical industry.
- 9.163 The Commission considers that expansion of the premises accreditation program to capture all premises which stock quantities of agvet chemicals sold for commercial purposes, which are hazardous substances, will enhance the safety of agvet chemical storage which represent a significant public benefit.
- 9.164 The Commission accepts that a change to the definition of agvet chemicals covered by the scheme is necessary given that the legislation on which the previous definition was based has been repealed. The Commission does not consider that the definition proposed by Agsafe changes the balance of public benefits and anti-competitive detriments of the arrangements.
- 9.165 Consequently, following consideration of the arguments advanced by the Applicant and interested parties, the Commission concludes that, subject to certain conditions, the public benefits likely to result from the arrangements will outweigh any anti-competitive detriment.
- 9.166 The authorisation the Commission proposes to grant is subject to certain conditions. In all other respects the Commission proposes to grant authorisation on the same terms as its 8 June 1994 determination (A90528, A90529 and A90530). That is subject to the same conditions imposed by that determination.
- C2 Where an exception in respect of premises has been granted by the relevant authority for dangerous goods and the granting of an exemption conflicts with accreditation requirements, the exemption shall apply and accreditation shall not be withdrawn or suspended if the matter relating to the exemption is the only reason for non-compliance with the standard for premises.**
- C3 The powers of the Agsafe board are to be limited to statutory matters, with the exception of its role in the appeals process, whilst the powers over policy and direction of the company in implementing the premises and personnel accreditation scheme are to be exercised by the Agsafe Council as explained in paragraphs 8.6 to 8.9 of the Commission's 8 June 1994 determination.**

- C4 Agsafe is to consult with the premises-committee before it amends any of its rules, or Code of Conduct, as they relate to the accreditation scheme.**
- C5 Agsafe is to make the Code of Conduct readily available to manufacturers, retailers, applicators and the community.**
- C6 In those instances where an appeal requiring the use of the conciliator has been lodged, accreditation is not to be suspended or withdrawn before the conciliator decides to confirm any preliminary Agsafe decision.**
- C7 Agsafe is to maintain the broad education program for manufacturers, retailers, applicators and the community, to inform those to be affected to the implications of the accreditation program and what accreditation means.**
- C8 Agsafe is to issue an annual report on accreditation and to make this publicly available. This report should include such issues as the number and nature of complaints, number and nature of appeals dealt with, future directions of Agsafe, and the operation and development of the accreditation scheme itself including the number of premises which have obtained accreditation.**
- C9 Agsafe is to maintain appointment of an industry monitor who is required to report annually to Agsafe and the Commission on the progress Agsafe makes in complying with the conditions of authorisation and on the operation of the Agsafe scheme. A copy of the monitor's report is to be included in Agsafe's annual report.**
- C10 The Industry Monitor is to report on increases in fees and the cost of premises registration on an annual basis and for this report to be incorporated in the Agsafe annual report.**
- C11 Members of the external monitoring committee are to have the power to call extraordinary meetings when and if they consider it necessary.**
- C12 Avcare and its members will only be permitted to deny goods to premises on the basis that they have failed to obtain premises accreditation from Agsafe either through assessment by Agsafe assessors directly, or through assessment by a mutually agreed external assessor, or through issue of relevant certificates by appropriate State and Territory regulatory authorities.**
- 9.167 The Commission proposes to grant authorisation subject to a five-year time limit.
- 9.168 In general, authorising arrangements for a limited time period allows the Commission, at the end of the period of authorisation, to evaluate whether the public benefits upon which its decision is made actually eventuate in practice and the appropriateness of the authorisation in the current market environment.

