



Draft Determination

Application for revocation of A91515 and the substitution of authorisation AA1000537

lodged by

Refrigerant Reclaim Australia Limited

in respect of

its operation of a product stewardship program to recover ozone depleting and synthetic greenhouse gas refrigerants.

Authorisation number: AA1000537

Date: 30 March 2021

Commissioners:

Keogh

Rickard

Brakey

Court

Ridgeway

Summary

The ACCC proposes to grant authorisation to enable Refrigerant Reclaim Australia to continue to operate a product stewardship program to recover ozone depleting and synthetic greenhouse gas refrigerants (the Refrigerant Gases). This conduct was first authorised by the ACCC's predecessor, the Trade Practices Commission, in 1994 and has been authorised a number of times ever since. The current application is unchanged from the most recent previous application for authorisation.

The ACCC considers that the Conduct is likely to continue to result in public benefits from greater compliance with the *Ozone Protection and Synthetic Greenhouse Management Act 1989* (Cth) and thus greater reduction in the release of Refrigerant Gases, pricing for Refrigerant Gases which better reflects the negative externalities inherent in their use, transaction cost savings, and economies of scale.

The ACCC considers that the Conduct has and is likely to continue to result in minimal public detriments in the form of:

- a reduction in competition in the supply of Refrigerant Gases and products containing these Refrigerant Gases due to either:
 - the levy fixing agreement which is applied to the price of Refrigerant Gases, or
 - the potential for Refrigerant Reclaim Australia to inappropriately exclude competitors
- increased barriers to entry to alternative product stewardship programs, including as a result of the rebates paid by Refrigerant Reclaim Australia.

The ACCC is satisfied that the Conduct is likely to result in a number of public benefits and that these public benefits would outweigh the likely minimal public detriment.

The ACCC proposes to grant authorisation for 10 years.

The ACCC invites submissions in relation to this draft determination by 20 April 2021 before making its final decision.

1. The application for authorisation revocation and substitution

- 1.1. On 2 December 2020, Refrigerant Reclaim Australia lodged an application to revoke authorisation A91515 and substitute authorisation AA1000537 for the one revoked (referred to as re-authorisation) with the Australian Competition and Consumer Commission (the **ACCC**). Refrigerant Reclaim Australia is seeking re-authorisation to enable it to operate a product stewardship program to recover the Refrigerant Gases for ten years. This application for re-authorisation AA1000537 was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.2. The ACCC can grant authorisation which provides businesses with legal protection for arrangements that may otherwise risk breaching the law but are not harmful to competition and/or are likely to result in overall public benefits.

1.3. In this instance, the members of Refrigerant Reclaim Australia are competitors at various levels of the refrigeration and air-conditioning industry. They sit on Refrigerant Reclaim Australia's board to discuss and collectively agree to:

- fix part of the price of bulk Refrigerant Gases or goods containing Refrigerant Gases, in the form of a levy, for the purposes of funding Refrigerant Reclaim Australia's industry wide product stewardship program
- fix the rebates delivered through the program to support participation in the operation of Refrigerant Reclaim Australia's product stewardship program by Refrigerant Gases importers and wholesalers and refrigerant plant and equipment contractors and repairers
- administer Refrigerant Reclaim Australia's program to reclaim, recycle, destroy and sell used Refrigerant Gases in Australia, which has the capacity to affect competition to reclaim, recycle, sell and destroy Refrigerant Gases in Australia, and
- decisions regarding the termination or suspension access to Refrigerant Reclaim Australia's program by industry participants which do not abide by the terms of the program. This may affect those industry participants' ability to compete with active members of Refrigerant Reclaim Australia.

The Conduct

1.4. Refrigerant Reclaim Australia is seeking authorisation to allow itself, its directors and members and those companies and persons that it has entered into agreements with, to discuss and agree to:

- set, and for importers to consistently apply, a maximum \$2.00/kg levy in addition to the price of the Refrigerant Gases imported into or manufactured and sold in Australia.¹
- determine the value of rebates to be paid by Refrigerant Reclaim Australia to Refrigerant Gases wholesalers and contractors for the return of recovered Refrigerant Gases.
- determine the processes and disposal practices that will be applied to recovered Refrigerant Gases; the main options for such processes and practices being storage, reclamation and sale, and destruction in Australia or offshore.

