



Sustainability collaborations and Australian competition law

A guide for business

Draft for consultation – July 2024

Acknowledgement of country

The ACCC acknowledges the traditional owners and custodians of Country throughout Australia and recognises their continuing connection to the land, sea and community. We pay our respects to them and their cultures; and to their Elders past, present and future.

Australian Competition and Consumer Commission

Land of the Ngunnawal people

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1. Purpose of this guide

1. The purpose of this guide is to assist businesses considering working together to achieve positive environmental outcomes to understand:
 - (a) when collaboration between businesses is likely to breach Australian competition law and when it is unlikely to do so, and
 - (b) whether the businesses may have the option to seek an exemption from Australian competition law, through ACCC 'authorisation', when there is a risk of breaching the *Competition and Consumer Act (2010)* (Cth) (**the Act**).
2. In this guide, the ACCC particularly wants to address misconceptions about the operation of the Act which might stop businesses from jointly pursuing environmental initiatives which are not prohibited by the Act. The guide also explains that where competition law risks do arise, but the sustainability collaboration is in the public interest, an ACCC authorisation may be appropriate. The guide provides information about the authorisation process so that businesses can understand the options available to them in Australia.
3. In this guide the ACCC uses the term **sustainability collaboration** to refer to discussions, agreements or other practices amongst businesses which are aimed at preventing, reducing or mitigating the adverse impact that economic activities have on the environment.¹
4. From time to time, the ACCC may publish updated guidance to reflect the evolving nature of sustainability initiatives and provide further assistance to businesses.
5. While this guide provides information to help businesses understand competition law risks and the authorisation process, businesses should seek their own legal advice about whether a proposed sustainability collaboration risks breaching the Act and whether they should apply for authorisation.

¹ While this guidance focuses specifically on environmental sustainability, the principles discussed may also apply to other types of collaboration agreements including those related to other forms of sustainability objectives.

2. Introduction

6. The ACCC recognises the clear need for urgent action on environmental sustainability. Environmental harm, including climate change and biodiversity loss, represents a special category of threat to the environment and economy which requires action by all stakeholders, including the business community.
7. Many businesses are taking steps to address environmental sustainability. This is occurring for a variety of reasons, including to win demand from environmentally conscious consumers, to demonstrate good corporate citizenship, to respond to commercial pressures from investors or supply chain partners, and to comply with legal obligations.
8. Competitive markets are crucial to driving the investment and innovation needed to support the transition to a greener, more sustainable economy. A key part of the transition will see businesses differentiating themselves to their consumers and shareholders based on unilateral investments in sustainable products, production and distribution processes and taking steps to reduce their impact on the environment.
9. However, as Australia transforms to a more sustainable economy, the ACCC recognises there may be instances where businesses decide to work together to achieve better environmental outcomes. This may include situations where individual businesses do not have the incentive or ability to address the environmental impact on their own, including where:
 - an individual business has insufficient volumes to justify the related size of an investment
 - an individual business acting on its own is unable to achieve the beneficial environmental outcome in a timely manner
 - the arrangements are not in the business' best financial interest, but it is nonetheless beneficial to society more generally
 - a business acting on its own would be at a competitive disadvantage relative to its rivals, including as a result of other businesses free riding on its efforts.

2.1. What is the ACCC's role?

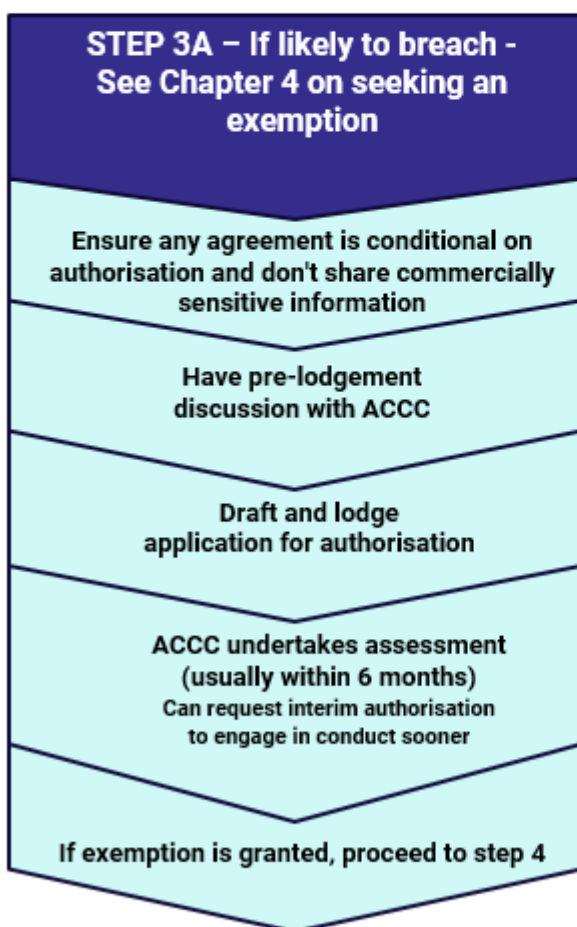
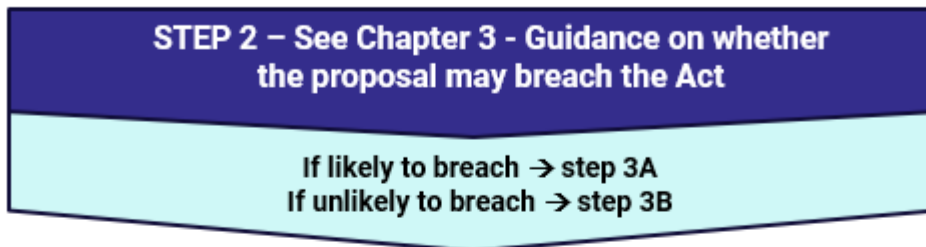
10. When businesses collaborate, they need to be aware of their obligations to comply with the Act. Business collaborations, particularly between competitors, risk breaching the prohibitions in the Act relating to:
 - (a) **cartel conduct**
 - (b) other anti-competitive practices which have the purpose, effect, or likely effect of **substantially lessening competition** in a market in Australia.
11. One of the primary responsibilities of the ACCC is enforcing compliance with the Act, including the prohibitions on cartel conduct and other anti-competitive practices.
12. Where a proposed sustainability collaboration risks breaching the Act, businesses may seek an exemption from the competition law provisions in certain circumstances. This is commonly done through an 'authorisation' from the ACCC.

