

ASFI Submission to the Australian Government’s Revitalising National Competition Policy Consultation

September 2024

The Australian Sustainable Finance Institute (ASFI) is pleased to respond to Treasury [consultations](#) in relation to the National Competition Policy (NCP).

ASFI is a not-for-profit organisation committed to realigning the Australian financial system to be sustainable, resilient, and inclusive. ASFI’s members are large Australian financial institutions – including major banks, superannuation funds, insurers, asset managers, and financial services firms – that support ASFI’s mission. ASFI members collectively hold over AU\$22 trillion in assets under management and are committed to allocating capital in a way that creates positive social and environmental outcomes.

Reflecting ASFI’s organisational focus, our comments in this submission are focussed on the intersection of competition policy and sustainability.

Question	ASFI Response
<i>National Competition Principles</i>	
<p>Questions about the public interest test</p> <p>13. Are changes required to the ‘public interest test’ in the Principles to make it more effective? If so, what changes could be made and why?</p>	<p>The public interest test considerations currently include ‘government legislation and policies related to ecologically sustainable development’. ASFI recommends this be updated and expanded to explicitly incorporate climate change and the net zero transformation (aligning with reform theme 2) and broader sustainability issues (see further below in response to question 32).</p> <p>Treasury could incorporate language that reflects the objective of the Climate Change Act 2022 (Cth), which aims ‘to advance an effective and progressive response to the urgent threat of climate change drawing on the best available scientific knowledge.’ This would ensure that climate considerations are adequately integrated into the ‘public interest test’. Similar language should be</p>

	<p>considered for broader sustainability concerns (see further below).</p>
<p>Questions about data sharing principles</p> <p>29. Should data sharing be incorporated into the Principles? What are the costs and benefits?</p> <p>30. In your experience, are there any issues related to data sharing that have not been identified and should be considered?</p> <p>31. What considerations should be taken into account in drafting and implementing a data sharing principles?</p>	<p>Open access to reliable data is an important enabler for competition. In the sustainable finance context, more open access to data could support finance sector participants to develop products and services to achieve sustainability goals. For example, information identifying households that have received a government rebate or credits for purchasing residential solar units could help banks to target and market green home loan products. Similarly, information on residential energy usage could aid with development of green finance products, including by facilitating validation of 'green' credentials.</p> <p>We recognise there are complexities around sharing data particularly where it is privately owned. However, at minimum, ASFI supports the proposal for the Principles to establish a presumption in favour of governments providing access to data in appropriate ways. Sharing of government information in an accessible, digital format levels the playing field for market participants to make informed decisions without needing to rely on expensive third party data providers.</p> <p>Data sharing is also an area where existing competition law is inhibiting potentially beneficial collaboration between competitors. This is outlined in more detail below.</p>
<p><i>National Competition Reform Program</i></p>	
<p>32. Do the reform themes adequately capture existing and emerging competition issues? Are there any additional objectives under each theme that you consider are important to improve community outcomes? What would you change?</p>	<p><i>Capturing the broader sustainability challenge</i></p> <p>ASFI supports the inclusion of a reform theme focussed on the net zero transformation, which is undoubtedly a central focus for actors across the economy including financial institutions. However, reducing greenhouse gas emissions is only one component of a broader set of sustainability challenges which includes: building resilience to climate change impacts; restoring and regenerating nature; and supporting social wellbeing including for Australia's First Nations peoples.</p> <p>Globally there is a trend towards financial system actors recognising and managing a wider range of sustainability challenges and opportunities. For example, the International Sustainability Standards Board has issued disclosure standards for general sustainability reporting and is considering developing standards for nature and biodiversity, as well as human capital.</p> <p>ASFI members are increasingly recognising the importance of sustainability to their long-term competitiveness and resilience, and the inter-connection between sustainability issues such as climate mitigation, adaptation and nature restoration.</p>

The Australian Government's Sustainable Finance Roadmap recognises the importance of broader sustainability risks in particular nature.¹

We suggest that reform theme 2 be broadened to encompass broader sustainability challenges, for example: "Harnessing the benefits of competition to support the net zero transformation and achievement of broader sustainability objectives"

Sustainability-related collaboration for public benefit

Effective competition often requires the development of common approaches or frameworks that create a level playing field, foster transparency, and reduce market fragmentation for example through common methodologies or standards, or codes of conduct. Developing these frameworks may require competitors in the market to share information and come to an agreement either directly or through an intermediary body such as an industry organisation or government.

