



Australian  
Competition &  
Consumer  
Commission

# Determination

## Application for authorisation

**lodged by**

**Australian Paint Manufacturers Federation Inc.**

**in respect of**

**a Pilot Waste Paint Scheme in Victoria which introduces a 2 cents per  
litre levy on Architectural and Decorative paint**

**Date: 20 April 2011**

**Commissioners:** Schaper  
Willett  
Dimasi

**Authorisation no.: A91251**

**Public Register no.: C2010/925**

## Summary

The ACCC grants authorisation to enable the Australian Paint Manufacturers Federation (APMF) and participating members of the waste paint collection scheme to impose a 2 cents per litre levy on the wholesale supply of Architectural and Decorative (A&D) paint in Australia (**the levy**). The money collected through the levy will be used to fund a trial of a waste paint collection scheme in Victoria (**the waste paint collection scheme**). The ACCC grants authorisation until **1 December 2012**.

The APMF seeks authorisation for an agreement to impose a 2 cents per litre levy on the wholesale supply of A&D paint in Australia to fund a 12 month waste paint collection scheme trial in Victoria.

Participating paint manufacturers will include the levy in the wholesale price of A&D paint they supply. The levy will subsequently be collected on a quarterly basis by Infomark, acting as an agent for the APMF, and deposited in a bank account separate from the APMF's ordinary income and revenues. The funds collected through the levy will be used to fund a waste paint collection scheme trial in Victoria. The scheme will have two elements:

- the **Paint Care program**, a scheme to collect and treat trade waste paint
- the **Detox Your Home (DYH)** program, where the APMF will assume financial responsibility for the existing waste A&D paint portion of the Victorian waste chemical collection scheme, which is currently operated by Sustainability Victoria.

Paint, which contains a number of environmentally harmful substances, can pose an environmental hazard if disposed of improperly. Large volumes of waste paint are improperly disposed of in Victoria, such as through disposal to landfill or into the sewer system. The ACCC considers that the waste paint collection scheme is likely to produce environmental benefits by increasing the collection of waste A&D paint in Victoria. Further, by ensuring that many consumers pay closer to the full (opportunity) cost of the affected products to society, the levy also signals a more efficient allocation of resources throughout the economy. There are also likely to be cost efficiencies from decreasing the cost of disposal of waste A&D paint in Victoria. The ACCC also notes that the waste paint collection scheme trial is likely to produce public benefit through the collection of data to facilitate the development of a national product stewardship scheme for paint.

The ACCC considers that the waste paint collection scheme is unlikely to produce significant public detriment. The imposition of a uniform levy on the wholesale supply of A&D paint is unlikely to significantly impact competition at either the wholesale or retail levels of the supply chain. The ACCC notes that the size of the levy is small and authorisation is sought for a relatively short timeframe.

The APMF advises that if the trial, which concludes on 1 July 2012, is successful, it proposes to introduce a national waste paint collection scheme, on a progressive basis. The APMF seeks authorisation until 1 December 2012 to allow the continuation of the waste paint collection program in Victoria prior to the implementation of the national scheme and to facilitate the progressive roll-out to other states and territories. If necessary, the APMF will seek authorisation for the national scheme.

The ACCC considers that the likely public benefits of the waste paint collection scheme outweigh the likely public detriments and grants authorisation until **1 December 2012**.

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# 1. The application for authorisation

- 1.1. On 12 October 2010 the Australian Paint Manufacturers' Federation Inc (APMF) lodged application for authorisation A91251 with the ACCC.
- 1.2. Authorisation is a transparent process where the ACCC may grant immunity from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010* (the Act). 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, 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. A chronology of the significant dates in the ACCC's consideration of this application is contained in Attachment B.
- 1.3. Application A91251 was made under:
  - 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 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 the Act).
- 1.4. The APMF seeks authorisation of an agreement between the APMF and paint manufacturers to impose a 2 cents per litre levy on the wholesale supply of Architectural & Decorative (A&D) paint in Australia (**the levy**) to fund a 12 month trial of a waste paint collection scheme in Victoria (**the waste paint collection scheme**).
- 1.5. The APMF initially sought authorisation for an agreement to impose a 5 cents per litre levy on the wholesale supply of A&D paint in Victoria to fund a waste paint collection scheme in Victoria. However, on 17 December 2010 the APMF amended its application for authorisation and instead sought authorisation to impose the lower levy on a national basis to fund a waste paint collection scheme in Victoria.
- 1.6. The duration of the waste paint collection scheme trial is 12 months, from 1 July 2011 to 1 July 2012. At the conclusion of the trial the APMF proposes to introduce a national waste paint collection scheme, on a progressive basis. In order to allow time for a more orderly continuation/transition to the next phase of the waste program in Victoria and to better facilitate the progressive roll-out of the waste paint collection scheme to new states and territories the APMF seeks authorisation until 1 December 2012. During this transitional period, paint manufacturers will continue to impose the levy and the APMF will continue to operate the waste paint collection scheme.
- 1.7. If necessary, the APMF will lodge further applications for authorisation following the conclusion of the trial.

## Other parties

- 1.8. 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 or proposed party to the conduct.
- 1.9. The APMF advises that the following paint manufacturers (**founding members**) will initially enter into an agreement with the APMF to provide for the collection and expenditure of the levy:
- DuluxGroup (Australia) Pty Ltd (DuluxGroup)
  - Wattyl Australia Pty Ltd (Wattyl)
  - PPG Industries Australia Pty Ltd (PPG)
  - Henry Haymes Pty Ltd (Haymes Paint).
- 1.10. The APMF also advises that it will approach other member and non-member manufacturers and importers of A&D paint to offer them inclusion in the waste paint collection scheme on equivalent terms to the founding members.

## The proposed trial waste paint collection scheme

- 1.11. The APMF proposes to conduct a 12 month trial of a waste paint collection scheme in Victoria. The trial is proposed to commence on 1 July 2011 and conclude on 1 July 2012.

## The levy

- 1.12. Under the waste paint collection scheme, the APMF will enter an agreement (**the Agreement**) with four APMF members (**the founding members**) to charge a 2 cents per litre levy on the wholesale supply of A&D paint throughout Australia. The money collected through the levy will be used to fund the waste paint collection scheme trial in Victoria.
- 1.13. The levy will apply to all A&D paint sold in Australia by participating paint manufacturers, including wood coatings and enamel which is sold in containers between 1 litre and above up to and including 20 litres but excluding aerosol containers.
- 1.14. The founding members are DuluxGroup, Wattyl, PPG and Haymes Paint. The APMF advises that together the founding members account for approximately 85% of all A&D paint sold in Australia.<sup>1</sup> Other manufacturers and importers of A&D paint will also be invited to participate in the waste paint collection scheme on equivalent terms to the founding members.
- 1.15. The manufacturers and importers who participate in the waste paint collection scheme will include the levy in the wholesale price of each litre of A&D paint invoiced for retail or trade supply to any customer in Australia, identifying the levy separately on

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<sup>1</sup> APMF *Submission in support of Authorisation to the ACCC* Annexure A para 31.

customer invoices. The levy will subsequently be collected on a quarterly basis by Infomark, acting as an agent for the APMF, and deposited in a bank account separate from the APMF's ordinary income and revenues.

