



Australian
Competition &
Consumer
Commission

Determination

Application for Minor Variation of
Authorisations A90680 & A90681

Lodged by

Agsafe Limited

In respect of

*Agsafe's agricultural and veterinary chemical accreditation program
and Code of Conduct*

Date: 19 April 2006

Public Register no.
C2005/1812

Commissioners:

Samuel
Sylvan
McNeill
King
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Willett

Executive Summary

The ACCC has considered Agsafe's application for minor variation to authorisations A90680 and A90681 which were granted subject to conditions in relation to Agsafe's accreditation program and Code of Conduct on 22 May 2002.

The ACCC is satisfied that the proposed amendments to Agsafe's accreditation program and Code of Conduct (with the exception of the proposed amendment to condition 12) are minor and would not result in a reduction of the public benefits which arose from the original authorisations. Accordingly, the ACCC has varied authorisations A90680 and A90681 to incorporate the proposed changes (with the exception of the proposed amendment to condition 12).

The ACCC does not consider it necessary that condition 12 of the original authorisations be amended. The ACCC considers that what Agsafe has proposed is currently provided for within the scope of condition 12.

The ACCC's role in varying the authorisations previously granted to Agsafe, does not amount to an endorsement of the Agsafe accreditation scheme or Code of Conduct.

The current authorisation A90680 and A90681 will expire on 12 July 2007. Should Agsafe seek re-authorisation of its accreditation scheme and Code of Conduct the ACCC will review Agsafe's arrangements and the ability of it to impose trading sanctions against businesses that do not comply with its accreditation standards and consider whether authorisation in the current market is still appropriate.

1. The Application

- 1.1 On 22 May 2002, applications for authorisations A90680¹ and A90681² were granted authorisation, subject to conditions, to Agsafe Limited (Agsafe) in respect of its agricultural and veterinary chemicals accreditation program and Code of Conduct. On 28 October 2005, Agsafe lodged an application under s 91A of the *Trade Practices Act 1974* (the Act) for a minor variation to authorisations A90680 and A90681. The application for minor variation was placed on hold, while it decided if it intended to lodge a further application for minor variation. However, on 7 February 2006, Agsafe advised that it wished to only proceed with the application for minor variation lodged on 28 October 2005.
- 1.2 In May 2002, authorisation was granted for Agsafe's accreditation scheme for premises and personnel involved in the transport, handling and storage of agricultural and veterinary chemicals (AgVet chemicals) to be accredited. Authorisation was also granted for a Code of Conduct which outlines the

¹ Authorisation A90680 relates to the making and giving effect to contract, arrangement or understanding that would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.

² Authorisation A90681 relates to conduct that may constitute the practice of exclusive dealing under section 47 of the Act.

requirements for compliance with the accreditation program and contains provisions for Agsafe to apply trading sanctions to businesses that fail to meet the accreditation standards. Businesses which have trading sanctions applied are prevented from purchasing from, or supplying to Agsafe members.

- 1.3 Agsafe has lodged this application for minor variation to cover the following amendments to its accreditation program and Code of Conduct:
- amending the fees which apply to obtaining Agsafe accreditation
 - the introduction of online training
 - combining premises and personnel accreditation into a single event
 - providing increased consultative services to premises managers
 - addition of workplace assessments
 - elimination of the self assessment process
 - revising condition 12 of the current authorisations and
 - amending the timing of warnings within the sanction process.

These amendments will be delivered under the Agsafe Guardian Program.

The applicant

- 1.4 Agsafe is a wholly owned subsidiary of CropLife Australia Limited.³ CropLife Australia is an industry association representing companies who develop and manufacture agricultural chemicals. Agsafe was formed to implement an accreditation scheme for persons and businesses involved in the transport, handling and storage of agriculture and veterinary chemicals which are classified as poisons, dangerous goods or hazardous substances.⁴ The accreditation scheme consists of personnel and premises accreditation.
- 1.5 Agsafe also administers the drumMuster and ChemClear waste reduction programs. The drumMuster program can be broadly described as an AgVet chemical container collection scheme while ChemClear is a program for the collection and disposal of unwanted AgVet chemicals.⁵

Current authorisations

- 1.6 The Agsafe accreditation scheme and Code of Conduct are the subject of a number of previous authorisations by the ACCC, the first of which was granted on 16 November 1990. The current authorisations were granted on 22 May 2002 for five years. The ACCC's role in granting authorisation does

³ Agsafe was formally a wholly owned subsidiary of Avcare. At the end of 2005, Avcare was restructured into two entities CropLife Australia Limited and the Animal Health Alliance (Australia) Limited.

