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Mr Ken Matthews AO
Chair
Independent Review Panel
Review of the Agvet Chemicals Regulatory System

Sent by email: reviewsubmissions@agriculture.gov.au

Dear Mr Matthews

ACCC Submission in response to the Draft Report of the Independent Review of the Agvet Chemicals Regulatory System

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to respond to the Draft Report of the Independent Review of the Agvet Chemicals Regulatory System (the Draft Report), and has appreciated the opportunities to meet with the Independent Review Panel (the Panel) and the Department of Agriculture, Water and the Environment to discuss the Review to date.

The ACCC had strong concerns with the proposal in the previous Issues Paper to broadly exclude pesticides and veterinary medicines that are also considered consumer products. This approach would likely have led to reduced safety outcomes for Australian consumers and eroded consumer trust in products that have been safely and efficiently regulated under the agvet system for a number of years. We agree that the agvet system is best placed to assess and manage the risks from these speciality products.

We note the Panel is now considering a move towards a new 'levels' approach for classifying pesticides and veterinary medicines according to their risk profile to determine appropriate pre-market assessment and other regulatory measures. We understand that products classified in Levels A, B and C would be retained within the agvet system, while products classified in Level D would be excluded from the agvet system, which potentially includes some low risk consumer products.

In general, the ACCC agrees that a risk-based model for determining regulatory options allows for greater focus on high risk products. However, we maintain our support for retaining all pesticides and veterinary medicines that are also consumer products under the specialist regulatory oversight of the agvet system, as the best option to ensure they continue to be safely and efficiently regulated in the future.

Role of the ACCC

The ACCC is a whole of economy regulator that promotes competition and fair trading in markets to benefit consumers, businesses and the Australian community. Our primary responsibility is to ensure that individuals and businesses comply with the Competition and Consumer Act 2010 (the CCA), which includes the Australian Consumer Law (ACL).

One of the ACCC's key objectives is for consumers to be able to confidently participate in markets. Through the application of the ACL, the ACCC aims to prevent misleading

behaviour and unconscionable conduct, and to minimise the risk posed by unsafe consumer goods and product related services.

Our responsibility for product safety and minimising safety risks for Australian consumers is achieved through administering the consumer product safety provisions of the ACL. These include powers for the Commonwealth Minister to issue compulsory recalls, impose product bans, make or declare mandatory safety standards and information standards, and issue safety warning notices.

Role of the ACCC with respect to pesticides and veterinary medicines

Where pesticides and veterinary medicines are also consumer goods, they must also comply with the requirements of the ACL. Consumer goods are defined as goods that are intended for personal, domestic or household use or consumption. However, in recognition of the specialist mandate of the Australian Pesticides and Veterinary Medicines Authority (APVMA), the ACCC does not generally take action in relation to pesticides and veterinary medicines.

This is consistent with the Government's Statement of Expectations for the ACCC, which states that the ACCC should avoid the duplication of the supervisory activities of other regulators, and should consider whether outcomes could be achieved by using existing regulation administered by another regulator, in order to ensure an integrated regulatory framework and minimise compliance costs.

In circumstances where pesticides and veterinary medicines are considered to be consumer goods, the ACCC accepts notifications of a voluntary recall for these goods on behalf of the Commonwealth Minister. However if the APVMA issues a statutory recall notice under its legislation, the recall is not voluntary and would not ordinarily be published by the ACCC. The ACCC also does not accept mandatory injury reports concerning pesticides and veterinary medicines, as these are subject to an exemption in the ACL, and are made directly to the APVMA.

As a result of the continued specialist oversight by the APVMA, the ACCC has had limited involvement with regulating pesticides and veterinary medicines that are also consumer goods. The product safety provisions of the ACL are not well suited to address chemical safety risks, as the Commonwealth Minister's powers apply to preventing the risk of acute physical injury rather than chronic or late onset illness, and do not extend to addressing land destruction or environmental protection from use or misuse of chemicals.

Levels approach for classifying pesticides and veterinary medicines

The ACCC recognises the APVMA is the specialist regulator and notes it proposes to use a risk-based approach for classifying pesticides and veterinary medicines within the agvet system into levels to determine the most appropriate regulatory options and pre-market assessment measures commensurate with the product risk. We consider this approach will help streamline assessments under the agvet system and allow for a more efficient allocation of resources towards high risk products, while continuing to maintain good safety outcomes.

The ACCC takes a risk-based approach to product safety which involves identifying, prioritising and addressing risks arising from unsafe consumer products. We allocate resources to the issues posing the greatest risk to consumers and prioritise action according to a published list of Product Safety Priorities. The ACCC does not prioritise product safety issues that are the province of specialist regulators, nor issues that are low risk. We are necessarily selective in the matters we investigate, including the product safety matters we address, and we cannot pursue all matters that come to our attention due to finite resources.

