



# Sustainability collaborations and Australian competition law

A guide for business

## Acknowledgment 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 and other entities considering working together to achieve positive sustainability outcomes to understand:
  - a. when collaboration is likely to breach Australian competition law, and when it is unlikely to do so, and
  - b. when there is a risk of breaching the *Competition and Consumer Act 2010* (Cth) (the **Act**), whether there may be the option to seek an exemption from the ACCC.
2. There are many ways businesses, along with other interested entities, can work together to achieve sustainability objectives without contravening Australian competition law.
3. This guide aims to inform businesses and other entities about the interaction between Australian competition law and sustainability collaborations. It seeks to clarify the operation of the Act so that businesses do not unnecessarily limit participation in lawful sustainability collaborations. The guide also explains that where Australian competition law risks do arise, but the sustainability collaboration is in the public interest, an ACCC exemption may be appropriate. The guide provides information about the different exemptions processes so that businesses can understand the options available to them in Australia.
4. This guide 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. The guide generally refers to businesses participating in sustainability collaborations, but other types of entities including not-for-profit organisations, charities and government may also participate in sustainability collaborations and be subject to Australian competition law.
5. This guide primarily focuses on environmental sustainability as this is the area that has been raised with the ACCC most commonly. However, the principles discussed may also apply to other types of sustainability collaboration, such as initiatives combating modern slavery where there are regulatory obligations on businesses.
6. The principles in this guide may also apply to sustainability objectives positively impacting First Nations Australians.
7. At Attachment A to this guide, there is a 5 step checklist to help entities assess whether Australian competition law is likely to apply. The ACCC has also published a separate [Quick Guide](#) with examples.
8. From time to time, the ACCC may publish updated or supplementary guidance to reflect the evolving nature of sustainability initiatives and provide further assistance to businesses.
9. While this guide provides information to help businesses understand Australian competition law risks and the exemption process, it is not legal advice. Businesses should seek their own legal advice about whether a proposed sustainability collaboration risks breaching the Act and whether they should apply for an exemption.

## 2. Introduction

10. The ACCC recognises the clear need for urgent action on environmental sustainability. Environmental harm, including climate change, pollution, and biodiversity loss, represents a special category of threat to the environment and economy which requires action by all stakeholders, including the business community.
11. 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.
12. 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.
13. 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 Competition law and the ACCC's role

14. The ACCC's role is to administer and enforce the Act, promoting competition, fair trading and regulating national infrastructure for the benefit of all Australians.
15. The ACCC uses a range of tools to encourage compliance and prevent breaches of the Act, including business and consumer education, and working closely with stakeholders and other agencies. The Act also provides the ACCC with a range of enforcement remedies to address contraventions of Australian competition law, including court-based outcomes and court enforceable undertakings.
16. The ACCC cannot pursue all matters that come to its attention. The ACCC's compliance and enforcement role is to focus on those circumstances that will, or have the potential to, impact consumers experiencing vulnerability, harm the competitive process or result in widespread consumer or small business detriment.
17. The ACCC exercises discretion in accordance with its longstanding [Compliance and Enforcement Policy](#) to direct resources to matters that provide the greatest overall benefit. When deciding whether to pursue a matter, the ACCC will prioritise those which fall within its priority areas. Cartel conduct, anti-competitive agreements and practices, and the misuse of market power are enduring priorities for the ACCC.

18. The ACCC will give particular consideration to those matters which also have the following factors:
  - conduct that is of significant public interest or concern
  - conduct that results in substantial consumer or small business detriment
  - national conduct by large traders, recognising the potential for greater consumer detriment and the likelihood that conduct of large traders can influence other market participants
  - conduct involving a significant new or emerging market issue or where the ACCC's action is likely to have an educative or deterrent effect
  - where the ACCC's action will help to clarify aspects of the law, especially newer provisions of the Act.
19. The ACCC also has the power to exempt conduct that would otherwise risk breaching the Act through a range of exemption processes which are outlined below.
20. 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.

## Australian competition law

21. 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.
22. These are explained below in sections 3.1 and 3.2.
23. It is good practice for businesses to take proactive steps to ensure they do not risk breaching the Act, such as by reminding participants in meetings involving competitors of their Australian competition law obligations and establishing protocols to govern any sharing of information or joint activities.
24. Australian competition law recognises that, in some circumstances, activities that might otherwise fall within the prohibitions of the Act:
  - do not actually harm competition or
  - have a net public benefit.
25. The Act provides a range of exceptions and exemptions that make it possible for these activities to proceed without risk.

