



Draft Determination

Application for authorisation
lodged by
Paintback Limited on behalf of itself and participating paint suppliers
in respect of
the Paintback Scheme which is funded through a 15 cents per litre levy
on Architectural and Decorative Paint
Authorisation number: AA1000536

16 April 2021

Commissioners:

Keogh

Rickard

Brakey

Court

Ridgeway

Summary

The ACCC proposes to grant authorisation to enable Paintback and participating paint suppliers to continue to impose a levy of up to \$0.15 per litre (plus GST) on the wholesale sale of certain architectural and design paints (A&D paint) to fund the Paintback scheme (the Scheme).

This conduct has been previously authorised since 20 November 2015 and is not changed in the current application.

Under the Scheme, Paintback contracts with state, territory, and local governments and waste service providers for the collection and safe disposal of waste A&D paint. Trade and household paint consumers are able to dispose of waste A&D paints at collection points across Australia at no cost.

A&D paints contain a number of environmentally harmful substances and can pose an environmental hazard if disposed of improperly. The ACCC considers that the Scheme as funded through the levy provides a mechanism where the price of paint more fully takes into account the full costs associated with the disposal of waste A&D paint products and is likely to result in environmental benefits through increased collection of waste A&D paint in Australia and less improper disposal than would be case if state, territory, and local government collection programs continued to operate without the Scheme. The ACCC also considers that the Scheme is likely to result in efficiencies from economies of scale, reducing the per-unit cost of collecting and disposing of waste A&D paint.

The ACCC considers that the scheme is unlikely to produce significant public detriment. The imposition of a uniform levy on the wholesale supply of A&D paint is unlikely to significantly impact competition at either the wholesale or retail levels of the supply chain. The ACCC notes that the size of the levy is small relative to the cost of A&D paints.

The ACCC proposes to grant authorisation for 10 years.

The ACCC invites submissions in relation to this draft determination by 7 May 2021 before making its final decision.

1. The application for authorisation

- 1.1. On 30 November 2020, Paintback Limited (**Paintback**, formerly known as the Paint Stewardship Scheme), lodged application for authorisation AA1000536 with the Australian Competition and Consumer Commission (the **ACCC**) on behalf of itself and participating paint suppliers. Paintback is seeking authorisation to continue to impose a levy of up to \$0.15 per litre, plus GST, (the **Levy**) on the cost of certain architectural and design paints, and woodcare products (collectively, **A&D paint**) to fund the Paintback scheme (**the Scheme**). The Scheme is a product stewardship scheme intended to provide a nationally co-ordinated approach to the collection and disposal of A&D paints. The Applicants are seeking authorisation for ten years. This application for authorisation AA1000536 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.2. The ACCC may grant authorisation which provides businesses with legal protection for arrangements that may otherwise risk breaching the competition law but are not harmful to competition and/or are likely to result in overall public benefits.

- 1.3. The ACCC first authorised the Scheme in October 2015. This authorisation is due to expire on 1 June 2021.

2. Background

- 2.1. Product stewardship is based on the understanding that parties involved in the production, retailing, use, and disposal of products have a shared responsibility to manage the environmental impacts of those products through their lifecycle, including end of life management
- 2.2. Paintback submits that the improper disposal of waste A&D paint poses environmental risks from contaminants that can seep into soil and water systems. Further, spillages in stockpile storage sites can result in contamination and health risks if the site is not adequately ventilated.
- 2.3. The primary paint consumers in Australia are trade consumers who provide commercial painting services, and household consumers who use paint for ordinary household activities such as renovations. Prior to the Scheme's introduction disposal options for each of these groups differed. There were, to varying degrees state, territory, and local government funded programs which accepted household waste A&D paint. Most of these programs did not accept trade waste A&D paint. Where trade waste A&D paint was accepted, an associated fee would usually be charged. In 2015, the Australian Paint Manufacturers' Federation (APMF) which was the original applicant for authorisation for itself, and on behalf of Paintback and the participating paint suppliers, submitted that this had led to significant and unsafe stockpiling of waste A&D paint and intermittent disposals to landfill.
- 2.4. Managing A&D paint waste has been a priority for federal, state and territory governments for many years. The federal Minister for Environment's product list for the 2013-14, 2014-15, and 2015-16 included A&D paint as a priority for product stewardship, citing the potential harm to the environment without management and the significant costs incurred by governments when collecting A&D paint waste.¹
- 2.5. APMF was initially granted authorisation in 2011 to impose a levy on wholesale sales of A&D paint to fund a 12 month waste paint collection scheme trial in Victoria. However, no levies were collected during this period. APMF participated in a waste paint collection trial in Victoria in 2013.
- 2.6. On 29 October 2015, the ACCC granted authorisation to APMF, Paint Stewardship Limited (the precursor to Paintback) and participating paint suppliers to impose the Levy. Paintback was subsequently incorporated to take over the administration and management of the Scheme. As a result, Paintback lodged the current application for authorisation to continue to impose the Levy.