13. Broadly, the ACCC may grant authorisation if it is satisfied that the likely public benefit resulting from the proposed conduct or agreement outweighs the likely public detriment (that is, it results in a **net public benefit**).² The authorisation test is sufficiently broad and flexible to enable the ACCC to take environmental sustainability benefits into account.
14. The ACCC is available and willing to discuss potential sustainability collaborations with businesses before they lodge an application for authorisation. The ACCC encourages businesses to come forward for preliminary discussions by contacting us at exemptions@acc.gov.au.
15. While the ACCC can discuss the process and factors it will have regard to, the ACCC cannot give legal advice about whether a particular proposal is at risk of breaching the Act or indicate whether authorisation will be granted.
16. There is also an alternative option to authorisation, called 'notification', which enables eligible businesses to seek an exemption from Australia's competition laws for specific types of conduct, such as small business collective bargaining, collective boycotts, resale price maintenance and exclusive dealing. Alternatively, the 'collective bargaining class exemption' may be available for groups of small businesses seeking to collectively bargain. Further information on [notifications](#) and the [collective bargaining class exemption](#) is available on the ACCC website.
17. The ACCC is also responsible for enforcing the Australian Consumer Law, and has released a [Making environmental claims guide](#) to assist businesses to ensure any environmental claims they make are not false, misleading or deceptive.

2.2. Overview of usual steps

18. The following chart provides an overview of steps to undertake when businesses are considering a potential sustainability collaboration.

² In some cases, it will also be open to the ACCC to grant authorisation because the proposed conduct would **not be likely to** substantially lessen competition. This is discussed further below.



3. Sustainability collaborations and Australian competition law

19. This chapter provides guidance on when sustainability collaborations are likely to breach the Act and when they are unlikely to do so.
20. Sustainability collaborations between businesses have the potential to breach the competition provisions in the Act where the collaboration involves cartel conduct, or where the collaboration has the purpose, effect or likely effect of substantially lessening competition in a market in Australia.
21. A business that is contemplating collaborating with other businesses to achieve a sustainability goal should consider the ACCC's guidance on [cartels](#), [cooperation among businesses](#), [concerted practices](#) and [exclusive dealing](#).
22. Businesses that propose to enter into sustainability collaborations that will or may breach the Act may be able to seek authorisation of the proposed conduct or arrangement. **Chapter 4** provides further information about authorisation.

3.1. Cartels

23. A cartel occurs when businesses that compete, or have the potential to compete, for the supply or acquisition of goods or services agree to act together instead of competing with each other.
24. Cartel conduct occurs when 2 or more competitors agree to:
 - [fix prices](#) – when competitors agree on pricing instead of setting prices independently of one another. These agreements can be about prices for selling or buying goods or services; minimum prices; a formula for pricing or discounting goods or services; or rebates, allowances or credit terms. Price fixing arises where there is a **purpose, effect or likely effect** of fixing prices, either directly or indirectly
 - [market share](#) – when competitors divide or allocate customers, suppliers or geographical areas among themselves, so they do not have to compete. They may, for example, agree to avoid producing each other's goods or services; serve different territories; divide contracts between them; or assign customers to each other. Market sharing arises where there is a **purpose** of allocating customers, suppliers or territories, either directly or indirectly
 - [control outputs](#) – when competitors agree to prevent, restrict or limit the amount or type of goods or services they will make available. Output restrictions arise where there is a **purpose** of restricting output of goods or services, or limiting the amount or type of inputs acquired, either directly or indirectly
 - [rig bids](#) – when competitors agree among themselves who should bid for, or win, a tender. Bid rigging arises where there is a **purpose** of controlling what bids are made, either directly or indirectly.
25. Businesses that are contemplating collaboration to achieve a sustainability goal should consider whether they are competitors. The cartel laws apply where businesses are in

competition with each other or are likely to be in competition with each other. They also apply where the businesses would be in competition, or likely to be in competition, with each other but for any contract, arrangement or understanding. Whether businesses are in competition with each other, or likely to be in competition with each other in the future, involves a question of fact.

If you are proposing a sustainability collaboration with your competitors which relates to or affects:

- the prices you and your competitors charge or pay
- which markets you will or won't operate in
- which customers or suppliers you will or won't deal with
- your level or type of output, or your level or type of input
- your bids for a tender,

the collaboration may breach the prohibitions on cartel conduct. You should very carefully consider your obligations under the Act before collaborating and seek legal advice.

Examples of sustainability collaborations that **are likely** to be a cartel:

- businesses that compete to acquire a certain type of input, agree to only buy the input from suppliers that meet a particular sustainability criteria
- suppliers agree to charge a levy on the sale of their products to customers, in order to fund an industry recycling scheme for their products at the end of life
- rival manufacturers agree to use a new technology in their production process and to stop using older technology that emits more pollution.

26. There are a number of exceptions in the Act, which are discussed at 3.3 below.
27. If a proposed sustainability collaboration is likely to result in public benefits, including sustainability benefits, authorisation may be an option. If granted, authorisation will provide a legal exemption from the prohibitions on cartel conduct. **Chapter 4** provides guidance on the authorisation process.