(the **Conduct**)

2. Background

2.1. Refrigerant Gases are used in Australia in a wide variety of industrial, commercial and household applications involving refrigeration and air-conditioning. Refrigerant Gases are not manufactured in Australia. They are imported:

- already installed, as part of manufactured goods such as cars or refrigerators, by an Australian retailer or wholesaler of manufactured goods
- for use in the manufacturing process or for installation of the Refrigerant Gases in refrigerant using products, by Australian manufacturers

¹ Note: an additional 20c GST is also added on, leading to a maximum increase due to the levy of \$2.20/kg.

- by refrigerant gas wholesalers for use by Australian manufacturers or by refrigerant industry contractors and repairers² to site install or maintain refrigeration and air-conditioning equipment and plant.
- 2.2. New refrigerants that do not deplete the ozone layer and have significantly lower global warming potential are now commercialised and widely available. However, during the phaseout period of the older refrigerants, there will remain a significant and growing volume of installed Refrigerant Gases in Australia that will require eventual recovery and destruction to prevent emission.
- 2.3. There are a number of processes that may be applied to recovered Refrigerant Gases but ultimately they must be either safely stored for subsequent reclamation (reclaimed to new specification and placed back in the market) or destruction (safely destroyed). Since the last application all contaminated and unwanted Refrigerant Gases collected by Refrigerant Reclaim Australia have been destroyed. The largest volume was destroyed using the argon plasma-arc facility in Melbourne. At least 247 tonnes of recovered Refrigerant Gases was destroyed through an upgraded cement plant in Yarwun, Queensland.

Regulatory requirements in relation to Refrigerant Gases

- 2.4. All importers of Refrigerant Gases, both in bulk and pre-charged in equipment, must have an import licence issued by the Department of Agriculture, Water and the Environment. A condition of that licence is that they take responsibility for the Refrigerant Gases they import by participating in a product stewardship program. Refrigerant Reclaim Australia submits that thus far all importers have chosen to enter into an agreement with Refrigerant Reclaim Australia to participate in the industry-wide product stewardship program and to contribute to the levy.

Refrigerant Reclaim Australia previous authorisations

- 2.5. The Refrigerant Reclaim Australia program has been authorised by the ACCC since 1994. Most recently the authorisations in 2011 and 2016 included conditions requiring Refrigerant Reclaim Australia to:
- publish its Annual Report on its website every year, and
 - publish and maintain on its website the methodology used to derive the program's recovery rates, including the underlying data and assumptions concerning the amount of refrigerant available for recovery.
- 2.6. Refrigerant Reclaim Australia has confirmed that it will continue to publish its Annual Report on its website and its ongoing market research (including the methodology used to derive the program's recovery rates).³

Refrigerant Reclaim Australia levy

- 2.7. The value of the levy was originally set at \$1.00 when the program commenced in 1993. The expansion of the program to include the take-back of synthetic greenhouse gases and the passing and implementation of the *Ozone Protection and Synthetic Greenhouse Management Act 1989 (Cth)* (the **OPSGM Act**), along with other initiatives, caused a substantial increase in the amount of Refrigerant Gases being recovered and destroyed. The levy increased to \$1.50 in 2006, and \$2.00 in 2008.

² Referred to in Refrigerant Reclaim Australia's authorisation application and in this paper generically as 'contractors'.

³ Email from Refrigerant Reclaim Australia dated 25 March 2021.

Refrigerant Reclaim Australia submits it does not foresee the requirement for a further increase in the levy in the next ten year period.

- 2.8. As an indicator of the relative amount of the levy compared to end-user costs of products which incorporate Refrigerant Gases, Refrigerant Reclaim Australia has submitted the following table (**Table 1**). Table 1 indicates the average amount (in kg) of refrigerant used in a variety of applications, the cost of the levy for this average amount and an indication of the estimated end-user cost of the end product.