## Class exemptions

26. In certain circumstances and subject to confirmation by parliament, the ACCC may determine that certain conduct is covered by a 'class exemption'. Class exemptions create an alternative path to protection from the prohibitions in the Act for eligible conduct.
27. In 2021, the ACCC made the [collective bargaining class exemption](#). This was the first class exemption created under Australian competition law. 'Collective bargaining' refers to collaboration between competitors to negotiate with a customer or supplier about terms,

conditions and/or pricing. In the sustainability context, this exemption may apply, for example, to a situation in which a group of small businesses collaborate to negotiate with a supplier with respect to sourcing more environmentally sustainable products. Obtaining legal protection under the collective bargaining class exemption is simple: if they self-assess that their planned activities fit within the class exemption, businesses can, prior to engaging in the conduct, submit a one-page form to the ACCC and a copy to each business they wish to collectively negotiate with. Each 'small business' must have a turnover of less than \$10 million for the financial year prior to joining the collective bargaining group. Further information on the collective bargaining class exemption is included in **Chapter 4**.

28. The ACCC is open to considering new class exemptions where there is a clear and compelling case, supported by evidence, for a well-defined category of collaboration to which a class of exemption could be applied. The process for establishing a new class exemption may take considerable time and would be subject to approval by parliament.

## **Certain conduct can be exempted through a notification**

29. The process of 'notification' provides another option which enables eligible businesses to seek an exemption from Australian competition law for specific types of conduct. Relevantly, notifiable conduct includes collective bargaining, collective boycotts and exclusive dealing. Further information on notifications is included in **Chapter 4**.

## **The ACCC can authorise conduct**

30. Where a proposed sustainability collaboration risks breaching the Act, an alternative to class exemptions or notifications is to seek an exemption from Australian competition law provisions via the ACCC's 'authorisation' framework.
31. Relevantly for collaboration between competing businesses, the ACCC's power to grant authorisation requires that it is satisfied the public benefit likely to result from the proposed conduct or agreement outweighs the likely public detriment (that is, it results in a **net public benefit**).<sup>1</sup> The meaning of 'public benefit' for this test is sufficiently broad and flexible to enable the ACCC to take sustainability benefits into account.

## **Businesses can discuss proposed collaboration with the ACCC**

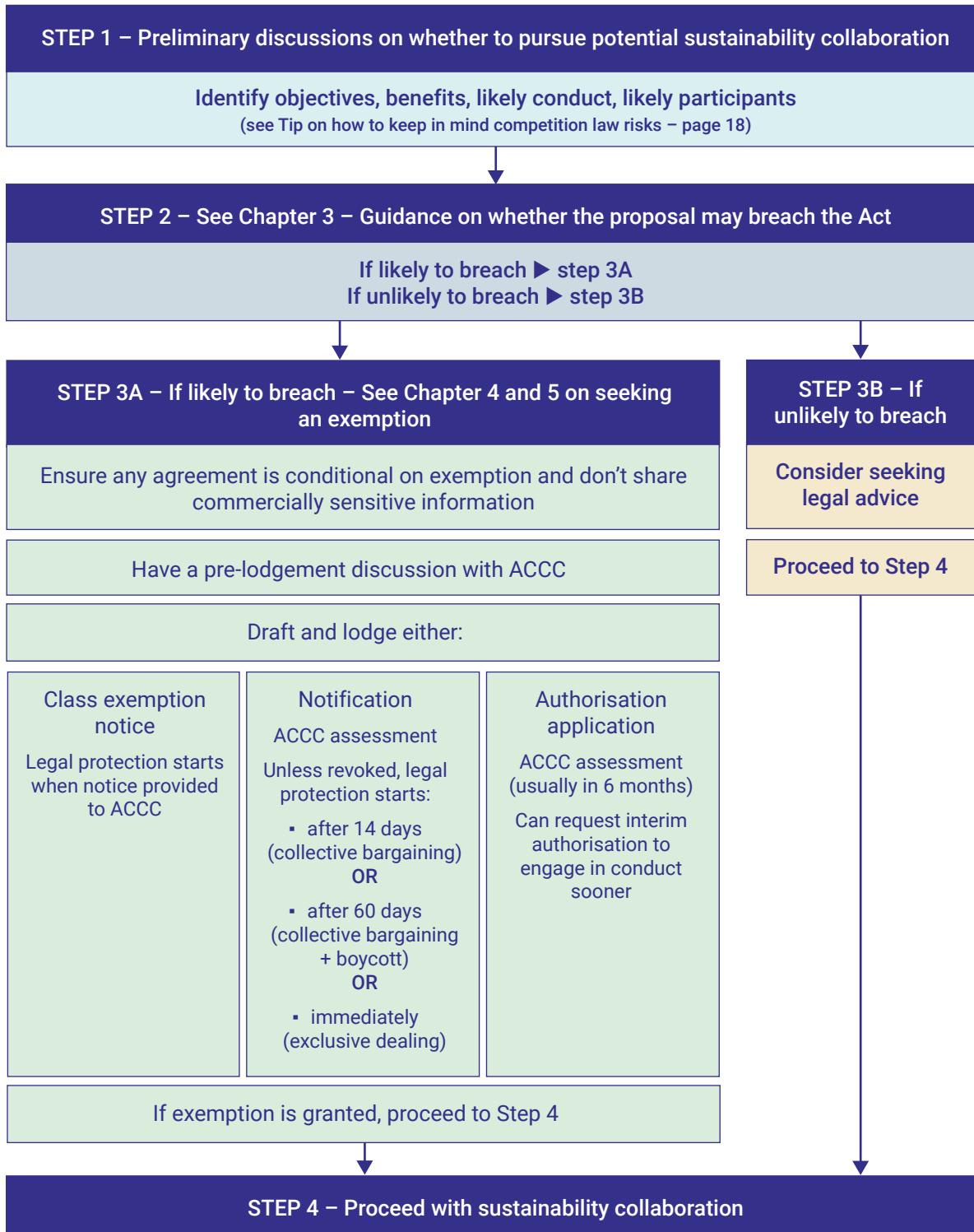
32. The ACCC is available and willing to discuss potential sustainability collaborations with businesses to help them understand whether an exemption may be available. The ACCC encourages businesses to come forward for preliminary discussions by contacting [exemptions@acc.gov.au](mailto:exemptions@acc.gov.au).
33. In relation to potential authorisation applications, 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.

