UN Global Compact Network Australia

Submission to the ACCC's consultation on the draft guide "Sustainability collaborations and Australian competition law."

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Submission to the ACCC's consultation on the draft guide, *Sustainability collaborations and Australian competition law*

1. The United Nations Global Compact Network Australia (**"UNGCNA"**) welcomes the opportunity to respond to the ACCC's consultation on the draft guide, *Sustainability collaborations and Australian competition law* (**"Draft Guide"**).

2. We make this submission in light of the United Nations (**"UN"**) Global Compact's Ten Principles and the Sustainable Development Goals ("**SDGs**") at the heart of the 2030 Agenda for Sustainable Development ("**2030 Agenda**"). This submission does not necessarily reflect the views of all UNGCNA participants.

3. The UN has estimated that the world will need to spend between $3 trillion and $5 trillion annually to meet the SDGs by 2030, and the Covid-19 pandemic has increased that estimate by an additional $2 trillion annually. New and adapted business models and markets represent critical and value-generating investment opportunities for both profit and impact.

4. The UN Summit of the Future will take place in New York in September 2024, bringing world leaders together to turbocharge the 2030 Agenda by getting the SDGs back on track, while also responding to emerging challenges and opportunities.

5. Australia participated in international discussions to design the 2030 Agenda and supported the involvement of stakeholders across all sectors, including non-governmental organisations (NGOs), civil society and the private sector.[1]

6. The Australian Government has underscored that it remains committed to the 2030 Agenda and its SDGs.[2] Consistent with that commitment, the UNGCNA encourages the Australian Government to advance urgent and ambitious efforts to accelerate the transition to a more sustainable Australian economy, in partnership with the Australian business sector, the international community and other stakeholders.

Background on the UN Global Compact

7. As a special initiative of the UN Secretary-General, the UN Global Compact is a call to companies everywhere to align their operations and strategies with Ten Principles in the areas of human rights, labour, environment and anti-corruption. Our ambition is to accelerate and scale the global collective impact of business by upholding the Ten Principles and delivering the Sustainable Development Goals through accountable companies and ecosystems that enable change. With more than 25,000

[1] Australian Government (DFAT), 2030 Agenda for Sustainable Development
[2] Australian Government (DCCEEW), 2030 Agenda for Sustainable Development and the Sustainable Development Goals

organisations in over 165 countries and 62 local networks, the UN Global Compact is the world's largest corporate sustainability initiative - one Global Compact uniting business for a better world.

8. The 2030 Agenda, adopted by all UN Member States in 2015, provides a shared blueprint for peace and prosperity for people and the planet, now and into the future. At its heart are the 17 SDGs, which are an urgent call for action by all countries - developed and developing - in a global partnership. The 2030 Agenda recognises that ending poverty and other deprivations must go together with strategies to improve health and education, reduce inequality, and spur economic growth – all while tackling climate change and working to preserve our oceans and forests.

9. In Australia, the UNGCNA brings together over 350 Australian signatories to the UN Global Compact, including over 80 ASX listed companies, other major companies, non-profits and universities, to advance the private sector's contribution to sustainable development. We lead, enable and connect businesses and stakeholders to create a sustainable future by supporting businesses to act responsibly and helping them find opportunities to drive positive business outcomes. We guide businesses on how advancing integration of the Global Compact's Ten Principles, and contributing to the SDGs, drives long-term business success.

Comments on sustainability collaborations

10. In February 2024, the UNGCNA conducted a Business Consultation on Partnerships for Sustainability: Navigating competition law implications. We subsequently shared key findings with the ACCC.

11. Our consultation provided background on the issues at the intersection of sustainability and competition law, highlighted the legal frameworks that are relevant in Australia, and gathered information from participants about their experiences with these issues.

12. In summary, our consultation revealed that:

    a. some participants had direct experience with partnerships for sustainability - either with competitors or within their supply chains.
    b. almost all of the participants had heard concerns raised about competition law in the context of their sustainability work.
    c. factors motivating participants to explore sustainability collaborations included: requests from customers for more data and transparency; participation in sectoral initiatives; innovation and efficiency.
    d. only half of the participants consulted were aware of a competition law protocol for staff dealing with competitors.
    e. only half of the participants were previously aware of the ACCC's authorisation process.