### **The waste paint collection scheme**

1.16. The waste paint collection scheme will have two elements:

- the **Paint Care program**, a scheme to collect and treat trade waste paint
- the **Detox Your Home (DYH)** program, where the APMF will assume financial responsibility for the existing waste A&D paint portion of the Victorian waste chemical collection scheme, which is currently operated by Sustainability Victoria.

### **Trade waste paint – the Paint Care program**

1.17. Currently, there is no collection service in Victoria for trade waste paint. The APMF proposes to establish and manage the Paint Care program which will collect trade waste paint from master painters, painting contractors and other businesses.

1.18. Under the Paint Care program, the APMF proposes to conduct six full day and eight half day collections of trade waste paint during the 12 month period of the trial. The APMF advises that in urban areas, collection of trade paint will take place at the same collection centres used for the DYH program. In rural areas, additional collections using the same mobile service as the DYH program will be organised for trade waste paint. No additional fee will be charged for the disposal of trade waste paint through the Paint Care program.

### **Domestic waste paint - the DYH program**

1.19. Sustainability Victoria currently operates the DYH program whereby residents of Victoria can drop off various chemicals, including but not limited to batteries, fluorescent tubes, gas cylinders and paint.<sup>2</sup>

1.20. The DYH program operates through 13 permanent sites located at council waste transfer stations and a mobile service that runs 31 mobile collection events per year, with the aim of visiting every Victorian suburb once every two to three years. No fee is charged for the disposal of chemicals through the DYH program. The DYH program is not available to businesses.

1.21. Under the waste paint collection scheme, the APMF will assume financial responsibility for the waste A&D paint recycling and collection component of the DYH program from Sustainability Victoria. The APMF will establish a contract with Chemsal, the waste service provider for the DYH program, and will pay Chemsal for the collection, treatment and disposal of domestic waste paint. These payments will be funded by the levy.

1.22. The same A&D paint products which are currently accepted under the government operated scheme will continue to be accepted under the APMF funded DYH program.

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<sup>2</sup> Sustainability Victoria 2010, viewed 29 October 2010  
<[http://www.resourcesmart.vic.gov.au/for\\_households/dropoff\\_points\\_2826.html](http://www.resourcesmart.vic.gov.au/for_households/dropoff_points_2826.html)>.

## **Other aspects of the waste paint collection scheme**

- 1.23. As part of the waste paint collection scheme, the APMF will also:
- commission research into improved methods of paint recycling and beneficial disposal of waste A&D paint
  - initiate a promotional campaign through retail advertising and other means to increase public awareness of the existing and new waste paint recycling and collection programs for both domestic and trade waste paint in Victoria. Sustainability Victoria will also promote the APMF Paint Care program.
- 1.24. The APMF advises that the estimated cost of the waste paint collection scheme trial is \$1 630 800 and that it estimates the total annual volume of paint sales attracting the levy to be 136 808 758 litres.<sup>3</sup> Therefore, with the levy rounded up to 2 cents per litre, the amount collected during the 12 month period of the trial will be approximately \$2 736 175.
- 1.25. Any levies collected but not paid at the end of the 12 month trial period would be rolled forward for use in further state and territory waste paint collection schemes, which the APMF proposes to implement following the conclusion of the trial.

## **Draft determination and pre-decision conference**

- 1.26. Section 90A requires that before determining an application for authorisation the ACCC shall prepare a draft determination. In addition, the ACCC shall invite the applicant and interested parties to notify the ACCC if they wish the ACCC to hold a conference in relation to the draft determination.
- 1.27. On 9 March 2011 the ACCC issued a draft determination proposing to grant authorisation to the APMF for the waste paint collection scheme until 1 June 2012.<sup>4</sup>
- 1.28. A pre-decision conference was not requested in relation to the draft determination.

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<sup>3</sup> APMF *Revised Pilot Budget Jan 2010*.

<sup>4</sup> Following the release of the Draft Determination, the APMF advised that it wished to seek authorisation for 17 months, until 1 December 2012 (see paragraph 1.6).

## 2. Background

### The Applicant

- 2.1. The APMF is an industry association representing suppliers of A&D paint in Australia. It currently has 34 members operating in all state and territory capital cities as well as regional areas. APMF members account for over 95% of all paint manufactured in Australia.<sup>5</sup>
- 2.2. Membership is open to firms substantially engaged in Australia in the manufacture and sale of paints, varnishes, lacquers or other such surface coatings, with associate membership available to firms otherwise involved in the coatings industry.<sup>6</sup>
- 2.3. The principal objectives of the APMF are to:
  - advance the theory and practice of paint technology in Australia
  - promote efficiency and safe work practices
  - foster international cooperation and standards
  - advance, encourage and protect the interests of its members.

### The A&D paint industry

- 2.4. A&D paint accounts for approximately 52% of all paint manufactured in Australia with the other major paint product being industrial paints and coatings.<sup>7</sup> A&D paint is commonly sold to trade depots for purchase by master painters and painting contractors or to retailers for purchase by Do-It-Yourself (DIY) customers.<sup>8</sup> Approximately 95% of A&D paint purchased in Australia is produced by Australian manufacturers.<sup>9</sup>
- 2.5. Paint contains a range of potentially harmful substances including suspended solids, stable emulsions, dyes, acids, alkalis and organic solvents. As a result, improper disposal (which includes disposal in landfill) or storage of waste A&D paint can cause harm to the environment or to members of the public.
- 2.6. The APMF advises that the improper disposal of waste A&D paint in Victoria is common and estimates that less than 15% of all waste paint and paint cans are recovered for recycling, with much of the rest discarded to landfill. The APMF also estimates that only 51% of trade contractors have a disposal practice and, of that, 41% of waste paint goes directly to landfill.<sup>10</sup>

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<sup>5</sup> APMF *Form B* paragraph 1 (b).

<sup>6</sup> *Ibid.*

<sup>7</sup> APMF 2010, viewed 29 October 2010 <<http://www.apmf.asn.au>>

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> APMF *Submission in support of Authorisation Annexure A* paragraph 6.

## **Product Stewardship**

- 2.7. Product stewardship involves the acknowledgement that all those involved in the production, retailing, use and disposal of products have a shared responsibility to manage the environmental impacts of those products.
- 2.8. State, Territory and Federal governments have been working with various industries to establish product stewardship arrangements. In November 2010 the Department of Sustainability, Environment, Water, Population and Communities released a consultation paper on product stewardship legislation.
- 2.9. The APMF's waste paint collection scheme is a voluntary product stewardship scheme, which paint manufacturers may choose to participate in, rather than being compelled by legislation. The Victorian Government, through Sustainability Victoria supports the waste paint collection scheme and has been involved in its development.