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<sup>1</sup> 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.

## 2.2 Overview of usual steps

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





# 3. Sustainability collaborations and Australian competition law

35. There are many ways businesses, along with other interested entities can work together to achieve sustainability objectives without contravening Australian competition law. This chapter provides guidance on when sustainability collaborations are likely to breach the Act and when they are unlikely to do so.
36. The ACCC has produced a [Quick Guide](#) on business practices to complement this guide. The Quick Guide is designed to help those considering entering a sustainability collaboration to understand their key obligations and options under Australian competition law. It also sets out examples of business practices that can be undertaken without any risk of breaching Australian competition law.
37. Sustainability collaborations 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.
38. 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](#).
39. Businesses that propose to enter into sustainability collaborations that will or may breach the Act may be able to seek exemption of the proposed conduct or arrangement. **Chapters 4 and 5** provide further information about exemptions.

## 3.1 Cartels

40. 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.
41. 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 or agree a material component of a bid. Bid rigging arises where there is a **purpose** of controlling what bids are made, either directly or indirectly.

42. 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.

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 will not operate in
- which customers or suppliers you will or will not 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.

43. There are a number of exceptions in the Act, which are discussed at section 3.3 below. Further, if a proposed sustainability collaboration may involve cartel conduct but is likely to result in public benefits, including sustainability benefits, businesses may be able to seek an exemption (see **Chapters 4 and 5**).

### **Tip: Reporting concerning conduct to the ACCC**

If you are concerned about a collaboration you are proposing to engage in, or about the conduct of others in the marketplace, you should seek advice from a lawyer and consider [contacting the ACCC](#).

## 3.2 Other anti-competitive practices

44. Sustainability collaborations may also breach other prohibitions in the Act on anti-competitive practices which have the **purpose, effect or likely effect** of substantially lessening competition in a market in Australia.
45. 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 or cooperation 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.
46. 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.
47. 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, or
  - involves the sharing of commercially sensitive information, particularly price sensitive information.
48. 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
  - the businesses do not have a significant market presence, including because they are small businesses or have a low market share, or
  - it does not involve the sharing of commercially sensitive information, particularly price sensitive information.

### Tip: Commercially sensitive information

Commercially sensitive information includes information about your prices, your margins, your current or future volumes, your non-public trading terms, or your tenders.

Information which is **aggregated** and cannot be attributed to specific traders will be less sensitive than specific information which is identifiable as relating to a particular business.

49. There are a number of exceptions in the Act, which are discussed in section 3.3 below. Further, if a proposed sustainability collaboration is likely to substantially lessen competition but is also likely to result in public benefits, including sustainability benefits, businesses may be able to seek an exemption (see **Chapters 4 and 5**).