13. In this submission, the UNGCNA draws on that consultation and our ongoing sustainability work to provide some general observations of principle responding to the Draft Guide.

1 General observations

1.1 Critical importance of sustainability collaborations

14. Sustainability collaborations are a crucial mechanism to achieve sustainable development, as contemplated by Agenda 2030 and the SDGs. SDG 17 – Partnerships for the Goals – explicitly acknowledges the important role of sustainability collaborations:

> **Target 17.16**: Enhance the Global Partnership for Sustainable Development, complemented by multi-stakeholder partnerships that mobilize and share knowledge, expertise, technology and financial resources, to support the achievement of the Sustainable Development Goals in all countries, in particular developing countries
>
> **Target 17.17:** Encourage and promote effective public, public-private and civil society partnerships, building on the experience and resourcing strategies of partnerships

15. The UN system has had direct experience of competition law rationales being employed to challenges business efforts to jointly pursue environmental initiatives. The UN Environment Programme (UNEP) Net-Zero Insurance Alliance (NZIA) was formally discontinued on 25 April 2024, after being undermined by allegations of antitrust violations by a group of politicians in the United States.

16. In the fall-out from the discontinuation of the NZIA, UN Secretary-General António Guterres observed:

> Fossil fuel companies must also cease and desist influence peddling and legal threats designed to knee-cap progress. I am thinking particularly of recent attempts to subvert net zero alliances, invoking anti-trust legislation.
>
> Governments are pivotal in setting the record straight. They must help by providing clear reassurance: collective climate action does not violate anti-trust — it upholds the public trust. [3]

17. The NZIA was subsequently replaced by a new initiative - the Forum for Insurance Transition (FIT) to Net Zero - providing a structured dialogue and multistakeholder forum to support the necessary acceleration and scaling up of voluntary climate action by the insurance industry and key stakeholders. The FIT takes into account the experience gained with the NZIA and established a legal team with experts on antitrust and competition laws, sustainability, insurance and finance, among other core areas of expertise, from three leading global law firms.

18. The development of a Guide on a *Sustainability collaborations and Australian competition law* by the ACCC, could play an important role in supporting Australia's commitment to the 2030 Agenda – and provide clear reassurance that collective action has a legitimate role for the public good.

[3] United Nations, Press Conference by Secretary-General António Guterres at United Nations Headquarters (15 June 2023)

19. We thank the ACCC for recognising the clear need for urgent action on [environmental] sustainability – and that there are legitimate circumstances where businesses can work together to achieve better [environmental] outcomes.[4]

20. However, at the outset we note that the purpose of the Draft Guide adopts a somewhat narrow and negative framing: "the ACCC particularly wants to address misconceptions about the operation of the Act…"[5]

21. The UNGCNA recommends that the Draft Guide adopt a more positive and expansive framing of the ACCC's role in supporting Australia's international commitments to the sustainable development agenda.[6]

1.2 Too narrow scope of the Draft Guide – "sustainability"

22. The title of the Draft Guide is "**Sustainability** collaborations and Australian competition law".[7]

23. At the outset, we note that the Draft Guide's actual scope is narrowly focused on *environmental* issues. The acknowledgement in footnote 1 that the principles *may also apply* to other areas of sustainability is not sufficient to correct the overall impression created by the title that the Draft Guide applies to all forms of sustainability collaborations. Nor is there a clear rationale to limit the scope of the Draft Guide to environmental sustainability.

24. While widely accepted definitions of "sustainability" do encompass environmental issues, it is important that any genuine consideration of "sustainability" topics should adopt an appropriately broad and holistic definition of the term.

25. We note that there is not one single definition of sustainability, but rather several definitions that have continued to evolve overtime. In the examples below, it is clear that the concept of sustainability is not isolated to environmental issues, but encompasses a much broader concept:

    a. In 1987, the UN Brundtland Commission defined sustainability as "meeting the needs of the present without compromising the ability of future generations to meet their own needs."[8]

    b. The same 1987 Brundtland Report also introduced the concept of the "three pillars" of environmental, social and economic sustainability.[9] While there are variations on the three pillars approach, it is frequently presented as a Venn diagram to illustrate the intrinsic links between each of the three pillars as seen in Figure 1 below.