Table 1: Levy Cost as a Component of Consumer Price

Unit or Service Type	Average charge of refrigerant	Cost of levy per unit @\$2.00 /	Estimated consumer cost of
Split System Air Conditioner	1.5 kg	\$3.00	\$2,000 +
Refrigerator / Freezer	0.2 kg	\$0.40	\$600 +
Motor Vehicle Air Conditioner	0.7 kg	\$1.40	\$26,000 +
Motor Vehicle AC Service	0.7 kg	\$1.40	\$300
Medium Size Supermarket	500 kg	\$1,000	\$500,000

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Refrigerant Reclaim Australia rebates

- 2.9. Rebates are fees paid to refrigerant gas wholesalers and contractors for the recovery, handling and return of Refrigerant Gases. In the case of refrigerant gas wholesalers, the rebate is part compensation for the costs they incur in managing the take back of recovered Refrigerant Gases. Refrigerant gas wholesalers provide market access for the take back of recovered Refrigerant Gases; their branch networks act as the collection points, cylinders provision, decanting services and administration that enables the product stewardship program to function effectively
- 2.10. For refrigeration and air-conditioning industry contractors, the rebate is an incentive to recover and return used, contaminated and unwanted Refrigerant Gases that they have used in the course of installing plant or repairing or maintaining equipment that contains Refrigerant Gases.
- 2.11. The values of the rebates are set by Refrigerant Reclaim Australia and it has agreements with the refrigerant gas wholesalers to pay contractors which buy Refrigerant Gases through them a rebate as a minimum fee for the return of Refrigerant Gases.

Termination provisions under the Refrigerant Reclaim Australia program

- 2.12. There are a number of agreements under the Refrigerant Reclaim Australia's program which govern the collection of the levy and participation by manufacturers, wholesalers and importers in the program.

⁴ Refrigerant Reclaim Australia (2021) *Application for authorisation* pg 17.

- 2.13. The *Manufacturers (Bulk) Importers Agreement* governs the payment of the levy to Refrigerant Reclaim Australia by bulk importers of Refrigerant Gases. The levy payments and associated record keeping by signatories are subject to audit from time to time at Refrigerant Reclaim Australia's expense. Signatories agree to be bound by the findings of any audit in terms of levy payment obligations.
- 2.14. Parties which have joined the Refrigerant Reclaim Australia program by signing the *Manufacturers (Bulk) Importers Agreement* may terminate their involvement by providing 180 days' notice. Refrigerant Reclaim Australia may do the same. Both parties may also terminate the agreement due to failure to make good a breach of the agreement (with 30 days' notice) or insolvency by the other party. Refrigerant Reclaim Australia may also suspend indefinitely or terminate the agreement (with 60 days' notice) if signatories fail to correctly report or pay the required levy amounts.
- 2.15. The *Charged Equipment Importers (More than 100 Kilograms per annum) Agreement* or the *Charged Equipment Importers (100 Kilograms or less per annum) Agreement* governs the payment of the levy to Refrigerant Reclaim Australia by regular importers of products containing Refrigerant Gases. This agreement may be terminated upon the importer by providing a notice of withdrawal or by Refrigerant Reclaim Australia with 30 days written notice.
- 2.16. The *Charged Equipment Importers (one time importer) Agreement* governs the payment of the levy to Refrigerant Reclaim Australia by one-off importers of products containing Refrigerant Gases. The agreement includes no termination provisions.
- 2.17. The *Wholesalers Agreement* governs the relationship between Refrigerant Reclaim Australia and wholesalers of Refrigerant Gases, including the method of collection of Refrigerant Gases and payment of the rebate. Either party may terminate the agreement with 90 days' notice. In addition, Refrigerant Reclaim Australia may immediately terminate the agreement by providing notice in writing in the event that the wholesaler (in summary):
- becomes insolvent
 - becomes bankrupt
 - is guilty of a material breach of Australian laws or standards
 - fails to rectify a material breach of the agreement within 14 days of a written notice from Refrigerant Reclaim Australia.

3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties including major industry participants, industry associations and state and federal government bodies.⁵

⁵ A list of the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

- 3.3. The ACCC received three submissions from interested parties in relation to the application. Five industry associations⁶ provided a joint submission supportive of Refrigerant Reclaim Australia and the industry program. The Australian Government Department of Agriculture, Water and the Environment and Fujitsu General Australia also provided submissions supportive of Refrigerant Reclaim Australia and the industry program.
- 3.4. The application for authorisation by Refrigerant Reclaim Australia and public submissions from interested parties are on the Public Register for this matter.