Paintback and the Scheme Participants

- 2.7. Paintback is a not for profit company founded by five paint manufacturers in 2015 for the purpose of administering the Scheme. Membership of the Scheme is open to any suppliers who enter into the Waste Paint Collection and Treatment Scheme Agreement (**Waste Paint Agreement**).²

¹ Department of Agriculture, Water and the Environment, *Minister for Environment's 2015-2016 product list*, <https://www.environment.gov.au/protection/waste/product-stewardship/products-schemes/product-list-2015-16>.

² A copy of the current Waste Paint Collection and Treatment Scheme Agreement is available as Annexure C of the Applicant's application for authorisation and can be viewed on the ACCC's [public register](#).

2.8. The five paint suppliers who were members of the Scheme at launch and who continue to participate in the scheme are:

- DuluxGroup (Australia) Pty Ltd (now part of Nippon Paint)
- PPG Industries Australia Pty Ltd
- Henry Haymes Pty Ltd
- Resene Paints (Australia) Limited
- The Sherwin-Williams Company

2.9. The following paint suppliers have joined the Scheme since 2016:

- Rust-Oleum Australia Pty Limited
- Palette Operations Pty Ltd (trading as Tint Paint)

2.10. Paintback submits that the participating paint suppliers account for over 90% of all A&D paint supplied in Australia.

The Proposed Conduct

2.11. Paintback is seeking authorisation for current participants in the Scheme, and any other suppliers of A&D paint who participate in the Scheme in the future, to continue to agree and implement a Levy (of up to \$0.15 per litre (plus GST)) to continue to fund the Scheme.

(the **Proposed Conduct**).

The Scheme

2.12. The Scheme enables household and trade paint consumers to take waste paint and packaging to Paintback collection sites and mobile collection events. In many circumstances the Scheme operates in conjunction with collection sites for paint and other waste that have been set up by local and state governments. Paintback's waste services contractors transport the collected paint and packaging from the collection point to processing, treatment and disposal.

2.13. Packaging and waste liquid are separated from paint, which is then sorted into solvent and latex paints.³ Solvent paints are then used as an alternative energy source for cement kilns,⁴ while latex paints are separated into water, which can be used for industrial processes or composting, and a residual which is disposed into landfill.

2.14. Paintback's main functions are to:

- administer the Scheme by receiving funds raised from the Levy
- contract with local governments and waste service providers for the collection and safe disposal of waste A&D paint
- promote education, awareness and information activities for the Scheme
- monitor, audit and report on the development of the Scheme, and
- administer a program of research into new end-of-life uses for waste A&D paint and collection processes.

³ Australian Paint Manufacturers' Federation – Authorisation A91504 – [Application Received](#), page 52.

⁴ [Paintback – Mid-Term Report – April 2019](#)

The Levy and the Waste Paint Agreement

- 2.15. The Levy has been set at \$0.15 per litre (plus GST) since the Scheme’s inception. The levy amount is determined under the Waste Paint Agreement, and can be changed by a special resolution of Paintback’s board. While the levy amount can be changed by resolution of the Paintback board, authorisation is only sought to impose a levy of ‘up to’ \$0.15 per litre (plus GST). Imposing any levy above this would not have legal protection under the authorisation.
- 2.16. The levy is imposed by participating paint suppliers at the wholesale level. The Waste Paint Agreement sets out requirements for participants to identify on their invoices the products subject to the Levy, and the total amount of Levy payable. Additionally, the Waste Paint Agreement sets out confidential audit and reporting requirements which include detailed information about sales, including the net volume of A&D paint sold, and the amount of levy contributed, to ensure that the Levy is being correctly collected and remitted to Paintback.
- 2.17. Authorisation is not sought for any conduct that would amount to resale price maintenance, or any agreement with or between retailers regarding the pass through of the Levy to retail consumers. Nor is there any broader agreement between Scheme participants about their wholesale or retail prices. Scheme participants recommend that A&D paint retailers recover the cost of the Levy by passing it through to retail customers in their prices, however there is no requirement to do so.

A&D Paint

- 2.18. The Levy is imposed on A&D paint products supplied in containers between 1 and 20 litres. Containers smaller than one litre do not attract a levy, however are still eligible for collection under the Scheme.
- 2.19. The Scheme covers the products listed in the table below, subject to the exclusions listed.