[4] Draft Guide at paras 6 and 9.
[5] Draft Guide at para 3.
[6] See for example the positive context and treatment in European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Chapter 9 (Sustainability Agreements) paras 515 to 522.
[7] Draft Guide, title page [emphasis added]
[8] United Nations, Report of the World Commission on Environment and Development: Our Common Future (Brundtland Report) , http://www.un-documents.net/our-common-future.pdf
[9] *Ibid.*

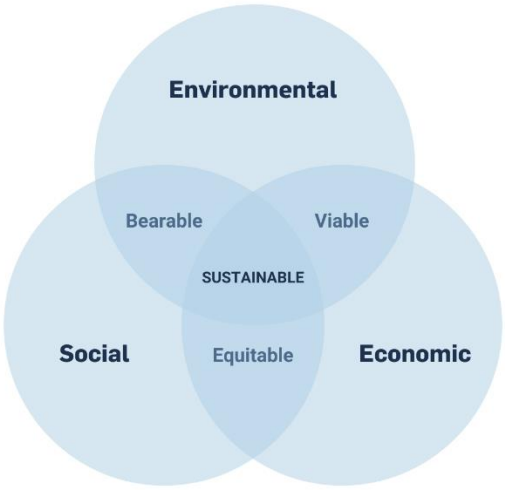

Figure 1 – The three pillars of sustainability

c. The ESG movement has visibly risen to prominence in recent years. The term "ESG", referring to Environmental, Social, and Governance, was first used in a UN Global Compact report titled "Who Cares Wins", which encouraged the financial industry to better integrate environmental, social and governance issues into a company's operations.[10]

d. The UN Sustainable Development Goals provide a common international approach to sustainability, adopted in 2015 by 193 nation states. It is critical to acknowledge the interconnectedness of all SDGs and adopt a holistic approach that prioritises progress across all aspects of sustainability. Addressing complex challenges like climate change requires a systemic approach that considers the broader socio-economic context. By tackling climate action (SDG 13) alongside other critical challenges like: food security (SDG 2); renewable energy (SDG 7); sustainable economic growth, decent work for all, and eliminating modern slavery (SDG 8); inequality (SDG 10); sustainable consumption and production (SDG 12); and protection of nature (SDGs 14 and 15), we can build a more sustainable and equitable future for all.

26. The European Commission has established global best practice in its approach to the definition of "sustainability." In June 2023, the EC amended its Horizontal Guidelines to promote Sustainability Agreements and adopted a broad definition of sustainability objectives based on the UN Sustainable Development Goals.[11]

27. Consistent with the title of the Draft Guide, we recommend that the ACCC update the text, case studies and examples in the Draft Guide, to explicitly apply the relevant principles to other widely recognised areas of sustainability, preferably adopting the Sustainable Development Goals as the relevant definition of "sustainability."

[10] The Global Compact, *Who Cares Wins: Connecting Financial Markes to a Changing World*
[11] European Commission, *Antitrust: Commission adopts new Horizontal Block Exemption Regulations and Horizontal Guidelines* (1 June 2023).

1.2 Draft Guide does not meet its stated purpose

28. A core purpose of the Draft Guide is articulated as assisting businesses to understand when collaboration between businesses "is likely to breach Australian competition law and when it is unlikely to do so."[12]

29. We have concerns that the tone and content of the Draft Guide do not in fact enable businesses to meaningfully self-assess when collaborations are unlikely to breach Australian competition law.

30. We recognise the challenge for the ACCC in trying to balance between (i) the risk of deterring legitimate collaborations that are not anti-competitive (Type I error); and (ii) the risk of failing to condemn anti-competitive conduct (Type II error).[13]

31. The Draft Guide contains only 4 examples of "low-risk sustainability collaborations"[14] and appears reluctant to allow for even remote possibilities of Type II error. As such it risks inappropriately increasing Type I errors of deterring legitimate collaborations. "Type I error reflects an over-enforcement or over-regulation."

