

The Commerce Act

Product stewardship schemes



This fact sheet explains how the Commerce Act might apply to product stewardship schemes. It is designed to give businesses a better understanding of how such schemes can be operated so that their benefits can be achieved without breaching the Act.

Product stewardship schemes can have significant benefits for New Zealand. However, if you are involved in a product stewardship scheme, or considering joining one, you need to be aware of how the Commerce Act may apply to the scheme, particularly when a scheme involves agreements between competitors. If you are considering setting up or joining a product stewardship scheme we recommend you seek legal advice on the Commerce Act as early as possible in the process.

What is a product stewardship scheme?

Product stewardship is when all sectors involved with a product's lifecycle share responsibility for the environmental effects that products can cause. Product stewardship is meant to encourage everyone involved in the manufacture, use and disposal of a product – producers, brand owners, importers, retailers, consumers, and local and central government – to take greater responsibility for the environmental effects of their products throughout the product lifecycle.

Even if a product stewardship scheme is accredited by the Minister, that scheme is still subject to the Commerce Act.

EXAMPLE

A scheme could be targeted at reducing the number of old desktop computers being disposed of in landfill. The scheme might be run by a number of parties, such as local government, recyclers and retailers, to provide a nationwide network of subsidised options to recycle old computers. Usually, it would be the end consumer that would have to pay to recycle or dispose of an old computer. However, with the scheme in place, the appropriate parties from all stages of the product's lifecycle contribute to the costs, and harm to the environment is reduced.

Product stewardship schemes in New Zealand

The Waste Minimisation Act 2008 (WMA) gives the Government the ability to recognise both voluntary and mandatory product stewardship schemes through accreditation. The Minister for the Environment can accredit schemes under the WMA if the Minister is satisfied that they meet the required level of desired reductions in environmental harm.

A range of schemes are currently accredited under the WMA. For a list of schemes accredited by the Minister visit the Ministry for the Environment [website](#).



What agreements are illegal under the Commerce Act?

The following agreements are illegal under the Commerce Act:

- *agreements that contain cartel provisions* – provisions in agreements that fix prices, restrict output or allocate markets¹ (section 30)
- *agreements that substantially lessen competition* – agreements between any two or more parties (eg, competitors, suppliers and customers) that have the purpose, effect or likely effect of substantially lessening competition in a market (section 27).

When we use the term ‘agreement’ in the list above and in this fact sheet we use it to encompass a ‘contract, arrangement or understanding’, which are the words used in the Commerce Act. Agreements can include both formal contracts and informal arrangements or understandings. Even a ‘nod and a wink’ between parties can be evidence of reaching an understanding.

These agreements may be part of a product stewardship scheme itself, or outside the scheme. So, while cooperation between scheme participants is allowed, if one of the agreements listed above is made, it may breach the Commerce Act.

Cartel conduct

Any provision in an agreement between competitors that sets the price of a good or service or interferes with how price is reached, restricts output, capacity or supply, or allocates markets is illegal under the Commerce Act. These provisions are known as cartel provisions.

Price fixing includes agreements between competitors to charge customers a specific price for a product or service. But it can also include agreements that ultimately affect the price a customer pays for a product or service. Agreements that relate to any part of the price, including discounts, allowances, rebates, or credit in relation to goods or services are all covered.

When scheme providers and participants are establishing and operating product stewardship schemes, competitors must be wary if the agreement sets the prices or sets a part of the prices for goods or services on which they compete. An agreement between competitors about how much they will adjust the price at which they sell their products (to take account of the cost of disposal or recycling at a later stage in the product’s lifecycle) under a product stewardship scheme may be illegal. Any adjustment that scheme participants

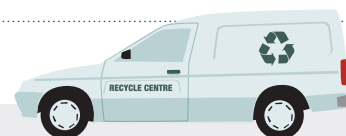
wish to make on the price of the product should generally be reached independently. All parties should be free to set the price of their products as they wish.

However, some agreements or behaviour are exempt from the cartel prohibitions. A product stewardship scheme may fall within the collaborative activities exception under the Commerce Act. This is discussed further below.

Businesses should consider whether each individual product stewardship proposal complies with the Commerce Act. We strongly recommend that you seek legal advice as early as possible.

🔗 You can read more in our fact sheet *Cartel conduct*.
www.comcom.govt.nz

EXAMPLE



Product stewardship scheme that is likely to breach the price fixing rules

A scheme is set up to collect and dispose of used chemical containers in New Zealand in order to reduce the environmental harm caused by the disposal of these products into landfill and by illegal dumping.