3.2. Other anti-competitive practices

28. Sustainability collaborations may also breach other prohibitions in the Act on anti-competitive practices.

29. Anti-competitive practices include:

- [contracts, arrangements or understandings](#) – formed when 2 or more businesses develop a shared plan of action. These agreements are often not put down in writing and a 'nod and wink' can be enough
- [concerted practices](#) – communication or cooperation between 2 or more businesses. The communication may not quite amount to a contract, arrangement or understanding, but it goes beyond businesses independently responding to market conditions. It involves sharing strategic commercial information, either publicly or privately

- [exclusive dealing](#) – when one business trading with another business puts conditions on the other’s freedom to choose who it does business with, what business it does or where it does business

which have the **purpose, effect or likely effect** of substantially lessening competition in a market in Australia.

30. Sustainability collaborations which take the form of any of these practices may substantially lessen competition if they have the purpose, effect or likely effect of interfering with or damaging the competitive process in a market in a meaningful way. This is usually by deterring, hindering or preventing competition. It is important to remember that this includes impacts in both the markets where businesses compete to *sell* goods or services, and the markets where businesses compete to *acquire* goods or services.
31. A sustainability collaboration is **more likely** to substantially lessen competition where it:
- prevents businesses from competing effectively
 - makes it more difficult for new businesses to start competing, or makes it hard for existing businesses to expand
 - involves the sharing of commercially sensitive information, particularly price sensitive information.
32. A sustainability collaboration is **less likely** to substantially lessen competition where:
- the businesses are not competitors in terms of selling goods or services or buying goods or services
 - the businesses are making decisions independently, rather than in consultation, coordination, or cooperation with competitors
 - the businesses are free to innovate, buy from or sell to whom they choose
 - it does not involve the sharing of commercially sensitive information, particularly price sensitive information.
33. There are a number of exceptions in the Act, which are discussed at 3.3 below.
34. If a proposed sustainability collaboration is likely to result in public benefits, including sustainability benefits, authorisation may be an option. If granted, authorisation will provide a legal exemption from a number of the prohibitions on anti-competitive practices in the Act.

3.3. Exceptions

35. There are a number of exceptions in the Act and if any of these apply, the sustainability collaboration will not breach the prohibitions on cartel conduct or other key anti-competitive practices.
36. Businesses should seek legal advice before relying on the exceptions.
37. The exceptions include:
- conduct specifically authorised by Commonwealth, State or Territory legislation³

³ See s 51(1) of the Act.

- certain acts relating to remuneration, conditions of employment, working hours or working conditions of employees⁴
- provisions or practices relating to standards prepared or approved by Standards Australia⁵
- export exemptions⁶
- agreements between related bodies corporate⁷
- 'anti-overlap' provisions for cartel conduct or certain other anti-competitive practices which also fall within:
 - resale price maintenance⁸
 - exclusive dealing⁹
 - dual listed company arrangements¹⁰
 - acquisitions of shares or assets¹¹
- Crown immunity in certain circumstances.

38. In addition, for cartel conduct the following exceptions may also be available:

- joint ventures¹²
- collective acquisition of goods or services.¹³

39. Further, a sustainability collaboration will not breach the prohibitions on cartel conduct and other key anti-competitive practices where it is:

- notified¹⁴ or
- authorised¹⁵

having met the requirements of those exemptions.

3.4. Examples of low-risk sustainability collaborations

40. The following examples of sustainability collaborations that are **unlikely** to breach the prohibitions on cartel conduct or other anti-competitive practices are for general illustration purposes only. Businesses must consider the particular facts of their proposed sustainability collaboration and assess their risk under the Act before proceeding, including seeking legal advice where necessary.

⁴ See ss 51(2)(a), (aa) and (b).

⁵ See s 51(2)(c).

⁶ See s 51(2)(g).

⁷ See ss 45AN, 45(8) and 47(12).

⁸ See ss 45AQ and s45(5).

⁹ See ss 45AR, 45(5A) and 45(6).

¹⁰ See ss 45AS and s 45(6A).

¹¹ See ss 45AT and s 45(7).

¹² See ss 45AP and 45AO.

¹³ See s 45AU.

¹⁴ See ss 45AL and s 45(8A).

¹⁵ See ss 45AM and s 45(9).

Case study 1: Jointly-funded research into reducing environmental impact

Several commercial fishing businesses agree to jointly fund independent research into reducing the environmental impact of their activities. The fishing companies also agree to jointly fund a campaign to raise awareness about the research among industry participants and customers. The research is made publicly available.

The agreement to fund and promote industry research about reducing the environmental impact of the industry is unlikely to raise competition concerns. This collaboration does not relate to any agreement or cooperation on the price at which the fishing businesses will sell their products or acquire inputs, the customers or suppliers they will deal with, their output, or any bids for business they will make, nor does it involve the businesses exchanging commercially sensitive information such as pricing information.

Case study 2: Pooling information about suppliers

A group of building companies reach an agreement to pool objective, evidence-based information about the environmental sustainability credentials of suppliers.

The information regarding sustainability credentials includes whether suppliers have environmentally sustainable value chains, use environmentally sustainable production processes or provide environmentally sustainable inputs.

This agreement is unlikely to raise competition concerns provided it does not involve any agreement to purchase (or refrain from purchasing) from particular suppliers or classes of suppliers and does not involve the sharing of commercially sensitive information, including information about prices or quantities purchased from those suppliers.

Case study 3: Industry-wide emissions reduction target

Industry participants make a pledge to work towards a target for the reduction in their greenhouse gas emissions. Committing to the pledge is voluntary, any participant can join or leave, and each participant will decide individually how it will meet the target.

The agreement to set a non-binding industry target to reduce emissions is unlikely to raise competition concerns. This collaboration enables each participant to independently determine whether and how it will meet the target. Participating businesses continue to independently set their own prices and independently determine who they will and won't deal with or what they will or won't invest in.

Case study 4: Independent decisions about using a sustainable input

Representatives from 2 competing cosmetics businesses discuss a recent public announcement by one of the businesses that it will be transitioning to a more environmentally sustainable input in its products. After the discussion, the other business decides to explore whether it can source a similar alternative more environmentally friendly input for its products.

