

26 July 2024

Australian Competition and Consumer Commission (**ACCC**)  
23 Marcus Clarke Street  
CANBERRA ACT 2601

Via email: [exemptions@accc.gov.au](mailto:exemptions@accc.gov.au)

Dear ACCC,

**Submission on the ACCC's draft guidance for business on sustainability collaborations and Australian competition law**

Thank you for the opportunity to provide a submission in response to the draft guidance on sustainability collaborations and Australian competition law (**Draft Guidance**).

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership of 53,000 reflects the diversity of Australia's director community, comprised of directors and leaders of not-for-profits (**NFPs**), large and small and medium enterprises (**SMEs**) and the government sector.

In our role as host of the [Climate Governance Initiative Australia](#), we are committed to lifting directors' climate capability through educational resources, webinars and events. To date, we have issued practice guides and reports on topics such as [sustainability governance structures](#) and preparing for [mandatory climate reporting](#), which have had cumulative unique downloads of around 26,000; hosted webinars attended by around 6,000 attendees; issued monthly climate newsletters sent to around 20,000 recipients; and organised two major climate governance conferences with over 1,500 attendees.

We have spoken with directors across our membership, competition law experts, peak bodies and civil society to inform the comments set out in this submission.

The AICD supports the ACCC providing guidance to business on sustainability collaborations, given the complexities of competition law and the pressing need for Australia to meet net zero emissions commitments. Overall, the Draft Guidance and detail provided is beneficial and relatively clear and the inclusion of some examples of low-risk sustainability collaborations is helpful. The AICD also welcomes the invitation in the Draft Guidance to engage in preliminary discussions with the ACCC prior to undertaking conduct or lodging an authorisation application.

The AICD, however, remains concerned that the guidance as currently drafted may create undue concern and have a chilling effect on lawful sustainability collaborations. In particular, directors and organisations in the SME and NFP sectors often lack the resources to obtain legal advice and follow the legislated authorisation process in order to collaborate on a low-risk sustainability initiative. The authorisation process can take time, is public, can be costly and there is limited scope for flexibility or adjustments.

The AICD's submission focuses on the need to ensure that lawful sustainability collaborations to decarbonise whole sectors at a more rapid pace are not discouraged by undue competition law constraints. We recognise that there are legislative constraints that the ACCC is operating within.

## Executive Summary

In respect of the Draft Guidance, we offer the following key points for consideration:

- That the Draft Guidance be reframed to be more permissive, emphasising that many types of sustainability collaborations will not raise competition law concerns.
- That the Draft Guidance include further detail about the types of environmental information that would be deemed 'commercially sensitive information', including guidance on data sharing within industries (for instance for scope 3 emissions).
- That further detail be provided regarding interim and streamlined authorisations, including what sorts of applications and conduct are likely to qualify, as well as guidance on timing.
- That the Draft Guidance be broadened to capture broader sustainability issues, such as modern slavery collaborations and appropriate case studies that demonstrate the 'public benefit test'.
- That legislative reform may be needed to address rigidity in Australia's competition laws and accelerate progress towards national sustainability goals.

## Comments on the Draft Guidance

### Low-risk sustainability collaborations

We understand that the ACCC's intention in developing this guide is to make clear that competition law should not be seen as an insurmountable barrier for collaboration on sustainability that can have a public benefit. To address director concerns and ensure the guidance reflects the ACCC's intention, we suggest:

- That it would be helpful to include an **overarching comment that many types of sustainability collaborations will not raise competition concerns** such as the comment made by ACCC Chair, Ms Gina Cass-Gottlieb, late last year:

*There are many types of sustainability collaborations that will not raise competition concerns. It is critical that **these legitimate collaborations** are not hampered by a fear of competition law risk or confusion about how competition law operates. If legitimate collaborations are not proceeding, this would mean that private sector resources – which often represent the majority of capital and expertise – are being unnecessarily prevented from contributing to society's transition. This delays environmental progress and increases the burden on governments and taxpayers.<sup>1</sup>*

- The Draft Guidance be **reframed to emphasise conduct between businesses that the ACCC views as having a low competition law risk** (currently included in Section 3.4 of the Draft Guidance). It would be helpful to include additional case studies illustrating a broader range of low-risk conduct unlikely to breach competition laws. It is critical that users of the guidance who are not familiar with the technicalities of competition law are not deterred from lawful sustainability collaborations because of a perceived high risk. See comments below on additional low-risk examples our members have sought guidance on.
- The low-risk examples in Section 3.4 of the Draft Guidance **include additional detail around the circumstances in which these examples might still breach the prohibitions on cartel conduct or other anti-competitive conduct**.
- The **exemptions included in Section 3.3 be expanded to include further detail around how they might apply**, particularly the joint venture exemption. We note that the joint venture exemption

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<sup>1</sup> Ms Gina Cass-Gottlieb, Chair of ACCC Speech, 6 December 2023. [\*Competition stewardship in markets transforming for environmental sustainability\*](#).

requires self-assessment by the parties and any further guidance on how it is applied would be very helpful.