⁴ The Agsafe accreditation program applies to chemicals as defined in the Agricultural and Veterinary Code 1994 (Sections 4 and 5) and Agricultural and Veterinary Chemical Code Regulations (Section 7 and 8) which are poisons, hazardous substances or dangerous goods.

⁵ On 24 August 2005, the ACCC granted a replacement authorisation allowing Agsafe to charge a levy to fund the drumMuster and ChemClear programs.

not amount to an endorsement of the Agsafe accreditation program or Code of Conduct. The authorisation simply provides immunity from the Act for Agsafe to engage in conduct or arrangements which would be prohibited by the competition provisions of the Act, such as imposing trading sanctions. Authorisation is granted where the ACCC is satisfied that the public benefits of the conduct or arrangements are likely to outweigh the public detriments, including any lessening of competition.

- 1.7 The current authorisations will expire on 12 July 2007. The ACCC notes that should Agsafe wish to continue the Agsafe accreditation program in its current form it will need to seek re-authorisation by lodging an application for a revocation and substitution under section 91C of the Act prior to the expiration of the current authorisations. Alternatively, if the current authorisations expire Agsafe can also lodge a new application for authorisation. In either case, the ACCC will review Agsafe's accreditation scheme and the ability of Agsafe to impose trading sanctions against businesses that do not comply with the accreditation standards and consider whether authorisation in the current market is still appropriate.

Proposed amendments to the accreditation program

Personnel accreditation

- 1.8 Personnel accreditation aims to ensure that agricultural and veterinary chemicals are handled by industry personnel who understand relevant safety and regulatory obligations and can provide appropriate advice on chemical use.
- 1.9 Currently all industry personnel are required to complete a 24 hour introductory course. Re-accreditation occurs every three years. As part of the changes it is proposed that re-accreditation will occur every two years to coincide with the premises accreditation process. It is also proposed that online training be available. In particular, it is proposed that online re-accreditation courses will be introduced which will be followed up with workplace assessments to reinforce the skills required at the workplace.
- 1.10 Agsafe advised that face-to-face training will remain available for individuals who prefer this method. Individuals choosing to become accredited by participating in the face-to-face training will remain on the three year re-accreditation cycle.

Premises accreditation

- 1.11 Agsafe submit that there currently exists a wide range of regulations relating to businesses which store and sell agricultural and veterinary chemicals. Agsafe state that its premises accreditation program has been effective in identifying and communicating regulatory information to the industry. The objective of premises accreditation is to ensure that all storage premises for agricultural and veterinary chemicals comply with:

- Relevant Australian Standards (AS 1940 and AS 2806)

- Relevant legislation relating to the following areas:
 - registration and use of agricultural and veterinary chemicals
 - occupational health and safety
 - dangerous goods storage and transport
 - sale and storage of scheduled poisons and
 - environmental protection.

These regulatory requirements are outlined in the Agsafe Code of Practice for the Safe Transport, Handling and Storage of Packaged Agricultural and Veterinary Chemicals (Code of Practice).

Agsafe advised that the Code of Practice sets a national standard which meets legislation in each of the States relating to handling, storage and transportation of agricultural and veterinary chemicals. Businesses assessed against the Code of Practice will receive either a 'pass', 'recommend fix' or a 'must fix' item. Agsafe advised that a 'must fix' item relates to dangerous goods and hazardous substances and is enforceable, as a business which fails to rectify the item will have a trading sanction imposed against them by Agsafe.

- 1.12 Currently, businesses seeking to obtain premises accreditation conduct a self-assessment process and submit the assessment to Agsafe. Once Agsafe is satisfied that the business has met the standards outlined in the Code of Practice, based on the self-assessment process, a self accreditation certificate will be issued. An external assessor will then conduct an initial assessment of the premises against the Code of Practice and identify any corrective actions if required. Upon the resolution of any corrective actions that may be required an external accreditation certificate is issued by Agsafe. An ongoing assessment process occurs every two years to ensure continued compliance.
- 1.13 It is proposed that the self-assessment process for obtaining premises accreditation be eliminated. Instead, businesses seeking to obtain accreditation will contact Agsafe. A facilitator will organise to visit the business 60 days in advance. Agsafe advised that facilitators are employed on contract throughout Australia and are required to meet criteria based on experience in the industry, technical competence and knowledge of the applicable regulations and standards. The facilitator will conduct a consultative audit to identify and resolve any items that can be corrected on site. During the same visit, the facilitator will also conduct an audit of individuals that have completed online training modules. The current ongoing assessment process which occurs every two years will remain for premises accreditation.