4. ACCC assessment

- 4.1. The ACCC's assessment of the Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. Refrigerant Reclaim Australia has sought 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 Act⁷, 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).
- 4.3. To assist with the assessment of the Conduct, the ACCC considers:
- the relevant area/s of competition likely to be affected by the Conduct, are:
 - the supply of Refrigerant Gases or goods containing these Refrigerant Gases in Australia
 - the collection of unwanted and unusable (end-of-life) Refrigerant Gases, and
 - recycling, sale, and destruction services for reclaimed Refrigerant Gases.
 - that the likely future without the Conduct is that an alternative program or programs would need to be developed in order for importers to satisfy their regulatory obligations.⁸ For example, larger importers may develop their own programs for end-of-life-cycle management of Refrigerant Gases, including potentially offering services to other importers.

Public benefits

- 4.4. 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:

⁶ Refrigerants Australia, the Air Conditioning and Refrigeration Equipment Manufacturers Association, the Air Conditioning and Refrigerant Wholesalers Association, the Refrigeration and Air Conditioning Contractors Association, and the Vehicle Air-conditioning Specialists of Australasia.

⁷ See subsection 91C(7).

⁸ *Ozone Protection and Synthetic Greenhouse Management Act 1989* (Cth) requires that import-licence holders participate in an approved scheme for managing Refrigerant Gases at the end of life and the Applicants' scheme is the only currently approved scheme,

*...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.*⁹

4.5. The ACCC has considered the following public benefits:

- greater compliance with the OPSGM Act and thus greater reduction in the release of ozone destroying and greenhouse gases
- pricing for Refrigerant Gases which better reflects the negative externalities inherent in their use, including the social cost of damage to the ozone layer and contribution to climate change
- transaction cost savings, compared to the situation in which importers of Refrigerant Gases would need to develop their own program/s in order to comply with the OPSGM Act, and
- economies of scale.

Greater compliance with the OPSGM Act and thus greater reduction in the release of Refrigerant Gases

4.6. The Department of the Environment submits that a viable product-stewardship program is an important part of Australia's policy approach to minimising emissions of Refrigerant Gases at end of life that would otherwise be released into the atmosphere, damaging the ozone layer and contributing to global climate change. The Department of the Environment supports Refrigerant Reclaim Australia's program as it provides a mechanism to manage these Refrigerant Gases. Refrigerant Reclaim Australia's program is currently the only program registered by the Department of Environment as a program that meets the requirements of the OPSGM Act. While there is potential for other programs to be established, all current licensed importers have chosen to meet their product stewardship responsibilities through membership of Refrigerant Reclaim Australia's program.

4.7. Refrigerant Reclaim Australia submits that it has facilitated the recovery of approximately 8,000 tonnes of Refrigerant Gases since the program began in 1993. In particular, it submits that:

- it takes back between 47% and 67% of all unwanted recovered Refrigerant Gases and the program has been globally recognised through awards from the United Nations Environment programme and the US EPA, and
- it assists Australia to meet obligations under various international agreements including the Montreal Protocol and the Kyoto Protocol, by assisting the refrigerant and air-conditioning industry to control the consumption and production of Refrigerant Gases. The program has so far prevented the emission of sufficient ozone depleting refrigerant to destroy more than 10 million tonnes of stratospheric ozone and emission of the equivalent of 14 million tonnes of carbon dioxide.

4.8. The ACCC notes that Refrigerant Reclaim Australia has maintained, for more than 25 years, a product stewardship program supported by industry members, industry associations and the Department of the Environment. It has led to public benefits in the form of increasing compliance with the OPSGM Act and thus greater reduction in the release of Refrigerant Gases compared to the likely situation of a more fragmented program. The ACCC also notes that alternative programs would take time to be

⁹ 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.

developed and would need to go through a Department of Environment approval process. During such a transition, the amount of Refrigerant Gases recovered would be less.