If the scheme were to be funded by a 5c per kilogram levy on participating manufacturers and suppliers of the containers, this is not likely to breach the Commerce Act on its own. However, if the parties involved reach agreement on the margin they will add on to the price of the chemical containers in order to cover the cost of the levy, this is likely to be illegal. In general, parties should be free to cover the costs individually and there should be no interference with how the price of those chemical containers is reached. However, this agreement may fall within the ambit of the collaborative activities exception if the price setting mechanism is reasonably necessary for the purposes of the product stewardship scheme, and it is not carried out for the dominant purpose of lessening competition.

A party proposing to enter into a product stewardship agreement containing a cartel provision can apply for clearance for that agreement as part of a collaborative activity. This is discussed in more detail below.

Parties may also wish to consider applying for authorisation. The Commission can only grant an authorisation for an agreement if it is satisfied that the benefits to the public outweigh the harm to competition.

1. While not explicitly covered in section 30A of the Commerce Act, bid rigging is caught under the price fixing, output restriction and market allocation prohibitions.

Another example of an agreement that interferes with how the price is reached is bid rigging or collusive tendering. This occurs when there is an agreement among some or all of the bidders as to which of them should win a bid. If there is a bidding process involved in selecting a collection services provider or recycler, you should ensure that the bidding process is competitive.

🔗 You can read more in our fact sheet, *How to recognise bid rigging*. www.comcom.govt.nz

Agreements that substantially lessen competition

Participants in product stewardship schemes should also not enter agreements that have the purpose, effect or likely effect of substantially lessening competition in a market. This could occur in any market, not just in the market for the product in question.

For example, an agreement reached as part of a product stewardship scheme could lead to a substantial lessening of competition in a market for:

- collection services
- an end-of-life product (such as an old desktop computer that is being replaced)
- a by-product of another product (such as sawdust, which is a by-product of timber).

To establish whether competition has been substantially lessened, we look at the impact of an agreement on competition. This would include assessing whether the agreement is likely to affect the ability of other market participants to compete effectively and the ability of potential competitors to enter the market. As part of the assessment, we also consider what competition would have looked like without the agreement being in place. Parties should consider whether or not their agreement has the potential to lessen competition in a market. If uncertain, we recommend seeking legal advice as soon as possible.

🔗 You can read more in our fact sheet *Agreements that substantially lessen competition*. www.comcom.govt.nz



Product stewardship schemes should not have any formal or informal agreements that the participating members will not deal with a particular third party if these agreements would substantially lessen competition. Such agreements do not have to be explicit. They can arise, for example, if membership criteria are restrictive beyond what is necessary to establish a scheme. This includes agreements between parties at different levels of the supply chain.

What agreements are exempt from the Commerce Act?

Certain agreements are exempt from the cartel prohibition in the Commerce Act, including exceptions relating to collaborative activities, vertical supply contracts, and joint buying and promotion. Whether any of these exceptions apply to any particular arrangement depends on the specific circumstances. In addition, even if an exception does apply, the agreement will still be illegal if it is likely to substantially lessen competition (section 27). Both the Commission and third parties could take legal action against such agreements.

Individuals or businesses who seek to rely on these exceptions should seek their own legal advice as to whether or not the arrangement they are involved in might substantially lessen competition, or whether or not the agreement falls within the scope of an exception.

Collaborative activities exception

The collaborative activity exception replaces the former joint venture exception. The former joint venture exception focussed on the form by which the parties were 'cooperating' to determine whether that exception to the price fixing prohibition applied. In contrast, the new collaborative activity exception is focused on the substance of the parties' cooperation.

The collaborative activity exception applies to a cartel provision in an agreement if:

- the parties to the agreement are involved in a collaborative activity (a co-operative enterprise, venture, or other activity, in trade, that is not carried on for the dominant purpose of lessening competition)
- the cartel provision is reasonably necessary for the purpose of the collaborative activity.

Parties proposing to enter into a product stewardship scheme as part of a collaborative activity can apply for clearance for that agreement. This is a voluntary regime and there is no statutory requirement to seek clearance.

Where we grant clearance to an agreement, parties to the agreement will not contravene the cartel prohibition or the prohibition on agreements that substantially lessen competition. In essence, a clearance provides certainty that the agreement is lawful under the Commerce Act.

