



Australian
Competition &
Consumer
Commission

Determination

Application for revocation and substitution of authorisations

lodged by

Agsafe Limited

in respect of

**proposed arrangements to continue to operate and enforce the
Agsafe Code of Conduct**

Date: 27 October 2010

Authorisation no.:
A91234, A91242 – A91244

Public Register no.: C2010/535

Commissioners: Samuel
Kell
Schaper
Court
Dimasi
Willett

Summary

The ACCC grants conditional authorisation to Agsafe Limited (Agsafe) to continue to operate and enforce the 8th edition of the Agsafe Code of Conduct (the Code) for a further three years. The Code includes provisions for Agsafe to impose trading sanctions on non-compliant businesses to ensure the Code is effective. Agsafe proposes to use the authorisation period to transition to an incentive based scheme.

Agsafe is an independent subsidiary of CropLife Australia Limited (CropLife), the national body for the plant science industry. It was established in 1994 to implement a range of industry stewardship programs, including the Agsafe Accreditation and Training Program (the Program).

Authorisations A91234, A91242 – A91244 allow Agsafe to continue to operate and enforce the Code. The Code requires persons and premises involved in the storage, handling, transport and distribution of agricultural and veterinary (agvet) chemicals to be accredited through the Program. The Code provides for the imposition of trading sanctions upon businesses not accredited under the Program, and upon any business that trades with a sanctioned business.

Agsafe is currently transitioning to a new incentive based Program, which would not involve the imposition of trading sanctions. Among other things, Agsafe has advised that under the new Program it will separate training from the store audit process. Training options will be more flexible, allowing individuals to use attained skills throughout their careers, aiding skill transfer across industry. Agsafe is not seeking authorisation of the new Program.

Agsafe has had authorisation to operate and enforce the Code since its inception, through authorisations granted in 1994, 2002 and 2007. On 31 May 2010 Agsafe sought authorisation for a further three years to assist it to transition the agvet chemical industry to a new incentive based accreditation and training program which does not involve the use of trading sanctions.

Agsafe sought and was granted interim authorisation to allow it to continue to operate and enforce the Code between the expiry of the previous authorisations on 28 June 2010 and a final determination by the Australian Competition and Consumer Commission (ACCC) on the current applications.

The production, storage and handling of dangerous chemicals can cause substantial safety risks to personnel, consumers, the community and the environment. In a competitive market there is limited commercial incentive for private business to reduce these risks as the costs of any safety or environmental incidents are not always borne by the businesses themselves. Furthermore, market forces alone are unlikely to provide sufficient information to consumers about whether products have been properly stored, transported and handled to minimise the risk of product degradation or damage to packaging. Effective regulation can address these instances of market failure and the ACCC considers the proposed arrangements are likely to result in substantial public benefits by assisting state governments in this regard.

As a result the ACCC considers that the Code is likely to deliver public benefits from increased safety and training in the agvet chemical industry, and public detriments from costs to business from compulsory compliance with the Program.

The ACCC considers that the Code is also likely to result in some public detriment, primarily arising from reduced competition in the provision of training and accreditation in the agvet chemical industry.

The ACCC is imposing a condition to ensure that Agsafe's documentation and website do not give the impression that only Agsafe can provide training and assessment for the 3 competencies that form part of Agsafe's Basic Training, given the potential for this to limit competition in the provision of this training and assessment. This training could be provided by other Registered Training Organisations.

The ACCC is satisfied that, subject to this condition, in all the circumstances, the operation and enforcement of the Code for a further three years is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment. Therefore, the ACCC has decided to grant conditional authorisation.

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LIST OF ABBREVIATIONS

ACCC	The Australian Competition and Consumer Commission
ACDC	Australian Commercial Disputes Centre
agvet	Agricultural and veterinary
AHA	Animal Health Alliance
APVMA	Australian Pesticides and Veterinary Medicines Authority
AQF	Australian Qualifications Framework
AQTF	Australian Quality Training Framework
COAG	Council of Australian Governments
NARA	National Audit and Registration Agency
NSWFA	New South Wales Farmers Association
RTO	Registered Training Organisation
the Act	<i>Trade Practices Act 1974</i>
the Code	The 8 th edition of the Agsafe Code of Conduct
the Committee	Agsafe Accreditation Advisory Committee
the Program	The Agsafe Accreditation and Training Program
VMDA	Veterinary Manufacturers and Distributors Association

1. The applications for authorisation

- 1.1 On 31 May 2010, Agsafe Limited (Agsafe) lodged applications under section 91C(1) of the *Trade Practices Act 1974* (the Act) for the revocation of authorisations A91027 – A91030 and the substitution of authorisations A91234, A91242 – A91244.
- 1.2 Authorisation is a transparent process where the Australian Competition and Consumer Commission (ACCC) may grant immunity from legal action for conduct that might otherwise breach the Act. Broadly, the ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.3 The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Further information about the authorisation process is contained in [Attachment A](#).
- 1.4 The holder of an authorisation may apply to the ACCC to revoke an existing authorisation and grant another authorisation in substitution for the one revoked (re-authorisation). In order for the ACCC to re-authorise conduct, the ACCC must consider the application for re-authorisation in the same manner as it would consider an application for initial authorisation under section 88 of the Act.
- 1.5 In this case, the initial authorisation was made under:
- section 88(1) of the Act to make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act.
 - section 88(1) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
 - section 88(1A) of the Act to make and give effect to a provision of a contract, arrangement or understanding, a provision of which is, or may be, a cartel provision and which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act.
 - section 88(1A) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding a provision of which would be, or might be, a cartel provision (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
 - section 88(7) of the Act to engage in boycott conduct to which sections 45D, 45DA or 45DB of the Act might apply.
 - section 88(8) of the Act to engage in conduct that constitutes or may constitute, exclusive dealing.

- 1.6 A chronology of the significant dates in the ACCC's consideration of these applications is contained in Attachment B.

The applicant

- 1.7 Agsafe is an independent, non-profit subsidiary of CropLife Australia Limited (CropLife). CropLife is the peak industry association for the plant science industry in Australia. Its members invent, develop, manufacture and market crop protection and crop biotechnology products.
- 1.8 CropLife works closely with the Animal Health Alliance Ltd (AHA), which represents the interests of the animal health industry in Australia. Its members include registrants, manufacturers and formulators of animal health products.
- 1.9 These two industry bodies represent, among others, manufacturers of agricultural and veterinary (agvet) chemicals, which are used by farmers to protect crops and animals from a wide variety of pests, weeds and diseases. To ensure that agvet chemicals are used safely, State Governments have legislated that agvet chemicals must be stored, handled and transported in accordance with prescribed regulations.
- 1.10 In representing their members, CropLife and the AHA recognise the importance of regulatory compliance throughout the agvet chemical supply chain. CropLife established Agsafe to seek to achieve 100% industry compliance with Government regulations and safety standards. This was to be facilitated by training and accrediting industry personnel and premises at the wholesale level through the Agsafe Accreditation and Training Program (the Program, formerly the Industry Accreditation Program). Agsafe has held authorisations to allow it to implement its accreditation and training program and the Agsafe Code of Conduct (the Code) in their various forms since 1994.
- 1.11 To ensure that all distributors would undertake the Program and comply with the Code, CropLife and the AHA require that their members, agvet chemical manufacturers, must comply with all aspects of the Code including the provision to agree not to trade with any agvet chemical distributor that does not comply with the Code.
- 1.12 This effectively results in all agvet chemical distributors being compelled to comply with the Code because CropLife member companies are responsible for 85% of crop protection products and 100% of crop biotechnology products and sales, and AHA member companies represent in excess of 85% of all animal health product sales in Australia (ex factory gate).

The conduct

- 1.13 Agsafe is seeking re-authorisation to continue to operate and enforce the 8th edition of the Code – a copy of which is set out at Attachment D. The Code outlines the requirements to comply with the Program and behaviours that are promoted and encouraged by Agsafe and its members.
- 1.14 The Code requires persons and premises involved in the storage, handling, transport and distribution of agvet chemicals to be accredited through the Program. The Code identifies the types of chemicals which fall within the scope of the Program and provides for the imposition of trading sanctions on businesses that are not accredited

under the Program and for any manufacturers or retailers that trade with sanctioned distributors.

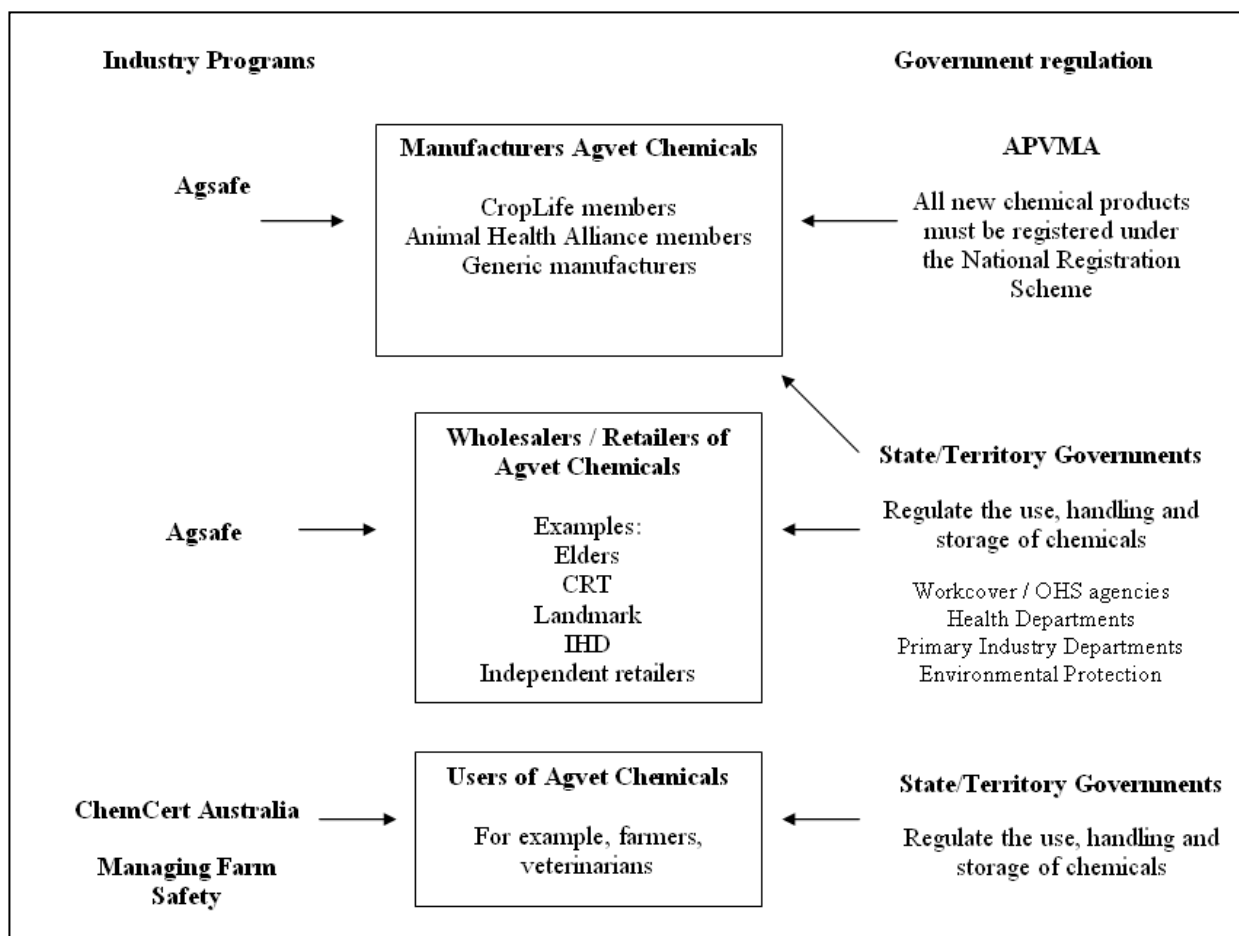
- 1.15 The Program is Agsafe's prescribed process for achieving compliance with the Code. It is designed to ensure that all people and premises which handle agvet chemicals are properly equipped to minimise the risk to persons, property and the environment. The Program sets out the requirements and training options available for attaining compliance with the Code.
- 1.16 Agsafe is seeking authorisation for a further three years during which time it proposes to transition to an incentive based scheme which would not involve the imposition of trading sanctions. Key elements of the Code, the Program and the proposed scheme are outlined below.