Levels A, B and C (products retained within the agvet system)

The ACCC supports measures that will retain pesticides and veterinary medicines that are also consumer products within the agvet system. As the specialist regulator, the APVMA, along with the newly proposed Commissioner for Pesticides and Veterinary Medicines Stewardship (the Commissioner), are best placed to determine the risk profile of a particular pesticide or veterinary medicine, and the level of pre-market assessment required.

We understand most categories of pesticides and veterinary medicines would be classified in Level A and remain subject to current pre-market assessment requirements. If it was determined that a particular low risk product would not require pre-market assessment (Levels B and C), consumers could still be confident that these products would be subject to the rigorous post-market controls of the agvet system.

The ACCC also supports the use of well-defined standards for well known, low risk products and chemicals that are not subject to any significant pre-market assessment, as proposed for Levels B and C. As noted in the Draft Report, when developing a standard it should be subject to public consultation to allow for appropriate industry and stakeholder feedback. Public consultation is also a requirement for making new mandatory product safety standards under the ACL. The Panel also is encouraged to consider whether there are efficient mechanisms for allowing the adoption of comparable overseas standards from trusted overseas organisations.

Level D (products excluded from the agvet system)

The ACCC maintains that the agvet system is best placed to regulate pesticides and veterinary medicines, including where those specialty products are also consumer goods. As such, we advocate against excluding certain low risk products that also have consumer uses from the agvet system by revising their definition, as proposed for products classified in Level D. This includes: pesticides containing only 'generally recognised as safe' (GRAS) substances; pheromones and semiochemicals; biostimulants; surfactants, adjuvants, wetting agents and spray markers; and products containing Bacillus thuringiensis.

If excluded from the agvet system, these products would likely fall within the broad remit of the ACL. Such products would be assessed and prioritised against all other economy-wide product safety issues that come to the ACCC's attention. As these products are being deregulated as low risk the ACCC would not give them any priority for monitoring. Any expectation on the ACCC to act in relation to excluded pesticides and veterinary medicines would diminish our ability to identify hazards in general consumer products, which may ultimately lead to adverse safety outcomes for consumers and the public.

We note that the products proposed to be classified in Level D are generally considered low risk, however, the low risk rating of certain products is likely at least in part as a result of the well-functioning agvet system. The lack of both pre-market assessment and specialist regulator oversight may become problematic over time as product manufacturers move to differentiate their product in the market. Changes to manufacturing process, formulation or adding additional ingredients may lead to safety concerns from impurities or toxicity issues from chemical mixtures. Any such safety issues may then expose gaps in regulatory protection.

Instead of exclusion, these low risk products could be retained within the agvet system using a 'light touch' regulatory approach without the need for pre-market assessment or standards, as appropriate. This could involve general packaging and labelling requirements such as a list of ingredients, specifying the active ingredients and their concentrations, safe use and storage instructions, supplier and contact information and a requirement that the label does not make misleading claims. Importantly, these products would be retained within the agvet system with the potential to apply post-market controls if the risks were subsequently found to be unmanaged.

The ACCC supports the APVMA or the Commissioner establishing and maintaining a published list of GRAS substances for low risk pesticides and veterinary medicines within the agvet system. This would allow manufacturers and suppliers to readily self-assess their products as containing only GRAS substances published on the list, and provide a streamlined process for these products to be classified and enter the market.

Efficacy assessment of pesticides and veterinary medicines

The ACCC agrees with the Panel's proposal not to make any major reforms to the pre-market assessment of effectiveness by the APVMA. We consider that it is important that consumers have access to safe and effective products and the requirement for efficacy assessments under the agvet system facilitates this aim.

The Draft Report clarifies that the existing agvet system provides no mechanism for users to seek redress for an ineffective product and points out that the ACL or contract law are the available legal avenues. However, it should also be acknowledged that the ACL is not a suitable pathway for consumers to seek redress for ineffective pesticides and veterinary medicines.

The ACL contains general provisions that products supplied to consumers are fit for purpose and operate consistent with the claims about the products. However, such provisions are not intended to be used to test the efficacy of specialty pesticides and veterinary medicines, and are deliberately designed to be broad and capture general efficacy claims about consumer products that are not regulated under a specialist regulatory framework.

Consumers are also required to enforce their rights individually against a manufacturer in a court or tribunal for financially significant claims and the onus would be on the consumer to seek compensation. In practical terms, this can impose such significant costs on affected consumers that few actions to enforce consumer rights may ever be pursued. For instance, there is often a need to retain lawyers and technical experts, and to institute proceedings against often well-resourced multinationals. Such a framework is neither going to deliver access to justice nor offer an incentive for the supply of safe and effective pesticides and veterinary medicines.

Next Steps

If you would like to discuss the ACCC's submission, we would be happy to arrange a meeting. Please contact Neville Matthew, General Manager, Risk Management and Policy, Consumer Product Safety Branch, on [redacted] or at [redacted]

Yours sincerely

Mick Keogh
Deputy Chair