Draft Determination

Application for revocation of authorisation A91256 and substitution of new authorisation

lodged by

Refrigerant Reclaim Australia Ltd

in respect of

its refrigerant recovery scheme

Date: 22 March 2016

Authorisation number: A91515

Commissioners: Schaper
Cifuentes
Featherston
Keogh
Walker

Summary

The ACCC proposes to grant conditional re-authorisation to Refrigerant Reclaim Australia and others to continue to operate a scheme to recover ozone-depleting and synthetic-greenhouse-gas refrigerants. Re-authorisation would be subject to conditions that RRA continue to publish certain information about the scheme's effectiveness on its website.

The ACCC proposes to re-authorise the conduct for a further five years.

The ACCC will seek submissions in relation to this draft determination before making its final decision.

The application for authorisation

1. On 12 October 2015 Refrigerant Reclaim Australia Ltd (RRA) lodged with the Australian Competition and Consumer Commission (ACCC) an application for revocation of authorisation A91256 and its substitution with a new authorisation, A91515 (re-authorisation).[1]

2. RRA is seeking re-authorisation, for five years, to continue to operate a scheme to recover ozone-depleting (OD) and synthetic-greenhouse-gas (SGG) refrigerants, which are then destroyed. The current authorisation expires on 31 May 2016.

3. In particular, RRA seeks re-authorisation for discussion and agreement by various industry participants (the RRA Board) to:

    - set, and for importers to consistently apply, a levy of $2 a kilogram in addition to the price of OD and SGG refrigerants imported into, or manufactured and sold in, Australia (the current authorisation extends to discussion and agreement to potentially reduce, but not increase, the levy)

    - determine the value of rebates to be paid by RRA to wholesalers and to contractors, for the return of recovered refrigerant and

    - determine the processes and disposal practices that will be applied to recovered refrigerant.

    (the Conduct)

4. The application is made on behalf of RRA, its directors and members and those companies and persons that have entered into agreements with RRA, including:

    - 17 bulk refrigerant importers

    - 1062 importers of equipment containing refrigerant and

[1] Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010* (the CCA). Applicants seek authorisation where they wish to engage in conduct which is at risk of breaching the CCA but nonetheless consider there is an offsetting public benefit from the conduct. Detailed information about the authorisation process is available in the ACCC's *Authorisation Guidelines* at **www.accc.gov.au/publications/authorisation-guidelines-2013**

- 30 wholesalers whose approximately 400 businesses and branches take back and handle recovered refrigerant for collection by RRA.

Background

5. Refrigerants are cooling substances. Those most relevant to this application are the chlorofluorocarbons (CFCs), hydrofluorocarbons (HFCs) and hydrochlorofluorocarbons (HCFCs) used in refrigeration and air-conditioning equipment.

6. In its submission about the application for re-authorisation, the Australian Government Department of the Environment (the Department of the Environment) explains that certain such refrigerants are particularly harmful to the environment when released to the atmosphere. Many deplete the earth's ozone layer, which absorbs ultraviolet solar radiation, and / or are 'greenhouse' gases that can contribute to global warming.

7. The Department of the Environment states that one of Australia's key approaches to this problem is to minimise emissions of these refrigerants. Under the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (Cth) (the OPSGGM Act), the Department of the Environment administers a program to regulate the importation, exportation, manufacture and domestic handling of such refrigerants. For example, it is an offence to act in a way that results in the unlawful discharge of fluorocarbon refrigerants.

8. To avoid emission into the atmosphere, refrigerant can be 'recovered' from equipment and be:

    - reclaimed – cleaned to be returned to virgin quality and then re-used (this requires considerable equipment and few companies in Australia currently provide this service)

    - recycled – cleaned to a lesser degree (for example, removing oil and water contaminants, which a number of contractors can do) and put back into equipment or

    - stored or, more likely, destroyed. RRA's principal activity is to arrange for the collection of recovered refrigerant and its destruction (RRA contracts the destruction of refrigerants it collects to third parties).

9. The Department of the Environment advises that the OPSGGM Act requires the appropriate 'end-of-life' management of refrigerants. That is, when the refrigerants are no longer wanted or usable (including not reclaimable or recyclable).

10. RRA states that all importers of OD and SGG refrigerants, both in bulk and pre-charged (installed) in equipment, must have an import licence from the Department of the Environment, a condition of which is that the licensee takes responsibility for the end of life management of the refrigerant it imports by participating in a product-stewardship scheme. The Department of Environment notes that RRA is currently the only product-stewardship scheme for the recovery and destruction of OD and SGG refrigerants in Australia.

11. RRA's principal activity is to arrange for the collection and then destruction of refrigerant at 'end of life' (of the refrigerant, as opposed to the equipment it is in).

