RETHINKING GREEN ANTITRUST: THE DOUBLE-EDGED OPPORTUNITIES AND BARRIERS IN PURSUIT OF A CIRCULAR AUSTRALIAN ECONOMY

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I INTRODUCTION

A Background and Context

The Australian Government has a pivotal role to play in changing Australia to a more sustainable and circular economy. According to a report jointly published by the Commonwealth Scientific and Industrial Research Organisation and the Bureau of Meteorology, Australia has warmed by an average of 1.47 degrees Celsius since 1910, leading to an increase in the frequency of extreme heat events.[1] Most Australians are worried about the impact of climate change and believe government action is an important tool in tackling the climate crisis.[2] Despite being a signatory to the United Nations Framework Convention on Climate Change ('UNFCCC') and the Paris Agreement,[3] Australia is falling behind other developed nations in terms of taking significant steps toward combatting climate change.[4] More recently, the present Minister for Industry and Science has reiterated that addressing the challenges of climate change was a mandate given to the Albanese Government during their election.[5]

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1 Commonwealth Scientific and Industrial Research Organisation and the Bureau of Meteorology, *State of the Climate 2022* (Biennial Report No 7, 23 November 2022) 4.

2 Institute of Opinion Polling and Statistics, *Climate Change Report 2022* (Annual Report, April 2022).

3 Prafula Pearce, 'Duty to Address Climate Change Litigation Risks for Australian Energy Companies: Policy and Governance Issues' (2021) 14(23) *Energies* 7838, 7838–9 <https://doi.org/10.3390/en14237838>.

4 Adam Morton, 'Australia "Lagging at the Back of the Pack" of OECD Countries on Climate Action, Analysis Finds', *The Guardian* (online, 9 August 2021) <https://www.theguardian.com/environment/2021/aug/09/australia-lagging-at-the-back-of-the-pack-of-oecd-countries-on-climate-action-analysis-finds>; Hugh Sadler, *Back of the Pack: An Assessment of Australia's Energy Transition* (Report, 9 August 2021).

5 Minister for Industry and Science, 'Launch of State of the Climate 2022 Report' (Media Release, 23 November 2022) <https://www.minister.industry.gov.au/ministers/husic/media-releases/launch-state-climate-2022-report>.

When striving to achieve sustainability goals collaboratively, competition rules apply, even when it comes to saving the planet.[6] Inspired by a lack of government action on environmental issues and the urgency of the climate crisis, many academics have advocated for 'green antitrust' – an idea which has been met equally with criticism.[7] Put briefly, green antitrust[8] is a premise which 'proposes to exempt corporate collaborative sustainability initiatives' from competition law.[9] Green antitrust advocates for a model of competition law which authorises anti-competitive conduct with the aim of furthering a more circular economy.[10] Circularity within green antitrust can be broadly characterised as a model of production and consumption whereby materials are reused, repaired and recycled; where materials never become waste.[11] Green antitrust is a holistic approach which recognises the interconnectedness of economic and environmental concerns and allows businesses to pursue value creation in a manner which reduces negative externalities.[12] As an illustration, green antitrust authorises two corporations engaging in collusion when such collusion has discernible environmental benefits.[13] However, green antitrust is not a silver bullet, as externalities complicate competition decisions and have policy implications which must be considered by regulators.[14] Granting exemptions to businesses from competition law provisions in the name of sustainability does not absolve the need to consider concerns related to competition, market power, innovation and the public interest.[15] Competition authorities such as the Australian Competition and Consumer Commission ('ACCC') straddle balancing functioning competitive markets alongside

6 Christoph Haid and Anna Sofia Reumann, 'Green Antitrust: The Very Thin Red Line between Legitimate Sustainability Cooperation and Illegal Collusion', *Schoenherr* (Web Page, 14 December 2021) <https://www.schoenherr.eu/content/green-antitrust-the-very-thin-red-line-between-legitimate-sustainability-cooperation-and-illegal-collusion/>.

7 See generally Cento Veljanovski, 'The Case against Green Antitrust' (2022) 18(3) *European Competition Journal* 501 <https://doi.org/10.1080/17441056.2022.2056346>.

8 This is the definition which this article uses throughout. In doing so, this article adopts a broad interpretation of green antitrust that encompasses cartel conduct and anti-competitive practices which prevent or restrict competition in a given market, with the underlying rationale being to further sustainability and circularity.

9 Maarten Pieter Schinkel and Leonard Treuren, 'Green Antitrust: Why Would Restricting Competition Induct Sustainability Efforts?', *ProMarket* (Web Page, 26 March 2021) <https://www.promarket.org/2021/03/26/green-antitrust-why-would-restricting-competition-induce-sustainability-efforts/> ('Green Antitrust: Restricting Competition').

10 Maarten Pieter Schinkel and Leonard Treuren, 'Green Antitrust: (More) Friendly Fire in the Fight against Climate Change' (Research Paper No 2020-72, Amsterdam Law School, University of Amsterdam, November 2021) <https://doi.org/10.2139/ssrn.3749147> ('Green Antitrust: Friendly Fire').

11 See generally Institut Montaigne, *The Circular Economy: Reconciling Economic Growth with the Environment* (Policy Paper, November 2016).

12 Cf Veljanovski (n 7); Schinkel and Treuren, 'Green Antitrust: Restricting Competition' (n 9).

13 This example refers to a horizontal agreement authorisation, but it is to be noted that this article uses a broad interpretation of green antitrust as described in n 8 above.

14 Frank Figge, Andrea Stevenson Thorpe and Siarhei Manzhynski, 'Value Creation and the Circular Economy: A Tale of Three Externalities' (2022) 26(5) *Journal of Industrial Ecology* 1690 <https://doi.org/10.1111/jiec.13300>.

