

Determination

Application for Minor Variation of Authorisation

lodged by

Agsafe Limited

in respect of

**Authorisation of the Agsafe
agricultural and veterinary chemicals
accreditation program, Code of Conduct
and sanctions process**

Date: 21 May 2003

Authorisation no:	A90680 A90681	Commissioners:	Fels Bhojani Martin McNeill Willett
Public Register Number:	C2000/965 C2000/966		

1. The Application

- 1.1 On 20 December 2002, Agsafe Limited (Agsafe) lodged an application under s 91A of the *Trade Practices Act 1974* (TPA) for a minor variation to authorisations A90680 and A90681, which were granted, subject to certain conditions, to Agsafe for its agricultural and veterinary chemicals accreditation program, Code of Conduct and sanction process, on the 22 May 2002.¹
- 1.2 Authorisation A90680 relates to the making and giving effect to provisions of an agreement that would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA. Authorisation A90681 relates to conduct that may constitute the practice of exclusive dealing under section 47 of the TPA. The authorisations were granted for a five-year period that came into effect on 11 July 2002.²
- 1.3 Authorisation was granted for Agsafe's accreditation scheme that requires persons and premises involved in the transport, handling and storage of agricultural and veterinary chemicals (agvet chemicals) which are hazardous substances, to be accredited. Authorisation was also granted 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 that fail to meet accreditation standards.
- 1.4 The Agsafe scheme is the subject of seven previous authorisations dated 16 November 1990 (A30131, A30132), 17 January 1992 (revocation and substitution of A30131, A30132) and 8 June 1994 (A90528, A90529, A90530). The current authorisations, granted by the Commission on 22 May 2002, were for the renewal of the existing scheme and for several changes to the scheme, included a change to the definition of the scope of agricultural and veterinary chemicals and premises covered by the scheme.
- 1.5 One of the conditions of the authorisations granted by the Commission in 1994 and 2002 was that the powers of the Agsafe Board be limited to statutory matters, with the powers over policy and direction of Agsafe in implementing the premises and personnel accreditation scheme exercised by the Agsafe Council.
- 1.6 Agsafe is now proposing a restructuring of its operations which includes dissolving the Agsafe Council and replacing it with an Accreditation Advisory Committee.

¹ On 3 October 2002, the Commission granted a minor variation to authorisations A90680 and A90681 which clarified the scope of the authorisations as they apply to veterinarians and veterinary chemical wholesalers.

² The Commission's determination was made on 22 May 2002. On 12 June 2002, the Veterinary Manufacturers and Distributors Association made an application for review of the Commission's determination to the Australian Competition Tribunal.

Where an application for review is made to the Tribunal, the determination comes into effect:

- 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.

The VMDA withdrew its application for review on 11 July 2002.

- 1.7 Agsafe has lodged this application for a minor variation to reflect its proposed new structure.

2. Statutory provisions

- 2.1 Section 91A of the TPA provides that on receipt of an application for a minor variation of an authorisation the Commission must, if it is satisfied that the variation sought is a minor variation, invite submissions from interested parties.
- 2.2 A minor variation in relation to an authorisation is defined (under section 87D of the TPA) as a single variation that does not involve a material change in the effect of the authorisation. A person may apply for two or more minor variations at the same time, and the Commission may deal with all the variations together, if it is satisfied that the combined effect of those variations, if all were granted, would not involve a material change in the effect of the authorisation.
- 2.3 After consideration of the application and any submissions received, the Commission may make a determination varying the authorisation or dismissing the application. The tests for varying an authorisation are in sub-sections 91A(4) and (5) of the TPA.
- 2.4 In respect of arrangements and conduct that may substantially lessen competition, the Commission must be satisfied that the variation would not result, or would be likely not to result, in a reduction in the extent to which the benefit to the public of the authorisation outweighs any detriment to the public caused by the authorisation.
- 2.5 In respect of exclusionary provisions and third line forcing exclusive dealing conduct, the Commission must be satisfied that the variation would not result, or would be likely not to result, in a reduction in the benefit to the public that arose from the original authorisation.