Table 1 – Current in-Scheme A&D paint and out-of-Scheme products

In-Scheme A&D paint	Out-of-Scheme products
<ul style="list-style-type: none"> • Interior and exterior architectural paint – water and solvent based • Deck coatings and floor paints • Primers, undercoats and sealers • Stains and shellacs • Varnishes and urethanes (single component) • Wood coatings (containing no pesticides) 	<ul style="list-style-type: none"> • Industrial maintenance coatings • Original equipment manufacturer (e.g. car manufacturing) and industrial surface coating (shop application) paints and finishes • Aerosol paints • Automotive paints • Anti-fouling coatings • Melamine, metal and rust preventative • Caulking compounds, epoxies, glues or adhesives • Colorants and tints • Resins • Paint thinners, mineral spirits or solvents

	<ul style="list-style-type: none"> • Paint additives • Roof patch or repair • Tar-based or bitumen-based products • 2-component coatings • Deck cleaners • Traffic paints • Texture coatings • Bagged renders • Isocyanates • Metal Coatings • Paint equipment • Paint washings • General waste • All other non-paint liquids and packaging
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Implementation of the Scheme during the term of the current Authorisation

- 2.20. As part of its 2015 application for authorisation, APMF submitted several projections for the performance of the Scheme. The Scheme aimed for 85% of the population to live within a suitable distance from a collection site (20km in metropolitan areas, and 40km in regional areas) during stage three of the implementation of the Scheme (expected to occur in years four and five of the operation of the Scheme).
- 2.21. Paintback submits that as of 2019/20, 85% of the population is within coverage range of its 160 permanent sites, with mobile collection events increasing the national coverage range to 88%.
- 2.22. In its 2015 and 2020 applications for authorisation Paintback provided estimates of the tonnages of waste A&D paint expected to be collected under the Scheme. Paintback's 2020 application also included details of actual volumes collected between 2016/17 and 2019/20.

Table 1 – Forecast and actual collection volumes (tonnes)

	16/17	17/18	18/19	19/20	20/21	21/22	22/23	23/24	24/25	25/26
2015 forecast	6,945	9,621	9,607	9,550	9,445	-	-	-	-	-
Actual	1,890	4,302	6,238	8,092						
2020 forecast					8,470	9,054	9,162	9,248	9,341	9,528

- 2.23. For the waste that is collected under the Scheme, Paintback estimated in its 2018/19 Annual Review that 76% of liquid paint was reused as an alternative fuel resource or water substitute in industrial applications. Paintback submits that in 2019/20 packaging represented 1,900 tonnes of the volume collected and that 78% of this packaging was recovered for reuse. In Paintback's 2019/20 Annual Review, its stated target is to divert 90% of material it collects from landfill.

- 2.24. As noted, at the time the Scheme was authorised in 2015, there were to varying degrees, state, territory and local government funded programs which collected domestic (but generally not trade) waste A&D paint. At the time federal, state and territory governments had been working with the A&D paint industry to establish product stewardship arrangements for a number of years. APMF submitted at the time that substantial public benefits could be generated if the taxpayer funded programs were supported and expanded under the Scheme.
- 2.25. Paintback submits that under the existing authorisation state and local governments have been relieved of the burden of collecting and properly disposing of waste A&D paint, with the costs avoided by government freeing up scarce funds for other public policies and objectives. For example, Paintback submits that there has been a significant shift in volumes from Victoria's Detox Your Home and WA's HHW recycling programs, as demonstrated in Table 2.

Table 2 – Collection volumes comparison (tonnes)

	2016/17	2017/18	2018/19	2019/20
Victoria				
Detox Your Home	1,450	662	284	69
Paintback	738	1,463	2,033	2,602
Total	2,188	2,125	2,317	2,671
Western Australia				
HHW	611	549	443	358
Paintback	264	594	809	1,093
Total	875	1,143	1,252	1,451

- 2.26. APMF submitted in 2015 that Scheme awareness would be important achieving greater waste A&D paint collection and appropriate disposal. To achieve this, APMF anticipated that the Scheme would use in excess of 15% of its budget on promotional activities, including establishing a strong brand, trade and mainstream media advertising, and point of sale materials.
- 2.27. Paintback submits that during the period of the current authorisation, it has undertaken a number of marketing initiatives including: a national launch with coverage over television, radio, and print reaching 11 million people, advertising and media that has reached an audience of 42 million in 2019/20, supplied training and educational materials for trade painters, hardware and specialist paint retailers and provided in-store materials at stores located within 10km of a Paintback collection point.
- 2.28. Paintback submits that market research undertaken by it indicates that as of April 2020, 15% of DIY painters and 70% of trade painters are now aware of the Scheme. Of those who have used the Scheme, 85% of DIY painters and 90% of trade painters are satisfied with it, and 90% of DIY and 98% of trade painters say they will use the Scheme again.
- 2.29. APMF also submitted in 2015 that the Scheme would result in funding new investments to identify more efficient and effective methods for safely disposing of waste A&D paint and containers.
- 2.30. Over the period of the current authorisation, Paintback has commenced a number of research and development projects, such as using recycled plastic in paint pails, developing sustainable design guidelines for paint packaging, improving their supply

chain to increase processing consistency of water based paints, and a number of projects concerned with expanding the range of new products and applications for reclaimed paint.⁵ Paintback submits that there are currently 5 research and development projects underway, and that a further 10 are being scoped for possible further consideration.