15 These are issues which arise during the ACCC exemptions process.

protecting consumer welfare and economic efficiency.[16] The ACCC, when granting an authorisation, must be satisfied either that the likely public benefit from the conduct outweighs the likely public detriment or that the conduct would not substantially lessen competition.[17] It is the former public interest test which warrants analysis, as the model attracts criticism for its width and 'values-based judgment' approach.[18]

B Overview and Approach

Consequently, the purpose of this article is to critically analyse and explore the opportunities and barriers associated with green antitrust and how the ACCC could facilitate such an adoption in competition law. Using the authorisation process used by the Australian regulator as a vehicle, this article explores how the regulator could aid in the transition towards a more circular Australian economy. Existing literature on this topic examines the compatibility of competition law with sustainability,[19] or international competition perspectives on sustainability,[20] but there is relatively minimal work within the Australian context. In this area of research, works frequently present compelling arguments either in favour or against green antitrust,[21] yet offer little in terms of practical recommendations. This article offers an alternative approach – it views competition law as a dynamic tool. Using reform-oriented research allows for this article to assess the adequacy of existing frameworks,[22] and suggest how the law could be amended.[23] The overall argument which this article advances is similar to that of Simon Holmes,[24] in that competition law should not be viewed as an end itself, but rather as a means to achieve other goals, particularly a means to a circular economy. A normative recommendation is offered in the same vein by John Duns,[25] which is to omit the 'public' criteria from the ACCC public benefit test, as this is excessively cautious and creates challenges when arguing for efficiencies.

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16 Amanda Smullen and Catherin Clutton, 'The ACCC: Guardian of Viable Markets and Consumer Rights' in Arjen Boin, Lauren A Fahy and Paul 't Hart (eds) *Guardians of Public Value: How Public Organisations Become and Remain Institutions* (Springer Nature Switzerland AG, 2021) 323 <https://doi.org/10.1007/978-3-030-51701-4_13>.

17 *Competition and Consumer Act 2010* (Cth) s 90(7) ('*Competition and Consumer Act*').

18 Nicholas Allingham, 'Authorisations and Notifications: Merger Authorisations and the Public Benefit Test' (2017) 25(4) *Australian Journal of Competition and Consumer Law* 279, 279.

19 See, eg, Michał Konrad Derdak, 'Square Peg in a Round Hole? Sustainability as an Aim of Antitrust Law' (2021) 14(23) *Yearbook of Antitrust and Regulatory Studies* 39.

20 See, eg, Jurgita Malinauskaite, 'Competition Law and Sustainability: EU and National Perspectives' (2022) 13(5) *Journal of European Competition Law and Practice* 336 <https://doi.org/10.1093/jeclap/lpac003>.

21 See, eg, Schinkel and Treuren, 'Green Antitrust: Friendly Fire' (n 10); Veljanovski (n 7).

22 Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83, 101 <https://doi.org/10.21153/dlr2012vol17no1art70>.

23 See Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 3 *Erasmus Law Review* 130 <https://doi.org/10.5553/ELR.000055>.

24 See Simon Holmes, 'Climate Change, Sustainability, and Competition Law' (2020) 8(2) *Journal of Antitrust Enforcement* 354 <https://doi.org/10.1093/jaenfo/jnaa006>.

25 See John Duns, 'Competition Law and Public Benefits' (1994) 16(2) *Adelaide Law Review* 245.

This article is divided into three sections. The first section examines the compatibility of sustainability objectives with competition law. The second section explores the experience of the Dutch competition regulator with green antitrust, with a view to distilling insights for the Australian regulator. The final section aims to reflect on the ideas and discussions presented in the preceding sections and builds upon Duns' proposed recommendation for the public benefit test.

II NAVIGATING THE TENSION: SUSTAINABILITY, CONSUMER WELFARE AND THE ENVIRONMENTAL CRISIS

The logical starting point for this article is the fundamental tension between competition law and sustainability generally. All competition laws have goals, and these goals direct decisions about what the law is and how it should be enforced.[26] On one hand, competition law has the main objective of maximising consumer welfare.[27] This proposition implies that the purpose of competition law aims at addressing inefficiencies within the market and how competitive markets are maintained and possibly strengthened.[28] A sentiment of this sort is captured by the mandate of the ACCC, where the regulator is tasked with enhancing consumer welfare through the promotion of competitive markets.[29] On the other side, sustainability encompasses various dimensions,[30] but fundamentally concerns the preservation of human societies and their physical wellbeing.[31] Naturally, the tension which arises is the fact that competition law is about market efficiency and consumer welfare, where 'non-economic public policy goals' such as sustainability cannot be taken into account.[32] As Hans Vedder suggests, these proposals are underpinned by an idea that, at a basic level, the choice of a free-market economy and competition will not work for sustainability and that there is a clash of these values.[33] This notion carries some significance. As the Organisation for Economic Co-operation and Development ('OECD') explains, 'while important action may be undertaken by businesses individually, committing to

26 David J Gerber, 'The Goals and Uses of Competition Law' in David J Gerber (ed), *Competition Law and Antitrust* (Oxford University Press, 2020) 17, 17–18 <https://doi.org/10.1093/oso/9780198727477.003.0003>.

27 Alexandre de Streel, 'The Relationship Between Competition Law and Sector Specific Regulation: The Case of Electronic Communications' (2008) 47(1) *Reflets et Perspectives de la vie économique* 55, 57 <https://doi.org/10.3917/rpve.471.0055>.

28 Claus Dieter Ehlermann and Laraine L Laudati, *European Competition Law Annual 1997: Objectives of Competition Policy* (Hart Publishing, 1st ed, 1998) ix–x.

29 *Competition and Consumer Act* (n 17) s 2.

30 Markus Vogt and Christoph Weber, 'Current Challenges to the Concept of Sustainability' (2019) (2) *Global Sustainability* e4:1–6, 1 <https://doi.org/10.1017/sus.2019.1>.

31 See Lynton K Caldwell, 'The Concept of Sustainability: A Critical Approach' in John Lemons, Laura Westra and Robert Goodland (eds), *Ecological Sustainability and Integrity: Concepts and Approaches* (Springer, 1998) 1 <https://doi.org/10.1007/978-94-017-1337-5_1?>.

32 Suzanne Kingston, 'Competition Law in an Environmental Crisis' (2019) 10(9) *Journal of European Competition Law and Practice* 517, 517 <https://doi.org/10.1093/jeclap/lpz076>.

33 Hans Vedder, 'Environmental Sustainability and Competition Policy: Trends in European and National Cases' (2021) *Concurrences* 98036:1–7, 2.

reach self-imposed targets in terms of emissions, recycling or green R&D [research and development] investments … these actions may be necessarily limited'.[34] However, German scholars Eckart Bueren and Jennifer Crowder write that 'it is generally acknowledged that the objectives promoted by competition, such as the effective use and allocation of resources tend to go hand-in-hand with sustainability' goals.[35] The debate of the compatibility between competition law and sustainability involves many views and issues ranging from 'constitutional … to the pragmatic'.[36] Although there are extensive arguments presented from both sides,[37] it is incumbent to refute two commonly held arguments against green antitrust, as this sets the foundation for the subsequent analysis: namely, the general urgency of environmental issues and the focus on the possibility that green antitrust, on balance, decreases consumer welfare.