Refrigerant at this point could also be described as unwanted or unusable. For example, it may be a redundant or phased-out technology with no current appealing uses or so contaminated that it is not viable or attractive to reclaim or recycle.

12. In its earliest years in the 1990s, RRA also reclaimed refrigerant for supply back to the market. In its 2010 application for re-authorisation, RRA sought to expand the then scope of the scheme to recommence reclaiming refrigerant for reuse and the ACCC granted authorisation for this expansion. RRA has not reclaimed any refrigerant for re-use over the life of the current authorisation; and it has advised that it has no current plans for being involved in reclamation. However, RRA has again sought re-authorisation for industry participants to discuss and agree on the option of reclaiming and selling recovered refrigerant. It advises that it wants to keep this option open, to seek to defray future costs if required.

13. RRA states that thus far all importers have chosen to participate in the RRA scheme and to contribute the levy. As noted, RRA is the only scheme of its kind operating in Australia. However, RRA advises that there are no exclusivity provisions in RRA's contracts with participants. A participant could use another scheme instead of, or in conjunction with, the RRA scheme (if one were to be developed and registered with the Department of the Environment).

14. On behalf of the Australian Government, a separate body, the Australian Refrigeration Council (ARC), administers refrigerant handling licences and refrigerant trading authorisations for professionals in the refrigeration/air-conditioning and auto industry. ARC states that its mission is to reduce direct and indirect greenhouse gas and ozone depleting substance emissions through licensing, compliance and education. ARC states that the trading authorisations it administers are subject to conditions and auditing processes designed to minimise the risk of emissions while refrigerant is in a business' or individual's possession.[2]

The RRA scheme

The levy

15. Importers pay a $2-per-kilogram levy to RRA on the import and sale of new refrigerant in Australia; and then recover the value of the levy by adding a matching $2-per-kilogram fee to the price of new refrigerant sold into the distribution chain. RRA explains that the fee may appear as a separate line item on an invoice (for, say, bulk refrigerant). Importers of equipment containing refrigerant (such as cars with air-conditioners) usually do not display the levy but effectively include it in the equipment's price. RRA considers that, since the scheme's conception, a core part of the arrangement has been that the members agree the rate of the levy and then agree to pass that cost down the supply chain at that same rate, without a 'margin' or mark-up. RRA advises that it will not increase the levy in the next five years and it is not seeking authorisation to do so in its current application.

16. Prices paid for the relevant refrigerants can vary significantly, based on supply, demand and regulatory settings, and can range from around $5 a kilogram to more than $100 a kilogram. Therefore, the $2 levy can be a large or a small proportion of the overall cost of the refrigerant. For example, the RRA submits that a motor vehicle air-conditioning system will on average require 0.7kg of refrigerant, attracting a levy of $1.40. Alternatively, the amount of refrigerant required for all the

[2] See www.arctick.org

fridges and freezers in a medium sized supermarket is around 500kg, attracting a levy of $1000.

17. RRA uses the levy to fund rebates paid to contractors and wholesalers for the recovery, handling and return to RRA of refrigerant.

Table 1: Levy Cost as a Component of Consumer Price

Unit or service type	Average amount of refrigerant	Cost of levy per unit @$2 / kg	Estimated cost of unit
Split-system air-conditioner	1.5 kg	$3	$2000
Refrigerator / freezer	0.2 kg	$0.40	$1000
Motor-vehicle air-conditioner	0.7 kg	$1.40	$20,000 [vehicle]
Motor-vehicle AC service	0.7 kg	$1.40	$300
Medium-size supermarket	500 kg	$1000	$500,000 [refrigeration system]

Source: RRA's application for revocation and substitution, 2 October 2015, page 12.

18. RRA's 2014/15 Annual Report states that it recorded in that year levy income of about $11.9 million, costs of destruction (including rebates to contractors) of about $7.5 million and a net surplus of about $5.45 million. It ended the year with gross assets of about $58.7 million and net assets of about $56.8 million.

19. In this respect, RRA states that it has accumulated these funds to pay for the destruction of OD and SGG refrigerants well into the future and long past the time when these products will have been phased out or substantially reduced. It states that a transition to low and no greenhouse-warming-potential refrigerants is already well underway and, as it progresses, RRA's revenue will decline (as fewer products to which the levy applies are purchased/imported), whereas the liability will have grown (the 'stock' of refrigerants in existing products will still need to be disposed of). RRA states that its current contingent liability is considered to be in excess of $200 million and growing as the bank of installed refrigerant continues to expand.

Contractor and wholesaler rebates

20. Rebates are paid by RRA to the contractors, such as technicians that service cooling equipment, to provide an incentive to recover and return used, contaminated and unwanted refrigerant.

