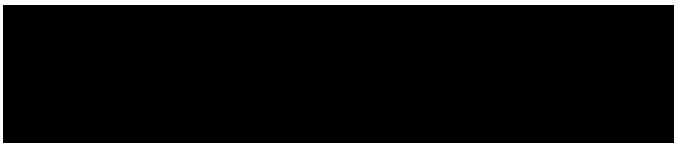


24 August 2023

By Email: [competition@comcom.govt.nz](mailto:competition@comcom.govt.nz)



## Draft Collaboration and Sustainability Guidelines 2023

1. Thank you for the opportunity to submit feedback on the Commission's Draft Collaboration and Sustainability Guidelines (**Draft Guidelines**).
2. As the Commission will be aware, it has been over two years since the New Zealand Government formally declared a climate emergency joining over 1,800 jurisdictions in 32 countries (at that time) to do the same. The climate emergency is a pressing issue for all participants in our economy; as the Hon James Shaw, Minister for Climate Change, recently noted, "*[the climate crisis] affects us at every level we operate [...] [a]s individuals, households, businesses, cities... and countries*".<sup>1</sup>
3. Accordingly, we welcome the Commission publishing guidance to assist businesses to understand when collaboration with competitors for sustainability objectives may raise competition issues under the Commerce Act 1986 (**Act**). However, the Draft Guidelines do not, in our view, give businesses (or their legal advisors) the guidance needed to make a real difference in addressing the climate crisis.
4. As the Draft Guidelines recognise, industry collaboration will be necessary to meet New Zealand's international commitment to reducing greenhouse gas emissions by 2050. However, it is a criminal offence under the Act for competitors to enter into arrangements or understandings that contain a cartel provision, even if the purpose of that collaboration is to reduce greenhouse emissions or implement other sustainability initiatives and does not lessen competition. While the Act contains an exception for collaborative activities, there is significant uncertainty as to how that exception will be interpreted and applied by the Commission and the courts.
5. Seeking clearance or authorisation of restrictive trade practices under the Act is often prohibitively expensive for all but the very largest businesses and uncertain.<sup>2</sup> Given this, the general outlook is that competitor collaboration on sustainability initiatives is high-risk which is likely to impede such collaboration. We are seeing a chilling impact already as the Draft Guidelines have themselves raised further awareness of how the exceptions to the strict cartel prohibition under the Act are strictly limited and applied, and may not exempt genuine collaboration between businesses to address the climate emergency.
6. Businesses proposing to collaborate on sustainability initiatives require a clear safe harbour and absolute clarity from the Commission on when the Commission may decide to take enforcement action in this area. The Draft Guidelines do not currently give this guidance. The examples of collaborative activity provided in the Guidelines that are unlikely to raise competition concerns are obvious and do not address areas of uncertainty. The examples also do not address the types of collaborative initiatives that are likely to move the dial on reducing greenhouse gas emissions.
7. The current legal framework is too restrictive to enable businesses to effect real change through collaboration. Accordingly, we encourage the Commission to consider taking a similar approach to its "Business Collaboration In Response To An Emergency" guidelines, at least for an interim period,

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<sup>1</sup> <https://www.beehive.govt.nz/speech/working-together-achieve-net-zero-speech-australia-new-zealand-leadership-forum>

<sup>2</sup> This is particularly the case for clearances, given the only application for clearance of a collaborative activity was declined by the Commission - Anytime NZ Limited [2022] NZCC 22.

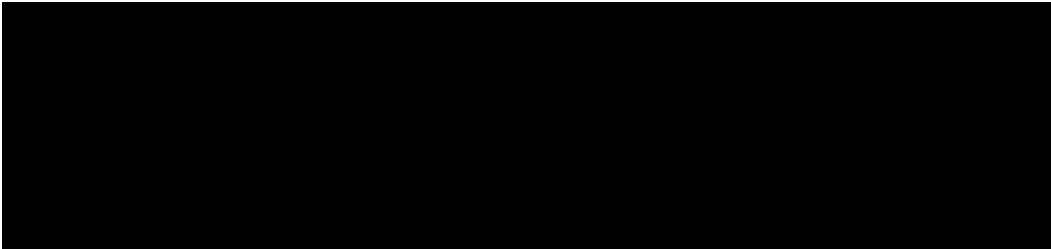


which set out the factors that the Commission will consider when exercising its discretion when it decides whether to investigate or take enforcement action.

8. This approach would assist both businesses who are required to make climate-related disclosures under the Part 7 A of the Financial Markets Conduct Act 2013 (as inserted by the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021) of measures they are taking to mitigate the climate impact of their businesses, and those other businesses who are voluntarily complying with the standards issued under Part 7A (or other TCFD-based standards) to understand climate impacts on their sector. That latter group should equally be of concern as climate impacts affect all businesses regardless of their legal status.
9. Many of the “large” entities<sup>3</sup> which are required to make such disclosure are, in reality, medium-sized businesses and are struggling to find the resources to understand how they and their industries will be impacted by climate change. The other businesses who are strictly outside the mandatory reporting regime but wish to comply voluntarily may have even less resources available, if they are below the “large” threshold. As a result, the only realistic way they can assess those impacts – and prepare to respond – is to work together.
10. These public disclosures would be another method by which the Commission could actively monitor collaboration between New Zealand entities on sustainability initiatives.
11. Thank you again for the opportunity to make this submission and the work to date in compiling the Draft Guidelines. We would be happy to discuss our views further with the Commission if that would be useful.
12. Finally, we note that this submission is made on behalf of MinterEllisonRuddWatts and does not necessarily represent the views of any of the firm’s clients.

Yours sincerely

**MinterEllisonRuddWatts**



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<sup>3</sup> These businesses are climate reporting entities under Part 7A of the Financial Markets Conduct Act 2013 (FMCA).