Fee structure

- 1.14 The current fee structure for accreditation is based upon a two tiered premises accreditation scale. Premises are classified as:

- Major Storage premises – being those premises stocking quantities greater than 1000L of agricultural and veterinary chemicals or
- Minor Storage Premises – being those premises stocking quantities up to and including 1000L of agricultural and veterinary chemicals.

1.15 Based on the 2005 Agsafe Monitoring Report⁶ minor storage locations are currently charged an annual fee of \$200 plus GST and major storage locations are charged an annual fee of \$400 plus GST for premises accreditation. There is a once off joining fee of \$370. Currently, the cost for personnel accreditation can range from \$550 a day for the two day introductory course and from \$400 a day for the re-accreditation modules.

1.16 It is proposed that the fee structure for accreditation be amended to reflect the complexity of the storage facility and number of personnel on the premises. The accreditation fees will include an amount covering up to four hours for premises assessment, a secretariat fee and online training and workplace assessment per person fee. The new fees are set out below:

- \$540 for up to four hours of premises consultative time – this is the maximum amount that will be charged for premises accreditation. Premises will only be charged for the actual time the consultant is present to conduct the assessment. Agsafe advised that it proposes to introduce this change before the end of the financial year. Any premises that have subsequently paid the full amount will receive a refund for the time not required.
- \$270 for online training and workplace assessment – this provides one hour of one to one time with a facilitator in the workplace in conjunction with the online module which has been completed by the individual.
- \$390 secretariat fee.

⁶ This report is provided to the ACCC annually pursuant to condition 9 of the current authorisation.

- 1.17 Agsafe provided the following table for illustration purposes which represents the maximum cost of accreditation under the proposed new fee structure:

Number of Accredited staff at premises	Approximate cost of Guardian every two years using online training and workplace assessment
1	\$1200
2	\$1470
3	\$1740
4	\$2010
5	\$2420*
6	\$2690*
7	\$2960*
8	\$3230*
10	\$3770*
15	\$5260*

*Please note that where a facilitator is expected to stay overnight to continue the next day a \$140 charge per night is levied.

Sanction process

- 1.18 Article 8 of the Code of Conduct outlines the current process for imposing trading sanctions on businesses who do not comply with the accreditation program.
- 1.19 Article 8 provides that if any business requiring accreditation of its personnel and/or premises does not comply with the accreditation program then its accreditation status will be denied, suspended or withdrawn (trading sanction imposed), if the non-compliance is not corrected.
- 1.20 The process for imposing trading sanctions is summarised below:
- Agsafe will write to the business involved seeking a written undertaking to correct the breach. A response from the business is required within 14 days to correct the breach. **(First warning)**
 - In the absence of a satisfactory response within 14 days, Agsafe will request the organisation to explain why it should not be subject to denial or suspension of its accreditation until the breach is corrected. **(Second warning)**
 - In the absence of a satisfactory reason why accreditation should not be denied or suspended, and if the breach continues, denial or suspension of its accreditation will be introduced until the breach is corrected.

This decision is subject to an appeal process as outlined by Article 9 in the Agsafe Code of Conduct. **(Denial or suspension of accreditation)**

- In the event of a further breach (where accreditation had previously been granted) or a continuation of an existing breach, the business would be advised that unless compliance was immediately achieved, its accreditation would be withdrawn. **(Accreditation is withdrawn)**
- If the business was a member of Avcare (now CropLife), denial or withdrawal of premises accreditation would also result in loss of Avcare (CropLife) membership.
- Agsafe is required to inform its members and all accredited organisations of such denial or withdrawal of accreditation status within 7 days of the denial or withdrawal.
- Agsafe members who continue to supply or purchase from businesses where sanctions have been applied (and subject to any right of appeal) will be suspended from Agsafe. If the breach continues they will have their membership terminated and their premises accreditation removed, even if they satisfy the accreditation requirements.
- Should a business to which sanctions have been applied correct a breach and therefore achieves compliance with the requirements of accreditation, Agsafe will inform all affected organisations of the reinstatement of accreditation and the consequent lifting of trading sanctions.