21. Wholesalers are companies that import and locally purchase OD and SGG refrigerants in bulk quantities for sale to contractors, end users and original equipment manufacturers. Typically they will have a number of geographically dispersed outlets dedicated to supplying a range of equipment and refrigerants to the industry. These outlets also act as collection points for surrendered refrigerant.

22. The wholesaler can decide that the refrigerant surrendered to it is commercially attractive and divert it to be reclaimed, instead of giving it to RRA for destruction. Where wholesalers direct the refrigerant to RRA, RRA pays them a rebate to reimburse some of the costs they incur in managing the take back for RRA.

23. The scheme currently pays $7.50 a kilogram to the wholesalers and $3 a kilogram to the contractor surrendering it. That is, the wholesaler pays the contractor at least $3. RRA then reimburses the wholesaler the $3 paid out (even if the wholesaler

retains the refrigerant) and, in addition, pays the wholesaler the further $7.50 rebate for refrigerant directed to RRA.

24. While RRA's agreements with wholesalers require them to pay contractors no less than $3 for refrigerant, wholesalers may decide to pay contractors more than $3, to entice them to surrender attractive refrigerant for the wholesaler's use.

Recovery rates and disposal

25. RRA states that in 2014/15 the total sales of bulk refrigerant in Australia were 3140 tonnes, including about 1000 tonnes for servicing commercial, industrial and domestic cooling equipment and about 900 tonnes used in servicing (replenishing) automotive air-conditioning. Much of the refrigerant used in service work is to replace refrigerant that has leaked. Therefore, RRA estimates that, while automotive servicing might consume 900 tonnes, only about 300 to 400 tonnes of refrigerant is available for recovery (with a similar ratio for other servicing).

26. RRA states that the majority of refrigerant that is recovered in Australia is reused, most usually in the system from which it was extracted. RRA states that it does not know how much refrigerant technicians/contractors retain and reuse but that the volume retained for reuse increases in line with the price of refrigerant and its scarcity.

27. Overall, RRA states that it takes back 'all recovered refrigerant presented to it by the market'. RRA states that it typically collects 30 to 50 per cent of unwanted and unusable refrigerant available for recovery. It offers the following estimates, based on what it collected in 2014/15 [comparative 2008/09 figures in square brackets]:

Table 2: Calculating percentage of recovery

New refrigerant – total sales (tonnes)		Assume 3200
Available for recovery	**Range of estimations**	
Automotive service	300	400
Commercial / industrial / domestic service	300	500
Vehicles at end of life	190	240
Air-con at end of life	680	880
Commercial equipment at end of life	300	400
Available for recovery	1770 [1660]	2420 [2220]
Amount retained and reused	-1000 [-880]	-1400 [-880]
Amount available to be returned	770 [780]	1020 [1340]
Amount returned to RRA	-350 [-475]	-350 [-475]
Balance available for recovery	420 [305]	670 [865]
Percentage recovery	45.5 % [61.1%]	34.3 % [35.5%]

Source: RRA's 2010 and current applications for re-authorisation (minor amendment to current-application calculations on 24 February 2016).

28. The 'Balance available for recovery' is the unwanted and unusable OD and SGG refrigerant that RRA could take in but that is not being surrendered to RRA. For example, recovery rates for decommissioned equipment are low. This is because Australia does not have product-stewardship schemes for end-of-life motor vehicles or consumer durables such as refrigerators and air-conditioners. These may be scrapped at wreckers or put in landfill without having refrigerants extracted.

29. Currently, most of the refrigerant RRA has collected is destroyed on its behalf by Toxfree in Melbourne, with some destroyed in a Cement Australia cement plant at Yarwun, near Gladstone in Queensland. These activities are funded by the levy.

RRA states that alternatives to destruction in Australia include storing the refrigerant or having it destroyed offshore.

Previous authorisations

30. The RRA scheme was first authorised by the ACCC's predecessor, the Trade Practices Commission, in 1994, pursuant to an application from the Association of Fluorocarbon Consumers and Manufacturers Inc. AFCAM received authorisation to establish a scheme to recover and destroy used OD substances. RRA was then established and the levy was set at $1 a kilogram. Under subsequent re-authorisations from the ACCC, the scheme has been extended to SGG refrigerants and the levy increased to $1.50 in 2006 and then $2 in 2008.

31. The ACCC most recently re-authorised the scheme, with conditions, in 2011.[3] The 2011 authorisation included allowing discussion and agreement on potentially reducing the level of the levy. However, the levy was not reduced over the life of that authorisation. The RRA is not currently authorised to increase the levy and the ACCC expressed concerns in its draft determination preceding the 2011 final determination that allowing RRA to have an open-ended ability to change the levy could result in 'cost-padding'. As noted, RRA is not seeking authorisation to be able to increase the levy in its current application for re-authorisation.

