Law Council
OF AUSTRALIA

Business Law Section

5 August 2024

Australian Competition and Consumer Commission
23 Marcus Clarke Street
CANBERRA ACT 2601

By email: exemptions@accc.gov.au

Dear Commission,

ACCC Draft Guidelines on Sustainability Collaborations

1. The Competition and Consumer Committee of the Business Law Section of the Law Council of Australia (the **Committee**) welcomes the opportunity to comment upon the draft guidelines on sustainability collaborations issued by the Australian Competition and Consumer Commission (the **ACCC**) on 8 July 2024 (the **Draft Guidelines**).

2. The Draft Guidelines provide an opportunity to guide parties involved in sustainability collaborations about the potential competition risks of working together and their options to address them. The Committee is of the view that the level of detail and practical examples included in the Draft Guidelines contain some welcome and helpful steps towards:

    a) ameliorating the chilling effect on businesses pursuing sustainability collaborations that are not prohibited by the *Competition and Consumer Act 2010* (Cth) (the **CCA**);

    b) providing clarity for businesses on the types of sustainability collaborations and their corresponding risk levels;

    c) educating businesses on the broad range of possible environmental and/or sustainability consequences that may qualify as a public benefit;

    d) providing practical guidance as to the manner the ACCC assesses authorisations, including when it will adopt a streamlined process.

3. However, the Committee believes that the Draft Guidelines should include further detail on the ways in which sustainability collaborations may be permitted by Australian competition law other than through authorisation, in particular the exemptions that are presently discussed briefly in section 3.3 of the Draft Guidelines. While the ability to obtain authorisation is an important and, compared to many overseas jurisdictions, unique feature of Australian competition law, the Committee has received feedback that the resources, cost and time that can be involved in obtaining authorisation may represent a barrier for some sustainability collaborations, which might otherwise benefit from an exemption. The prominence given to authorisation in the Draft Guidelines means that they do not sufficiently address the underlying reasons why businesses are reluctant to engage in sustainability collaborations, which are contributing to missed opportunities in sustainability and other social areas of collaboration.

4. The Committee notes authorisation is expensive, time consuming and onerous for both small and well-resourced businesses alike. The Committee recommends the ACCC address these issues for businesses by:

    a) introducing safe harbours through use of class exemptions for low-risk sustainability collaborations;

    b) providing additional examples of collaborations that trigger the joint venture exception, collective acquisition exception or notification regime;

    c) implementing an informal guidance regime; and

    d) clarifying the Draft Guidelines also apply to non-environmental types of sustainability initiatives such as ethical supply chain issues, human rights, safety or labour practices.

5. The Committee believes adopting these changes can create greater certainty for businesses and enables the ACCC to devote its resources to addressing those sustainability collaborations that are most problematic from a competition law perspective.

Sustainability Collaboration Safe Harbours by Class exemption

6. The Committee observes that, in 2023 and 2022 respectively, the European Commission (**EC**) and Competition and Markets Authority (**CMA**) implemented soft safe harbours within which certain specialisation and research and development agreements would not be construed as having the required effects to amount to an infringement, provided that a number of cumulative conditions are met.[1] Examples of these agreements include agreements which phase out or replace unsustainable products (e.g. plastics) with sustainable ones.[2]

7. A significant number of authorisations that are approved by the ACCC fall into similar categories of conduct that are likely to be low risk (and also eligible for the streamlined procedure), such as:

    a) joint renewable energy buying groups (for example: 1Circle Pty Ltd[3]);

    b) industry stewardship schemes that impose a levy for the recycling or safe disposal of products (for example: REDCycle[4] or Battery Stewardship Council[5]); and

    c) joint tenders by local councils to underwrite investment in new waste disposal or recycling facilities (for example: Eastern Metropolitan Regional Council[6]).

8. As acknowledged by the ACCC in section 3.4 of the Draft Guidelines, these types of initiatives can be implemented in a manner that is unlikely to impact on the key parameters of competition—being price, quantity, quality, choice or innovation. Despite the similarities of these proposals, on each occasion a separate application must be made. While application costs may be lower than for large corporate entities, or in some instances waived, the cost of preparing an application can still

[1] EC Antitrust: Commission adopts new Horizontal Block Exemption Regulations and Horizontal Guidelines and CMA Retained Horizontal Block Exemption Regulations – R&D and specialisation agreements.
[2] For example, CMA Guidance on environmental sustainability agreements at [5.10].
[3] ACCC Final Determination AA1000634 - 1Circle Pty Ltd.
[4] ACCC Final Determination AA1000627 – Coles.
[5] ACCC Final Determination AA1000476 - Battery Stewardship Council.
[6] ACCC Final Determination AA1000587 - Eastern Metropolitan Regional Council.

be high and delay can result in initiatives being abandoned or opportunities to participate being missed.

9. The Committee invites the ACCC to consider whether an alternative mechanism may be more appropriate. Under section 95AA of the CCA, the ACCC may determine "class exemptions" which permit businesses to engage in specified conduct, that would otherwise risk contravening the CCA, without needing an authorisation application.

10. The rationale for these class exemptions is that they allow the ACCC to effectively create "safe harbours" for specific forms of conduct, without the administrative and financial burden of an authorisation application. Businesses can then self-assess whether their proposed activity would be covered by the class exemption. Since being given this power under the CCA, however, the ACCC has only granted one class exemption—a collective bargaining class exemption under which there have been over 90 notifications.[7]

11. The Committee recommends that the ACCC determine a class exemption for low-risk sustainability collaborations. The ACCC can develop the scope of any safe harbour with respect to the criteria identified in paragraph 32 and using the examples in paragraph 40 of the Draft Guidelines as a reference point, to satisfy itself that either:

    a) conduct of the kind under consideration would not have the effect of substantially lessening competition; or

    b) conduct of that kind would result in a benefit to the public that would outweigh any detriment,

    as required by section 95AA.