32. The Draft Guide does not sufficiently set out clear categories of conduct that are unlikely to be condemned under Australian competition law. To compound this deficiency, the examples of collaborations that are identified as likely to be a cartel on page 8 of the Draft Guide are not accompanied by a statement that exemptions have been granted for similar forms of conduct – creating the impression that these forms of collaborations will not be possible.

33. By contrast, the UK Competition and Markets Authority sets out consideration of safe harbour and *de minimis* thresholds.[15] The EC's Horizontal Guidelines list various examples of sustainability agreements that generally fall outside the scope of Article 101(1) TFEU, as well as soft safe harbour for sustainability standardisation agreements that meet certain conditions and hypothetical examples illustrating the application of Article 101 TFEU.[16]

34. We note that the Draft Guide provides more useful examples of conduct that would be likely to be granted authorisation. While these examples are helpful for any businesses who may choose to seek authorisation, they do not necessarily assist businesses to self-assess what forms of conduct would be unlikely to breach competition law in the first place.

35. An approach that is distinctly weighted towards Type I errors is likely to incent businesses to act in an overly cautious manner – in this context making them less inclined to pursue sustainability collaborations.

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[12] Draft Guide at para 1(a) [emphasis added]
[13] See for example, discussion in New York Law School *The Role of Error Analysis in Antitrust Cases and Why Antitrust Cases are Vulnerable to Erroneous Decisions*
[14] Draft Guide at 3.4
[15] See Competition and Markets Authority (UK) *Environmental sustainability agreements and competition law*
[16] European Commission, *Antitrust: Commission adopts new Horizontal Block Exemption Regulations and Horizontal Guidelines* (1 June 2023).

36. In addition, the Draft Guide repeatedly underscores that businesses should seek their own legal advice: (i) generally[17]; (ii) if exceptions may apply;[18] and (iii) even if conduct is self-identified as "unlikely to breach."[19]

37. This sends a strong signal that any party considering a sustainability collaboration must obtain professional legal advice, which will serve to deter legitimate collaborations, particularly for parties who are typically not as well-resourced, such as SMEs.

38. The current approach of the Draft Guide does not advance its identified purpose of helping businesses understand when collaboration is unlikely to breach Australian competition law. **We recommend that the Draft Guide be amended to provide more clarity and examples for market participants about forms of conduct that are unlikely to breach competition law – without needing to seek expert legal advice or navigate a complex exemption process.**

1.3 The Draft Guide places overreliance on exemptions

39. A second stated purpose of the Draft Guide is to assist businesses to understand when they "may have the option to seek an exemption from Australian competition law."[20]

40. In our view, the Draft Guide places disproportionate emphasis on the authorisation process, while providing too limited guidance on the threshold issues of:

    a. what collaborations are unlikely to breach competition law; and
    b. how the ACCC would apply their enforcement powers and discretion to sustainability collaborations that could have technical or *de minimis* competition impacts.

41. It is notable that the Draft Guide dedicates 14 pages to Authorisation, compared to just over 2 pages addressing both exceptions and low-risk sustainability collaborations.

42. We acknowledge that authorisation is a very useful tool to have under Australian competition law, with the potential to provide certainty about businesses' exposure to risk of legal action. The Draft Guide sets out helpful examples where the process has supported the advancement of sustainability collaborations.

43. Nevertheless, there are significant financial and administrative burdens for businesses to navigate the authorisation process, meaning that it will not work for all parties and is not appropriate for the Draft Guide to place so much reliance on the authorisation process.

44. A diverse range of stakeholders have previously observed that the authorisation process is slow, expensive and complex, particularly for SMEs.