1.21 It is proposed that the time period for the first warning be extended to 30 days. It is also proposed that before accreditation can be denied or suspended businesses will have a three day time period by which they have to provide a response.

Appeals

1.22 It is proposed that appeals be lodged with the Agsafe Accreditation Advisory Committee instead of the Agsafe Council as currently provided for by Article 9 of the Code of Conduct. The Agsafe Accreditation Advisory Committee has responsibility for the premises and personnel accreditation program and the sanction process.

Condition 12 of the authorisation

1.23 Condition 12 of the final determination states:

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.

- 1.24 Agsafe submits that Government regulatory authorities do not issue compliance certificates. Agsafe advised that some Government authorities do provide licenses (for example for dangerous goods and poisons). Agsafe advised that State Occupational, Health and Safety authorities do provide some certification for activities that are specific to various industries (for example, such as forklift procedures), but that their certification does not relate to the handling or storage of dangerous goods or hazardous substances. Agsafe proposes that condition 12 be revised to reflect that where certificates that prove compliance against legislation are not issued, then businesses may use a mutually agreeable assessor to demonstrate compliance.

Agsafe's supporting submission

- 1.25 Agsafe submit that the current accreditation program has the following shortcomings:
- The choice of re-accreditation training courses, whilst meeting the regulatory and industry standard guidelines, is limited and content is too general.
 - Participants attending courses have difficulty in relating competencies delivered by training as applicable to their own workplace.
 - Travel and accommodation costs associated with face-to-face training are costs for businesses.
 - Premises assessments are often too short to provide detailed advice on remedial actions.
- 1.26 Agsafe submit that the changes proposed to the accreditation program under the Guardian Program will address these shortcoming by:
- Increasing the choice and availability of re-accreditation training courses by providing shorter, job specific, courses delivered online.
 - Creating online re-accreditation courses which are completed in the workplace and followed up with workplace assessments will address the problem of participants who have difficulty in relating competencies delivered by training to their own workplace.
 - Providing online training which is cost effective.
 - Increasing the amount of time spent on site by an Agsafe accreditation facilitator. Advice provided by the accreditation facilitator can be customised to suit specific challenges of the business and will enable issues to be resolved whilst the facilitator is on site.
- 1.27 Agsafe advised that overall, the proposed changes will create a link between premises assessment and personnel training creating a safe workplace and environment. Agsafe submitted that the tightening of the time frame between warnings prior to trading sanctions being imposed and the increased

consultative services from accreditation facilitators will foster further commitment from the industry to ensure that accreditation is achieved.

Submissions from interested parties

- 1.28 The ACCC sought submissions from a range of interested parties. The main points of the submissions received are summarised below. Complete copies of all publicly available submissions are available on the ACCC's public register and website.
- 1.29 The ACCC received seven submissions generally in support of Agsafe's application for minor variation from the Australian Pesticides and Veterinary Medicines Authority, Department of Agriculture, Fisheries and Forestry (DAFF), Department of Health (Western Australia), Department of Emergency Services (Queensland), Department of Industrial Relations (Queensland), the Veterinary Manufacturers and Distributors Association (VMDA), and the Department of Primary Industries (Victoria).
- 1.30 The VMDA stated that it supported Agsafe's application on condition that Agsafe continues to recognise the specialist Animal Health Industry Training Program provided by VMDA to Animal Health industry personnel to attain Agsafe accreditation.
- 1.31 The ACCC received four submission raising concerns with Agsafe's application for minor variation namely from Mr Mike Barrett, Mr David Jesse, the Department of Primary Industries (NSW) and Guyra Rural Services.
- 1.32 Mr Mike Barrett raised concerns about the proposal to phase out face-to-face training. Mr Barrett considered that there are completely inadequate human resources to implement the workplace assessments as proposed by Agsafe.
- 1.33 Mr David Jesse, an Agsafe assessor, raised concerns about the figures Agsafe had provided to compare the current costs of accreditation with the costs of accreditation proposed under the Guardian program. Mr Jesse also raised concerns about the options available for personnel accreditation for businesses. Mr Jesse stated there was some confusion in the industry as to whether and when face-to-face training was available.
- 1.34 The Department of Primary Industries (NSW) noted that the proposed changes to premises accreditation would remove the choice of assessors currently available to firms that are not members of either Agsafe or Avcare. It noted that given that Agsafe accreditation is a pre-condition to the supply of AgVet chemicals, requiring businesses to use Agsafe assessors should be viewed as a restriction on competition.
- 1.35 The ACCC received a submission from Guyra Rural Services which was generally in support of the changes proposed to personnel accreditation, but not in support of the proposed changes to the premises accreditation.