A Redefining the Relationship between Consumer Welfare and Sustainability

The appropriate aim of competition law has been a topic of much discussion within competition literature.[38] Some scholars propose that the aim of competition law be an economic one,[39] marked by characteristics of a free market, economic efficiency, and protection of consumer welfare.[40] But the proposition to limit the goal of competition law solely to an economic objective is counterproductive. Sustainability and competition law are not ideals which are devoid of each other. In fact, both goals should be integrated because a fully effective competition policy cannot ignore market failures, external effects, and should consider climate change, pollution and conduct.[41] Konstantinos Stylianou and Marios Iacovides have observed that '[f]or any field of law, the goal it was designed to achieve should permeate every aspect of its application and interpretation'.[42] In looking toward the application and interpretation of competition law there exists a myriad of broader social objectives which are often considered by competition

34 Organisation for Economic Co-operation and Development ('OECD'), 'Environmental Considerations in Competition Enforcement' (Discussion Paper, OECD Competition Committee, 2021) 10.

35 Eckart Bueren and Jennifer Crowder, 'Sustainability and Competition Law: Germany' in Bruce Kilpatrick, Pierre Kobel and Pranvera Këllezi (eds), *LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition: Sustainability in Competition Law and Green IP* (Springer, forthcoming) 1, 18.

36 Vedder (n 33) 2.

37 See Maurits Dolmans, 'Sustainable Competition Policy and the "Polluter Pays" Principle' in Simon Holmes, Dirk Middelschulte, Martijn Snoep (eds), *Competition Law and Environmental Sustainability* (Concurrences, 2021) 17. See Veljanovski (n 7). See Schinkel and Treuren, 'Green Antitrust: Friendly Fire' (n 10).

38 See generally Jules Stuyck, 'EC Competition Law After Modernisation: More than Ever in the Interest of Consumers' [2005] (28) *Journal of Consumer Policy* 1 <https://doi.org/10.1007/s10603-004-6052-4>; Gerber (n 26).

39 Derdak (n 19) 63. See also Bueren and Crowder (n 36).

40 Derdak (n 19) 57.

41 Dolmans (n 37) 7.

42 Konstantinos Stylianou and Marios Iacovides, 'The Goals of EU Competition Law: A Comprehensive Empirical Investigation' (2022) 42(4) *Legal Studies* 620, 620 <https://doi.org/10.1017/lst.2022.8>.

regulators.[43] Clearly the scope of competition law extends beyond mere consideration of consumer welfare and efficiencies in the market. Michał Derdak writes that promoting sustainable development through competition law leads to decreasing consumer surplus and it is highly debatable whether it increases consumer welfare.[44] While the views of Derdak on consumer surplus are fleeting, Maarten Schinkel and Leonard Treuren provide a more comprehensive version of the argument.[45] According to Schinkel and Treuren, firm incentive to operate sustainably is higher when firms compete rather than when they are allowed to make sustainability arrangements.[46] Protecting competition stimulates innovation, and increases the quality and choice of products, ultimately contributing to welfare.[47] However, Schinkel and Treuren fail to consider that consumers derive utility from non-market goods too.[48] As Maurits Dolmans describes, consumers derive utility from clean air, water and good health – where economic models based on purely rational and selfish consumers of market goods are not reflective of reality.[49] Much like other scholars,[50] Schinkel and Treuren conclude their analysis by relegating green antitrust as an ineffective and counterproductive measure at addressing sustainability.[51] But just because green antitrust cannot be a complete solution, does not mean it does not have value. The sustainability and competition law relationship is much more dynamic than a mere consideration of consumer welfare or economic goals generally. A concerted effort is required to achieve a balance between economic goals and environmental concerns.

B Balancing Environmental Urgency and Prudence

Numerous scholars have used the urgency of environmental issues and the climate crisis to advocate for the implementation of green antitrust mechanisms in their respective jurisdictions.[52] The wide variety of proposals range from introducing a 'carbon defence',[53] a 'polluter pays principle',[54] to a 'market failure defense'.[55] A common argument among these proposals is that the world is

43 Without conflating the tests used by competition regulators, see the public benefit test used by the ACCC and see the general exemptions process used by the Authority for Consumers and Markets (Netherlands) which allows for consideration of non-economic objectives.

44 Derdak (n 19) 64.

45 See Schinkel and Treuren, 'Green Antitrust: Friendly Fire' (n 10).

46 Ibid 1.

47 See Edith Loozen, 'EU Antitrust in Support of the Green Deal: Why Better is Not Good Enough' (2023) 00 *Journal of Antitrust Enforcement* (advance) <https://doi.org/10.1093/jaenfo/jnad005>.

48 See generally Roman Inderst and Stefan Thomas, 'Reflective Willingness to Pay: Preferences for Sustainable Consumption in a Consumer Welfare Analysis' (2021) 17(4) *Journal of Competition Law and Economics* 848 <https://doi.org/10.1093/joclec/nhab016>.

49 Dolmans (n 37) 10.

50 See Derdak (n 19); Veljanovski (n 7).

51 Schinkel and Treuren, 'Green Antitrust: Friendly Fire' (n 10) 21.

52 See Dolmans (n 37); Inara Scott, 'Antitrust and Socially Responsible Collaboration: A Chilling Combination?' (2016) 53(1) *American Business Law Journal* 97 <https://doi.org/10.1111/ablj.12073>; Jordan Ellison, 'A Fair Share: Time for the Carbon Defence?' (Research Paper, 21 February 2020) <http://doi.org/10.2139/ssrn.3542186>.