45. The Dawson Review of the *Trade Practices Act* observed:

[17] Draft Guide at para 5
[18] Draft Guide at para 36
[19] Draft Guide, see diagram on p6, step 3B and para 40
[20] Draft Guide at para 1(b)

> General dissatisfaction with the process of authorisation was expressed in a number of submissions, which went, for the most part, to the procedure rather than the eventual outcome. It was said that the process took too long and was too expensive both in the cost of preparing an application and the cost of filing it. However, some parties said that authorisation does not provide sufficient certainty because it is granted for a limited period only and is subject to appeal by third parties. In particular, it was contended that small businesses, including primary producers, should have access to a cheaper and more expeditious process for gaining statutory protection for collective bargaining.[21]

46. The Competition Policy Review,[22] Chaired by Professor Ian Harper, also considered the effectiveness of the authorisation framework in 2017. The Harper Review panel noted that "the authorisation and notification processes are unnecessarily complex, which imposes costs on business."[23]

47. The Panel recommended changes to both authorisation and notification, and introducing a block exemption power for the ACCC, to reduce costs for business, especially small business. The recommendations resulted in amendments to the authorisation regime.

48. Nevertheless, a range of long-standing concerns about the authorisation framework remain relevant in this context.

Cost

49. Applications for authorisation incur a fee of $7,500. While a fee waiver might be available to some parties, the requirements to apply for a waiver themselves introduce additional administrative burdens that must be navigated before applying for authorisation.

50. Further, the complexity of the authorisation framework also means that businesses would ordinarily need to pay for professional legal advice to navigate the process.

Timelines

51. We note that the Draft Guide refers to a 6-month timeline for a determination,[24] as well as the potential availability of interim authorisation or streamlined processes.

52. We are concerned that the Draft Guide downplays the total time commitments – and uncertainty - involved in navigating the authorisation process.

53. First, a 6-month timeline of itself provides a disincentive to use the authorisation process for possible sustainability collaborations. The cost and basic timelines provide strong factors against even starting to seek internal approvals to proceed.

54. However, we note that a 6-month period is not the complete picture on relevant timelines for businesses considering lodging an application:

[21] *Report of the Trade Practices Act Review Committee* (Dawson Review) p 110. (31 January 2003)
[22] Professor Ian Harper et al, *Competition Policy Review: Final Report* (March 2015)
[23] *Ibid*, Harper Review at p 398
[24] Draft Guide at para 49. Section 90(10) and 90(10A) of the *Competition and Consumer Act* 2010 (Cth).

a. Any application for a fee waiver must be lodged with the ACCC before applying for authorisation.
b. Significant time is required to seek internal approvals, prepare and validly lodge an authorisation application, to start the clock running.
c. The 6-month period can be extended by up to a further 6 months.[25]
d. If authorisation is granted, legal protection commences a minimum of 21 additional days after the date of the final determination.
e. Any determination is also subject to the potential of an application for review by third parties to the Australia Competition Tribunal, which can significantly extend the timelines.
f. While interim or streamlined consideration may be available, these involve additional steps, uncertainties, and burdens that disincentivise investing the time and resources to seek an exemption in the first place.
g. Even upon final grant of authorisation, parties do not have long-term certainty of the arrangements. The ACCC "in practice, will only grant authorisations without a time limit in exceptional circumstances."[26] "Parties who wish to continue to engage in authorised conduct beyond the term of authorisation must lodge a new application for authorisation or an application for revocation and substitution"[27] and "the ACCC will consider the application afresh."[28]

Confidentiality

55. Furthermore, the public nature of the authorisation process may also provide disincentives for its use, where there are limitations on the information that is possible or desirable to disclose publicly. Applicants are required to make and substantiate claims for confidentiality over specific material contained in submissions. There is no ability to maintain confidentiality over a proposed (and uncertain) course of conduct that may disclose confidential business strategies – as a public version of the application must be provided to enable public consultations by the ACCC.

56. Overall, while authorisation is a very useful mechanism, the complexities, costs, uncertainties and disincentives of the current process mean that in practice it will only be used by well-resourced parties, for initiatives that have significant scale.

57. We recommend that Draft Guide place less emphasis on the authorisation process and provide more focus on supporting business to identify types of conduct that are unlikely to breach Australian competition law.

1.4 The ACCC should consider faster and more practical approaches

58. In our view, the current authorisation process is not an adequate mechanism to support the increasing number and diversity of parties likely to need consultations with the ACCC on proposed sustainability collaborations.

