



Australian  
Competition &  
Consumer  
Commission

# Draft Determination

Application for revocation and substitution of  
authorisation A91105

lodged by

AgStewardship Australia Limited

in respect of

arrangements to impose a levy  
on the sale of agricultural  
and veterinary chemicals

Date: 2 December 2013

Authorisation number: A91382

Commissioners: Sims  
Rickard  
Cifuentes  
Court  
Walker

## Summary

The ACCC proposes to grant authorisation for five years to AgStewardship, on behalf of itself, its members, Agsafe Limited and current and future participants in the drumMuster® and ChemClear® programs, to impose a four cent per litre/kilogram levy on the sale of agricultural and veterinary chemicals. The levy is ultimately passed on to end users and is used to fund programs that provide for the collection of AgVet chemical containers and disposal of AgVet chemicals.

### Next steps

The ACCC will seek submissions in relation to this draft determination before making its final decision. The applicants and interested parties may also request the ACCC to hold a pre-decision conference to allow oral submissions on the draft determination.

AgStewardship is responsible for the governance of two voluntary Stewardship programs, drumMuster® and ChemClear® (the **Programs**). The Programs provide for the safe collection of empty AgVet chemical containers and the disposal of obsolete or unwanted AgVet chemicals. The Programs are subsidised by a four cent per litre/kilogram levy on the sale of AgVet chemicals which is passed on to users on the purchase of eligible containers.

The Programs operated by AgStewardship seek to achieve the avoidance, reduction, recycling and/or responsible disposal of unwanted crop protection and on-farm animal health products and containers. Since 1999 when the drumMUSTER program was first introduced, around 22 million containers have been collected. Around 387 tonnes of chemicals have been cleared as a result of the ChemClear program which has been operating since 2004.

The ACCC considers that the Programs are likely to continue to result in significant environmental and cost efficiency benefits. The size of the public benefits is likely to have increased during the past five years through greater participation by AgVet chemical manufacturers and suppliers and increased drum collections. The ACCC considers that the Programs result in minimal public detriment.

Authorisation of the arrangements imposing the levy have been in place since the Programs began and they continue to receive broad industry and government support. The ACCC proposes to re-authorise the arrangements for a further five years.

## The application for re-authorisation

1. On 27 August 2013, AgStewardship Australia Limited (**AgStewardship**) lodged an application for revocation of authorisation A91105 and substitution of A91382 (**re-authorisation**). The current authorisation (A91105) is due to expire on 12 February 2014.
2. AgStewardship has applied for re-authorisation on behalf of itself, its members, AgSafe Limited and current and future participants in two voluntary Stewardship Programs, drumMuster® and ChemClear® (the **Programs**), for making and giving effect to arrangements to impose a four cent levy per litre/kilogram on the supply of Agricultural and Veterinary (**AgVet**) chemicals (the **Arrangements**). The Programs provide for the collection of eligible empty AgVet chemical containers and chemicals.
3. Manufacturers and suppliers of AgVet chemicals voluntarily participate in the Programs and in doing so agree to impose a four cent levy per litre/kilogram on the supply of AgVet chemicals. The levy is passed through to end users in the final price of AgVet chemicals.
4. Manufacturers and suppliers of AgVet chemicals remit the proceeds of the levy to AgStewardship which uses the proceeds of the levy to fund the Programs.
5. AgStewardship seeks authorisation of the Arrangements under subsections 88(1A) and 88(1) of the *Competition and Consumer Act 2010* (the **Act**) as the Arrangements may potentially contain a cartel provision or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
6. AgStewardship seeks authorisation for a period of five years, until February 2019.

## Background

### The Applicant

7. AgStewardship is a not-for-profit organisation that developed, facilitates and funds the Programs to reduce and manage waste for Australia's agricultural sector. The members of AgStewardship are:
  - Croplife Australia Limited: an industry organisation representing the registered agricultural chemical and biotechnology (plant science) sector in Australia. It represents the innovators, developers, manufacturers, formulators and registrants of crop protection products and agricultural biotechnologies.
  - The Veterinary Manufacturers and Distributors Association Limited: an industry organisation representing manufacturers, importers, registrants and distributors of veterinary medicines and animal health products including labelling, quarantine, manufacturer's licensing, training and waste disposal.

- National Farmers' Federation Limited: is an agricultural representative group representing farmers, and more broadly, agriculture.
  - The Australian Local Government Association: is the national voice of local government, representing 560 councils across the country.
  - Animal Health Alliance (Australia) Ltd: is an animal health industry organisation representing the interests of registrants, manufacturers and formulators of animal health products.
8. Agsafe Limited is a subsidiary of CropLife Australia and runs industry stewardship services in Australia for the agricultural and veterinary sector.
  9. AgStewardship provided a list of 100 participants in the Programs with its application.

