



29 November 2024

Commissioner Joanne Chong and Commissioner Alison Roberts
Inquiry into Australia's opportunities in the circular economy 2024-2025
Productivity Commission

Sent by email: circular.economy@pc.gov.au

Dear Commissioners Chong and Roberts

ACCC information in support of the Productivity Commission's inquiry into opportunities in the circular economy

The Australian Competition and Consumer Commission (ACCC) appreciates the opportunity to provide information in support of the Productivity Commission's inquiry into Australia's opportunities in the circular economy.

While the ACCC is not an environmental regulator or advocate, we recognise that achieving a circular economy will require transformation across supply chains, with significant involvement from all stakeholders, including government actors. Alignment is important for responding effectively to climate and sustainability concerns, and the ACCC welcomes this inquiry as a step to increase alignment.

This letter shares the ACCC's experience where its role intersects with sustainability issues and the circular economy. It provides information on the key competition and consumer protection (including product safety) developments and issues, informing the Inquiry's consideration of regulatory enablers and barriers.

The letter includes information on ways that the ACCC can contribute to the circular economy transition, including by:

- Continuing its investigative and enforcement actions against breaches of competition law, thereby protecting the competitive process and facilitating innovation.
- Recognising that there may be a need for collaboration in a circular economy, and issuing guidance for businesses to educate and clarify on when such collaborations may be low risk of falling foul of competition laws, and how to seek exemptions.
- Protecting consumers against greenwashing.
- Our role in administering the motor vehicle information scheme (MVIS).
- Developing guidance to support consumer safety and confidence in second-hand goods markets.

1) The ACCC's role in markets transitioning to greater circularity

The ACCC is an independent Commonwealth statutory agency that promotes competition, fair trading and product safety for the benefit of consumers, businesses and the Australian community. The primary responsibilities of the ACCC are to enforce compliance with the competition, consumer protection, fair trading and product safety provisions of the Competition and Consumer Act 2010 (Cth) (CCA), regulate national infrastructure, and

undertake market studies. The CCA contains the Australian Consumer Law (ACL), which is a national law that deals with consumer protection and fair trading issues across the economy. States and territories also enforce the ACL under a 'one law, multi regulator' model.

While we are not an environmental regulator, and our role is not central to Australia's transition to the circular economy, environmental issues and goals such as Australia's 2030 circular economy goal are relevant to the ACCC's work because markets are increasingly impacted by environmental sustainability (including circularity) drivers. This is reflected in our 2023-24 compliance and enforcement priorities, which includes a priority on consumer, product safety, fair trading and competition concerns in relation to environmental claims and sustainability.

Complementing our sustainability related compliance and enforcement work, we have also established a Sustainability Taskforce to build expertise, inform and coordinate whole-of-agency efforts to respond effectively as markets transition to greater environmental sustainability.

2) Competition and the circular economy

Competition drives efficiency and innovation

Healthy competition incentivises businesses to allocate their resources efficiently, maximise productivity and minimise waste – all of which have the potential to drive the circular economy. Competition law and ACCC compliance and enforcement can support the transition to a circular economy such as by ensuring that businesses with market power do not abuse that power.

The OECD has identified that there is significant alignment between the goals of competition policy and those of the circular economy.¹ If businesses abuse independent or collective market power to raise prices, reduce quality, or lock out new, more circular market entrants, or prevent technological innovations that enable circularity, this will hinder Australia's efforts to pursue a more circular and resource efficient economy. Where incumbents have market power, competition from new business models that reflect greater focus on circular practices, may be hindered. The ACCC therefore considers that its focus on competition enforcement is an important element to support the circulate economy.

However, as Australia transitions to a more circular economy, there may be instances where businesses, government, not-for-profit organisations and charities decide to work together, rather than compete, to realise circular economy outcomes.

Sustainability collaborations are 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.

Competition law can accommodate collaboration in pursuit of a circular economy

Australia is one of the few jurisdictions where entities can seek an exemption to engage in conduct that may breach competition laws where it delivers a net public benefit. The ACCC can give businesses greater certainty about their exposure to the risk of legal action under the Act via exemption processes. An exemption allows businesses to engage in the specific

¹OECD Competition Policy Roundtable Background Note, "Competition in the Circular Economy", 2023 https://www.oecd-ilibrary.org/finance-and-investment/competition-in-the-circular-economy_4b829cf6-en

conduct without risk of the ACCC, or third parties, taking legal action against them for a breach of the Act.