32. In assessing the scheme in 2011, the ACCC noted concerns about measurement of the scheme's effectiveness and the amount of information that is publicly available. The ACCC considered it would be appropriate to have transparency about the scheme's effectiveness and required, as conditions of authorisation, that RRA:

    - publish its Annual Report on its website every year and
    - publish and maintain on its website the methodology used to derive the Scheme recovery rates, including the underlying data and assumptions concerning the amount of refrigerant available for recovery (the ACCC said it considered that this information would be similar to the information outlined by RRA in its then application for authorisation and maintained with current data).

33. RRA has published its Annual Report on its website each year. It also published the methodology used to derive the scheme recovery rates. At the time it did so using 2009/10 data. This data has not been updated since first published. When the ACCC brought this to RRA's attention during the ACCC's assessment of RRA's current application for re-authorisation, RRA acknowledged that this data should have been kept current and committed to do so in the future.

Consultation

34. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process.

[3] ACCC Determination: Application for authorisation lodged by Refrigerant Reclaim Australia, 12 May 2011, A91256.

35. The ACCC invited submissions from a range of potentially interested parties, including government, importers of refrigerant (in bulk and in equipment) and industry associations for air-conditioning and refrigeration contractors.[4]

36. The ACCC received submissions, generally supportive, from:

    - Arkema (an RRA member that manufactures refrigerants offshore and imports them to Australia)
    - the Department of the Environment
    - CSIRO
    - Federal Chamber of Automotive Industries
    - Fujitsu General (Aust.) (an RRA member that manufactures equipment containing refrigerants)
    - Refrigerants Australia and
    - the Western Australian Department of Environment Regulation.

37. The Department of Environment stated that requiring that waste and unwanted refrigerants be returned for disposal is one of a range of measures the Australian Government has mandated to reduce emissions of OD and SGG refrigerants. Others include: mandatory trade qualifications for all people handling refrigerants; and mandating standards, including for equipment, handling and storage. With respect to the RRA scheme, the Department of Environment stated that it supports the application for re-authorisation as the scheme provides a mechanism to manage refrigerants at end of life and plays an important role in Australian Government policy.

38. CSIRO said its research had shown that Australia's chlorofluorocarbon / hydrofluorocarbon (CFC/HFC) refrigerant emissions have declined significantly since 1995; and that hydrochlorofluorocarbon (HCFC) emissions are likely in decline, presumably by improved stewardship of refrigerants. It said that integral to those beneficial environmental outcomes was the successful refrigerant reclaim program managed by RRA. CSIRO said the program had played a significant role in the overall reduction in Australia's refrigerant emissions, directly via the reclaim operation and indirectly via promoting an industry-wide culture of careful refrigerant stewardship. It said the RRA program was recognised world-wide for its impact and excellence.

39. A submission was also received from the Australian Refrigeration Association (ARA), which advises that its purpose is to advance the science and practice of refrigeration in the national interest. The ARA proposed that the mandate and performance of RRA be fundamentally reviewed with a view to requiring far greater performance in refrigerant emissions reduction on a whole-of-life basis (as opposed to the end of the refrigerant's life). It said it was not suggesting that the ACCC deny re-authorisation as, in the immediate future, there was no obvious alternative to the RRA scheme.

[4] A list of the parties consulted and the public submissions received is available from the ACCC's public register: www.accc.gov.au/authorisationsregister

40. The ARA said RRA must be required to broaden the scope of its mandate to include 'true product-stewardship responsibility'. It submitted that structural changes are required for RRA to function as a whole-of-life product-stewardship organisation, including:

    - comprehensive and balanced industry representation
    - transparent operations
    - performance criteria (with a view to requiring greater reductions in emissions)
    - assessment by an independent authority and
    - comprehensive environmental-impact responsibility – most importantly responsibility for refrigerant leakage through the life of refrigeration and air-conditioning equipment.

41. The RRA responded, among other things:

    - that the RRA board is representative of the broad industry[5]
    - that RRA is transparent (it, for example, undergoes external auditing and publishes annual reports and accounts)
    - that, with regard to performance, RRA took back all contaminated and unwanted OD and SGG refrigerant made available by the industry but there were many forces, beyond RRA's control, that influenced the magnitude of that volume, including government regulations and economic conditions
    - that, with regard to the scope of its responsibilities, RRA does not and cannot have any control over the design of refrigerants or the equipment in which they are contained.