The agvet chemical industry

- 1.17 Responsibility for the regulation of the use of agricultural and veterinary (agvet) chemicals is spread across jurisdictional boundaries and across several pieces of legislation. All new agvet chemicals must be registered by the Australian Pesticides and Veterinary Medicines Authority (APVMA) before they can be sold in Australia. State and Territory Governments are then responsible for regulating the use, storage and handling of chemicals after they have been sold. Relevant agencies include WorkCover/Occupational Health and Safety agencies and health departments, primary industry departments and environmental protection agencies.
- 1.18 The Council of Australian Governments (COAG) is currently seeking reform in agvet chemical regulation with the goal of reducing the regulatory burden on business. COAG has directed that a proposal be prepared for a single national framework to improve the efficiency and effectiveness of the regulation of agvet chemicals. The reform process is lengthy and the reforms are unlikely to take place for a number of years.¹
- 1.19 Industry developed programs, such as the Agsafe Accreditation and Training Program, work in conjunction with government regulation relating to the use of agvet chemicals.

¹ The Department of Primary Industries website, available at <http://www.new.dpi.vic.gov.au/agriculture/attachments/a-national-scheme> (accessed on 16 July 2010).

Figure 1.1 – Cooperative approach to regulation



Application of the Program

1.20 The Program applies to businesses and individuals who sell, handle, transport, store and/or take responsibility for the safety of agvet chemicals, as defined in the Agricultural Chemicals Code 1994 Section 4 (agricultural chemical product) and Section 5 (veterinary chemical product) and Sections 7 and 8 of the Agricultural and Veterinary Code Regulations which are²:

- Schedule 5 Poisons (low toxicity, low to moderate hazard and cause only minor health affects)
- Schedule 6 Poisons (high toxicity, may cause death or injury if ingested, inhaled etc.)
- Schedule 7 Poisons (extremely high toxicity, can cause death or injury at low exposures)
- Hazardous Substances, and
- Dangerous Goods

² Preface, *Code of Conduct*, p. 2.

and which are not:

- dairy sanitisers or cleansers in outlets which do not supply any other agricultural or veterinary chemical products
- products exclusively for home use including those for companion animals when sold in outlets catering exclusively for home use
- nutritional pre-mixes and supplements for animals
- substances used in conjunction with an agricultural chemical product to identify areas treated with that product
- insect repellents for use on human beings
- substances listed in Schedule 3 of the Agricultural and Veterinary Chemical Regulations³, or
- swimming pool products.

1.21 The Program does not cover veterinarians and veterinary chemical wholesalers where the quantity of non-exempt agricultural and veterinary chemical products does not exceed 500L or 500kg or products used and sold by veterinarians where these products in the supply chain are being wholesaled to veterinary practices.⁴

1.22 Examples of businesses which require accreditation under the Program include:

- a chemical manufacturer's storage premises
- a transport or distribution warehouse
- a retail warehouse
- a retail store supplying horticulture, orchards, farms, councils, golf courses or any other use other than home gardening, and an aerial operator's premises which acts as a reseller.⁵

Costs of Agsafe accreditation

1.23 Costs of Agsafe accreditation include an annual administration fee, premises accreditation every two years and a variety of fees for training requirements of personnel dependent on time, location and method of training.

1.24 Currently, all businesses are charged \$160 for each hour an Agsafe facilitator spends at the business site. Agsafe advise that a facilitator spends an average of 2.5 hours at a business location at a cost of \$400. Agsafe advises that businesses which maintain good

³ For example mould inhibitors used in paper and glue manufacture, fungicides, bactericide or deodorants, soil ameliorants, invertebrate pest management lures based on food, cut flower preservatives, hay inoculants, predatory insects and industrial biocides.

⁴ Preface, *Code of Conduct* p. 3.

⁵ Agsafe website, Premises Eligibility, available at <http://www.agsafe.com.au/aat/category.php?id=14> (accessed 9 July 2010).

compliance with the accreditation requirements could expect a consultation with a facilitator to be shorter.

- 1.25 The online basic training course offered by Agsafe costs \$520 and participants will be awarded Agsafe accreditation for a period of three years. Face to face charges are negotiated with the contractor.
- 1.26 A variety of online re-accreditation courses cost \$321 and include a workplace assessment at the next premises accreditation.
- 1.27 The Agsafe administration fee is \$500 per premises.
- 1.28 Agsafe submits that the Program is based on the principle of cost recovery and not-for-profit. Agsafe adds that in the 2009/10 financial year the Program will have an approximate annual turnover of \$1.4 million and will absorb a loss.
- 1.29 Agsafe submits that it is expanding its streamlined, web-based training which will enhance the training experience and ensure that it is focussed on delivering results to individuals. Agsafe submits that face-to-face learning is being provided in more locations. Agsafe submits that the program receives positive feedback from businesses, in the last financial year post consultation on premises audits responses indicated 89% of people rated the experience as either “excellent” or “good” while only 2% rated it as “poor” or “very poor”.

Key provisions of the Code

Agsafe accreditation requirements

- 1.30 Agsafe accreditation applies to the storage, handling, transport, sale and provision of advice with regard to agvet chemical products from the point of manufacture to the end user. Both storage premises and personnel are required to be accredited.⁶
- 1.31 Article 4 of the Code states all persons and organisations involved in the storage, handling, transport and distribution of agvet chemical products shall:
- adhere to all Acts, regulations, standards, codes and statutory requirements pertaining to the storage, handling, transport and distribution of agvet chemical products⁷
 - ensure that the requirements for personnel and premises accreditation are maintained⁸, and
 - only use contractors or sub-contractors who meet Agsafe accreditation requirements.⁹

⁶ Article 3 of the *Code of Conduct*.

⁷ Article 4.1 of the *Code of Conduct*.

⁸ Article 4.2 of the *Code of Conduct*.

⁹ Article 4.3 of the *Code of Conduct*.

Marketing

- 1.32 Article 5 of the Code outlines the requirements on manufacturers, distributors or retailers in marketing agvet chemical products.

Provision of Advice or Recommendations

- 1.33 Article 6 outlines the requirements of any person, organisation or other entity providing advice or recommendations with regard to agvet chemical products.

Trading Sanctions

- 1.34 Trading sanctions may apply to those aspects of the Code which apply to the accreditation program.¹⁰
- 1.35 The Code provides that any business location requiring accreditation of its personnel and/or premises that does not comply with the Program and/or those sections of the Code which apply to the Program may have its accreditation status denied, suspended or withdrawn if the non-compliance is not corrected.¹¹ If a business has its accreditation status denied or withdrawn, a trading sanction will be applied and the business' membership of Agsafe or CropLife (where applicable) will be terminated.¹²
- 1.36 Agsafe members who continue to supply or purchase from businesses where trading sanctions have been applied will be suspended from Agsafe. If the breach continues, these Agsafe members will have their membership terminated and their premises' accreditation removed, even if they satisfy the accreditation requirements.¹³ This provision of the Code applies the threat of trading sanctions to both members and non-members of Agsafe. In effect CropLife, the AHA and Agsafe members must all agree not to supply or deal with non-accredited businesses.
- 1.37 Before imposing a trading sanction on a non-compliant business, Agsafe conducts the following procedures:¹⁴
- A three step warning process. The non-compliant business will have 30, 14 and three days to respond to warnings one, two and three respectively. For each warning the business has the option to either correct the breach or show cause why it should not be subject to denial or suspension of its accreditation.¹⁵
 - In the absence of a satisfactory reason why accreditation should not be denied or suspended, and if the breach continues, denial or suspension of the businesses' accreditation will be introduced.¹⁶
 - Agsafe will inform its members and all accredited organisations of such denial or withdrawal of accreditation status within 7 days.¹⁷

¹⁰ Article 8.1 of the *Code of Conduct*.

¹¹ Article 8.2 of the *Code of Conduct*.

¹² Article 8.3 of the *Code of Conduct*.

¹³ Article 8.12 of the *Code of Conduct*.

¹⁴ Article 8.4 of the *Code of Conduct*.

¹⁵ Article 8.6-8.8 of the *Code of Conduct*.

¹⁶ Article 8.9 of the *Code of Conduct*.

1.38 Sanctioned businesses may correct their breaches and obtain accreditation. In this situation, Agsafe will inform all interested or affected organisations of the reinstatement of accreditation and the lifting of the trading sanction.¹⁸

Appeals

1.39 There is also an option for appeal of Agsafe's decisions to deny, suspend or withdraw membership. Appeals must be made within 14 days of notification.¹⁹

1.40 Appeals are first dealt with by the Agsafe Accreditation Advisory Committee and then the Agsafe Board of Directors. In both cases, there is a 14 day period to attempt to reach a solution which is acceptable to both parties. If a solution cannot be found the appeal will be lodged with and considered by the Australian Commercial Disputes Centre (ACDC).²⁰

1.41 The cost of an appeal which requires the use of a conciliator shall be equally shared by the parties involved unless the appeal is resolved in favour of the appellant. In such cases Agsafe will pay all costs of the conciliation process.²¹

Key elements of the current Program

Personnel Accreditation

1.42 The Program applies to all people who handle, sell, recommend, advise and/or take responsibility for the safety of agvet chemicals.²²

1.43 Figure 1.2 provides examples of those people required to be accredited under the Program

Job Description	Accreditation Required
Premises Manager	Yes
Merchandise Manager	Yes
Agronomist	Yes
Sales Representative	Yes
Marketing	Yes
Administration/Finance	No

¹⁷ Article 8.12 of the *Code of Conduct*.

¹⁸ Article 8.14 of the *Code of Conduct*.

¹⁹ Article 9.1 and 9.2 of the *Code of Conduct*.

²⁰ Article 9.4-9.6 of the *Code of Conduct*.

²¹ Article 9.11 of the *Code of Conduct*.

²² Agsafe website, personnel eligibility, available at <http://www.agSAFE.com.au/aat/category.php?id=9> (accessed on 12 July 2010).

Senior Management	No
Warehouse Manager	Yes
Transport Manager	Yes
Farmer	No
Spray Contractor	No

1.44 The Program is devised and implemented to ensure people who handle agvet chemicals at any stage during the distribution chain:

- understand the 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 relevant government departments.

1.45 The Program requires:

- completion of the Personnel Accreditation (Basic) Agsafe training course for those with some experience in the industry (a new Induction Course is about to be introduced which is targeted at employees with no experience in the industry)
- a formal commitment to comply with the Code which outlines requirements of compliance with industry accreditation program
- completion of at least one training unit every two or three years (depending on the learning method employed) from a current choice of the following training modules:
 - Face to Face: Occupational Health and Safety, Chemical Handling Storage and Transport, Principles of Pest Management and AgSAFER Risk Management.
 - Online: Occupational Health and Safety Managers, Occupational Health and Safety General, Chemical Warehousing, Spray Application Technology, Animal Health and Agsafe Basic Induction course.
 - Both Face to Face and Online: Emergency Planning and Response.