### 3. Submissions received by the ACCC

- 3.1. 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.

#### Before the draft determination

##### APMF

- 3.2. The **APMF** submitted that public benefits from the waste paint collection scheme are substantial and involve:
- educating and encouraging users of A&D paint to return unused and waste paint containers for appropriate collection, free of charge;
  - reducing the likelihood of A&D paint products being stored in households or other premises in an inappropriate manner which creates risk for the general public;
  - increasing the volume of post-consumer A&D paint that is returned for proper recycling or disposal and reducing the volume of paint containers sent to general landfill;
  - improving the efficiency and cost recovery of the management and collection of post-consumer A&D paint by local councils and the Victorian government;
  - making safe waste paint disposal more accessible to the community by increasing the number of collection facilities;
  - investing in research and development to identify more efficient methods for safely disposing of waste paint and cans as well as new ways that these resources can be reused;
  - improving community awareness of safe and appropriate procedures regarding the disposal of paint and the availability of appropriate disposal facilities which will be available at no cost to consumers;
  - appropriate efficiency gains from sending the correct signals to the purchasers of A&D paint that the cost of the paint will, even if by a slight amount, include an appropriate charge to assist in the management and proper disposal of post-consumer A&D paint; and
  - reducing the negative effects of the environmentally inappropriate practice of disposing significant volumes of trade waste to landfill.
- 3.3. The APMF advised that it amended its application for authorisation to respond to the competition issues raised by PaintRight (discussed below) and to the difficulties created by the use of centralised distribution systems by major paint retailers, which make it difficult for paint manufacturers to identify where products are sold after delivery and therefore difficult to impose a levy only on products sold in Victoria.

- 3.4. The APMF submitted that the use of a national levy to fund the waste paint collection scheme will:
- mitigate against the different pricing arrangements across Australia for paint that would be the result of a state-based levy
  - enable data to be collected from the pilot trial, particularly with regards to trade paint, which will be crucial for the development of a national waste paint collection scheme
  - facilitate the development of a national product stewardship scheme for paint at the conclusion of the trial. The APMF has held discussions with the relevant Ministers/agencies in Tasmania, South Australia, Western Australia, Victoria and NSW, to build the necessary partnerships to create a future national scheme
  - have a minimal impact on households and trade painters as the 2 cent levy represents around 0.1% of the price of A&D paint.

### **Interested Parties**

- 3.5. Prior to issuing its draft determination, the ACCC conducted two rounds of public consultation with interested parties potentially affected by the application, including paint manufacturers, government agencies, local government bodies, waste management companies, environmental groups and paint retailers. The ACCC consulted 36 parties in its initial round of consultation, then 53 parties following the APMF's amendment of its application for authorisation. A summary of the public submissions received from interested parties follows.

#### *Retailers*

- **Bunnings** supported in principle, the proposal for an industry wide levy to fund the recycling of waste paint. Bunnings submitted that it is essential for the levy to apply to all paint manufacturers to ensure that there is no commercial disadvantage to certain paint brands.

Bunnings also submitted that there is a need for a strong consumer awareness program to ensure that consumers know where and how to access the scheme. As customers have an expectation that they can recycle paint at the point where they pay the levy, the waste paint collection scheme should take into account collection points at retail locations. The scheme should have the capability to expand after the conclusion of the trial and service other states.

Bunnings had no objections to the amended application.

- **Mitre 10** submitted that it may be administratively easier to impose the levy on the manufacturer, rather than suppliers, to ensure there is no duplication of the levy payment.
- **PaintRight**, a paint and decorating retailer aligned with Haymes Paint, supported the idea of waste paint collection facilities in principle, however PaintRight made the following points:
  - it would raise competition concerns if the levy was applied to A&D paint sold by manufacturers to retailers, but not to A&D paint sold by manufacturers directly to trade painters, as manufacturers and retailers are in competition with regards to paint sales

- Victorian paint stores near the border will be disadvantaged if the levy is not applied nationally
- while the increase in the price of A&D paint due to the levy may appear to be a small cost, it may cause some specialist paint stores to close, which will reduce retail competition
- the location of waste paint collection points is important and should not advantage some retail outlets over others.

#### *Trade associations*

- **The Master Painters Association of Australia** supported the APMF's application for authorisation and the waste paint collection scheme as a method for reducing the volume of waste paint.
- **The Master Painters Association of Australia (WA Association)** supported the APMF's amended application for authorisation and advised that it is involved with the Western Australian Waste Authority in the Product Stewardship for Paint Working Group and is focused on reducing waste paint in a number of areas.
- **Master Builders Australia Ltd (MBA)** submitted that it is committed to promoting practices which add to environmental sustainability, but has concerns about the APMF application, namely:
  - before the commencement of the scheme, the APMF should provide greater information in respect of the waste paint collection scheme trial, particularly on how the trial will underpin the development of a national scheme, on the impact of the levy on trade painters and a cost benefit analysis of the scheme compared with alternatives and the status quo
  - a more complete analysis of the market failure involved and of the functioning of the market with or without the application of the levy should be provided.
- **The Housing Industry Association Ltd (HIA)** supported the levy in principle as an appropriate way to meet the cost of properly disposing of waste A&D paint and supported a voluntary industry-led scheme over a government-imposed fee or charge. HIA submitted that the administration of the scheme needs to be transparent and independent.

#### *Government Agencies*

- **Melbourne Water**, which manages Melbourne's water supply, supported the application for authorisation as it has the potential to reduce the illegal disposal of paint into the sewerage system and therefore the level of contaminants reaching water treatment plants.
- **The Metropolitan Waste Management Group (MWMG)** is responsible for coordinating municipal waste management activities in Melbourne on behalf of 30 metropolitan councils. The MWMG supported the application for authorisation and submitted that there is significant community benefit in allowing the trial to be undertaken to gauge the effectiveness of the scheme in reducing the environmental damage caused by current waste practices, which see significant volumes of waste paint deposited to landfill. The MWMG considered that the trial is consistent with the aims and objectives of government policies to reduce the amount of waste

generated and increase opportunities for recovery and recycling. The MWMG raised no objection to the APMF's amended application for authorisation.