## 3.3 Exceptions and exemptions

50. 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.
51. Businesses should seek legal advice before relying on the exceptions.
52. The exceptions include:
- conduct specifically authorised by Commonwealth, state or territory legislation<sup>2</sup>
  - certain acts relating to remuneration, conditions of employment, working hours or working conditions of employees<sup>3</sup>
  - provisions or practices relating to standards prepared or approved by Standards Australia<sup>4</sup>
  - export exemptions<sup>5</sup>
  - agreements between related bodies corporate<sup>6</sup>
  - 'anti-overlap' provisions for cartel conduct or certain other anti-competitive practices which also fall within:
    - resale price maintenance<sup>7</sup>
    - exclusive dealing<sup>8</sup>
    - dual listed company arrangements<sup>9</sup>
    - acquisitions of shares or assets<sup>10</sup>
  - Crown immunity in certain circumstances.
53. In addition, for cartel conduct the following exceptions may also be available:

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2 See s 51(1) of the Act.

3 See ss 51(2)(a), (aa) and (b) of the Act.

4 See s 51(2)(c) of the Act.

5 See s 51(2)(g) of the Act.

6 See ss 45AN, 45(8) and 47(12) of the Act.

7 See ss 45AQ and s45(5) of the Act.

8 See ss 45AR, 45(5A) and 45(6) of the Act.

9 See ss 45AS and s 45(6A) of the Act.

10 See ss 45AT and s 45(7) of the Act.

- joint ventures<sup>11</sup>
  - collective acquisition of goods or services.<sup>12</sup>
54. Further, a sustainability collaboration will not breach the prohibitions on cartel conduct and other key anti-competitive practices where it is:
- notified<sup>13</sup>
  - authorised<sup>14</sup> or
  - falls within the collective bargaining class exemption, having met the requirements of those exemptions.

### 3.4 Examples of low-risk sustainability collaborations

55. The following examples of hypothetical 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.
56. More examples can be found in the accompanying [Quick Guide](#).

#### 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 sharing pricing information or other commercially sensitive information.

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11 See ss 45AP and 45AO of the Act.

12 See s 45AU of the Act.

13 See ss 45AL and s 45(8A) of the Act.

14 See ss 45AM and s 45(9) of the Act.

### 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 information about prices or quantities purchased from those suppliers or other commercially sensitive information.

### 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 **provided** each participating business independently determines whether and how it will meet the target, and continues to independently set its own prices and independently determine who it will and will not deal with or what it will or will not 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 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 has not shared commercially sensitive information about its suppliers.

### Case study 5: Supply chain partners collaborate on recycled content traceability

A manufacturer proposes to each of its suppliers that they share information with the manufacturer to enable compliance with the voluntary National Framework for Recycled Content Traceability.

The suppliers individually agree to share information with the manufacturer about the provenance, composition, and quality of the recycled materials they supply in each shipment, as outlined in the framework. They also each decide to set up their individual traceability systems in line with the global standards set out in the framework. The suppliers commit to not share commercially sensitive information with each other, such as proprietary product formulations or pricing strategies.

This agreement is unlikely to raise competition concerns **provided** the supply chain partners do not share commercially sensitive information with each other and the agreement does not limit the freedom of a business to choose its business inputs or trading partners.

### Case study 6: Collaborative supply chain mapping to identify modern slavery risk

Industry participants, including competitors, agree to work together to reduce the likelihood that their industry is dealing with suppliers that engage in modern slavery practices. The industry participants develop a protocol to govern their collaboration which establishes that:

- the industry participants may individually or jointly conduct audits of their supply chain partners to identify suppliers which may be credibly engaging in modern slavery practices
- if an industry participant identifies a supplier that is credibly engaging in modern slavery practices, it will notify the other industry participants of the supplier's name
- the industry participants will make independent business decisions in relation to the information that is shared
- the industry participants only share information which is necessary to achieve the objective
- the industry participants will not convey to each other how they will otherwise use the data they collect from their audits
- there will be no collaborative decision making
- participation in the collaboration is voluntary.

This collaboration is unlikely to raise competition concerns **provided** the industry participants are not reaching any agreement about whether they will or will not purchase from particular suppliers and are not coordinating their conduct beyond what is necessary to achieve the objective of reducing the modern slavery risks.