## Regulation of the agricultural and veterinary chemical industry

10. State and territory governments are responsible for the regulation of AgVet chemicals after they have been sold. The regulations cover basic training requirements for users, licensing of commercial pest control operators and ground and aerial spray operators, residue monitoring and arrangements that enforce the safe use of chemicals including the use of codes of practice, spray-drift guidelines and other user awareness raising initiatives.
11. In many Australian states, due to the potential risks to human health and the environment associated with AgVet chemicals and chemical containers, their handling and disposal is subject to specific approvals and conditions relating to their transport, handling and disposal. For example, in Queensland the *Environmental Protection (Waste Management) Regulation 2000* prohibits dumping of waste agricultural chemicals or containers, other than at approved waste management facilities.
12. In 1990, the Senate Select Committee inquiry on Agriculture and Veterinary Chemicals in Australia recommended that a national strategy for the safe and effective disposal of AgVet chemical containers be developed. Following this, in 1993 the Standing Committee on Environment Protection recommended that a team comprising of members of the Commonwealth, New Zealand, Victoria, New South Wales, Queensland and Western Australia develop a national strategy for the disposal of these containers.
13. In December 1997, the Australian and New Zealand Environment and Conservation Council issued a National Strategy for the Management of Unwanted Empty Farm Chemical Containers. The national strategy resulted in an Industry Waste Reduction Scheme (**IWRS**),<sup>1</sup> encompassing the Programs and the levy, with the aim of safely collecting and recycling cleaned chemical

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<sup>1</sup> The IWRS was developed by National Farmers Federation, CropLife, Animal Health Alliance, the Veterinary Manufacturers and Distributors Association and the Australian Local Government Association.

containers and collecting unwanted AgVet containers in compliance with relevant regulations.

## The Programs

14. The Programs are funded by a four cent levy on sales of AgVet chemical containers. The levy is passed through to farmers and other users of crop protection and on-farm animal health chemicals. AgStewardship submits that the purpose of passing the levy on to end users is to encourage the purchase of products that are packaged in returnable containers or water-soluble bags or boxed containers (which are not subject to the levy).
15. The funds collected are directed to subsidise the costs associated with the implementation of the programs, employment of regional consultants, reimbursement of councils and community groups for construction of compounds, container inspection, charges by processors to collect the containers and paying external contractors for ChemClear collections. The funds collected are also used in the promotion and communication of the Programs.

## drumMUSTER

16. The drumMUSTER program involves collection and recycling of used containers for crop production and on-farm animal health chemicals. Eligible non-returnable, metal and plastic containers are cleaned of residue by farmers and delivered to one of more than 780 collection sites across Australia. Around 22 million containers (about 26,700 tonnes of materials) have been collected since the program began in 1999. drumMUSTER receives funding as a result of the levy of four cents per litre or kilogram on participating AgVet chemicals, which is managed by AgStewardship. Daily operation of the program is delivered by Agsafe Limited on behalf of AgStewardship.
17. The collection operations of the program (as administered by Agsafe), rely on the support of local government and other collection agencies. Currently there are approximately 455 collection agencies around Australia, including 366 councils and shires.

## ChemClear

18. The ChemClear program involves collection and disposal of unwanted crop production and veterinary chemicals. It provides a safe and convenient method of disposal for chemicals that may have accumulated on properties over many years. ChemClear focuses on obsolete chemicals which may become unwanted because they are out of date or superseded; are no longer used as a result of changes in cropping and animal management practices or regulation; or when a property changes hands. The ChemClear program has collected close to 387,000 litres/kg of hazardous Group 1 and Group 2<sup>2</sup> agricultural chemicals

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<sup>2</sup> Group 1 chemicals are registered AgVet chemicals manufactured by companies supporting the Industry Waste Reduction Stewardship initiative. Group 2 chemicals are those chemicals that

since it began in 2003. ChemClear also receives funding through proceeds from the levy of four cent per litre or kilogram and is also delivered by Agsafe Limited on behalf of AgStewardship.

## Previous authorisations

19. The drumMUSTER program has been authorised (A30194) by the ACCC since September 1998. drumMUSTER commenced operation in 1999, funded by the four cent per litre/kilogram levy on the sale of AgVet chemicals. ChemClear began operating in July 2004 under an extended producer responsibility charter and was subsequently incorporated into the IWRS, to which the ACCC granted authorisation A90963 in March 2005.
20. Most recently, on 21 January 2009, the ACCC granted authorisation A91105 for AgStewardship to charge the four cent per litre/kilogram levy on the manufacturers and suppliers of agricultural and veterinary chemicals for a period of five years. Subsequently, on 9 June 2011, the ACCC decided to vary authorisation A91105 to expand the definition of “containers” which are accepted under the Programs.