This discussion is unlikely to raise competition concerns. Each business has made an independent decision regarding the type of input it will use and no commercially sensitive information has been exchanged.

4. Authorisation

4.1. Overview of authorisation process

41. If businesses consider there is a risk that their proposed sustainability collaboration would, or might, breach the prohibitions on cartel conduct or other anti-competitive practices in the Act, they may be able to seek an exemption from the ACCC. This is commonly done through an 'authorisation'.¹⁶ Detailed information on the authorisation process is available in the [Guidelines for Authorisation of conduct \(non-merger\)](#).
42. While a number of overseas regulators have provided guidance to businesses about how they will apply their enforcement powers to sustainability collaborations, in Australia the ACCC is able to give businesses certainty about their exposure to the risk of legal action under the Act through the authorisation process.
43. If businesses obtain authorisation **before engaging in the conduct**, the businesses to which the authorisation applies can engage in the authorised conduct without risk of the ACCC, or third parties, taking legal action against them for a breach of the Act.
44. The ACCC will assess applications for authorisation on a case-by-case basis, depending on the facts and circumstances relevant to each application.
45. For collaborations which may breach the prohibitions on cartel conduct, the ACCC may grant authorisation if it is satisfied that the likely public benefit resulting from the proposed collaboration outweighs the likely public detriment (that is, it results in a **net public benefit**).
46. For collaborations which may breach other key prohibitions on anti-competitive practices, the ACCC may grant authorisation if it is satisfied that the collaboration results in a net public benefit, or if it is satisfied that the collaboration would not have the effect, or likely effect, of **substantially lessening competition**.

Tip: Preliminary discussions about potential collaborations

Businesses can have preliminary discussions amongst themselves about whether to pursue a potential sustainability collaboration without the need for prior ACCC approval.

If there is a risk that the collaboration may involve cartel conduct or other anti-competitive practices, any agreement must be clearly conditional on it being authorised before coming into force and the parties should not share commercially sensitive information with each other until authorisation is in place.

Once authorisation is granted, businesses must operate within the terms of the authorisation, including any conditions imposed by the ACCC.

47. The ACCC is available and willing to engage with businesses about potential applications for authorisation for sustainability collaborations and to discuss the process and factors it will have regard to.

¹⁶ Other types of exemption – '[notification](#)' and the '[collective bargaining class exemption](#)' – are also available in some circumstances.

48. While the ACCC cannot give legal advice on whether or not proposed sustainability collaborations are likely to breach the Act or indicate whether authorisation will be granted (as it cannot pre-empt its consultation and decision-making process), the ACCC can provide feedback on a draft application, identify potential areas of concern and indicate where more information or justification is needed.

 **Tip: ACCC informal discussions before lodging**

The ACCC is available and willing to discuss proposals for sustainability collaborations with businesses. Before applying for authorisation, we encourage businesses to contact us for a discussion.

Before approaching the ACCC, it would assist if you identify the objectives and public benefits you are seeking to achieve with the sustainability collaboration, any features that might limit the impacts on competition, and the businesses who will be part of the collaboration.

The ACCC can:

- guide you on which exemption process is suitable – it may be that authorisation is not the right process for your sustainability collaboration and other exemptions should be considered
- guide you on the factors we will have regard to in assessing the application, and explain in general terms the issues that you should address in your application
- guide you on what information we might need
- guide you on the steps in the process and likely timeframes
- review a draft application and provide feedback on potential areas of concern and indicate where more information or justification is needed.

Businesses can contact the ACCC at exemptions@acc.gov.au.

Defining your arrangements

If you decide to seek authorisation, you must be able to describe the proposed sustainability collaboration in a sufficiently precise manner to allow the ACCC to consult with interested parties and assess the application.

You should take care to ensure you accurately describe the scope of the conduct and that you specify all provisions of the Act for which you seek authorisation.

49. The ACCC must make a determination in relation to an application for authorisation within 6 months of the application being validly lodged. Before doing so, the ACCC is required to issue a draft determination and undertake a public consultation process.

50. In certain circumstances, the ACCC may grant an 'interim authorisation' or streamline its consideration of applications so that businesses can get authorisation for their sustainability collaboration sooner. This is discussed in sections 4.3 and 4.4 below.

4.2. Public benefits and detriments

51. The concepts of public benefit and public detriment are central to the ACCC's assessment of applications for authorisation.
52. 'Public benefit' and 'public detriment' are not defined in the Act. The ACCC interprets the terms broadly, consistent with how the Australian Competition Tribunal has defined them:

Public benefits: ... *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.*¹⁷

Public detriments: ...*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.*¹⁸

53. The ACCC tests the public benefit and detriment claims, including through a public consultation process.

4.2.1. Sustainability benefits can be public benefits

54. Under the authorisation test, the ACCC can take sustainability benefits into account as part of its assessment if those benefits are likely to result from (that is, they are caused by) the conduct sought to be authorised.
55. The ACCC has already granted authorisation for agreements that involve sustainability-related public benefits, including:
- Industry stewardship arrangements which impose a levy on the sale of products to increase the level of recycling or safe disposal of potentially harmful end-of-life products (such as batteries, paint, tyres and soft plastics).
 - Joint tendering by a group of local councils, who by combining their volumes can underwrite investment in a new waste recycling processing facility and promote environmental benefits such as diversion of waste from landfill, increased generation of renewable energy from waste and decreased greenhouse gas emissions.
 - Joint buying groups to purchase renewable energy, resulting in reduced greenhouse gas emissions by enabling members of the buying group to transition to renewables at lower cost and with less risk than if they each sourced renewable energy individually.
 - Major supermarkets collaborating to manage disruptions to in-store collections of soft plastics for recycling.
56. The ACCC has also accepted that a reduction in greenhouse gas emissions is a public benefit of considerable weight. The ACCC has considered public benefits from a reduction in emissions intensity to be highly valuable and important to Australians in the

¹⁷ *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.

