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Competition Law Treatment of Joint Ventures

A Jurisdictional Guide

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Part 1:

Joint Ventures and Merger Control Legislation, Regulations and Guidelines

1. Please identify the relevant merger control legislation in your jurisdiction and provide a short overview of the merger control regime, noting in particular:
 - If it is suspensive.
 - The relevant authority/ies and any regulations or guidance they have issued in relation to merger control which is specifically applicable to joint ventures (JVs).
 - Please provide links to the relevant legislation, regulations, and guidelines (if possible, in English).

Legislation

The Australian legislation that regulates mergers from a competition law perspective is the Competition and Consumer Act 2010 (Cth) (CCA) and section 50 is the main merger provision of that legislation.¹ Section 50 of the CCA prohibits the acquisition of shares or assets that would have the effect, or likely effect, of substantially lessening competition in a market in Australia.²

Authority

The relevant authority is the Australian Competition and Consumer Commission (ACCC).

Guidance

The ACCC has produced *Merger Guidelines*, which outline its approach to assessing mergers under section 50 of the CCA.³ The ACCC has also produced the *Informal Merger Review Process Guidelines*, which set out the ACCC's process in assessing applications for informal merger review, and the *Merger Authorisation Guidelines*, which outline the ACCC's statutory merger authorisation process.⁴

Voluntary and Non-Suspensory System

There is no legal requirement to notify the ACCC of mergers prior to completion. However, there is a practice of seeking informal merger clearance from the ACCC

¹ Competition and Consumer Act 2010 <www.legislation.gov.au/Details/C2021C00151>.

² Section 50A of the CCA is intended to apply to acquisitions that occur wholly outside of Australia but have an effect on a market in Australia, but it has never been relied upon.

³ Merger Guidelines <www.accc.gov.au/publications/merger-guidelines>.

⁴ Informal Merger Review Process Guidelines <www.accc.gov.au/publications/informal-merger-review-process-guidelines-2013>; Merger Authorisation Guidelines <www.accc.gov.au/publications/merger-authorisation-guidelines>.

in appropriate cases. The ACCC's Informal Merger Review Process Guidelines provide some indication as to when the ACCC may expect to be notified of a merger; however, the decision whether to seek informal merger clearance from the ACCC largely depends on a substantive case-by-case assessment on the facts. Generally, the ACCC expects to be notified of mergers in advance where the products or services of the merger parties are either substitutes or complements, and the merged firm will have a market share greater than 20% post-merger.

Even if parties do not notify a merger to the ACCC, the ACCC can, and does, investigate mergers that it becomes aware of through other channels such as complaints, the media or other regulators within Australia (e.g. the Foreign Investment Review Board (*FIRB*)) or in other jurisdictions.

If the ACCC forms a view that a merger is likely to breach section 50 of the CCA, the ACCC can apply to the Federal Court of Australia for an injunction to prevent a merger from completing.

It is possible for parties to seek formal authorisation of a merger from the ACCC. Section 88 of the CCA gives the ACCC power to grant merger authorisations that provide the parties with statutory protection from legal action by the ACCC or third parties for a breach of section 50 of the CCA.

Application to JVs

2. Is the term “joint venture” defined under your jurisdiction’s merger control legislation? If so, please provide the definition.

The merger control provisions of the CCA do not explicitly refer to JVs but can apply to a JV transaction if it involves the acquisition of shares or assets.

In detail, the term “joint venture” is not defined in the CCA for the purposes of the merger control provisions. However, section 4J of the CCA defines the term for the purposes of JV exceptions to the cartel prohibitions under sections 45AO and 45AP of the CCA.

Section 4J of the CCA provides that a reference in the CCA to a “joint venture” is a reference to an activity in trade or commerce carried on jointly by two or more persons, whether or not in partnership (an unincorporated JV), or carried on by a body corporate formed by two or more persons for the purpose of enabling them to carry on the activity jointly by means of their joint control or ownership (an incorporated JV).

3. Does the relevant merger control legislation explicitly apply to JVs? Alternatively, are JVs subject to merger control only if they involve certain elements, such as an acquisition of shares or assets?

Australian merger control legislation can apply to JVs that involve the acquisition of shares or assets if the acquisition would have the effect, or likely effect, of substantially lessening competition in a market in Australia.

Section 4(4) of the CCA provides that section 50 also applies to joint acquisitions of shares or assets and acquisitions of equitable as well as legal interests in shares or assets.

When assessing whether an acquisition would have the effect or likely effect of substantially lessening competition in a market, the ACCC considers the factors set out in section 50(3) of the CCA, which include barriers to entry, levels of market concentration, the availability of substitutes, import competition, countervailing power, and the ability of the acquirer to significantly and sustainably increase prices or profit margins. In section 50(6) of the CCA, the term “market” is confined to markets within Australia.

Question 3(a) HydroCell JV: Please explain whether the HydroCell JV transaction falls within the scope of the merger control legislation in your jurisdiction. If unclear, please identify what other information would be needed to conclude your analysis. Please assume that any financial threshold or market share/share of supply/size of transaction threshold in your jurisdiction is met.

If the HydroCell JV does not fall within the scope of the relevant merger control legislation, please explain what options may be available to the parties to obtain some degree of legal certainty regarding the HydroCell JV.

Australian merger control legislation can apply to the HydroCell JV if it involves the acquisition of shares or assets and would have the effect, or likely effect, of substantially lessening competition in a market in Australia.

Firstly, the acquisition of equal one-third shareholdings by CarCo, TruckCo and NewCell in the newly created manufacturing entity means that the HydroCell JV could fall within section 50 of the CCA on the basis that it involves the acquisition of shares.

Secondly, the ACCC is likely to expect to be notified of the HydroCell JV in advance because at least two of the parties (i.e. CarCo and TruckCo) offer products that are likely to be considered substitutes or at least complements (i.e. cars) and, for the purposes of this survey, we assume the combined share held by the parties post-merger (i.e. for cars) will exceed 20%.

If the parties decide to notify the ACCC, there is a range of engagement alternatives, depending on the likely impact of a transaction on competition. It is generally advisable to seek informal clearance, a public process involving market enquiries by the ACCC, in cases where the combined share held by the parties in an Australian market would exceed 20%, or where a transaction raises any other potential competition issues, such as increased vertical integration or foreclosure risks. In other cases, involving transactions with lesser degrees of overlap, the ACCC also provides a confidential “pre-assessment” mechanism, which can be sought more quickly, typically within 2–4 weeks. Another option to seek merger clearance is the ACCC’s formal merger authorisation process.⁵

While there is no mandatory requirement to notify mergers to the ACCC, if the parties choose to proceed with the merger without seeking any regulatory consideration, they assume the risk of the ACCC investigating the merger (including issuing statutory notices requiring the production of documents and information⁶) and defending any court action by the ACCC for a contravention of section 50 of the CCA.⁷

⁵ Section 88 of the CCA allows the ACCC to authorise certain conduct including mergers that would or might otherwise contravene sections 50 or 50A of the CCA.

⁶ Section 155 of the CCA gives the ACCC the power to issue compulsory requests for the production of information and/or documents regarding suspected breaches of the CCA. It is a criminal offence to refuse or fail to comply with a section 155 notice, or knowingly produce false or misleading information.

⁷ The ACCC must apply to the Federal Court of Australia for a range of remedies, including an injunction to prevent the transaction from completing, orders for divestiture, or pecuniary penalties up to A\$10 million per contravention for companies, and \$500,000 for individuals. See, for example, sections 76, 80 and 81 of the CCA.

4. **Does the merger control legislation require that a transaction must involve a “change of control” to trigger merger control notification obligations? If so, please describe how a “change of control” is defined and how this would be applied to JVs. If not, please explain which types of JV transactions are subject to merger control notification obligations. Finally, please also indicate whether the merger control rules can apply to JV transactions in the absence of joint control by the parents (e.g. that involve only the acquisition of a minority shareholding).**

JV transactions that give rise to a level of ownership that is less than a controlling interest could fall within section 50 of the CCA if they involve the acquisition of shares or assets and would have the effect, or likely effect, of substantially lessening competition in any market in Australia.

Australian merger control legislation does not require that a transaction involve a “change of control” and there is no reference to or definition of “control” for the purposes of section 50 of the CCA.