- **Department of Sustainability, Environment, Water, Population and Communities (Dept. of Sustainability)**, is a Commonwealth Government environmental protection body. The Department of Sustainability stated that it is currently developing legislation for a national product stewardship framework under the *National Waste Policy: Less Waste, More Resources* and that the APMF application is broadly consistent with the objectives of the National Waste Policy.
- **Sustainability Victoria**, a Victorian Government agency which promotes the sustainable use of resources, supported the APMF's amended application for authorisation. Sustainability Victoria stated that the proposed 12 month trial will provide key statistical information for the development of a national product stewardship scheme for paint and noted that the development of a voluntary product stewardship scheme is in line with government policy, particularly the National Waste Policy and the National Product Stewardship Framework.
- **Department of Environment and Conservation WA (WA Department of Environment)** a Western Australian environmental protection body, advised that it has been working with the Western Australian Waste Authority, APMF, Master Painters Australia and the West Australian Local Government Association to develop a product stewardship scheme for paint in WA. Should the trial be successful, it is likely to take the form of an extension of the waste paint collection scheme. The WA Department of Environment submitted that the WA Government and local governments currently incur significant costs to dispose of waste A&D paint. The Department supported the APMF's application for authorisation and the proposed national levy as part of an overall product stewardship initiative that will result in improved environmental outcomes as well as reduced overall costs to the community and advised that the Western Australian Waste Authority also supports the application.
- **EPA Victoria**, a Victorian environmental protection body, supported the APMF's application for authorisation and welcomes the proposed product stewardship approach. EPA Victoria submitted that paint is an important product to divert from landfill and advises that it is interested in the results of the proposed trial, which may inform future national approaches.
- **Environmental Protection Authority South Australia (EPA South Australia)** is a South Australian environmental regulator. EPA South Australia supported the APMF application for authorisation and the intent of the waste paint collection scheme as an effective mechanism to protect the environment through product stewardship.
- **Department of Environment, Climate Change and Water (NSW Department of Environment)** is a NSW environmental protection body. The NSW Department of Environment advised that NSW state and local governments spend over \$ 1 million per year on the collection and treatment of waste paint, particularly through the operation of the Household Chemical Cleanout (HCC) program. The NSW Department of Environment advised that it has previously discussed with the APMF the development of a product stewardship scheme for paint in NSW and is generally supportive of the use of industry levies to fund waste collection schemes and of a voluntary scheme for collecting waste paint. However, it was concerned that the Victorian trial will not lead to a national scheme and therefore there will be little public benefit to NSW consumers, who will pay a significant portion of the funds

collected through the levy. The NSW Department of Environment submitted that the APMF could take financial responsibility for the HCC program as well as the Victorian DYH program, without further trials and it would support the APMF application if the levy were applied to fund domestic waste paint collection in NSW or nationally at the same time as the trial of trade waste collection in Victoria.

- **Zero Waste SA** is a South Australian government organisation which improves recycling and waste avoidance practices. Zero Waste SA supported the APMF's amended application for authorisation and submitted that the proposed 12 month trial will provide key statistical information for the development of a national product stewardship scheme for the safe disposal of waste A&D paint. Zero Waste SA also submitted that industry lead product stewardship initiatives require a shared responsibility through strong partnerships with consumers, industry and government and are in line with the National Product Stewardship Framework and the National Waste Policy.

#### *Other*

- **Wattyl**, a paint manufacturer and member of the APMF's steering committee on the waste paint collection scheme trial, fully supported the amended application for authorisation.
- **Chemsal**, the waste service provider for the DYH program supported the application for authorisation and submitted that the proposed waste paint collection scheme is likely to result in environmental benefits.

### **Following the draft determination**

3.6. Following the release of the draft determination proposing to grant authorisation the ACCC received the following submissions from interested parties:

- **Zero Waste SA** supports the development of a national product stewardship scheme for paint. Zero Waste SA advises that waste paint collection in South Australia is currently funded by the state government at significant cost. Zero Waste SA submits that information collected through the trial should be provided to it, to enable it to make informed decisions about future waste paint collection arrangements in South Australia.
- **MBA** reiterates its call for further information to be provided by the APMF, particularly with regards to the costs factored into the levy for administration, before the waste paint collection scheme trial commences and before it is authorised. MBA also submits that the scheme should be far more transparent and independent in its administration. MBA also reiterates its concern with the assertion by the APMF that data collected from the trial will be crucial to the development of a national waste paint collection scheme. MBA submits that the APMF should substantiate this claim and provide further information before the trial commences.
- **Greenpainters Ltd (Greenpainters)**, a national body that represents painting contractors and manufacturers and promotes sustainability, supports the APMF application. Greenpainters submits that one of the impediments to improved recycling rates is a lack of suitable facilities to handle commercial paint waste and that many businesses are frustrated by the prohibitive cost of effectively recycling their waste. Greenpainters submits that the waste paint collection scheme has the potential to significantly lower the cost of recycling to businesses in the painting

industry and therefore raise participation rates in sustainability programs. Greenpainters also submits that the cost increases proposed by the APMF will have a minimal effect on its member businesses or the broader painting industry.

- 3.7. In response to the submission by MBA, the APMF stated that as waste paint from trade painters is currently excluded from various government facilitated waste paint collection schemes including the Victorian DYH program, the trial will identify for the first time how much waste paint is generated by trade painters as a percentage of paint sold into the same sector. The APMF submits this information will be crucial in building a proper understanding around the levels of trade waste paint and the cost of disposal. This information will also be a vital input into future waste paint collection business models.
- 3.8. The views of the APMF and interested parties are outlined further in the ACCC's evaluation of the waste paint collection scheme in Chapter 4 of this determination. Copies of public submissions may be obtained from the ACCC's website ([www.accc.gov.au/AuthorisationsRegister](http://www.accc.gov.au/AuthorisationsRegister)) and by following the links to this matter.

## 4. ACCC evaluation

4.1. The ACCC's evaluation of the waste paint collection scheme is in accordance with tests found in:

- 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.

4.2. For more information about the tests for authorisation and the relevant provisions of the Act, please see [Attachment C](#).

### The relevant areas of competition

4.3. The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant area/s of competition affected by that conduct.

4.4. The ACCC notes that the conduct involves the imposition of a levy by participating paint manufacturers on the wholesale supply of A&D paint. It is expected that paint retailers will pass on the levy, either in whole or part, to end consumers.

4.5. Therefore the ACCC considers that the areas of competition which are most relevant to the application are the wholesale and retail supply of A&D paint in Australia.

4.6. In addition, the levy is likely to impact on the provision of waste A&D paint and container disposal and recycling services in Victoria.