In the sustainable finance context, this type of collaboration will be critical to achieving the scale and pace of economic transformation required to address climate and other sustainability challenges. Currently, there is a widespread concern that existing competition law may prohibit sustainability-related collaboration in a range of areas. These include:

- Joint development of consistent climate reporting methodologies for use in a particular industry or sector which could require industry participants to come together to share information on their approaches to reporting, data availability, etc;
- Co-design of novel financing structures or products that support sustainability outcomes – for example, 'on-bill financing' of home energy upgrades that require cooperation and information exchange between energy retailers and banks; or the development of 'blended finance' structures that require cooperation between financial institutions and government or philanthropic organisations;
- Participation in alliances that support entities to set and achieve credible net zero targets, such as the Glasgow Financial Alliance for Net Zero.

ASFI's submission to the ACCC on its draft Guide on Sustainability Collaborations provides further detail on this issue (see Attachment A to this submission).

¹ Sustainable Finance Roadmap, June 2024, <https://treasury.gov.au/sites/default/files/2024-06/p2024-536290.pdf> and Sustainable Finance Strategy Consultation Paper, November 2023, Principles at page 7.

	<p>To support this important collaboration that has public benefits and is often a pre-condition for the development of competitive markets, ASFI recommends that reform theme 2 include an additional objective that focuses on facilitating sustainability-related collaboration where that is in the public interest and may support foundational underpinnings of competitive markets.</p>
<p>33. What specific reform actions could governments pursue in the National Competition Reform Agenda? What are the potential benefits and costs?</p>	<p><i>Reforms to support sustainability-related collaboration</i></p> <p>ASFI recommends the National Competition Reform Agenda include an assessment of opportunities to remove impediments to sustainability-related collaboration.</p> <p>ASFI’s submission to the ACCC makes a range of recommendations for how the ACCC could better support sustainability-related collaboration in the public interest. These recommendations are in line with approaches taken in jurisdictions such as the UK, EU, and New Zealand.</p> <p>ASFI understand that most of these recommendations are within the existing mandate of the ACCC. Where this is the case, it would be helpful for the Government to express to the ACCC the Government’s support for these actions and underscore the its interests in aligning regulator activity with Australia’s sustainability objectives. This could be done through the Treasurer’s Statement of Expectations for the ACCC.</p> <p>Some of ASFI’s recommendations likely go beyond the ACCC’s current mandate and would require legislative reform to action. For example, the recommendation that the ACCC could provide comfort letters in relation to collaboration proposals that advance sustainability objectives (see p.6 of Attachment A).</p> <p>These reforms should be pursued promptly under the National Competition Reform Agenda.</p> <p><i>Removing regulatory barriers – the Your Future Your Super performance framework</i></p> <p>As noted in Treasury’s consultation paper earlier this year on reform options for the Annual Superannuation Performance Test (“Your Future Your Super”),² the performance test has had several unintended consequences including encouraging “benchmark hugging” and reducing member choice, product development, and active management of strategies by asset owners.</p> <p>An important consequence is that the test is significantly constraining the ability or appetite of super funds to adopt sustainable finance investment strategies at scale. This is at odds with Australia’s</p>

² Australian Treasury, Annual Superannuation Performance Test Consultation Paper, April 2024