Premises Accreditation

1.46 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 State legislation in areas including:

- registration and use of agvet chemicals

- occupational health and safety
 - dangerous goods storage and transport
 - sale and storage of Scheduled Poisons
 - environmental protection.
- 1.47 Premises accreditation, under Article 4 of the Code, requires that premises which store, handle or sell agvet chemicals comply with all relevant Acts, Regulations, Standards, Codes and statutory requirements.
- 1.48 Premises are required to have an in store audit with a facilitator every two years.

Key elements of proposed new scheme

- 1.49 Agsafe is still completing the final details of the proposed new scheme. However, the ACCC understands that training options under the new scheme will be more flexible and varied. The proposed new scheme does not form part of the current application.
- 1.50 Agsafe has submitted that the new scheme will separate training from the store audit process. This will allow individual employees to use the attained skills throughout their careers, which will aid skill transfer across industry and provide an individual career pathway for personnel engaged in the agvet chemical industry.
- 1.51 Agsafe has indicated it intends to move to the new training options from 1 September 2010 and to the new audit arrangement after 1 July 2011.

Premises Accreditation

- 1.52 Stores undertaking an accreditation audit will be assessed on what percentage of corrective actions have been identified by the Agsafe facilitator. If the level is within an acceptable range and the corrective actions involve issues of a minor nature and are not directly related to compliance requirements under state and federal regulations, the premises has the opportunity to move to a silver level of accreditation.
- 1.53 Under a silver level accreditation, premises will only be required to undertake a store audit every three years. Managers and staff will be able to receive a range of benefits (providing annual fees are paid within 30 days of falling due).
- 1.54 If a store receives a similar standard of silver level audit at their next audit, they will move to a gold level accreditation.
- 1.55 A gold level accreditation results in premises only requiring an in-store audit every five years, reduced annual fees, no formal facilitated visits between in-store audits and online access to 24/7 advice on a range of matters related to compliance.
- 1.56 Silver and gold level accreditation will be contingent on annual fees being paid in a timely manner.
- 1.57 Agsafe suggests these elements of the new scheme will be attractive to agvet chemical suppliers and will provide strong incentives to maintain regulatory compliance after the threat of sanctions has been removed.

Personnel Accreditation

- 1.58 Training status for individual employees will be based on a rolling points system with a variety of course and points accumulation options.
- 1.59 Agsafe states that over the next twelve months it will inform members about a new accreditation arrangement that will provide greater choice and more flexible ways of achieving and maintaining personnel accreditation.²³

National vocational education and training framework

*Australian Qualifications Framework*²⁴

- 1.60 The Australian Qualifications Framework (AQF) was introduced in 1995 and is a national framework of qualifications in the school, vocational education and training, and higher education sectors in Australia.
- 1.61 Among other things, the AQF comprises:
- national guidelines for each of the current national qualifications issued in the senior secondary school, vocational education and training and higher education sectors
 - policies and guidelines for articulation, credit transfer and recognition of prior learning
 - a register of authorities empowered by government to accredit qualifications and
 - a register of institutions authorised to issue qualifications.

*Australian Quality Training Framework*²⁵

- 1.62 The Australian Quality Training Framework (AQTF) is the national set of standards which aim to ensure consistency and quality of training and assessment services in Australia's vocational education and training system. Under the AQTF, any organisation that wants to deliver nationally recognised and accredited training and assessment services must become a Registered Training Organisation (RTO).
- 1.63 Generally, to register as an RTO, an organisation must:
- apply to the appropriate state or territory registering authority and
 - demonstrate compliance with the AQTF Essential Conditions and Standards for Initial Registration.

²³ Agsafe website: <http://www.agsafe.com.au/guardian/content.php?id=79>, viewed on 14 October 2010.

²⁴ Unless stated otherwise, information appearing under this heading was obtained from the AQF website: <http://www.aqf.edu.au/AbouttheAQF/TheAQF/tabid/108/Default.aspx>, viewed on 4 October 2010.

²⁵ Unless otherwise stated, the information appearing under this heading was obtained from the National Training website: <http://www.training.com.au/Pages/menuitem91cdbaeb7a2bc0e2cd9ae78617a62dbc.aspx>, viewed on 4 October 2010.

- 1.64 Upon successful registration, details of the RTO and the courses and qualifications it may deliver are published on a national register called the National Training Information Service. Registration under the AQTF typically lasts for five years. Once registered, an RTO must continue to comply with the AQTF Essential Conditions and Standards for Continuing Registration. Any variation to the scope of training offered by an RTO must also be approved.
- 1.65 Recently, new Essential Conditions and Standards for Initial Registration and Continuing Registration of Training Organisations were approved by the Ministerial Council for Tertiary Education and Employment, which became effective from 1 July 2010.²⁶
- 1.66 Condition 7 of the Essential Conditions and Standards for Initial Registration states that an applicant RTO must confirm that it will recognise the AQF qualifications and Statements of Attainment issued by any other RTO.
- 1.67 Key changes to the Essential Conditions and Standards include:²⁷
- clear requirements for the initial registration of new providers and strengthened requirements for continuing registration
 - compliance with the Conditions of Registration will now be audited in the same way that compliance with the Standards is audited
 - an application must comply with the Essential Standards for Continuing Registration as the date that is approved for registration and
 - non-compliance with the new Essential Conditions and Standards may result in a range of sanctions being placed on the RTO, which may include additional conditions being placed on an RTO's registration, an RTO being de-registered, or an application for registration being rejected.
- 1.68 The benefits of being an RTO include that only an RTO:²⁸
- can issue Australian Qualifications Framework qualifications
 - can use the Nationally Recognised Training logo
 - is listed on the National Training Information Service database
 - is eligible to tender for public funding for vocational education and training.

²⁶ National Quality Council special bulletin, *New AQTF Essential Conditions and Standards for Registered Training Organisations to Come into Effect*, 22 June 2010.

²⁷ Ibid.

²⁸ NARA website: <http://www.nara.tvetaustralia.com.au/>, viewed on 5 October 2010.

- 1.69 The National Audit and Registration Agency (NARA) provides audit and registration services for RTO's that operate in more than one Australian state or territory.
- 1.70 For eligible RTO's, NARA's registration processes includes:
- a training organisation determines its intended scope of registration and completes the application documentation
 - NARA reviews the application, auditing it against AQTF Essential Conditions and Standards
 - NARA Auditor completes draft audit report identifying areas of good practice, continuous improvement and non-compliance (as appropriate)
 - draft audit report is sent to applicant for comment
 - Client Relationship Manager makes a recommendation to NARA General Managers – to register; not register; or further action required
 - if AQTF Essential Conditions and Standards are met, the NARA General Manager approves registration for up to five years
- 1.71 The vocational education and training sector is currently working to create a national regulator, as agreed by COAG in December 2009. The national regulator will be responsible for the registration and audit of registered training providers and accreditation of courses. Currently, the states and territories and the Commonwealth are working together to create the legislation and intergovernmental agreement which will make this happen. The new regulator will be a Commonwealth statutory authority and the new arrangements are expected to commence from April 2011. At this stage, all jurisdictions except Victoria and Western Australia have agreed to refer powers to the Commonwealth to implement the national regulator.
- 1.72 It is envisaged that providers that have an existing registration with state regulators will not be required to re-apply for registration with the national regulator. Registration with state regulators will be transferred to the national regulator, subject to normal conditions of registration.
- 1.73 Over the next 12 months, NARA will be working with the Department of Education, Employment and Workplace Relations and the state and territory registering bodies to establish the national regulator. During this transition phase, the ACCC understands that NARA will continue operations as normal.

Other parties

- 1.74 Under section 88(6) of the Act, any authorisation granted by the ACCC is automatically extended to cover any person named in the authorisation as being a party

²⁹ Unless stated otherwise, information appearing under this heading was obtained from NARA's website: <http://www.nara.vetaustralia.com.au/>, viewed on 5 October 2010.

or proposed party to the conduct. Agsafe has named CropLife, AHA and the members of these associations as being parties to the proposed conduct.

Interim authorisation

- 1.75 Agsafe sought interim authorisation to allow it to continue to operate and enforce the Code between the expiry of authorisations A91027 – A91030 on 28 June 2010 and a decision on the final determination by the ACCC on applications A91234, A91242 – A91244. The ACCC granted interim authorisation on 24 June 2010 for the following reasons:
- granting interim authorisation for the proposed arrangements will maintain the status quo while the ACCC undertakes its public assessment of the application for authorisation, and
 - denying interim authorisation may result in a decline in the safety and regulatory compliance of the storage, handling and distribution of agricultural and veterinary chemicals in Australia.
- 1.76 Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Draft determination

- 1.10 Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.
- 1.10 On 20 August 2010, the ACCC issued a draft determination proposing to re-authorise the proposed conduct for three years.
- 1.10 A conference was not requested in relation to the draft determination.

2. Submissions received by the ACCC

- 2.1 The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. To this end, the ACCC aims to consult extensively with interested parties that may be affected by the proposed conduct to provide them with the opportunity to comment on the application.

Prior to the draft determination

Applicant's supporting submission

- 2.2 The ACCC has previously stated that, for it to be satisfied that the imposition of trading sanctions on non-accredited businesses is likely to result in a public benefit, the ACCC considers it necessary for the relevant government agencies to indicate they support Agsafe in its role and methods as industry co-regulator. To address this issue Agsafe has provided submissions in support of its applications for authorisation from:

- Department of Agriculture and Food WA
- Department of Employment, Economic Development and Innovation QLD
- Department of Environment and Climate Change NSW
- Department of Health WA, and
- WorkSafe WA.

Interested party submissions

- 2.3 The ACCC also sought submissions from around 150 interested parties including agvet chemical manufacturers, distributors and retailers, State, Territory and Commonwealth agencies and agvet industry associations. The ACCC received public submissions from:

- Aerial Agriculture Association of Australia Ltd
- Animal Health Alliance
- CropLife Australia Limited
- CSL Limited
- David Rose & Elizabeth Hak (Agsafe facilitators)
- Department of Agriculture and Food WA
- Department of Employment, Economic Development & Innovation QLD
- Department of Environment and Conservation WA
- Department of Health WA
- Department of Health and Ageing

- Department of Primary Industries
- Department of the Prime Minister & Cabinet
- John Blair Bowa Organics P/L
- John Fennell (Agsafe facilitator)
- Monsanto Australia Ltd
- NSW Farmers Association
- Nursery & Garden Industry Australia
- Primary Industries and Resources SA
- The Veterinary Manufacturers and Distributors Association Ltd
- Work Cover NSW.

Following the draft determination

- 2.4 On 20 August 2010, the ACCC issued a draft determination in relation to the applications for authorisation. The draft determination proposed to grant authorisation.
- 2.5 A conference was not requested in relation to the draft determination.
- 2.6 The ACCC received five public submissions in response to the draft determination from:
- AHA
 - Biosecurity Queensland, Department of Employment, Economic Development and Innovation
 - Bowa Organics
 - ChemCert Training Group and
 - VMDA.
- 2.7 The views of Agsafe and interested parties are outlined in detail in the ACCC's evaluation in Chapter 3 of this determination. Copies of public submissions are available from the ACCC website (www.accc.gov.au) by following the 'Public Registers' and 'Authorisations Public Registers' links.