42. All public submissions are available from the ACCC's public register.[6]

ACCC assessment

43. The ACCC's assessment of the Conduct is conducted in accordance with the net public benefit tests contained in the *Competition and Consumer Act 2010* (Cth) (the CCA).[7] The ACCC has taken into account:

    - the application and submissions received from RRA and interested parties
    - other relevant information available to the ACCC, including previous assessments
    - the likely future without the Conduct for which authorisation is sought.[8] In particular, given the requirements of the OPSGGM Act that import-licence

[5] RRA lists its directors in its Annual Reports and at **https://refrigerantreclaim.com.au/about/board-of-directors/**

[6] **www.accc.gov.au/authorisationsregister**

[7] Subsections 90(5A), 90(5B), 90(6) and 90(7).

[8] For more discussion see paragraphs 5.20-5.23 of the ACCC's *Authorisation Guidelines*.

holders participate in an approved scheme for managing refrigerant at the end of its life, and that the RRA scheme is the only currently approved scheme, the ACCC considers that, without the Conduct that is the subject of authorisation, an alternative scheme or schemes would need to be developed in order for importers to satisfy their regulatory obligations. This could take the form of:

    - an alternative product-stewardship program replacing RRA but run independently, rather than through agreement between industry participants, and/or
    - larger importers developing their own arrangements for end-of-life-cycle management of refrigerants, including potentially offering services to other importers.

- the relevant areas of competition likely to be impacted by the Conduct, namely:

    - the supply of OD and SGG refrigerants or products containing these refrigerants
    - the collection of unwanted and unusable (end-of-life) OD and SGG refrigerants and
    - destruction services for OD and SGG refrigerants.

- that RRA has requested authorisation for five years.

Public benefit

44. The ACCC considers that the Conduct is likely to result in the following public benefits.

More compliance and abatement

45. The Department of the Environment submits that a viable product-stewardship scheme is an important plank of Australia's policy approach to minimising emissions of OD and SGG refrigerants at end of life that would otherwise be released into the atmosphere, damaging the ozone layer and contributing to global warming. The Department of the Environment supports the RRA scheme as it provides a mechanism to manage these refrigerants. The RRA scheme is currently the only scheme registered by the Department of Environment as a scheme that meets the requirements of the OPSGGM Act.

46. The ACCC notes that the OPSGGM Act and associated regulations leave a great deal of discretion to industry about how to comply with the various legislative and regulatory requirements. Further, because leakage of refrigerants is an unobservable event, proving that refrigerant has been unlawfully emitted can be difficult. Therefore, the threat of prosecution under the OPSGGM Act may not adequately constrain the industry's behaviour.

47. In this regulatory environment, suppliers acting individually have an incentive to adopt minimum recovery and disposal practices necessary to comply with the legislation, particularly where competitors are also meeting these minimum standards. Over time, limited compliance activity could result in widespread adoption of progressively lower recovery and disposal standards.

48. The ACCC notes that the RRA has maintained, for more than 20 years, a scheme supported by many industry members and the Department of the Environment and CSIRO. The RRA scheme covers all industry members regardless of the economics

of servicing them (for example, some may be located in more isolated areas). Without the RRA scheme, some providers might emerge to collect unwanted and unusable refrigerant in the most profitable or viable industry or geographic niches, leaving other areas unserved. Recovery is likely to become more fragmented and some parties may not then be able to satisfy their licence conditions or may face greater costs in doing so. Ultimately, less refrigerant might be recovered.

49. The ACCC also notes that alternative schemes would take time to be developed and would need to go through a Department of Environment approval process. In such a transition, the amount of refrigerant recovered could be less.

50. Therefore, the ACCC considers that the RRA scheme is likely to result in a public benefit through achieving higher levels of compliance with the OPSGGM Act, seeking to abate OD and SGG refrigerant emissions.

Pricing to better reflect the externalities in refrigerant supply

51. In general, competition can be relied on to deliver the most efficient market outcomes. 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.[9]

52. The imposition of the levy means that the market price of OD and SGG refrigerants is closer to the social cost of consumption, inclusive of the negative externalities of emissions (damage to the ozone layer and contribution to global warming), than would otherwise be the case. Where the cost of the levy may be passed on by manufacturers and importers to purchasers of end products that contain refrigerant, the ACCC considers that consumers will face prices that are more reflective of the full (opportunity) cost of the affected products on society. Without the levy or a similar charge, the price of refrigerant is less likely to reflect its full social cost.

53. While not in a position to quantify the size of the negative externality associated with OD and SGG refrigerants or the extent to which it is corrected by the levy, the ACCC considers that the RRA scheme is likely to achieve a more efficient allocation of resources than would be the case without the scheme.