	<p>national transition goals, limits competition and dynamism in the market, and could inhibit appropriate management of systemic climate and other sustainability risks.</p> <p>Treasury is currently considering stakeholder feedback on options to refine the performance test. ASFI recommends that consideration of options to reform the test be included within the National Competition Reform Agenda and that Treasury’s decisions in relation to the performance test reform take into account competition impacts.</p> <p><i>Government support for industries/activities</i></p> <p>Subsidies, including tax credits and public financing, can be a helpful tool to support the creation of new markets in line with public policy objectives. However, if not designed and administered carefully, adapting as markets mature, they can become anti-competitive – protecting incumbent industries and participants and reducing government funding for other priority expenditures. Sunsetting or phasing out of subsidies as markets mature is important to promote competition and maintain a level playing field.</p> <p>According to the International Energy Association, Australian governments provided \$10 billion in subsidies for fossil fuel activities in 2020.³ The largest subsidy is the Fuel Tax Credits Scheme which cost the Federal Government around \$8 billion per year in lost fuel tax revenues for off-road vehicles and on-road heavy vehicles.⁴ While we recognise that subsidies can support a range of social and public policy purposes, ASFI recommends the National Competition Reform Agenda assess the impact of existing subsidies on competition, particularly in sectors that are key for the net zero transformation (reform theme 2).</p> <p>The Government should also consider the potential longer-term impacts of proposed support under the Future Made in Australia agenda and plan for and signal an appropriate approach to phasing out support once industries have either matured or it becomes clear that they will not mature without an unacceptable level of public support.</p>
<p><i>Implementation arrangements</i></p>	
<p>34. What institutional, governance and other arrangements, including mechanisms to share the economic growth and revenue benefits of reforms, would best support the</p>	<p><i>Resourcing the ACCC to deal with sustainability-related collaboration inquiries</i></p> <p>It is likely that sustainability-related authorisation requests and inquiries will increase substantially in coming years. ASFI recommends the ACCC should be adequately resourced to respond to, and</p>

³ IEA, Australia 2023 Energy Policy Review, 2023 <https://www.iea.org/reports/australia-2023>

⁴ OECD, Achieving the transition to net zero in Australia, 2024 https://www.oecd.org/en/publications/achieving-the-transition-to-net-zero-in-australia_9a56c9d2-en.html

implementation phase of a revitalised NCP?	facilitate, growing demand for assurance and guidance in this area.
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Attachment A: ASFI's Submission to the ACCC Consultation: Draft Guide on Sustainability Collaborations and Competition Law – July 2024

Summary of ASFI recommendations

ASFI welcomes the ACCC's draft guide as a positive step for sustainability-related collaboration. A summary of our recommendations is below. Overall, these recommendations aim to encourage and facilitate sustainability-related collaborations by encouraging the provision of clearer guidance, reduced burdens, and ensuring that competition law does not pose unnecessary barriers to collaboration that is essential to support sustainability goals such as decarbonisation, environmental restoration, and better outcomes for First Nations people.

Overarching recommendations

1. The guide should send a stronger signal that competition law should not impede sustainability collaborations in the public interest, including through stronger statements in the Purpose and Introduction sections, more examples of permissible conduct, and introduction of a class exemption.
2. Where recommendations may require legislative changes, these should be considered by the Government's Competition Policy Review.
3. As sustainability collaborations increase, the ACCC should be adequately resourced to respond to demand. More guidance on permissible activities and introduction of a class exemption would reduce the burden on industry participants and the ACCC.

Low-risk Conduct:

4. The guide's case studies on low-risk collaborations are welcome but should be expanded to include a broader range of conduct
5. More detail on some of the existing case studies would also be valuable as well as clarity on what sorts of information are and are not considered sensitive

Protocol for Mitigating Competition Risk:

6. The ACCC should provide templates for organisations to mitigate competition law risks in sustainability collaborations.
7. Adoption of risk mitigation measures should be considered when determining low-risk activities.

Reliance on Authorisation Applications:

8. The authorisation process can be burdensome and may deter collaborations. Two steps are recommended to reduce the burden: providing comfort letters for low-risk proposals and introducing a sustainability class exemption.

Streamlined Consideration of Authorisation Applications:

9. The process for streamlined authorisation is welcome but needs clearer criteria and broader applicability. More information on the process and expected timelines should be provided.

Interim Authorisations:

10. The ACCC should more readily utilise interim authorisations where there are likely strong public benefits. More detail on what conduct qualifies and the expected timelines should be included.

Definition of Sustainability and Public Benefits:

11. The guide should explicitly apply to collaborations beyond environmental sustainability to include positive social outcomes. Low-risk examples should be expanded accordingly.
12. The ACCC should clarify how this guidance applies to global sustainability agreements that involve Australian as well as international businesses and organisations.