53 See Ellison (n 52).

54 See Dolmans (n 37).

55 See Scott (n 52).

experiencing a deteriorating climate crisis, underscoring the need for policymakers to take action to address it.[56] This has led to some scholars highlighting the need for a more realistic approach to green antitrust.[57] As Cento Veljanovski explains, 'declaring that we face an existential environmental and human crisis, or using bad economics, is not a license to advocate [for] bad laws and bad policies'.[58] However, in the same way, doing nothing about the climate crisis is not a viable solution. This article acknowledges that the pressing nature of the issue should not justify hasty policy decisions or law-making, but the international sustainability obligations Australia owes are irrefutable. As briefly discussed earlier, Australia is a signatory to the Paris Agreement and the UNFCCC,[59] which imposes obligations at a global level to take action to combat the climate crisis. In an ideal world, comprehensive measures would be in place that would render the need for green antitrust unnecessary. But, as Jordan Ellison describes, in the imperfect world in which we live, green antitrust 'could potentially make a useful contribution'.[60] A recent study by Boston Consulting Group argued that to achieve sustainability 'companies must act aggressively – and collectively – to transform their ecosystems'.[61] The study also found 'collaborations in sectors' has produced several 'concrete outcomes' for furthering sustainability.[62] Like Holmes, this article proposes that a shift is needed in how individuals perceive competition law and economics,[63] in order to move beyond obscure and unhelpful discussions such as individual firm motivation for sustainability or whether the urgency of the crisis necessitates action. We need to remind ourselves that competition law is not an end, rather it is a means toward a more sustainable and circular economy.[64]

III EXAMINING THE EXPERIENCE OF COMPETITION REGULATORS IN AUSTRALIA AND THE NETHERLANDS TOWARD GREEN ANTITRUST

Sustainability and competition law is 'currently one of the most debated topics' in the European Union ('EU'),[65] where EU member states such as the Netherlands

56 See generally Ellison (n 52); see Dolmans (n 37).
57 See Schinkel and Treuren, 'Green Antitrust: Friendly Fire' (n 10); Veljanovski (n 7); Derdak (n 19).
58 Veljanovski (n 7) 513.
59 See Pearce (n 3) 7838–9.
60 Ellison (n 52) 16.
61 David Young, Simon Beck and Konrad von Szczepanski, 'How to Build a High-Impact Sustainability Alliance', *Boston Consulting Group* (Web Page, 14 February 2022) <https://www.bcg.com/publications/2022/how-to-build-sustainability-alliance>.
62 Matteo Gasparini, Knut Haanaes and Peter Tufano, 'When Climate Collaboration Is Treated as an Antitrust Violation' *Harvard Business Review* (Web Page, 17 October 2022) <https://hbr.org/2022/10/when-climate-collaboration-is-treated-as-an-antitrust-violation>.
63 Holmes (n 24) 402.
64 Ibid.
65 Malinauskaite (n 20) 336.

have already started 'trailblazing' initiatives.[66] The Dutch competition regulator, the Netherlands Authority for Consumers and Markets ('ACM'), was one of the first authorities to provide draft guidance about sustainability and competition rules in the EU.[67] This provides an opportunity for competition regulators, specifically the ACCC in the Australian context, to learn and draw insights from the Dutch experience. The article now shifts its focus to this aspect.

A The Role of the ACCC and ACM in Their Respective Jurisdictions

It is important to first explain the differing roles of the ACCC and the ACM in Australia and the Netherlands, respectively, before delving into case examples. Businesses in Australia are obliged to seek authorisation from the ACCC if they suspect that their conduct will breach the *Competition and Consumer Act* 2010 (Cth) ('*Competition and Consumer Act*'). As stated earlier in this article, in granting an authorisation, the ACCC must be satisfied that the conduct would result, or likely result, in a net benefit to the public or that the conduct would not substantially lessen competition.[68] With the public benefit test, the ACCC must be satisfied in all the circumstances that the benefit to the public would outweigh the detriment to the public.[69] While the *Competition and Consumer Act* does not explicitly define 'public benefit',[70] the ACCC has given the term a broad definition.[71] A 'public benefit' is held to be 'anything of value … any contribution to the aims pursued by society including … the achievement of the economic goals of efficiency and progress'.[72] On the other hand, the ACM is primarily governed by the *Mededingingswet* ('*Dutch Competition Act*')[73] being influenced by European treaties which, more relevantly to green antitrust, require EU member states such as the Netherlands to integrate environmental protection in the implementation of EU policies.[74] The EU regime requires businesses to self-assess whether their business practices are compliant with competition law, whereas in

66 Ibid; Gornall et al, 'Dutch Competition Authority Willing to Walk the Talk on Sustainability Agreements', *De Brauw Blackstone Westbroek* (Web Page, 22 September 2022) <https://www.debrauw.com/articles/dutch-competition-authority-willing-to-walk-the-talk-on-sustainability-agreements>.

67 See Malinauskaite (n 20); Gornall (n 66).

68 *Competition and Consumer Act* (n 17) s 90(7).

69 Ibid s 90(7)(b).

70 See generally ibid.

71 *ACI Operations Pty Ltd* (1991) ATPR (Com) ¶ 50-108, 56,066–67; *Re 7-Eleven Stores* (1994) ATPR ¶ 41,357, 42,677 (Lockhart J, Prof Brunt and Dr Aldrich) ('*7-Eleven Stores*'). See also *Queensland Co-operative Milling Associated Ltd* (1976) ATPR ¶ 40-012, 17,242 (Woodward J, Members Shipton and Brunt) ('*Queensland Co-operative Milling*'); Gaetano Lapenta and Matteo Giangaspero, 'Greening Antitrust: Lessons from the ACCC's Authorisation of a Recycling Co-operation Agreement' (2021) 12(10) *Journal of European Competition Law and Practice* 758, 759 <https://doi.org/10.1093/jeclap/lpab072>.

72 *7-Eleven Stores* (n 71) 42,677 (Lockhart J, Prof Brunt and Dr Aldrich), quoting *Queensland Co-operative Milling* (n 71) 17,242.

73 *Mededingingswet 1997* [Competition Act 1997] (Netherlands) ('*Dutch Competition Act*').

74 *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2012] OJ C 326/49 (entered into force 1 November 1993) art 11 ('*FEU*'); *Charter of the Fundamental Rights of the EU* [2012] OJ C 326/02 art 37.

the Netherlands the ACM may provide their opinion on this point.[75] Self-assessment by entities in the EU marks a divergence from the formalised authorisation process required by the ACCC, where competition law in the EU appears to take a more dynamic and holistic approach. Through the use of a general exemption the ACM can exempt agreements or practices that restrict, prevent, or distort competition if it contributes to 'improving the production or distribution of goods or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit'.[76] It is important to note that 'EU competition law is a complex beast',[77] and this article does not propose to conduct a thorough comparative analysis between both jurisdictions. Rather the focus is on what lessons and insights *could* be gleaned from the respective successes and challenges from the ACCC and ACM approaches in addressing green antitrust, where neither the ACCC nor the ACM has an explicit mandate to consider environmental protection or sustainability.[78]

B Understanding the Dutch Consumer Welfare Standard through 'Chicken of Tomorrow'