## The counterfactual

- 4.7. The ACCC applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and public detriment generated by conduct for which authorisation has been sought.<sup>11</sup>
- 4.8. Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by the arrangements in the future if authorisation is granted with those generated if 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’.
- 4.9. The ACCC notes that the Agreement will not come into force and effect unless authorisation is granted by the ACCC.<sup>12</sup> On this basis, the ACCC considers that absent authorisation, the waste paint collection scheme incorporating the levy will not be implemented.
- 4.10. The ACCC considers it unlikely that individual paint manufacturers or importers will unilaterally impose a levy to fund the disposal of waste A&D paint and paint containers, as they may lose customers to a competitor who does not impose a levy. Further, if manufacturers unilaterally implement waste paint collection schemes, such schemes may be limited to the products of that manufacturer, as it is unlikely an individual manufacturer would bear the cost of disposing of waste paint and paint containers produced by their competitors.
- 4.11. Therefore, absent authorisation, the ACCC considers it likely that the DYH program, operated by Sustainability Victoria, and funded by Victorian taxpayers, will continue in its current form to provide for the collection and disposal of domestic waste A&D paint. Currently there is not a disposal charge for access to the DYH program but given funding constraints there may or may not be a disposal charge in the future.
- 4.12. In the counterfactual it is considered likely that the DYH program will continue in its current form, operating through the 13 permanent sites located at council waste transfer stations. Further, the mobile service, which conducts 31 mobile collection events per year visiting every Victorian suburb once every two to three years, is considered likely to continue.
- 4.13. However, the ACCC notes that the current scope of the DYH program does not provide for the collection of trade waste paint. In the absence of authorisation, significant volumes of unused A&D paint are likely to continue to be stored in homes or business premises, discarded to landfill, or dumped illegally on land or into the wastewater system.

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<sup>11</sup> *Australian Performing Rights 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.

<sup>12</sup> *APMF Submission in support of Authorisation Annexure D Clause 2.*

## Public benefit

4.14. 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.<sup>13</sup>

4.15. The ACCC considers the waste paint collection scheme is likely to deliver public benefits in the form of:

- environmental benefits
- efficiency benefits
- the collection of information to facilitate the development of a national product stewardship scheme for paint.

4.16. The APMF submits that a market failure exists in the market for A&D paint in Victoria because, absent the levy, the price of paint fails to take into account the cost associated with the safe disposal of paint products.

4.17. In general, competition can be relied on to deliver the most efficient market arrangements. However, in circumstances where there is market failure (for example, from information asymmetries or externalities) the competitive outcome of the market is not the most efficient.

4.18. In relation to A&D paint the ACCC notes that:

- the benefits from the proper disposal of waste A&D paint accrue primarily to external parties (the public at large through the protection of health and safety and the environment) rather than to paint manufacturers
- neither the operation of a competitive market, nor any legislative obligation imposed on paint manufacturers currently impose on paint manufacturers sufficient incentives to account for the proper disposal of waste A&D paint, particularly where that paint may have been produced by other paint manufacturers.

4.19. In these circumstances, an efficient method for the disposal of waste paint requires collective, rather than individual willingness of paint manufacturers to fund a waste paint collection scheme. Levy arrangements, such as those proposed by the APMF capture manufacturer's collective willingness to pay to facilitate the proper disposal of waste paint.

## Environmental benefits

4.20. Absent an industry stewardship arrangement there is potential for significant volumes of waste A&D paint in Victoria to continue to be improperly disposed of with the resulting damage to the environment from the seepage into soil and water systems of heavy metals, dyes, acids, alkalis and other contaminants which are contained in paint.

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<sup>13</sup> *Re Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

- 4.21. The APMF advises that approximately 16.5 million litres of paint is sold each year in Victoria through retail outlets.<sup>14</sup> The APMF submits that significant volumes are improperly disposed of through general waste that ends up in landfill. Alternatively, as noted by Melbourne Water, paint is poured illegally into the sewerage system.
- 4.22. The APMF submits that the waste paint collection scheme will produce environmental benefits through:
- educating and encouraging all users of A&D paint to return unused and waste paint containers for appropriate collection, without additional costs
  - reducing the likelihood of A&D paint products being stored in households or other premises in an inappropriate manner which creates risks for the general public
  - increasing the volume of A&D paint that is properly recycled or disposed of and reducing the volume of paint and paint containers sent to general landfill
  - identifying more efficient methods for the safe disposal of waste paint and cans, and new ways that these resources can be reused.
- 4.23. In particular, the APMF predicts that under the scheme the increase in the recovery of post-consumer A&D paint and packaging for proper recycling or disposal will be approximately 1.5 million kg for the 12 month duration of the trial.<sup>15</sup>
- 4.24. The ACCC notes that interested parties, such as the Metropolitan Waste Management Group, Chemsal, Sustainability Victoria, Melbourne Water, Master Builders Australia, Zero Waste SA, EPA South Australia, the WA Department of Environment, the Department of Sustainability, Greenpainters and EPA Victoria agree that the waste paint collection scheme will produce environmental benefits particularly through the reduction in the volume of waste paint which is improperly disposed of or stored.
- 4.25. The ACCC accepts that environmental damage is caused by the improper disposal of waste A&D paint and that there are instances of improper disposal that can be addressed by the proposed waste paint collection scheme, particularly the improper disposal of trade paint.

#### *Trade waste paint*

- 4.26. The ACCC notes that there is currently no scheme for the collection and treatment of trade waste paint in Victoria. At present, unused paint by commercial painters is either stockpiled at their business premises, left for storage by the householder, disposed of through a commercial waste provider at a cost to the painter, or disposed of improperly. The APMF estimates that only 51% of trade contractors have a disposal practice and of that, 41% of waste paint goes directly to landfill.<sup>16</sup>
- 4.27. The ACCC considers that the provision of conveniently located collection facilities for trade waste paint where none were previously available, and at no additional cost, will make it easier for trade painters to dispose of waste paint and containers properly. In turn, this is likely to result in benefits to the environment from the reduction in the

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<sup>14</sup> APMF *Submission in support of Authorisation* Annexure A paragraph 8.

<sup>15</sup> APMF *Submission in support of Authorisation* Annexure A paragraph 30.

<sup>16</sup> APMF *Submission in support of Authorisation* Annexure A paragraph 6.

volume of trade waste paint that ends up in landfill, is dumped illegally or stored improperly. Greenpainters, a painting industry sustainability body, submits that high costs are an impediment to recycling by paint businesses and may be significantly reduced by the waste paint collection scheme. The ACCC notes the support of the Master Painters Association of Australia, a representative body for trade painters, for the waste paint collection scheme as a method for increasing the collection of waste A&D paint.

- 4.28. The ACCC considers that, for the environmental benefits to be realised it is essential to increase awareness among trade painters of the environmental harm caused by improper disposal of waste A&D paint and of the availability of facilities to properly dispose of waste paint under the waste paint collection scheme. The ACCC notes that the APMF proposes to promote the existence of the new scheme for trade painters in Victoria, which is likely to educate and encourage them to return waste A&D paint for proper disposal, free of charge. The APMF has not provided information on the type and extent of the promotional activities proposed. However, the Master Painters Association of Victoria has worked with the APMF and Sustainability Victoria in the development of the trial and as such the Master Painters Association of Victoria may be in a position to advise its members of the new scheme for trade painters.
- 4.29. As the trial is implemented the ACCC encourages the APMF to collect data on the effectiveness of the promotional activities directed at trade painters and the extent to which the scheme increases the proper disposal of trade waste paint. As noted by the APMF, data collected from the trial will be important for the development of a national waste paint collection scheme. The ACCC would expect such data to be made available in any future application for authorisation lodged by the APMF for the waste paint collection schemes.