3 Submissions

The application

- 3.1 Agsafe is a wholly owned, independent subsidiary of Avcare (the National Association for Crop Protection and Animal Health). Avcare is proposing a restructuring of its organisation part of which involves a restructuring of Agsafe and its operations. However, as Agsafe's roles and functions extend beyond those arrangements the subject of the authorisations granted by the Commission, many of the proposed changes are to elements of Agsafe's operations which are not related to the accreditation scheme authorised by the Commission.
- 3.2 Relevant to the accreditation scheme authorised by the Commission, it is proposed that the Agsafe Council (which has previously run the premises and personnel accreditation scheme the subject of the authorisations) be dissolved and replaced with an Accreditation Advisory Committee.
- 3.3 Under the proposed restructuring Agsafe would also have advisory committees for each of the other programs under its management.
- 3.4 It is proposed that the Agsafe Board exercise a greater co-ordinating and supervisory role and have overall responsibility for the setting of policy and direction of Agsafe as

a whole, although the Accreditation Advisory Committee would continue to implement the accreditation program and sanctions process. The Accreditation Advisory Committee would have financial and management autonomy, although it would operate in accordance with the policies, strategies and budgets set by the Board. The Board would retain the right to override any decisions made by the Committee.

3.5 It is not intended that the Code of Conduct or sanction process for the accreditation scheme be modified as part of the restructuring.

3.6 The authorisations granted by the Commission on 22 May 2002, were subject to a number of conditions. Relevant to Agsafe's request for a minor variation to those authorisations, condition C3 of the authorisations granted reads:

'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...'

3.7 Agsafe submitted that the proposed changes are in line with condition C3 and that it continues to have structures in place to ensure independence from Avcare. Agsafe submitted that, to the extent possible given the restructuring, the new arrangements replicate the existing composition and rights of the Agsafe Council in the Accreditation Advisory Committee, including independent representation on the Committee.

3.8 However, Agsafe submitted that as it is proposed to replace the Agsafe Council with the Accreditation Advisory Committee, it is necessary to review the proposed (amended) Constitution and By-Laws to ensure consistency with the authorisation granted and to amend condition C3 to take account of the new structure.

3.9 Agsafe therefore seeks a minor variation to authorisations A90680 and A90681 to reflect its proposed new structure.

Agsafe's supporting submission

3.10 Agsafe noted that under its existing articles of association the Agsafe Council is responsible for setting the policy direction of Agsafe while the Agsafe Board is empowered to exercise all powers of Agsafe which are not, by law or by the articles, required to be exercised by Agsafe in general meetings. Agsafe noted that these provision work in conjunction with condition C3 of the Commission's May 2002 authorisations to give the Agsafe Council power to implement the premises and personnel accreditation scheme.

3.11 Agsafe noted that, at a practical level, the Agsafe Council is currently only involved in administering the premises and personnel accreditation program and one other program run by Agsafe (the *drumMUSTER* program). Agsafe contended that as its activities expand into new areas it is no longer appropriate for the Agsafe Council to have overall responsibility for setting the policy direction for Agsafe as a whole. Agsafe consider it more appropriate that the existing responsibilities of the Agsafe Council (or its replacement under the proposed restructure, the Accreditation Advisory Committee) be restricted to the accreditation program. Agsafe noted that under the proposed restructure, responsibility for other areas of its operations will be held by the Agsafe Board in conjunction with the Accreditation Advisory Committee and its other committees.

- 3.12 Under the proposed restructure, responsibility for the premises and personnel accreditation program would be transferred to the Accreditation Advisory Committee. The new Agsafe Board would have the power to override decisions of any committee, including the Accreditation Advisory Committee, although it argued, this power would only ever be exercised in exceptional circumstances, where the Board considered that there was a risk that action by a committee may place the directors in breach of their statutory obligations or the principles of good corporate governance.
- 3.13 Agsafe argued that the duties imposed on directors by the *Corporations Act 2001 (Cth)*, common law and equity, make it essential that the Agsafe Board maintain the discretion to override decisions of its committees which, it argues, are essentially considered to be delegates under law.
- 3.14 Agsafe argues that the proposed restructure will have the following benefits:
- removing inefficiencies in the Agsafe and Avcare structures and improving decision making processes;
 - providing a more streamlined management of industry stewardship programs including at the decision making and reporting levels;
 - providing clarification of the responsibilities of the various management bodies within Agsafe;
 - providing increased involvement of non-Avcare bodies within Agsafe and therefore increased independence of Agsafe from Avcare; and
 - improving corporate governance and awareness and adherence to director's duties under the *Corporations Act 2001 (Cth)*.

