

Unclassified

English - Or. English

6 November 2020

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Sustainability and Competition – Note by Australia and New Zealand

1st December 2020

This document reproduces a written contribution from Australia and New Zealand submitted for Item 1 of the 134th OECD Competition Committee meeting on 1-3 December 2020.

More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/sustainability-and-competition.htm>

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JT03468069

Australia and New Zealand

1. Abstract

1. This paper is a written contribution to the Competition Committee’s call for country contributions to the roundtable on 23 July 2020, to be discussed at the Hearing on “Sustainability and Competition” on 1 December 2020.

2. For much of its history, competition law has largely focused on promoting consumer welfare as its primary objective.¹ Recently though, there has been a growing school of thought that competition law’s objectives should be broadened to incorporate other public policy considerations, including sustainability.²

3. Without discrediting the merit of these additional public policy objectives, and subject to some qualifications discussed below, Australia and New Zealand’s competition authorities hold the position that competition legislation should remain focused on protecting the competitive process by applying a consumer welfare standard. Specific policy measures and regulatory measures (for example, environmental protection frameworks, workplace relations regimes, and prudential regulation) are better equipped to achieve these supplementary goals without undermining the efficacy of competition law.

4. Both New Zealand’s and Australia’s competition laws have authorisation regimes that can allow each agency to authorise mergers or restrictive trade practices which may reduce competition, but only if it is in the public interest, that is, there is a net public benefit. This paper explains how those regimes work, their benefits and how each agency can account for sustainability factors in certain circumstances to allow anti-competitive mergers or restrictive arrangements that may have sustainability benefits to proceed. In those situations, the New Zealand and Australian competition law regimes have sufficient flexibility to look beyond a consumer welfare standard to consider broader wider economic and social impacts.

2. What is sustainability?

5. Sustainability refers to the practice of future-focused development, to ensure future generations will have access to the resources needed to meet their needs. While environmental protection is what many would associate with sustainability, it can extend to include issues of inequality, food security, responsible consumption, and labour rights.

6. This submission considers a broader definition of sustainability in the context of the OECD’s Action Plan based on the 17 UN Sustainable Development Goals. In particular, this submission expresses Australia and New Zealand’s joint view of how competition law can be equipped to resolve conflicts between sustainability goals and the protection of competition without deviating from the primary objective of enhancing consumer welfare.

¹ For example, the purpose of New Zealand’s Commerce Act is to “promote competition in markets for the long-term benefit of consumers within New Zealand”.

² Daniel A. Crane, 'Antitrust's Unconventional Politics' (2018). *Law & Economics Working Papers*. 153. repository.law.umich.edu/law_econ_current/153/

3. Competition regimes in New Zealand and Australia

7. Australia and New Zealand have a close relationship, built on strong economic, social and cultural links. This strong bond comes from being trans-Tasman neighbours, and a rich shared history of cooperation, healthy rivalry, and similar legal systems with a common origin.

8. The similarity in legal systems extends to our respective competition frameworks, both of which have similar objectives³ focused on enhancing the long-term interests of consumers, and prohibiting similar types of anti-competitive conduct. This joint submission recognises the ACCC and NZCC's positions as established competition regulators in the Asia-Pacific region with comparable aims, laws, and powers under their competition frameworks.

9. The respective aims of Australia and New Zealand's competition laws have some overlap with sustainability goals. In particular, one objective of competition law enforcement is to promote efficient markets, which often leads to better outcomes for consumers across different generations.

4. Competition law and sustainability

10. Australian and New Zealand competition laws protect the process of competition in the interests of the public. Robust competition in markets promotes economic efficiency, creating incentives to innovate and develop products and services at the lowest cost and highest quality.

11. Competition law assists sustainability goals by ensuring firms are able to develop products and services that contribute to these objectives unhindered by anti-competitive conduct. This could include exclusionary conduct from dominant market players, or competitors coordinating their activities through a cartel or other anti-competitive agreement.