## Submissions received by the ACCC

21. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process.
22. The ACCC sought submissions from around 115 interested parties potentially affected by this application, including AgVet chemical manufacturers, suppliers, distributors and retailers, State, Territory and Commonwealth agencies and agricultural and veterinary industry associations. A summary of the public submissions received from AgStewardship and interested parties follows.

## AgStewardship

23. Broadly, AgStewardship submits that the programs provide an effective, national mechanism for safe collection, disposal and recycling of chemical containers and unwanted or waste AgVet chemicals. AgStewardship submits that no natural market exists that would otherwise deal with this waste and its associated environmental and health and safety impacts. AgStewardship submits that in its experience with the programs, the value of the material collected across vast distances has never been sufficient to sustain a market-led process and hence the need for product stewardship.

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are no longer registered, unknown, unlabelled, out of date, or mixed AgVet chemicals. A fee per lt/kg applies for disposal of Group 2 chemicals unless a state government subsidy is in place.

## Interested parties

24. Submissions were received from 13 interested parties supporting the application. The submissions are summarised below:

- Department of Environment: submits that unwanted stocks of AgVet chemicals and containers can pose serious risks to the environment and human health if disposed of improperly. The Programs have made a positive environmental impact and the Department recognises the benefits of the Programs as mechanisms that ensure an increasing proportion of waste AgVet chemicals and their containers are disposed of appropriately.
- Department of Environment and Primary Industries (Victoria): submits that the Programs reduce the potentially negative side effects to the environment, public health and safety from the use of AgVet chemicals. Without the Programs, alternative practices of stockpiling, disposing to landfill and burying containers and hazardous chemicals could increase.
- Zero Waste SA<sup>3</sup>: submits that the Programs are highly beneficial and can deliver on-going environmental and health and safety benefits that significantly offset any public detriment. Zero Waste SA submits that the ideal solution rests largely in the development of extended producer responsibility (**ERP**) arrangements, where the manufacturer accepts some responsibility (including financial) for its product throughout its lifecycle including at end of life.
- Department of Environment & Heritage Protection (Qld): supports the application.
- Department of Environment Regulation (WA): supports the application and submits that the Programs reduce the incidence of agricultural waste being presented at hazardous household waste collection points, and hence reduces public costs.
- Growcom<sup>4</sup>: submits that its members make regular use of the Programs, and consider the benefits generated by the Programs to be substantial and necessary, outweighing any public detriment.
- Australian Dairy Farmers: submits that the Programs are the most significant environmental stewardship programs available for the farming sector. Chemical container waste and chemical waste pose a high environmental risk in rural areas and the Programs provide the only opportunity to safely collect and dispose of this waste. The levy imposed is fundamental to the design and success of the programs.
- Runge Agrichems Pty Ltd: supports the application as the Programs are well managed and run, important to industry, end-users and the environment.

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<sup>3</sup> Zero Waste SA is a South Australian state government organisation which enables people to improve their recycling and waste avoidance practices, whether at home, at work or in industry.

<sup>4</sup> Growcom is the voice for Queensland fruit and vegetable growers, championing the profitable and sustainable future of Queensland horticulture industry through effective agri-political representation and service delivery.

- GrainGrowers<sup>5</sup>: submits that the Programs allow the agricultural and AgVet industry, in partnership with grain growers and government, to self-regulate and address and issue that the market currently cannot address. In their absence there would remain no industry-led mechanism for the safe and environmentally sound collection of the relevant container and waste chemicals. As a result, AgVet chemical users would be required to fund and arrange their own disposal - costs associated with this would quickly escalate from four cents per litre/kilogram and there would be increased chances of more containers going to landfill or disposed on-farm.
- Animal Health Alliance and CropLife Australia Limited: are both members of the Industry Waste Reduction Scheme (**IWRS**), which saw the introduction of the Programs. They submit that it conducted a significant review of the Programs over the last 12-18 months and is confident that the significant benefits the Programs deliver to the livestock and companion animal industry and community more broadly provide a solid basis for re-authorisation.
- National Farmers' Federation: is also a founding member of IWRS. It submits that the continued growth in participation by manufacturers, suppliers and farmers is testament to the growing need for programs such as these. It submits that more suppliers and containers are now covered by the Programs than at the time of the last authorisation in 2009.
- Department of Agriculture and Food, WA: noted that access to AgVet chemicals is important to agricultural industries in Western Australia and that this can only continue if the chemicals are transported, stored, handled and used responsibly. The Department acknowledged that the Programs resulted in the safe disposal of 388 tonnes of unwanted chemicals and the diversion of 75% of packaging away from landfill.