A key distinction between the current tests applied by the ACCC and the ACM is that Dutch competition policy focuses on 'consumer interest' whilst, in the Australian instance, regard is had to the concept of 'public interest'. An application of this framework can be observed in the Dutch case of 'Chicken of Tomorrow' ('Chicken').[79] In 'Chicken', Dutch farmers 'promised to improve the welfare of broiler chicken' where supermarkets wanted to engage in a horizontal agreement to not import 'competitive cheap chicken substitutes'.[80] The ACM analysed changes to 'animal welfare, the environment, and public health',[81] and concluded that the sustainability benefits were too small compared to the anti-competitive harm.[82] When considering the impact of sustainability to consumer welfare, 'sustainability gains are not automatically considered welfare gains [by the ACM] unless this is perceived by the consumer as "value creation"'.[83] This was apparent in 'Chicken', wherein the ACM analysis showed that prices would increase by €1.46 per kilogram, while Dutch consumer willingness to pay for increased animal

75 See Gornall et al (n 66).

76 '*Dutch Competition Act*' (n 73) art 6(3); *FEU* (n 74) art 101.

77 Niamh Dunne, 'Public Interest and EU Competition Law' (2020) 65(2) *Antitrust Bulletin* 256, 259 <https://doi.org/10.1177/0003603X20912883>.

78 See generally Lapenta and Giangaspero (n 71) 759; *Competition and Consumer Act* (n 17).

79 Authority for Consumers and Markets (Netherlands), 'ACM's Analysis of the Sustainability Arrangements Concerning the "Chicken of Tomorrow"' (Consultation Document No ACM/DM/2014/206028, 26 January 2015) <https://www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.pdf> ('Chicken of Tomorrow').

80 Schinkel and Treuren, 'Green Antitrust: Friendly Fire' (n 10) 9.

81 See Authority for Consumers and Markets (Netherlands), 'Chicken of Tomorrow' (n 79) 1.

82 Ibid; Schinkel and Treuren, 'Green Antitrust: Friendly Fire' (n 10) 9.

83 Jacqueline M Bos, Henk van den Belt and Peter H Feindt, 'Animal Welfare, Consumer Welfare, and Competition Law: The Dutch Debate on the Chicken of Tomorrow' (2018) 8(1) *Animal Frontiers* 20, 21 <https://doi.org/10.1093/af/vfx001>.

welfare was valued at only 0.68 euros per kilogram.[84] As this agreement could not satisfy the ACM requirement that consumers receive a 'fair share of the benefits', the agreement was disallowed.[85] The approach taken by the ACM to sustainability in 'Chicken' caused ensuing debate,[86] prompting the Minister of Economic Affairs in 2015 to promise in parliament 'to revise the policy rules on competition and sustainability'.[87] Among these concerns was the role that the ACM played in considering animal welfare and its consideration of broader societal goals.[88] As Edith Loozen explains, 'the risk of using a citizen welfare standard' pursuant to consumer benefit 'is that it politicizes competition law'.[89] The ACM acknowledges this point, and states that '"[n]ormally [we are] very reluctant to allow [anticompetitive] agreements" … because "it is up to the … elected legislature to determine who contributes to … the achievement of public interest goals"'.[90] The question then arises as to why the ACCC adopts the more expansive concept of the 'public interest'.[91] The answer can be found in the ACCC's legislation which 'tasks the agency to enforce both competition and consumer law for the public interest'.[92] In 1997, ACCC Commissioner Sitesh Bhojani explained that the authorisation exemption process is a 'balancing exercise between public benefits and anti-competitive detriment', where 'establishment of public benefit is central' to the authorisation process under the *Competition and Consumer Act*.[93] Thus it can be said that the ACCC has a seemingly contradictory dual mandate to ensure that markets function in ways that both encourage competition and protect consumer welfare,[94] where a balance must be achieved. Arguably if 'Chicken' had been decided by the ACCC, the outcome *may* have been different. This is because the Australian public benefit test would have allowed the regulator to consider the flow-on effects to the environment,[95] and the improvement in quality and safety[96] of the chickens, without having regard to consumer value creation.[97] The Dutch case serves as a pertinent example of the difficulties encountered abroad by the ACM when trying to consider policy goals and the interests of the public. Moreover, it illustrates the effectiveness of the approach taken by the ACCC,

84 Authority for Consumers and Markets (Netherlands), 'Chicken of Tomorrow' (n 79) 6.
85 Herman Lelieveldt, 'Out of Tune or Well Tempered? How Competition Agencies Direct the Orchestrating State' (2020) 14(3) *Regulation and Governance* 465, 473 <https://doi.org/10.1111/rego.12223>.
86 See Bos, van den Belt and Feindt (n 83).
87 Lelieveldt (n 85) 474.
88 See Bos, van den Belt and Feindt (n 83).
89 Loozen (n 47) 5.
90 Ibid 5–6; quoting Martijn Snoep, 'Keynote Speech' (Speech, IBA 2020 – 24th Annual Competition Virtual Conference, 9 September 2020) 3.
91 Referring to the scope of and considerations within both tests – see below in Part IV.
92 See Smullen and Clutton (n 16) 324.
93 See Sitesh Bhojani, '"Public Benefits" under the Trade Practices Act' (Speech, Joint Conference – Competition Law and the Professions, 11 April 1997) 1.
94 Smullen and Clutton (n 16) 324.
95 See *Tasmanian Oyster Research Council* (1991) ATPR (Com) ¶ 50-106.
96 See *The Australian Tyre Dealers' and Retreaders' Association (formerly Australian Tyre Dealers Association, Independent Retreaders Division)* (1994) ATPR (Com) ¶ 50-162.
97 See Bos, van den Belt and Feindt (n 83) 21.

which considers a wide range of factors aiming to strike a balance between consumer welfare and economic efficiency.

C Fairness in the ACM – An Assessment of 'Coal'

The use of fairness is a key point of difference between the ACM and the ACCC, where the ACM requires consideration of a 'fair share of the resulting benefits'. [98] In practice this means that the agreement must fully compensate consumers concerned for the anti-competitive harm they suffer from the agreement.[99] A 'fair share' allows the net benefit for consumers directly harmed to be at least zero, but no less than zero.[100] In other words, 'consumers must not be worse off'.[101] While this need not apply to each individual consumer, consumers must at least be compensated as a group.[102] The concept of fairness is a prominent feature within European competition law,[103] where Sandra Marco Colino claims 'it makes little sense to defend a competition policy [which] … develops with its back purposefully turned to the attainment of moral and social justice'.[104] Notably however, the fair share condition is only concerned with the costs and benefits of the agreement for consumers 'directly related to the objectives of the agreement'.[105] An application to this effect was showcased in the case of 'Coal',[106] considered by the ACM. Put briefly, in 'Coal' electricity producers sought an opinion of the ACM whether a horizontal agreement,[107] 'to close five coal-fired electricity plants five years ahead of … schedule',[108] would breach Dutch competition regulation. In valuing the benefits, namely the environmental emissions, the ACM, using 'sophisticated' economics,[109] analysed the impact of the emissions then monetised the 'unpriced effects'.[110] The ACM provided that the agreement could not be exempt,[111] as the result would be higher electricity costs totalling 75 million euros

98 *Dutch Competition Act 1997* (n 74) art 6(3); *FEU* (n 75) art 101.