- That the ACCC **provide template protocols that competitors looking to collaborate on sustainability issues could put in place to mitigate competition law risks.** This would be particularly beneficial for SMEs and NFPs that are not well-resourced and will struggle to obtain affordable specialist competition law advice.

We believe the above amendments will ensure businesses looking to engage in genuine sustainability collaborations are not deterred in line with the ACCC's aims with this guidance. This is particularly important for arrangements that are not in a business' short term financial interest, but it nonetheless has long term benefits to society more generally.

### **Specific comments on low-risk case studies**

Set out below are some comments we have received from stakeholders on the specific case studies in the Draft Guidance:

- **Pooling information about suppliers (Case Study 2):** This case study helpfully notes that pooling information about the environmental credentials of suppliers would be unlikely to breach competition laws. We understand that certain sectors are interested in developing standardised questionnaires for suppliers that apply to environmental issues (as they have done in the context of modern slavery). We would appreciate confirmation that such conduct would be unlikely to breach competition laws in the Draft Guidance, or alternatively, for the guidance to state the circumstances in which questionnaires such as these might be of concern to the ACCC.
- **Industry-wide emissions reduction target (Case Study 3):** It is helpful that the ACCC has confirmed that pledges to work towards an industry target are acceptable. We would welcome confirmation that collaborations to define the actions that would constitute or support credible achievement of the target or agreement on common methodologies for accounting and reporting progress towards that target would also be acceptable.

More broadly, as competition laws apply equally to NFPs as for-profits, we also believe that it would be useful to have examples that apply to the NFP sector where organisations are not well resourced and collective buying groups are common.

### **Commercially sensitive information and data sharing**

As an overarching comment, we understand that 'commercially sensitive information' is defined very broadly. To the extent it is possible, we would welcome additional detail in the Draft Guidance around the types of environmental information that would be considered competitively sensitive. For example, a clear list of "information that should not be shared ('don'ts') and information that can be shared where appropriate. (e.g. Don't share information about pricing, quantities, customers and territories; Where appropriate, share information about the environmental credentials of suppliers).

It is widely accepted that mandatory climate-related financial reporting requirements (to be introduced once the *Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024* passes) will require data and systems that may not currently exist to measure and reduce emissions. Directors repeatedly highlighted the challenges with obtaining accurate and reliable data on climate-related factors, particularly data relating to risks that occur outside the scope of a company's direct control (such as scope 3 emissions data). The same challenge will be presented for broader sustainability reporting (i.e. nature and biodiversity) where global reporting frameworks may be adopted by Australia and would require upstream and downstream value chain risk assessments and disclosure of impacts and dependencies on nature.

To ensure data availability and certainty, industry collaboration will be critical. Given interdependencies across sectors for scope 3 reporting, we understand that sectors and industry bodies are currently considering options (such as industry databases and tools) to uplift data capability and support credible and robust scope 3 reporting. Any further guidance around these sorts of collaborations would be helpful, with a view to supporting them to facilitate faster sectoral decarbonisation.

### **Agreeing to only acquire from suppliers who meet environmental standards (Case study 5)**

Members have highlighted Case study 5 as being particularly concerning. In certain industries, we understand there has been progress on setting environmental standards that would apply to the industry, for example limiting the use of particular inputs in the production process, as a material step to delivering decarbonisation targets.

We are concerned that advising that such agreements will generally require authorisation will slow progress on steps that are critical to decarbonise the economy.

We would encourage the ACCC to engage across government to ensure that there is an alignment of policy and enforcement approach. Where there is misalignment stemming from rigidity in the laws, then there will be a case for legislative reform (see below).

### **Further cases studies**

We believe that the Draft Guidance would benefit from additional case studies of sustainability collaborations that may be happening in the Australian market and internationally. Regulators in other jurisdictions (e.g. the [UK's Competition and Markets Authority](#) and [New Zealand's Commerce Commission](#)) have provided guidance to business about how they will apply their enforcement powers to sustainability collaborations.

While we acknowledge the legislative framework in these jurisdictions differs from Australia's, these jurisdictions have provided guidance on competition law risks associated with certain types of arrangements that we believe could be included in the ACCC's guidance. These include:

- collaborations to use joint funds for training activities for people in the industry to develop or encourage the use of more sustainable practices or processes;<sup>2</sup> and
- industry-wide reporting frameworks for reporting climate-related information.

Directors have also highlighted that it would be helpful to clarify that industry co-designed and governed tools such as sustainability and rating certifications systems do not breach competition laws, or alternatively, for the guidance to state the circumstances in which the development of such tools might be of concern to the ACCC.