3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
- 3.2. The ACCC invited submissions from around 150 potentially interested parties including major retailers and manufacturers, industry associations, consumer and environmental groups, federal and state departments and parliamentarians, and local government bodies and associations. The ACCC received 14 submissions.
- 3.3. The ACCC received submissions in favour of authorisation from the Commonwealth Department of Agriculture, Water and Environment, the WA Department of Water and Environmental Regulation, ACT No Waste, Liverpool City Council, the Australian Local Government Association, the Western Australian Local Government Association, Cradle Coast Waste Management Group, Metropolitan Waste and Resource Recovery Group, Planet Ark, DuluxGroup and Bunnings Group.
- 3.4. Broadly, these interested parties, some of whom work with Paintback through operating collection points, submit that the Scheme, supported by the Levy, provides safe and effective disposal options for household and trade users of A&D paint products,
- 3.5. Green Industries SA and the Environment Protection Authority of South Australia (**EPA SA**) made a joint submission in favour of authorisation, submitting that the Scheme provides a convenient and environmentally responsible disposal option for unwanted household and trade paint. However Green Industries SA and EPA SA submit that in addition to annual reporting of the volume of paint collected Paintback may wish to also report total paint sold in Australia, to help determine the relative percentage of paint collected and the effectiveness of the Scheme.
- 3.6. Paintback submits in response that total paint sold is not an appropriate metric as most paint sold is used and subsequently not recoverable, and that it considers volumes of paint collected to be the most meaningful and simple metric.
- 3.7. The NSW Environment Protection Authority (**NSW EPA**) submits that the Scheme has reduced the burden on the NSW government of the cost of paint disposal and that it supports authorisation. However the NSW EPA submits that the ACCC should strengthen requirements on Paintback to take on the full cost of waste paint recovery in NSW, provide detailed state by state reporting, expand the scope of the scheme to include aerosols and other paint products and publish research findings into improved environmental outcomes.
- 3.8. Paintback submits that NSW EPA's proposed conditions are unnecessary. Paintback submits that the relevant assessment to be undertaken by the ACCC is whether the Proposed Conduct would result in a net public benefit, and not whether an alternative Scheme is conceivable.

⁵ Paintback Annual Review [2018/19](#), [2019/20](#).

- 3.9. Nick Favot Painting, a commercial painting contractor located in Townsville, submits that it has paid \$14,000 in Paintback levies over the life of the Scheme but is unable to use the Scheme because Paintback accepts a maximum of 100 litres in volume per visit regardless of whether the paint buckets are full or empty. Nick Favot Painting submits that it could have better used these funds on other environmental and safety initiatives and that a user pays system based on actual usage of recycling schemes would be more efficient.
- 3.10. In response Paintback submits that the 100 litre collection limit is in place to strike a balance between compliance with capacity regulations for transporting dangerous goods, equity of access to participants, and administrative simplicity.
- 3.11. Paintback submits that the Scheme's purpose is to ensure that, more broadly, paint users pay for the costs associated with properly disposing of waste paint, and that a scheme based on payment upon disposal would have a much lower volume of collection.
- 3.12. The submissions of Green Industries SA and EPA SA, NSW EPA and Nick Favot Painting, and Paintback's response to these submissions, are discussed in more detail in the ACCC's assessment of the Proposed Conduct.
- 3.13. Public submissions by the Applicants and interested parties are on the Public Register for this matter, available [here](#).

4. ACCC assessment

- 4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. Paintback seeks authorisation for Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsection 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).

Relevant areas of Competition

- 4.3. To assess the likely effect of the Proposed Conduct, the ACCC will identify the relevant areas of competition likely to be impacted.
- 4.4. Paintback submits that the relevant markets are the wholesale and retail markets for A&D paint products.
- 4.5. The ACCC considers that the relevant areas of competition are likely to be the wholesale and retail supply of A&D paint in Australia. The ACCC notes that the Proposed Conduct involves a levy by participating paint suppliers on the wholesale supply of A&D paint, as well as on the retail supply of A&D paint through manufacturer-owned trade centres.

Future with and without the Proposed Conduct

- 4.6. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.

- 4.7. The ACCC considers that without agreement between the Scheme participants to impose the Levy they are unlikely to individually implement a levy to fund disposal of waste A&D paint and containers as this would increase the prices of their paint at the risk of losing customers to competing suppliers who do not impose a levy. Further, should a supplier seek to create their own collection scheme it would likely be much more limited in scope as it is unlikely they would be willing to bear the cost of the safe disposal of waste paint produced by their competitors.
- 4.8. As many of Paintback's collection points are operated by state, territory, and local governments, these collection points may continue to operate, most likely on a more limited scale, as was the case prior to the launch of the Scheme. Any continuing A&D waste paint collection points would likely be taxpayer funded.