Sustainability related collaborations and competition law

ASFI welcomes publication by the ACCC of its [draft guide](#) on sustainability collaborations and Australian competition law. Collaboration will be critical to achieving the scale and pace of economic transformation required to address climate and other sustainability challenges. In many cases, collaboration is needed between entities who are natural competitors.

In the words of UK Competition and Markets Authority CEO, Sarah Cardell:

“Given the scale of the challenge to address environmental sustainability and particularly climate change concerns, and the degree of public concern about it, ...it is important that firms are not unnecessarily or erroneously put off collaborating in this space by fears about competition law compliance. This is particularly important because industry collaboration is likely to play an essential part in delivering net zero ambitions.”⁵

Currently, uncertainty regarding the application of Australian competition law to collaborations on sustainability is creating challenges for a range of collaborative initiatives. Examples include:

- Joint development of consistent climate reporting methodologies for use in a particular industry or sector;
- Co-design of public-private partnerships and investment structures and products that support sustainability outcomes;
- Participation in alliances that support entities to set and achieve credible net zero targets.

⁵ “Sustainability – Exploring the Possible”, Speech by Sarah Cardell to the Scottish Competition Forum, 25 January 2023, <https://www.gov.uk/government/speeches/sustainability-exploring-the-possible>

To help reduce this uncertainty, and consistent with developments in several other jurisdictions,⁶ ASFI has previously recommended that the ACCC: clarify the application of existing competition laws to sustainability-related collaborations; streamline the process for authorisation of sustainability-related collaborations where there is a clear public interest; and consider introducing a class exemption for sustainability-related collaborations in the public interest.

Detailed recommendations and comments on the draft guide

Overarching

Supporting desirable conduct

ASFI welcomes the ACCC's draft guide a positive step towards enabling important sustainability related collaboration in the public interest. However, we think that overall the guide could send a stronger signal to industry that competition law should not be a barrier to sustainability-related collaboration where that collaboration is in the public interest. One way to do this would be to include stronger statements in the Purpose and Introduction sections of the guide, underscoring the ACCC's intention to ensure that legitimate collaborations, of which there are many types, are not hampered by a fear of competition law risk, in line with Ms Gina Cass-Gottlieb's previous public statements.⁷ The guide could also be clearer – with more examples of permissible conduct – and broader in its application to apply explicitly to sustainability related conduct beyond environmental agreements. More detailed comments on this are set out below.

Further reform

We note that some of the suggestions we make in this submission may be considered to be outside the scope of this guide, or to require legislative change – for example, our recommendations to provide 'comfort letters' and to introduce a sustainability class exemption. In these cases, we recommend that the suggestions be considered as part of the Government's Competition Policy Review being led by the Department of Treasury.

Resourcing the ACCC

As the focus on decarbonisation and other sustainability solutions grows, it is likely that interest in collaborations – and corresponding concern to manage competition law risk – will also increase. It is important that the ACCC is appropriately resourced to be able to respond in a timely manner to growing demand. Clear and comprehensive guidance for industry on permissible activities will help ensure that businesses and the ACCC are not spending time on activities that do not have significant competition law risk. In addition, our suggestions below regarding comfort letters, class exemptions, and competition risk management resources, will not only help to encourage sustainability related collaboration in the public interest, but also to ensure the authorisation process is used only where it is needed for uncertain or edge cases.

⁶ In June 2023, the EU updated its [Horizontal Guidelines](#) to clarify that the antitrust rules do not stand in the way of agreements between competitors that pursue a sustainability objective, clarify exemption processes, and provide a soft safe harbour for sustainability standardisation agreements that meet certain conditions; in October 2023, the UK's Competition and Markets Authority published final [Green Agreements Guidance](#) to ensure businesses are not unnecessarily deterred from lawfully collaborating on climate, including introducing an exemption process for climate agreements; in November 2023, New Zealand's Commerce Commission published [Collaboration and Sustainability Guidelines](#) that explain collaboration for sustainability objectives is more or less likely to harm competition and how, through the clearance and authorisation processes, New Zealand's competition laws can accommodate collaboration between businesses even when it may harm competition.