#### *Domestic waste paint*

- 4.30. The APMF advises that it does not currently plan to expand the number of collection centres currently available under the DYH program operated by Sustainability Victoria.
- 4.31. Therefore the ACCC has no information that suggests the current volume of domestic waste paint collected through the DYH program will increase or decrease under the APMF's waste paint collection scheme.
- 4.32. The ACCC understands that the APMF proposes to initiate a public campaign to promote the existing recycling and collection program and Sustainability Victoria will similarly promote the APMF arrangements. However, the ACCC has not been provided with information about how Victorian consumers will be educated about the existence, size and use of the levy or about the waste paint collection scheme.
- 4.33. These issues will be an important feature of any national product stewardship scheme for paint which is developed and implemented after the trial.

#### **Efficiency benefits**

- 4.34. The APMF submits that absent the levy, the pricing of paint fails to take into account the costs associated with the safe disposal of paint products.

- 4.35. The APMF claims that approximately 80% of total waste dropped off at Sustainability Victoria's permanent sites and 51% of waste collected as part of the mobile collection services is paint. This service comes at a significant cost.
- 4.36. The APMF submits that the proposed waste paint collection scheme will improve the efficiency and cost recovery of the management and collection of post-consumer A&D paint which is currently operated by local councils and the Victorian government. In particular, the APMF considers that substantial public benefits can be generated if the current Victorian taxpayer funded DYH program is supported and brought together with the trade waste scheme under the APMF and funded through the levy.
- 4.37. Negative externalities occur when the consumption or production of a good imposes additional costs on others that are not taken into account in purchasing or production decisions. Therefore to the extent that the cost of the levy is passed on to consumers of A&D products, prices are more reflective of the full (opportunity) cost of those products to society. As a result the waste paint collection scheme is likely to achieve a more efficient allocation of resources in the economy.
- 4.38. The ACCC notes that the centralised distribution systems used by major paint retailers make it difficult to identify where products are sold after delivery. As a result, it would be costly to separately identify which products will be sold in Victoria, in order to allow paint manufacturers to impose the levy at the wholesale level on those products only. This is the reason that the APMF has given for amending its application for authorisation.
- 4.39. As a result, during the trial paint buyers outside Victoria will cross subsidise the disposal of paint in Victoria which may produce allocative inefficiencies. For example, outside of Victoria paint users will be required to pay the levy in addition to any payments they already make for the disposal of waste paint either in the form of a direct payment to a commercial waste service provider or through local or state charges for government run waste collection schemes.
- 4.40. Notwithstanding this, the ACCC considers that the potential for allocative inefficiency is limited by the small amount of the levy and the limited timeframe for which authorisation is sought.
- 4.41. In addition, the waste paint collection scheme trial is likely to produce public benefits nationally, in the form of data collected to facilitate the development of a national waste paint collection scheme, as discussed at 4.48 to 4.55.
- 4.42. The ACCC considers there are likely to be improved cost efficiencies from the proposed industry scheme for the management and collection of post-consumer A&D paint relative to the current arrangements.
- 4.43. To the extent there is unused capacity with the current infrastructure, increasing the volumes of paint collected and treated through the acceptance of trade waste paint, is likely to provide economies of scale and thereby reduce the per-unit cost of treating and disposing of waste A&D paint in Victoria.

- 4.44. Further, to the extent that significant volumes of paint containers no longer end up in landfill in Victoria, the scheme may allow local governments to defer investment in new landfill sites and/or the expansion of existing sites.
- 4.45. The ACCC also notes that the APMF proposes to conduct research into improved methods of waste paint recycling and disposal as part of the waste paint collection scheme.
- 4.46. The ACCC notes that as the waste paint collection scheme is likely to result in an increase in the total volume of waste A&D paint collected, it may make available more efficient methods of recycling, which are uneconomical with smaller volumes of waste paint. This may also lead to the greater availability of cheaper recycled paint products. However, the ACCC also questions whether this will eventuate during the 12 month period of the trial.
- 4.47. Overall, the ACCC considers that the waste paint collection scheme, including the use of a national levy to fund a Victorian scheme, is likely to produce important allocative and cost efficiency benefits.

#### **Collection of information to facilitate a national waste paint collection scheme**

- 4.48. The APMF advises that following the completion of the trial in Victoria it intends to introduce a similar scheme nationally, on a progressive basis. The APMF submits that the data collected from the trial will be crucial for the development of the national scheme, especially with regard to data collected around the sales of trade paints (where there is no such scheme currently operating in Victoria).
- 4.49. A number of interested parties support the trial as a way of gathering data for the development of a national product stewardship scheme for paint.<sup>17</sup>
- 4.50. The ACCC notes the view of MBA that further analysis should be conducted by the APMF even before the trial begins. In particular, MBA submits that a cost benefit analysis of the scheme (and alternatives) should be publicly available as well as an analysis of the market failure involved and the functioning of the market with or without the application of the levy.
- 4.51. The NSW Department of Environment submits that it is concerned that the Victorian trial will not lead to a national scheme and if so, there will be little public benefit to NSW consumers for supporting paint collections in Victoria.
- 4.52. The ACCC accepts that the type of information identified by MBA would assist with the development of the trial. However, the ACCC considers that conducting a trial prior to wider implementation can be an effective way to obtain data and assess the effectiveness of proposals. The ACCC considers that information collected through the trial will produce public benefit by providing information to facilitate the development of a national product stewardship scheme for paint, particularly with regards to:

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<sup>17</sup> See for example submissions from Sustainability Victoria, EPA Victoria, WA Department of Environment and Zero Waste SA

- the volume of waste A&D paint collected for proper disposal, particularly from trade users
  - the cost of the scheme compared to the amount collected through the levy
  - the effectiveness of promotional activities, to increase awareness among both domestic and trade paint users of their options for the proper disposal of waste A&D paint.
- 4.53. The Agreement between the founding members provides for an audit to be conducted at the end of the waste paint collection scheme trial and the results will be provided to participating paint manufacturers.<sup>18</sup> The ACCC considers that it is important that the accounts of the APMF relating to the trial are independently audited and notes that parties other than participating paint manufacturers will also have an interest in whether the amount of the levy is appropriate to the cost of the scheme.
- 4.54. The ACCC considers that data collected through the trial will be an important consideration in any future applications for authorisation in relation to the proposed national rollout of a product stewardship scheme for paint.
- 4.55. The ACCC also considers that in developing the national scheme, the APMF should consider:
- the transparency of the scheme, particularly around setting the levy, reporting on the monies collected and spent, and the effectiveness of the scheme in increasing the collection of waste paint
  - the independence of the administration of the scheme.