Over recent years, around 1 in 4 conduct authorisations considered by the ACCC have involved assessment of sustainability based public benefits. As an example, product stewardship schemes are increasingly prominent in government policy and some of these arrangements come to the ACCC in the form of applications for authorisation.

ACCC exemptions powers

There are 2 key pathways to exemption from competition law in Australia – notification, or authorisation. Authorisation is the most common form of exemption used to date for large businesses or complex conduct, though some businesses (typically small and medium enterprises) may be eligible to use the quicker and simpler notification process for certain types of conduct, or to use the class exemption for small business collective bargaining.

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). The ACCC takes a broad range of public benefits, including environmental benefits, into account in its authorisation assessment.

The ACCC has significant experience authorising collaborations that deliver environmental benefits, dating back to the 1990s. We have approved a number of authorisations that relate to the circular economy, including numerous product stewardship schemes. For example, the [2022 authorisation of the 'Recycle my Mattress' scheme](#). Part of the scheme involved a \$10 levy on each new mattress sold which partially covered the cost of collecting and recycling mattresses, with excess revenue allocated to research and development, marketing, and scheme administration. Additionally, the ACCC authorised major supermarkets to collaborate, consider, and seek to develop and implement the 'Road to Restart' plan for the management of soft plastics, following the suspension of the REDcycle scheme.² We have also authorised a number of councils to jointly procure [recycling services](#) or [renewable energy](#). And at the time of writing, we are considering a June 2024 application for authorisation for [Resiloop](#) to establish and operate a voluntary, industry-led product stewardship scheme to collect and recycle resilient flooring waste.

Clear and transparent processes for exemption

ACCC exemptions processes are clear and transparent. The ACCC maintains a public register of authorisations, notifications and its decisions, as well as a public register of class exemption notices.

The ACCC consults with interested parties on authorisation applications which allows it to test claimed benefits (including environmental benefits) arising from the collaboration. All public submissions are published.

Guidelines on each type of exemption process are publicly available. Prospective applicants can engage in pre-lodgement discussions with the ACCC to ensure that they are informed with respect to what information will be required, the indicative authorisation timeframe and other aspects of the process.

The authorisation and notification processes are subject to statutory deadlines. This provides certainty on timeframes for businesses who want to engage in sustainability collaborations.

² ACCC, [Sustainability collaboration and Australian competition law: a guide for business – Draft for consultation](#), 8 July 2024 (p22)

The ACCC can grant interim authorisation where there is a need for urgent collaboration. For example, the authorisation of the major supermarket's 'Road to Restart' discussed prior.

The notification process provides eligible businesses with legal protection immediately after it is validly lodged (i.e. for exclusive dealing) and as quickly as 14 days after it is validly lodged (i.e. for small business collective bargaining conduct).

Alternatively, eligible small businesses can use the class exemption to obtain immediate protection under competition law, simply by completing a one-page form.

Proactive guidance for sustainability collaborations

The ACCC recognises when it comes to serious environmental sustainability imperatives such as transitioning to circular models that keep materials in use at their greatest value for longer there are increased calls for collaboration. The ACCC does not see a need to change competition law in this context. We do recognise, however, the importance of ensuring competition law and exemptions are well understood to avoid the scenario where businesses unnecessarily abandon, or fail to pursue, collaborations on the circular economy due to unfounded competition law concerns. We have responded by [developing guidance](#) for businesses who wish to take steps to address environmental sustainability by collaborating with other businesses. This guidance will help provide greater clarity about where competition law risk is likely or less likely to arise when jointly pursuing sustainability initiatives.

The guidance:

- outlines what types of sustainability collaborations are unlikely to breach the Act;
- explains the exemptions process for sustainability collaborations that may risk breaching the Act; and
- outlines how under the Act, there are also specific exemptions available where the sustainability collaboration has been excepted from the application of competition law.³ For example, if the conduct is specifically authorised by Commonwealth, State or Territory legislation.

The ACCC has published and consulted on draft guidance and is now finalising the guidance based on feedback.

Stewardship schemes

In relation to the circular economy, industry led product stewardship schemes (self-regulation) can be enabled by the authorisation process. However, they are not a complete substitute for mandatory regulation. Ineffective schemes can have adverse consequences for consumers due to the opportunity cost of the resources invested in these schemes and the build-up of waste products.

The ACCC will continue to assess any applications for authorisation involving product stewardship schemes by applying the relevant test, which in most cases will be the net public benefit test. In some cases, the ACCC may impose conditions on authorisation; for example, to increase the transparency of the scheme's effectiveness.

³ See s51(1) of the Act.