3. ACCC evaluation

- 3.1 Broadly, under section 91C(7) of the Act the ACCC must not make a determination revoking an authorisation and substituting another authorisation unless the ACCC is satisfied that the relevant statutory tests are met.
- 3.2 The ACCC's evaluation of the proposed conduct is in accordance with the test(s) found in:
- section 90(8) of the Act which states that the ACCC shall not authorise a proposed exclusionary provision of a contract, arrangement or understanding, unless it is satisfied in all the circumstances that the proposed provision would result or be likely to result in such a benefit to the public that the proposed contract, arrangement or understanding should be authorised.
 - sections 90(6) and 90(7) of the Act which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
 - the provision of the proposed contract, arrangement or understanding in the case of section 90(6) would result, or be likely to result, or in the case of section 90(7) has resulted or is likely to result, in a benefit to the public and
 - that benefit, in the case of section 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of section 90(7) has resulted or is likely to result from giving effect to the provision.
 - sections 90(5A) and 90(5B) of the Act which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:
 - the provision, in the case of section 90(5A) would result, or be likely to result, or in the case of section 90(5B) has resulted or is likely to result, in a benefit to the public and
 - that benefit, in the case of section 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of section 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.
 - section 90(8) of the Act which states that the ACCC shall not authorise the proposed conduct, unless it is satisfied in all the circumstances that such conduct would result or be likely to result in such a benefit to the public that the proposed conduct should be authorised.
 - section 90(8) of the Act which states that the ACCC shall not authorise the proposed exclusive dealing conduct unless it is satisfied in all the circumstances

that such conduct would result or be likely to result in such a benefit to the public that the proposed conduct should be authorised.

- 3.3 For more information about the tests for authorisation and relevant provisions of the Act, please see Attachment C.

The relevant areas of competition

- 3.4 The first step in assessing the effect of the conduct for which re-authorisation is sought is to consider the relevant areas of competition affected by that conduct.

- 3.5 Agsafe submits that the relevant areas of competition are the markets for:

- the supply of agvet chemicals by manufacturers
- the retail distribution of agvet chemicals in localised areas, and
- the provision of accreditation and training services for premises and personnel involved in the storage, handling, transport and distribution of agvet chemicals.

- 3.6 Agsafe advises that member companies of CropLife and AHA represent approximately 87% of the Australian farm chemical market in terms of sales.

- 3.7 Agsafe also advises that the four largest buying groups Elders, CRT, Landmark and IHD who are represented on the Agsafe Board, make up approximately 80% of retail outlets.

- 3.8 The ACCC did not receive any submissions from interested parties in relation to market definition.

- 3.9 The ACCC considers that for the purposes of this authorisation application the relevant areas of competition are:

- the supply of agvet chemicals by manufacturers, distributors and retailers, and
- the provision of accreditation and training services for premises and personnel involved in the storage, handling, transport and distribution of agvet chemicals.

- 3.10 The ACCC considers minor changes in the precise definition of the market will not affect the outcome of this assessment.

The counterfactual

- 3.11 The ACCC applies the ‘future with-and-without test’ established by the Australian Competition Tribunal to identify and weigh the public benefit and public detriment generated by arrangements for which authorisation has been sought.³⁰
- 3.12 Under this test, the ACCC compares the likely public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.

Agsafe’s views

- 3.13 Agsafe submits that without authorisation, enforcement in the agvet chemical industry would be left to operate solely under the current State/Territory Government regulation. Agsafe submits that this regulation may be inadequate because:
- the current regulations are extremely complex. They comprise more than 140 State and Federal Acts and regulations which differ not only in text and emphasis but in content
 - for high levels of compliance to occur, adequate resources must be committed to monitoring and assessment and under the State/Territory regimes neither are sufficient, and
 - these regulatory regimes are reactionary rather than proactive.
- 3.14 Agsafe submits that without authorisation, it will not be allowed to remove the trading sanctions through the gradual introduction of the new model. This will result in lower levels of compliance with the new Program as Agsafe will not have an opportunity to explain and promote its value to the industry.

Interested party submissions

- 3.15 The ACCC received submissions from a number of Agsafe facilitators, who expressed concern that compliance with the Program would be likely to fall by as much as 20-30% if the trading sanctions were removed at this time.

ACCC’s views

- 3.16 The ACCC notes that, in the absence of authorisation, manufacturers, distributors and retailers involved in the manufacture, storage and handling of agvet chemicals would continue to be required to comply with existing legislation such as State and Territory laws relating to occupational health and safety, transportation of dangerous goods, environmental protection and licensing requirements for dangerous goods and poisons.

³⁰ *Australian Performing Right Association* (1999) ATPR 41-701 at 42,936. See also for example: *Australian Association of Pathology Practices Incorporated* (2004) ATPR 41-985 at 48,556; *Re Media Council of Australia* (No.2) (1987) ATPR 40-774 at 48,419.

- 3.17 The ACCC considers the counterfactual to be the situation where Agsafe continues to offer training and accreditation services but does not impose, or threaten to impose trading sanctions. The ACCC considers that in the counterfactual, the take-up of Agsafe's services would be based on the value businesses placed on these services. The ACCC considers this would be likely to result in a lower take up of the Program as the businesses may not face the full consequences of non-compliance. However it is difficult to estimate the size of any such decline in Agsafe membership.
- 3.18 The ACCC considers that the likely lower take up of the Program will lead to lower levels of compliance with the relevant State and Territory legislation.
- 3.19 The ACCC considers that absent authorisation Agsafe would likely introduce the new model of the Program in the near future. However it may be more difficult for Agsafe to transition the industry to the new model.

Public benefit

- 3.20 Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:
- ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.³¹
- 3.21 Generally, competition can be relied upon to deliver the most efficient market arrangements. In circumstances where there are market failures from information asymmetries or externalities, effective regulation may be required to deliver efficient outcomes.
- 3.22 There are features of the agvet chemical supply chain that are likely to result in market failures. The production, storage and handling of agvet chemicals can result in negative externalities through safety risks to personnel, consumers, the community and the environment. In a competitive market there is limited commercial incentive for private business to reduce these risks as the costs of any safety or environmental incidents are often not borne by the businesses themselves. Furthermore, information asymmetries exist as market forces alone are unlikely to provide sufficient information to consumers about whether products have been properly stored, transported and handled to minimise the risk of product degradation or damage to packaging. Effective regulation can address these instances of market failure and the ACCC considers the proposed arrangements are likely to result in substantial public benefits by assisting state governments in this regard.
- 3.23 Agsafe submits the continued operation and enforcement of the Code will deliver public benefits to:
- the agvet chemical industry
 - personnel and premises involved in sale, distribution, transport and storage of agvet chemicals

³¹ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677. See also Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242.

- the farm sector in which these products are used
- Government agencies responsible for the regulation and control of the use of agvet chemicals, and
- the wider community who can be assured that these products are being managed responsibly.

3.24 Agsafe's description of these benefits and the ACCC's assessment of the likely public benefits from the proposed conduct follows.

Improved skills, knowledge and safety from Agvet personnel training

3.25 Agsafe submits that the Program provides industry personnel with:

- easier access to more job-specific training courses
- continuous learning opportunities, strengthening an employee's commitment to the industry, and
- on-site workplace assessment to confirm competency and give more meaning to training

which ensure:

- that sales, recommendations and advice about industry chemicals are made only by trained people
- the national recognition and acceptance of training qualifications
- regular information updates and the ability to disseminate such updates
- that any proposed unauthorised use is prevented at the point of sale
- that users are able to receive guidance on product use, rather than just product access/purchase
- that additional information on safe use, appropriate protective gear and disposal guidance is available to supplement label advice, and
- the correct use of product according to manufacturers' label directions in order to improve operator safety, minimise environmental effects and maintain minimum residue levels in food to ensure consumer protection.

3.26 Agsafe submits that, by ensuring best practice and providing high quality advice at the point of sale of agvet chemicals, the Program positively influences farmers in the use and storage of agvet chemicals.

3.27 The NSW Farmers Association (NSWFA) supports this view. The NSWFA stated that the Program provides benefits to end users such as farmers through assurance that they:

- are being provided with a product that has been properly stored, transported and handled to minimise the risk of product degradation and of damage to packaging

- are being supplied by personnel who understand all relevant safety and regulatory obligations, and
 - have access to personnel who can deliver appropriate advice on chemical use, consistent with legal obligations and with advice from primary industry departments.
- 3.28 The NSWFA also submits that a key benefit of the Program is that it assists farmers to meet their own industry quality assurance requirements. If trading sanctions were removed before the new incentive based scheme were introduced, some agvet chemical suppliers, particularly smaller businesses, may choose to discontinue accreditation. The NSWFA argues that this would impact on the availability of accredited suppliers particularly in smaller and isolated rural communities, therefore impacting on the ability of farmers to meet their own quality assurance requirements and limiting access to particular chemical products.
- 3.29 Agsafe submits that the entire agvet industry benefits because of personnel training through an increase in the transferable skill base within Australia. Personnel who are accredited gain a statement of attainment which is nationally recognised under the Australian Quality Training Framework. The additional combination of online training and workplace assessment enables the industry to confirm competency and the application of practical knowledge and safe procedures.
- 3.30 The ACCC accepts the proposed conduct is likely to provide public benefit through promotion of greater industry personnel training. The ACCC considers this benefit is conveyed through benefits to farmers from easier access to accredited suppliers, easier transfer of skills within the industry ensuring easier access to competent personnel, and staff skills reducing environmental and safety risks to farmers through education at the point of sale. The ACCC agrees these benefits are likely to be reduced without authorisation due to a lower level of compliance with Agsafe's Code and therefore training under Agsafe.

Compliance cost savings to industry

- 3.31 Agsafe submits that participation in the Program assists businesses to ensure they comply with all legal requirements in all jurisdictions, including over 140 State and Federal Acts and Regulations. Agsafe considers that authorisation will assist businesses to minimise compliance costs by providing them with a single facilitator to assist them to comply with legislation rather than numerous specialist consultants.
- 3.32 The ACCC considers that without authorisation, businesses would be able to choose whether to obtain accreditation under the Program or whether to use other methods such as engaging a consultant or seeking advice from a government agency to assist them to comply with the relevant legislative requirements. The ACCC is not of the view that businesses would necessarily need to engage specialist consultants to assist them in complying with legislation. Businesses would choose the method which most suited their requirements based on the value and cost of the method, one of which would be to continue operating under the Agsafe Code. Therefore the ACCC does not consider business would face significantly reduced costs through forced Agsafe premises accreditation.

Cost savings to Government

- 3.33 Agsafe submits that without the threat of trading sanctions it is likely that some businesses would attempt to comply with regulations independently, or not at all. This would require significant increases in monitoring and enforcement from a variety of State and Federal agencies for regulating agvet chemicals if events such as the one detailed above were to be avoided. Agsafe's premises accreditation therefore represents a significant public benefit in terms of costs to regulators.
- 3.34 Agsafe submits that the reduction in cost to regulators proposed by Agsafe is supported by government agency submissions. For example, the Department of Agriculture and Food WA argues that Agsafe saves State Government regulators considerable time and effort as it provides the educational component for state and national legislation for the majority of reseller companies storing and handling agvet chemicals. Also, by self-regulating there is a reduced need for inspection of resellers by the State authorities.³²
- 3.35 Agsafe submits it has facilitated an extremely high level of industry compliance and a low level of incidents which may not be able to be matched by government agencies even with extra resources. Agsafe submits that currently approximately 85% of premises registered with Agsafe are fully compliant with the Code and that since the inception of the Program the agvet chemical industry has not experience any major incidents.
- 3.36 Submissions from Agsafe suggest that some businesses may attempt to comply with the relevant regulation independently but may be unsuccessful and that this may have dangerous consequences for those businesses, the environment, the industry, and for the public in general. The facilitators argue that without assistance from Agsafe, the complexity of the regulations and agvet chemicals themselves can lead to errors which result in serious danger to the community, agvet industry employees and the environment.
- 3.37 The ACCC accepts that the Code (including trading sanctions) has been successful in ensuring a high standard of compliance with the program and relevant State and Territory legislation. The ACCC considers that this is likely to continue and that it provides public benefits through cost savings to relevant State regulators from reduced monitoring and enforcement costs.