Submissions from interested parties

- 3.15 The Commission received submissions from the following interested parties:
- The Veterinary Manufacturers and Distributors Association;
 - The Australian Veterinary Association Limited;
 - Worksafe Victoria;
 - Virbac; and
 - Mike Barrett & Associates.
- 3.16 All submissions supported the proposed minor variation.
- 3.17 Several interested parties noted that they did not consider that the proposed restructure of Agsafe would involve a material change in the effect of the authorisations granted or reduce the extent to which the benefit to the public from the authorisations outweighs any detriment to the public caused by the authorisations.
- 3.18 Mike Barrett & Associates argued that the proposed restructure would enhance the public benefit of the Agsafe accreditation program by involving wider representation and independence in the accreditation process and allowing for better monitoring of accreditation activities.

4. Commission's Evaluation

- 4.1 In the Commission's Determination dated 22 May 2002, granting authorisations A90680 and A90681, subject to a number of conditions set out in section ten of that determination, it concluded that the arrangements would be likely to result in a benefit to users of Agvet chemicals and the community generally by promoting the safe use of agvet chemicals and Australia-wide uniformity in the storage of agvet chemicals.
- 4.2 As noted above, one of the conditions of the authorisations granted by the Commission in 1994 and 2002 was that the Agsafe Council exercise the powers over policy and direction in implementing the premises and personnel accreditation program, with the powers of the Agsafe Board in this respect (apart from its role in the appeals process) limited to statutory matters.
- 4.3 The Commission imposed this condition to ensure the independence of the premises and personnel accreditation program from Avcare, which is essentially an agvet chemical manufacturers and distributors representative body. The Commission considered it imperative that, if an industry body was to be in a position to impose trading sanctions on businesses, that that body not be in a position to derive any commercial advantage from the use of the sanctioning process. The Commission considered the Agsafe Council to be considerably more representative of industry interests and independent from Avcare, than the Agsafe Board.
- 4.4 In its 2002 review of the Agsafe scheme, the Commission was satisfied that the implementation of the scheme was fair, had inbuilt safeguards to ensure independence, and allow for natural justice and procedural fairness for firms operating under the scheme.
- 4.5 The Commission notes that since its premises and personnel accreditation scheme was first implemented, Agsafe's roles and functions have expanded considerably beyond those arrangements the subject of the Commission's authorisations. The restructuring proposed by Agsafe is designed to reflect this expansion and more effectively manage all of Agsafe's operations. In this respect, the Commission notes that many of the changes proposed by Agsafe are unrelated to the accreditation scheme authorised by the Commission.
- 4.6 Relevant to the accreditation scheme authorised by the Commission, Agsafe has proposed two changes:
- dissolving the Agsafe Council and transferring its responsibilities in regard to the premises and personnel accreditation program to the newly formed Accreditation Advisory Committee; and
 - that the Agsafe Board retain the right to override any decision made by a Committee if the decision would be in breach of any statutory obligations or good corporate governance.
- 4.7 Agsafe contend that these changes are consistent with the intent of condition of authorisation C3 and continue to provide for independence of the premises and personnel accreditation program from Avcare.