3) Consumers and the circular economy

As some consumers become more aware of the environmental impact of their purchasing behaviours, demand for circular economy products and practices will increase. However, some consumers are not equipped with sufficient information about circular economy values to change their purchasing behaviour.

However, information provision is not the only barrier to overcome to increase consumers' participation. There are other factors that may limit demand for circular products and services including price, cultural considerations, habit, and preference for convenience.

Consumers exercising their choice sends critical signals in markets, including for circular goods and services. The consumer protection and fair trading provisions in the ACL can support Australia's pursuit of a circular economy in several ways. We provide some examples below:

ACCC perspectives on greenwashing

Consumers have become more conscious of the impact of their consumption on the environment, and are increasingly considering the environmental impact of their purchases. Consequently, consumers often seek to purchase goods and services that are marketed using claims about environmental impacts. Businesses are responding to this consumer demand for environmentally sustainable products and services, and environmental claims are becoming more common in the marketing of consumer goods and services. However, consumers can often find it difficult to determine whether environmental claims are true, and/or that some of these claims do not accurately reflect the true environmental impact associated with a business or the products or services it supplies. Where claims misrepresent the environmental impact associated with a business or the goods and services it supplies, this is referred to as 'greenwashing'.

The ACCC has observed several ways that businesses take part in greenwashing. Some businesses intentionally make claims that create misleading impressions to capitalise on consumer preferences for environmentally sustainable products and services without making genuine investments in sustainable practices. However, sometimes businesses mislead consumers inadvertently. This happens for a variety of reasons including a lack of due diligence before making claims, poor data practices or poor understanding of supply chains.

On the latter, improving businesses' understanding of supply chains, and how each step in the chain supports and substantiates circular economy claims, will be essential in order to support truthful and accurate claims. As supply chains transform with the investment of stakeholders, businesses relying on these supply chains will need to ensure that they are making accurate claims. For some small to medium sized businesses they will also be relying on stakeholders such as government and other business to provide them with accurate and up to date information as to this transformation process so they can ensure that their consumer facing claims are accurate and can be substantiated. In this vein, the ACCC welcomes the National Framework for Recycled Content Traceability which can support improved data practices and help businesses to substantiate their claims in relation to use of recycled material.

The ACCC also considers whether scientific or technical language a business may use in their sustainability claim is likely to confuse or mislead the average consumer. Consumers generally do not have specialist knowledge and will not understand when words are used with a technical or specially defined meaning rather than their ordinary meaning. Consumers may be misled if there is a difference between the ordinary meaning and a technical or

industry defined meaning. Some language may be technically accurate but still mislead the consumer. For example, a claim about the disposability of a product may not be accurate to a consumer if their local area does not have the backend infrastructure to dispose of the product in a way that will confer the environmental benefit being communicated.

More information on greenwashing practices can be found in the findings of the ACCC's [Greenwashing Sweep](#).

To combat greenwashing, the ACCC undertakes a variety of compliance and enforcement work.

Compliance and engagement

We have conducted greenwashing internet sweeps focusing on targeted industries. Amongst other findings, those related to the circular economy include:

- Some businesses will make unqualified claims about the use of recycled materials, including recycled plastics, in their products – a common circular economy practice. These claims can confuse or mislead consumers as they will often omit information about the proportion of recycled materials used.
- As previously discussed, some businesses will make unqualified claims about the disposability of their products or packaging, claiming them to be biodegradable, compostable, or recyclable, often in reliance on a technical meaning of the term. For example, where the product meets the specifications of a technical industry standard. However, consumers are not aware of these industry or technical meanings and will understand the terms as per their common usage. As such, consumers are likely to be misled where the products are only biodegradable, compostable or recyclable with certain infrastructure that may not be available. In some cases, there was concern that claims a product or its packaging were recyclable were false entirely.

We have also developed [guidelines](#) to assist businesses to understand the obligations under the ACL with when making sustainability and circularity claims. The guidelines draw out key 8 principles that businesses should follow when making claims.

We are also engaging with stakeholders while continuing our proactive work to identify new areas of concern and potential industries for enforcement. Given false or misleading credence claims are difficult to identify on their face, we do rely on industry bodies, other regulators, competitors, being those with specialist knowledge in addition to consumer reports to initiate investigations.