25. In addition to the above submissions supporting the re-authorisation application, a submission was received from The Weed's Network requesting that the ACCC consider imposing conditions on any re-authorisation to increase the benefits of the programs. These submissions and AgStewardship's responses are detailed from paragraph 50 below.

26. The views of AgStewardship and interested parties are considered in the evaluation chapter of this draft determination. Copies of public submissions may be obtained from the ACCC's website [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

## ACCC evaluation

27. The ACCC's evaluation of the Arrangements is in accordance with the relevant net public benefit tests<sup>6</sup> contained in the Act. In broad terms, under the relevant tests the ACCC shall not grant authorisation unless it is satisfied that the likely benefit to the public would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result.

<sup>5</sup> GrainGrowers is an independent, member-based, grain producer organisation in Australia.

<sup>6</sup> Subsections 90(6), 90(7), 90(5A) and 90(5B). The relevant tests are set out in Attachment A.

28. In order to assess the effect of the Arrangements and the public benefits and detriments likely to result, the ACCC identifies the relevant areas of competition and the likely future with and without the conduct that is the subject of the authorisation.
29. AgStewardship submits the relevant areas of competition are:
- the manufacture and wholesale supply of AgVet chemicals;
  - the distribution and sale of AgVet chemical products in Australia; and
  - the collection and recycling particularly of AgVet chemical waste.
30. These areas of competition are consistent with the ACCC's view during previous assessments of earlier applications and the ACCC agrees that these remain the most likely areas of competition relevant to the application for re-authorisation.

## The future with and without

31. The ACCC considers the likely future with-and-without the conduct to identify and weigh the public benefit and public detriment generated by conduct for which authorisation has been sought.<sup>7</sup> The ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future with the conduct to those generated without the conduct.
32. AgStewardship submits that there are currently no programs in place that assist individual farmers in the same manner or coverage as the Programs. As a result, AgVet chemical users would be required to fund and arrange their own disposal of AgVet chemical containers if the Programs were not available. Considering the vast landmass of rural Australia, AgStewardship submits that costs to individual end-users of disposal would quickly escalate from four cents per litre/kilogram, and in many places be economically unviable for either chemical users or waste disposal services.
33. AgStewardship further submits that in such a situation it is likely that the past practices of stockpiling, disposing to landfill, burying and even burning containers and/or hazardous chemicals would resume.
34. The Australian Dairy Farmers submits that the levy is fundamental to the design and success of the Programs and without the levy the Programs would fail.
35. The ACCC notes that the Programs have been authorised for the past 15 years. A number of national and state regulations have been in place prior to and during the life of the Programs, including for the disposal of AgVet chemicals and chemical containers. These regulations, and consequential obligations on AgVet chemical manufacturers, suppliers and end-users regarding disposal, would remain in place with or without the Programs.
36. However, prior to the introduction of the Programs, the Senate Select Committee on Agricultural and Veterinary Chemicals in Australia concluded that

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<sup>7</sup> See *Re Medicines Australia Inc* [2007] ACompT 4 at [120].

it was apparent that some users of agricultural chemicals were not disposing of containers responsibly, despite existing regulations requiring appropriate disposal.<sup>8</sup> The Committee noted concerns that containers were being disposed of inappropriately at the end-user's property, or when they were being delivered to local waste facilities, those facilities were often unattended leaving the local government staff unable to police appropriate disposal. Evidence at the time suggested that additional or stricter regulations would not solve the problems associated with disposal and that alternative strategies for disposal were needed. The recommendations of that Committee ultimately resulted in the introduction of the Programs to provide greater support to end-users (including through collections and disposals services).

37. The ACCC considers that in the absence of continued authorisation for the imposition of the levy to subsidise the Programs, AgStewardship is likely to discontinue the services offered by the Programs. In turn, collection agencies that rely on Program funding to sustain their AgVet chemical and container collection activities are likely to review their service offering. Some may decide to scale back or cease offering collection services for AgVet chemicals and containers. Others may continue but move to a user pays system, which would increase the cost penalty to users who dispose of their AgVet chemicals and containers at these facilities compared with more environmentally damaging disposal methods.
38. The ACCC considers that in the absence of the Programs, the higher cost and/or inconvenience due to difficulties in accessing appropriate collection services involved in responsibly disposing of chemicals and chemical containers in accordance with existing regulations may lead to greater incidents of environmentally damaging (including illegal) disposal, as was the case prior to the Programs being implemented.
39. On balance, the ACCC accepts that without the Programs, at least in the short to medium term, it is likely that the market would achieve lower collection rates than those achieved with the Programs.