The ACCC’s Merger Guidelines note that there is no threshold shareholding for the purposes of section 50 of the CCA, and the acquisition of less than a controlling interest (e.g. partial shareholdings and minority interests) may have anticompetitive effects and contravene the CCA.

The Merger Guidelines provide examples of some of the potential anticompetitive effects of partial and minority interests that include dampening incentives to compete effectively, facilitating coordination and/or providing access to commercially sensitive information of competitors.⁸

5. **Is the concept of “full-functionality” relevant in your jurisdiction? In other words, does the regime distinguish between “full-function” and “non-full-function” JVs? If so, please explain how these terms are defined in your jurisdiction and how the merger control rules apply to each type of JV.**

The merger control provisions of the CCA do not explicitly refer to JVs and the concept of the “full-functionality” of a JV is not relevant.

Question 5(a) HydroCell JV: If your jurisdiction distinguishes between full-function and non-full-function JVs, please explain whether the HydroCell JV would be treated as full-function or non-full-function.

Would this answer change if the parties decide only to engage in R&D collaboration, but not the joint manufacturing activity? Please explain how this affects your analysis, if at all.

Not applicable.

⁸ See Merger Guidelines, Appendix 2, paras 9–19.

- 6. If the concept of full-functionality is not relevant in your jurisdiction, please indicate whether and how the merger control regime distinguishes between JVs that are independent from their owners and those which are not. Please explain how the merger control rules apply to each of these situations.**

Australian merger control legislation can apply to JV transactions if they involve the acquisition of shares or assets and would have the effect, or likely effect, of substantially lessening competition in any market in Australia, regardless of whether the JV is independent from its owners.

As set out in the Merger Guidelines, the ACCC's focus will be on whether the acquisition may give rise to anticompetitive effects such as leading to muted competition or coordinated conduct between rivals and providing access to commercially sensitive information of competitors.⁹

- 7. Please explain whether the merger control regime applies in the same way to unincorporated JVs (e.g. a partnership) as to incorporated JVs.**

The merger control provisions of the CCA can apply to acquisitions of shares or assets, regardless of whether the JV is incorporated or unincorporated, if they would have the effect, or likely effect, of substantially lessening competition in any market in Australia.

- 8. Please explain whether contractual arrangements between companies that do not involve the formation of a separate JV entity are subject to merger control notification.**

The merger control provisions of the CCA could apply to contractual arrangements that do not involve the formation of a separate JV entity if the arrangements involve the acquisition of any assets and that acquisition would have the effect, or likely effect, of substantially lessening competition in any market in Australia.

For completeness, other parts of the CCA, not specific to mergers, deal with anticompetitive arrangements and cartel conduct. (See response to Question 2.)

Changes of Ownership or Scope in Existing JVs

- 9. Please explain how the merger control rules in your jurisdiction apply to changes in ownership of an existing JV. Please consider changes where:**
- One owner is replaced by a new owner (i.e. sale of shares or other ownership interests);
 - One or more new owners are added (with or without a change of control);
 - One or more owners exit (with or without a change of control); and,
 - Changes where the identity of the owners stays the same, but there is a change in the level of shareholdings/other ownership interests/rights.

⁹ *ibid.*

Any changes in ownership of shares in an existing JV company will be assessed under the same test as for the creation of the JV, which means that it is necessary to consider whether the change gives rise to an acquisition of shares that would have the effect, or likely effect, of substantially lessening competition in any market in Australia.

For example, potential acquisitions of shares arising from changes in ownership of an existing JV may include:

- A new shareholder acquires shares in an existing JV company (either by acquiring the interest of an existing shareholder or by acquiring newly issued share capital); or
- A current shareholder in the JV company divests its interest to the other existing shareholders, thereby those shareholders acquire more shares.

For example, in 2016, Qube Holdings Limited (*Qube*) proposed to acquire the 50% interest in Australian Amalgamated Terminals Pty Ltd (AAT) that it did not already hold, and which was held by a consortium. The acquisition would result in Qube holding 100% of AAT. The ACCC reviewed Qube's proposed acquisition of the consortium's 50% interest in AAT. The ACCC's concerns included that the proposed acquisition would give Qube the incentive and ability to discriminate against existing and potential competing suppliers of stevedoring and pre-delivery inspection services. The ACCC decided to not oppose the transaction after Qube offered court-enforceable undertakings to ensure Qube did not discriminate against other stevedores and pre-delivery inspection operators that compete with Qube or its related entities.¹⁰

Question 9(a) HydroCell JV: How would the merger control rules in your jurisdiction apply where CarCo exits, and the JV continues to be jointly owned by TruckCo and NewCell? Would the answer differ if TruckCo exited and the JV continued to be owned by CarCo and NewCell?

If CarCo exits and TruckCo and/or NewCell acquire CarCo's interest in the HydroCell JV, the CCA merger control provisions could apply on the basis that it involves the acquisition of shares, depending on the effect on competition. The same reasoning applies if TruckCo exits and CarCo and/or NewCell acquires TruckCo's interest in the HydroCell JV.

It should be noted that in both scenarios one of the two parties offering products that are likely to be considered substitutes or at least complements will exit the HydroCell JV. This indicates that the acquisition might not be considered to have the effect or likely effect of substantially lessening competition in relation to cars in Australia. In those circumstances, the ACCC might not expect to be notified of the acquisition in advance if there are no potential concerns regarding vertical integration and foreclosure.

¹⁰ See ACCC, "Qube Holdings Limited – proposed acquisition of 50 per cent interest in Australian Amalgamated Terminals Pty Ltd" (24 November 2016) <www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/qube-holdings-limited-proposed-acquisition-of-50-per-cent-interest-in-australian-amalgamated-terminals-pty-ltd>.

10. Please explain how the merger control rules in your jurisdiction apply to changes in the scope of an existing JV.

If the scope of an existing JV changed, the merger control provisions of the CCA could apply if there has also been a change in the shareholding structure of the JV and/or a change in the ownership of assets involving an acquisition of shares or assets.

For example, a change in the scope of an existing JV may give rise to an acquisition of assets where the JV purchases new assets (e.g. a manufacturing facility) to expand the range of products supplied by the JV, or an existing shareholder sells some assets (e.g. patents and trademarks) to the JV so that it can market new products.

If the ACCC has previously reviewed an acquisition of shares or assets in relation to the formation of a JV and decided not to oppose the transaction based on a court-enforceable undertaking that would be impacted by a change in the scope of the JV activities (e.g. the JV would no longer supply an input required by customers that compete with the shareholders in a downstream market), it is possible that the ACCC might raise concerns about compliance with the undertaking.

If a change in the scope of an existing JV raises concerns about potential coordination between the shareholders and the JV (e.g. the JV enters a market and an existing shareholder then exits that market), the ACCC could decide to investigate the parties' conduct under other provisions of the CCA regarding anticompetitive arrangements and cartel conduct.

Question 10(a) HydroCell JV: Assume that the parties decide in the future to expand the HydroCell JV. Assume that CarCo and TruckCo contribute sales assets and infrastructure, and that the parties decide to manufacture and brand a "HydroCell" branded vehicle. Please explain if this could trigger a new filing under the relevant merger control rules?

If the contribution of sales assets and infrastructure to the HydroCell JV involves an acquisition of assets by the HydroCell JV, then the CCA merger control provisions could apply, depending on the effect on competition. It should be noted that "acquire" for the purposes of section 50 of the CCA is not limited to acquisition by way of purchase but also includes circumstances where assets are leased or hired. As such, we would need further information about how the sales assets and infrastructure will be contributed to the HydroCell JV. The CCA's merger control provisions would not apply to a decision to manufacture and brand a HydroCell-branded vehicle if it does not involve the acquisition of any assets or shares.

11. Please explain how the merger control rules in your jurisdiction apply where a new controlling shareholder is introduced. Is it possible that a (new) notification requirement could arise?

If the introduction of a new controlling shareholder involves the acquisition of shares, the CCA's merger control provisions could apply, depending on the effect on competition in a market in Australia.

Question 11(a) HydroCell JV: Assume that the parties decide in the future to expand the HydroCell JV by adding another parent, EVHybridCo, which focuses on electric and hybrid vehicles. If EVHybridCo also obtains joint control of the HydroCell JV, please explain if this could trigger a new filing under the relevant merger control rules?