## Case study 7: Guidance on methodologies used in emissions reporting

Large agricultural businesses are required by regulation to report their greenhouse gas emissions and exposure to the financial impacts of climate change. In particular, large agricultural businesses are required to report their scope 3 emissions, which are emissions produced by their upstream and downstream supply chain partners. In order to do this, the agricultural businesses will each need to collect data from their suppliers.

To ensure that the data each agricultural business is relying on in its reporting is accurate and consistent, the agricultural businesses agree to jointly prepare and issue a guidance note to suppliers about the 'best practice' methodology for calculating greenhouse gas emissions in the agricultural industry.

The guidance confirms that:

- suppliers remain free to adopt a different methodology
- the agricultural businesses will not stop dealing with a supplier because the supplier does not use the 'best practice' methodology
- the agricultural businesses will individually decide how they use the data they collect from suppliers to meet their reporting obligations
- the agricultural businesses will not convey to their competitors how they will use the data they collect from suppliers to meet their reporting obligations.

This collaboration is unlikely to raise competition concerns **provided** the agricultural companies are not reaching any agreement about whether they will or will not purchase from particular suppliers, the suppliers are free to adopt their preferred methodology, and no commercially sensitive information is being shared.

## Case study 8: First Nations Australians collaborate on biodiversity

Two First Nations communities which own adjacent lands agree to participate in a nature repair program aimed at increasing biodiversity and enabling the landholders to earn biodiversity credits. The communities agree to jointly engage an accredited assessor to undertake a study of the current level of biodiversity on their lands for the purpose of generating and selling biodiversity credits. Each community then independently uses the assessor's findings to develop plans to implement biodiversity projects and generate tradable credits from their lands. The communities agree that they will not convey to each other how they will use the assessor's findings to generate credits.

This collaboration is unlikely to raise competition concerns **provided** there is no agreement or cooperation between the communities about the price or volume of biodiversity credits they will offer.

57. Where businesses want to collaborate with others in a way which does raise Australian competition law concerns, then certain exemptions may be available enabling them to undertake the activity:
- authorisation, which is often used by larger businesses and/or for more complex conduct (discussed in **Chapter 5**)
  - other forms of exemptions, including the class exemption for collective bargaining, and notifications for certain other conduct – both of which are usually simpler and faster (discussed below in **Chapter 4**).



# 4. Small business exemptions from Australian competition law

## 4.1 Class exemption for small business collective bargaining

58. Collective bargaining occurs when 2 or more businesses come together as a group to negotiate with a customer or a supplier (known as the target business) about terms, conditions and/or prices.
59. Businesses that bargain collectively can save time and money on negotiations and can have more influence over terms and conditions. The target business can also benefit from reduced negotiation costs, better information and more certainty about supply. Businesses may also seek to collectively bargain to improve their environmental footprint/achieve sustainability outcomes.
60. Small business collective bargaining is generally unlikely to harm competition but may still risk contravening the Act because it may mean that competing businesses are not making independent decisions about pricing, terms, and conditions.
61. The collective bargaining class exemption allows eligible businesses to negotiate with their customers or suppliers as a group, without risking a breach of Australian competition law. Most collective bargaining by small business can be covered by the class exemption, in which case they do not need to be individually assessed by the ACCC.

### 4.1.1 The class exemption applies to small businesses

62. The class exemption applies to small businesses and independent contractors who form, or are members of, a bargaining group, and who each had turnover of less than \$10 million in the financial year before the bargaining group was formed. More than 98% of Australian businesses would fall below this \$10 million limit (as at the time of publishing this guide).<sup>15</sup>
63. The class exemption also provides protection for eligible businesses to conduct joint tender processes, and for eligible businesses when jointly responding to a tender.

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<sup>15</sup> Australian Small Business and Family Enterprise Ombudsman, [Number of small businesses in Australia](#), 2024.

## Examples of collective bargaining related to sustainable procurement that may be covered by the class exemption

A group of small competing retailers agrees to jointly negotiate with a common supplier about the terms and prices on which they will acquire sustainable inputs from that supplier.

A group of small businesses agree to run a collective tender process to acquire low emissions freight services to transport their produce to customers and run reverse logistics for their respective take-back schemes.

Several small manufacturers collectively negotiate supply of a special category of locally recycled polymer to make the consumer goods they produce more sustainable.

Co-located small businesses in an industrial hub jointly procure renewable energy to power their operations on more favourable terms than had they sourced the renewable energy independently.

64. The class exemption does not apply to collective boycotts, where businesses reach agreements with competitors about which suppliers and customers the businesses will not deal with. These activities may be covered through the ACCC's notification process (see section 4.2 below).