1.36 Guyra Rural Services did not consider that Agsafe was an effective authority in managing premises accreditation. In relation to the proposed changes to the premises accreditation Guyra Rural Services submitted that:

- A business is required to obtain appropriate State regulatory certificates in any case.
- Agsafe has been unable or unwilling to provide industry with updates on regulatory changes.
- A two year premises accreditation cycle is not conducive to State regulatory compliance.
- For businesses handling minor quantities of dangerous goods Agsafe does not offer a cost effective model.
- The existing condition 12 of the authorisation should be maintained.

2. ACCC's evaluation

Statutory provisions

- 2.1 Section 91A of the Act provides that on receipt of an application for a minor variation of an authorisation the ACCC 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 87ZD of the Act) 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 ACCC 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 ACCC may make a determination varying the authorisation or dismissing the application. The relevant tests for varying an authorisation are outlined in sub sections 91A(4) and (5) of the Act.
- 2.4 In respect of arrangements or conduct that may substantially lessen competition, the ACCC 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 outweighs any detriment to the public caused by the original authorisation.
- 2.5 In respect of exclusionary conduct and exclusive dealing conduct, the ACCC 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.
- 2.6 In its determination dated 22 May 2002, the ACCC granted authorisation to A90680 and A90681 for five years. The ACCC concluded that the accreditation program and the Code of Conduct were likely to result in a public benefit by encouraging safe use of AgVet chemicals and Australia-wide uniformity in the storage of AgVet chemicals. The ACCC was satisfied that such public benefits would likely outweigh the public detriments particularly arising from the ability to impose trading sanctions and the costs on businesses to comply with Agsafe's accreditation procedures.

Amendments to personnel accreditation

- 2.7 The ACCC notes that the proposed changes to the personnel accreditation program will increase the frequency of re-accreditation and introduce online training. Agsafe advised that whilst this may appear to be a further demand on the industry, online training will require no more than four hours work as a compared to a full day workshop at a venue outside the workplace. Agsafe also noted that the online training could be completed over a 60 day period.

- 2.8 Some interested parties raised concerns about the introduction of online training for personnel accreditation. Mr David Jesse expressed concerns that some businesses in the industry were confused about the training options available for personnel accreditation. Mr Mike Barrett considered that there were inadequate resources to implement the workplace assessments as proposed by Agsafe.
- 2.9 Agsafe has advised that due to existing demand for face-to-face training it will not be phased out. Agsafe has advised that businesses can choose either face-to-face training or online training to complete personnel accreditation.
- 2.10 The ACCC has evaluated the amendment proposed to personnel accreditation and considers it to be minor in nature. The ACCC considers that the proposed amendment relates to the way personnel training is delivered, rather than involving any extensive change to personnel accreditation in itself. The ACCC also notes that face-to-face training will remain an option for completing the personnel accreditation program. The ACCC considers that the proposed change does not affect the public benefits and public detriments arising from Agsafe's accreditation program.

Amendments to the premises accreditation

- 2.11 Agsafe proposes to eliminate the self assessment process for premises accreditation. Instead, businesses will contact Agsafe and arrange for a facilitator to visit their premises who will conduct an audit against the Agsafe Code of Practice. Agsafe advised that any issues which need to be resolved will be resolved on site where possible. At the same time, the facilitator will also conduct an assessment of the skills of personnel that have completed the relevant online training modules.
- 2.12 Guyra Rural Services submitted that Agsafe has been unable to provide industry with timely updates on regulatory changes. Guyra Rural Services stated that this can lead to businesses that have Agsafe premises accreditation erroneously believing that they are 'regulatory compliant' when they are not. Guyra Rural Services submitted that a two or three year premises accreditation cycle is not conducive to maintaining State regulatory compliance.
- 2.13 In response, Agsafe advised that:
- It maintains a network of accreditation facilitators and trainers, many of which are experts in handling and storage of dangerous goods.
 - Facilitators are required to attend a three day training conference on an annual basis to maintain and improve their knowledge of the industry.
 - It maintains good relationships with a number of Government bodies and is often advised of changes to legislation or asked to comment on regulatory proposals.
- 2.14 Agsafe submitted that if a business has been assessed against the standards contained within the Agsafe Code of Practice, they could be confident that

their business is compliant with the relevant State/Territory or Federal legislation relating to dangerous goods and hazardous substances.