### **ACCC conclusion on public benefits**

- 4.56. The ACCC considers that the introduction of a waste paint collection scheme is likely to produce public benefit in the form of environmental benefits by increasing the collection of waste A&D paint in Victoria. Further, where consumers pay closer to the full opportunity cost of A&D paint this signals a more efficient allocation of resources. There are also likely to be cost efficiencies from decreasing the cost of disposal of waste A&D paint in Victoria. Finally, the ACCC notes that the waste paint collection scheme trial is also likely to produce public benefit through the collection of data to facilitate the development of a national product stewardship scheme for paint.

### **Public detriment**

- 4.57. 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.<sup>19</sup>

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<sup>18</sup> APMF *Submission in support of Authorisation* Annexure D paragraph 4.6

<sup>19</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

- 4.58. The APMF submits that the waste paint collection scheme will give rise to a very low level of anti-competitive detriment, in the form of a pass through of a minimal additional cost on the wholesale price of A&D paint as a result of the levy.

### **Effect on competition**

#### *Wholesale and retail supply*

- 4.59. In general terms, an agreement among competitors in relation to price is likely to lessen competition relative to a situation where each business individually makes its own pricing decisions.
- 4.60. In this instance, the waste paint collection scheme involves the imposition of the levy on the wholesale supply of A&D paint in Australia, through an initial agreement between four paint manufacturers which together produce approximately 85% of all paint manufactured in Australia. Other paint manufacturers will be approached and invited to participate in the waste paint collection scheme on equal terms. The ACCC notes that the levy will be applied by all participating manufacturers on the paint they supply to both retail and trade customers.
- 4.61. MBA and the HIA raised concerns about the administration of the scheme and submitted that it should be managed on an independent and transparent basis.
- 4.62. The Agreement provides that participating paint manufacturers must separately identify the levy on customer invoices. It will be collected from manufacturers by Infomark, on a quarterly basis and deposited in a bank account separate from the APMF's ordinary income and revenues. At the conclusion of the trial, the accounts will be audited and the report provided to each participating manufacturer.
- 4.63. The ACCC considers that paint manufacturers do not have an incentive to act unilaterally to impose a levy to fund the collection of waste paint. Therefore to achieve the public benefits identified there is a need for manufacturers to reach an agreement to impose a levy.
- 4.64. The ACCC does not consider that agreement to impose the levy increases the likelihood of co-ordination among wholesalers on price and other areas in which they currently compete. In particular, the ACCC notes that each participating paint manufacturer individually sets its own prices and then applies the levy.
- 4.65. Similarly, the levy does not prevent retailers from setting their prices individually and deciding whether to pass through all or some of the levy to consumers.
- 4.66. Therefore the ACCC does not consider that there are any particular aspects of the scheme that would give paint manufacturers and retailers any additional opportunity to engage in co-ordinated conduct than exists without the scheme.
- 4.67. The ACCC also notes the submission by PaintRight in relation to the APMF's initial application for authorisation that Victorian paint retailers located close to state borders will be disadvantaged as a result of the price disparity that will result from the levy between Victorian stores and those in other states. The amendment to the APMF's

application for authorisation, imposing a national rather than a Victorian levy will address this concern.

- 4.68. As such, the ACCC is of the view that the imposition of a uniform levy on the wholesale supply of A&D paint is unlikely to significantly impact competition at either the wholesale or retail levels of the supply chain.

#### *Waste paint recycling providers and other waste paint collection schemes*

- 4.69. The ACCC notes that consumers in Victoria seeking to properly dispose of waste A&D paint outside the APMF scheme would nonetheless be required to pay the levy. Such consumers would therefore pay twice for the proper disposal of waste A&D paint and this may constitute a barrier to entry to alternate waste paint disposal providers, including those that may be capable of disposing of waste A&D paint more efficiently than under the APMF scheme.
- 4.70. The ACCC notes that the APMF has entered an agreement with Chemsal to provide waste disposal services for both domestic and trade waste paint. Therefore it is unlikely that alternative waste paint disposal schemes will develop in Victoria during the period of the trial and competition from alternative waste paint recycling providers may be restricted due to the imposition of the levy.
- 4.71. However, the ACCC notes that the trial is limited to Victoria and authorisation is sought for a relatively short timeframe,.
- 4.72. The ACCC notes that in the development of a national product stewardship scheme for paint it will be relevant to consider whether there is capacity for providers of alternative waste paint collection schemes to approach paint manufacturers and the APMF and seek inclusion.

#### **Increased prices for A&D paint**

- 4.73. As noted by the APMF, the levy, which is imposed at the wholesale level, is likely to be passed on by retailers to consumers. As such the end price for A&D paint sold in Australia may increase as a result of the levy. This will depend on pricing decisions made by paint wholesalers and retailers, which are influenced by a range of factors.
- 4.74. Given the proportion of paint manufactured in Australia which is produced by the founding members and that only relatively small volumes of paint are imported, the ACCC notes that the bulk of A&D paint purchased in Australia during the period of the trial will be subject to the levy and therefore to the potential price increase.
- 4.75. However, the ACCC notes that the potential price increase that may result from the levy is small. The APMF advises that the typical wholesale price of a standard four litre tin of A&D paint supplied by its members is between \$50 and \$80 and that increasing the price by 8 cents as a result of the levy is therefore immaterial. Even if the levy is passed on in full by retailers, the APMF submits that the impact on the retail price from the levy is not significant and will have minimal impact on paint users. Greenpainters similarly submits that the potential price increase will have a minimal effect on member businesses and the broader painting industry.

- 4.76. Further, the ACCC considers that to the extent that consumers pay closer to the full (opportunity) cost of A&D paint, the price increase that may occur due to the levy is likely to signal a more (rather than less) efficient allocation of resources in the economy.
- 4.77. The ACCC also considers that the potential increase in the price of A&D paint can be offset, to some extent by the savings that may accrue to Victorian taxpayers, given that the waste paint collection scheme provides for the transfer of funding responsibility for the disposal of waste paint and containers from taxpayers to paint users.
- 4.78. That being said, the ACCC recognises that for paint users outside Victoria, the levy may simply increase the total price of paint without any corresponding increase in safe disposal or decrease in the cost of disposing of waste A&D paint. However the ACCC considers that this imbalance is limited by the short timeframe for which authorisation is sought and the small amount of the levy.

### **ACCC conclusion on public detriments**

- 4.79. The ACCC considers that the imposition of a uniform levy on the wholesale supply of A&D paint is unlikely to significantly impact competition at either the wholesale or retail levels of the supply chain. The ACCC notes that, for the duration of the trial, it is unlikely that alternative waste paint disposal schemes will develop in Victoria and competition from alternative waste paint recycling providers may be restricted. However, this potential detriment is limited because the trial is restricted to Victoria and is of limited duration. The levy may increase the price of paint, including for paint users outside Victoria, however the ACCC does not consider that this price increase would produce significant public detriment.