¹⁸ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

context of the need to reduce greenhouse gas emissions to assist in global efforts to avoid the most severe impacts of climate change.¹⁹

57. The ACCC anticipates that as businesses increase their efforts to be more sustainable, the ACCC may receive applications for authorisation for increasingly ambitious initiatives involving industry collaboration.
58. The authorisation test enables the ACCC to take a broad range of sustainability benefits into account as part of the assessment of an application. For example, provided that the public benefit would result or be likely to result from the conduct sought to be authorised, this could include other environmental benefits such as biodiversity conservation, reduced plastic use or increased circularity.²⁰
59. In Australia, there is no requirement that the public benefits from an agreement flow back to the consumers that are impacted by that agreement. This means the ACCC can take sustainability benefits into account that flow to society generally, with a particular focus on public benefits to Australians.

4.2.2. Making public benefit claims to support authorisation

60. Businesses must substantiate their public benefit claims and demonstrate how those public benefits result from the sustainability collaboration. Businesses can do this by providing sufficient information, documents and evidence to enable the ACCC to consider whether a sustainability collaboration is likely to result in public benefits, whether the benefits claimed are of value to the community generally and, if so, how much weight society attaches to those benefits. The ACCC will give more weight to benefits which flow through to the broader community and are sustained over time.
61. Where relevant, businesses should provide evidence demonstrating why collaboration is necessary. For example, individual businesses may lack the incentive or ability to address the environmental or sustainability issue individually, as discussed at paragraph 9 above.
62. One way that sustainability collaborations may result in public benefits is that they may mitigate a 'market failure'. Examples of how sustainability collaborations can address a market failure include:
 - where providing a good or service has a cost to society greater than the cost to the purchaser (for example, where the product price does not include the eventual cost of recycling at the end of the product's life). Sustainability collaborations can reduce market failures by internalising more of the full costs to society into the purchase price of the good or service in a way that would not be feasible for an individual business to sustain (for example, the product price includes the related recycling cost)
 - where acting individually, a business that is considering switching to a more sustainable but expensive input may be at a competitive disadvantage relative to other businesses that do not make the switch (a 'first mover disadvantage'). While the more sustainable input is better for the environment, it increases the business' costs and does not provide a sufficient compensating increase in

¹⁹ ACCC, [Reasons for Determination: Application for merger authorisation lodged by Brookfield LP and MidOcean in respect of the proposed acquisition of Origin Energy](#), 10 October 2023, p viii; ACCC, [Media release: ACCC authorises Brookfield and MidOcean's acquisition of Origin](#), 10 October 2023.

²⁰ Circularity refers to steps to promote the continual use, recycling and regeneration of materials and products.

revenue. Therefore, the business may be reluctant to make the switch without its competitors also agreeing to make the switch

- where an individual business lacks the resources and capabilities to achieve environmentally sustainable outcomes, but a group of businesses could act collectively, for example:
 - to set up a stewardship scheme to fund recycling and disposal activities or facilitate research and development to identify new markets for end-of-life products
 - to establish the scale required to make a project commercially or technologically feasible.

63. Another way sustainability collaborations may result in public benefits is if they create 'positive externalities'. For example, the financial benefit that a firm might receive from acting individually might not be sufficient for it to justify the investment required to give rise to the environmental benefit. An authorisation enabling firms to share the relevant cost may, however, give rise to the requisite investment.

Case study: ['Recycle My Mattress' Scheme](#)

An example of businesses setting up a product stewardship arrangement to ensure that particular products or materials are disposed of in a way that reduces their impact on the environment, and on human health and safety, is the 'Recycle My Mattress' Scheme.

This Scheme required participating mattress manufacturers and importers to pay a \$10 levy to the Scheme (overseen by the Australian Bedding Stewardship Council) on each new mattress sold and encouraged (but did not require) them to exclusively deal with other Scheme participants. The levy partially covered the cost of collecting and recycling mattresses, with any excess revenue allocated to research and development, marketing and Scheme administration.

The businesses sought authorisation on the basis the arrangement risked breaching the prohibitions on cartel conduct and/or section 45 of the Act.

The ACCC granted authorisation in 2022. The ACCC accepted that environmental public benefits were likely to result from the Scheme. That is, by funding research and development activities aimed at increasing the value of recovered materials from end-of-life mattresses and pricing mattresses to more closely reflect the costs of their supply and disposal, it was likely that fewer mattresses would end up in landfill. Had the levy resulted in price rises *beyond* those reflecting the full social cost of the mattresses, this could have been considered a public detriment if the increases were associated with cost inefficiency and market power.

The ACCC considered that any public detriments likely to result from the Scheme were limited because:

- the levy was unlikely to impact competition in the supply chain for mattresses. Each Scheme participant individually set its own prices for the mattress they supplied and then applied the levy, and retailers decided the extent to which they passed the levy through to consumers
- any increase in retail prices as a result of the levy would be a relatively small proportion of the overall retail prices of mattresses
- participation in the Scheme was voluntary. More generally, however, the ACCC will balance this against the need to address the risk of competitors who are not

participating in the arrangement being able to benefit (or 'free ride') from the Scheme, placing those who participate in the arrangement (and charge the levy) at a competitive disadvantage

- any limitation on the ability of mattress suppliers to deal with non-accredited collectors and recyclers was not likely to give rise to significant public detriment.

As the design of the Scheme was subject to change and it did not include transparency requirements, the ACCC granted authorisation with conditions that required annual reporting and an independent review of the Scheme's operations.