Investigations and enforcement

We have a number of important on-going greenwashing investigations and assessments, and continue to proactively target misleading green claims targeted at consumers in a range of markets. For example:

- We have current court proceedings against Clorox Australia Pty Limited (Clorox) in the Federal Court for alleged false or misleading representations that its GLAD-branded Kitchen Tidy Bags and Garbage Bags are comprised of '50% ocean plastic'. The ACCC alleges that that Clorox represented that its GLAD Kitchen Tidy Bags and Garbage Bags were comprised of 50 per cent recycled 'ocean plastic' collected from an ocean or sea, when that was not the case. The ACCC alleges that they were instead partly made from plastic that was collected from communities in Indonesia up to 50 kilometres from a shoreline, and not from the ocean or sea.

- In November 2023 we also accepted a court enforceable undertaking from MOO Premium Foods Pty Ltd (MOO) in relation to false and misleading representations regarding its yoghurt product packaging. Between at least November 2021 to the date of the undertaking, MOO made representations on the packaging of its yoghurt products, and on its website and social media platforms, that the packaging was made from '100% ocean plastic' which gave the impression it was made from plastic waste collected directly from the ocean, when in fact the packaging was made from abandoned plastic waste that was collected within 50km of the shoreline in regions where waste management is inexistent or inefficient.

4) Facilitating repairs

As noted in an ACCC submission to the Productivity Commission's 2021 Right to Repair inquiry, facilitating a 'right to repair' is a complex and multi-faceted issue involving the intersection of many aspects of the law and economy, including intellectual property, international law, competition law and consumer protection and fair trading laws.

In that inquiry, the Productivity Commission defined a 'right to repair' as the ability of consumers to have their products repaired at a competitive price using a repairer of their choice. While other instruments may have a more direct role, competition, consumer protection and fair trading laws may contribute to facilitating such a right. Product design, access to repair services, and environmental and resource management also remain key issues to facilitate repairs, which contribute to a circular product life-cycle.

The CCA includes one specific scheme that facilitates third party repairers gaining access to repair information necessary to repair motor vehicles. The Motor Vehicle Information Scheme (MVIS) came into effect on 1 July 2022. It is a mandatory scheme under the CCA that requires motor vehicle service and repair information to be made available to all motor vehicle repairers and registered training organisations (RTOs) at a fair price.

The scheme ensures that independent repairers can engage in fair competition with larger car manufacturers and their affiliated repairers. As a result, consumers have more choice when engaging a motor vehicle repairer and may also benefit from more competitive pricing and service options.

In this way, the MVIS has the potential to contribute positively to circular economy outcomes as repairs are more accessible, potentially keeping motor vehicles on the road for longer and extracting greater value from their material inputs. Greater access and affordability of repairs may also alleviate some concerns consumers may hold over purchasing second-hand cars, further contributing to circular economy outcomes in the motor vehicles industry. The ACCC has also recommended that it may be beneficial to include agricultural machinery in the MVIS, and this should be explored further.⁴

5) Consumer safety and confidence in second-hand goods markets

Driven by environmental and other incentives, consumers are increasingly participating in the circular economy, driving an increase in both the supply of and demand for second-hand consumer products, and products that are refurbished, remade or made from recycled materials (RRR products).

⁴ ACCC, [Submission to Productivity Commission's Right to Repair – Draft Report](#), 28 July 2021

Second-hand products are those that have been purchased new in the past by a previous owner and are now being resold in their existing condition⁵. RRR products are consumer products that are either made from a combination of new and second-hand components (refurbished), remade entirely from second-hand components (remade), or made partly or entirely from recycled materials (recycled).

The practice of selling second-hand or RRR products keeps products, components and their materials in circulation for longer, extracting greater value from them. These outcomes align with circular economy objectives.

Consumer guarantees and second-hand or RRR products

While second-hand and RRR products do address sustainability and circularity concerns, there may also be implications for product safety, and the application of consumer guarantee rights.⁶

For example, wear from prior use may impact the quality and safety of such products when compared to a new product. The implications of such wear may not be immediately visible or made apparent to a consumer at the point of sale, making an accurate assessment of the quality and safety of a second-hand or RRR product more difficult for the consumer.

At a certain point in its lifecycle, a second-hand or RRR product may no longer be able to meet the statutory consumer guarantee requirements of acceptable quality and safety due to significant wear, and can no longer be kept in circulation. In this sense, there is a tension between the material productivity of consumer products and the provision of consumer guarantees to acceptable quality and safety.

While consumer guarantees do apply to many sales of second-hand and RRR products, the ACCC recognises that there may be some challenges and complexities for consumers in deciding whether to purchase such products. This includes that consumers may not be well-placed to make assessments about the product's quality and safety, particularly when purchasing online, and there may be confusion around the meaning of terms used to describe second-hand or RRR products.