99 Authority for Consumers and Markets (Netherlands), 'Second Draft Version: Guidelines on Sustainability Agreements' (Regulation Publication, 26 January 2021) 14–15 [49]–[50] ('Second Draft Guidelines').

100 Erik Kloosterhuis and Machiel Mulder, 'Competition Law and Environmental Protection: The Dutch Agreement on Coal-Fired Power Plants' (2015) 11(4) *Journal of Competition Law and Economics* 855, 862 <https://doi.org/10.1093/joclec/nhv017>.

101 See Roman Inderst, *Incorporating Sustainability into an Effects-Analysis of Horizontal Agreements* (Expert Report, European Commission of the European Union, 2022) 8 <https://doi.org/10.2139/ssrn.4098476>.

102 See generally Bos, van den Belt and Feindt (n 83).

103 See Niamh Dunne, 'Fairness and the Challenge of Making Markets Work Better' (2021) 84(2) *Modern Law Review* 230 <https://doi.org/10.1111/1468-2230.12579>.

104 Sandra Marco Colino, 'The Antitrust F Word: Fairness Considerations in Competition Law' (Research Paper No 2018-09, Chinese University of Hong Kong, 1 May 2019) 18.

105 Kloosterhuis and Mulder (n 100) 862.

106 See Authority for Consumers and Markets (Netherlands), 'ACM Analysis of Closing Down 5 Coal Power Plants as Part of SER Energieakkoord' (Consultation Document, 26 September 2013) ('Coal').

107 Ibid. Horizontal agreement refers to a collaborative agreement between two competitors operating at the same level of a supply chain.

108 Schinkel and Treuren, 'Green Antitrust: Friendly Fire' (n 10) 8.

109 Ibid.

110 Kloosterhuis and Mulder (n 100) 870.

111 See Authority for Consumers and Markets (Netherlands), 'Coal' (n 106).

per year which would not be offset by the benefits valued at 30 million euros per year,[112] where overall Dutch consumers would be left worse off. In contrast, the ACCC does not incorporate a fairness element in its framework, as it relies on the net public benefit test to address this issue. One issue with the ACCC approach is that sustainability gains are complex and multifaceted, and they have impacts on resources, the environment, and society, which could either be positive or negative. Considering efficiencies through the ACM lens of a fair distribution of benefits could lead to a more robust analysis of authorisations where the ACCC could 'perform a more meaningful trade-off between competition [including consumer welfare] and efficiency'.[113] For a test which attracts critique for its width and 'values-based judgment' approach,[114] the Dutch experience showcases how the ACCC *could* derive greater objectivity in its decision-making.

D Renewed Approach Adopted by the ACM in Response to the EU Green New Deal

The ACM was one of the first EU competition regulators who, in response to the EU Green Deal, issued draft sustainability guidelines in 2020, with further revision in 2021 ('Second Draft Guidelines').[115] The Second Draft Guidelines, which are 'limited in scope to sustainability agreements',[116] stretch beyond environmental objectives; they encompass 'human rights … food, and animal welfare'.[117] Notably, the ACM-proposed framework would allow the anti-competitive effects of agreements to be weighed against the environmental benefits to society, rather than in-market consumers under the existing framework.[118] A mechanism of this sort would bring the ACM system of competition regulation more in line with the broader consideration of the public interest as used by the ACCC. Under the Second Draft Guidelines businesses will have the opportunity to contact the Minister of Economic Affairs and Climate Policy,[119] where the ACM has extended an 'open invitation' for companies to 'discuss the acceptability' of their ventures.[120] Since releasing the Second Draft Guidelines, the ACM has acted promptly, having already assessed and granted five

112 Schinkel and Treuren, 'Green Antitrust: Friendly Fire' (n 10) 8. See generally Kloosterhuis and Mulder (n 100).

113 Arlen Duke, 'A More Efficient Use of Efficiencies in Merger Authorisation Determinations' (2007) 35(4) *Australian Business Law Review* 278, 292.

114 See Allingham (n 18) 279.

115 See Authority for Consumers and Markets (Netherlands), 'Second Draft Guidelines' (n 99).

116 Malinauskaite (n 19) 343.

117 See Simone Pelkmans and Hester Kok, 'The European Commission Publishes Draft Guidance on Sustainability Agreements: A Step Towards Collaboration Between Competitors', *Deloitte* (Blog Post, 2022) <https://web.archive.org/web/20230310161446/https://www2.deloitte.com/nl/nl/pages/sustainability/articles/the-european-commission-publishes-draft-guidance-on-sustainability-agreements.html>.

118 See Shila Kobakiwal, 'The ACM's Green Deal: Achieving Sustainability via Competition Law?', *Stibbe* (Article, 3 September 2020) <https://www.stibbe.com/publications-and-insights/the-acms-green-deal-achieving-sustainability-via-competition-law>.