- 4.9. For the above reasons, the ACCC considers that Refrigerant Reclaim Australia's program is likely to result in a public benefit by achieving higher levels of compliance with the OPSGM Act and reduced environmentally damaging emissions of Refrigerant Gases.

Pricing to better reflect the externalities in supply of Refrigerant Gases

- 4.10. The competitive process generally leads to 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.¹⁰ In this case, efficient pricing which better reflects the external impact of the use of the Refrigerant Gases is likely to reduce their use and also lead to significant environmental benefits.
- 4.11. In particular, the imposition of the levy means that the market price of Refrigerant Gases is likely to be closer to the social cost of consumption, meaning that it is inclusive of the negative externalities of emissions (damage to the ozone layer and contribution to global climate change), 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 Gases, the ACCC considers that consumers will face prices that are more reflective of the full cost of the affected products on society. Without the levy or a similar charge, the price of Refrigerant Gases is less likely to reflect its full social cost.
- 4.12. The ACCC is not in a position to quantify the size of the negative externality associated with Refrigerant Gases or the extent to which it is corrected by Refrigerant Reclaim Australia's levy. However, the ACCC considers that Refrigerant Reclaim Australia's program is likely to achieve prices that are more reflective of the full social cost of Refrigerant Gases and is likely to reduce their use. This is a source of public benefit.

Transaction cost savings

- 4.13. Without Refrigerant Reclaim Australia's program, large importers may develop their own programs to comply with the OPSGM Act or they may coordinate to develop a new single program. For each new program, importers (and the parties they deal with) would incur transaction costs to develop and register the program with the Department of Environment and establish arrangements for the supply and use of Refrigerant Gases collection and storage, transport and destruction services.
- 4.14. Even if importers were to develop a single program, they (and the parties they deal with) would incur transaction costs to register the new program, establish contracts with service providers, obtain legal and technical advice and other expert advice (at least until an alternative coordinated program or programs were developed and registered by the Department of Environment).
- 4.15. Under Refrigerant Reclaim Australia's program, participants (of which there are more than 1000) are all delegating decisions, operational responsibility and contracting to

¹⁰ 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.

Refrigerant Reclaim Australia. Refrigerant Reclaim Australia coordinates and/or executes, for example, the collection network, the payments to the contractors surrendering Refrigerant Gases and the contracts with the destruction facilities. Parties such as the destruction businesses or contractors surrendering Refrigerant Gases may also have lower transaction costs under Refrigerant Reclaim Australia's program to the extent that they otherwise would have to enter into arrangements with multiple programs.

- 4.16. Putting in place alternative arrangements would incur establishment costs, duplicating those already incurred under Refrigerant Reclaim Australia's program. Therefore, the ACCC considers that Refrigerant Reclaim Australia's program is likely to result in a public benefit through the saving of transaction costs associated with establishing one compared to having multiple new programs.

Economies of scale

- 4.17. Without the Conduct, the process for the collection of unwanted and unusable Refrigerant Gases may become more fragmented. That is, more than one collection program may operate. The single Refrigerant Reclaim Australia collection program is likely to realise greater economies of scale than separate programs. For example, it may be able to operate with fewer, more efficiently utilised transport vehicles and storage sites.
- 4.18. To the extent that multiple programs would operate without the Conduct, and to the extent that multiple programs used multiple operators of disposal services, the Refrigerant Reclaim Australia collection program may also facilitate the realisation of economies of scale in disposal. These efficiencies could be achieved if the disposal costs per kilogram of Refrigerant Gases fall as the volume increases.
- 4.19. Further, as discussed above, Refrigerant Reclaim Australia's program is likely to result in a higher level of compliance with regulations concerning end-of-life-cycle management of Refrigerant Gases than would otherwise be the case, which is also likely to facilitate further realisation of scale economies in collection and disposal.

ACCC conclusion on public benefit

- 4.20. The ACCC considers that the Conduct is likely to result in the following public benefits:
- greater compliance with the OPSGM Act and thus greater reduction in the release of Refrigerant Gases
 - pricing for Refrigerant Gases which better reflects the negative externalities inherent in their use, including the social cost of damage to the ozone layer and contribution to climate change
 - transaction cost savings, compared to the situation in which importers of Refrigerant Gases would need to develop their own program/s in order to comply with the OPSGM Act, and
 - economies of scale in the collection and disposal of Refrigerant Gases.