🔗 You can read more about the collaborative activity clearance process in our *Competitor Collaboration Guidelines*. www.comcom.govt.nz

Joint buying and promotion exception

The joint buying and promotion exception only applies to the price fixing rules under the cartel prohibition. Joint buying and promotion occurs when a group of individuals or businesses come to an arrangement to purchase goods or services together which may also provide for the joint advertising of the goods and services bought.

This exception means that if parties to a product stewardship scheme collectively acquire goods or services, such as product disposal services, they are free to jointly set the purchase price for the good or service that they are jointly purchasing. However, parties must still remain free to sell the goods or services at a different price should they choose to do so. This does not extend to other goods or services that are not being collectively acquired, where prices must still be set independently.

🔗 You can read more about this and the other exceptions in our fact sheet, *Exceptions under the Commerce Act*. www.comcom.govt.nz

Are you part of a trade or industry association?

If so, there are additional Commerce Act considerations you should be aware of. Please read more in our fact sheet, *Trade Associations*.

www.comcom.govt.nz



What to be aware of when deciding how to fund your scheme

Product stewardship schemes may incur costs on a number of parties at different levels of the supply chain. The way in which those costs are managed must be carefully considered in light of the Commerce Act.

Membership fees

Generally, a membership fee on its own is unlikely to breach the Commerce Act.

However, parties should consider the likely impact of a membership fee on the relevant market(s) to ensure that they are not in breach of the Act.

The way in which a membership fee is covered has the potential to be price fixing. If there is a common cost such as a membership fee that has been incurred by all parties (which may include competitors), the decision on how to cover those costs should be made independently of other scheme participants. For example, parties may agree to increase the price at which scheme members sell an end product by the amount of the membership fee. As a result, if the end price of the product is no longer set independently, this is likely to be price fixing unless one of the exceptions above applies.

A membership fee has the potential to exclude competitors from a relevant market, which could lead to a substantial lessening of competition. For example, if parties agree to include a condition as part of the membership fee that only parties with a certain amount of turnover can join the scheme, and this leads to the exclusion of a rival, this could amount to a substantial lessening of competition.

Levies

Levies are often charged at different points of a product's lifecycle, such as the point of import, disposal or sale. They may also relate to a range of activities such as collection, storage and disposal costs.

Levies increase the potential for Commerce Act breaches. The way in which a levy is recovered has the potential to be a price fixing agreement. If a levy leads to an interference with how the price of a good or service is reached, this may be price fixing unless one of the exceptions above applies. The decision on how to cover the cost of the levy should generally be made independently of competitors.

A levy has the potential to exclude competitors from a relevant market, which can lead to a substantial lessening of competition.

When setting a levy, scheme participants may share information that they do not usually share with other parties. If the information is considered confidential or commercially sensitive, appropriate confidentiality protections should be included. These protections should ensure that confidential information is not accessible (or able to be derived) by other scheme members. Schemes should be set up in a way that ensures that only information that is necessary for the purpose of establishing the amount of any levy payable is collected. For example, confidential information could include information on the quantity of product imported over a period of time or predicted sales of a product.

What if it is necessary to agree on price (or otherwise breach the Commerce Act) to make a scheme work?

If participants consider it necessary to cooperate in a manner that could breach the Commerce Act, they should consider applying to the Commission for a clearance or an authorisation.

Under the Commerce Act, the Commission can clear a collaborative activity agreement containing a necessary cartel provision. The Commission can also authorise an anti-competitive agreement where it is satisfied that the benefits to the public outweigh the harm to competition.

Anyone considering applying for an authorisation should seek legal advice.

🔗 You can read more about applying for a clearance or authorisation at www.comcom.govt.nz.

If you are involved in an existing product stewardship scheme and you are concerned that it may breach the Commerce Act we recommend ceasing your involvement with that scheme and seeking legal advice.

Practical tips to avoid breaching the Commerce Act

- Make sure you are familiar with the requirements of the Commerce Act.
- Review documentation, policies and procedures to ensure Commerce Act compliance.
- Avoid exchanging pricing information with your competitor businesses and ensure you set your prices independently of your competitors, even if discussing a product stewardship scheme.
- Do not discuss tenders or bids for contracts (bid rigging).
- Do not engage in any activity that has the purpose of excluding a rival.
- Consider applying for clearance if the scheme is a collaborative activity, or applying for authorisation if the benefit to the public outweighs the harm caused by the loss of competition.
- Contact the Commerce Commission if you become aware of anti-competitive conduct.
- Seek independent legal advice.



This fact sheet provides guidance only. It is not intended to be definitive and should not be used in place of legal advice. You are responsible for staying up to date with legislative changes.

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