12. Innovation is a key driver of creating sustainable products and industries. For example, the development of electric vehicles to reduce pollution, reliance on fossil fuels and overall carbon footprint associated with personal transport.⁴ During the early years of mass production, electric cars were expensive, could only cover short distances per charge, and few manufacturers produced them.

13. Today, thanks to changing consumer preferences, strong commitment to innovation through research and development, and the proliferation of charging infrastructure, electric car sales are growing strongly. There are many choices from hybrid to fully electric cars across several brands, at a range of price points to suit different drivers. However, without strong competition between manufacturers to continue to enhance varieties of electric cars, the market may not have responded to consumer preferences for more sustainable vehicles in the same way.

³ Section 2 of Australia's *Competition and Consumer Act 2010* (CCA) states the CCA 'aims to enhance the welfare of Australians by promoting fair trading and competition, and through the provision of consumer protections'. Section 1A of New Zealand's *Commerce Act 1986* states the Act 'aims to promote competition in markets for the long-term benefit of consumers within New Zealand.'

⁴ Office of Energy Efficiency & Renewable Energy, "Reducing Pollution with Electric Vehicles", *Energy.gov* (2020). <https://www.energy.gov/eere/electricvehicles/reducing-pollution-electric-vehicles>

14. Cartels and other types of anti-competitive agreements stifle innovation by removing incentives to compete with rival firms and locking out potential competition. Likewise, in the absence of unilateral conduct laws, firms with enough market power can use their advantaged position to deter competition or hinder competitors from participating freely in markets. Competition law helps to achieve sustainability by preventing conduct that undermines competition and prevents markets from moving to sustainable solutions based on innovation and consumer demand and preferences.

4.1. Interaction between competition and sustainability

15. Competition law is not the primary policy tool for promoting sustainability in New Zealand or Australia. There are good reasons for this to remain the case.

16. Firstly, it is not prudent to promote both of these goals with the single instrument of competition or consumer policy. The Tinbergen maxim suggests policymakers targeting multiple economic objectives need at least one policy tool for each policy target. This implies that promoting sustainability requires different instruments and agencies other than the competition law and regulator.⁵

17. Further, the OECD has warned that having multiple objectives applied to competition law increases a number of risks. These include inconsistent application of competition policy, and the interests of stakeholders constraining the independence of competition regulators or leading to political interference.⁶ This independence is necessary to ensure both business certainty and public accountability.

18. Even leaving aside competition issues, the assessment of sustainability considerations, such as the impact that conduct may have on the environment or sustainable development, will often require the ability to measure and adjudicate on difficult trade-offs, including between environmental and commercial or financial impacts, and between current and future generations. Therefore, in our jurisdictions, sustainability considerations are typically addressed by targeted legislation and/or regulatory interventions administered or enforced by a specialist agency with the expertise and resources to assess them effectively.

19. Altering the objectives of competition law to consider sustainability factors would create several issues because competition enforcement interests may not align with sustainability. For example, a competition agency could decline a merger or take action against an arrangement that has potential environmental benefits because of its likely impact on competition. Outside the exception for collaborative activities and joint ventures, conflict may arise if an arrangement prohibited by cartel provisions between competitors may enhance sustainability.⁷

20. Additionally, sustainability considerations may raise difficult trade-offs with other community goals, not just competition. Even with authorisation regimes, regulators may face trade-offs between sustainability impacts and other impacts, both competition and non-competition. This means a competition agency may authorise conduct that decreases sustainability because of other community goals.

⁵ Tinbergen J (1952), *On the Theory of Economic Policy*, North-Holland, Amsterdam.

⁶ OECD, 'Objectives of Competition Policy', *Journal of Competition Law and Policy*, 5, 2003, at pp. 8-9.

⁷ Section 31 of the Commerce Act provides an exception to the prohibition against cartel provisions for "collaborative activities", as defined in that section. Section 45AO of the CCA provides an exception from cartel conduct prohibitions for genuine joint ventures between corporations.