For other examples of authorisations of agreements to impose industry levies, see:

[Agricultural and veterinary chemical and chemical containers disposal and collection](#) (2018)

[Tyre Stewardship Scheme](#) (2018)

[Paintback Limited Stewardship Scheme](#) (2021)

[Battery Stewardship Scheme](#) (2020)

[Refrigerant Reclaim Australia product stewardship program](#) (2021)

Tip: Substantiating sustainability claims in authorisation applications

As part of your application for authorisation, you should:

- outline how the sustainability benefits or any other public benefits claimed result from (in the sense that they are caused by) your proposed collaboration. This includes identifying why the public benefit will not exist, or will exist only in part, without the collaboration
- identify why the sustainability outcomes claimed are likely to result, that is, why they are not mere possibilities, but there is a real chance of them occurring
- provide evidence that supports the public benefit claims. Claims should be clear, specific and avoid using vague language
- while quantification is not a requirement, where possible, quantify the size of the likely public benefits (as well as public detriments). This includes an explanation of any methodologies, assumptions and sensitivity testing that underly that quantification
- outline why the proposed collaboration is required to achieve the public benefits and why businesses cannot individually address the sustainability concern
- outline why the proposed collaboration is proportionate. That is, demonstrate why the collaboration is no more restrictive on competition than is reasonably necessary to achieve the relevant benefits. In other words, why the benefits cannot be achieved using measures that are equally effective, but less restrictive on competition
- where relevant, include the domestic or international standards that the proposed collaboration is designed to achieve or exceed. If technical standards are being developed, include the research and/or scientific method that the technical standards are based on
- explain what, if any, transparency and reporting measures are included to ensure that the public benefits are achieved, including if there are steps in place to identify and address any issues.

Quantification can provide guidance on the relative weight to be attributed to particular public benefits and detriments in the ACCC's overall assessment.

For example, estimating the reduction in greenhouse gas emissions/incorrect disposal of chemicals/landfill, and if possible then putting a dollar amount on the value of that public benefit.

The ACCC recognises that in many cases it will not be possible to credibly quantify benefits (and detriments), particularly environmental or other types of sustainability benefits.

In these cases, claims will usually need to be qualitatively assessed and there must be a sufficient basis for concluding that the benefits (and detriments) are likely to result from the proposed conduct.

4.2.3. Examples of types of sustainability benefits

64. The following examples are for general illustration purposes only. The ACCC will assess applications for authorisation on a case-by-case basis, depending on the facts and circumstances relevant to each application.

Case Study 5: Agreeing to only acquire from suppliers who meet environmental standards

Several companies that manufacture soy milk want to take steps to reduce the impact of the soya industry on biodiversity, climate change and water systems. They know that they can reduce their environmental impact by only buying soy beans from sustainable suppliers. However, soy beans sourced from sustainable suppliers are more expensive, and a decision by an individual company to only buy from sustainable suppliers would place them at a cost disadvantage as compared with its competitors who buy the cheaper alternatives. To improve the environmental impact of their industry, the companies want to agree with each other that they will only buy soy beans from growers that meet a certain environmental standard.

This agreement is likely to breach the prohibitions on cartel conduct in the Act. The companies are competitors and it would involve them agreeing with each other to not buy goods from certain classes of suppliers (being suppliers who do not meet the environmental standard).

However, it is the type of agreement that could potentially be authorised by the ACCC if the businesses can show the agreement is likely to result in an environmental benefit to the public that outweighs any public detriments likely to result from it. The ACCC will consider such factors as whether, for example:

- *cooperation is necessary to address a 'first mover disadvantage' market failure*
- *there are clear biodiversity, climate change and water systems public benefits resulting from the use of soy beans that meet the standard*
- *the information shared by the companies is limited to that which is reasonably necessary to facilitate the sustainability collaboration (for example, it does not include the prices at which they buy soy beans or supply soy milk).*

Case study 6: Agreeing to not use plastic wrap on products

A group of soft drink manufacturers want to reduce the use of single use plastics in their industry by ceasing the use of all plastic wrap on their drink multipacks. They consider the transition will occur earlier if it is part of an industry-wide change where they coordinate the timing together. They also want to undertake a joint consumer campaign about the improved environmental outcomes.

This proposal may risk breaching the prohibitions on cartel conduct and/or other anti-competitive practices in the Act, given the manufacturers are competitors and the agreement would restrict the type of goods they will make available and restrict the acquisition of plastic wrap from their suppliers.

However, it is the type of agreement that could potentially be authorised by the ACCC. The ACCC would consider the likelihood that the agreement will result in a reduction in plastic use and assess whether this is a benefit to the public that outweighs any anti-competitive effect or other public detriment arising from the proposal. Relevantly, the ACCC may find that plastic wrapping may not be a point of significant competition between the soft drink manufacturers, therefore limiting the extent of any public detriment that may result from the agreement.

Case Study 7: Joint development of technology with environmental benefits

Four manufacturers of building materials want to explore ways to make their businesses more sustainable. They would like to enter an agreement to conduct joint research and development to develop an early-stage technology to reduce greenhouse gas emissions during cement production, working with third party technical experts and sourcing inputs that they will jointly select. The collaboration is required in order to make the research and development feasible as the businesses lack the technical capabilities and resources to viably conduct the research alone.

The agreement may risk breaching the Act if it involves joint decisions by the competitors about who they will and won't acquire services and inputs from and the sharing of commercially sensitive information between them. The manufacturers are likely to need to obtain legal advice about whether any relevant exceptions in the Act apply (such as the joint venture exception), or whether they should seek authorisation.

It is the type of agreement that could potentially be authorised by the ACCC, if the businesses can show the agreement is reasonably necessary to achieve and likely to result in an environmental benefit in the public interest (such as reduced greenhouse gas emissions), and that benefit outweighs any public detriments likely to result from the agreement.

Case study 8: Sharing of information and agreeing not to deal with certain suppliers or acquirers to improve recycling rates

Three clothing retailers source the clothes they sell in their shops from a large number of suppliers. Many of the suppliers are common to all 3 retailers. The retailers want to work together, along with their suppliers, to coordinate recycling processes and systems in their industry so that unwanted clothing can either be reused or transformed into a new material. They consider that they need to work together because standardising recycling processes will ensure that all suppliers and retailers are using systems that are interoperable. This helps overcome an issue currently impacting recycling rates in their industry, which is that systems/processes of some suppliers do not work with some retailers (and vice versa).