### **Balance of public benefit and detriment**

- 4.80. In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances the waste paint collection scheme is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.
- 4.81. In the context of applying the net public benefit test in section 90(8)<sup>20</sup> of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.<sup>21</sup>
- 4.82. The ACCC is satisfied that the waste paint collection scheme is likely to produce significant public benefits, specifically environmental benefits, allocative efficiencies, cost efficiencies and information benefits through the collection of data to facilitate the development of a national product stewardship scheme for paint.

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<sup>20</sup> The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

<sup>21</sup> *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

- 4.83. While the imposition of the levy may result in an increase in the price of A&D paint in Australia at both the wholesale and retail level, the ACCC notes that the price increase due to the levy is likely to be small compared to the total price of A&D paint. Further, the levy is otherwise unlikely to significantly impact competition for the sale of A&D paint at either the wholesale or retail levels.
- 4.84. The ACCC accepts that the imposition of a national levy to fund a Victorian waste paint collection scheme trial may produce inefficiencies. However the ACCC notes that moving to a national scheme should address the inefficiency resulting from the cross subsidisation and the detriment is limited by the small amount of the levy and the limited timeframe for which authorisation is sought.
- 4.85. The ACCC considers the public benefit that is likely to arise from the waste paint collection scheme will outweigh the likely public detriment. The ACCC is therefore satisfied that the relevant tests in sections 90 (5A), 90 (5B), 90(6) and 90 (7) are met.

### **Length of authorisation**

- 4.86. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>22</sup> 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 light of any changed circumstances.
- 4.87. In this instance, the APMF states that the waste paint collection scheme will commence on 1 July 2011 and that it seeks authorisation for 17 months, until 1 December 2012. The APMF advises that the additional period beyond the trial will allow it to continue the waste paint collection program in Victoria prior to the implementation of the national scheme and will facilitate the progressive roll-out to other states and territories..
- 4.88. The ACCC grants authorisation as requested by the APMF.
- 4.89. The ACCC notes that following the trial the APMF intends on expanding the waste paint collection scheme on a national basis. The APMF advises it will seek a further authorisation at that time.
- 4.90. As noted, the trial will provide an opportunity for the collection of data to assess, among other things, the effectiveness of the scheme and the appropriateness of the size of the levy. The ACCC considers that information collected through the trial will provide information to facilitate the development of a national product stewardship scheme for paint, particularly with regards to:
- the volume of waste A&D paint collected for proper disposal, particularly from trade users
  - the cost of the scheme compared to the amount collected through the levy
  - the effectiveness of promotional activities, to increase awareness among both domestic and trade paint users of their options for the proper disposal of waste A&D paint.

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<sup>22</sup> Section 91(1).

- 4.91. This data will be important to the ACCC's consideration of any future applications for authorisation the APMF may make in respect of the national scheme.

## **5. Determination**

### **The application**

- 5.1. On 12 October 2010 the Australian Paint Manufacturers Federation (APMF) lodged application for authorisation A91251 with the Australian Competition and Consumer Commission. The application was subsequently amended on 17 December 2010 and further changes to the timing of the trial were advised to the ACCC on 25 March 2011.
- 5.2. Application A91251 was made using Form B Schedule 1, of the Competition and Consumer Regulations 2010. The application was made under subsection 88(1A)/88(1) of the Act for authorisation for a waste paint collection scheme trial in Victoria, to be funded by a 2 cent per litre levy imposed on the wholesale sale of Architectural and Decorative (A&D) paint in Australia.

### **The net public benefit test**

- 5.3. For the reasons outlined in Chapter 4 of this determination the ACCC considers that in all the circumstances the conduct for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.
- 5.4. The ACCC therefore **grants** authorisation to application A91251.

### **Conduct for which the ACCC grants authorisation**

- 5.5. The ACCC grants authorisation for an agreement between the APMF and paint manufacturers to impose a 2 cents per litre levy on the wholesale supply of A&D paint in Australia to fund a waste paint collection scheme trial in Victoria.
- 5.6. The authorisation is in respect of the waste paint collection scheme as described in the APMF's application for authorisation, amended in subsequent correspondence. Any changes to the waste paint collection scheme during the term of the authorisation would not be covered by the authorisation.
- 5.7. The ACCC grants authorisation until 1 December 2012.
- 5.8. This determination is made on 20 April 2011.
- 5.9. The attachments to this determination are part of the determination.

### **Conduct not authorised**

- 5.10. The authorisation does not extend to the APMF or participants in the waste paint collection scheme to reach any other agreements with respect to the price of A&D paint.

### **Date authorisation comes into effect**

- 5.11. This determination is made on 20 April 2011. If no application is made to the Australian Competition Tribunal it will come into effect on 12 May 2011.

## **Attachment A — the authorisation process**

The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Competition and Consumer Act 2010* (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 for application A91251**

The following table provides a chronology of significant dates in the consideration of the application by the APMF.

<b>DATE</b>	<b>ACTION</b>
12 October 2010	Application for authorisation lodged with the ACCC
21 October 2010	ACCC seeks submissions from interested parties in relation to the application for authorisation
12 November 2010	Closing date for submissions from interested parties in relation to the substantive application for authorisation
17 December 2010	APMF amends application for authorisation
6 January 2011	ACCC seeks submissions from interested parties in relation to the amended application for authorisation
28 January 2011	Closing date for submissions from interested parties in relation to the substantive application for authorisation
14 February 2011	Last submissions from interested parties received by the ACCC
21 February 2011	APMF responds to submissions from interested parties
9 March 2011	Draft determination issued
9 March 2011	ACCC seeks submissions from interested parties in relation to the draft determination
16 March 2011	Statutory deadline for ACCC consideration of the application for authorisation extended to 12 May 2011
25 March 2011	Closing date for submissions from interested parties in relation to the draft determination
20 April 2011	Final determination issued

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

## Competition and Consumer Act 2010

### 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.<sup>23</sup>

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.<sup>24</sup>

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.<sup>25</sup>

## 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 future<sup>26</sup>

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<sup>23</sup> *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.

<sup>24</sup> *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.

<sup>25</sup> Section 91(3).

- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.<sup>27</sup>

## **Six- month time limit**

A six-month time limit applies to the ACCC's consideration of new applications for authorisation<sup>28</sup>. 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.<sup>29</sup> 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.<sup>30</sup>

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 conduct.

## **Revocation; revocation and substitution**

A person to whom an authorisation has been granted may request that the ACCC revoke the authorisation.<sup>31</sup> The ACCC may also review an authorisation with a view to revoking it in certain circumstances.<sup>32</sup>

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.<sup>33</sup> The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.<sup>34</sup>

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<sup>26</sup> Section 88(10)

<sup>27</sup> Section 88(6)

<sup>28</sup> Section 90(10A)

<sup>29</sup> Subsection 91A(1)

<sup>30</sup> Subsection 87ZD(1)

<sup>31</sup> Subsection 91B(1)

<sup>32</sup> Subsection 91B(3)

<sup>33</sup> Subsection 91C(1)

<sup>34</sup> Subsection 91C(3)