



AUSTRALIAN COMPETITION AND CONSUMER COMMISSION AUTHORISATION



**Product
Stewardship
Centre of
Excellence**

**PRACTICE
NOTES**

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SUMMARY

In this practice note, we provide an overview of Australian Competition and Consumer Commission (ACCC) authorisation and its relevance to product stewardship schemes. Authorisation can be an important tool in the development and implementation of industry-led, product stewardship schemes. We highlight the types of activities for which a product stewardship scheme may seek out authorisation, the process of applying for authorisation, and questions to consider before engaging in this process. We conclude with four examples of authorisation in action: AgStewardship, Paintback, Tyre Stewardship Australia and the Battery Stewardship Scheme.



INTRODUCTION

In this practice note, we provide an overview of the Australian Competition and Consumer Commission (ACCC) and its relevance to product stewardship activities. We focus on authorisation, which provides legal protection for certain types of activities that may be deemed anticompetitive, and review the types of activities where authorisation may apply. In particular, we focus on levies, enterprise-to-enterprise agreements and codes of conduct. We also provide examples of ACCC authorisation in action through in-depth case studies of AgStewardship, Paintback, Tyre Stewardship Australia and the Battery Stewardship Council.

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC) AUTHORISATION

The primary responsibility of the Australian Competition and Consumer Commission is: “to ensure that individuals and businesses comply with Australian competition, fair trading, and consumer protection laws – in particular the *Competition and Consumer Act 2010*”.¹ It is an independent Commonwealth statutory authority whose role, in addition to enforcing the *Competition and Consumer Act 2010* and a range of additional legislation, is to promote competition, fair trading and regulating national infrastructure for the benefit of all Australians.²

Parties can apply for exemption from competition provisions in the *Competition and Consumer Act 2010* if they think their conduct is in the public interest. There are three ways to obtain an exemption – through a class exemption,³ notification,⁴ or authorisation – it is authorisation that is most relevant to product stewardship schemes and will be the focus of this practice note. Detailed guidelines for authorisation of conduct are available on the ACCC website.⁵

THE LEGAL TEST FOR AUTHORISATION

In order to remove the risk of legal action under the competition provisions of the *Competition and Consumer Act 2010*, the ACCC must be satisfied that the relevant legal test is met. The following is a description of the legal test from the ACCC (emphasis added):

“The legal test that the ACCC will apply when considering an application for authorisation depends on the conduct being engaged in. For conduct that involves a **potential or actual per se** breach of the Act (conduct that is prohibited outright), such as cartel conduct, the ACCC may grant authorisation **only** if it is satisfied that the likely public benefit from the conduct outweighs the likely public detriment. This test applies to the entire application for authorisation even if only part of the application is for conduct that may breach a per se provision of the Act.


¹ Australian Competition and Consumer Commission (2021). [About Us](#).

² Australian Competition and Consumer Commission (2021). [About the ACCC](#).

³ A class exemption is a way for the ACCC to grant businesses an exemption from competition law for certain types of conduct that may otherwise risk breaching competition laws, but that do not substantially lessen competition, and/or are likely to result in overall public benefits. For more information, see the ACCC webpage on [Collective Bargaining Class Exemption](#) or get in touch with the ACCC.

⁴ Notification is an alternative process to authorisation that is available where parties propose to engage in small business collective bargaining, exclusive dealing or resale price maintenance. In some cases it can be faster than seeking authorisation, but is not available for all types of conduct. For more information, see the ACCC webpage on [Notification](#) or get in touch with the ACCC.

⁵ Australian Competition and Consumer Commission (2019). [Guidelines for Authorisation of Conduct \(non-merger\)](#).