Maintaining a high level of industry safety and regulatory compliance / environmental and consumer protection

- 3.38 Government agencies have submitted that Agsafe regularly consults with the appropriate agencies and updates the Program to adapt to any changes in regulation.³³
- 3.39 A number of government agencies supported the ability for Agsafe to enforce the Code, principally as the Code encourages compliance with legislation and assists in providing

³² The Department of Agriculture and Food, submission dated 15 June 2010.

³³ The Department of Employment, Economic Development and Innovation, submission dated 28 June 2010, The Department of Environment and Conservation, submission dated 21 June 2010, the Department of Primary Industries, submission dated 22 June 2010.

consistent and high standards of chemical use and handling. For example government agencies stated:

- the ability for Agsafe and its members to impose trading sanctions on businesses who have not obtained the appropriate accreditation ensures a high level of regulatory compliance and best practice management in the handling, distribution and transportation of agvet chemicals.³⁴
- without Agsafe's program it is likely that the current high standards demonstrated by the industry would suffer and the safe use and handling of agricultural chemicals would decline.³⁵
- Agsafe have been very successful in significantly improving pesticide and veterinary medicine storage and transport in the rural merchandise sector.³⁶

3.40 A number of private organisations and individuals provided support for Agsafe to impose trading sanctions, stating that the benefits from reducing the risk of agvet chemical accidents from unsafe storage, handling and transport far outweigh the costs of the Program and its corresponding trading sanctions.³⁷ These parties submitted that authorisation would ensure that the premises most at risk of breaching safety regulations would comply, reducing risks to the industry and the public.

3.41 The ACCC accepts that the trading sanction element of the Code previously authorised has been successful and is likely to continue to provide public benefits from reduced risk to suppliers and end users of agvet chemicals through a high standard of compliance with the Program.

3.42 The ACCC considers public benefit will arise from allowing Agsafe time to transition to the new incentive based scheme. Authorisation allows the industry to minimise disruption while it transitions to the incentive based scheme and therefore limit the potential for a reduction in industry safety. This will avoid a potentially large disruption to both accreditation and training markets in the agvet chemical industry.

ACCC conclusion on public benefits

3.43 The production, storage and handling of dangerous chemicals can cause substantial safety risks to personnel, consumers, the community and the environment. In a competitive market there is limited commercial incentive for private business to reduce these risks as the costs of any safety or environmental incidents are not always borne by the businesses themselves. Furthermore, market forces alone are unlikely to provide sufficient information to consumers about whether products have been properly stored, transported and handled to minimise the risk of product degradation or damage to packaging. Effective regulation can address these instances of market failure and the ACCC considers the proposed arrangements are likely to result in substantial public benefits by assisting state governments in this regard.

³⁴ The Department of Primary Industries, submission dated 30 June 2010.

³⁵ The Department of Primary Industries, submission dated 30 June 2010.

³⁶ The Department of Primary Industries and Resources SA, 15 June 2010.

³⁷ CropLife Limited Australia, submission dated 18 June 2010, Agsafe facilitators, David Rose and Elizabeth Hak, submission dated 10 June 2010, Agsafe facilitator, John Fennel, submission dated 9 June 2010, Veterinary Manufacturers and Distributors Association, submission dated 9 June 2010.

- 3.44 In particular, the ACCC considers the Code is likely to result in the following public benefits over the next three years:
- increased safety for farmers from the increased availability of accredited suppliers of agvet chemicals and high quality advice at the point of sale of agvet chemicals
 - increased environmental and consumer protection for all of Australia through increased industry compliance and greater likelihood of transition to the new scheme
 - reduced cost to State and Federal regulators through continued industry self-regulation and education provided by Agsafe
 - increased transferable skill base within the agvet chemical industry through personnel training
 - increased stability in both training and accreditation markets through allowing the industry time to adjust to the new incentive based scheme.

3.45 The ACCC considers these benefits to be substantial.

Public detriment

3.46 Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.³⁸

3.47 Agreements between competitors which impose restrictions on their decisions as to what they deal in, or with whom they deal, can result in allocative inefficiencies. Such agreements distort market signals and can suppress competitive dynamics that would exist in a competitive market.

3.48 These agreements also have the potential to increase barriers to entry or expansion, which reduces the competitive restraint applying to market participants. Both can lead to increased prices and reduced choice for consumers and significant inefficiencies.

3.49 The ACCC considers that public detriments are likely to result from Agsafe's ability to impose trading sanctions on any business judged to not comply with the Code. The public detriments result from barriers to entry in the provision of accreditation and training services, and costs of forced acquisition of Agsafe's accreditation and training services.

Barriers to entry in provision of accreditation and training services

3.50 Agsafe is currently the predominant provider of personnel training and premises accreditation in the storage and handling of agvet chemicals. The strong market presence of AHA and CropLife members combined with the requirement under the

³⁸ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

Code that all members of Agsafe uphold trading sanctions creates a significant barrier to entry for any other business attempting to compete with Agsafe.

- 3.51 This results in businesses in the agvet chemical industry foregoing the choice and price benefits of competition in the provision of industry accreditation and training. Further, businesses cannot simply abide by regulations independently, or seek advice from a government agency to assist them to comply with the relevant legislative requirements.
- 3.52 The NSWFA suggests there are training providers other than Agsafe that have the skills and qualifications to deliver the Program. The NSWFA submits these concerns need to be addressed under the new scheme.

Recognition of prior learning

- 3.53 Following the draft determination, the ACCC received a submission from ChemCert Training Group, a registered training organisation that provides training and assessment of individuals to safely store, transport, handle and use chemicals.
- 3.54 ChemCert has expressed concern that the current arrangements effectively provide Agsafe with the exclusive right to provide training and assessment at the wholesale level:
- The AQF units of competency that Agsafe trains are not so specific that they deserve exclusivity in the VET sector. CTG is also certified to assess the unit of competency RTC3705A: Transport Handle and Store Chemicals, which is one of the three units of competency within Agsafe's scope of registration.
- The Code does not clearly articulate or provide for free and fair competition from other RTOs to deliver the same units of competency.³⁹
- 3.55 According to ChemCert, Agsafe has insisted that participants must complete this unit through the Agsafe course in order to obtain accreditation under the Code. ChemCert submits that Agsafe does not recognise statements of attainment issued by other RTOs.
- 3.56 ChemCert submits that Agsafe is not fulfilling its obligations as a registered training organisation. In order to maintain its status as an RTO, Agsafe is required to comply with the *AQTF Essential Conditions and Standards for Continuing Registration*. This includes Condition 7 of Registration – Recognition of Qualifications issued by Other RTOs. Condition 7 requires that each RTO must recognise the AQF qualifications and Statements of Attainment issued by any other RTO.⁴⁰
- 3.57 In response, Agsafe notes that its recognition of prior learning policy (RPL) is detailed on the Agsafe website and in associated course materials. Agsafe notes that it must provide RPL for all courses that are offered under Agsafe Accreditation and Training.
- 3.58 In order to obtain RPL, a candidate must:⁴¹
- Obtain a basic accreditation or re-accreditation training manual (indicative cost \$254) and complete the course within 40 days.

³⁹ ChemCert, submission dated 10 September 2010, p.4.

⁴⁰ Ibid, p.5

⁴¹ Agsafe, *Personnel Accreditation: Learner Handbook for Basic and Re-accreditation*, January 2010, p. 15.

- Undertake an assessment, the form of which is at the discretion of the Agsafe Accreditation Manager. It will be according to AQTF standards and could either be the Basic Accreditation Exam, parts of the exam or other processes such as a workplace assessment or an assessment by correspondence based on evidence. Indicative fees for an assessment are \$154.

3.59 This RPL process does not appear to amount to an automatic recognition of statements of attainment issued by other RTOs, as required by Agsafe's NARA registration. However, the ACCC notes that Agsafe's Learner Handbook also outlines that candidates seeking personnel accreditation can apply for credit transfer, which:

Directly identifies which parts of a new qualification or course a person may already have, based on their qualifications and courses attended. Agsafe recognises Australian Qualifications Framework Qualifications & Statements of Attainment issued by any other Registered Training Organisation (RTO) that are a direct equivalent to those issued under any Agsafe training course.⁴²

3.60 The National Audit and Registration Agency (NARA) confirmed that Agsafe recently went through a re-registration process as a registered training organisation. As part of its assessment, NARA was satisfied that Agsafe is operating in compliance with the *AQTF Essential Conditions and Standards for Continuing Registration*, which includes Condition of Registration 7 – Recognition of Qualifications Issued by other RTO's. NARA stated that it has no evidence that Agsafe is not complying with this condition.⁴³

3.61 Nevertheless, the ACCC is concerned that the statement in Agsafe's Learner Handbook outlined above is not sufficiently prominent in Agsafe's training documentation to make it clear that Agsafe is required to accept relevant statements of attainment issued by other RTOs. Candidates seeking Agsafe accreditation may form the view that they are unable to source some aspects of the required training from other providers when this is not the case. Agsafe's Basic Training course has three units of competency that are registered under the AQTF and could potentially be supplied by other training providers.

3.62 The way Agsafe has structured and describes its arrangements typically means that only Agsafe provides training and accreditation services. When combined with the trading sanctions, this effectively prevents any competition in the provision of these services. The ACCC considers that Agsafe could allow competition in the provision of training and accreditation services while maintaining trading sanctions for non-accredited entities. Overall quality and effectiveness could be maintained by setting standards for the provision of training and accreditation services. The ACCC considers the restrictions the current Code places on competition for the provision of these services is a significant detriment.

Costs of forced acquisition of Agsafe's accreditation and training services

3.63 The extent of the public detriment caused by the trading sanctions outlined above is heavily dependent on the nature of the prices and choices businesses are presented by Agsafe through the Program. As previously noted, the Code currently ensures that virtually all training and accreditation is provided by Agsafe, limiting competition in the provision of these services.

⁴² Ibid.

⁴³ Record of teleconference with NARA, 6 October 2010.

- 3.64 The ACCC notes that even a small business only requiring premises inspection and training of two employees each year will incur costs in excess of \$1000 each year.
- 3.65 The NSWFA submitted that the current Program is very expensive and can sometimes be hard to access as Agsafe is the sole provider of the Program.
- 3.66 ChemCert suggests that the cost of Agsafe's training may be higher than if it were able to be provided competitively. ChemCert compares the costs of one of its courses which it considers to be comparable with Agsafe's Basic Training. ChemCert submits that Agsafe's basic training course costs \$520, while a similar course it conducts costs \$350.⁴⁴
- 3.67 Agsafe submits that these are entirely different courses aimed at different audiences.⁴⁵
- 3.68 The ACCC recognises there are difficulties in directly comparing the costs of training provided by Agsafe with other providers, but considers there is the potential for alternative training providers to offer equivalent training at lower cost or at a location or time that is more convenient to industry participants. The fact that Agsafe's current arrangements discourage this potential competition in the provision of training is a detriment.
- 3.69 ChemCert further submits that there are additional whole of industry costs that are imposed by duplicating the government regulatory framework within the Code. ChemCert considers that the total cost of a single regulatory program could be less than the cost of two schemes running in parallel.⁴⁶
- 3.70 The ACCC accepts that distributors' additional costs of compliance with the Code are likely to be passed on to retailers and in turn consumers. As a result, where distributors would comply with industry regulations without Agsafe accreditation, the ACCC considers the proposed conduct is likely to raise prices and reduce competition to some extent and that this constitutes a detriment.