21. Those who call for competition law to have broader objectives point to these incompatibilities, arguing the focus on a consumer welfare standard risks regulators overlooking genuinely harmful commercial practices to the detriment of sustainability goals like inequality.⁸

22. However, notwithstanding the use of the consumer welfare standard in the application of competition law generally, Australia's and New Zealand's competition regimes have the flexibility to depart from this approach in some situations. This can allow potential trade-offs between sustainability objectives and competition to be addressed directly.

23. For instance, under the authorisation processes in our respective competition law frameworks, Australia and New Zealand have similar mechanisms to accommodate sustainability initiatives where their benefits would outweigh any detriments from a loss of competition. Additionally, in New Zealand collaborative efforts between competitors that aim to enhance sustainability may be permitted. These are explored further in the following sections.

5. Authorisation frameworks

24. Authorisation is an important part of Australian and New Zealand competition law. The process recognises that there can be benefits to the public that outweigh the public detriment arising from conduct technically prohibited by competition law.

5.1. New Zealand

25. Competition law in New Zealand is typically enforced without specific focus on any potential adverse impacts beyond relevant market(s).

26. However, New Zealand's authorisation regime recognises the fact that an anti-competitive merger or arrangement may have sufficient public benefit to outweigh the competitive harm arising from the merger or arrangement. Changes that lessen competition might nevertheless promote wider economic welfare, including welfare derived from sustainability considerations, even if consumer welfare is reduced.

27. Firms can apply to the NZCC for authorisation of a merger (section 67) or an arrangement (section 58) to allow firms to act in a way that would otherwise breach the Commerce Act 1986 (the Commerce Act).⁹ The NZCC will grant authorisation where we are satisfied that the merger or arrangement would be likely to benefit the New Zealand public. This is known as the "public benefit test".¹⁰

28. Section 3A of the Commerce Act requires the NZCC, when considering public benefits, to have regard to any efficiencies that the NZCC considers will, or will be likely

⁸ Khan, Lina and Vaheesan, Sandeep, *Market Power and Inequality: The Antitrust Counterrevolution and its Discontents* (2016). 11 *Harvard Law & Policy Review* 235 (2017).

⁹ For further guidance on the NZCC's approach to authorisations, refer to our Authorisation Guidelines: https://comcom.govt.nz/data/assets/pdf_file/0018/165123/Draft-revised-Authorisations-Guidelines-9-August-2019.PDF.

¹⁰ The Commerce Act contains two versions of the public benefit test, but the Courts have held there is no material difference between the two: see *Air New Zealand v Commerce Commission (No 6)* (2001) 11 *TCLR* 347 (HC) at [33].

to, result from the relevant conduct. The New Zealand courts have considered the meaning and application of this section in three key authorisation decisions.

29. In particular, in 1991, the New Zealand High Court endorsed the comments of the Australian Trade Practices Commission that public benefit is “anything of value to the community generally...including the achievement of economic goals of efficiency and progress”.¹¹ With respect to the addition of section 3A, the High Court said that such efficiency considerations, both positive and negative, are relevant to the NZCC’s assessment of benefits and detriments in authorisations, but do not exhaust society’s interest in the conduct of businesses that is the subject of the Commerce Act.¹² The more efficient use of society’s resources was therefore a benefit to the public deserving of weight, but it was not the only, or the most important, consideration in the circumstances.¹³

30. These comments were endorsed by the New Zealand High Court in *Air New Zealand v Commerce Commission (No 6)* (2001) 11 TCLR 347 at [319] and, more recently, by the New Zealand Court of Appeal in *NZME Ltd v Commerce Commission* [2018] NZCA 389. There, the Court accepted the NZCC’s submission that a broad range of considerations are relevant, including those relating to the physical environment.¹⁴

5.1.1. How New Zealand’s competition law can take sustainability impacts into account

31. Where sustainability issues are considered within New Zealand’s authorisation regime, the measurement of these impacts follow a standard Government policy framework, as outlined within the New Zealand Treasury’s Cost/Benefit analysis guidelines.¹⁵ Depending on the materiality of any such impacts, independent experts may be used where necessary, as was the case regarding media plurality impacts in *NZME*, and as indicated in *Nelson City Council and Tasman District Council* [2017] NZCC 6. Such expert advice may also be informative for assisting Commissioners to make decisions regarding the trade-offs inherent in such analysis.