Public benefits

- 4.9. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*⁶

- 4.10. The ACCC has considered the following public benefits:

- environmental benefits, and
- cost savings and efficiencies.

Environmental benefits

- 4.11. Paintback submits that the Proposed Conduct has resulted in environmental and public health benefits associated with the diversion of waste A&D paint from inappropriate disposal pathways such as sewer/stormwater infrastructure, and that the Scheme has resulted in an increase in the volume of waste A&D paint returned for proper disposal.
- 4.12. The ACCC recognises that the improper disposal of waste A&D paint to landfill and waterways results in long-term damage from seepage into soil and water systems of heavy metals, dyes, acids, alkalis, and other contaminants.
- 4.13. The ACCC considers that the provision of more, and more conveniently located, collection facilities for waste A&D paint and free at the point of disposal at those facilities under the Scheme, has made it easier and cheaper to dispose of waste paint and containers properly than was the case previously when state, territory, and local government collection points operated on a more limited scale. This is particularly the case for trade painters whose waste paint was not accepted by many of the state, territory and local government funded collection sites prior to the Scheme commencing. The ACCC also notes the considerable resources dedicated to promoting awareness of the Scheme has also likely reduced inappropriate disposal of waste A&D paint.

⁶ Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

- 4.14. In this respect the ACCC notes the increase in the volumes of waste A&D paint collected and either reused or appropriately disposed of over the five years the Scheme has been in place, which in turn results in benefits to the environment. While volumes of waste A&D paint collected in the early years of the Scheme fell well short of Paintback's forecasts, as the Scheme has become established volumes collected have increased significantly.
- 4.15. The ACCC also notes that externalities exist in wholesale and retail supply of A&D paint in Australia. In particular, the ACCC considers that the following issues are relevant:
- the benefits from the proper disposal of waste A&D paint, as well as the costs of improper disposal, accrue primarily to external parties; that is, the public at large through the protection of health and safety as well as the environment, rather than to paint manufacturers or users, and
 - neither the operation of a competitive market, nor any legislative obligation imposed on paint manufacturers or users currently provide sufficient incentives to ensure the proper disposal of waste A&D paint.
- 4.16. Hence, an efficient method to fund a waste paint collection scheme requires collective action, such as through agreement by paint manufacturers or a levy imposed by governments, rather than action by individuals. This is because unilateral imposition of a levy would likely put that party at a competitive disadvantage to those that do not impose the levy or take steps to ensure the proper disposal of the waste paint they supply.
- 4.17. The ACCC considers that the ongoing imposition of the levy is likely to lead to greater allocative efficiency as paint consumers pay closer to the full cost of A&D paint, and greater resources are allocated to its safe disposal.
- 4.18. Due to the externalities outlined at paragraph 4.15, a research and development program to identify more efficient and effective methods for safely disposing of waste A&D paint and containers is also likely to be more efficiently delivered collectively by paint manufacturers, rather than through funding by individual manufacturers.
- 4.19. In summary, the ACCC considers that the imposition of the levy:
- enables the Scheme to collect and properly dispose of greater volumes of waste A&D paint than would be the case if state, territory, and local government collection programs continued to operate without the Scheme
 - means the price of paint more fully takes into account the full costs associated with the disposal of waste A&D paint products, and
 - provides funds for research and development to identify more efficient and effective methods for safely disposing of waste A&D paint.
- 4.20. The ACCC considers that the resultant reduction in improperly disposed of waste A&D paint is a significant public benefit in the form of an environmental benefit.

Cost savings and efficiencies

- 4.21. The ACCC considers there are likely to be cost efficiencies from the Scheme compared to a number of separately operated schemes operating on a more limited scale. Increasing both the volume of paint collected and treated through the increased acceptance of trade waste paint as well as expanding paint collection facilities, is likely

to provide economies of scale and thereby reduce the per-unit cost of collecting, treating and disposing of waste A&D paint.

- 4.22. The ACCC also notes that as the Scheme is likely to result in an increase in the total volume of waste A&D paint collected, it may make available more efficient methods of recycling, which are uneconomical with smaller volumes of waste paint. This may also lead to the greater availability of cheaper recycled paint products.

