



To the Commerce Commission

Your reference

By email:

competition@comcom.govt.nz

Our reference

24 August 2023

Collaboration and Sustainability Guidelines

This letter responds to the request for submissions on the draft Collaboration and Sustainability Guidelines (**Guidelines**), issued by the Commerce Commission on 1 August 2023.

Thank for your taking the time to prepare the Guidelines, as this is an important topic that is increasingly of concern to our clients and businesses more generally.

The Guidelines are clear on the potential competition law risks arising from collaboration between competitors on sustainability initiatives.

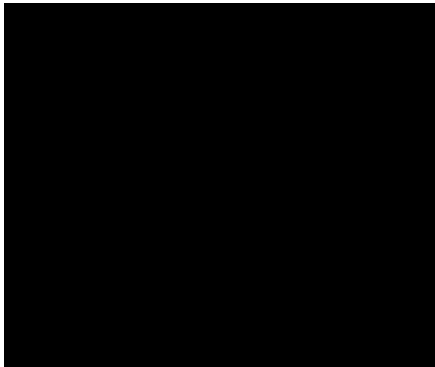
However, overall the Guidelines go no further than identifying the issues, and do not provide businesses with any certainty or comfort, and do not go far enough to encourage pro-competitive collaboration, which is necessary to solve some of the very important issues facing the world right now.

In our view, it would be helpful if the Guidelines included:

- examples of conduct that would likely be a breach of the Act and conduct that would not. The examples provided note the issues but not the outcomes, e.g. on page 7 the collaborative activity example simply notes "A key consideration will be whether agreeing to charge levies is reasonably necessary to achieve the disposal of the harmful waste". This is simply restating the law. It would be useful to have some guidance on when that would be considered reasonably necessary, what factors the Commission would take into account, and on what basis the Commission may grant a clearance for the agreement in the example.
- examples of in what circumstances the Commerce Commission would believe cartel behaviour 'reasonably necessary' and 'not lessening competition', in particular in relation to paragraphs at 34.1 and 34.2.
- reference to the social and governance components of ESG practices and specific examples relating to these issues.
- specific factors that the Commission will consider relating to ESG issues in assessing a clearance application.
- specific factors that the Commission will consider relating to ESG issues in assessing an authorisation application.
- clarification about what constitutes a 'public benefit' in granting businesses Authorisation.
- further information at paragraph 44 to distinguish how a standardisation agreement would differ from other agreements and industry-wide standards that would likely be considered anti-competitive behaviour. Currently, the phrasing would likely confuse businesses, as the guidance appears contradictory.

- Whether the Commission will exercise any discretion in deciding to take enforcement action, or amend its enforcement guidelines, in recognition of the important public benefits in addressing climate and sustainability issues in a timely way and encouraging collaboration to address the issues.

Yours sincerely



DLA Piper New Zealand