## **Public benefit**

40. In brief, AgStewardship submits that the Programs deliver environmental and cost efficiency public benefits and that these public benefits have increased during the last five year term of authorisation.

## **Environmental benefits**

41. AgStewardship submits that the Programs result in public benefits because they continue to provide for the recycling of AgVet chemical containers and safe disposal of AgVet chemicals. Without the Programs there would be a significant increase in the disposal of containers to landfill, the burial of containers on farm land or, in some instances, illegal burning of containers. There would also be an increase in the stockpiling of unwanted hazardous AgVet chemicals because no

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<sup>8</sup> Report of the Senate Select Committee on Agricultural and Veterinary Chemicals in Australia, July 1990, p.219.

other safe, national disposal pathway is currently available to end users. AgStewardship further submits that the Programs are designed to address negative consequences, including environmental and health and safety costs, arising from the improper disposal of waste container packaging and unwanted chemicals.

42. As outlined at paragraph 24, interested parties continue to support the Arrangements and generally submit that the Programs have been successfully implemented. In particular:
- The Department of Environment submits that “Unwanted stocks of AgVet chemicals and containers can pose serious risks to the environment and human health if disposed of improperly. The two schemes have made a positive environmental impact...”
  - The Department of Environment and Primary Industries submits that “The ChemClear and drumMUSTER programs implemented by AgStewardship reduce the potentially negative side effects to the environment, public health and safety from the use of AgVet chemicals.”
  - Australian Dairy Farmers submits that the Programs provide the only opportunity to safely collect and dispose of AgVet waste.
  - GrainGrowers submits that in the absence of the Programs there would remain no industry-led mechanism for the safe and environmentally sound collection of the relevant container and waste chemicals and there would be increased chances of more containers going to landfill or disposed on-farm.
43. The ACCC considers that, absent AgStewardship’s Programs, there is potential for significant volumes of AgVet chemical waste to be improperly handled or disposed of (for example from on-farm storage, burning or burying), which results in damage to the environment. The ACCC considers that AgStewardship’s chemical waste and container recovery Programs provide benefits to end-users of (mostly) pre-paid collection and disposal services and some end-users with a more accessible service than they would be likely to obtain in the absence of the Programs. The ACCC considers that the Programs, subsidised by the levy, have therefore resulted in significant environmental benefits and are likely to continue to do so.

## **Improved cost efficiencies**

44. AgStewardship claims that the Programs represent a successful industry-led and voluntary stewardship arrangement. They operate on a user-pays basis and offer efficiency benefits compared to a regulated approach in terms of business compliance costs and effective use of publicly funded resources.
45. The ACCC understands that, while the most utilised collection method under the Programs involves users taking their rinsed containers and waste chemicals to local government managed collection sites, the Programs also offer more tailored collection methods that may better suit the needs of some users. For example, AgStewardship conducts remote area collections by coordinating with station properties to aggregate stockpiles at neighbouring farms and arranging

for collections via a dedicated truck run. drumMUSTER also works with aerial sprayers and provides on-farm collections where the volume of drums is high.

46. The ACCC considers that, to the extent that AgStewardship is able to identify and arrange more convenient and/or lower cost collection methods for some users, the conduct may reduce the overall cost these users incur to comply with regulatory obligations. The conduct may also reduce the cost incurred by governments to enforce compliance with regulations by those users. The ACCC recognises that any such cost efficiencies arising from the Programs represent a further source of public benefit.

## Improvements to the Programs

47. At the time of the ACCC's previous consideration of AgStewardship's authorisation, in 2008/09, AgStewardship submitted that it was developing strategies, and allocating resources, to ensure greater success of the Programs.
48. AgStewardship currently submits that over the last five years the Programs have resulted in increased public benefits through the increase in return rates and number of drums collected through drumMUSTER, and the use of ChemClear as a safe disposal path for unwanted or obsolete hazardous AgVet chemicals.
49. AgStewardship further submits that over the last five years the Programs have resulted in improvements in outcomes including:
- Increased participation by AgVet chemical manufacturers and suppliers – since the last authorisation the number of participants has increased from 72 to 100;<sup>9</sup>
  - Increased drum collection – since 2008/09 around 10.4 million containers were returned to drum MUSTER, compared to approximately 7.6 million containers for the five year authorisation period prior to that;
  - Consistently higher return rates under the drumMUSTER program, which have averaged over 50% on a per drum basis (20 litre equivalent), compared with approximately 40% at the time of the last authorisation;
  - By August 2013 a total of 387,000 kilograms of chemicals had been collected under the ChemClear program since it commenced in 2004 (this represents 267,512 kilograms of chemicals collected over the last five year period, compared with 119,488 kilograms collected between 2004 and 2008);
  - Increased convenience and access via a larger number and variety of sites and models for increased collections, including more peri-urban (or urban fringe) collections. drumMUSTER now operates 781 collection sites around Australia compared with 703 sites five years ago. This includes growth of urban fringe sites from approximately 10 sites in 2008 to 39 currently.