### 4.1.2 Using the class exemption is simple

65. To be covered by the class exemption, the collective bargaining group is required to submit a one-page [Collective bargaining class exemption notice form](#) to the ACCC. The form is simple and easy to complete and lodgement is free of charge.
66. Once the notice form is lodged, each business in the group that meets the eligibility criteria gets immediate and ongoing protection under Australian competition law when collectively bargaining as part of the group within the terms of the class exemption.<sup>16</sup> Completed notices will be published on the ACCC's public register. The group must also provide the form to any target business the group proposes to collectively bargaining with.

### 4.1.3 Collective bargaining group members can share certain information

67. Small businesses will need to share information to facilitate the collective bargaining process. For example, businesses seeking to reduce their environmental footprint by running a collective tender process to acquire low emissions freight services to transport their produce may need to share information on logistics with competitors to maximise transport and storage efficiencies and achieve the environmental outcome. However, sharing of commercially sensitive information beyond that which is reasonably necessary to collectively bargain can reduce competition and, where accompanied by other conduct, breach Australian competition law. Accordingly, businesses should limit the commercially sensitive information they share to that which is reasonably necessary to collectively bargain within the terms of the exemption.
68. Refer to the [Collective bargaining class exemption guidelines](#) for further information.

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<sup>16</sup> Note that the ACCC may withdraw the protection of the class exemption in certain circumstances: s 95AB of the Act.

## 4.2 Notification

69. Notification is a quick and simple way to obtain an exemption from Australian competition law for exclusive dealing, resale price maintenance or certain collective bargaining and collective boycotts.<sup>17</sup> This guide focuses on collective bargaining and collective boycott notifications as these are most relevant in the context of collaborative activities.<sup>18</sup> The following focuses on notification processes for small business, but notification is also available to large businesses.

### 4.2.1 Collective bargaining and collective boycotts

70. As discussed in section 4.1 (above), collective bargaining and collective boycotts risk contravening Australian competition law, unless covered by an exemption.
71. A collective bargaining or collective boycott notification may be lodged if the businesses in the group expect to transact less than \$3 million (or higher in certain industries) over 12 months with the business they are dealing with. A trade union is not able to lodge a notification.
72. Refer to the [Small business collective bargaining – Notification and authorisation guidelines](#) for further information.

#### Example of collective bargaining and boycott related to sustainable procurement that may be eligible for notification

A group of small competing retailers agree to jointly negotiate with a common supplier about the terms and prices on which they will acquire sustainable inputs from that supplier. The retailers agree not to purchase from that supplier unless the terms agreed include that its inputs are sourced from slavery-free regions.

This arrangement constitutes a collective boycott and may be eligible for an exemption from Australian competition law through the notification process if the businesses in the group expect to transact less than \$3 million over 12 months with the business they are dealing with

### 4.2.2 Notification provides legal protection automatically unless the ACCC objects

73. Collective bargaining and collective boycott notifications are assessed by the ACCC to determine whether the arrangement is likely to result in a net public benefit.
74. After lodging a valid notification, legal protection for the notified activity begins after 14 days for collective bargaining with no collective boycott and after 60 days for collective bargaining with a collective boycott. Legal protection commences by default unless the ACCC issues a draft notice objecting to the notification prior to the end of the above timeframes.

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<sup>17</sup> Exemption through notification is available for contracts that the parties have entered into or propose to enter into and for proposed conduct giving effect to a contract.

<sup>18</sup> Refer to the [Exclusive dealing notification guidelines](#) and [Resale Price Maintenance notification guidelines](#) for further information on notification governing exclusive dealing and resale price maintenance activities.

### **Tip: Discuss the notification with the ACCC**

Before lodging a notification, we encourage businesses to contact the ACCC to discuss the prospective notification. The ACCC can give general guidance on:

- which exemption processes are suitable for different activities
- the notification process and who can lodge
- what information and evidence to include with the notification
- how we assess notifications.

Businesses can contact the ACCC at [exemptions@acc.gov.au](mailto:exemptions@acc.gov.au).

# 5. Authorisation

## 5.1 Overview of authorisation process

75. 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 authorisation from the ACCC.
76. A number of overseas regulators, which do not have an authorisation process, have provided guidance to businesses about how they will apply their enforcement powers to sustainability collaborations. In Australia, the authorisation process enables the ACCC to give businesses certainty about protection from legal action under the Act.
77. 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.
78. The ACCC will assess applications for authorisation on a case-by-case basis, depending on the facts and circumstances relevant to each application.
79. 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**).
80. 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**.
81. As noted in the Tip box below, businesses **can** have preliminary discussions amongst themselves about whether to pursue a potential sustainability collaboration without the need for prior ACCC approval.
82. Detailed information on the authorisation process is available in the [Guidelines for Authorisation of conduct \(non-merger\)](#).