119 Malinauskaite (n 20) 344.

120 See Gornall et al (n 66).

pro-sustainability agreements covering diverse sectors.[121] Marcin Kaminski comments that the Second Draft Guidelines provide actual guidance for businesses looking to implement sustainability initiatives – a positive step toward sustainable competition policy.[122] The updated approach used by the ACM to green antitrust reflects a collaborative style where the Dutch regulator works alongside parties in a facilitative role. In contrast, the ACCC has not published guidance on matters pertinent to green antitrust.[123] Whilst the Australian regulator regularly releases guidelines for a diverse range of activities,[124] the most awareness in the realm of sustainability has been made around 'greenwashing'.[125] As the ACCC does not 'quantify the degree of harm to establish that conduct is anticompetitive',[126] guidance and a facilitative approach as evidenced by the ACM could be beneficial. Other than providing legal clarity, specific guidelines may reassure Australian companies that environmentally relevant actions taken will not attract enforcement if they meet certain requirements.[127]

IV A WAY FORWARD – AMENDING THE PUBLIC BENEFIT TEST

Considering the points discussed, this article proposes to amend the ACCC public benefit test by removing the 'public' criterion, suggested by Duns.[128] As Duns explains, when considering non-economic criteria such as the impact to the environment, public health or safety, the Australian authorisation process 'has the virtue of pragmatism'.[129] The ACCC can directly address these issues instead of relying on other legislative means to potentially deal with them.[130] In this context, the ACCC authorisation process has 'been a valuable one' as it enables 'competition policy to operative effectively while accommodating wider

121 See Gornall et al (n 66).

122 Marcin Kamiński, 'Energy Transition Enhanced by the European Green Deal: How National Competition Authorities Should Tackle This Challenge in Central and Eastern Europe?' (2021) 14(23) *Yearbook of Antitrust and Regulatory Studies* 101, 116.

123 The closest guidance provided by the ACCC regarding sustainability and competition matters has been through its work on 'greenwashing'.

124 See, eg, Australian Competition and Consumer Commission, *Compliance and Enforcement Guidelines on Part IVBB and Competition and Consumer (Gas Market Emergency Price) Order 2022* (Guidelines, 9 June 2023); Australian Competition and Consumer Commission, *Guidelines for Authorisation of Conduct (Non-Merger)* (Guidelines, 22 December 2022); Australian Competition and Consumer Commission, 'Targeting Scams: Report of the ACCC on Scams Activity 2022' (Report, April 2023).

125 See Australian Competition and Consumer Commission, 'ACCC "Greenwashing" Internet Sweep Unearths Widespread Concerning Claims' (Media Release 17/23, 2 March 2023) <https://www.accc.gov.au/media-release/accc-greenwashing-internet-sweep-unearths-widespread-concerning-claims>.

126 Rod Sims and Graeme Woodbridge, 'Public Interest in Antitrust Enforcement: An Australian Perspective' (2020) 65(2) *Antitrust Bulletin* 282, 282 <https://doi.org/10.1177/0003603X20912890>.

127 Kamiński (n 122) 116.

128 See Duns (n 25).

129 Ibid 266.

130 Ibid.

concerns'.[131] This perspective aligns with the core argument presented in this article, namely, that competition law is a tool, or rather, it is a means to an end. But if the end goal is a more sustainable and circular economy, then removing the 'public' aspect from the public benefit test could be a sound practical step. The inclusion of the 'public' criterion in the test is unduly cautious and poses additional challenges when arguing for efficiencies.[132] Removing the 'public' criterion would bring the ACCC in line with international standards, namely the Dutch competition regulator, which is moving toward a collaborative and rounded approach to green antitrust. It would also allow greater clarity and flexibility in the ACCC's assessment of green antitrust.

A Consideration of the Public Interest Is Apparent in the ACCC Decision-Making Process

The ACCC's authorisation process involves a meticulous decision-making process that already involves considerations of the public interest. Firstly, the agency has guidance for parties interested in gaining authorisation,[133] which, as suggested before, could be strengthened through further green antitrust guidance. Additionally, ACCC staff can provide guidance to potential applicants on preparing an authorisation application, including on issues of confidentiality.[134] The authorisation process is a public process,[135] where the ACCC invites submissions from interested stakeholders before its draft decision.[136] If a party is unhappy with the decision of the Commission the avenue of judicial review is available.[137]

In 2022, the ACCC authorised the Australian Bedding Stewardship Council ('ABSC') 'Recycle My Mattress' Scheme.[138] In the authorisation, the applicant ABSC sought permission to impose a fixed $10 surcharge per mattress to be passed to consumers,[139] with the primary argument being that the authorisation would

131 Vijaya Nagarajan, 'The Paradox of Australian Competition Policy: Contextualizing the Coexistence of Economic Efficiency and Public Benefit' (2013) 36(1) *World Competition: Law and Economics Review* 133, 133 <https://doi.org/10.54648/woco2013007>.

132 Duns (n 25) 267.

133 See above n 124 and accompanying text.

134 'Guidelines for Excluding Confidential Information from the Public Register for Authorisation (Merger and Non-merger) and Notification Processes', *Australian Competition and Consumer Commission* (Web Page, 2019) <https://www.accc.gov.au/system/files/Guidelines%20for%20excluding%20confidential%20information%20from%20the%20public%20register%20for%20authorisation.pdf>.

135 See Australian Competition and Consumer Commission, 'Authorisation', *Exemptions from Competition Law* (Website) <https://www.accc.gov.au/business/competition-and-exemptions/exemptions-from-competition-law/authorisation>.

136 Ibid.

137 See Roger Featherston, 'Checks and Balances on the ACCC's Powers' (2003) 26(1) *University of New South Wales Law Journal* 296.

138 See Authorisations Register, 'Australian Bedding Stewardship Council', *Australian Competition and Consumer Commission* (Web Page, 26 October 2022) <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/australian-bedding-stewardship-council>.

139 Anoushka William, 'Authorisations and Notifications: "Sustainability Agreement" Authorisations' (2023) 31(1) *Australian Journal of Competition and Consumer Law* 48, 48.

assist with a 'co-ordinated solution across the bedding industry' which tackles the landfilling of end-of-life mattresses.[140] The ACCC heard from interested stakeholders and allowed ABSC to respond to submissions,[141] both aspects which shaped the ACCC analysis.[142] In considering the counterfactual public detriments within the scheme, the ACCC analysed the 'impact on competition between … participants', 'the potential for increased … prices', and 'the potential for limiting … suppliers' ability to deal with … recyclers'.[143] As a point of observation none of these potential detriments were specifically pertinent to the public, rather they were inefficiencies impacting the relevant market. The current authorisation regime has been commended for its flexibility,[144] allowing for a case-by-case economic analysis.[145] However, opportunities to voice concerns relevant to wellbeing, welfare and collective good are largely captured through the robust process of stakeholder guidance, consultations and submissions used by the ACCC. It is fair to say that the ACCC achieves its requirement to consider the public interest through its processes and considering the 'public' in the assessment of an authorisation is unwarranted. As evidenced by the 'Recycle My Mattress' scheme, utilising the 'public' is unduly cautious and somewhat of an arbitrary yardstick.