[25] Section 90(10A) CCA.
[26] ACCC, *Guidelines for Authorisation of Conduct (non-merger)* (December 2022) at para 9.14.
[27] *Ibid* at 9.18
[28] *Ibid* at 9.19

59. We recommend that the ACCC focus on more streamlined and practical options to support businesses in assessing the threshold issue of whether a proposed sustainability initiative is likely or unlikely to breach Australian competition law.

Informal consultations

60. The Draft Guide indicates that the ACCC is available and willing to engage with businesses about applications for authorisation.[29]

61. We recommend that the Draft Guide remove the apparent limitation that these discussions occur only in the context of applications for authorisation. The ACCC should equally be prepared to have informal discussions about the threshold issue - whether proposed sustainability collaborations are likely or unlikely to breach Australian competition law.

62. We recognise the ACCC's stated concern about giving legal advice,[30] nevertheless even under existing legal frameworks it should be able to "provide feedback on potential areas of concern,"[31] just as proposed for the exemptions process.

63. A proposal for informal consultations is neither new nor novel, with an analogue found in the ACCC's informal merger review process, and also having been recommended by a past independent review of Australian competition law.

64. The informal merger review process has no underpinning legislation. The ACCC encourages merger parties to contact the ACCC when a merger is being considered to discuss possible competition issues. A decision by the ACCC not to oppose a merger gives merger parties a level of comfort.[32]

65. The ACCC's description of the informal merger process also provides a relevant rationale for informal consultations on sustainability collaborations:

> "…the informal merger regime started as a 'service' to the business community to allow firms to seek the ACCC's (and previously the TPC's) view about whether a proposed acquisition would be opposed and subject to litigation by the agency. There is no fee for this service. In the absence of this service, merging firms would have to rely on the advice of their legal advisers and bear the risk that the ACCC might take a different view and commence court action…"[33]

66. Additionally, the Wilkinson Review[34] previously recommended changes to streamline the authorisation process and Recommendation 12 stated:

> The ACCC establish a pre-formal authorisation assessment process to facilitate informal dialogue with professions and potential applicants about current or proposed arrangements which potentially fall within the ambit of the Trade Practices Act and therefore may require authorisation.

[29] Draft Guide at para 47
[30] Draft Guide at para 48
[31] Draft Guide at p13 "Tip: ACCC informal discussions before lodging"
[32] ACCC, *Informal merger reviews*
[33] ACCC, *Outline to Treasury ACCC's proposals for merger reform* (March 2023)
[34] *Review of the impact of Part IV of the Trade Practices Act 1974 on the recruitment and retention of medical practitioners in rural and regional Australia* (Wilkinson Review 2002), Recommendation 12, p109.

67. The Wilkinson Review went on to note, "The Committee believes that there is a need for doctors to be able to contact the Commission without fear of reprisal, and to be able to obtain advice and guidance on existing or proposed arrangements."[35] This observation remains equally valid for businesses, particularly SMEs, seeking to understand their rights and obligations in relation to contemplated sustainability collaborations.

68. We note in this regard that the UK CMA provides an open offer for informal guidance:

> If having read the Green Agreements Guidance you are still unsure about how it applies to your agreement, you can also contact the CMA for informal guidance before entering into that agreement…[36]
>
> …
>
> We are conscious that this Guidance cannot provide answers to all questions that businesses may have. We are keen to hear from businesses with questions that are not covered by this Guidance, as well as those seeking clarity or comfort on how this Guidance will be applied.[37]

69. The CMA also takes a reasonable position on its enforcement discretion, striking an effective balance between not deterring legitimate collaborations that are not anti-competitive (Type I error) and the risk of failing to condemn anti-competitive conduct (Type II error):

> The CMA would not expect to take enforcement action where parties approach the CMA to discuss their agreement and the CMA does not raise any competition concerns (or where any concerns raised have been addressed). However, if the CMA concluded, in the future, that further investigation of that agreement was necessary, and then found at the end of the investigation that the agreement infringed the Chapter I prohibition, the CMA would not issue fines against the parties that had implemented the agreement provided that the parties did not withhold relevant information from the CMA which would have made a material difference to its initial assessment under the open-door policy (paragraph 7.13 below).The CMA will expect parties who have benefited from informal guidance to take reasonable steps to keep their agreements under review to ensure they remain consistent with the informal guidance provided by the CMA.[38]

70. The Japan Fair Trade Commission also has an open consultation policy:

> In the implementation of activities toward the realization of a green society, enterprises, etc. may choose to consult with the JFTC in advance on whether the specific activity they intend to carry out may pose any problem under the Antimonopoly Act… To encourage the activities of enterprises, etc. toward the realization of a green society, the JFTC actively responds to their requests for advice in light of the Green Guidelines and this consultation case, etc. while maintaining close communication with enterprises.[39]

71. The European Commission also invites companies wishing to enter into a sustainability agreement to request informal guidance from the Commission in order to ensure compliance with EU competition rules.