- 9.169 In addition, the Commission may review the authorisation, prior to the expiry of the authorisation, if there has been a material change of circumstances since the authorisation was granted.
- 9.170 This authorisation relates to, and is limited to Agsafe directives in accordance with the accreditation scheme and Code of Conduct. It does not in any way extend to firms acting without the authority of Agsafe either individually or collectively to refuse to deal with others. In certain circumstances such conduct may give rise to actions under the TPA. Further, as stated in past Commission authorisations of the Agsafe scheme, should evidence come to light of the scheme being operated for the purpose of anti-competitive conduct rather than for the objectives for which it has been established, this may form the basis for a revocation of the authorisation under s.91B of the TPA. In the 10 years that the scheme has been operating no such concerns have come to the Commission's attention.
- 9.171 On 30 March 1999, the Commission granted interim authorisation for the current application as previously authorised by the Commission on 8 June 1994, effective until the date of the final determination, or until the Commission decides to revoke interim authorisation. The Commission has extended the interim authorisation granted on 30 March 1999 until the date that this determination comes into force, or until the Commission decides to revoke interim authorisation.

10. Determination

- 10.1 For the reasons outlined in section 9 of this determination, the Commission concludes that, subject to the conditions set out below, in all the circumstances, the arrangements for which authorisation is sought:
- are 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.
- 10.2 The Commission grants authorisation under s.88 of the TPA and State and Territory Competition Codes to application for authorisation nos A90680 & A90681 for a period of 5 years from the date this determination comes into force. Authorisation is granted subject to the following conditions.
- C1 Wholesalers of veterinary pharmaceutical products, which are being supplied to veterinary practices, are not to be included in the scope of the Agsafe program.**
- 10.3 In all other respects authorisation is granted on the same terms as the Commission's 8 June 1994 determination (A90528, A90529, and A90530). That is, subject to the same conditions imposed by that determination, namely conditions C2 – C12.
- C2 Where an exception in respect of premises has been granted by the relevant authority for dangerous goods and the granting of an exemption conflicts with accreditation requirements, the exemption shall apply and accreditation shall not be withdrawn or suspended if the matter relating to the exemption is the only reason for non-compliance with the standard for premises.**
- C3 The powers of the Agsafe board are to be limited to statutory matters, with the exception of its role in the appeals process, whilst the powers over policy and direction of the company in implementing the premises and personnel accreditation scheme are to be exercised by the Agsafe Council as explained in paragraphs 8.6 to 8.9 of the Commission's 8 June 1994 determination.**
- C4 Agsafe is to consult with the premises-committee before it amends any of its rules, or Code of Conduct, as they relate to the accreditation scheme.**
- C5 Agsafe is to make the Code of Conduct readily available to manufacturers, retailers, applicators and the community.**
- C6 In those instances where an appeal requiring the use of the conciliator has been lodged, accreditation is not to be suspended or withdrawn before the conciliator decides to confirm any preliminary Agsafe decision.**

- C7 Agsafe is to maintain the broad education program for manufacturers, retailers, applicators and the community, to inform those to be affected to the implications of the accreditation program and what accreditation means.**
- C8 Agsafe is to issue an annual report on accreditation and to make this publicly available. This report should include such issues as the number and nature of complaints, number and nature of appeals dealt with, future directions of Agsafe, and the operation and development of the accreditation scheme itself including the number of premises which have obtained accreditation.**
- C9 Agsafe is to maintain appointment of an industry monitor who is required to report annually to Agsafe and the Commission on the progress Agsafe makes in complying with the conditions of authorisation and on the operation of the Agsafe scheme. A copy of the monitor's report is to be included in Agsafe's annual report.**
- C10 The Industry Monitor is to report on increases in fees and the cost of premises registration on an annual basis and for this report to be incorporated in the Agsafe annual report.**
- C11 Members of the external monitoring committee are to have the power to call extraordinary meetings when and if they consider it necessary.**
- C12 Avcare and its members will only be permitted to deny goods to premises on the basis that they have failed to obtain premises accreditation from Agsafe either through assessment by Agsafe assessors directly, or through assessment by a mutually agreed external assessor, or through issue of relevant certificates by appropriate State and Territory regulatory authorities.**
- 10.4 This determination is made on 22 May 2002. If no application for review is made to the Australian Competition Tribunal, it will come into effect on 13 June 2002. If an application for review is made to the Tribunal, the determination will come into effect:-
- Where the application is not withdrawn – on the day on which the Tribunal makes a determination on the review;
 - Where the application is is withdrawn – on the day on which the application is withdrawn.