32. The NZCC has considered sustainability considerations in several authorisation decisions to date. In these cases, the sustainability issues considered were environmental benefits that were claimed as arising from the various proposals. Generally, these benefits were unable to be quantified and did not materially affect the NZCC’s final determination.¹⁶

¹¹ For example, see *Air New Zealand v Commerce Commission* (2001) 11 TCLR 347 (HC) at [319]; *Telecom Corporation of New Zealand Ltd v Commerce Commission* (1991) 4 TCLR 473 (HC) at 527-530 citing *In Re Rural Traders Co-operative (WA) Ltd* (1979) ATPR 40-110 at 18,123.

¹² *Telecom Corporation of New Zealand Ltd v Commerce Commission* (1991) 4 TCLR 473 (HC) at 528.

¹³ At [530].

¹⁴ *NZME Ltd v Commerce Commission* [2018] NZCA 389 at [61].

¹⁵ See: <https://treasury.govt.nz/information-and-services/state-sector-leadership/investment-management/plan-investment-choices/cost-benefit-analysis-including-public-sector-discount-rates>.

¹⁶ See, for example: *Ravensdown Corporation Limited and SouthFert Co-operative Limited* (Commerce Commission Decision 279, 21 June 1992), at [427-437]; *Air New Zealand Limited and Qantas Airways Limited* (Commerce Commission Decision 511, 23 October 2003) at [1378-1380]; *Nelson City Council and Tasman City Council* [2017] NZCC 6 at [107-112]; *Tennex Capital Limited and San-i-pak Limited* [2018] NZCC 25 at [116-120].

33. For example, and as cited in *NZME*, in *Nelson City Council*, the NZCC considered reduced greenhouse gas emissions that would result from lower waste volumes but did not consider that the savings would meaningfully contribute to the assessment.¹⁷

34. Environmental benefits more directly impacted the NZCC's decision in Refrigerant License Trust Board (RLTB).¹⁸ In this case, RLTB sought authorisation for an arrangement under which up to 100% of New Zealand refrigerant wholesalers may agree to supply refrigerants only to customers that are trained and licensed or certified to safely handle refrigerants. In granting authorisation, the primary benefit that we took into account was increased compliance with the Hazardous Substances and New Organisms Act 1996. Flowing from this, the NZCC considered the arrangement would lead to a reduction in the amount of ozone depleting refrigerants released into the environment.¹⁹

5.2. Australia

35. The ACCC is able to grant authorisation for conduct, specified in the authorisation, to which one or more provisions of Australia's competition laws apply.²⁰ As in New Zealand, the ACCC may authorise mergers and anti-competitive arrangements, although there are separate processes for each.²¹

36. For non-merger authorisations, the ACCC may provide an exemption to competition laws where proposed conduct is likely to result in a net public benefit, that is, where the likely public benefit resulting from the conduct outweighs the likely public detriment. In some circumstances, depending on the type of conduct that is the subject of the application, the ACCC can grant authorisation if it is satisfied the conduct will not substantially lessen competition.

37. The CCA does not define what is meant by 'public benefit' or 'public detriment'. However, in authorisation decisions it has traditionally been given a broad meaning. The Australian Competition Tribunal, which has the power to review ACCC authorisation decisions, noted that public benefits include:

*"... anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress". Plainly the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society's resources. We bear in mind that (in the language of economics today) efficiency is a concept that is usually taken to encompass "progress"; and that commonly efficiency is said to encompass allocative efficiency, production efficiency and dynamic efficiency.*²²

And described public detriment as:

¹⁷ *NZME Ltd v Commerce Commission* [2018] NZCA 389 at [112].

¹⁸ Refrigerant License Trust Board (Commerce Commission Decision 735, 25 November 2011).

¹⁹ At [81].

²⁰ Contained in Part IV of the CCA.