They want to give preference to traders that employ the standardised recycling processes in their future business dealings.

The collaboration may risk breaching the Act as it is likely to involve agreements between businesses (at least some of whom compete with each other) not to do business with traders that do not use a particular recycling process and the sharing of commercially sensitive information about production processes.

It is the type of conduct that could potentially be authorised by the ACCC if the businesses can show that the conduct is reasonably necessary to improve recycling rates, and this is a benefit to the public likely to result from the conduct that outweighs the anti-competitive effect and any other public detriments likely to result. A relevant factor in the ACCC's consideration would be understanding why collaboration amongst the group of retailers and suppliers is necessary; for example, why the systems need to be interoperable.

Case study 9: Sharing of information and coordination activities to reduce food waste

Two large food retailers operate complex supply chains and work with many primary producers, distributors and other suppliers. The retailers recognise an issue with food waste in their industry, with produce that cannot be sold often perishing before it can be redistributed. The retailers would like to reduce food waste across their industry. They agree to share information with each other as well as third parties about where excess food is located, where food is required and when it will expire. They consider this will result in more food being reallocated before it perishes.

This agreement may risk breaching the Act as it involves the sharing of commercially sensitive information between competitors (such as volumes) and has the potential to spill over into agreements regarding who the competitors will and won't acquire from and on what terms.

In these circumstances, the retailers may decide to seek certainty about potential competition law risk by applying for authorisation from the ACCC.

This is the type of agreement that could potentially be authorised by the ACCC. Relevant factors in the ACCC's consideration would be, for example:

- *understanding what is preventing the retailers from each acting unilaterally to address this issue*
- *whether there are clear food waste reduction public benefits likely to result*
- *the extent to which the sharing of information is likely to affect competition between the retailers in the acquisition and supply of fresh produce.*

4.2.4. Public detriments

65. The ACCC will take into account all public detriments that are **likely to result** from the conduct for which businesses seek authorisation.

66. In most cases, the identifiable public detriments will be those that result from a lessening of competition. The protection of competition is a priority consideration for the ACCC. A lack of competition gives businesses the ability to give less and charge more, and reduces incentives to innovate. The ACCC's approach to assessing the likely effects on competition is outlined in the [Guidelines for Authorisation of conduct \(non-merger\)](#) (Chapter 7).

67. Businesses should identify how the proposal may affect competition and whether there are relevant features to the proposal that will limit any likely anti-competitive effects or other public detriment. The greater the potential competition impacts, the greater the public benefits will need to be for the proposal to result in a 'net public benefit'.
68. Some factors that may enable the ACCC to determine that the likely anti-competitive effects of a sustainability collaboration are limited include whether:
- the proposed conduct impacts only a limited aspect of how the businesses compete
 - the participants collectively represent a small proportion of the supply or purchasing of the good/service. The greater the proportion (either on the sell-side or the buy-side) that is impacted by the proposed conduct, the more likely there will be substantial anti-competitive effects
 - the only information shared is information necessary for businesses to perform the relevant conduct. This reduces the possibility that the collaboration creates the potential for competitors to coordinate conduct beyond what is authorised
 - participation is voluntary for the businesses involved in the collaboration and for any target they are negotiating or dealing with
 - the collaboration does not remove incentives for individual businesses to go further (that is, if one member of the group wants to achieve sustainability outcomes that are greater than those proposed by the participants to the sustainability collaboration)
 - the collaboration does not create or enhance the market power of participants in a way that enhances their ability to raise prices, reduce output or quality or restrict innovation
 - the collaboration has little impact on the ability of businesses that are outside of the group to compete, including to supply to, or buy from, the target business(es). For example, businesses outside the group may be able to get similar discounts because of their size or their ability to form their own group.

4.3. Interim authorisation

69. As part of the authorisation application process, businesses can seek 'interim authorisation' to enable them to engage in the proposed conduct while the ACCC considers the substantive application.
70. The ACCC may grant interim authorisation where it considers it appropriate to do so. The ACCC will determine whether to grant interim authorisations on a case-by-case basis taking into account all factors it considers relevant, including the extent to which the relevant market will change if interim authorisation is granted, and the urgency and the possible harm (if any) to the applicant(s) if interim authorisation is denied. Further details are provided in [Guidelines for Authorisation of Conduct \(non-merger\)](#) (Chapter 10).
71. Businesses that wish to request interim authorisation should make a request in writing and provide reasons in support of the request and the date from which interim authorisation is sought.
72. The ACCC's grant of or refusal to grant an interim authorisation is not an indicator of whether the ACCC will grant a final authorisation.

Case study: [REDcycle](#)

In 2022, consultation and recycling organisation REDcycle announced that it was indefinitely suspending its REDcycle Program. The program was the only return-to-store program facilitating collection and processing of soft plastics into recycled plastic products. The announcement created significant community concerns about existing stockpiles and how consumers could continue to recycle soft plastics.

The major supermarkets sought urgent interim authorisation from the ACCC. Coles Group Limited, Woolworths Group Limited, ALDI Stores (and current and future program partners) sought authorisation to collaborate, consider, and seek to develop and implement solutions for the management of soft plastics. They sought authorisation on the basis the arrangement risked breaching the prohibitions on cartel conduct and/or sections 45, 46 and 47 of the Act.

The ACCC moved quickly to grant conditional **interim** authorisation, which enabled the supermarkets to develop an interim 'Roadmap to Restart' plan. The ACCC later granted **final**, conditional authorisation for 12 months to allow the supermarkets to continue their discussions around longer-term solutions to the issue of in-store collections.

The ACCC considered that there was a risk for potential public detriments to arise including: increasing barriers to other industry participants being able to develop separate recycling schemes (in the event other supermarkets were not part of the REDcycle program); a reduction in competition for the supply of transport, storage and recycling services for soft plastics; and the potential for the conduct to facilitate coordination beyond the scope of the conduct authorised.