ACCC assessment of public detriments

- 3.71 The ACCC considers that trading sanctions combined with the effectively exclusive training and accreditation arrangements result in Agsafe holding a monopoly in the accreditation and training of the agvet chemical industry. As a result, the ACCC considers that this conduct is likely to result in public detriments in the form of:
- reduced choice of personnel training providers and premises accreditation providers for agvet chemical manufacturers, distributors and retailers
 - increased costs to some agvet chemical manufacturers, distributors and retailers, and
 - reduced choice and higher prices for retailers and end users through reduced competition and businesses passing on costs in agvet distribution and retail markets.

⁴⁴ ChemCert, submission dated 10 September 2010, p.5.

⁴⁵ Agsafe, submission dated 21 September 2010, p. 3.

⁴⁶ ChemCert, submission dated 10 September 2010, p.3.

- 3.72 The ACCC notes that Agsafe has taken steps to attempt to reduce public detriments resulting from its monopoly position. Agsafe has expanded training services, including increasing the number of locations and providing a range of courses online for easier access in remote communities. Agsafe has conducted customer surveys and has provided evidence of positive feedback on the Program. Agsafe continues to run as a non-profit organisation. Nevertheless, it is not clear to the ACCC that this restriction on competition in the provision of training services is necessary to the Code's successful operation and as such constitutes a significant detriment.
- 3.73 The ACCC considers the proposed new scheme would allow for the introduction of greater competition in training and accreditation and allow distributors and retailers more flexibility to choose their method of regulatory compliance. The ACCC considers that this would significantly reduce the current public detriments.

ACCC conclusion on public detriments

- 3.74 The ACCC considers the following public detriments will arise from authorisation of the Code over the next three years:
- reduced competition in the provision of training and accreditation in the agvet chemical industry
 - increased costs to some agvet chemical manufacturers, distributors and retailers, and
 - reduced choice and higher prices for retailers and end users through reduced competition and businesses passing on costs in agvet distribution and retail markets.

Balance of public benefit and detriment

- 3.75 In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the operation and enforcement of the Code for a further three years is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.
- 3.76 For the reasons outlined in this chapter the ACCC considers the public benefit that is likely to result from the conduct is likely to outweigh the public detriment, including the detriment from any lessening of competition that would result. The ACCC is therefore satisfied that the tests in sections 90(6), 90(7), 90(5A) and 90(5B) are met.
- 3.77 In addition, the ACCC is satisfied that the test in section 90(8) is met as the re-authorisation sought is likely to result in such a benefit to the public that the arrangements should be allowed to take place.

Conditions

- 3.78 The Act allows the ACCC to grant authorisation subject to conditions.⁴⁷

⁴⁷ Section 91(3).

- 3.79 As previously noted, the ACCC considers that detriment arises from the fact that Agsafe's current documentation may lead people to form the view that only Agsafe can provide training and assessment for the 3 competencies that form part of Agsafe's Basic Training and that this limits competition in the provision of this training and assessment.
- 3.80 The ACCC is imposing a condition to address this issue. Agsafe is required to amend its documentation and website to clearly and prominently indicate that parties are able to obtain statements of attainment from alternative training providers for any accredited courses which constitute requirements for Agsafe accreditation – currently comprising the three competencies set out below.
- RTC3705A – Transport, handle and store chemicals
 - PRMWM44B – Identify wastes and hazards
 - RTE2804A – Provide information on products and services.
- 3.81 These changes to Agsafe's documentation and website must also make clear that anyone that has obtained a statement of attainment for a required accredited training course from another RTO does not need to undergo a recognition of prior learning process with Agsafe or pay additional fees to demonstrate they have met that competency requirement.

Length of authorisation

- 3.82 The Act allows the ACCC to grant authorisation for a limited period of time.⁴⁸ The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.
- 3.83 In this instance, Agsafe seeks authorisation for three years. However, the ACCC notes that Agsafe has signalled its intention to seek to introduce the new scheme within 18 months.
- 3.84 Agsafe has sought a three year authorisation so that it has time to properly consult on, formulate and educate/inform the agvet chemical industry of the changes. A three-year authorisation would also allow Agsafe sufficient flexibility to ensure a complete transition to the new scheme.
- 3.85 The ACCC is concerned that granting authorisation for three years may reduce the incentives for the new scheme to be introduced on a timely basis. However, a shorter period increases the risk that Agsafe will have insufficient time to formulate the new scheme or a lack of time to educate/inform industry. The ACCC considers a three-year authorisation provides some flexibility to enable Agsafe to seek to minimise disruption to the industry and result in the highest level of compliance with relevant legislation. Therefore, the ACCC considers the period of three years sought to be appropriate.
- 3.86 As such, the ACCC has decided to grant authorisation to Agsafe to operate and enforce the Code for three years.

⁴⁸ Section 91(1).

Variations to the proposed conduct

- 3.87 The ACCC notes that any amendments to the Code during the three-year term of this re-authorisation would not be covered by the authorisations.

4. Determination

The application

- 4.1 On 31 May 2010 Agsafe lodged applications for the revocation of authorisations A91027 – A91030 and the substitution of authorisations A91234, A91242 – A91244.
- 4.2 Applications A91234, A91242 – A91244 were made under section 91C(1) of the Act. Relevantly, the previous applications were made under subsections 88(1), 88(7) and 88(8) of the Act.
- 4.3 In particular, Agsafe seeks authorisation to continue to operate and enforce the Code, which includes the imposition of trading sanctions against any business which does not comply with the Code.

The net public benefit test

- 4.4 For the reasons outlined in Chapter 4 of this determination, and subject to the condition set out below, the ACCC considers that in all the circumstances the arrangements for which the re-authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements. The ACCC is therefore satisfied that the tests in sections 90(6), 90(7), 90(5A) and 90(5B) are met.
- 4.5 In addition, the ACCC is satisfied that the test in section 90(8) is met as the re-authorisation sought is likely to result in such a benefit to the public that the arrangements should be allowed to take place.

Conduct for which the ACCC grants authorisation

- 4.6 The ACCC revokes authorisations A91027 – A91030 and grants authorisations A91234, A91242 – A91244 in substitution.
- 4.7 The ACCC grants authorisation under section 91C(4) of the Act to Agsafe to continue to operate and enforce the code, on condition that within 1 calendar month of this determination coming into effect, Agsafe amends its documentation and website to clearly and prominently indicate that parties are able to obtain statements of attainment from alternative training providers for any accredited courses which constitute requirements for Agsafe accreditation.
- 4.8 These changes to Agsafe's documentation and website must also make clear that anyone that has obtained a statement of attainment for a required accredited training course from another RTO does not need to undergo a recognition of prior learning process with Agsafe or pay additional fees to demonstrate they have met that competency requirement.
- 4.9 The ACCC grants authorisation until 27 October 2013.
- 4.10 Further, the re-authorisation is in respect of the 8th edition of the Agsafe Code of Conduct as it stands at the time authorisation is granted. Any changes to the Code during the term of the re-authorisation would not be covered by the re-authorisation.

4.11 This determination is made on 27 October 2010.

4.12 The attachments to this determination are part of the determination.

Interim authorisation

4.13 At the time of lodging the application Agsafe requested interim authorisation to continue to operate and enforce the Code. The ACCC granted interim authorisation to Agsafe Limited on 24 June 2010.

4.14 Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Date authorisation comes into effect

4.15 This determination is made on 27 October 2010. If no application for review of the determination is made to the Australian Competition Tribunal (the Tribunal), it will come into force on 18 November 2010.

Attachment A — the authorisation process

The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.

The Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.

The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.

The ACCC conducts a public consultation process when it receives an application for authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.

After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.

Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.

The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.

Attachment B – chronology of ACCC assessment of applications A91234, A91242 – A91244

DATE	ACTION
31 May 2010	Applications for revocation and substitution lodged with the ACCC, including an application for interim authorisation.
10 June 2010	Closing date for submissions from interested parties in relation to the request for interim authorisation.
21 June 2010	Closing date for submissions from interested parties in relation to the substantive applications for authorisation.
24 June 2010	The ACCC granted interim authorisation to Agsafe to continue to enforce the Code pending final determination from the ACCC.
20 August 2010	Draft determination issued.
3 September 2010	Closing date for submissions from interested parties in relation to the draft determination.
27 October 2010	Determination issued.

Attachment C — the tests for authorisation and other relevant provisions of the Act

Trade Practices Act 1974

Section 90—Determination of applications for authorisations

- (1) The Commission shall, in respect of an application for an authorization:
 - (a) make a determination in writing granting such authorization as it considers appropriate; or
 - (b) make a determination in writing dismissing the application.
- (2) The Commission shall take into account any submissions in relation to the application made to it by the applicant, by the Commonwealth, by a State or by any other person.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.
- (4) The Commission shall state in writing its reasons for a determination made by it.
- (5) Before making a determination in respect of an application for an authorization the Commission shall comply with the requirements of section 90A.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.
- (5A) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a proposed contract, arrangement or understanding that would be, or might be, a cartel provision, unless the Commission is satisfied in all the circumstances:
 - (a) that the provision would result, or be likely to result, in a benefit to the public; and
 - (b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:
 - (i) the proposed contract or arrangement were made, or the proposed understanding were arrived at; and
 - (ii) the provision were given effect to.
- (5B) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a contract, arrangement or understanding that is or may be a cartel provision, unless the Commission is satisfied in all the circumstances:
 - (a) that the provision has resulted, or is likely to result, in a benefit to the public; and
 - (b) that the benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.
- (6) The Commission shall not make a determination granting an authorization under subsection 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct (other than conduct to which subsection 47(6) or (7) applies), unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to

the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:

- (a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;
- (b) the proposed covenant were given, and were complied with; or
- (c) the proposed conduct were engaged in;

as the case may be.

(7) The Commission shall not make a determination granting an authorization under subsection 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant.

(8) The Commission shall not:

- (a) make a determination granting:
 - (i) an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
 - (ii) an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or
 - (iii) an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
 - (iv) an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

- (b) make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.

(9) The Commission shall not make a determination granting an authorization under subsection 88(9) in respect of a proposed acquisition of shares in the capital of a body corporate or of assets of a person or in respect of the acquisition of a controlling interest in a body corporate within the meaning of section 50A unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

(9A) In determining what amounts to a benefit to the public for the purposes of subsection (9):

- (a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
 - (i) a significant increase in the real value of exports;

- (ii) a significant substitution of domestic products for imported goods; and
- (b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

Variation in the language of the tests

There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).

The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same. The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition but the test under section 90(8) is not so limited.⁴⁹

However, the Tribunal has previously stated that regarding the test under section 90(6):

[the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.⁵⁰

Consequently, when applying either test, the ACCC can take most, if not all, public detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is also applicable to section 90(7). Further, as the wording in sections 90(5A) and 90(5B) is similar, this approach will also be applied in the test for conduct that may be a cartel provision.

Conditions

The Act allows the ACCC to grant authorisation subject to conditions.⁵¹

Future and other parties

Applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:

- persons who become party to the contract, arrangement or understanding at some time in the future⁵²

⁴⁹ *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT9 at paragraph 67.

⁵⁰ *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

⁵¹ Section 91(3).

- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.⁵³

Six-month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation⁵⁴. It does not apply to applications for revocation, revocation and substitution, or minor variation. The six-month period can be extended by up to a further six months in certain circumstances.

Minor variation

A person to whom an authorisation has been granted (or a person on their behalf) may apply to the ACCC for a minor variation to the authorisation.⁵⁵ The Act limits applications for minor variation to applications for:

... a single variation that does not involve a material change in the effect of the authorisation.⁵⁶

When assessing applications for minor variation, the ACCC must be satisfied that:

- the proposed variation satisfies the definition of a 'minor variation' and
- if the proposed variation is minor, the ACCC must assess whether it results in any reduction to the net benefit of the arrangements.