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[35] *Ibid* at p 110
[36] Competition and Markets Authority (UK), *Green agreements guidance: how competition law applies to environmental sustainability agreements*, (12 October 2023).
[37] Competition and Markets Authority (UK), *Green Agreement Guidance* at 1.15
[38] *Ibid* at 1.16
[39] See JFTC, Consultation case related to joint activities aiming to achieve carbon neutrality by constituent enterprises of a petrochemical complex.

72. The New Zealand Commerce Commission also invites stakeholders to contact them if they are unsure how to apply Collaboration and Sustainability Guidelines, or wish to discuss their proposal further.

73. We recommend that ACCC facilitate informal dialogue with parties about proposed sustainability collaborations which potentially fall within the ambit of the competition law.

Opinions and clearances

74. The current authorisation framework does not treat an assessment of the lawfulness of proposed conduct as an essential first step. An authorisation applicant is not required to show that the proposed conduct would breach competition law – and indeed the ACCC is not required to satisfy itself that the proposed conduct would constitute a breach of the competition law to consider an application.

75. It would be preferable to provide streamlined options for parties, by bifurcating the relevant steps, potentially minimising the number of parties who need to proceed to an authorisation application:
    i. Standalone mechanisms for assessment of whether proposed collaboration would have, or be likely to have, anti-competitive impacts (either *per se* breaches or SLC).
    ii. **If there are likely anti-competitive impacts**:
        a) adjust or abandon the proposal, or
        b) move to an authorisation application.

76. There are law reform options available that could support bifurcation by providing a focus on the threshold assessment of anti-competitive impacts. Experience elsewhere provides two models that could be considered in Australia:
    i. advisory opinions; and
    ii. clearance certificates.

77. Under section 124.1 of the Canadian *Competition Act*, any person may apply to the Commissioner for a binding written opinion regarding the application of one or more sections of the *Competition Act* to proposed conduct. Written opinions provide a streamlined mechanism to obtain comfort in respect of proposed conduct that could potentially raise issues under competition law. Written opinions are available under the conspiracy and civil agreements provisions of the *Competition Act*.

78. A second streamlined mechanism was recently introduced to the Canadian *Competition Act*. Commencing on 20 June 2024, new provisions were introduced, allowing the Commissioner to issue environmental agreement clearance certificates. An environmental clearance certificate will be issued when the Commissioner is satisfied that the proposed arrangement is (i) for the purpose of protecting the environment; and (ii) not likely to prevent or lessen competition substantially in a market. A valid certificate confirms that the *Competition Act*'s conspiracy, bid-rigging and civil agreement provisions will not apply to the collaboration.[40]

79. A clearance procedure in respect of cartel conduct is also available for collaborative activities under section 65A of the New Zealand *Commerce Act*.

[40] Section 124.3(1) of the *Competition Act*.

80. A clearance process for sustainability collaborations would be more streamlined and timely because it would not require consultations with interested third parties, or an assessment against a public benefit standard.

81. Notably, both written opinions and clearance certificates in Canada can also be provided on a confidential basis – allowing parties a rapid mechanism to obtain certainty, without requiring public disclosure or consultation in relation to sensitive business plans and strategies.

82. **We recommend that advisory opinion and clearance mechanisms be considered for the Australian context to provide more streamlined and confidential guidance for businesses on the legality of proposed sustainability agreements.** In many cases, parties would not then need to move to the second step of navigating the formal authorisation process.