Transaction cost savings

54. In the absence of the RRA scheme coordinated by industry participants, activities such as collecting and destroying refrigerant are likely to involve numerous individual, bilateral negotiations, each incurring transaction costs, such as the time taken to negotiate and other costs such as obtaining legal, technical and other expert advice (at least until an alternative coordinated scheme or schemes were developed and registered by the Department of Environment). Similar transactions costs would be incurred if larger importers were to develop their own arrangements and offer services to other importers. In contrast, under the RRA scheme, participants (of which there are more than 1000) are all delegating decisions, operational responsibility and contracting to RRA. RRA coordinates and/or executes, for example, the collection network, the payments to the contractors surrendering refrigerant and the contracts with the destruction facilities. Parties such

[9] An externality is an economic term referring to a cost or benefit that affects a third party (a party who did not agree to the action causing the cost or benefit) and is not reflected in market prices. In the presence of an externality, the market prices do not reflect the full costs and benefits of producing or consuming a product or service. This results in an economic inefficiency or market failure.

as the destruction facilities or contractors surrendering refrigerant may also have lower transaction costs, as they can deal with just one system.

55. Further, putting in place alternative arrangements would incur establishment costs, duplicating those already incurred under the RRA scheme.

Economies of scale

56. Without the Conduct, the process for the collection of unwanted and unusable refrigerants may become more fragmented. That is, more than one collection scheme may operate. The single RRA collection scheme might realise greater economies of scale than separate schemes. For example, it might be able to operate with fewer, more efficiently utilised transport vehicles and storage sites.

57. To the extent that multiple schemes would operate without the Conduct, and to the extent that multiple schemes used multiple operators of disposal services, the RRA collection scheme may also realise economies of scale in disposal. These efficiencies could be achieved if the disposal costs per kilogram of refrigerant fall as the volume increases.

58. Further, as discussed above, the RRA scheme is likely to result in a higher level of compliance with regulations concerning end-of-life-cycle management of refrigerants than would otherwise be the case, which is also likely to enable RRA to achieve greater economies of scale.

A further supply option for reclaimed refrigerant

59. Although RRA has not reclaimed any refrigerant for re-use over the life of the current authorisation, it has again sought re-authorisation for industry participants to discuss and agree on the option of reclaiming and selling recovered refrigerant. The ACCC considers that, if RRA was to start doing so again, this would be likely to result in the public benefit of a further supply option for customers wanting reclaimed refrigerant, including perhaps as a substitute for imported virgin refrigerant.

60. However, the ACCC notes that the RRA has no current plans for being involved in reclamation and therefore the ACCC does not place significant weight on this benefit.

Sufficiency of the scheme and level of public benefit

61. The ARA submits that the scope of the RRA scheme should be broadened to deal with emissions through the life of products containing refrigerants. That is, the RRA scheme should be a 'whole-of-life' rather than just end-of-life product-stewardship scheme. In response, the RRA submits that it does not have any control over the factors that impact refrigerant emissions through the life of products, such as the design of refrigerants or the equipment in which they are contained.

62. The ACCC notes that expansion of the scope of the RRA scheme beyond end-of-life destruction of refrigerants would, if successful, further reduce emissions.

63. However, the role of the ACCC is to assess whether the public benefits of the current RRA scheme for which the parties have sought authorisation are likely to outweigh the detriments. In this respect, as already discussed, the ACCC considers that the RRA scheme is likely to result in better coverage of industry members and

compliance with the OPSGGM Act, compared with the likely future without the scheme.

64. The ACCC particularly notes the submissions of the CSIRO, that RRA has played a significant role in the overall reduction in Australia's refrigerant emissions, directly via the reclaim operation and indirectly via promoting an industry-wide culture of careful refrigerant stewardship. The ACCC has also placed weight on the support for the Scheme from the Department of Environment, as the Australian Government agency responsible for environmental regulation.

65. Although the ACCC notes that it may be possible to design a more effective scheme that recovers more refrigerant, the relevant future without the scheme against which the public benefits and detriments must be assessed is not an ideal scheme but one in which the market and regulatory incentives on individual participants to comply with the legislation are relatively low.

66. Notwithstanding this, the ACCC encourages RRA to continue to monitor, re-assess and, if and when required, alter the scheme's operations to improve its effectiveness.

67. Further, as discussed in more detail below in the section on Barriers to alternatives, to the extent that industry members wish to develop alternatives to the RRA scheme, they are free to do so.

Public detriment

68. The ACCC considers that the Conduct has resulted, and is likely to continue to result, in a low level of public detriment.