For other conduct (conduct that **does not involve a breach** of a per se provision of the Act), the legal test has two limbs. The ACCC may grant authorisation if it is satisfied **that either**:

- i. the proposed conduct would not be likely to substantially lessen competition or
- ii. the likely public benefit from the conduct outweighs the likely public detriment.⁶

Public benefit and detriment are not defined in the Act. However, the Australian Competition Tribunal has said that public benefit includes: “anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements...the achievement of the economic goals of efficiency and progress”.⁷ It has also said that public detriment includes: “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”.⁸

An example of activities whereby the outcome could be considered to be in the public benefit could include the establishment of new collection and recycling services which improve the environmental outcomes associated with a product lifecycle. An example of activities where the outcome could be considered to be in the public detriment could be an activity that lessens competition contributing to an increase in the cost of a product for consumers. A determination made by the ACCC weighs the potential for public benefit and public detriment as a result of the proposed stewardship actions.

AUTHORISATION AND PRODUCT STEWARDSHIP SCHEMES

At the Product Stewardship Centre of Excellence, our understanding of product stewardship acknowledges those involved in designing, manufacturing, and selling products have a responsibility to ensure those products or materials are managed in a way that reduces their environmental and human health impacts throughout the life-cycle and across the supply chain.⁹ In Australia, the Recycling and Waste Reduction Act 2020 provides the legal framework for three different kinds of product stewardship schemes: voluntary industry-led product stewardship schemes, co-regulatory product stewardship schemes, and mandatory public stewardship schemes.^{10,11}

Through pursuing ACCC authorisation, product stewardship schemes can gain protection for conduct or arrangements that would otherwise be deemed anti-competitive or raise concerns under the competition provisions of the Competition and Consumer Act (2010). In particular, authorisation can be an important tool in the development and implementation of key mechanisms of industry-led, voluntary product stewardship schemes, such as levies, enterprise-to-enterprise agreements, and accreditation of services or codes of conduct for a scheme.

⁶ Australian Competition and Consumer Commission (2021). [Authorisation](#).

⁷ Product Stewardship Centre of Excellence (2021). [Webinar: ACCC Authorisation for Product Stewardship Schemes](#).

⁸ Product Stewardship Centre of Excellence (2021). [Webinar: ACCC Authorisation for Product Stewardship Schemes](#).

⁹ Federal Register of Legislation (2020). [Recycling and Waste Reduction Act 2020](#).

¹⁰ Product Stewardship Centre of Excellence (2021). [What is Product Stewardship?](#)

¹¹ Product stewardship schemes are used to support the responsible management of materials from a range of waste streams in Australia, including batteries, paint, and tyres. Currently, the following products classes are on the 2021-22 Minister’s Priority List which means the Minister is proposing to consider, during the next financial year, whether some form of regulation under this Act might be appropriate: photovoltaic systems, electrical and electronic products, plastic oil containers, child car seats, clothing textiles, problematic and unnecessary single use plastics.



ACCC AUTHORISED BEHAVIOURS

According to the ACCC, “if the applicable authorisation test is met, the ACCC may grant authorisation to conduct that may breach one or more of the competition provisions in the Act, including agreements between competitors, cartel conduct, mergers, misuse of market power and concerted practices.

The types of conduct or arrangements the ACCC is often asked to authorise include:

- Collective bargaining – for example where two or more competitors come together to negotiate terms and conditions with a customer or supplier
- Some (but not all) codes of conduct – for example where provisions of a code impose standards of behaviour on signatories that may restrict competition, require training from specific providers and/or impose sanctions for code breaches
- Industry levies – for example an agreement among industry participants to impose a levy on the sale of a particular product, the proceeds of which may then be used to fund product stewardship activities that aim to ensure the responsible management of environmentally harmful products at end of life, or research and development aligned with the objectives of a product stewardship scheme
- Certain joint ventures or alliances – for example a supply agreement where one competitor agrees to stop producing a particular product and instead purchase it from the other party to the agreement”.¹²

At the end of this practice note, we examine how these tools have been used by product stewardship schemes in Australia pertaining to Agvet chemicals and containers, used paint, end-of-life tyres and batteries.

DOES YOUR SCHEME REQUIRE AUTHORISATION?