However, the ACCC considered that the arrangement, provided it imposed certain conditions, was likely to result in significant public benefit, including:

- facilitating the development of interim solutions to soft plastic recycling
- the increased potential to divert some soft plastics from landfill through collaborative efforts
- providing clear and consistent messaging for consumers regarding the Roadmap

and that this would outweigh any likely public detriment.

The ACCC imposed conditions to ensure that only solutions that were consistent with the scope of the proposed conduct were implemented and to ensure sufficient transparency and accountability by requiring that participants reported on the program's progress.

Case study: [Offshore electricity generation feasibility licences](#)

In 2024, the ACCC granted urgent interim authorisation to the Department of Climate Change, Energy, the Environment and Water to allow renewable energy businesses to collaborate to resolve overlapping geographic areas in their applications for feasibility licences for the Gippsland and Hunter declared offshore electricity generation regions. Following a period of background discussions, the ACCC was able to act promptly when an application was made, and took under a week from the date the formal authorisation application was lodged to grant urgent interim authorisation.

This was to prevent delays in feasibility licence processes that were well advanced in the Gippsland and Hunter declared regions.

4.4. Streamlined consideration of applications

73. The ACCC has gained experience in considering certain sustainability-related agreements, such that the ACCC considers that, where certain features are present, it may be appropriate to proceed directly to a draft determination, without an initial consultation phase. This can shorten the process, allowing for authorisation to potentially be granted more quickly. The ACCC will still consult publicly after the draft determination.
74. Examples where the ACCC may consider streamlining the process include where:
- there do not appear to be any significant detriments associated with the conduct
 - the application deals with a subject matter or industry that the ACCC has previous experience with and has concluded there was a clear net public benefit for similar arrangements.
75. Businesses that want the ACCC to streamline the process should explain how these features, or any other relevant features, are present.

Case study: [Joint renewable energy buying group](#)

In 2024, the ACCC granted authorisation to the Business Renewables Buying Group to pool their electricity demand and conduct a joint procurement process for renewable energy. The group was comprised of 5 healthcare businesses, although the authorisation allowed future members to join provided the group's total consumption did not exceed 1% of electricity consumption in each State and Territory in the National Electricity Market (NEM).

The group sought authorisation on the basis the arrangement risked breaching the prohibitions on cartel conduct and/or section 45 of the Act.

The ACCC considered the joint procurement process was likely to result in public benefits relative to the situation where each organisation individually arranged their transition to renewable electricity, including:

- transaction cost savings for both the group members and potential retail electricity suppliers as a result of the joint tender process
- environmental benefits through a reduction in greenhouse gas emissions as a result of the group members being able to achieve a faster or more extensive transition to renewable energy at lower cost and with less risk.

The ACCC considered there was likely to be little, if any, public detriment, particularly given:

- the joint electricity demand of the group was relatively low (that is, less than 1% of electricity consumption in each State and Territory in the NEM)
- while some group members may have competed downstream, the risk of broader coordination between them (beyond the authorised coordination) was low because

any information-sharing authorised was confined to discussions regarding the joint tender process and any post-tender consultation was limited to the ongoing management of the contracts. Further, the joint procurement process would be managed by a facilitator with oversight of the group and who would act as an intermediary between group members.

Further, the ACCC had considered and granted numerous other applications for authorisation by energy buying groups. In light of these factors, the ACCC considered it appropriate to proceed directly to issuing a draft determination without conducting an initial consultation process. The ACCC consulted after the draft determination and then issued its final determination within 2 months of the application being lodged.

For other examples of joint buying or selling groups, see:

- Numerous local council joint procurement groups seeking authorisation to jointly tender for waste services (available on the ACCC's [public register](#))
- [Municipal Association of Victoria](#) (2020)
- [Melbourne Renewable Energy Project 2](#) (2019)

4.5. Lodging an application

76. The ACCC requests that applications be lodged electronically via the [Authorisations and notifications web form](#).

Tip: Fees and fee waivers

Applications for authorisation incur a fee of \$7,500. The ACCC may waive this fee (in whole or in part) if satisfied that the full fee would 'impose an unduly onerous burden on an applicant'.

In considering a request for a fee waiver, the ACCC will take into account all relevant information, including:

- Having regard to the applicant's income, liabilities and assets, will the payment of the fee cause the applicant financial hardship?
- Is the applicant a not-for-profit organisation?
- If the application is to be lodged on behalf of a number of businesses, is it possible for each of these businesses to contribute towards the fee?

77. The [Application for authorisation \(non-merger\) form](#) details the information generally required for authorisations. The information required depends on the nature and complexity of the proposed arrangement and the markets affected. Where an applicant considers that some of the information listed on the form is irrelevant to their proposal or is not available to them, they should provide a written explanation of this, or discuss it with the ACCC.

78. It is important for applicants and any person making submissions to the ACCC in respect of an application for authorisation to take care that the application or submissions are

not false or misleading. Giving false or misleading information to the ACCC is a serious criminal offence.²¹

In your application, it is important to provide:

- ✓ a description of the proposed arrangements; this should be precise enough to allow the ACCC to consult with interested parties and assess the application
- ✓ an outline of the areas of competition/relevant markets likely to be affected by the proposed arrangements
- ✓ an outline of the likely public benefits from the proposed arrangements, including evidence to support your environmental or other sustainability claims
- ✓ an outline of the likely public detriments, including the effect on competition from the proposed arrangements. If you do not consider there will be any reduction in competition or other public detriments, explain why not
- ✓ the time period relevant to the arrangements
- ✓ any other information or evidence that may be relevant to the ACCC's assessment.

The authorisation process is more efficient and timely if you provide comprehensive information and supporting evidence.

DRAFT

²¹ See section 137 of the *Criminal Code* (Cth).