Revocation; revocation and substitution

A person to whom an authorisation has been granted may request that the ACCC revoke the authorisation.⁵⁷ The ACCC may also review an authorisation with a view to revoking it in certain circumstances.⁵⁸

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.⁵⁹ The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.⁶⁰

⁵² Section 88(10)

⁵³ Section 88(6)

⁵⁴ Section 90(10A)

⁵⁵ Subsection 91A(1)

⁵⁶ Subsection 87ZD(1)

⁵⁷ Subsection 91B(1)

⁵⁸ Subsection 91B(3)

⁵⁹ Subsection 91C(1)

⁶⁰ Subsection 91C(3)

Attachment D – 8th Edition of the Agsafe Code of Conduct



Code of Conduct

*Accreditation Program for the Australian
Agricultural and Veterinary Chemical Industry*

*"Safety for people and the environment through
education and responsibility"*

Agsafe Limited

ACN 057 112 062
A Subsidiary of CropLife
Australia

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8th Edition, July 2007

PREFACE

Agsafe Limited is a wholly owned, independent subsidiary of CropLife Australia Ltd. It has been formed to implement the Industry Accreditation Program in accordance with the provisions of Australian Competition and Consumer Commission (ACCC) Authorisation of 1994 and subsequent Determinations of 2002. The aim of this program is to assist the Industry in ensuring its future viability through improved safety management and co-regulation with government.

Under Agsafe Guardian, all Industry members have equal standing with regard to safety management and co-regulation initiatives.

The Code of Conduct outlines:

- The essential requirements for compliance with the Industry Accreditation Program (see Articles 3, 4, 8 and 9); and
- Ethical behaviours which are promoted and encouraged by Agsafe and its members (see Articles 1, 2, 5, 6 and 7).

Agsafe Guardian Objectives

1. To ensure that agricultural and veterinary chemicals, within the distribution chain, are stored, handled and transported in accordance with all statutory regulations and standards; and
2. To ensure that all individuals who sell or offer advice on agricultural and veterinary chemicals, from point of manufacture through to point of sale have received proper training in the principles of safe, effective and legal use of these products.

Agsafe Guardian Strategies

Agsafe Guardian's objectives will be achieved by:

- (a) Training and accreditation of all industry personnel who handle sell, recommend, advise or take responsibility for the safety of agricultural and veterinary chemicals; and
- (b) Accreditation of agricultural and veterinary chemical storage premises throughout the Industry.
- (c) Administration of inquiries regarding accreditation compliance in accordance with the ACCC Authorisation.

Scope of the Agsafe Guardian Program

The scope of Accreditation applies to businesses and individuals who sell, handle, transport, store and or take responsibility for the safety of agricultural and veterinary chemicals, as 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 which are:

- Schedule 5 Poisons;
- Schedule 6 Poisons;
- Schedule 7 Poisons;
- Hazardous Substances;
- Dangerous Goods;

and which are not:

- Dairy sanitisers or cleansers in outlets which do not supply any other agricultural or veterinary chemical products;
- Products exclusively for home use including those for companion animals when sold in outlets catering exclusively for home use;
- Nutritional pre-mixes and supplements for animals;
- Substance used in conjunction with an agricultural chemical product to identify areas treated with that product;

- Insect repellents for use on human beings;
- Substances listed in Schedule 3 of the Agricultural and Veterinary Chemical Regulations (examples are mould inhibitors used in paper and glue manufacture, fungicides, bactericide or deodorants in footwear or clothing, soil ameliorants if there is no claim to have effects as regulators of plant growth, invertebrate pest management lures based on food, cut flower preservatives, hay inoculants, predatory insects, industrial biocides);
- Swimming pool products.

The Guardian Program does not cover:

- Products used and sold by veterinarians and where these products in the supply chain are being wholesaled to Veterinary practices.
- Veterinarians and veterinary wholesalers where the quantity of non-exempt agricultural and veterinary chemicals does not exceed 500 litre or 500 kg.

Further details of the coverage of the Guardian Program can be obtained from the Agsafe Web site on www.agsafe.com.au or on the ACCC public register.

Agsafe Membership

Any person who, at the date of application for Membership:

- holds a current Premises Accreditation Certificate; or
- is involved in the manufacture of agricultural and veterinary chemical products; or
- is involved in the sale of agricultural and veterinary chemical products; or
- is involved in the distribution of agricultural and veterinary chemical products; and
- who is in accordance with and subscribes to the objects of the Company; and
- if an individual, is a natural person over the age of 18,

may apply for **Business Membership** in accordance with the Company By-Laws.

Any individual who, at the date of application for Membership is a natural person over the age of 18 years and:

- holds a current Personnel Accreditation Certificate; or
- is a registered course provider; or
- is interested in the agricultural and veterinary chemicals industry; and
- subscribes to the objects of the company,

may apply for **Individual Membership** of the Company in accordance with its By-Laws.

TEXT OF THE CODE

Article 1: Objectives of the Code

- 1.1 The objectives of this Code are to set out responsibilities affecting the storage, distribution, marketing and provision of advice to the agricultural and veterinary chemical products industry.
- 1.2 The Code describes the shared responsibility of many segments of society, including governments, the agricultural and veterinary marketing sector and the distribution chain.
- 1.3 The Code addresses the need for co-operative effort between governments and the agricultural and veterinary chemical industry (including the distribution chain and providers of advice) to promote practices which ensure efficient and safe use of agricultural and veterinary chemical products.
- 1.4 The Standards set forth by this Code:
 - 1.4.1 encourage responsible and generally acceptable trade practices;
 - 1.4.2 promote the safety, management and regulatory responsibility in the storage, transport and handling of agricultural and veterinary chemicals;
 - 1.4.3 promote the effective use of agricultural and veterinary chemical products for the improvement of agricultural production and of human, animal and crop plant health within a framework of environmental protection;
 - 1.4.4 are designed to be used, within the context of Australian Legislation, Regulations, Standards, Codes of Practice and Codes of Conduct, whereby government authorities, agricultural and veterinary marketers, distributors, providers of advice, those involved in trade of any kind and any individuals concerned may judge whether their proposed actions and the actions of others constitute acceptable practices;
- 1.5 The Code specifically defines the obligations of certain persons and/or organisations to meet the ethics and behaviours expected to meet the requirements and maintenance of Agsafe Accreditation (refer Agsafe's objectives, Page 4), pursuant to Authorisations granted by the ACCC.

Article 2: Definitions

Agsafe: is a wholly owned independent subsidiary of CropLife Australia Ltd (formerly AVCA Ltd) formed to implement the Industry Accreditation Program in accordance with the provisions of prescribed Australian Competition and Consumer Commission Authorisations and the Agsafe Code of Conduct.

Agsafe Accreditation: an approval issued pursuant to meeting prescribed standards for personnel or premises accreditation.

Agricultural chemical product

- (1) Subject to subsections (2) and (3), an agricultural chemical product is a substance or mixture of substances that is represented, imported, manufactured, supplied or used as a means of directly or indirectly:
 - (a) destroying, stupefying, repelling, inhibiting the feeding of, or preventing infestation by or attacks of, any pest in relation to a plant, a place or a thing; or
 - (b) destroying a plant; or
 - (c) modifying the physiology of a plant or pest so as to alter its natural development, productivity, quality or reproductive capacity; or
 - (d) modifying an effect of another agricultural chemical; or
 - (e) attracting a pest for the purpose of destroying it.
- (2) An agricultural chemical includes a substance or mixture of substances declared by the regulations to be an agricultural chemical product.

- (3) An agricultural chemical product does not include:
 - (a) a veterinary chemical product; or
 - (b) a substance or mixture of substances declared by the regulations not to be an agricultural chemical product.

Active Constituent: the biologically active part of the agricultural or veterinary chemical product present in the formulation.

Co-regulation: a process whereby industry and government co-operate to administer prescribed legislation, requirements or standards.

Dangerous Goods: the substances and items classified as such in the Australian Code for the Transport of Dangerous Goods by Road and Rail.

Distribution: the process by which agricultural and veterinary chemical products are supplied through channels to and including the retail market for final sale and/or supply to end users.

Distributor: person, persons or organisation(s) who conduct the process of distribution.

Environment: surroundings, including water, air, soil and their interrelationships as well as all relationships between them and any living organisms.

Formulation: the combination of various ingredients designed to render the product useful and effective for the intended purpose; the form of the agricultural or veterinary chemical product as registered and presented for sale and use.

Hazardous Substance: (identified by a generic statement on the MSDS) are classified by the manufacturer or importer in accordance with the *National Occupational Health and Safety Commission's Approved Criteria for Classifying Hazardous Substances*. Hazardous Substances are substances that have the potential to harm the health of persons in the workplace.

Manufacturer: a corporation or other entity in the public or private sector or any individual, engaged in the business or function (whether directly or through an agent or through an entity controlled by or under contract to it) of manufacturing an agricultural or veterinary chemical active constituent or preparing its formulation or product.

Marketing: the overall process of agricultural or veterinary chemical product promotion, including advertising, product public relations and information services as well as distributing and selling in retail markets.

Registered Product: a product registered under the Agricultural and Veterinary Chemicals Act (1994) and Regulations (1995).

Registered Label: an agricultural or veterinary chemical product label registered under the Agricultural and Veterinary Chemicals Act (1994) and Regulations (1995).

Scheduled Poisons: (identified by the signal heading on the label) are chemicals which because of their toxicological properties, use patterns and potential hazard if misused, are classified according to the Standard for the Uniform Scheduling of Drugs and Poisons (SUSDP).

Use Pattern: the combination of all factors involved in the use of an agricultural or veterinary chemical product, including the concentration of the active constituent in the preparation being applied, the rate of application, time of treatment, number of treatments, additives recommended and other directions which determine total quantity applied, timing of treatment and withholding period.

Veterinary chemical product

- (1) Subject to subsections (2) and (3), a veterinary chemical product is a substance or mixture of substances that is represented as being suitable for, or is manufactured, supplied or used for, administration or application to an animal by any means, or consumption by an animal, as a way of directly or indirectly:
 - (a) preventing, diagnosing, curing or alleviating a disease or condition in the animal or an infestation of the animal by a pest; or
 - (b) curing or alleviating an injury suffered by the animal; or
 - (c) modifying the physiology of the animal:

- i. (veterinary) so as to alter its natural development, productivity, quality or reproductive capacity; or
 - ii. so as to make it more manageable; or
 - (d) modifying the effect of another veterinary chemical product.
- (2) A veterinary chemical includes:
 - (a) a vitamin, a mineral substance, or an additive, if, and only if, the vitamin, substance or additive is used for a purpose mentioned in paragraph (2)(a), (b), (c) or (d); and
 - (b) a substance or mixture of substances declared by the regulations to be a veterinary chemical product.
- (3) A veterinary chemical product does not include:
 - (a) a substance or mixture of substances that is:
 - i. prepared by a pharmacist in accordance with the instructions of a veterinary surgeon; or
 - ii. prepared by a veterinary surgeon; in the course of the practice, by the person preparing the substance or mixture of substances, of his or her profession as permitted by or under a law of this jurisdiction; or
 - (b) a substance or mixture of substances declared by the regulations not to be a veterinary chemical product.

Withholding Period: the minimum recommended interval that should lapse between the last application of an agricultural or veterinary chemical product to any crop, pasture or animal; and the harvesting, grazing, cutting or slaughtering thereof, or the collection of milk and eggs for human consumption, or collection of fibre, as the case may be.