Reporting and transparency

- 4.23. As noted, Green Industries SA and EPA SA submit that in addition to annual reporting of the volume of paint collected Paintback may wish to also report total paint sold in Australia, to help determine the relative percentage of paint collected and the effectiveness of the Scheme. Paintback submits in response that total paint sold is not an appropriate metric as most paint sold is used and subsequently not recoverable, and that it considers volumes of paint collected to be the most meaningful and simple metric.
- 4.24. EPA NSW submits that on a per capita basis, Paintback's servicing of each state is highly variable, with NSW and the Northern Territory receiving the lowest contributions.
- 4.25. EPA NSW states that it is assumed that the amount of investment in recovering paint state by state should be proportional to the revenue from paint sales state by state, but as the scheme operates a confidential audit process Paintback does not disclose this information.
- 4.26. EPA NSW submits that authorisation should be granted subject to conditions requiring Paintback to publicly report:
- income and expenditure for each state
 - expenditure on: paint recovery and disposal, research and development, education, awareness and promotional activities and administration costs, and
 - summaries and findings of all research projects
- 4.27. Paintback submits that it is important for governments and the public to be informed about the operation of the Scheme so that they can have confidence that the Scheme is achieving its objectives. Paintback submits that for this reason it regularly publishes, in its annual reports and elsewhere, information including: Scheme population coverage, waste paint volumes collected and growth in volumes collected, paint product packaging volumes collected and the percentage recovered for reuse, research and development projects and trials and brand awareness and Scheme satisfaction.
- 4.28. Paintback submits that greater transparency in respect of its financial information is unnecessary to safeguard the recognised environmental public benefits accruing from the Scheme and would compromise the effectiveness (and potentially the existence) of the Scheme because:
- protecting commercially sensitive information is necessary for a voluntary product stewardship scheme. Paintback has structured its operations, reporting and meeting formats to protect the confidentiality of each participant's involvement. Processes have also been established to ensure that no participant has access to financial or other records that contain commercially

sensitive information of any other participant including commercial-in-confidence information about participants' sales

- manipulation of proposed public reporting would threaten key participants' involvement in the Scheme. Paintback's Constitution and Paintback's agreements with each participant, specifically state that "[Paintback] acknowledges and agrees with each Scheme Participant that any information disclosed to it...is confidential information, and as such, must not be disclosed or used by [Paintback]..., except for calculating the Scheme Participant's Levy Contribution". If Paintback's financial information is disclosed, third parties may be able to manipulate that information in such a way that it would disclose the commercially sensitive information of participants. Paintback provided examples of how it considers such information could be used to reveal commercially sensitive information to the ACCC on a confidential basis, and
- disclosure of Paintback's financial information would give rise to risks in its commercial negotiations and agreements. Publication of Paintback's financial information, when combined with published collection volume data, would provide specific pricing information on a national and state-by-state market basis to prospective tenderers on the amounts paid by Paintback to incumbent suppliers. For example, amounts paid to collect unwanted paint from collection sites and deliver that paint to treatment facilities.

- 4.29. With respect to transparency on the outcomes on research and development work, Paintback submits that it already publicly reports on its progress on research and development outcomes in its annual reports. For example, its Annual Review 2019/20 explains that, among other research, Paintback undertook technical trials using Plastech prototype technology to melt high paint content plastic shred to form a new composite polymer (and is awaiting the next generation of this technology to improve economies of scale). Further information beyond that already published by Paintback is not available, either because Paintback is still completing research on a research and development project (i.e. a final report has not yet been completed) or is subject to a non-disclosure agreement in respect of that information.
- 4.30. The ACCC considers that a level of transparency about Paintback's operations is important to stakeholders having confidence in, participating in and supporting the Scheme and therefore to the realisation of the public benefits of the Scheme identified above. Transparency about the Scheme also allows stakeholders such as state, territory and local governments to make better informed decisions about related initiatives and spending.
- 4.31. The ACCC considers that the current level of reporting provides transparency about the scheme in diverting waste A&D paints from inappropriate disposal pathways. The ACCC considers that the additional level of detail in financial reporting is not necessary for the realisation of the public benefits of the Scheme.
- 4.32. The ACCC also considers that reporting total paint sold in Australia, as suggested by Green Industries SA and EPA SA is unlikely to provide significant meaningful information about the effectiveness of the Scheme in recovering waste (i.e. unused) A&D paint as it does not indicate how much unused paint is available for recovery.
- 4.33. The ACCC notes that many of Paintback's research and development initiatives are ongoing and encourages Paintback to publish the results of these programs as they become available.

4.34. In this respect the ACCC notes the general support for the Scheme among stakeholders and that concerns about the level of reporting Paintback currently undertakes do not appear to be widespread. The ACCC invites submissions from interested parties about this issue.

Expansion of the Scheme

4.35. EPA NSW submits that the Scheme does not cover the full costs of recovery of waste paint in NSW. NSW EPA states that it currently pays all staging costs (set up, collection and transport) of CleanOut events, which receive paint, with Paintback covering only the disposal costs of water-based and oil-based paint. Out of the state's 94 Community Recycling Centres (CRCs), only 24 are Paintback sites. NSW EPA states that it continues to pay the full cost of paint recovery from the remaining 70 sites and that Paintback's contribution covered 59% of the paint processing cost for paint collected in NSW in 2019/20. The EPA submits that a condition should be imposed requiring additional ACCC approval in the event the levy costs are not covering the full paint recovery and disposal costs of each state.