- 2.15 The ACCC has evaluated the amendments to the premises accreditation and considers that they are minor in nature. The ACCC considers that the proposed amendments to premises accreditation relate to the way premises accreditation program is delivered, rather than involving any extensive changes to premises accreditation in itself. The ACCC considers that the proposed changes do not affect the public benefits and public detriments arising from Agsafe's accreditation program.
- 2.16 That being said, the ACCC considers it important that the Agsafe accreditation standards at least reflect the standards imposed by the relevant State/Territory or Federal legislation. The extent to which the Agsafe keeps up to date with legislative changes and reflects such changes in its Code of Practice will be examined in detail should Agsafe seek re-authorisation (see paragraph 1.7).

Amendments to fee structure for personnel and premises accreditation

- 2.17 In the determination dated 22 May 2002, the ACCC noted that potential anti-competitive detriment could arise from compliance costs associated with meeting Agsafe's premises and personnel accreditation standards. The ACCC noted that the cost of compliance could constitute a barrier to entry to the industry, particularly to smaller firms. Similarly, the cost of satisfying the standards may result in firms leaving the industry.
- 2.18 The ACCC also noted that that some form of fee is necessary in order for the Agsafe scheme to be financially viable. In past determinations, the ACCC concluded that it did not consider it unreasonable for those organisations whose premises are inspected to pay for the costs of inspection. Similarly, the ACCC considered that it was not unreasonable that these firms pay the cost of meeting accreditation standards.
- 2.19 Agsafe proposes to amend the fee structure for the cost of accreditation so that it is based upon the complexity of the storage facility and the number of personnel on site. Under the proposed fee structure the total accreditation fees are based on up to a four hour assessment for premises accreditation (\$540), a secretariat fee (\$390) and an online training and workplace assessment per person fee (\$270).
- 2.20 DAFF noted in its submission that it was not clear whether the proposed amendments to the fees for personnel and premises accreditation would result in an increase or decrease in the cost of accreditation. DAFF noted assuming that the cost of accreditation is increased by the proposed changes, that such a cost increase would be offset by cost savings resulting from other changes proposed by Agsafe, such as replacing face-to-face training with online training.
- 2.21 Guyra Rural Services noted that businesses may be able to comply with State regulations relatively simply and inexpensively. Guyra Rural Services submitted that the proposed changes to the cost of accreditation are

disproportionate to the returns a small business could expect to receive from the sales of minor quantities of agricultural chemicals.

- 2.22 Mr David Jesse expressed concerns about cost figures Agsafe had provided to compare the current costs of accreditation with the costs of accreditation proposed under the Guardian program. In particular, Mr Jesse noted that it was difficult to make a comparison using the figures provided by Agsafe as the same types of costs had not been included in calculating the current cost of accreditation and the cost of accreditation proposed under the Guardian program.
- 2.23 In assessing the proposed amendments to the fee structure for personnel and premises accreditation the ACCC is concerned to ensure that the proposed new fee structure will not create an onerous compliance burden and that Agsafe advises businesses upfront and clearly what the required fees are.
- 2.24 In assessing Agsafe's application for minor variation the ACCC considers that the amendments to the fee structure for the cost of accreditation are minor. The ACCC considers that amendments to the fee structure for the cost of accreditation are not changes in themselves which affect the balance of public benefits and public detriments arising from Agsafe's accreditation program.
- 2.25 However, the ACCC notes that the actual cost of Agsafe accreditation is a factor which affects the public benefits and public detriments arising from Agsafe's accreditation program. The ACCC notes that some businesses, particularly those currently classified as minor storage locations, may pay higher accreditation fees under the Guardian program. Should Agsafe seek re-authorisation the ACCC intends to review the cost of obtaining Agsafe accreditation and its effect on businesses when it reviews Agsafe's authorisation (see paragraph 1.7).