- 4.8 The Commission does not consider that transferring the powers of the Agsafe Council, with regard to the premises and personnel accreditation scheme, to the Accreditation Advisory Committee, will materially effect the operation of the scheme. The roles, responsibilities and powers of the new Committee with respect to premises and personnel accreditation will be exactly the same as those exercised by the Council under the existing arrangements. The composition of the Committee will also be substantially comparable to the existing Council. The Code of Conduct and sanction process for the accreditation scheme, and implementation of the scheme, will not be modified as part of the restructuring.
- 4.9 The only roles and responsibilities of the existing Council which will be transferred to the Agsafe Board, rather than to the newly established Committee, are those with respect to areas of Agsafe's operations which are outside the scope of these authorisations.
- 4.10 As a condition of the authorisations granted by the Commission in 1994 and 2002, the powers of the Agsafe Board were, excluding the boards role in the appeals process, limited to statutory matters. Agsafe is now proposing that the Board have the discretion to override any decision of the Accreditation Advisory Committee. However, Agsafe argued, it would only ever exercise this discretion if a decision of the Committee would be in breach of any statutory obligations or good corporate governance.
- 4.11 Agsafe argued that in the current climate with an emphasis on corporate governance and the overreaching duties imposed on directors by the *Corporations Act 2001 (Cth)*, common law and equity, it is essential that the Board maintain the discretion to override decisions of its committees, which are essentially considered to be delegates under the law. Agsafe argued that this is necessary to ensure that directors comply with their obligations to act with due care and diligence. In light of its legal obligations, Agsafe argued that it is essential that the Board be acknowledged as having the power to review decisions made by the Accreditation Advisory Committee.
- 4.12 As noted above, the Commission considers it imperative that, if an industry body is to be in a position to impose trading sanctions on businesses, that that body not be in a position to derive any commercial advantage from the use of the sanctioning process. It was for this reason that the Commission required that the powers of the Agsafe Board be limited to statutory matters. However, the Commission also recognises that it is necessary for the Board to retain the power to override decision of the Accreditation Advisory Committee in accordance with its statutory obligations and the principals of good corporate governance.
- 4.13 The wording of the Condition imposed by the Commission in its 1994 and 2002 authorisations is somewhat ambiguous in this respect, limiting the Boards powers to 'statutory matters'. As part of its restructuring process, Agsafe has formulated, and provided to the Commission, details of the circumstances in which, under the revised structure, it considers it necessary for the Board to have the power to override decisions of the Accreditation Advisory Committee in order to comply with its statutory obligations. Specifically, as noted above, Agsafe contends that the Board should retain the power to override decisions of the Accreditation Advisory Committee where it considers that a decision of the Committee may place directors in breach of their statutory obligations under the *Corporations Act 2001 (Cth)* or the principles of good corporate governance.

4.14 The Commission considers that varying condition C3 to explicitly specify the circumstances in which the Board has the power to override decision of the Committee will provide greater certainty as to the circumstances in which the Board is able to intervene in decisions of the Committee, and allow the Agsafe Board to comply with its legal obligations while maintaining the independence of the Accreditation Advisory Committee in implementing the premises and personnel accreditation scheme.

4.15 The Commission has therefore amended condition C3 of its 2002 authorisation to read as follows:

C3 The powers over policy and direction of the company in implementing the premises and personnel accreditation scheme are to be exercised by the Accreditation Advisory Committee. With the exception of its role in the appeals process, the powers of the Agsafe Board to override decisions of the Accreditation Advisory Committee are limited to instances where the Board considers that action taken by the Accreditation Advisory Committee may place directors in breach of their statutory obligations under the *Corporations Act 2001 (Cth)* or the principles of good corporate governance.

4.16 The Commission is of the view that that the variation to condition C3 is a minor variation and will not impact on the net public benefit identified in the original authorisation.

5 Determination

5.1 The Commission is satisfied that the variation to authorisations A90680 and A90681 is minor, and it does not involve a material change in the effect of the authorisations.

5.2 The Commission is satisfied that the variation to authorisations A90680 and A90681 which is the subject of this application would not result, or would be likely not to result, in a reduction in:

- the extent to which the benefit to the public of the authorisations outweighs any detriment to the public caused by the authorisations; or
- the benefit to the public that arose from the original authorisations.

5.3 The Commission therefore varies condition C3 of authorisations A90680 and A90681 to read that:

C3 The powers over policy and direction of the company in implementing the premises and personnel accreditation scheme are to be exercised by the Accreditation Advisory Committee. With the exception of its role in the appeals process, the powers of the Agsafe Board to override decisions of the Accreditation Advisory Committee are limited to instances where the Board considers that action taken by the Accreditation Advisory Committee may place directors in breach of their statutory obligations under the *Corporations Act 2001 (Cth)* or the principles of good corporate governance.

5.4 The authorisations remain in force until 11 July 2007, five years from the day on which the determination came into effect.

- 5.5 This determination is made on 21 May 2003. If no application for a review of the determination is made to the Australian Competition Tribunal, it will come into force on 21st day after 21 May 2003. 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; or
 - where the application is withdrawn – on the day on which the application is withdrawn.