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<sup>9</sup> Noting the changing dynamics within the industry, AgStewardship estimates this accounts for approximately 90 percent of the market.

50. The Weed's Network submitted that re-authorisation should be conditional on improvements to the Programs including:
- 50% of the total levy collected being allocated to a suitably qualified service provider (for example, The Weed's Network) for the purposes of researching and implementing strategies to reduce the number of drums collected and to reduce the amount of hazardous chemicals being distributed in the containers.
  - Identification and implementation of methods for cleaning empty containers that avoid contaminating the cleaning site and/or surrounding environ, such as waterbodies, dams, or farm household buildings.
  - Development of guidelines to ensure that cleaning does not result in chemicals being mixed during the cleaning process to create even more hazardous by-products as a number of commonly used AgVet chemicals are known to increase in toxicity when combined.
51. AgStewardship responded that The Weed's Network identifies issues that are outside the scope of the AgStewardship application for authorisation. AgStewardship submits that it does not have a mandate to eradicate the use of AgVet chemicals, nor could it. Rather AgStewardship's aim is to avoid and reduce waste, which it achieves by providing a mechanism for the safe disposal of AgVet chemicals and containers, including providing training and guidelines for the safe cleaning of containers. AgStewardship also submits that diverting the levy income in the way suggested would not be appropriate because it is not the purpose of the levy and to do so may jeopardise voluntary participation.
52. The ACCC notes that AgStewardship continues to maintain communication and education programs including websites relating to the Programs that provide end-users with information about how to participate in the programs and limit the potential for environmental damage on their properties and surrounding environ. For instance, the drumMUSTER website educates end-users regarding appropriate methods for on-farm cleaning of empty containers before they are collected.<sup>10</sup>
53. In relation to the cleaning of containers required by AgStewardship before containers can be handed in for disposal at the collection site, AgStewardship submits that this is most appropriately undertaken by end-users at their property. AgStewardship submits that collection sites do not necessarily have facilities to clean the containers and manage the unknown chemicals contained in the containers.
54. Based on current information, the ACCC considers that the Programs are unlikely to materially reduce collection agency incentives to offer value added services that complement the Programs. For instance, if there is sufficient demand by farmers for off-farm drum rinsing, collection sites may wish to offer this service on a user-pays basis.

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<sup>10</sup> <http://www.drummuster.com.au/container-recycling/rinsing-standards/>, accessed 13 November 2013.

55. Overall, the ACCC considers that the Programs continue to result in a public benefit, and that the extent of public benefit is likely to be larger than in previous authorisations by virtue of the increased scale of the Programs.
56. The ACCC encourages AgStewardship to continue to incorporate improvements to the Programs, including strategies to minimise on-farm contamination caused by rinsing of containers.

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

57. The Programs, including the levy, have been in place since 1999. Interested parties are supportive of the Programs and consider that the Arrangements have delivered positive environmental outcomes.
58. The ACCC considers that the Programs, facilitated by the four cent levy per litre/kilogram on AgVet chemicals are likely to continue to result in significant public benefits in the form of environmental and cost efficiency benefits. The ACCC considers that the public benefits flowing from the Programs are likely to have increased during the past five years through greater participation by AgVet chemical manufacturers and suppliers and increased drum collections.

### **Public detriment**

59. Agreements between competitors which influence the pricing decisions of market participants have the potential to result in allocative inefficiencies. That is, they can move prices away from levels that would be set in a competitive market. This can result in higher prices for consumers and send market signals which direct resources away from their most efficient use
60. In this instance, the signatories of the Programs have agreed on a price for the levy of four cents per litre/kilogram to charge end users for the disposal of AgVet chemical containers.
61. The ACCC's assessment of the likely public detriments follows.