If EVHybridCo obtains joint control of the HydroCell JV through the acquisition of shares or assets in the JV entity, then this may need to be notified to the ACCC as it will be an acquisition for the purposes of section 50 of the CCA. In determining whether an acquisition falls within section 50 of the CCA, it is necessary to also consider whether EVHybridCo's acquisition of shares or assets would have the effect, or likely effect, of substantially lessening competition in any market in Australia.

Formation of New JVs

12. Please explain how the merger control rules in your jurisdiction apply to the following types of transactions. In each case, please identify whether these transactions are subject to notification, and how and to which entity(ies) the jurisdictional tests apply. If helpful, please provide a case or hypothetical example:
- Formation of an entirely new JV, with no contribution of a business or assets amounting to a business (e.g. “greenfield JV”);
 - New JV formed by the transfer of businesses/assets from the parents (e.g. “brownfield JV”); and
 - Temporary JVs, such as buying consortia or other special purpose JVs.

Greenfield JV

If an entirely new JV is formed as a corporate entity, Australian merger control legislation could apply in circumstances where the parents of the new JV acquire shares in the newly formed JV entity and that acquisition of shares would be considered to have the effect, or likely effect, of substantially lessening competition in any market in Australia. For example, company A and B decide to form a new JV company, and each acquire a 50% shareholding in that company.

For example, Channel 7 and Foxtel's proposed JV to collectively produce and supply a new standalone subscription-video-on-demand service called “Presto Entertainment”. The ACCC ultimately decided not to oppose the transaction.¹¹

Brownfield JV

If a new JV is formed by the transfer of businesses/assets from the parent entities, Australian merger control legislation could apply in circumstances where the JV entity acquires assets from the parent entities (e.g. a manufacturing facility), or acquires shares in a subsidiary of a parent entity that operates the transferred

¹¹ See ACCC, “Channel 7 and Foxtel proposed joint venture” (2 March 2015) <www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/channel-7-and-foxtel-proposed-joint-venture> .

business or assets, and the acquisition would be considered to have the effect, or likely effect, of substantially lessening competition in any market in Australia.

For example, in CSR Ltd (*CSR*) and Boral Ltd's (*Boral*) proposed JV, CSR and Boral combined their clay brick businesses located on the east coast of Australia including their operations in New South Wales/ACT, Victoria, Queensland, South Australia and Tasmania. The proposed JV comprised the manufacture, marketing and supply of clay bricks, as well as associated clay sourcing activities. Under the proposed JV, CSR and Boral no longer offered separate clay brick product ranges or competed on price or other terms of supply to customers in eastern Australia. The ACCC ultimately decided not to oppose the transaction.¹²

Temporary JVs

There is no specific requirement in relation to section 50 of the CCA that an acquisition of shares or assets must be long-term or of a particular duration. However, in applying the concept of "substantially lessening competition", the Australian courts have noted that the term "substantial" means that the effect on competition in the relevant market must be "meaningful or relevant to the competitive process" and little weight is given to short-term effects that can be readily corrected by market processes.¹³ This means that if a JV is temporary, there are good arguments as to why it should not be considered to have the effect of substantially lessening competition in a market.¹⁴

Question 12(a) HydroCell JV: How does the fact that the parties will each contribute existing assets to the HydroCell JV, making it a "brownfield" JV rather than a "greenfield" JV, impact your analysis?

The contribution of existing assets by each of the parties to the HydroCell JV, making it a "brownfield" JV, might mean that Australian merger control legislation applies if the assets are acquired by the JV and any of the acquisitions would be considered to have the effect, or likely effect, of substantially lessening competition in any market in Australia.

Application of Merger Control Notification Thresholds

13. **If the thresholds for notification in your jurisdiction are based on turnover and/or assets, please explain how these thresholds are applied to transactions involving JVs. Please indicate which specific entity(ies)'s turnover and/or assets**

¹² See ACCC, "ACCC to not oppose CSR and Boral's proposed clay brick joint venture" (Press release, 18 December 2014) <www.accc.gov.au/media-release/accc-to-not-oppose-csr-and-borals-proposed-clay-brick-joint-venture> .

¹³ See *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] FCA 38 (2000) ATPR 41-752, 114; *Universal Music Australia Pty Ltd v ACCC* [2003] FCAFC 193, (2003) 131 FCR 529; *Australian Gas Light Co v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317, (2003) ATPR 41-966, 352.

¹⁴ See *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 230 ALR 217.

are counted for notifiability determination and the specific test involved. For example, are any of the following taken into account:

- The JV itself;
- Controlling parent(s) or any groups to which they belong;
- Non-controlling parent(s) or any groups to which they belong; or
- Any other entities?

For example, if Parent A acquires 80% of C, and Parent B acquires the remaining 20%, how does a revenue threshold apply? Is the turnover of A, B and C relevant? Only A&C? Or both A&C and B&C but as separate transactions?

It is not mandatory to notify mergers to the ACCC and the CCA does not have a minimum turnover or asset value threshold for notification of a merger to the ACCC.

14. **If the thresholds for notification are based on market shares, please explain how these thresholds apply to transactions involving JVs. In particular, are the market shares of the JV parents' activities outside the JV taken into account?**

It is not mandatory to notify mergers to the ACCC and the CCA does not have a market-share threshold for notification of a merger to the ACCC. However, the ACCC's Merger Guidelines note that the ACCC expects to be notified of mergers in advance where the products or services of the merger parties are either substitutes or complements, and the merged firm will have a market share greater than 20% post-merger.

As explained in response to Question 6, the ACCC's Merger Guidelines indicate that the ACCC's competition analysis will consider whether the acquisition may give rise to anticompetitive effects such as leading to muted competition or coordinated conduct between rivals, and the market shares of the JV parents' activities outside the JV might be relevant to that analysis.¹⁵

15. **If the thresholds for notification are based on a size of transaction test, please explain how these thresholds apply to transactions involving JVs.**

It is not mandatory to notify mergers to the ACCC and the CCA does not have a size of transaction test for notification.

Question 15(a) HydroCell JV: Assuming that the HydroCell JV could fall within the scope of merger control legislation in your jurisdiction, please explain how the relevant financial thresholds and/or market share (or share of supply) thresholds apply, taking into account the questions above.

Not applicable.

¹⁵ See Merger Guidelines, Appendix 2, paras 9–19.

Local Nexus

- 16. Do the merger control rules in your jurisdiction require that a JV transaction must have a local nexus? If so, please describe how the requirement is structured under the relevant legislation.**

For the CCA's merger control provisions to apply, there is a local effects test in that the ACCC must find that the acquisition of shares or assets will have an effect or likely effect of substantially lessening competition in a market for goods or services in Australia or in a region, territory or state of Australia. This includes a section of a global or regional market that exists within Australia.

- 17. Please explain whether notification can be required for "offshore" JVs based solely on the parents' respective turnover, other financial measure or market share? Please address the situation where the JV itself:**

- Has no physical presence in your jurisdiction but makes sales into your jurisdiction; or,
- Has no physical presence and makes no sales into your jurisdiction.

In practice, does the competition authority enforce the notification obligations in such situations? Please provide relevant case examples if available.

It is not mandatory to notify mergers to the ACCC, but the ACCC can (and does) investigate mergers if it becomes aware of them and has concerns that they could have an anticompetitive effect in breach section 50 of the CCA.

Section 50 of the CCA can apply to a JV transaction involving a foreign-to-foreign acquisition of shares or assets, if the merger parties' activities include Australia, such that the acquisition could have the effect, or likely effect, of substantially lessening competition in an Australian market. Section 50 of the CCA applies if the merger parties carry on a business in Australia through a subsidiary or other representative, even if the acquirer has no direct operations in Australia.

Section 50A of the CCA can also apply to foreign-to-foreign acquisitions of a controlling interest in a corporation that carries on business in Australia. Section 50A provides that if such a transaction would not otherwise be caught by section 50 of the CCA, the ACCC can approach the Australian Competition Tribunal for a declaration that the transaction has the effect, or likely effect, of substantially lessening competition in an Australian market. To date, section 50A has not been used by the ACCC.

Whether or not the JV makes sales into Australia is relevant to the assessment of whether there could be an anticompetitive effect in Australia, including whether there are Australian customers or businesses that could be affected.