Further there can also be challenges and complexities for consumers in exercising their consumer guarantee rights. For example, with successive owners of a product, it may be difficult to establish whether product faults or safety issues are due to design factors, defects or product misuse. Successive owners may also present challenges to establishing proof of purchase.

We also note that the policy objectives of the consumer guarantees are to ensure consumers receive what they have paid for, rather than prioritising environmental outcomes.

Mandatory standards and bans

Additionally, while many mandatory standards and bans do not specify a difference in application between new and second-hand products (noting as the ACL definition of 'good' encompasses second-hand goods), there are some that specifically exempt application to goods that are second-hand. As the sales of second hand goods increases, the overall protection provided by these mandatory standards and bans may be eroded to a degree. As no mandatory standards currently specify a difference in application to RRR goods, these types of products are likely to be covered comprehensively.

⁵ A second-hand product may then be sold on again to another buyer, and so forth.

⁶ See: <https://www.accc.gov.au/consumers/buying-products-and-services/consumer-rights-and-guarantees>

Responsive guidance for consumers

To raise awareness of the possible risks associated with the supply and purchase of second-hand and RRR goods, the ACCC is currently finalising two online guidance pieces to address each product type.

The pieces provide guidance to consumers on their rights, including noting that the application of the ACL's consumer protection provisions is limited in respect of private (consumer-to-consumer sales).⁷ This guidance also provides tips on how to make informed purchasing decisions, and how to engage in consumer-consumer sales safely, and to suppliers and online marketplaces on how to ensure they comply with their obligations and keep the products they sell or list safe. Once completed, these guidance pieces will be made public via <https://www.productsafety.gov.au/>.

6) International horizon scanning

In October 2024 the ACCC participated in the OECD's first Ministerial level meeting of its Committee on Consumer Policy, on the theme of "Consumers at the centre of the digital and green transitions". This meeting culminated in a [Declaration on Protecting and Empowering Consumers in the Digital and Green Transitions](#).

The Declaration recognises that consumers in well-functioning markets can incentivise businesses to provide more sustainable and safe goods and services, and help to shift market offerings towards more sustainable choices. Of relevance to a circular economy, the Declaration recognises that consumer protection issues, including product labelling, second-hand product sales and rentals, shared services, product repair, product warranties, and business liability, can affect the ability of consumers to act on their environmental concerns in marketplace transactions. It recognises that addressing obstacles consumers face when looking to reduce their environmental impact can require the engagement of several policy areas, including but not limited to consumer policy, and that other policy areas can play an important role in addressing obstacles to sustainable consumption that impact all consumers. The Declaration also includes a commitment enhance co-operation with other policy areas to develop whole-of-government approaches to current and emerging consumer policy and product safety issues.

As well as multilateral fora such as the OECD, the ACCC is also monitoring developments such as France's repairability index⁸, and the EU's directives against planned obsolescence⁹ and Right to Repair legislation¹⁰.

7) Conclusion

The ACCC is committed to proactively considering how competition and consumer issues may promote, limit or arise from Australia's transition toward a circular economy.

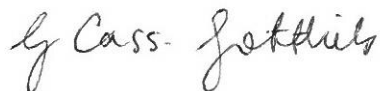
⁷ Most consumer guarantees don't apply to one-off sales between 2 people, where the seller isn't running a business. Consumers selling products in these circumstances also do not need to ensure products they sell comply with the mandatory standards and bans under the ACL. This is because sellers of products in consumer-to-consumer sales are not considered to be engaged in trade or commerce.

Competition has an important role to play in driving an efficient transition to a circular economy. However, where collaboration between competitors is pursued in the context of a circular economy transition, entities pursuing that collaboration can apply for exemption from competition law where it risks harming competition but a net public benefit can be demonstrated, and the ACCC can take into account environmental benefits in this process. The ACCC's forthcoming Sustainability Collaborations and Competition Law Guide will help business to self-assess their competition law risk, and understand their options for applying for exemptions where that is necessary.

Misleading practices arising in the transition to the circular economy, namely greenwashing, undermine market signals and can obstruct circular economy advances. This is why the ACCC continues to prioritise compliance and enforcement work in this area. Similarly, consumer trust is needed for a thriving circular economy and the ACCC is proactively monitoring for and responding to emerging safety issues in this context.

The ACCC is happy to provide further assistance or information as required.

Yours sincerely

A handwritten signature in cursive script that reads "Gina Cass-Gottlieb".

Gina Cass-Gottlieb

Chair