4.36. In the scheme's current form, the EPA will also need to continue to fund the disposal of non-eligible paint related waste. The EPA submits that high volumes of aerosols and other paint related waste continue to be received at NSW CRCs and CleanOut events and a condition of authorisation should be imposed requiring the Scheme to be broadened to capture these wastes.

4.37. Paintback submits that the benefits the Scheme should not be discounted on the basis that the NSW EPA considers that a scheme in which Paintback covers a government's full cost of waste paint recovery would be better.

4.38. Paintback states that in addition to CRCs, the Scheme is offered at non-CRC locations such as commercial waste depots and at Paintback's mobile collection events. These non-CRC locations and events help to provide efficient coverage of regional and remote areas. More broadly, Paintback submits that the Scheme is a national scheme with 85% population coverage nationally which strikes an appropriate balance between extending the Scheme as broadly as possible and ensuring that the Scheme is economically efficient.

4.39. Paintback submits that the Scheme is otherwise designed to be harmonised across states and territories. It is not an intention of the Scheme to subsidise particular states or territories; rather, Paintback seeks to allocate the pool of Scheme contributions efficiently across states and territories in the context of waste paint collection benchmarks.

4.40. Paintback states that in 2019/20 NSW received the second-highest spend of all states and is forecast to have the highest collection and disposal expenditure in 2020/21. On a cost per kilogram basis, setting aside the more remote regions such as the Northern Territory and Tasmania, NSW had the highest collection cost per kilogram.

4.41. In relation to the issue of aerosols, Paintback submits that it is considering including aerosols in the Scheme in the future. However, significant further work would be required before their inclusion could be implemented (as well as potentially an increased Levy). In relation to other paint related waste, Paintback submits that it is already responsible for the safe disposal of large volumes of bycatch that arise through the everyday operations of the Scheme (including bycatch collected from NSW CRCs).

- 4.42. The ACCC notes that the conditions suggested by NSW EPA would significantly expand the scope of the Scheme both in terms of products covered and the level of funding provided by the Scheme for disposal of waste.
- 4.43. The ACCC's role through the authorisation process is to consider whether those aspects of Scheme that may breach competition law are likely to result in a net public benefit such that they should be authorised. While the power conferred upon the ACCC to authorise conduct is discretionary and the ACCC may specify conditions in an authorisation, it is not for the ACCC to use its power to impose conditions in order to substantially redraft or redesign proposed conduct simply to make the conduct better.
- 4.44. In this respect the ACCC considers that expansion of the Scheme in the manner suggested is a matter for Paintback, Scheme participants and relevant stakeholders to consider rather than something that should be required by the ACCC through the imposition of conditions of authorisation. The ACCC also notes that it is open to governments to adopt regulatory solutions if they consider that would result in better outcomes.

Public detriments

- 4.45. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.⁷

- 4.46. The ACCC has considered the following potential public detriments:

- impact on competition between participating paint suppliers
- impact on competition between paint recyclers and other waste paint collection schemes, and
- increased prices for A&D paint.

Impact on competition between participating paint suppliers

- 4.47. Generally, an agreement among competitors in relation to price is likely to lessen competition relative to a situation where each business individually makes its own pricing decisions.
- 4.48. In this case, the ACCC considers that an agreement to impose the levy is unlikely to materially impact competition between participating paint suppliers or retailers on price and other areas in which they currently compete. The levy is determined by Paintback reflecting the cost of operating the Scheme, rather than impacting wholesale or retail profits. Each participating paint manufacturer individually sets its own prices and then applies the levy. Similarly, retailers must set their prices and decide the extent to which they pass the levy through to paint consumers.
- 4.49. Accordingly, the ACCC does not consider that the agreement to impose the levy significantly increases the likelihood of broader price or non-price co-ordination between otherwise competing industry participants.