Question 17(a) HydroCell JV: If your jurisdiction requires a local nexus for a JV transaction to be notifiable, please explain whether the HydroCell JV would likely be considered to have a local nexus with your jurisdiction and how this would be determined. CarCo and TruckCo each respectively sell through independent and owned dealerships in the various countries and regions in which they are active. If the facts are not sufficient to make this determination, please identify what else you would need to know.

At least two of the parties (i.e. CarCo and TruckCo) supply cars in Australia through independent and owned dealerships, which means that Australian consumers or businesses could be affected by the HydroCell JV. Assuming the HydroCell JV involves the acquisition of shares or assets, the Australian merger control provisions could apply if the ACCC finds that the acquisition will have an effect or likely effect of substantially lessening competition in an Australian market.

- 18. If a JV transaction *does not* meet the jurisdictional thresholds for review in your jurisdiction, does the relevant competition authority nevertheless have the power to investigate the JV under the relevant merger control rules? What is the relevance of the JV's local nexus in this respect?**

It is not mandatory to notify mergers to the ACCC, but the ACCC can (and does) investigate mergers if it becomes aware of them and has concerns that they could have an anticompetitive effect in breach of section 50 of the CCA. Section 50 of the CCA applies if an acquisition will likely have local effects (i.e. an effect, or likely effect, of substantially lessening competition in a market in Australia).

Notification of JV Transactions

- 19. Which party(ies) is (are) obliged to provide a notification to the competition authority in your jurisdiction in a JV transaction? For example, does each parent separately submit a notification, or is there one joint notification? Does the JV itself have to notify? Please explain if this varies for the different scenarios related to existing and new JVs (see Questions 9 and 10), and how the rules apply in each scenario.**

There is no obligation to notify the ACCC as Australia has a voluntary regime. However, if a JV transaction is notified to the ACCC under the informal process, the party acquiring the assets or shares in the JV entity will usually make the submission. If there are multiple parties acquiring the assets or shares in the JV entity, typically there would be one joint submission on behalf of all acquiring parties. The JV entity itself could submit a notification to the ACCC under the informal process if it is acquiring assets, regardless of whether it is for an existing JV or to create a new JV.

- 20. Are JVs eligible for any simplified notification procedures or other special procedural or timing rules or exemptions?**

There are no simplified procedures or other special procedural or timing rules or exemptions for JVs.

Question 20(a) HydroCell JV: Assuming that the HydroCell JV is subject to the merger control legislation in your jurisdiction, based on the available facts, is the transaction eligible for simplified treatment, or do any special procedural rules or exemptions apply? What other information would be needed to make this determination?

In addition, assuming that the HydroCell JV is subject to mandatory (or voluntary) review in your jurisdiction, please indicate which party(ies) is (are) obliged to file.

Not applicable.

21. Please explain the extent to which notifying a JV transaction (and receiving clearance) provides the parties with protection from future intervention under substantive competition law rules (see also Part 2 below)?

A decision of the ACCC under the informal process to grant clearance does not protect the merging parties from possible legal action by third parties in the Federal Court for an alleged breach of section 50 (although such third-party action is extremely unusual). Third parties can seek damages, declarations and/or divestiture of the shares or assets acquired for a breach of section 50. With that said, if the ACCC decides to not oppose a proposed acquisition under the informal process, this should provide comfort to the merger parties as it indicates the ACCC's view based on available information is that the proposed acquisition is unlikely to have the effect of substantially lessening competition in any Australian market in breach of section 50.

If the ACCC decides to grant merger authorisation in relation to a proposed acquisition under section 88 of the CCA, then the merging parties are protected from legal action by the ACCC or third parties for a breach of section 50. Third parties could, nevertheless, apply to the Australian Competition Tribunal for review of the ACCC's merger authorisation decision, provided they can explain their interest in the decision.

Question 21(a) HydroCell JV: One of the parties' stated objectives is legal certainty. Please explain the extent to which the parties will obtain legal certainty from notifying the HydroCell JV (assuming that it falls within the scope of the relevant merger control legislation).

If the parties notify the ACCC under the informal process and the ACCC decides to not oppose the proposed acquisition, the parties should have comfort that, based on available information, the ACCC's view is that the JV is unlikely to substantially lessen competition in breach of section 50. There is a very low risk that a third party can seek damages, declarations and/or divestiture of the shares or assets acquired in connection with the JV. If it is a priority for the parties to obtain protection from legal action by the ACCC or third parties, the parties could seek a merger authorisation in relation to the JV, which would provide greater protection from third-party legal action.

Assessment of a JV Under Merger Control

22. **Please explain the competition test that applies to transactions subject to merger notification and, in particular, how this test applies to JV transactions. Please describe the primary (horizontal, vertical, conglomerate or any other) theories of harm and factors normally considered. Are there separate tests, theories of harm, or factors that apply to the concentrative effects of a JV transaction (e.g. significantly impede effective competition) and the cooperative effects (e.g. coordination of competitive behaviour of the parents)? Please include references to relevant legislation/guidelines and important case law.**

The competition test that the ACCC applies under the informal process is whether the proposed acquisition will result, or be likely to result, in a substantial lessening of competition in a relevant Australian market. As explained in the ACCC's Merger Guidelines, this test requires a forward-looking analysis comparing the likely state of competition in the future with and without the proposed acquisition.¹⁶

When determining whether a proposed acquisition is likely to result in a substantial lessening of competition in a relevant Australian market, section 50(3) of the CCA sets out a non-exhaustive list of factors that must be considered:

- The actual and potential level of import competition in the market;
- The height of barriers to entry and expansion in the market;
- The level of concentration in the market;
- The degree of countervailing power in the market;
- The likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
- The extent to which substitutes are available in the market or are likely to be available in the market;
- The dynamic characteristics of the market, including growth, innovation and product differentiation;
- The likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor; and
- The nature and extent of vertical integration in the market.

The ACCC analyses JVs caught by section 50 in the same way that it analyses other acquisitions. In addition, the Merger Guidelines indicate that, where the acquisition involves parties acquiring a partial shareholding or minority interest, the ACCC's competition analysis will also consider whether the acquisition may give rise to anticompetitive effects such as leading to muted competition or coordinated conduct between rivals.¹⁷

¹⁶ See Merger Guidelines, paras 3.14–3.19; *Australian Gas Light Co v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317.

¹⁷ See Merger Guidelines, Appendix 2, paras 9–19.

For a merger authorisation under section 88 of the CCA, the ACCC must be satisfied that either the proposed acquisition would not be likely to have the effect of substantially lessening competition, or is likely to result in a net public benefit (i.e. the likely public benefit resulting from the proposed acquisition would outweigh the likely resulting public detriment). See the response to Question 23 for further discussion.

Question 22(a) HydroCell JV: Please provide a short, summary of the competition considerations that would apply to the HydroCell JV if it is subject to your jurisdiction's merger control rules. In responding to this question, please consider the primary (horizontal and vertical) theories of harm that may be considered under the merger control rules. Please also consider whether the analysis of the HydroCell JV would differ under the substantive competition (i.e. non-merger control) rules.

For the HydroCell JV, the ACCC would likely focus on whether it will increase market concentration, including by considering the degree of horizontal overlap between CarCo and TruckCo and the extent to which substitutes will be available post-merger. The ACCC is also likely to focus on any vertical relationships arising from the HydroCell JV and whether the parties have an incentive and ability to engage in vertical foreclosure of either competing vehicle manufacturers or suppliers of next-generation hydrogen fuel cell technology. Another potential area of focus for the ACCC is how the HydroCell JV would likely impact innovation in relation to hydrogen fuel cell technology. The ACCC is also likely to focus on whether CarCo and TruckCo's minority shareholdings in the HydroCell JV could dampen their incentives to compete effectively, facilitate coordination and/or provide access to commercially sensitive information.

The HydroCell JV is likely to also be assessed under other non-merger provisions of the CCA such as the provisions regarding anticompetitive arrangements and cartel conduct, as set out in Part 2.

23. Is there any scope for productive, dynamic or other efficiencies or public interest considerations to be taken into account when assessing a JV that is subject to merger control? If yes, explain how this is done.

When assessing whether a proposed acquisition is likely to result in a substantial lessening of competition under the informal process, the ACCC does not consider non-competition issues (e.g. non-competition public benefits) and will only consider economic efficiencies if the parties can demonstrate the efficiency gain is likely to have an impact on competition by being passed on to consumers, for example, in the form of lower pricing.