Amendments to the sanction process

- 2.26 The proposed changes to the sanction process will increase the time period for a business to provide a response to a first warning from 14 days to 30 days and will impose a time period of three days for a business to respond before its accreditation status is denied or suspended.
- 2.27 In relation to the proposed three day time period for businesses to respond to the final warning, the Department of Industrial Relations (Qld) considered that five days was an appropriate timeframe as it would accommodate for delays that may occur in the communication process. The ACCC notes this concern, however, it considers that businesses have a number of opportunities to provide a timely response to Agsafe before accreditation is denied or suspended.
- 2.28 In response to potential concerns from industry about Agsafe's proposal to tighten the sanction process, Agsafe noted that with the personnel and premises accreditation becoming more firmly linked and accreditation facilitators taking a more consultative approach, businesses will have extensive resources available to meet the accreditation standards.

- 2.29 The ACCC is of the view that the amendments to sanction process are minor and will not result in a reduction in the public benefits flowing from the original authorisation. Should Agsafe seek re-authorisation the ACCC intends to review whether it is appropriate for Agsafe to continue to have protection under the Act to impose trading sanctions on business who do not meet the Agsafe accreditation standards when it reviews Agsafe's authorisation (see paragraph 1.7).

Amendments to appeal process

- 2.30 It is proposed that appeals in the first instance be lodged with the Agsafe Advisory Committee instead of the Agsafe Council.
- 2.31 On 21 May 2003 the ACCC varied authorisations A90680 and A90681 which related to Agsafe's proposal that the Agsafe Council be dissolved and replaced with the Accreditation Advisory Committee. At that time the ACCC varied condition 3 of the current authorisation so that it reads:

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 actions 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.

- 2.32 The ACCC notes the proposed change is consistent with the minor variation which the ACCC granted on 21 May 2003. The ACCC considers that the proposed amendment is minor and will not result in a reduction in the public benefits flowing from the original authorisation.

Proposed amendment to condition 12

- 2.33 Condition 12 of the current authorisation states:

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.

- 2.34 Agsafe has advised that no government authorities provide certification for compliance against legislation. Agsafe noted that some government authorities do provide licences (for example, dangerous goods and poisons). Agsafe noted that some State Occupational, Health and Safety authorities do provide some certification services, but the services do not relate to the handling or storage of dangerous goods or hazardous substances. Agsafe proposes that condition 12 of the current authorisation be revised to reflect that where certificates that prove compliance are not issued, and a business does not wish to obtain Agsafe accreditation, then premises may use a mutually

agreeable assessor to demonstrate compliance with the Agsafe accreditation standards.

- 2.35 The ACCC notes that condition 12 as it is currently worded provides that businesses that do not wish to obtain Agsafe accreditation can demonstrate compliance with the Agsafe accreditation standards by using a mutually agreed assessor. Accordingly, the ACCC does not consider it necessary to amend condition 12.
- 2.36 Agsafe advised that it is currently in the process of developing a process that should be followed if a business does not wish to use an Agsafe facilitator. Once this proposal is developed the ACCC would expect Agsafe to inform the industry of its existence. The ACCC notes that it is disappointing that after four years of authorisation Agsafe has not been able to develop a workable alternate proposal if a business does not wish to use an Agsafe facilitator. The ACCC encourages Agsafe to finalise the development of the proposal as quickly as possible and advise the industry of its availability.
- 2.37 The ACCC considers that it is important that businesses have options as to how they demonstrate their compliance with the Agsafe Code of Practice. The number and extent of alternatives, in addition to obtaining Agsafe accreditation, is relevant because it is a factor that impacts on the anti-competitive detriment arising from the Agsafe accreditation program. The Department of Primary Industries (NSW) noted that given that Agsafe accreditation is a pre-condition to the supply of Agvet chemicals, requiring businesses to use Agsafe assessors restricts competition.
- 2.38 Should Agsafe seek re-authorisation, the ACCC will consider the alternatives which are available to businesses seeking to demonstrate their compliance with the Agsafe accreditation standards and how this impacts on the public benefits and public detriments arising from Agsafe's accreditation program when it reviews the authorisation (see paragraph 1.7).

Review of authorisation

- 2.39 The Agsafe accreditation program has been authorised by the ACCC in various forms since 1990. The current authorisation provides Agsafe with immunity to engage in conduct which may have the effect or purpose of substantially lessening competition within the meaning of section 45 of the Act and conduct which may constitute exclusive dealing as described under section 47 of the Act.
- 2.40 In particular, the current authorisation provides immunity under the Act for Agsafe to impose trading sanctions on a business which fails to comply with its accreditation standards.
- 2.41 The ACCC notes that the anti-competitive detriments which can result from imposing trading sanctions are potentially very significant. The ACCC notes that ultimate loss of accreditation can result in one of the heaviest penalties which can be applied to a firm, the inability for it to trade in the industry. Given the potential for significant anti-competitive detriment to arise from the

ability to impose trading sanctions, authorisation of such conduct is not taken lightly by the ACCC.