Competition between importers and between wholesalers

69. In general terms, an agreement among competitors on price (or other terms or arrangements) is likely to lessen competition relative to a situation where each business individually makes its own pricing decisions.[10]

70. However, the ACCC does not consider that the agreement to impose the levy increases the likelihood of co-ordination among suppliers or more broadly on products containing refrigerant. Each importer sets its own prices and then applies the levy. Similarly, it is up to wholesalers to set their prices and individually decide whether to pass through all or some of the levy. As such, the levy is unlikely to meaningfully impact competition at either the import or wholesale level of the supply chain by increasing the likelihood of co-ordination.

71. The ACCC considers that the levy is likely to be passed on to wholesalers and is thereby reflected in the end price of products containing OD and SGG refrigerants. However, the ACCC considers that a $2-per-kilogram levy is small compared with the overall price of the equipment the refrigerant is in or the cost of servicing that equipment to replenish the refrigerant. Further, costs would be incurred with or without the RRA scheme in place as there is a need to meet the legislative obligations around the end-of-life management of refrigerants. Specifically, without

[10] ACCC Determination: Application for authorisation lodged by Refrigerant Reclaim Australia Ltd, 12 May 2011, A91256, para. 4.83; ACCC Determination: Application for authorisation A91504 lodged by the Australian Paint Manufacturers' Federation, 29 October 2015, para. 49.

industry wide agreement on a single scheme for refrigerant recovery, other means of complying with importers' OPSGGM obligations, with associated costs, would need to be developed.

Barriers for alternatives

72. With regard to whether the scheme creates or increases barriers to entry for alternative schemes and suppliers, under the OPSGGM Act, anyone can apply to the Department of the Environment for approval to operate a product-stewardship scheme for the recovery and destruction of refrigerant. Accordingly, an alternative scheme or schemes could be established in competition with RRA. Further, as the RRA scheme is voluntary, its members would be free to leave RRA and join competing schemes.

73. In this respect, as discussed at paragraphs 46 and 47, the OPSGGM Act and associated regulations leave a great deal of discretion to industry about how to comply with the various legislative and regulatory requirements. In this regulatory environment, suppliers, acting individually or collectively, have an incentive to adopt minimum recovery and disposal practices necessary to comply with the legislation.

74. Therefore the ACCC considers that there is limited incentive for industry to join schemes that are designed to achieve a higher level of performance, if they would involve higher financial costs and impose greater obligations on members. In the current regulatory environment, any demand for an alternative scheme and, particularly, for a scheme that imposes greater obligations on participants than the current scheme, would be driven by industry participants seeking to go above and beyond their legal obligations (which are satisfied by the RRA Scheme) in dealing with refrigerants. Demand for and the ability to implement such a scheme are not affected by the RRA scheme.

75. In relation to RRA and industry members discussing and agreeing on reclaiming and selling reclaimed refrigerant, the ACCC considers that the RRA scheme would, similarly, not create significant barriers to entry and expansion by alternative refrigerant reclaimers and RRA would face constraint from competitors and potential competitors.

Destruction services facing a single customer

76. Because the entire industry currently participates in the RRA scheme, businesses supplying services to destroy OD and SGG refrigerants are faced with a single customer. In the alternative, if, for example, larger importers developed their own separate arrangements, destruction facilities could benefit from competition to engage their services, possibly increasing their bargaining power.

77. However, the ACCC considers that the loss of this opportunity is likely to result in little public detriment. The destruction-service providers' facilities have alternative uses and customers for their facilities and so have bargaining power and outside options. That is:

    - Toxfree, which destroys most of the refrigerant RRA collects, has a large and diverse range of environmental and waste-management operations.

    - The primary activity of the cement plant that also destroys some refrigerant for RRA is making cement.

Balance of public benefit and detriment

78. In summary, the ACCC considers that:

- The Conduct is likely to result in some public benefits through:
    - more compliance and abatement
    - pricing to better reflect externalities in refrigerant supply
    - transaction cost savings
    - economies of scale and
    - a further supply option for reclaimed refrigerant (with limited weight placed on this, given RRA has advised that it is unlikely to engage in the related conduct in the near term).
- The Conduct is likely to result in a low level of detriment.

79. Although the level of refrigerant recovered by the scheme may not be as large as it could be, the ACCC notes the regulatory environment in which the scheme operates and the support of the Department of the Environment, the Australian Government agency responsible for environmental regulation.

80. On balance, the ACCC is satisfied that a continuation of the RRA scheme is likely to result in a public benefit that would outweigh the likely public detriment, including the detriment constituted by any lessening of competition, that would be likely to result.

81. The CCA allows the ACCC to grant authorisation subject to conditions.[11] The ACCC considers that it is appropriate to continue to impose conditions on the scheme about information disclosure.