However, in the merger authorisation process the ACCC will assess whether the transaction is likely to result in a net public benefit, which can include consideration of non-competition public benefits and economic efficiencies. Parties to a JV may wish to seek merger authorisation under section 88 of the CCA, where the acquisition could be considered to raise competition issues but would also give rise to material public benefit.

24. Is there any scope for exigent/emergency considerations (e.g. a firm failing, possible pandemic-related competitor collaborations, energy shortages etc.) to be taken into account in the assessment of a JV that is subject to merger control?

As explained in the ACCC's Merger Guidelines, the ACCC will only take into account failing-firm arguments when assessing the future state of competition without the proposed acquisition where the parties can demonstrate that:

- One of the parties is in imminent danger of failure and is unlikely to be successfully restructured without the proposed acquisition;
- The assets associated with that party will leave the industry; and
- The likely state of competition with the proposed acquisition will not be substantially less than the likely state of competition after that party has exited and its customers have found alternative sources of supply.¹⁸

Non-competition public benefits such as ensuring access to essential goods during a pandemic or addressing energy shortages can be assessed by the ACCC in the merger authorisation process regarding whether the transaction is likely to result in a net public benefit. However, the ACCC will not consider such non-competition issues under the informal process.

25. What limits – if any – exist in your jurisdiction on parties' ability to jointly petition/lobby governments?

The ACCC is an independent statutory agency and petitioning or lobbying the Australian government is unlikely to have any influence on its decisions. Generally, parties are free to jointly petition or lobby the Australian government, subject to the parties not sharing competitively sensitive information.

Question 25(a) HydroCell JV: How would the parties' objective of encouraging governments to invest in hydrogen fuelling infrastructure likely be viewed under the substantive competition and/or merger control rules?

The parties' objective of encouraging governments to invest in hydrogen fuelling infrastructure would not be considered by the ACCC under the informal process. However, as explained in response to Questions 23 and 24, non-competition public benefits can be assessed by the ACCC in the merger authorisation process regarding whether a proposed acquisition is likely to result in a net public benefit.

Remedies

26. If a notified JV (or agreements/provisions related to it) is found to be anticompetitive, what are the available behavioural and/or structural remedies that can be imposed by the competition authority or the courts to address the concerns?

Under section 87B of the CCA, the ACCC can accept court-enforceable undertakings (*87B Undertakings*) to remedy competition concerns that might arise from a proposed acquisition, including notified JVs.

¹⁸ See Merger Guidelines, paras 3.22–3.23.

While it is possible for parties to offer behavioural or structural remedies (or a combination of both), the ACCC has discretion over whether to accept a remedy and has a strong preference for structural remedies, which is also reflected in its Merger Guidelines.¹⁹ The reasons given by the ACCC for preferring structural remedies include that it considers they tend to be more straightforward to administer, monitor and enforce.

The ACCC recently refused to approve a behavioural undertaking offered by Google relating to its proposed acquisition of Fitbit because it did not believe Google would adhere to the undertakings.²⁰

27. Is the competition authority in your jurisdiction willing to negotiate commitments designed to ensure that a JV does not have anticompetitive effects? If yes, please provide examples.

As explained in response to Question 26, the ACCC can accept 87B Undertakings to remedy competition concerns that might arise from a proposed acquisition, including a notified JV.²¹

Parties (usually the acquirer) can offer 87B Undertakings at any stage of the informal process or the merger authorisation process, although they are typically offered after the ACCC has raised preliminary competition concerns to address those concerns.

The ACCC typically requires parties to offer 87B Undertakings based on its standard form and does not accept changes to most of its operational provisions. Any proposed amendments to the operational provisions must be explained in a submission to the ACCC.

¹⁹ See Merger Guidelines, Appendix 3, paras 11–12.

²⁰ See ACCC, “ACCC rejects Google behavioural undertakings for Fitbit acquisition” (22 December 2020) <www.accc.gov.au/media-release/accc-rejects-google-behavioural-undertakings-for-fitbit-acquisition>.

²¹ For example, see ACCC, Gebr. Knauf KG (28 March 2019) <www.accc.gov.au/public-registers/undertakings-registers/gebr-knauf-kg> and ACCC, “GlaxoSmithKline Plc & Novartis Consumer Health Australasia Pty Limited – s.87B undertaking” (17 December 2014) <www.accc.gov.au/public-registers/undertakings-registers/s87b-undertakings-register/glaxosmithkline-plc-novartis-consumer-health-australasia-pty-limited-s87b-undertaking>.

Part 2:

Analysis of Non-Notifiable Joint Ventures or Issues Arising After Merger Control Clearance

Please note that these questions relate specifically to JVs that (a) are not subject to your jurisdiction's merger control laws; or (b) arise after merger control clearance and consummation of the notified transaction. Collectively, these are described in the questions below as "outside of merger control".

Legislation and Enforcement

- 28. Aside from the merger control rules described in Part 1, is there any other legislation and/or guidelines governing JVs under your jurisdiction's competition laws? Please provide a short description, including how JVs outside of merger control are defined. Please provide a link to the relevant legislation, regulations, and guidelines (if possible, in English).**

Aside from the merger control provisions, there are other provisions of the CCA, including the prohibitions of anticompetitive agreements,²² concerted practices²³ and cartel conduct,²⁴ which also apply to JVs.

There is no general definition of JVs under the CCA. The common law in Australia provides some guidance on the characteristics of JVs, although there is no settled meaning of the term.

In *United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1 the majority of the High Court of Australia observed that in ordinary language a JV means an association of persons for the purposes of a particular trading, commercial, mining or other undertaking with a view to mutual profit, with each participant usually contributing funds, property or skill.

²² Sections 45(1)(a) and (b) of the CCA prohibit contracts, arrangements or understandings that have the purpose, effect or likely effect of substantially lessening competition in a market.

²³ Section 45(1)(c) prohibits concerted practices that have the purpose, effect or likely effect of substantially lessening competition.

²⁴ Under sections 45AD, 45AF, 45AG, 45AJ and 45AK of the CCA, competitors are prohibited from making or giving effect to a contract, arrangement or understanding that contains a cartel provision. This includes any provision with the purpose or likely effect of controlling pricing, or the purpose of restricting supply volumes or capacity, allocating customers or territories, and bid-rigging.

As was observed in *Gibson Motor Sport Merchandise Pty Ltd v Forbes* [2005] FCA 749, common characteristics of JVs include:

- Holding proprietary interests in the assets of the joint undertaking, often, but not necessarily, as tenants-in-common;
- Exercising joint control;
- Contributing to the joint undertaking, but not necessarily equally;
- Enjoying rights and assuming obligations, which are often several, and calculated by reference to ownership of shares and/or contributions made;
- Having a joint (or community of) interest in the performance of the undertaking’s purpose; and
- Associating in the undertaking for mutual commercial gain.

As explained in response to Question 2, JVs are also defined in section 4J of the CCA for the purposes of the JV exceptions under sections 45AO and 45AP of the CCA to the prohibitions of cartel conduct.

Section 4J of the CCA defines JVs as an activity in trade or commerce carried on jointly by two or more persons, whether or not in partnership (an unincorporated JV) or carried on by a body corporate formed by two or more persons for the purpose of enabling them to carry on the activity jointly by means of their joint control or ownership (an incorporated JV).

The concept of whether a JV exists for the purpose of an exception to cartel conduct in the CCA was considered in *ACCC v Cascade Coal (No 3)* [2019] FCAFC 154 (*Cascade Coal*).²⁵ See further details on Cascade Coal at Question 40.

29. If your jurisdiction distinguishes between “concentrative” and “cooperative” JVs, what rules apply to concentrative JVs that do not trigger the notification thresholds? What rules are applied to JVs that have been cleared in merger control? Please also briefly indicate the authority responsible for enforcement.

Not applicable. There is no distinction between concentrative and cooperative JVs.

Question 29(a) HydroCell JV: If the HydroCell JV is subject to the merger control rules of your jurisdiction, to what extent could the substantive competition laws nevertheless apply to the HydroCell JV?