²¹ The ACCC has public guidelines for both merger, and non-merger authorisations available on its website. See <https://www.accc.gov.au/business/exemptions/authorisation>.

²² *Re 7-Eleven* (1994), ATPR 41-357 at [42,677]. See also *Queensland Co-operative Milling Association Ltd* (1976), ATPR 40- 012, at 17,242 and *VFF Chicken Meat Growers' Boycott Authorisation* (2006) AcompT 9 at [75].

“... 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...”²³

38. Most public benefits the ACCC accepts are attributable to improvements in economic efficiency through addressing a source of market failure or market imperfection. However, the CCA does not constrain the ACCC to only take into account public benefits in these categories.

39. Non-merger authorisations have facilitated sustainability-focused initiatives. Boxes 1 and 2 provide case study examples of authorisations granted by the ACCC that have sustainability elements.

Box 1. Tyre Stewardship Scheme

In 2018 the ACCC granted authorisation to Tyre Stewardship Australia to continue its Tyre Stewardship Scheme, which aims to increase the recycling of tyres and use of products made from recycled tyres. The ACCC had previously authorised the scheme in 2013.

Tyre Stewardship Australia sought authorisation of specific provisions of the guidelines that govern the operation of the Tyre Stewardship Scheme. Broadly, those provisions impose obligations on participants to commit to the environmentally sound use of used tyres and to only deal with accredited businesses along the tyre supply chain. Participants in the scheme are businesses involved across the entire tyre supply chain and include tyre retailers, importers, recyclers and collectors, fleet operators and local governments across Australia.

The scheme also imposes a levy of 25 cents per tyre on tyre importers. The levy is not designed to directly fund recycling of used tyres, but to find and promote new uses for tyre-derived products.

The ACCC authorised provisions of this scheme because it considered the scheme was likely to increase the number of tyres being disposed of in an environmentally friendly way and result in a net public benefit.

In granting the authorisation, the ACCC expressed publicly there was room for further progress in developing the scheme to improve outcomes. It also noted that it would monitor the performance of the scheme during the authorisation period (six years), and if the participation by mining companies and vehicle importers in the scheme does not improve, governments should consider regulation.

Source: <https://www.accc.gov.au/media-release/accc-re-authorises-tyre-stewardship-scheme>

²³ Re 7-Eleven Stores Pty Limited (1994), ATPR 41-357 at [page 42] 42,683.

Box 2. Code for ethical treatment of clothing workers

In 2018, the ACCC reauthorised Ethical Clothing Australia's Homeworkers Code of Practice, which helps reduce the exploitation of textile, clothing and footwear (TCF) workers in Australia.

The Code imposes obligations on participants in the supply chain to demonstrate they provide award wages and conditions to textile, clothing, and footwear workers.

The ACCC considered the Code an important tool for incentivising businesses to observe their obligations to vulnerable workers in the TCF industry and take steps to manage legal and reputational risks in their outsourced supply chains.

Businesses accredited under the Code are also able to promote their compliance to consumers through a certification trademark on their products and branding. This allows consumers to choose products with confidence that the businesses they are buying are adhering to ethical standards regarding the payment of workers.

The ACCC determined the Code would result in net public benefits. In making this decision, the ACCC examined the possibility that the Code could lead to anti-competitive detriment such as increased costs for businesses seeking accreditation, but concluded that this risk of detriment is limited because the Code is voluntary. In addition, retail signatories and accredited manufacturers are only able to agree to boycott other businesses that are not compliant with their legal obligations, and the Code contains safeguards against inappropriate accreditation or boycott decisions.

Source: <https://www.accc.gov.au/media-release/code-for-ethical-treatment-of-clothing-workers-reauthorised>

5.3. The benefit of authorisation regimes for competition regulators, business and the public

40. These examples show well-designed exemption frameworks, like authorisation regimes, enable competition agencies to consider sustainability impacts in certain circumstances. In addition, the framework is sufficiently flexible to allow sustainability-focused initiatives in the public interest to go ahead without needing to change the objectives of competition law.