### **Interim authorisations**

We understand this to be a flexible power of the ACCC that allows parties to commence taking steps in pursuit of their objective before final determination. As sustainability collaborations take time, we have received feedback that this is a useful option for companies looking to commence work on a

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<sup>2</sup> [Green agreements guidance \(publishing.service.gov.uk\)](#), pg 13.

collaboration where there is a competition law risk, provided the interim authorisation is provided in a timely manner.

We would welcome further detail in this section of the guide on the conduct that may be permitted under an interim authorisation, like the development of an interim roadmap plan or the types of commercially sensitive information that could be shared.

There may be an acute need to address an environmental issue and to move quickly. We have also received feedback that in practice an interim authorisation can take as long as the full authorisation and would also welcome guidance on timing for interim authorisations.

### ***Streamlined authorisation***

Directors welcome the streamlined consideration of authorisation applications set out in Section 4.4 of the Draft Guidance. We would appreciate further detail around the streamlined process, including further criteria for what types of applications would likely qualify and whether a shorter time frame could be considered.

We have received feedback that two months for a streamlined authorisation (as suggested in the case study under Section 4.4) is relatively slow and could be a deterrent for companies considering a streamlined authorisation process.

### ***A 'class exemption' for sustainability collaborations***

We have received feedback that the ACCC should consider using its 'class exemption' power to identify and implement a class exemption which would authorise sustainability collaborations between competitors that pursue a genuine sustainability objective, without requiring an authorisation. The exemption should provide clear guidance and case studies to support businesses to self-assess and avoid the need for individual authorisations. Such an approach could give business comfort that competition law is supporting their initiatives to mitigate climate risk.

### ***Resourcing of the ACCC and broader legislative reform***

We expect there to be an increased workload for the ACCC given the pressing need to decarbonise the economy and meet national emissions targets. It will be critical that the ACCC is sufficiently resourced to address authorisations, particularly interim and streamlined authorisations in a timely manner.

It may be that reform is needed to address rigidity in Australia's competition laws and accelerate progress towards national sustainability goals. We note that the ongoing competition policy review being conducted by Treasury, supported by an Expert Advisory Panel, may be the appropriate avenue for these issues to be taken up. If the 'class exemption' is not an option, we would encourage Treasury to consider:

- the European Union's 'safe harbour' arrangements<sup>3</sup> for certain sustainability-agreements exempted from competition rules; or
- the UK's exemption for certain environmental sustainability agreements contained in the Green Agreements Guidance<sup>4</sup>.

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<sup>3</sup> [Antitrust \(europa.eu\)](https://europa.eu)

<sup>4</sup> [Green agreements guidance \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

We would also suggest that the ACCC consider the use of comfort letters for competitors who approach the ACCC confidentially to discuss sustainability collaborations it considers very low risk. Alternatively, reform could include immunity from prosecution for all sustainability agreements where parties have discussed their agreement with the ACCC and it did not raise competition concerns, or those concerns were addressed. This approach has been adopted in the UK.<sup>5</sup>

### **Other sustainability issues**

Finally, while the Draft Guidance notes in Footnote 1 that the principles 'may' be applied to other sustainability issues, the examples provided are all environmentally focused. The use of the word 'may' in Footnote 1 is likely to increase uncertainty as to whether the principles included in the Draft Guidance will be applied to sustainability collaborations beyond environmental ones.

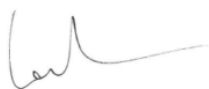
In addition, we have received extensive feedback that the ACCC should not limit the definition to environmental sustainability and that there is utility in extending the Draft Guidance to cover collaborations on broader issues relating to human rights, including modern slavery. We further note global developments via IFRS's International Sustainability Standards Board (ISSB) to develop specific reporting standards beginning with, but not limited to climate (with the latter being used as the basis for Australia's pending mandatory reporting regime).

We note that there is an illegality overlay that applies to modern slavery and human rights issues in supply chains. Directors would welcome further guidance and case studies to understand how collaborative arrangements (particularly those that are already under way) to address modern slavery and other human rights issues would be treated by the ACCC. For example, would resources developed to aid a sector better operationalise modern slavery risk identification and management be considered a low-risk activity or would sharing information from reputable sources about entities alleged to be linked to the most egregious forms of modern slavery be acceptable. From a public policy perspective, we would encourage the ACCC to take a pragmatic approach that recognises the scale of the global challenge.

### **Next Steps**

We hope our submission will be of assistance. If you would like to discuss any aspects further, please contact Christian Gergis, Head of Policy, at [cgergis@aicd.com.au](mailto:cgergis@aicd.com.au), or Christie Rourke, Senior Policy Adviser at [crourke@aicd.com.au](mailto:crourke@aicd.com.au).

Yours sincerely,



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<sup>5</sup> Ibid, pg 44.