Public detriments

- 4.21. 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.¹¹

4.22. The ACCC considers that the Conduct has resulted, and is likely to continue to result, in minimal public detriment. The ACCC has considered the following public detriments:

- reduction in competition in the supply of Refrigerant Gases and products containing these Refrigerant Gases due to either:
 - the levy fixing agreement which is applied to the price of Refrigerant Gases, or
 - the potential for Refrigerant Reclaim Australia to inappropriately exclude competitors, and
- increased barriers to alternative programs and suppliers of Refrigerant Gases reclamation, recycling, sale and disposal services, including as a result of the rebates paid by Refrigerant Reclaim Australia.

Reduction in competition in the supply of Refrigerant Gases and products containing these Refrigerant Gases due to the fixed levy

4.23. The levy is an agreement between competitors on a component of retail pricing of Refrigerant Gases containing products. 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. However, the ACCC considers that, in this case, the levy is unlikely to materially impact competition between suppliers of Refrigerant Gases or competition between suppliers of products containing these Refrigerant Gases on the basis that:

- industry participants each set their prices and then apply the \$2-per-kilogram levy. The levy is likely to be reflected in the end prices of products containing Refrigerant Gases and in charges to replenish the Refrigerant Gases, but is small compared with the end price of the product containing the Refrigerant Gases or the cost of servicing that product to replenish the Refrigerant Gases
- without Refrigerant Reclaim Australia's program there is likely to be a similar levy or charge to recover the cost to establish and operate an alternative program or programs in order for importers to comply with their obligations under the OPSGM Act, and

4.24. 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.

Reduction in competition in the supply of Refrigerant Gases and products containing these Refrigerant Gases due to the potential to exclude competitors

4.25. As outlined above in paragraphs 2.12-2.17, the agreements between Refrigerant Reclaim Australia and industry participants in its program allow Refrigerant Reclaim Australia to make decisions regarding the termination or suspension of access to Refrigerant Reclaim Australia's program. Lack of access to the program may affect industry participants' ability to compete with active members of Refrigerant Reclaim Australia.

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

- 4.26. Exclusion from Refrigerant Reclaim Australia's program would require that industry participant to develop its own program to reclaim Refrigerant Gases or use the more expensive refrigerants (to the extent that may be possible). As noted above, the economies of scale and transaction costs inherent in developing a new program would be likely make this a prohibitively expensive option for most industry participants at this time. Therefore, an industry participant which loses access to the Refrigerant Reclaim Australia program may exit from the refrigeration and air-conditioning industry.
- 4.27. The ACCC considers that to the extent that industry participants may be suspended or terminated for genuine reasons, any loss of competition is outweighed by the benefit of having Refrigerant Reclaim Australia's program in place to ensure Refrigerant Gases are appropriately returned, stored, reclaimed, recycled, and destroyed.
- 4.28. Further, the ACCC notes that it has not received any complaints or submissions that indicate that Refrigerant Reclaim Australia has or might exclude industry participants for non-genuine reasons. The Refrigerant Reclaim Australia program has extensive support from a variety of industry bodies connected with the refrigerant and air-conditioning industry.
- 4.29. Accordingly, the ACCC is satisfied that the Proposed Conduct is unlikely to lead to a significant reduction in competition in the supply of Refrigerant Gases and products containing these Refrigerant Gases due to the potential to exclude competitors.

Increased barriers (including in the form of rebates) to alternative Refrigerant Gases reclamation programs and suppliers of reclamation, recycling, sale and disposal services