Applying for authorisation is only necessary if proposed conduct would or might breach the competition provisions of the Act.¹³ Thus, before going down the road of applying for authorisation, a scheme should first consider scheme design without anti-competitive behaviours. Authorisation is an expensive and time-consuming process and if a product stewardship scheme can achieve its goals without engaging in anti-competitive behaviours, this should be the first course of action. However, it may also be the case that these types of behaviours are necessary to effectively engage in product stewardship activities and as such, authorisation will be required. In the next section, we will provide an overview of the authorisation process.

THE APPLICATION PROCESS

Applying for ACCC authorisation for a product stewardship scheme is a public and transparent process. Applications for authorisation are made publicly available on an ACCC’s authorisations register and on its website (along with responses to ACCC requests for information), unless the applicant can establish that the information is genuinely confidential. The following is not intended as a replacement for the information available from the ACCC but is instead intended to provide an overview of the steps behind preparing an application. We wish to highlight a number of key aspects of the application process, including:

¹² Australian Competition and Consumer Commission (2021). [Authorisation](#).

¹³ Australian Competition and Consumer Commission (2021). [Authorisation](#).

- **Who can apply:** Industry bodies (e.g., associations, dedicated product stewardship organisations), or the entity that is responsible for implementing the product stewardship scheme, are the actors responsible for applying for ACCC authorisation.
- **Amongst other things, an application must:** explain what the proposed conduct is and the rationale for doing it, describe the relevant market(s) likely to be impacted, list who is likely to participate in the conduct and who will be affected by it, explain what public benefits and detriments are likely to result from the conduct, and explain how long authorisation will be required.¹⁴
- **What must an application provide:** A public version of your application for publication on the public register, a signed declaration that the information in your application is accurate, and a \$7,500 lodgement fee (unless a fee waiver is granted).¹⁵

Detailed guidance on the application process is also available from the ACCC online¹⁶ or by contacting Exemptions@accc.gov.au before you lodge an application in order to confirm the necessary information that is needed for an application to be assessed.

AUTHORISATION IN ACTION

In the chart below, we provide an overview of four industry-led schemes that have gone through the authorisation process. We highlight the length of authorisation that has been granted, the types of activities that have received authorisation, as well as a summary of the ACCC's rationale for granting authorisation.

	AG STEWARDSHIP AUSTRALIA (DRUMMUSTER AND CHEMCLEAR)	PAINTBACK	TYRE STEWARDSHIP AUSTRALIA	BATTERY STEWARDSHIP SCHEME
OVERVIEW	Founded in 1998, AgStewardship Australia is an industry-led, non-profit organisation which fosters on-farm chemical safety and waste reduction. ¹⁷	Founded in 2016, Paintback is an industry-led initiative designed to divert unwanted paint and packaging from ending up in landfill and vital waterways. ¹⁸	Founded in 2014, Tyre Stewardship Australia implemented the national Tyre Product Stewardship Scheme to promote the development of viable markets for end-of-life tyres. ¹⁹	Launched in 2022, ²⁰ the Battery Stewardship Scheme is an industry-led initiative to provide free battery recycling to consumers across Australia. ²¹

¹⁴ The full list of factors that need to be addressed can be found [here](#).

¹⁵ The Australian Competition and Consumer Commission has provided detailed instructions of the application process, which are available [here](#).

¹⁶ Australian Competition and Consumer Commission (2019). [Application for authorisation for proposed conduct](#).

¹⁷ Ag Stewardship (2021). [Who is AgStewardship Australia?](#)

¹⁸ Paintback (2021). [Who we are](#).

¹⁹ Tyre Stewardship Australia (2021). [About TSA](#).

²⁰ Note: The Battery Stewardship Council, which will operate the Battery Stewardship Scheme, was incorporated as a not-for-profit in 2019.

²¹ Department of Agriculture, Water and Environment (2021). [Battery Stewardship Council](#).