⁷ See, Ms Gina Cass-Gottlieb, Chair of ACCC Speech, 6 December 2023. [Competition stewardship in markets transforming for environmental sustainability](#).

Low-risk conduct

The draft guide sets out four case studies of sustainability collaborations that are unlikely to breach competition law. This is welcome but could go further. It would be useful to include additional case studies that relate to a broader range of conduct, where possible. In particular, the case studies appear to be limited to examples of actual authorisations that the ACCC has reviewed. While this is helpful, the landscape is changing quickly and novel forms of collaboration are likely to arise. It would be helpful if the ACCC could provide examples of conduct that may not yet have been formally assessed. In the absence of further guidance and examples, this Guide may have the unintended effect of discouraging legitimate collaboration that is already underway or is being contemplated.

Examples proposed by ASFI members include clarification of whether it would be anti-competitive for financial institutions or other businesses to:

- develop an agreed baseline assessment of nature-related impacts and risks at the portfolio level, intended to support better incorporation of nature-related risks and benefits into lending and investment decisions
- develop methodologies and tools to support credible and comparable reporting of scope 3 emissions (for example, to facilitate reporting under sustainability-related disclosure rules)
- share (anonymised) customer data, for example to support the development of novel finance products that support customers to implement emissions reductions activities such as energy upgrades for households or small businesses
- work with customers or suppliers to reduce an organisation's scope 3 emissions
- agree to jointly advocate for policy or legislative changes in respect of environmental or sustainability laws.

ASFI would also welcome additional guidance relating to the “joint venture exception” to cartel conduct and how it might apply in a sustainability context. Further, it would be valuable to clarify the application of competition law in cases where regulators request industry participants to act together or to provide information. An example of this is the Insurance Climate Vulnerability Assessment currently being conducted by APRA, for which insurers are required to provide certain sensitive information on risk writing, premiums and the outcome of modelling exercises. Due to concerns about competition law, insurers are providing this Information to the Insurance Council of Australia, which subsequently collates and anonymises the data. The ability to provide such Information directly would better support regulator objectives while saving time for companies and their peak bodies.

As competition laws apply equally to not-for-profits (NFPs) and for-profits, it would be useful to have examples that apply to the NFP sector particularly recognising that NFPs may be less well-resourced to engage in an authorisation process.

In addition, existing case studies could go further. In particular, in Case Study 3 “Industry-wide emissions target” recognising that in some cases industry-wide targets are framed as ‘binding’, it would be useful to clarify whether agreement to a ‘binding’ target is low risk in situations where that target is sufficiently high level and allows members to determine their independent paths to reach those targets. It would also be useful to clarify whether related collaborative activity is similarly considered low risk – for example, collaboration to further define the emissions target; or to define the actions that would constitute or support credible achievement of the target; or work on common methodologies for accounting and reporting progress towards that target.

It would also be useful to provide more detail on the types of information that would and would not be considered competitively sensitive. For example, the Guide could indicate that competitors should not share information about pricing, quantities, customers and territories; but where appropriate, can confidently share information about the environmental credentials of suppliers.

Templates to help businesses mitigate competition risk

In addition to further guidance and examples regarding low-risk activities, it would be helpful for the ACCC to provide template protocols that organisations looking to collaborate on sustainability issues could put in place to mitigate competition law risks. This would be particularly beneficial for smaller and less well-resourced organisations that may not have access to specialist competition law advice.

The Guide could also include reference to the adoption of risk mitigation measures as a specific consideration that the ACCC takes into account in determining whether an activity is low-risk, or qualifies for an exemption or authorisation.

Reliance on authorisation applications

The draft guide provides useful information about the authorisation process, including an indication of the types of sustainability-related arrangements that the ACCC has previously approved. However, this places an onerous obligation on parties seeking to work together to achieve public interest outcomes. The authorisation process is lengthy and can be expensive and resource intensive. This is a significant barrier and disincentive to businesses that may otherwise be willing or eager to work together to help overcome complex environmental challenges. In the absence of further clarity about what constitutes low-risk actions, a clearer process for 'streamlined' approvals, and/or introduction of a class exemption or safe harbour (as proposed below) it is likely that some if not many organisations will decide simply not to proceed with collaboration.