### **Increased prices for end-users**

62. AgStewardship submits that the public detriment arising from the conduct is that end-users are required to pay a small levy on participating AgVet chemical containers. AgStewardship submits that the levy is negligible in size and only leads to a small increase in cost to the consumer relative to the total cost of the packaged chemical. AgStewardship further submits that this increase covers the externality cost of addressing the waste arising from using the AgVet chemicals, which otherwise would not be reflected in the market price.
63. The levy totals 80 cents for the most commonly purchased container size of 20 litres. AgStewardship submits that 80 cents is a very small component of the total cost of AgVet chemicals. Although the purchase price of packaged chemicals varies significantly, AgStewardship provided examples of:

- \$130 for 20 litres of 360 Glyphosate (where the four cent levy would account for 0.6% of the purchase price); and
  - between \$549 and \$869 for sheep drenches (where the four cent levy would account for less than 0.1% of the purchase price).
64. Grain Growers submits that in the absence of the four cent levy AgVet chemical users would be required to fund and arrange their own disposal of AgVet chemical containers. In such a scenario it can be expected that costs to end-users of the disposal would quickly escalate from four cents per litre/kilogram.
65. The ACCC notes that the imposition of a levy is likely to result in a small increased cost to end users of AgVet chemicals however it is very small relative to the total cost of the product. The ACCC also notes that the quantum of the levy has remained unchanged at four cents per litre/kilogram since its commencement in 1999.
66. The ACCC considers that the proceeds from the levy subsidise the Programs that seek to address the negative environmental effects which may otherwise result if there is no collection service provided by the Programs. Further, to the extent that end-users pay closer to the full (opportunity) cost of AgVet chemicals, the price increase due to the levy is likely to signal a more (rather than less) efficient allocation of resources in the economy.

### **Inability for some users to access the service**

67. The ACCC notes that in its 2009 determination concerns were raised that some end users (i.e. users of AgVet chemicals) were required to pay the levy (as passed on by manufacturers and suppliers) but were unable to access the service (i.e. the recycling of containers or the collection of chemicals) due to their location.
68. AgStewardship submits a continuing challenge it faces is to achieve broader access to the Programs across Australia. AgStewardship submits that increased access and participation will continue to improve the effectiveness and enhance the public benefit resulting from the Programs.
69. Given the vast majority of demand for the Programs comes from rural Australia, AgStewardship submits that over the last five years it has expanded metro and urban fringe collections sites only where justified by demand. AgStewardship submits that it has increased urban fringe collection sites from 10 sites in 2008 to 39 currently. AgStewardship submits that more metropolitan golf clubs and councils, for example, can now access the Programs for their AgVet chemicals and containers.
70. In 2009, in relation to this issue, the ACCC concluded that:
- ...while some AgVet chemical users will be required to pay a levy for a scheme that they are unable to utilise, any detriment that may be caused by the inability for some users to fully access the Programs is likely to be limited.<sup>11</sup>

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<sup>11</sup> Paragraph 5.23, ACCC Determination, 21 January 2009

71. The ACCC notes that no submissions have been received raising concerns regarding this issue during the current application for re-authorisation. Given the expansion of the Programs to more sites since 2009, and that the size of the levy relative to the overall cost of AgVet chemicals is small, the ACCC continues to view any detriment arising in this regard to be limited.

### **Inability of some users to access the ChemClear program without further cost**

72. The ACCC notes that in its 2009 determination concerns were raised by some parties that there were disincentives for users of certain chemicals to offer them for collection and destruction, and instead dispose of them in unsafe ways.<sup>12</sup>

73. AgVet chemicals fall into one of two categories:

- Group 1 chemicals are registered AgVet chemicals manufactured by members of the Programs.
- Group 2 chemicals include AgVet chemicals whose registration expired more than two years ago, manufacturers who are not participating in the Programs and chemicals that are unknown, unlabelled or mixed rural chemicals.

74. Group 1 chemicals are eligible for collection and disposal at no additional cost under the ChemClear program, while Group 2 chemicals have no collection costs (as these are subsidised by ChemClear) but purchasers are required to pay for the cost of disposal.

75. The concerns raised in 2009 related to Group 2 chemicals because purchasers of these chemicals have to pay for the cost of their disposal.

76. Zero Waste SA submits that costs imposed on farmers for disposal of Group 2 chemicals can be a significant barrier to farmer participation in the ChemClear program. Given the object of ChemClear is to facilitate the responsible removal and disposal of agricultural and veterinary chemicals, measures to further increase levels of participation should be a key feature of this scheme into the future and may warrant consideration of increased industry funding to underpin that program.

77. AgStewardship acknowledges the potential for hazardous chemicals and containers to be disposed of inappropriately if no convenient and accessible means of disposal exists. However, AgStewardship submits that the Programs provide those means.

78. AgStewardship acknowledges that not all industry participants participate in the Programs, but AgStewardship's aim is to continue to increase the number of participants. AgStewardship submits that it has successfully pursued this aim over the past five years (for instance with the growth in participating manufacturers and suppliers from 72 to 100, reflecting up to 90 percent of the

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<sup>12</sup> Paragraph 5.26, ACCC Determination, 21 January 2009

market). AgStewardship submits that it has also increased the number of collection agencies and sites and built awareness through education.