Further clarity on class exemptions[41]

83. The Draft Guide makes a passing reference to the fact that "the 'collective bargaining class exemption' may be available for groups of small businesses seeking to collectively bargain."[42]

84. The ACCC can make a class exemption when it is satisfied that a class of business conduct is unlikely to substantially lessen competition or is likely to result in a net public benefit.

85. There is one class exemption currently in place, which applies to small business collective bargaining. However, there appears to be potential for class exemptions to provide a more streamlined process for certain types of sustainability collaborations, which could be of particular benefit to SMEs. We encourage the ACCC to identify types of sustainability collaborations where a class exemption may be appropriate.

86. We recommend that the ACCC update the Draft Guide to enhance awareness of the class exemption process and how it might be used by small businesses in the context of sustainability collaborations.

Develop practical, quick-reference guidance

87. Another practical step the ACCC could take to support sustainability is to develop quick-reference resources for market participants.

88. **First, we recommend that the Draft Guide be updated to identify more clearly types of conduct that are: likely; possible; and unlikely to breach competition laws.** A quick reference guide would be useful to a business audience, perhaps adopting the following categories:
    a. Green light – types of conduct that are permissible.
    b. Yellow light – types of conduct that should only be considered with caution.

[41] See by contrast, the consideration of block exemptions addressed in Competition and Markets Authority (UK) *Environmental sustainability agreements and competition law*
[42] Draft Guide at para 16

c. Red light – types of conduct that are not permissible (eg discussions between competitors about pricing and sensitive strategic or market data).

89. Second, the ACCC's educative function would usefully extend to equipping businesses with summary awareness materials and template protocols for meetings with competitors. Such materials could be used to remind collaboration participants that there are possible competition law issues in certain activities, and set out best practices to be followed.[43] For example, template materials could equip meeting facilitators to: remind participants of competition laws at the start of meetings; abstain from conversation about commercially sensitive issues; and ensure minutes are kept of the main points discussed, who was present and what was approved.

90. We recommend that the ACCC develop template meeting protocols for use by parties to promote compliance with the *Competition and Consumer Act* in the context of a potential sustainability collaboration.

Recommendations and Closing

91. It is important for Australia to ensure a regulatory environment that supports and accelerates the transition to a more sustainable Australian economy.

92. The Draft Guide provides a detailed overview of competition law relating to sustainability collaborations that may provide appropriate information for compliance and legal professionals who do not have existing familiarity with competition law. However, the Draft Guide does not succeed in distilling key principles and processes that would empower businesses to self-assess and enter sustainability collaborations with confidence.

93. The UNGCNA makes the following recommendations:

I. that the Draft Guide adopt a more positive and expansive framing of the ACCC's role in supporting Australia's international commitments to the sustainable development agenda

II. that the ACCC update the text, case studies and examples in the Draft Guide, to apply the relevant principles to other widely recognised areas of sustainability, preferably adopting the Sustainable Development Goals as the relevant definition of "sustainability."

III. that the Draft Guide be amended to provide more clarity and examples for market participants about forms of conduct that are unlikely to breach competition law – without needing to seek expert legal advice or navigate a complex exemption process.

IV. that Draft Guide place less emphasis on the authorisation process and provide more focus on supporting business to identify types of conduct that are unlikely to breach Australian competition law.

V. that the ACCC facilitate informal dialogue with parties about proposed sustainability collaborations which potentially fall within the ambit of the competition law.

VI. that advisory opinion and clearance mechanisms be considered for the Australian context to provide more streamlined guidance for businesses on the legality of proposed sustainability agreements.

VII. that the ACCC update the Draft Guide to enhance awareness of the class exemption process and how it might be used by small businesses in the context of sustainability collaborations.

[43] See for example, ACCC, *Professional associations*

VIII. that the Draft Guide be updated to focus more clearly on types of conduct that are: likely; possible; and unlikely to breach competition laws.

IX. that the ACCC develop template meeting protocols for use by parties to promote compliance with the Competition and Consumer Act in the context of a potential sustainability collaboration.

94. The UNGCNA will continue to connect, promote and enable the business community's efforts towards achieving the Sustainable Development Goals. We would be happy to discuss further if we can be of any assistance in engaging the business sector in relation to the outcomes of this consultation.

Contact

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