82. The ACCC previously authorised the RRA scheme subject to conditions to address concerns that, at that time, information about the operation of the scheme was not always publicly available. As stated earlier, RRA complied with the condition requiring it to publish its Annual Report and methodologies used to derive the scheme recovery rates. However, the data underpinning this methodology has not been updated since first published.

83. To maintain the increased transparency around the operation of the scheme, including in light of the ARA's concerns, the ACCC considers it appropriate that RRA continue to provide publicly available information about its effectiveness. The ACCC considers that this would continue to contribute to ensuring that RRA is conscious that it is accountable for its performance.

84. Given the previous problem with publishing updated data, the ACCC proposes to amend the condition about RRA publishing its methodologies to explicitly require that the data is updated annually at the same time that RRA's Annual Report is published.

[11] Subsection 91(3)

85. Therefore the ACCC proposes to impose as conditions of authorisation that RRA publish annually on its website:

    - its Annual Report

    - up-to-date methodology used to derive the scheme recovery rates, including the underlying data and assumptions concerning the amount of refrigerant available for recovery (similar to the information RRA has outlined in its current authorisation application, maintained with data that is current and is updated each year at the same time its Annual Report is published, to reflect the data in the Annual Report about recovery rates).

86. The ACCC notes previously data on the methodology used to derive the scheme's recovery rates has not been kept current. The CCA provides consequences for failure to comply with conditions and the ACCC would expect full compliance with the proposed conditions in the future.[12]

87. Subject to the proposed conditions, the ACCC proposes to grant re-authorisation.

Length of authorisation

88. The CCA allows the ACCC to grant authorisation for a limited period of time.[13] This enables 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.

89. In this instance, RRA seeks re-authorisation for five years.

90. The ACCC proposes to grant re-authorisation for five years.

Draft determination

91. Application A91515 was made using a Form FC, under section 91C (1) of the CCA. RRA seeks authorisation for itself, its directors and members and those companies and persons that have entered into agreements with it to continue to operate a scheme to recover OD and SGG refrigerants, for a further five years.

92. Authorisation is sought as the conduct may involve making and giving effect to agreements that contain a cartel provision or that may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.

93. Subsection 90A(1) of the CCA requires that, before determining an application for authorisation, the ACCC shall prepare a draft determination.[14]

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[12] The ACCC may revoke an authorisation, after consultation, if a condition to which the authorisation was expressed to be subject has not been complied with. Failure to comply with a condition to which an authorisation is expressed to be subject also means that the conduct being engaged in falls outside the terms of the authorisation and the participant risks not being covered by the statutory protection afforded by the authorisation.

[13] Subsection 91(1).

[14] For an application for revocation and substitution of an authorisation, CCA section 91C(5) requires the ACCC to comply with the requirements of section 90A before making a determination.

The net public benefit test

94. For the reasons outlined in this draft determination, and subject to the proposed conditions below, the ACCC is satisfied, pursuant to sections 90(5A), 90(5B), 90(6) and 90(7) of the CCA, that in all the circumstances the Conduct for which authorisation is sought is likely to result in a public benefit that outweighs the likely detriment to the public constituted by any lessening of competition arising from the Conduct.

Conduct which the ACCC proposes to authorise

95. The ACCC proposes to revoke authorisation A91256 and grant conditional authorisation A91515 in substitution. The substitute authorisation is granted to RRA, its directors and members and those companies and persons that have entered into agreements with RRA, for discussion and agreement to:

    - set, and for importers to consistently apply, a $2-per-kilogram levy in addition to the price of OD and SGG refrigerants imported into, or manufactured and sold in, Australia

    - determine the value of rebates to be paid by RRA to wholesalers and to contractors, for the return of recovered refrigerant and

    - determine the processes and disposal practices to apply to recovered refrigerant.

96. The ACCC proposes that authorisation extend to discussions and agreements to reduce the level of the levy to below $2 a kilogram. RRA has not applied for authorisation for, and the ACCC does not propose that authorisation extend to, discussion or agreement on raising the levy above $2 a kilogram.

97. The proposed authorisation A91515 is subject to the conditions that RRA publish annually on its website:

    - its Annual Report

    - up-to-date methodology used to derive the scheme recovery rates, including the underlying data and assumptions concerning the amount of refrigerant available for recovery (similar to the information RRA has outlined in its current authorisation application, maintained with data that is current and is updated each year at the same time its Annual Report is published, to reflect the data in the Annual Report about recovery rates)

98. The ACCC proposes to grant authorisation A91515 for five years.

99. Under section 88(10) of the CCA, the ACCC proposes to extend the authorisation to future parties to the proposed Conduct.

100. This draft determination is made on 22 March 2016.

Next steps

101. The ACCC now seeks submissions in response to this draft determination. 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 CCA.