Even if the HydroCell JV has been cleared by the ACCC under the merger control provisions of the CCA, other provisions of the CCA such as the prohibitions of anti-competitive agreements, concerted practices and cartel conduct will still apply to the HydroCell JV and the parties.

²⁵ The Court was considering an earlier version of the JV exception to cartel conduct in section 76C of the Trade Practices Act (Cth) 1974 which was amended following the Harper Review however the reasoning of the court provides useful guidance on the application of the current exceptions in sections 45AO and 45AP of the CCA.

Investigations

30. Please describe the process (e.g. procedural steps, timeline, etc.) for the assessment of JVs outside of merger control? Is there a time bar for the authority to investigate a JV after its establishment? Can the authority prevent or suspend the JV's implementation/operation while it carries out its investigation?

Outside of the merger control provisions of the CCA, the ACCC may conduct investigations into potential contraventions of other provisions of the CCA such as the prohibitions of anticompetitive agreements, concerted practices and cartel conduct by JVs and/or parties to JVs. There is no set timeline for such investigations and the ACCC has broad powers to compel the production of documents and/or provision of information from parties.

Sections 77(1) and (2) of the CCA provide that the ACCC may commence proceedings for the recovery of a civil pecuniary penalty within six years after the contravention. In *Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd* [2016] FCAFC 42, the court held that section 77(2) is to be read as a limitation on the ACCC's power to seek a pecuniary penalty for those contraventions which were more than six years prior to the commencement of the proceeding, but not the overall originating process and pleading.

The ACCC does not have the power to force parties to prevent or suspend the operation or implementation of a JV while it carries out its investigation. However, the ACCC can apply to the court for an injunction under section 80 of the CCA to restrain the JV and/or parties to a JV from engaging in conduct in contravention of a provision of Part IV of the CCA, such as the prohibitions of anticompetitive agreements, concerted practices and cartel conduct.

Question 30(a) HydroCell JV: If the HydroCell JV is investigated, what are the implications for the parties' timing objectives? Will they be able to begin operations pending the competition authority's investigation?

Unless the ACCC makes an application to the court under section 80 of the CCA for an injunction to restrain the HydroCell JV and/or the parties from beginning the JV operations on the basis that it would contravene Part IV of the CCA, the parties will be able to begin operations prior to the ACCC completing its investigation.²⁶ The parties would be taking the risk that by commencing operations they are engaging in a contravention of the CCA and an ACCC investigation still has the potential to be disruptive, costly and time-consuming.

²⁶

For the grant of an interlocutory injunction, the ACCC would have to satisfy the court that it has a prima facie case, and the balance of convenience favours the grant of the injunction.

Authorisations

31. Is there a possibility to apply for an exemption order, approval or other form of authorisation for a JV? If not, is competition compliance based on self-assessment by the parties?

Under section 88 of the CCA, upon application by the parties, the ACCC has the power to authorise planned activities that will or might breach Part IV of the CCA, including breaches of the prohibitions of anticompetitive agreements, concerted practices and cartel conduct.²⁷ Authorisation provides parties with statutory protection from legal action in relation to that conduct, for the authorisation's duration.²⁸ Authorisation can only be granted before the conduct has occurred. Applications for authorisation must be granted within 90 days (however that timing can be extended). The ACCC can specify conditions in the authorization that must be complied with to benefit from the statutory protection from Part IV breaches.²⁹

The authorisation test differs depending upon whether the conduct is prohibited per se (e.g. cartel conduct) or on the basis that it likely substantially lessens competition (e.g. anticompetitive agreements and concerted practices). For the authorisation of conduct that is not prohibited per se but requires a substantial lessening of competition to contravene the CCA, the applicant must satisfy the ACCC either that the conduct would not be likely to substantially lessen competition, or that the conduct is likely to result in a public benefit that would outweigh the likely public detriment (i.e. a net public benefit). For the authorisation of per se conduct, the party seeking authorisation must demonstrate that the conduct would produce a net public benefit.

The ACCC has also published Guidelines for Authorisation of Conduct (non-merger) which provide detailed guidance on the process.³⁰

There are also limited circumstances in which parties can notify the ACCC of anticompetitive conduct which it proposes to engage in: small business collective

²⁷ It is the responsibility of the parties planning to engage in the contravening activities to apply to the ACCC for authorisation of the conduct.

²⁸ For example, see ACCC, Gladstone Power Station Joint Venture (29 October 2021) <www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/gladstone-power-station-joint-venture> and ACCC, Vali gas joint venture participants (13 May 2021) <<https://www.accc.gov.au/media-release/vali-gas-joint-venture-participants-granted-authorisation-for-joint-marketing>> and ACCC, Jetstar joint ventures (26 March 2013) <<https://www.accc.gov.au/media-release/accc-authorises-coordination-between-jetstar-joint-ventures>>.

²⁹ See section 88(3) of the CCA and ACCC, Macquarie Mereenie & Ors (29 July 2021) <www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/macquarie-mereenie-ors>.

³⁰ Guidelines for Authorisation of conduct (non-merger) <www.accc.gov.au/publications/guidelines-for-authorisation-of-conduct-non-merger>.

bargaining, exclusive dealing or resale price maintenance. The ACCC has published guidelines regarding the notification of each type of conduct:

- Exclusive dealing notification guidelines;³¹
- Resale price maintenance notification guidelines;³² and
- Small business collective bargaining guidelines.³³

Substantive Assessment of a Non-Notifiable JV

32. Please explain the substantive test that applies to JVs outside of merger control. Please describe the primary (horizontal, vertical, conglomerate, complementary or any other) theories of harm and factors normally considered. Please include citations to relevant case law and examples.

As explained in response to Question 28, outside of merger control, there are other provisions of the CCA including the prohibitions of anticompetitive agreements,³⁴ concerted practices³⁵ and cartel conduct,³⁶ which also apply to the conduct of JVs. In recognition that JVs require cooperation between companies that can inadvertently breach the prohibitions of cartel conduct, the CCA provides for a JV exception to the prohibitions of cartel conduct in sections 45AO and 45AP. See the response to Question 40 for further discussion of the JV exception and its application by the Court in *Cascade Coal*. Under section 88 of the CCA, it is also possible for parties planning to engage in contravening activities to apply to the ACCC for authorisation of the conduct. See the response to Question 31 for further discussion.

Question 32(a) HydroCell JV: If the HydroCell JV is unlikely to fall within the scope of the merger control rules of your jurisdiction, please provide a short summary of the analysis that would apply to the HydroCell JV.

The analysis of whether other provisions of the CCA, such as the prohibitions of anticompetitive agreements and cartel conduct, would apply to the HydroCell JV would

³¹ Exclusive Dealing Notification Guidelines <www.accc.gov.au/publications/exclusive-dealing-notification-guidelines>.

³² Resale Price Maintenance Notification Guidelines <www.accc.gov.au/publications/resale-price-maintenance-notification-guidelines>.

³³ Small business collective bargaining guidelines <www.accc.gov.au/publications/small-business-collective-bargaining-guidelines>.

³⁴ Sections 45(1)(a) and (b) of the CCA prohibit contracts, arrangements or understandings that have the purpose, effect or likely effect of substantially lessening competition in a market.

³⁵ Section 45(1)(c) prohibits concerted practices that have the purpose, effect or likely effect of substantially lessening competition.

³⁶ Under sections 45AD, 45AF, 45AG, 45AJ and 45AK of the CCA, competitors are prohibited from making or giving effect to a contract, arrangement or understanding that contains a cartel provision. This includes any provision with the purpose or likely effect of controlling pricing, or the purpose of restricting supply volumes or capacity, allocating customers or territories, and bid-rigging.

require a detailed review of the specific terms of any agreements regarding the JV and their likely effect on competition. For example, analysis should be performed as to whether any of the agreements have the purpose, effect or likely effect of substantially lessening competition in a market, and whether they contain a cartel provision with the purpose or likely effect of controlling pricing, or the purpose of restricting supply volumes or capacity, allocating customers or territories, and bid-rigging. In particular, the proposed non-compete obligations and supply and purchase obligations should be carefully considered. It is also possible for the Parties to the HydroCell JV to apply to the ACCC for authorisation of the conduct they are planning to engage in under section 88 of the CCA.

33. For JVs involving parents that have competing entities within their respective groups, does the substantive analysis of JVs differ from that of other coordination between competitors? If so, how?