41. Authorisation frameworks can be constructed to accommodate temporary exemptions during times of crisis without suspending the competition regime. This ensures necessary collaboration during the crisis does not have a permanent impact on markets and consumer welfare. This has been of great benefit in Australia during the recent COVID-19 pandemic.

42. For example, in the early stages of the COVID-19 pandemic, Australia, like much of the world, experienced grocery supply shortages. On one hand, supermarkets were unable to cater to dramatically increased consumer demand for essential items including toilet paper, hand sanitiser, and staple foods. On the other hand, restrictions on businesses

to contain the pandemic exacerbated supply shortages. Combined, the demand and supply shocks caused widespread panic.²⁴

43. To address undersupply issues, Australia's four largest supermarket chains lodged an urgent authorisation application to the ACCC, seeking non-price coordination when dealing with manufacturers, suppliers, and transport and logistics providers. This was to ensure fair and equitable supply and distribution of fresh food, groceries, and other household items to Australian consumers - particularly, vulnerable consumers or those in rural and remote areas.²⁵

44. Given the urgent situation, the ACCC granted interim authorisation to the arrangement within one business day. This allowed the supermarkets to respond quickly during the interim authorisation period whilst the ACCC considered the implications of the arrangement.

45. In September 2020, the ACCC granted conditional authorisation to the arrangement until March 2021.

46. This flexibility can leave the economy better equipped to navigate unexpected challenges. The ability to grant authorisations, including quickly granting interim authorisation, gives businesses certainty when undertaking collaborative activities to respond to crises.

47. An added advantage is that interim authorisation can be revoked at any time if the arrangement does not demonstrate the expected benefits, or if the arrangement is no longer necessary. Further, even when an interim authorisation is affirmed by the ACCC for an extended period, it can be reviewed (and potentially revoked and replaced) if at any time it appears:

- the authorisation was granted on the basis of evidence or information that was false or misleading in a material particular
- a condition to which the authorisation was expressed to be subject has not been complied with, or
- there has been a material change of circumstances since the authorisation was granted. A 'material' change of circumstances is one that has 'a significant impact upon the benefits to the public or upon the detriment'.²⁶

48. Once revoked, parties no longer have statutory protection from legal action under the CCA to engage in the conduct that was the subject of the authorisation. Therefore, there is little risk of structural market failures and long-term competition impacts arising from authorisations the ACCC grants.

49. Competition law is a disincentive to cooperation between firms. In most cases, this is positive, i.e. where collaboration reduces competition, but it can also prevent industry-wide measures to achieve significant changes in the long-term interests of the public. In our example, the public benefits through greater and more reliable supply of essential items would likely not be realised in the absence of the authorisation, as businesses would not be

²⁴ William Ho, "The COVID-19 Shock to Supply Chains", *University of Melbourne Faculty of Business and Economics* (2020). <https://fbe.unimelb.edu.au/newsroom/the-covid-19-shock-to-supply-chains>

²⁵ See <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/coles-group-on-behalf-of-itself-and-participating-supermarkets>

²⁶ Re Media Council of Australia (1996), ATPR 41-497 at 42,241. See also Re AGL Cooper Basin Natural Gas Supply Arrangements (1997), ATPR 41-593 at 44,212; Re 7-Eleven Stores Pty Ltd (1998), ATPR 41-666 at 41,462.

willing to risk engaging in potential cartel conduct (which attracts criminal sanctions in Australia, and soon New Zealand) to go through with the arrangement.

6. Other ways sustainability considerations might align with competition law

6.1. Other exemptions

50. As above, in New Zealand, sustainability issues are most likely to be considered in applications submitted under the authorisation regime. However, there are other scenarios where competition and sustainability goals may be taken into account.