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

Impact on competition between paint recyclers and other waste paint collection schemes

- 4.50. The ACCC notes that consumers seeking to properly dispose of waste A&D paint outside the Scheme are nonetheless required to pay the levy. Such consumers therefore pay for the Scheme despite not actually making use of the Scheme themselves.
- 4.51. Nick Favot Painting submits that it is required to pay the Levy despite not being able to use the Scheme and that it could have better used these funds itself on other environmental and safety initiatives.
- 4.52. The ACCC considers that the inclusion of the cost of waste A&D paint disposal at the point of purchase may, through the funding of free disposal facilities, act as a barrier to other waste A&D paint recycling providers entering and remaining in the paint recycling market and/or more bespoke options being developed by particular paint consumers. However, the ACCC considers that Paintback is incentivised to seek out the most cost-effective means of disposing of waste paint.
- 4.53. Accordingly appropriate incentives will still exist for waste disposal methods to develop, although this competition will occur in the context of seeking funding raised by the levy. Therefore there may be some reduction in the possibility of alternatives to the Scheme being established. However, as discussed in the ACCC's assessment of the public benefits likely to be realised by the Scheme, the ACCC considers that, overall, the Scheme is likely to result in more efficient management of waste A&E paint reuse and/or disposal than would be the case with competing schemes.
- 4.54. The ACCC also notes that trade paint consumers retain the option of factoring the additional costs of paint in the services they offer, in the same way that retailers have the option of including it in the retail cost of paint. It is unlikely that any stewardship scheme will meet the preferences of all users, however the Scheme's Levy provides for a greater proportion of disposal costs to be borne by the users and beneficiaries of these products, rather than the wider population.

Increased costs for A&D paint

- 4.55. The ACCC considers that the end price of A&D paint is likely to have increased as retailers are likely to have passed on the levy to paint consumers, at least in part. However, the price increase is likely to be a small proportion of the overall cost of A&D paint, with APMF submitting in 2015 that based on a typical wholesale cost between \$20 and \$80 for a four litre container of A&D paint, they estimated an increase to wholesale prices between 0.75 and 3 per cent. The increase in the price of end use paint would be proportionally less than this amount.
- 4.56. To the extent that consumers pay closer to the full cost of A&D paint (i.e. that includes the cost of proper disposal), the price increase that may occur due to the levy is likely to signal a more efficient allocation of resources in the economy. In particular, the levy internalises the cost associated with the improper disposal of A&D paint.
- 4.57. The ACCC also considers that without the imposition of a levy on A&D paint, the significant costs of safe disposal and improper disposal of waste A&D paints are more likely to be assumed by governments and the community as a whole. In this respect, the increase in the price of A&D paint is somewhat offset by the savings to taxpayers through transferring funding responsibilities to paint users.

4.58. Overall, the ACCC accepts that the levy is likely to represent a relatively small increase in the overall retail price for A&D paint. The ACCC considers that this limited increase in prices, directed at providing for the appropriate collection and safe disposal of waste A&D paint, is unlikely to constitute a material public detriment

Balance of public benefit and detriment

4.59. The ACCC considers that the Proposed Conduct is likely to result in public benefits in the form of:

- environmental benefits resulting from the Levy enabling greater collection of waste A&D paint and less improper disposal than would be the case if state, territory, and local government collection programs continued to operate without the Scheme, and
- cost efficiencies from economies of scale, reducing the per-unit cost of collecting and disposing of waste A&D paint.

4.60. The ACCC considers that the Proposed Conduct is unlikely to result in significant public detriment as imposition of the levy is unlikely to significantly impact competition at either the wholesale or retail levels. The cost of the levy is small relative to the cost of A&D paint.

4.61. Therefore, for the reasons outlined in this draft determination, the ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.

Length of authorisation

4.62. The Act allows the ACCC to grant authorisation for a limited period of time.⁸ 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.

4.63. In this instance, Paintback seeks authorisation for 10 years. Paintback submits that 10 years is appropriate considering the long-term nature of the Scheme, the clear and demonstrated public benefits arising from it, and that the Scheme does not result in any material public detriments.

4.64. Submissions from Metropolitan Waste and Resource Recovery Group, DuluxGroup, Planet Ark, and the WA Department of Water and Environmental Regulation support authorisation for 10 years. NSW EPA supports a 10 year authorisation period with periodic reviews and conditions.

4.65. The ACCC considers a 10 year authorisation is appropriate given the continuing nature of the conduct, no changes have been proposed to the currently authorised conduct and submissions from stakeholder have been generally supportive of authorisation.

4.66. The ACCC therefore proposes to grant authorisation for 10 years.

⁸ Subsection 91(1)

5. Draft determination

The application

- 5.1. On 30 November 2020, the Applicants lodged application AA1000536 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 5.2. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 5.3. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.
- 5.4. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 5.5. Accordingly, the ACCC proposes to grant authorisation.

Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to grant authorisation AA1000536 to enable Paintback Limited, and current and future participating paint suppliers who sign the Waste Paint Collection and Treatment Agreement to impose a Levy of up to \$0.15 per litre (plus GST) on sales of architectural and decorative paint to fund the Paintback Scheme.
- 5.7. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
- 5.8. The ACCC proposes to grant authorisation AA1000536 for ten years.
- 5.9. This draft determination is made on 16 April 2021.

6. Next steps

- 6.1. The ACCC now invites submissions in response to this draft determination. In addition, consistent with section 90A of the Act, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.