JVs can be an exception to the prohibitions of cartel conduct. See the response to Question 40 for further discussion.

34. Does the legislation, regulations or guidelines have specific provisions addressing particular types of JVs (e.g. production JVs, marketing JVs, R&D JVs, distribution JVs, joint-bidding JVs, purchasing JVs, etc.)? Please provide a short description of any distinctive elements.

Not applicable because applicable legislation, regulations and guidelines do not distinguish between particular types of JVs.

35. Is there any scope for productive, dynamic or other efficiencies or public interest considerations to be considered when assessing JVs outside of merger control? If yes, explain how this is done.

As for mergers, if the parties to a JV make an application for authorisation of non-merger conduct, public interest considerations can be taken into account in assessing whether there is a net public benefit. See the response to Question 31.

Remedies and Sanctions

36. If a JV (or agreements/provisions related to it) is found to be anticompetitive, what are the available behavioural and/or structural remedies that can be imposed by the competition authority or the courts to address the concerns?

As for mergers, the ACCC can accept a court-enforceable undertaking under s 87B of the CCA to remedy breaches or likely breaches of the CCA's non-merger control provisions. The ACCC has published Guidelines on the Use of Enforceable Undertakings.³⁷ The ACCC has a broad discretion over whether to accept a remedy. Court enforceable undertakings can be accepted by the ACCC in a range of

³⁷ Guidelines on the Use of Enforceable Undertakings <www.accc.gov.au/system/files/Guide%20to%20Section%2087B.pdf>.

circumstances including to resolve or avoid court proceedings or an ACCC investigation, and to obtain a merger authorisation from the ACCC.

While not specific to a JV, the ACCC recently accepted a court-enforceable undertaking from Tasmanian Ports Corporation Pty Ltd. (*TasPorts*) for an alleged breach of the misuse of market power provisions in the CCA.³⁸ The court-enforceable undertakings were accepted after the ACCC had already commenced court proceedings against *TasPorts* and brought an end to those proceedings. The undertakings included ensuring that charges imposed by *TasPorts* are reasonable and cannot be varied to discriminate, and a third party can obtain access on reasonable commercial terms. The ACCC has also previously accepted court enforceable undertakings offered by JV parties to resolve breaches or likely breaches of the CCA.³⁹

37. Is the authority open to negotiating commitments designed to ensure that a JV does not have an anticompetitive effect? If yes, please provide examples.

The ACCC has previously accepted court enforceable undertakings offered by JV parties to resolve breaches or likely breaches of the CCA. The ACCC has a broad discretion and undertakings can be accepted in a range of circumstances including court proceedings, investigations and merger authorisation processes. See the response to Question 36.

38. Please describe any fining/penalty legislation/regulations in your jurisdiction that apply to anticompetitive JVs.

The ACCC can seek civil pecuniary penalties from the court for breaches of Part IV of the CCA by a JV and/or parties to a JV, including breaches of the prohibitions of anticompetitive agreements, concerted practices and cartel conduct.⁴⁰ For a corporation, the maximum pecuniary penalty for each contravention is the greater of: (a) A\$ 10 million; (b) if the court can determine the value of the benefit that the contravening party obtained directly or indirectly, three times the value of that benefit; or (c) 10% of the contravening party's annual turnover. The ACCC can also seek orders from the court granting injunctive relief, damages, or non-punitive or punitive orders, among other things.

In addition to civil penalties for cartel conduct, the court can also impose criminal penalties for contraventions of the prohibition of cartel conduct. For corporations, the maximum fine for each criminal offence is the same as for civil penalties. For individuals, the penalty can be a fine that does not exceed 2,000 penalty units (currently A\$ 444,000), and/or imprisonment for up to ten years for each criminal offence.

³⁸ See ACCC, Tasmanian Ports Corporation Pty Limited (4 May 2021) <www.accc.gov.au/public-registers/undertakings-registers/tasmanian-ports-corporation-pty-limited>.

³⁹ For example see ACCC, BHP Billiton Petroleum (Bass Strait) Pty Ltd (18 December 2017) www.accc.gov.au/public-registers/undertakings-registers/s87b-undertakings-register/bhp-billiton-petroleum-bass-strait-pty-ltd-s87b-undertaking.

⁴⁰ For example see ACCC, Cascade Coal (25 May 2015) www.accc.gov.au/media-release/accc-takes-action-for-alleged-cartel-conduct-in-the-nsw-government%E2%80%99s-mount-penny-coal-exploration-licence-tender-process>. The ACCC commenced civil proceedings in the Federal Court against eleven respondents, including Cascade Coal, for alleged bid rigging conduct involving mining exploration licences.

39. Please describe any scope for customers or other parties who may be negatively affected by an anticompetitive JV to pursue private or class actions to recover damages or obtain other remedies.

A private party who suffers loss or damage by the conduct of a JV and/or parties to JV in contravention of Part IV of the CCA can make a claim for damages against the parties involved under section 82 of the CCA. An action of this kind must be brought within six years of the date on which the loss or damage is suffered.

If a private party brings an application under section 82 of the CCA, section 83 allows any previous finding of fact made by a court or an admission of any fact made by the person to be used as prima facie evidence against that person by the private applicant. For example, if the ACCC brings an action against the JV party and the court finds that a certain set of facts took place, then the private party can rely on that evidence in their own proceedings and does not need to prove those facts occurred themselves.

Part 3:

General Questions

Please provide brief responses to the questions below. Please note that these questions relate both to JVs that (a) are subject to and have been reviewed and cleared under your jurisdiction's merger control laws and subsequently consummated; and (b) are not subject to your jurisdiction's merger control laws. To the extent there is a difference in your responses to situations (a) and (b), please indicate.

Exemptions / Safe Harbours

- 40. Do the competition law rules in your jurisdiction include exemptions or “safe harbours” (e.g. where market shares are below a particular level) for either a) the merger notification obligations as they apply to JVs; and/or b) the application of substantive competition rules to JVs? Please explain whether the exemption or safe harbour is the same or different from general competition law concepts and how they are applied in practice.**

There are no safe harbours or exemptions for JVs in the merger control provisions of the CCA.

In relation to other substantive competition rules, sections 45AO and 45AP of the CCA provide that JVs can be an exception to the prohibitions of cartel conduct. As explained in response to Question 28, JVs are defined in section 4J of the CCA for the purposes of the JV exceptions, and the common law principles are also relevant in determining whether parties are carrying on a JV for the purposes of the JV exceptions.

Under sections 45AP and 45AO of the CCA, the cartel conduct prohibitions do not apply to a contract, arrangement or understanding if the participant proves:

- The cartel provision in the contract, arrangement or understanding is for the purposes of the JV and is reasonably necessary for the undertaking of the JV;
- The JV is for the production of goods, the supply of goods or services or the acquisition of goods and services; and
- The JV is not carried on for the purpose of substantially lessening competition.

The Full Court of the Federal Court of Australia considered the JV exception to cartel conduct in *Cascade Coal*.⁴¹ The cartel conduct related to a provision of an agreement whereby one of the parties would receive a JV interest in exchange for its agreement to procure the withdrawal of an expression of interest of another relating to an exploration licence for coal. The court found that the provision in question was for the purposes of a JV because it ensured that the parties did not engage in conduct elsewhere that would contradict or undermine the activities of the proposed JV. The court also found that the provision in question was not included for the purpose of substantially lessening competition but rather to contribute to the foundation, protection, subsistence and success of the proposed JV.

Ancillary Restraints

- 41. How are ancillary competition restrictions that are related to the formation or operation of JVs dealt with? For example, are there legislative provisions, guidelines or case law concerning non-compete provisions, licensing agreements or exclusive supply/purchasing obligations? Do these rules apply to the relationship between the parent companies, and to the relationships between the parents and the JV? If so, please describe.**
- **Regarding notified JVs, are such ancillary restrictions i) required to be identified in the notification of the JV transaction; ii) subject to separate notification requirements; or iii) not subject to notification? Please provide relevant case examples that illustrate the analysis.**
 - **Does a merger control clearance include (specific or implicit) clearance of ancillary restraints, and does a clearance preclude future enforcement action by the authority in respect of ancillary restraints related to the JV transaction?**
 - **Is the concept of “ancillary restrictions” also relevant in the review of JVs outside of merger control, and do the rules differ from the ones applied in merger control?**

It is not necessary to separately identify or notify ancillary or related arrangements for the purposes of the ACCC’s informal merger process and they are not specifically approved by the ACCC. However, the ACCC’s clearance under its informal process will generally cover related arrangements that are legitimately part of the transaction, as the ACCC will assess whether the acquisition, including the related arrangements, substantially lessens competition, compared with the future without the acquisition and the related arrangements.