51. The Commerce Act contains an exception to the cartel prohibition in section 30 of the Commerce Act for “collaborative activities”.²⁷ To satisfy this exception in section 31 of the Commerce Act, the parties must show (among other things) that a cartel provision is reasonably necessary for the purpose of the collaboration and the dominant purpose of any collaboration is not to lessen competition between them. The NZCC recognises that parties may collaborate for any number of reasons that are not directly related to their ability and incentives to compete, for example, to achieve environmental benefits. This exception could apply to a situation where parties are collaborating for a sustainability purpose.²⁸

52. This exception recognises that collaboration can be beneficial and provides greater certainty to parties about the boundaries of permissible collaboration. The exception ensures that competition laws do not deter legitimate, genuine collaboration where the dominant purpose of that collaboration is not to lessen competition.

53. The NZCC has worked with business and industries to provide advice on the application of this exception in response to issues of supply arising due to the COVID-19 pandemic.

54. In addition, in markets where firms compete for customers by taking sustainability initiatives, such as mitigating the environmental impact of their production, a substantial lessening of competition could lead to less sustainable outcomes. Here, standard competition law analysis in New Zealand would take any likely sustainability losses into account as a reduction in product quality. Specific scenarios could be:

- the prevention of a merger or agreement that would give a firm substantial market power, such that it does not need to compete as vigorously on sustainability grounds
- enforcement against agreements between competitors to hinder entrants or innovations that threaten to disrupt incumbent less-sustainable technologies, and/or
- enforcement against a firm with substantial market power that engages in conduct intended to reduce the competitiveness of an otherwise more sustainable rival.

²⁷ See the Commission’s Competitor Collaboration Guidelines: www.comcom.govt.nz/data/assets/pdf_file/0036/89856/Competitor-Collaboration-guidelines.pdf.

²⁸ Although outside of competition law, we note that consumer laws can have an important role in achieving more sustainable outcomes by ensuring that consumers have accurate information about the products they buy. For example, enforcement of consumer laws can ensure that firms’ claims about the sustainability credentials of their products are accurate and not misleading.

6.2. Misleading and deceptive claims

55. Competition and consumer protection laws have a shared objective in improving outcomes for consumers, and consumer protection laws can play an important role in promoting sustainability. It is not uncommon for competition agencies to have dual responsibility as a consumer protection regulator. The NZCC and the ACCC both have this structure.

56. In the face of major environmental challenges like climate change, pollution, and resource depletion, consumers are increasingly looking to the business community to adopt more sustainable practices. There are costs associated with doing so, but there are also significant payoffs on offer for businesses. In addition to any positive environmental impacts that arise from sustainability measures, many consumers will preference companies that demonstrate commitment to sustainability, and will demonstrate strong brand loyalty.²⁹

57. A firm's sourcing and production methods can be relatively opaque to consumers. This presents an opportunity to make sustainability claims to consumers that are untrue or cannot be substantiated. A firm that does this obtains an unfair advantage over their competitors by reaping the benefits of increased consumer demand without the commensurate investment. This type of conduct distorts the value proposition between competing products, and may deter other sustainability initiatives in the industry if left unabated.

58. NZ and Australia have broad prohibitions against general misleading and deceptive conduct³⁰, as well as prohibitions against specific false or misleading representations (for example, false representations that goods or services have certain performance characteristics or benefits).³¹ Companies that make misleading claims about sustainability in NZ and Australia can face large pecuniary penalties, and there have been several cases brought by the ACCC and NZCC against false claims about sustainability, particularly in relation to environmental protection. Both agencies have produced extensive guidance for businesses about their obligations when marketing goods or services, including when specifically making environmental claims.³²

²⁹ Kuchinka, D.G.J.; Balazs, S.; Gavriletea, M.D.; Djokic, B.-B. Consumer Attitudes toward Sustainable Development and Risk to Brand Loyalty. *Sustainability* 2018, 10, 997.

³⁰ Section 9 of the Fair Trading Act 1986 (NZ) and section 18 of the Australian Consumer Law (as contained in Schedule 2 to the *Competition and Consumer Act 2010* (Aus))

³¹ Section 13(e) of the Fair Trading Act 1986 (NZ) and Section 29(g) of the Australian Consumer Law

³² For example, see the NZCC's environmental claims guidelines: www.comcom.govt.nz/business/dealing-with-typical-situations/environmental-claims