79. The ACCC considers that AgStewardship is encouraging greater participation by manufacturers and suppliers with 28 additional manufacturers and suppliers joining the Programs over the last five years. The ACCC therefore considers that this is likely to broaden access to additional consumers who will now also be paying the levy and becoming eligible for free access to the collection and disposal service offered by the ChemClear program for Group 1 chemicals.
80. The ACCC notes also that AgStewardship is taking steps to increase awareness of the Programs (including ChemClear) which may encourage end users to request collection of their Group 1 chemicals before they fall into the Group 2 category and attract an additional fee. Use of ChemClear appears to be growing with 267,512 kilograms of chemicals collected over the last five year period, compared with 119,488 kilograms collected between 2004 and 2008.
81. No submissions have raised concerns regarding this issue during the current application for authorisation. Given this and the apparent expansion of the Programs to more sites and more participants since 2009, the ACCC continues to view any detriment arising in this regard to be limited.

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

82. The ACCC considers that detriment likely to result from the Programs is minimal.
83. A small amount of detriment may result as some consumers may not be able to access the Programs (i.e. due to their location). In addition, where consumers have purchased chemicals that were formerly covered by the Programs (i.e. Group 1) and for which the levy has been paid, but which have since fallen into Group 2, a small amount of detriment may result as those consumers will have to pay for disposal of these chemicals. The ACCC notes in relation to the access issues that it appears that these detriments have been reduced since the time of the previous authorisation due to increased number of collection sites and increased participation rates of suppliers and manufacturers.

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

84. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed arrangement is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.
85. The ACCC is satisfied that the proposed Arrangements are likely to generate public benefits in the form of significant environmental and efficiency benefits. The ACCC considers that the proposed Arrangements are likely to result in limited public detriments.
86. On balance, the ACCC considers the public benefit is likely to outweigh the public detriment.

## Length of authorisation

87. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>13</sup> This allows the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
88. In this instance, AgStewardship seeks authorisation for five years.
89. Given that authorisation for the levy has been in place since 1998 and the Programs continue to receive broad support, the ACCC proposes to grant authorisation in respect of the proposed Arrangements for a period of five years.

## Draft determination

### The application

90. Application A91382 was made using a Form FC.
91. The application seeks authorisation under subsections 88(1) and 88(1A) of the Act to make and give effect to Arrangements between AgStewardship, its members, Agsafe Limited and current and future participants of the Programs to impose a four cent levy per litre/kilogram on the sale of AgVet chemicals, as they may contain a cartel provision or may have the purpose or the effect of substantially lessening competition within the meaning of section 45 of the Act.<sup>14</sup>
92. Participants of the Programs (i.e., manufacturers and suppliers of AgVet chemicals) voluntarily participate in the Programs and in doing so agree to impose a four cent levy per litre/kilogram on the supply of AgVet chemicals. The levy is passed through to end users in the final price of AgVet chemicals.
93. Subsection 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

### The net public benefit test

94. For the reasons outlined in this draft determination, the ACCC is satisfied pursuant to sections 90(5A), (5B), (6) and (7) of the Act that in all the circumstances the Arrangements for which authorisation are sought are likely to result in a public benefit that would outweigh the detriment to the public

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<sup>13</sup> Subsection 91(1).

<sup>14</sup> The initial authorisation (A91105) was made under subsection 88(1) of the *Trade Practices Act 1974* (Cth) (now the CCA). With the introduction of the cartel provisions into the CCA, transitional provisions were introduced to cover authorisations of agreements that may contain cartel provisions. (See Division 1 of Part XIII of the Act).

constituted by any lessening of competition arising from making or giving effect to such Arrangements.<sup>15</sup>

## **Conduct for which the ACCC proposes to grant authorisation**

95. The ACCC proposes to grant authorisation to AgStewardship, its members, AgSafe Limited and current and future participants of the Programs to make<sup>16</sup> and give effect to Arrangements to impose a four cent per litre/kilogram levy on the sale of agricultural and veterinary chemicals for a period of five years.
96. The ACCC notes that should AgStewardship wish to change the Arrangements including the quantum of the levy during this time, it would need to seek authorisation for such a change.
97. This draft determination is made on 2 December 2013.

## **Further submissions**

98. The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.

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<sup>15</sup> Subsections 90(7) and 90(5B). The relevant tests are set out in Attachment A.

<sup>16</sup> Only with respect to future participants in the Programs.

## Attachment A - Summary of relevant statutory tests

**Subsections 90(5A) and 90(5B)** provide 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 subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 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 subsection 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.

**Subsections 90(6) and 90(7)** 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 subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 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 subsection 90(7) has resulted or is likely to result from giving effect to the provision.