⁴¹ The court considered the JV defence under the former section 76C and the former section 44ZZRP of the CCA, which were reformulated by the Competition and Consumer Amendment (Competition Policy Review) Act No 114 of 2017 (Harper Reforms). However, the findings of the court on the purpose of the JV requirement are still of useful guidance under the new JV defence. The ACCC had commenced civil proceedings in the Federal Court against eleven respondents, including Cascade Coal, for alleged bid rigging conduct involving mining exploration licences

Outside of merger control, any restraints or restrictions such as non-compete provisions, licensing agreements or exclusive supply or purchasing obligations that relate to the formation or operation of a JV may be scrutinised under Part IV of the CCA, including the prohibitions of anticompetitive agreements, concerted practices, cartel conduct and exclusive dealing.⁴² If a JV and/or parties to the JV plan to engage in conduct that could breach Part IV of the CCA, it is possible to seek authorisation by making an application under section 88. See the response to Question 31. The JV exemption to cartel conduct might also apply. See the response to Question 40. If a non-compete clause is included in an agreement for the sale of a business or issuing shares in the capital of a body corporate carrying on a business and that provision was solely for the purpose of protecting the goodwill of the business, it might benefit from the goodwill exemption to the cartel prohibitions in section 51(2)(e) of the CCA.

Question 41(a) HydroCell JV: Would the non-compete obligations between the parents and the JV, as well as purchase and supply obligations between the parties and the JV, be viewed as part of the merger control process if the JV had been notifiable? And if not, how would these restrictions be analysed under the substantive competition law rules in your jurisdiction?

Regarding merger control, as discussed in response to Question 41, non-compete obligations and related arrangements are not specifically approved by the ACCC. However, the ACCC's clearance will generally cover related arrangements that are legitimately part of the transaction because, when assessing the transaction's likely impact on competition, the ACCC will include those arrangements in its consideration of the future with or without the acquisition.

Regarding the substantive competition law rules, see the response to Question 32(a) regarding the analysis under Part IV of the CCA. As discussed in response to Question 41, it is possible to seek authorisation and the provisions might benefit from an exemption to cartel conduct.

Information Exchange; Interlocking Directorates

- 42. Are there specific legislative provisions, guidelines or case law concerning the exchange of information between the owner companies through JVs, and/or between parents and the JV itself? Are there any safeguarding measures, such as clean teams, firewalls, ring-fencing etc. that are prescribed or generally accepted to address such concerns?**

There are no legislative provisions or guidelines that specifically address information exchange in the context of JVs.

⁴² Section 47 of the CCA prohibits various types of exclusive dealing when it substantially lessens competition. Exclusive dealing involves either supplying or acquiring goods or services (or offering a particular price, discount, rebate etc) on condition that the customer or supplier accepts a restriction on its ability to deal with others. Exclusive dealing also involves refusing to supply or acquire goods or services because the customer or supplier will not accept or has not accepted a certain condition.

Section 45(1)(c) of the CCA generally prohibits concerted practices that have the effect of substantially lessening competition. The concerted practices prohibition is new to Australia's competition law and there is no case law.

Although it is not specific to JVs, the ACCC's Merger Guidelines indicate that the ACCC's focus when reviewing joint acquisitions of partial shareholdings or minority interests will be on whether the acquisition may give rise to anti-competitive effects, including providing access to commercially sensitive information of competitors.⁴³

Generally, to avoid potential breaches of the concerted practices prohibition or the prohibitions of anticompetitive agreements or cartel conduct, the use of clean teams, firewalls and ring-fencing are all appropriate measures to safeguard from inappropriate disclosure of commercially sensitive information.

Question 42(a) HydroCell JV: Are there specific rules or case law in your jurisdiction concerning how the parties may exchange of information – for example, through their steering committee or in connection with their joint manufacturing efforts?

Not applicable.

- 43. Are there legislative provisions, guidelines, or case law that restrict whether a person can become a director, officer, or employee of a JV (e.g. can a person employed by or serving as a director of a parent also serve as a director of the JV)? If so, please describe?**

The ACCC's Merger Guidelines indicate that, where an acquisition involves the acquisition of a partial shareholding or minority interest, the ACCC's competition analysis will also consider whether directorships may result in coordination and facilitate the exchange of information between rivals.⁴⁴

International JVs

- 44. Describe whether the impact of a JV on competition at an international level is a factor that may be considered when assessing the impact of a JV (i.e. does the competition authority focus only on the impact of a JV in its own jurisdiction, or take into account the market definition, competitive effects and efficiencies of the overall transaction on an international basis)? If yes, please provide examples where this was done and any guidelines on this subject.**

The impact of a JV at an international level will be taken into account if the ACCC considers the relevant geographic market is global in scope. For example, in *Riverstone Computer Services Pty Limited v IBM Global Financing Australia*

⁴³ See Merger Guidelines, Appendix 2, paras 9–19.

⁴⁴ See Merger Guidelines, Appendix 2, paras 12–19.

Limited [2002] FCA 1608, the court found that a global market that included sales in Australia (even though that activity was small) is still a market in Australia, even though the market also existed in the United States, Japan, China or any country of the European Union. Otherwise, the ACCC will only be concerned with the impact of the JV in relevant Australian markets.

Trends and Expected Developments

45. Please describe any competition law policy and enforcement trends or expected changes in your jurisdiction related to JVs.

In an interim report released on 1 August 2022 regarding its inquiry into gas supply arrangements in Australia, the ACCC raised concerns about JVs, joint marketing and exclusivity arrangements influencing supply and development of gas in the east coast of Australia and contributing to a lack of effective competition in a highly concentrated upstream market.⁴⁵ The ACCC also noted that JVs can adversely impact competition if effective ring-fencing arrangements to prevent the sharing of commercially sensitive information between JV parties are not in place and adhered to by JV parties.

With the forecast gas supply shortfall in 2023, we would expect that the ACCC will continue to look closely at any JVs, joint marketing and exclusivity arrangements in relation to gas supply and the robustness of information ring-fencing arrangements between JV parties in this market.

⁴⁵ See ACCC, Gas inquiry interim report (1 August 2022) <www.accc.gov.au/publications/serial-publications/gas-inquiry-2017-2025/gas-inquiry-july-2022-interim-report>.

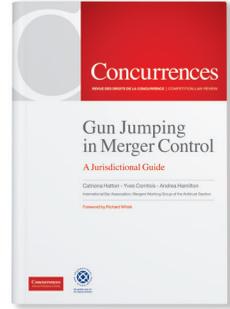
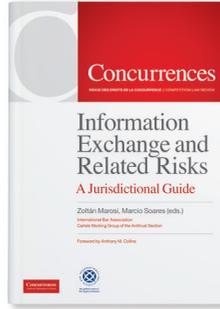
Competition Law Treatment of Joint Ventures

A Jurisdictional Guide

Benedict Bleicher, Neil Campbell, Andrea Hamilton,
Niko Hukkinen, Arshad (Paku) Khan, Alastair Mordaunt (eds.)

Preface by Michael Reynolds
Foreword by Terry Calvani

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The Mergers Working Group (MWG) of the Antitrust Section of the International Bar Association (IBA) has formulated the first multi-jurisdictional survey dedicated exclusively to the competition law treatment of joint ventures (JVs) across 22 jurisdictions. The survey considers critical issues and questions that businesses and their advisers face when dealing with JV transactions in light of merger control and substantive competition laws, in order to provide an up-to-date and comprehensive overview of the state of the law. A practical analysis of key issues is also provided, by using a hypothetical JV transaction developed by the MWG that appears throughout each chapter, as well as a high-level overview of key results compiled by the editors.

The jurisdictions covered include Australia, Brazil, Canada, Chile, China, COMESA, the European Union, France, Germany, India, Japan, Mexico, Poland, Russia, Singapore, South Africa, South Korea, Spain, Switzerland, Ukraine, the United Kingdom and the United States.

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