B Efficiencies and the Nebulous Concept of the 'Public'

Arguing for efficiencies becomes challenging due to the existence of the 'public' criterion in the net public benefit test. Despite the range of public benefits said to be recognised by the ACCC, 'an examination of those decisions suggests that economic analysis dominates'.[146] In this context, efficiencies are most often perceived and advocated by applicants as a public benefit,[147] rather than the broad host of benefits prescribed by the ACCC. Adding in the nebulous concept of the 'public' may lead to outcomes that are 'less desirable from a competition perspective', because of the unpredictability of outcomes.[148] The case of *Re*

140 Ibid 49.
141 Ibid 49–50.
142 See Keogh Brakey, 'Determination: Application for Authorisation AA1000613 Lodged by Australian Bedding Stewardship Council in Respect of "Recycle My Mattress" Product Stewardship Scheme' (Determination No AA1000613, Australian Competition and Consumer Commission, 26 October 2022).
143 William (n 139) 51.
144 See Nagarajan (n 131); William (n 139).
145 Duns (n 25) 266.
146 Ibid 260. See also Nagarajan (n 131).
147 See Anita Wise, 'Authorisations and Notifications: RG Tanna Coal Export Terminal Producers' (2014) 22(3) *Australian Journal of Competition and Consumer Law* 210; Lapenta and Giangaspero (n 72). Cf William (n 139).
148 See Dave Poddar, 'Merger Authorisation Processes in Australia in Light of the Tabcorp Decision (It's Hip to Be Square – Hipster Economics and Antitrust)' (2019) 27(1) *Australian Journal of Competition and Consumer Law* 13, 24.

Tabcorp Holdings ('*Tabcorp*')[149] serves as an illustrative example of this point.[150] *Tabcorp* concerned an authorisation between two entities, on judicial review from the ACCC, where the Australian Competition Tribunal ('Tribunal') held that among other things the authorisation would likely result in net public benefits,[151] thereby granting authorisation. The Tribunal gave significant weight to private benefits stemming from the authorisation, specifically, 'revenue increases, productivity gains and [notably] economic efficiencies'.[152] This was despite the Tribunal observing that greater weight is to be given to wider public benefits.[153] On the other hand, when assessing the authorisation the ACCC placed greater emphasis on benefits to consumers when considering net public benefits,[154] leading to a 'different view from the Tribunal on the extent of the public benefits and detriments'.[155] The disagreement between the Tribunal and the ACCC in *Tabcorp* evidences that 'reasonable minds can disagree about the application' of the 'public' criterion on the same facts.[156] Including the 'public' criterion in the net benefit test creates unpredictability and detracts from discussions about efficiencies irrespective of whether these are social, environmental, or economic. It is better to rely on stable competition concepts such as net benefits to 'ensure more predictable and certain outcomes' when assessing efficiencies.[157] By removing the term, the ACCC would gain greater flexibility in its assessment of green antitrust, allowing for a targeted evaluation of the case on its facts rather than restricting it solely to the measure of the 'public'. This amendment would recognise the interconnectedness of economic and environmental concerns and become more aligned with the Dutch regulator, who is moving toward a holistic and collaborative approach to green antitrust. Christine Parker and Vibeke Lehmann Nielsen have noted that '[w]hen businesses see the ACCC as both strong and fair, this improves both compliance management behaviour and attitudes toward compliance'.[158] There is an apprehension that expanding the authorisation

149 *Re Tabcorp Holdings Ltd* [2017] ACompT 5 ('*Tabcorp Authorisation*').

150 Although *Tabcorp Authorisation* (n 149) is not an example of green antitrust, it serves as an example of the difficulties encountered with the public benefit test.

151 *Re Tabcorp Holdings Ltd* [2017] ACompT 1, [542] (Middleton J, Member Latta and Dr Abraham) ('*Tabcorp*'); *Tabcorp Authorisation* (n 149) [281]–[282] (Middleton J, Member Latta and Dr Abraham).

152 Allingham (n 18) 282.

153 *Tabcorp* (n 151) [62] (Middleton J, Member Latta and Dr Abraham); *Tabcorp Authorisation* (n 149) [229], [241], [244], [253] (Middleton J, Member Latta and Dr Abraham).

154 Allingham (n 18) 282.

155 Australian Competition and Consumer Commission, 'ACCC Won't Seek Review of Tabcorp-Tatts Determination' (Media Release MR 228/17, 1 December 2017) <https://www.accc.gov.au/media-release/accc-wont-seek-review-of-tabcorp-tatts-determination>.

156 Allingham (n 18) 285.

157 Poddar (n 148) 24.

158 Christine Parker and Vibeke Lehmann Nielsen, 'The Fels Effect: Responsive Regulation and the Impact of Business Opinions of the ACCC' (2011) 20(1) *Griffith Law Review* 91, 91 <https://doi.org/10.1080/10383441.2011.10854692>.

process 'will allow for a range of ill-defined values to muddy the scope',[159] but for the reasons explained,[160] the Australian experience gives little cause for concern.

V CONCLUSION

Competition law is often perceived to be a barrier to companies collaborating to promote sustainability and a more circular economy. This article argued that this need not be the case. It championed an alternative model where competition law is viewed as a means to an end, specifically, a means to a more circular Australian economy. Recognising the international obligations Australia owes with respect to the climate crisis and rethinking the relationship between traditional assumptions of consumer welfare, this article put forth that green antitrust could make a useful contribution. Exploration of the Dutch and Australian competition regulatory experience with green antitrust revealed that the ACCC treads a fine balance in its duty to consider economic efficiency and consumer welfare. The public benefit test employed by the Australian regulator sufficiently enables for a wide range of interests pertinent to a circular economy to be analysed. The ACCC could consider sustainability gains through fair distribution and releasing guidelines on green antitrust, both measures which could bring about greater objectivity and transparency. Overall, being characterised by its pragmatism and flexibility, the public benefit test has been a valuable mechanism. However, this article proposed that if the goal is a more sustainable and circular economy, then removing the 'public' criterion could be a sound practical step. The inclusion of the 'public' condition is an unduly cautious yardstick which poses challenges when arguing for efficiencies. The removal of the 'public' stipulation would provide greater flexibility in authorisation assessments, minimise potential challenges associated with subjectivity, and allow for a well-rounded evaluation of green antitrust. By embracing the change, the ACCC can effectively leverage competition law as a tool to facilitate positive environmental outcomes and foster innovation in pursuit of a circular Australian economy.

159 Duns (n 25) 267.

160 Including, as referred to above: the ACCC's robust and transparent decision-making process where public interest is considered, the opportunity for judicial review, and efficiencies and economic analysis dominating authorisation decisions.