- 4.30. An issue is whether the existence of the Refrigerant Reclaim Australia program creates barriers to the formation of alternative Refrigerant Gases reclamation programs and the potential entry of alternative suppliers of reclamation, recycling, sale and disposal services. One potential barrier is the use of rebates in the Refrigerant Reclaim Australia program and whether they discourage competition by commercial suppliers to operate an alternative program.
- 4.31. Under the OPSGM Act, anyone can apply to the Department of the Environment for approval to operate a product-stewardship program for the recovery and destruction of Refrigerant Gases. Accordingly, an alternative program or programs could be established in competition with Refrigerant Reclaim Australia. As Refrigerant Reclaim Australia's program is voluntary, Refrigerant Reclaim Australia's members would then be free to leave and join competing programs.
- 4.32. Although the Refrigerant Reclaim Australia program uses rebates to encourage participation by wholesalers and contractors, this is due to the low or negative value of the recovered gases. The low price of used Refrigerant Gases also acts as a strong disincentive to entry by commercial suppliers or internal reuse schemes by industry participants. It is likely that any program which sought to meet the requirements of the OPSGM Act would need to utilise rebates.
- 4.33. Accordingly the ACCC does not consider that existence of Refrigerant Reclaim Australia's program or its use of rebates increases the barriers to the development of alternative programs and the potential entry of alternative suppliers of reclamation, recycling, sale or disposal services.

ACCC conclusion on public detriment

4.34. The ACCC considers that the Conduct is likely to continue to result in minimal public detriment in the form of:

- a reduction in competition in the supply of Refrigerant Gases and products containing these Refrigerant Gases due to either:
 - the levy fixing agreement which is applied to the price of Refrigerant Gases, or
 - the potential for Refrigerant Reclaim Australia to inappropriately exclude competitors, and
- increased barriers to alternative programs and suppliers of Refrigerant Gases reclamation, recycling, sale and disposal services, including as a result of the rebates paid by Refrigerant Reclaim Australia.

Balance of public benefit and detriment

4.35. For the reasons outlined in this draft determination, the ACCC is satisfied that the Conduct is likely to result in a public benefit and that this public benefit would outweigh the minimal likely public detriment from the Conduct.

Conditions

4.36. As noted above (see paragraph 2.5), the ACCC previously granted conditional authorisation to Refrigerant Reclaim Australia's program to address concerns that, at that time, information about the operation of the scheme was not always publicly available. Refrigerant Reclaim Australia has advised that it intends to publish an annual report and monitor the program's effectiveness through market analysis (which includes determining the methodology used to derive the program's recovery rates) on an annual basis. Having regard to Refrigerant Reclaim Australia's commitment to publish information the subject of the previous conditions and having received no submissions from interested parties on this issue, the ACCC does not propose to reimpose the previous conditions.

Length of authorisation

4.37. The Act allows the ACCC to grant authorisation for a limited period of time.¹² 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.

4.38. In this instance, Refrigerant Reclaim Australia initially sought re-authorisation for five years.

4.39. The ACCC considers that a longer authorisation period is appropriate given:

- the long standing nature of the program, which has undergone several re-authorisations, recognising the net benefits associated with the program
- no changes have been proposed in the current re-authorisation, and

¹² Subsection 91(1)

- submissions received in relation to the ACCC's initial consultations have been supportive of Conduct.

4.40. Accordingly, the ACCC proposes to authorise the Conduct for ten years.

5. Draft determination

The application

- 5.1. On 2 December 2020, Refrigerant Reclaim Australia lodged an application to revoke authorisation A91515 and substitute authorisation AA1000537 for the one revoked (referred to as re-authorisation). This application for re-authorisation AA1000537 was made under subsection 91C(1) of the Act.
- 5.2. Refrigerant Reclaim Australia seeks authorisation for Conduct which may breach the Act. 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 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 Conduct.
- 5.4. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the 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 Conduct, including any lessening of competition.
- 5.5. Accordingly, the ACCC proposes to grant re-authorisation.

Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to revoke authorisation A91515 and grant authorisation AA1000537 in substitution to enable Refrigerant Reclaim Australia to operate a product stewardship program to recover ozone depleting and synthetic greenhouse gas refrigerants for ten years as described in paragraph 1.4 and defined as the Conduct.
- 5.7. The 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 AA1000537 for ten years.
- 5.9. This draft determination is made on 30 March 2021.

6. Next steps

- 6.1. The ACCC now invites submissions in response to this draft determination by 20 April 2021. In addition, consistent with section 90A of the Act, Refrigerant Reclaim Australia or an interested party may request that the ACCC hold a conference to discuss the draft determination.