### 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.

### 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
- give you an indicative timeframe for the authorisation process.

Businesses can contact the ACCC at [exemptions@acc.gov.au](mailto: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 conduct and that you specify all provisions of the Act for which you seek authorisation.

83. 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.
84. 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 5.3 and 5.4 below.
85. Applicants should clearly mark any information that they wish to request *not* be published on the public register (for example, confidential information) and provide reasons substantiating their request.

## 5.2 Public benefits and detriments

86. The concepts of public benefit and public detriment are central to the ACCC's assessment of applications for authorisation.
87. '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.*<sup>19</sup>
- 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.*<sup>20</sup>
88. The ACCC tests the public benefit and detriment claims, including through a public consultation process.
89. Examples of the kinds of public benefits that could be claimed include:
- environmental benefits (including reduced emissions, biodiversity benefits, reduced plastic waste and increased circularity<sup>21</sup>)
  - human rights improvements (including anti-slavery conduct and Closing the Gap collaborations positively impacting First Nations Australians)
  - transaction cost savings
  - other economic efficiencies, such as achieving economies of scale, scope and/or density.
90. The ACCC recognises the importance of achieving positive sustainability outcomes and will give consideration to sustainability benefits in undertaking its public benefits assessment.

### 5.2.1 Sustainability benefits can be public benefits

91. 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.
92. 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, and tyres<sup>22</sup>).
  - 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.<sup>23</sup>

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19 *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.

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

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

22 See [Battery Stewardship Council](#) (2020); [Paintback Limited](#) (2021); [Tyre Stewardship Australia](#) (2024).

23 See [Barwon Water & Ors](#) (2022).

- 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.<sup>24</sup>
  - Major supermarkets collaborating to manage disruptions to in-store collections of soft plastics for recycling.<sup>25</sup>
  - Businesses in the textile, clothing and footwear industry agreeing to a voluntary code of conduct to ensure they and their outsourced supply chains comply with relevant awards and workplace laws and agreeing to boycott suppliers who are non-compliant.<sup>26</sup>
93. 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 context of the need to reduce greenhouse gas emissions to assist in global efforts to avoid the most severe impacts of climate change.<sup>27</sup>
94. 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.
95. 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, or public benefits in the form of increased compliance by businesses with legal obligations relating to workers.<sup>28</sup>
96. 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.

## 5.2.2 Making public benefit claims to support authorisation

97. 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.
98. 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 in section 2.
99. 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:

24 See [Business Renewables Buying Group](#) (2023); [1Circle Pty Ltd and Ors](#) (2024).

25 See [Coles Group on behalf of itself and participating supermarkets](#) (2023).

26 See [Homeworker Code Committee Incorporated](#) (2018).

27 See 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.

28 See [Homeworker Code Committee Incorporated \(2018\)](#).



- 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 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.

100. 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 9: '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](#) (2024)
- [Paintback Limited Stewardship Scheme](#) (2021)
- [Battery Stewardship Council](#) (2020)
- [Refrigerant Reclaim Australia product stewardship program](#) (2021)
- [ResiLoop Limited](#) (2024).

## 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
- where relevant, detail what international and domestic laws and policies the collaboration will support implementation of<sup>29</sup>
- 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 underlie that quantification
- for product stewardship schemes, include data and information to evidence the viability of the scheme (including projected recovery rates) and to substantiate the proposed levy (if any)
- 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.

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<sup>29</sup> Examples of international agreements to which Australia is party include the Paris Agreement on Climate Change, the Kunming-Montreal Global Biodiversity Framework and the forthcoming Global Plastics Treaty. Domestic sustainability targets could include the Australian Government's net zero, nature positive and circular economy targets.

## Quantification

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.

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.

### 5.2.3 Examples of types of sustainability benefits

101. 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 10: 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 soybeans from sustainable suppliers. However, soybeans 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 soybeans 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 soybeans 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 soybeans or supply soy milk).

### **Case study 11: 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 12: 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 will not 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 13: 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).

## 5.2.4 Public detriments

102. The ACCC will take into account all public detriments that are **likely to result** from the conduct for which businesses seek authorisation.
103. 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).
104. 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'.
105. 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 commercially sensitive 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.