PRODUCT CATEGORY	Agvet chemicals and containers ²²	Architectural and decorative (A&D) paint and packaging	End-of-life tyres	Batteries ²³
AUTHORISATION GRANTED	Granted 5-year extension in 2018. Previous extensions between 3-5 years in length.	Granted 5-year authorisation in 2015 and 10-year extension in 2021.	Granted 5-year authorisation in 2013 and 6-year extension in 2018.	Granted 5-year authorisation in 2020.
CONDUCT PERMITTED	Levy: DrumMuster and ChemClear are both funded through a \$0.06 per L/kg levy on the sale of agvet chemicals which is collected and managed by AgStewardship Australia. Levy was increased from \$0.04 per L/kg during most recent authorisation review.	Levy: \$0.15 per L (plus GST) on wholesale sale of (A&D) paints to fund the national paint product stewardship scheme, including collection and disposal of paint and packaging, as well as R&D work.	Levy: \$0.25 per tyre on imported tyres. Note: The levy is used to fund and promote new uses for end-of-life tyres and tyre-derived products (such as road surfacing, brake pads, surfacing and flooring). Unlike other schemes, it does not fund recycling activities. Enterprise-to-enterprise agreement: whereby scheme members are required to only deal with other scheme members.	Levy: \$0.04 per 24 grams applied to imported batteries to fund the scheme. A rebate system will be used for service providers who are responsible for the collection, sorting and processing of batteries. Enterprise-to-enterprise agreement: whereby scheme members are required to only deal with other scheme members. Code of conduct: Scheme will assess potential service providers against defined minimum performance standards for service providers or code of conduct.
RATIONALE FROM THE ACCC	"The public benefits of the proposed conduct, including the increased levy, outweigh the likely public detriments." ²⁴ While the ACCC noted some concerns regarding the consultation process, the previous levy was	"The Scheme 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	"The scheme is likely to increase the number of tyres being disposed of in an environmentally friendly way and result in a net public benefit." ²⁷ The ACCC Determination emphasised the importance of improving participation by mining companies and vehicle	"ACCC considers the scheme is likely to result in public benefits in the form of significant environmental benefits, increased public awareness of battery disposal and re-use, and supporting increased innovation, research and development" ²⁸ The rationale highlights the

²² Empty agvet chemical containers are handled by the DrumMuster program and unwanted agvet chemicals by the ChemClear program.

²³ Specifically: handheld batteries (<5 kg), battery energy storage system (BESS) & electrical vehicle (EV) batteries, lead batteries (> 5kg).

²⁴ ACCC (2018). [Determination for AgStewardship Australia Limited](#).

²⁷ ACCC (2018). [ACCC re-authorises Tyre Stewardship Scheme](#).

²⁸ ACCC (2020). Determination for the [Battery Stewardship Scheme](#).



<p>authorized for 20 years and resulted in clear public benefit that is likely to continue. In their determination, the ACCC strongly encouraged AgStewardship to conduct further consultation, to work closely and transparently with farmers and other stakeholders to ensure improved understanding of programming, and take into account stakeholder views to ensure programs remain effective and relevant.²⁵</p>	<p>continued to operate without the Scheme.²⁶ The Determination also notes that through efficiencies from economies of scale the per-unit cost of collecting and disposing of paint waste will be reduced.</p>	<p>importers over the authorisation period or regulation may be considered.</p>	<p>potential for some public detriment through the enterprise-to-enterprise agreement but this is mitigated by factors including free scheme membership and increases in recycling services.</p>
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With respect to the types of activities that have received authorisation, AgStewardship (which operates DrumMuster and ChemClear), Paintback, Tyre Stewardship Australia and the Battery Stewardship Scheme all use levies to fund their activities. This may be viewed as cartel conduct and directly aligns with conduct defined by the ACCC as an ‘industrial levy’ as a group of companies that sell a particular product have agreed to raise a levy on a product at point of sale with proceeds used to cover costs at EOL (such as for recycling and/or RD).