ASFI recommends the ACCC take two steps to reduce the burden on firms in these circumstances:

1. Comfort letters for low-risk proposals

We welcome the clear invitation in the draft guide for businesses to engage in preliminary discussions with the ACCC prior to undertaking conduct and/or lodging an authorisation application. We recommend the ACCC provide comfort letters in relation to collaboration proposals that it considers very low risk, or adopt the UK's approach of creating a protection from prosecution for all sustainability agreements where parties have discussed their agreement with the ACCC and the ACCC did not raise competition concerns, or those raised were addressed. We recognise that creating a protection from prosecution may require legislative reform and encourage Treasury's Competition Policy Review to consider options to implement this proposal.

2. Sustainability class exemption

We recommend the ACCC utilise its power to implement a class exemption which would authorise collaboration and arrangements between competitors that pursue a genuine sustainability objective, without requiring an authorisation. The exemption should provide clear guidance and illustrative case studies to support businesses to self-assess whether their planned activity would be covered by the exemption. This approach would be consistent with the EU's 'safe harbour' arrangements for certain sustainability-related conduct; and the UK's exemption for certain sustainability-related collaborations.

Streamlined consideration of authorisation applications

Section 4.4 of the draft guide notes the ACCC will consider a streamlined process in certain circumstances, i.e. where there do not appear to be significant detriments associated with the conduct; and where the ACCC has in similar circumstances found a clear net public benefit.

ASFI welcomes the introduction of a streamlined (or ‘fast-tracked’) process. However, we consider that the process is not clear and is too narrowly defined. We recommend establishing more detailed criteria for what sorts of applications would be likely to qualify for streamlined consideration, and expanding this beyond examples the ACCC has previously dealt with to include other examples that are likely to be firmly in the public interest. Guidance on this criteria will be particularly important if the ACCC determines not to establish a sustainability class exemption.

It would also be valuable to provide more information on the process, including whether applicants are responsible for requesting a streamlined review or whether the ACCC will make that determination of its own volition. It would also be useful to provide information on how long the streamlined process is expected to take.

Under this section, the draft Guide provides a case study of a “joint renewable energy buying group” and notes that: *“the ACCC had considered and granted numerous other applications for authorisation by energy buying groups.”* Given this appears to be a well-established area of permissible and desirable conduct, ASFI queries the need for organisations contemplating these activities to seek authorisation. Instead, this conduct could be an example that falls under ‘low-risk conduct’ or that could be covered by a class exemption with suitable guardrails (for example, a requirement that the aggregate market share of the group be below a defined threshold).

Interim authorisations

We encourage the ACCC to more readily utilise its power to provide interim authorisations particularly in circumstances where there are likely to be strong public benefits to the conduct and no significant detriments. It would be useful to provide more detail in the guide on what conduct would likely qualify for interim authorisation and on how long it would take for the ACCC to grant an interim authorisation. This will be particularly important if the ACCC determines not to establish a sustainability class exemption.

Definition of sustainability and public benefits

The 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....”* It goes on to note that *“[w]hile this guidance focuses specifically on environmental sustainability, the principles discussed may also apply to other types of collaboration agreements including those related to other forms of sustainability objectives.”*

ASFI considers that the guide should explicitly apply beyond environmental sustainability to sustainability-related collaborations that seek to achieve positive social outcomes. Without this clarity, the guide is likely to be interpreted as applying only to environment-related collaborations and this may deter legitimate collaborations on other issues. It would be helpful to list the categories of sustainability-related collaboration that is covered such as environmental, climate, modern slavery, and First Nations.

The ‘low-risk’ examples should be correspondingly expanded to include examples in each category. In relation to First Nations, it would be helpful for the guide to clarify whether discussions between banks and other financial institutions regarding appropriate due diligence and screening processes and templates for lending to First Nations businesses, and other approaches to overcoming barriers to finance for First Nations customers, could be considered low-risk.

Furthermore, as sustainability collaborations may require global partnership between businesses in Australia and elsewhere, ASFI recommends that the ACCC clarify how global partnerships are treated and considered under this guidance. Particularly in the assessment of public benefits and detriments to competition in Australia, given the Australian focus of the ACCC's mandate.