Article 3: Agsafe Accreditation Requirements

Agsafe Accreditation is an industry co-regulation program introduced by the Agricultural and Veterinary Chemicals Association, now CropLife Australia Ltd and administered by an independent subsidiary, Agsafe, to establish and maintain uniformly high safety standards within the industry.

Agsafe Accreditation applies to the storage, handling, transport, sale and provision of advice with regard to agricultural and veterinary chemical products from the point of manufacture through to the point of sale to the end-user.

Both storage premises and personnel are covered by Agsafe Accreditation.

Article 4: Storage, Handling, Transport and Distribution

All persons and organisations involved in the storage, handling, transport and distribution of agricultural and veterinary chemical products shall:

- 4.1** adhere to all Acts, Regulations, Standards, Codes and statutory requirements pertaining to the storage, handling, transport and distribution of agricultural and veterinary chemical products;
- 4.2** ensure that the requirements for Personnel Accreditation and Premises Accreditation are maintained for all staff and premises within their control;
- 4.3** only use contractors or sub-contractors who meet Agsafe Accreditation requirements, where applicable.

Article 5: Marketing

Manufacturers, Distributors, Retailers or any other person conducting the marketing of agricultural or veterinary chemical products should ensure that:

- 5.1 products made available for sale are appropriately registered under the Agricultural and Veterinary Chemicals Act (1994) and Regulations (1995) and/or other legislation, as required;
- 5.2 all statements used in advertising are capable of technical substantiation;
- 5.3 advertisements do not contain any statement or visual presentation which, directly or by implication, omission, ambiguity or exaggerated claim, is likely to mislead the buyer, in particular with regard to the safety of the product, its nature, composition, or suitability for use or official recognition, approval or registration;
- 5.4 advertising does not encourage uses other than those specified on the registered product label;
- 5.5 advertisements do not misuse research results or quotations from technical and scientific literature; and scientific jargon and irrelevances are not used to make claims appear to have a scientific basis they do not possess;
- 5.6 claims as to safety, including statements such as 'safe', 'non-poisonous', 'harmless', 'non-toxic' are not made, with or without a qualifying phrase such as 'when used as directed';
- 5.7 misleading statements are not made concerning the effectiveness of a product;
- 5.8 no guarantees or implied guarantees - eg. 'more profits with...', 'guarantees high yields' - are given unless definite evidence to substantiate such claims is available;
- 5.9 advertisements do not contain any visual representation of potentially dangerous practices, such as mixing or application without sufficient protective clothing, use near food or use by or near children;
- 5.10 technical literature provides adequate information on correct practices, including the observance of registered application rates, frequency of application and withholding periods;
- 5.11 false, distorted or misleading comparisons with other agricultural or veterinary chemical products are not made. Negative comparisons in advertising are discouraged but any comparisons must be factual and capable of substantiation;
- 5.12 advertisements encourage purchasers and users to read the registered label carefully;
- 5.13 advertisements, promotional materials and/or technical literature, wherever feasible, are consistent with recognised Resistance Management programs or policies (eg Department of Agriculture and CropLife Australia policy documents on these matters).

Article 6: Provision of Advice or Recommendations

Any person, organisation or other entity providing advice or recommendations with regard to agricultural and veterinary chemical products should ensure that:

- 6.1 all persons who are in a position of providing advice and/or recommendations are adequately trained to provide advice consistent with label recommendations;
- 6.2 false or misleading comparisons with other agricultural or veterinary chemical products are not made;
- 6.3 misleading statements are not made concerning the effectiveness, safety or other features or characteristics of product(s);
- 6.4 advice or recommendations are accompanied with appropriate advice on warning statements or other limitations or cautions detailed on the registered label;

- 6.5 purchasers, users or other recipients of advice should be encouraged to carefully read the registered agricultural or veterinary chemical product label;
- 6.6 advice or recommendations do not misuse research or quotations from technical or scientific literature; and scientific jargon and irrelevances are not used to make claims appear to have a scientific basis they do not possess;
- 6.7 advice and/or recommendations are consistent, wherever feasible, with recognised Resistance Management programs or policies, as appropriate (eg CropLife Australia or Department of Agriculture documents on these issues).

Article 7: Monitoring the Observance of the Code

- 7.1 The Code should be brought to the attention of all concerned in the manufacture, marketing, sale, advice and use of agricultural and veterinary chemical products; and in the control of such activities so that governments, industry or individuals understand their responsibilities in working together to ensure that the objectives of the Code are achieved.
- 7.2 The Code should be considered a dynamic text which will be updated as required, taking into account technical, economic and social progress.

Article 8: Sanctions

- 8.1 Trading sanctions may apply to those aspects of this code which apply to the Industry Accreditation Program.
- 8.2 If any business location requiring accreditation of its personnel and/or premises does not comply with the accreditation program and/or those sections of this Code of Conduct which apply to the accreditation program then its accreditation status will be denied, suspended or withdrawn if the non-compliance is not corrected.
- 8.3 If such a business location is found to be in breach of accreditation requirements and its accreditation status is denied or withdrawn, trading sanctions would then be applied and (where applicable) there would be simultaneous loss of Agsafe and/or CropLife Australia membership. (Refer also to CropLife Australia Code of Conduct regarding CropLife Australia membership.)
- 8.4 The procedures outlined below in Articles 8.4 to 8.12 will be followed before imposing sanctions.
- 8.5 Industry responsibility for regulation (or co-regulation) means that it is the responsibility of industry members to inform Agsafe, in writing, of any individuals or organisations that do not comply with the requirements of accreditation.
- 8.6 Agsafe will write to the organisation involved seeking a written undertaking to both correct the breach and to ensure its non repetition. A response, within thirty (30) days, to correct the breach, will be required.
- 8.7 In the absence of a satisfactory reason or response from the first warning, Agsafe will request the organisation to show cause why it should not be subject to denial or suspension of its accreditation until the breach is corrected – a response is required within fourteen (14) days.
- 8.8 In the absence of a satisfactory reason or response from the first warning, Agsafe will request the organisation to show cause why it should not be subject to denial or suspension of its accreditation until the breach is corrected – a response is required within three (3) days.
- 8.9 In the absence of a satisfactory reason why accreditation should not be denied or suspended, and if the breach continues, denial or suspension will be introduced, subject to the appeal provisions (see below).
- 8.10 In the event of either a further breach (where accreditation had previously been granted) or a continuation of an existing breach, the organisation would be advised that, unless compliance was immediately rectified, its accreditation would be withdrawn.

- 8.11** If the organisation is also a member of CropLife Australia, denial or withdrawal of premises accreditation would simultaneously result in loss of CropLife Australia membership. (Refer CropLife Australia Code of Conduct for loss of CropLife Australia membership, where relevant.)
- 8.12** Agsafe is required to inform its members and all accredited organisations of such denial or withdrawal of accreditation status or membership status within seven (7) days of denial or withdrawal.
- 8.13** Agsafe members who continue to supply or to purchase from business locations where sanctions have been applied will, (and subject to any appeal rights as outlined below) be suspended from Agsafe and, if the breach continues will have their membership terminated and their premises accreditation removed, even if they satisfy the normal accreditation requirements. (Refer CropLife Australia Code of Conduct for similar conditions regarding CropLife Australia members.)
- 8.14** Should a business location to which sanctions have been applied at some later date correct a breach and hence comply with the requirements of accreditation, Agsafe will inform all interested or affected organisations of the reinstatement of accreditation and the consequent lifting of trading sanctions.

Article 9: Appeals

- 9.1** Any Agsafe member, accredited person, accredited premises or person or premises seeking accreditation, when advised in writing of denial, suspension or withdrawal of membership or accredited status may appeal against this determination within fourteen days of receipt of such notification.
- 9.2** Any organisation or individual (regardless of its accreditation or membership status) may take action through the appeals process if Agsafe fails to act in dealing with non-compliance with either the Code of Conduct or the conditions of the accreditation program by any accredited organisation, accredited person or Agsafe member. Agsafe is to provide evidence that it has dealt with the issue of non-compliance within fourteen (14) days.
- 9.3** The appeal is to be lodged with the General Manager of Agsafe who shall immediately inform members of the Agsafe Accreditation Advisory Committee of the existence and nature of the appeal. The Accreditation Committee and the General Manager shall seek a suitable resolution to the problem.
- 9.4** If a solution acceptable to both parties is not found within fourteen (14) days of receipt of the appeal, the appeal will be referred to the Agsafe Board of Directors.
- 9.5** The Directors of Agsafe shall be obliged to seek a suitable resolution to the problem. If a solution suitable to both parties is not found within fourteen (14) days, the appeal will be lodged with the Australian Commercial Disputes Centre (ACDC). ACDC was selected, in consultation with CropLife Australia and the National Farmers Federation as the most appropriate mediation/conciliation body to co-ordinate Agsafe's selection of an Industry Conciliator.
- 9.6** ACDC will provide a panel of suitably qualified conciliators from whom the parties involved in the appeal may choose a Conciliator to deal with the matter. Such persons should be of recognised integrity and stature who will command respect from all sectors of the industry.

During the term of office, the Conciliator shall be neither an officer, director, employee nor hold any pecuniary interest in the farm chemical industry that could conflict with the proper performance of his or her functions. The Conciliator shall be required to disclose any such interest before appointment and to disclose any subsequent acquisitions to the Chairman of Agsafe.

- 9.7** The Conciliator will determine the manner in which the appeal will be considered, for example:
 - hearing in the capital city of the State in which the dispute occurs;

- on-site inspection of storage premises;
- telephone conferences; or
- exchange of submissions, documents and information by facsimile and mail.

9.8 Subject to the conditions of the accreditation program, the Conciliator shall determine his own procedures. Parties shall not be allowed legal representation before the Conciliator. The complainant and the other party to the dispute may appear personally or be represented by an employee. The parties will be required to agree that:

- everything which occurs before the Conciliator shall be in confidence and in closed session;
- the discussions are without prejudice; and
- no documents created for the purpose of the conciliation process may be called as evidence in later litigation by either party.

9.9 The Conciliator shall:

- act fairly in good faith, without bias and shall treat matters brought before him/her in confidence;
- give each party the opportunity of adequately stating its case;
- ensure that relevant documents used by the Conciliator are disclosed to the parties to the dispute, subject to their acquiescence; and
- make appropriate recommendations for resolution of the disputes between the parties.

The parties shall report back to the Conciliator on actions taken on the Conciliator's recommendations within a period of time determined by the Conciliator.

the Conciliator shall deal with matters referred as expeditiously as possible but not later than fourteen (14) days after the matter has been referred.

9.10 The Conciliator's role is to facilitate constructive discussion between the parties on the causes of a dispute and, if possible, to assist the parties in reaching agreement on a mutually acceptable solution. In the event a mutually acceptable solution to the dispute not being found, the Conciliator shall resolve whether there has, or has not, been breach of the conditions of accreditation and whether accreditation status should be restored or withheld.

9.11 The cost of an appeal which requires the use of a Conciliator shall be shared equally by the parties involved unless the appeal is resolved in favour of the appellant's case. In such cases, Agsafe shall pay all costs of the conciliation process.

REFERENCES

Personnel Accreditation and Training Manual 9th Edition (2002), Agsafe Limited

CropLife Australia Code of Conduct (January 2006), CropLife Australia Ltd.

The Industry Code of Practice for the Safe Transport, Handling & Storage of Packaged Agricultural and Veterinary Chemicals (2002) 2nd Edition, Agsafe Limited

International Code of Conduct on the Distribution and Use of Pesticides (1990), Food and Agriculture Organisation of the United Nations (FAO)

Australian Competition and Consumer Commission - Determinations of 23 May, 2002 and 3 October, 2002 in response to renewal of Authorisations A90680 and A90681, Agsafe Limited



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