## 5.3 Interim authorisation

106. 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.
107. 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, the urgency, and the possible harm (if any) to the applicant(s) if interim authorisation is denied.
108. Interim authorisation is more likely to be granted when it will ensure that the market status quo is maintained. Interim authorisation is unlikely to be granted if doing so would permanently alter the competitive dynamics of the market or inhibit the market from returning to its pre-interim state if final authorisation is later denied.
109. The ACCC will generally make inquiries and/or seek submissions from interested parties about the effect of granting interim authorisation (except in particularly urgent matters). Market inquiries about requests for interim authorisation are generally conducted over a shorter timeframe than market inquiries for the substantive application for authorisation.
110. 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.
111. 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.
112. Further details are provided in [Guidelines for Authorisation of Conduct \(non-merger\)](#) (Chapter 10).

## Case study 14: 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 15: [ResiLoop Limited](#)

In 2024, the ACCC granted interim authorisation to ResiLoop Limited to establish and operate a voluntary, industry-led product stewardship scheme to collect and recycle resilient flooring waste. The scheme will be funded by a product levy of no more than 15 cents per square metre applied to certain categories of flooring products.

ResiLoop had sought interim authorisation on the basis that the viability of the scheme was dependent on securing a foundation contract and this involved supplying a particular manufacturer who needed to fulfil an order from a major retailer immediately.

ResiLoop lodged its application on 28 June 2024 and was granted interim authorisation on 16 August 2024. The ACCC subsequently granted final authorisation on 21 November 2024.

In granting authorisation, the ACCC took into account:

- environmental benefits from reducing resilient flooring going to landfill
- benefits from research and development into resilient flooring end-of-life products
- pricing to reflect the externalities of resilient flooring disposal.

### Case study 16: [Offshore electricity generation feasibility licences](#)

In 2024, the ACCC granted urgent interim authorisation to the Commonwealth 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.

## 5.4 Streamlined consideration of authorisation applications

113. For arrangements which are largely consistent with those that have been previously considered by the ACCC and are non-contentious in nature, 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. Streamlined consideration of applications for authorisation will be considered on a case-by-case basis and the authorisation timeframes will depend on the type of conduct/agreement. The ACCC will still consult publicly after the draft determination.
114. Examples in which 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.

115. Businesses that want the ACCC to streamline the process should explain how these features, or any other relevant features, are present.

### **Case study 17: [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.

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 National Electricity Market)
- 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).

## 5.5 Lodging an application

116. 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?

117. The [Application for authorisation \(non-merger\) form](#) details the information 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.
118. 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.<sup>30</sup>

### 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 timelier if you provide comprehensive information and supporting evidence.

<sup>30</sup> See section 137 of the *Criminal Code Act 1995* (Cth).

# Attachment A – 5 step checklist

## 5 step checklist for businesses considering collaboration

There are many ways businesses can work together to achieve sustainability objectives without contravening Australian competition law.

This checklist will help businesses to assess whether a proposed collaboration may raise competition concerns.

There are 5 important steps that a business considering collaboration to achieve sustainability objectives can take.

1. Read the ACCC's Guide on Sustainability collaborations and Australian competition law carefully to better understand the potential effects of the collaboration on competition.
2. Consider the objectives of the proposed collaboration, and whether collaboration is necessary to achieve those objectives.
3. Consider whether the collaboration will impact competition.
  - Will the collaboration involve actual or potential competitors?
  - Will the collaboration affect the way that businesses make decisions in relation to:
    - How prices are set?
    - The quantity and quality of goods and services supplied or purchased?
    - The range of goods and services supplied or purchased?
    - Incentives to improve and innovate?
  - Will the collaboration involve competitors who collectively hold a significant share of the market?
  - Will the collaboration restrict the ability of businesses to enter, exit, or expand in the market?
  - Will any competitively sensitive information be shared between competitors, suppliers or customers?
  - Will the collaboration take place over an extended or unlimited time?
4. If the answer is yes to any part of question 3, or you are unsure, consider seeking legal advice on how Australian competition law may apply.
5. If you think your collaboration might raise competition law concerns, consider the benefits of the proposed collaboration and whether an exemption from Australian competition law may be available.
  - There are three types of exemptions:
    - [authorisation](#), often used by larger businesses or for more complex conduct
    - [notification](#)

- [class exemption for collective bargaining](#), available for small businesses and is the simplest, fastest process.

Contact the ACCC at [exemptions@acc.gov.au](mailto:exemptions@acc.gov.au) if you wish to discuss the availability of these exemptions further. While the ACCC is unable to provide legal advice, we can discuss with you the various options for exemption.