12. Additionally, a safe harbour could be crafted by the ACCC providing a commitment to not take enforcement action in certain limited circumstances (without formally granting an exemption) that are low risk.

Additional elaboration on joint ventures, collective acquisition and notifications

13. The Committee further notes that, while the Draft Guidelines provide many useful case studies, the predominant focus is on conduct in an authorisation context, and do not provide examples of sustainability collaborations that may rely on:

    a) the joint venture exception (aside from a passing reference in case study 7),

    b) the collective acquisition exception, or

    c) the notifications mechanism.

    The Committee sees this as a potentially missed opportunity to assist businesses in considering alternatives to applying for authorisation.

14. The joint venture and collective acquisition exceptions are a feature of Australian competition law commonly relied on to facilitate a broad range of joint activities and procurement in the Australian economy. In many instances a sustainability arrangement will involve the type of joint activity that the joint venture or collective

[7] ACCC Collective Bargaining Class Exemption as of 31 July 2024.

acquisition exceptions are capable of covering. Where this type of joint activity is not for an anti-competitive purpose and is structured appropriately, it can—and should—avoid cartel conduct risks. The joint venture exception applies where:[8]

a) there is a joint venture for the production of goods, supply of goods or services, or the acquisition of goods or services,

b) the relevant cartel provision is for the purposes of the joint venture, and reasonably necessary for undertaking the joint venture, and

c) the joint venture is not carried on for the purpose of substantially lessening competition.

15. The Committee recommends that the ACCC provides additional examples of how the joint venture and collective acquisition exceptions can apply to sustainability collaborations. For instance, the ACCC could elaborate further on case study 7 by explaining how the building manufacturers could structure their arrangement to benefit from the joint venture exception. Practical tips, such as:

    a) implementing controls on the flow of commercially sensitive information,

    b) limiting any inputs that are jointly selected to only those that are necessary for the arrangement, and

    c) competition protocols for joint meetings,

    can assist businesses in considering whether alternatives to authorisation are right for them. The Committee suggests a similar approach can also be applied to the collective acquisition exception and notifications in the Draft Guidelines. The Committee considers the provision of this guidance will be particularly important to ensure that businesses understand their options for effectively managing competition law risk for sustainability collaborations and are not given the impression that authorisation, and the associated costs and time involved in that process, should be the main option considered.

Informal guidance

16. The Committee observes that both the EC and CMA provide some protection from enforcement through an informal guidance letter process.[9] Under each process, businesses can work collaboratively with regulators to resolve any concerns. The review is 'light touch' and informal, and not a binary assessment of compliance or non-compliance. Regulators can indicate any concerns and possible adjustments, working with the parties to achieve a solution consistent with its guidance. Both regulators have provided assurances to not impose a penalty provided there are no material changes to the circumstances. For example, since its introduction in October 2023, the CMA has already issued two decisions: to the Fairtrade Foundation in relation to the sourcing of Fairtrade products by supermarkets[10] and to the World Wide Fund for Nature UK (WWF-UK) in relation to a joint commitment by supermarkets to using suppliers who commit to net zero emission targets.[11]

[8] CCA, s 45AO.
[9] EC Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that arise in individual cases (guidance letters) and CMA Guidance on environmental sustainability agreements, section 7.
[10] CMA Informal Guidance: Green Agreements Guidance Fairtrade Shared Impact Initiative.
[11] CMA Informal Guidance: Green Agreements Guidance WWF-UK: WWF Basket – Climate Action.

17. The ACCC is well placed to use the authorisations process and its associated administrative powers such as the streamlined procedure, conditions and undertakings in the same way. It is also consistent with the ACCC's position that it is "available and willing" to discuss sustainability collaborations with businesses prior to lodging an authorisation application. However, this will require the ACCC to think differently about its role and the nature and value of sustainability goals.

Application of the Draft Guidelines

18. The Committee also encourages the ACCC to take the opportunity to clarify and emphasise that the principles in the Draft Guidelines extend to additional types of sustainability. This is currently limited to a mention in a footnote:

> *While this guidance focuses specifically on environmental sustainability, the principles discussed may also apply to other types of collaboration agreements including those related to other forms of sustainability objectives.*

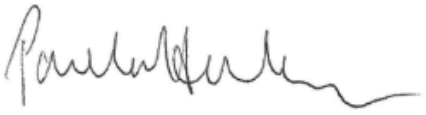
19. The EC, for example, expressly notes that sustainability agreements are not limited to environmental or climate change concerns but encompass all aspects of sustainable development that contribute to 'the ability of society to consume and use the resources available today without compromising the ability of future generations to meet their own needs'. This includes initiatives that support economic, environmental, and social (including labour and human rights) development.[12] Similarly, the New Zealand Commerce Commission provides that, while "the concept is generally associated with environmental protection, it also includes broader aims such as inequality, food security, responsible consumption, and labour rights".[13] This wide definition of sustainability agreements is consistent with the broad treatment of "public benefits" under the authorisation regime.

20. The Committee suggests that the ACCC draw similar attention in the main body of the Draft Guidelines to how the principles mentioned may also apply to other forms of sustainability.

21. The Committee thanks the ACCC for consideration of its submission.

22. Please contact Peta Stevenson, Deputy Chair, Competition and Consumer Committee (+61 438 289 743) in the first instance should you require any further information or clarification.

Yours faithfully



Dr Pamela Hanrahan
Chair
Business Law Section

[12] EC Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements at [517].
[13] Commerce Commission Collaboration and Sustainability Guidelines at [11].