2.42 Should Agsafe wish to seek re-authorisation of its accreditation scheme, the ACCC will review Agsafe's accreditation scheme and the ability of Agsafe to impose trading sanctions and consider whether authorisation in the current environment is still appropriate. Should Agsafe wish to seek re-authorisation, the ACCC would expect Agsafe to:

- provide information which demonstrates that the anti-competitive effects of the accreditation scheme are outweighed by significant public benefits. In particular, given that the Agsafe accreditation scheme has been in operation for a number of years, the ACCC would expect Agsafe to provide evidence to support its claimed public benefits.
- demonstrate why it is necessary for trading sanctions to be imposed on businesses which do not meet Agsafe's accreditation standards.

2.43 The ACCC also notes that a number of submissions received by interested parties raised issues which are more appropriately dealt with in the review of the Agsafe's authorisation. The issues raised by interested parties include:

- how industry is kept informed about regulatory changes which impact on the Agsafe Code of Practice
- the cost of complying with Agsafe accreditation
- the alternatives available to businesses who do not wish to obtain Agsafe accreditation and
- whether Agsafe should continue to have the ability to impose trading sanctions against businesses who do not comply with the accreditation standards.

2.44 Should Agsafe apply for re-authorisation, the ACCC will conduct an extensive public consultation process seeking views from relevant interested parties on the public benefits and public detriments of the Agsafe accreditation scheme. As such the ACCC would expect Agsafe to seek re-authorisation well in advance of the expiry of the current authorisations and preferably before the end of 2006.

Conclusion

2.45 The ACCC is satisfied that the following amendments to Agsafe's accreditation program and Code of Conduct are minor and do not reduce the public benefits resulting from the original authorisations:

- The introduction of a two year re-accreditation cycle for personnel accreditation, for individuals who complete the online training modules.

- Introduction of online training.
- The elimination of the self-assessment process for premises accreditation.
- The introduction of workplace assessments for individuals who have completed online training.
- Amendments to the fee structure for the cost of Agsafe accreditation
- Amendments to the timing of warnings for imposing trading sanctions.
- The proposal that appeals are to be lodged with the Agsafe Advisory Committee instead of the Agsafe Council.

2.46 The ACCC does not propose to amend condition 12 of the current authorisation as requested by Agsafe. The ACCC considers that what Agsafe has proposed is currently provided for within the scope of condition 12.

3. Determination

3.1. On 28 October 2005 Agsafe lodged an application under s 91A of the Act for a minor variation to authorisations A90680 and A90681 which was granted by the ACCC on 22 May 2002 for five years. The application for minor variation covers the following amendments to Agsafe's accreditation program and Code of Conduct:

- The introduction of a two year re-accreditation cycle for personnel accreditation, for individuals who complete the online training modules.
- Introduction of online training.
- The elimination of the self-assessment process for premises accreditation.
- The introduction of workplace assessments for individuals who have completed online training.
- Amendments to the fee structure for the cost of Agsafe accreditation
- Amendments to the timing of warnings for imposing trading sanctions.
- The proposal that appeals are to be lodged with the Agsafe Advisory Committee instead of the Agsafe Council.
- Revising condition 12 of the current authorisations

3.2. The ACCC is satisfied that the variations to authorisations A90680 and A90681 as outlined in paragraph 3.1, with the exception of the proposed

amendment to condition 12, 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 authorisation; or
- The benefit to the public that arose from the original authorisation.

- 3.3. Pursuant to section 91A(3) of the Act, the ACCC makes this determination varying authorisations A90680 and A90681 to cover the proposed changes to the Agsafe personnel and premises accreditation program and the Code of Conduct, as described in paragraph 3.1, with the exception of the proposed amendment to condition 12. The ACCC's role in varying the authorisations previously granted to Agsafe, does not amount to an endorsement of the Agsafe accreditation scheme or Code of Conduct. The ACCC has simply assessed whether the proposed changes are minor and whether they can be incorporated into the current authorisations consistent with the statutory tests outlined in sub sections 91(4) and (5) of the Act.
- 3.4. This determination is made on 19 April 2006. If no application for a review of the determination is made to the Australian Competition Tribunal in accordance with section 101 of the Act, it will come into effect on 11 May 2006.