For example, the Paintback product stewardship scheme uses a 15C-per-levy levy (plus GST) on the wholesale cost of architectural and design (A&D) paints to fund its scheme, including collection and R&D activities. DrumMuster and ChemClear are both funded through a \$0.06 per L/kg levy on the sale of agvet chemicals. In the case of DrumMuster, this replaces the previous levy of \$0.04 per L/kg which was approved for increase in 2019.


A product stewardship scheme may seek to encourage participation in a voluntary, industry-led scheme by encouraging members to preferentially do business with other scheme members. This type of enterprise-to-enterprise agreement may be viewed as an alliance and require ACCC authorisation. Prominent product stewardship schemes which utilise enterprise-to-enterprise agreements include Tyre Stewardship Australia, Paintback and the Battery Stewardship Scheme.

Moreover, the use of an enterprise-to-enterprise agreement can also be employed as a strategy to reduce free-riders. For example, the recent ACCC Determination of the Battery Stewardship Council (BSC) recognised justification from the Council of using enterprise-to-enterprise agreements as a way to reduce free-riders. As the BSC submitted: “The exclusive dealing requirements are an important element of the proposed Scheme to limit the issue of ‘free riders’ (that is, non-members who benefit from the Scheme but are subsidised by participants who pay the levy). This is an issue identified by both industry and government as being important for the Scheme to address. Businesses that participate in the Scheme will have a means of distinguishing themselves from those that do not”.²⁹

²⁵ ACCC (2018). [Determination for AgStewardship Australia Limited](#).

²⁶ ACCC (2021). [Determination for Paintback Limited](#).

²⁹ Australian Competition and Consumer Commission (2020). Determination for the [Battery Stewardship Scheme](#).



It should also be kept in mind that the process of applying for authorisation is a public process. The application for authorisation, all relevant submissions by the applicant and interested parties, and the ACCC's draft and final determinations are available on the authorisations public register. The public version of an ACCC authorisation application must contain sufficient information to enable consultation.³⁰ The ACCC conducts public consultation with interested parties including written submissions. At the end of this process, the ACCC will issue their final determination.

Building on this, we see that authorisation is also an iterative process. For example, during the process of reviewing the application from the Battery Stewardship Council, the risk of public detriment due safety concerns causes through encouraging customers to retain button cell batteries – which are a known child safety risk – at home was identified. As a result, the authorisation of the Battery Stewardship Scheme is conditional on the scheme developing, maintaining and implementing a Button Battery Safety Strategy.

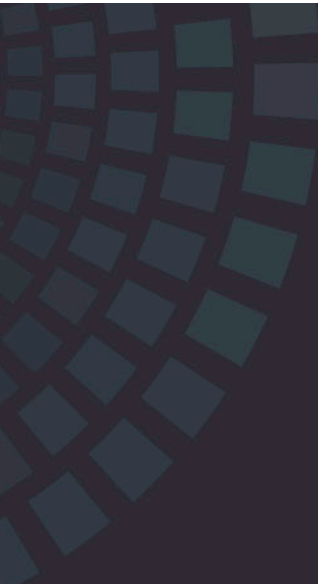
NEXT STEPS

For detailed guidance on applying for ACCC authorisation, please get in touch with the ACCC at Exemptions@acc.gov.au. The Product Stewardship Centre of Excellence can provide support in other ways, including through webinars, case studies and whitepapers. Our September 2021 webinar on ACCC authorisation is available on our [website](#) under Resources.

NOTE

The content of this practice note is information of a general nature sourced from public sources and investigations conducted by the Product Stewardship Centre of Excellence. It does not represent advice, direction or endorsement from the Product Stewardship Centre of Excellence, nor does it represent the only method or practice to address the topics laid out in this document. This Practice note has not been endorsed by the ACCC, nor is it a joint work product. Individuals or organisations are encouraged to conduct their own analysis and consideration of strategic options relevant to their situation before taking action in regards to the matters covered.

³⁰ Australian Competition and Consumer Commission (2021). [Applying for authorisation](#).



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