



**Submission to the Commerce Commission  
Collaboration and Sustainability Guidelines**

**23 August 2023**

**INTRODUCTION**

1. Webb Henderson is grateful for the opportunity to submit to the Commerce Commission (**Commission**) on its Collaboration and Sustainability Guidelines (Draft for Consultation, 31 July 2023) (**Draft Guidelines**).
2. The Draft Guidelines are an important and useful initiative because it is essential that competition law strikes an appropriate balance between enabling businesses to collaborate for sustainability outcomes, while also protecting consumers and the wider economy from anti-competitive behaviour. It is particularly important that competition law does not obstruct or unnecessarily chill the development of initiatives by competitors to collaborate in appropriate cases, as may be required to make meaningful progress towards sustainability outcomes.
3. Our observation as practitioners is that the combined effect of criminalisation of cartel conduct and the ongoing (and important) enforcement activity by the Commission in relation to cartels has resulted in many businesspeople being reluctant to engage with competitors at all in any circumstances, for fear of a technical breach of the Commerce Act 1986 and the significance of the potential consequences. In this context, the Draft Guidelines provide a welcome indication of the areas in which engagement between competitors would not be problematic when pursuing sustainability initiatives.
4. We particularly commend the Commission for the “open door” approach indicated in the Draft Guidelines, by way of contact details provided for its competition branch.
5. At the same time, we are of the view that the Draft Guidelines would benefit from further clarity on the circumstances in which initiatives will not be likely to be problematic, and also on the process, and timeframes within which the Commission will aim to provide guidance if it is sought. We set out some suggestions below.
6. Unless the correct balance is struck, the Commission’s scarce resources may be tied up assessing applications that could have been self-assessed, and progress toward more sustainable outcomes will risk being deterred, including due to parties deciding not to proceed with initiatives, or only progressing initiatives that have a lower sustainability impact, rather than investing the time and cost in a clearance process.

## RECOMMENDATION

7. Without repeating the extensive commentary available internationally, it suffices to note here that in the publication of specific guidelines for competitor collaboration in pursuit of more environmentally friendly and sustainable outcomes, a large number of international competition regulators, like the Commission, have acknowledged the particular issues with the interface between competition law and essential competitor collaboration for public good in this sector.
8. Our observations as practitioners are similar. As compared with other competitor collaborations, in our experience sustainability initiatives often have different value drivers, for example:
  - (a) Optimal environmental outcomes, particularly with respect to climate change initiatives, are often achieved if there are prescriptive common standards or approaches that all or most market participants adhere to. This is both because the impact of the initiative will not be as effective if only part of the market adopts it, and also because if consumers need to change their behaviour, the environmental or sustainability benefit may be lost or muted, or trumped, by the competition effect of the consumers adopting the most convenient and least cost option. For example, consider New Zealand's move away from single-use plastic bags by supermarkets charging for alternative multi-use bags. That initiative would arguably not have been effective in changing consumer practices, and the significant waste reduction benefits it has provided, if only one supermarket chain had adopted it.
  - (b) If the whole market moves to a more sustainable practice that does not cost consumers more, then there may be no net financial advantage to competitors in adopting those practices, because there is no competitive differentiation arising from the change. This is a good outcome for the environment and consumers, and businesses are often willing to invest in it for social good reasons, but it has an impact on the budget available to pursue the initiative. Particularly in the current economic environment, there are a number of competing calls on businesses' costs.
9. The corollary of this is that an expensive and lengthy process can make the difference in parties' decisions whether to proceed with the initiative at all, and if so, what shape the collaboration takes. A clearance application or authorisation can take many months to be processed through the Commission, and, in most cases, costs in the hundreds of thousands, once the management time, internal and external legal support and, in the case of authorisations, expert economic assistance is factored in. The Draft Guidelines in this context are welcome, to the extent they are designed to assist the self-assessment process and provide an informal avenue for businesses to engage directly with the Commission to promote collaboration on sustainability initiatives.
10. However, in our view, the Draft Guidelines could go further and provide greater clarity on the application of the relevant tests and on process. In this context there is a case for being even more prescriptive in providing guidance for self-assessment, and more flexible in respect of process. In particular:
  - (a) *More flexible and swifter processes for engagement with the Commission on climate change collaboration:* The Commission operated a highly successful and flexible approach to covid response-specific collaboration in the course

of 2020-21.<sup>1</sup> It provided a commitment to turn around comments on informal approaches and grant interim clearances expeditiously if the collaboration met certain criteria (ie it was necessary to address covid response impacts). It would be a welcome development if collaborations that meet particular sustainability criteria could be fast tracked for at least a preliminary assessment or interim clearance within a short, say 4 week, timeframe with some dedicated expert resource at the Commission to support those assessments.<sup>2</sup>

- (b) *More lenient and fast-tracked approach to climate change agreements:* The United Kingdom Competition and Markets Authority (**CMA**) in its draft Guidance published in February 2023<sup>3</sup> adopts a lower threshold for “climate change agreements”, which are agreements that “*will typically reduce the negative externalities from greenhouse gases, such as carbon dioxide and methane, emitted from the production and consumption of goods and services.*” In respect of those agreements, a more lenient approach is taken, that permits benefits from the collaboration to the wider public to be balanced against any detriments, such as increased costs, in the markets that are the subject of the collaboration.

Although New Zealand’s authorisation process allows the same balancing exercise to be undertaken, the self-assessment process does not. The Commission’s usual approach to authorisations is conservatively thorough, because ultimately it is the grant of a statutory authorisation to lessen competition<sup>4</sup>. However, in our experience this also means that the time and cost of such processes is significant, and likely a material deterrent to arrangements of this nature.

The CMA’s approach to defining this separate category of collaboration is motivated by the UK’s international obligations in relation to climate change (such as the commitment to net zero by 2050), and also more broadly by what the CMA calls “the special category of threat” that climate change represents. New Zealand’s current climate change ambition is the same<sup>5</sup>. In that context it would be useful if the Draft Guidelines were able to similarly indicate a stronger commitment of Commission resources to facilitating urgent action in this important area.

This approach also would permit the Commission to ensure that outside the category of climate change agreements, it can play its part in facilitating a wide range of collaborations promoting sustainable business practices and social good, to which the same considerations, already outlined in the Draft Guidelines, would apply. For example, in the wider arena of sustainable

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<sup>1</sup> Kris Faafoi “Government statement on commercial cooperation during COVID-19” (22 March 2020) <[www.beehive.govt.nz](http://www.beehive.govt.nz)>; Commerce Commission “COVID-19: Commission issues guidance on business collaboration” (1 May 2020) <[www.comcom.govt.nz](http://www.comcom.govt.nz)>; and Commerce Commission “Authorisations under the COVID-19 Response (Further Management Measures) Legislation Act” (May 2020) <[www.comcom.govt.nz](http://www.comcom.govt.nz)>.

<sup>2</sup> Some of these additional procedures adopted by the Commission during COVID-19 required specific legislative support in the COVID-19 Response (Further Management Measures) Legislation Act 2020. However, it remains within the Commission’s powers to provide further guidance or amend its usual processes for collaborative activities (outside of the legislated authorisation regime).

<sup>3</sup> [CMA Guidance](#)

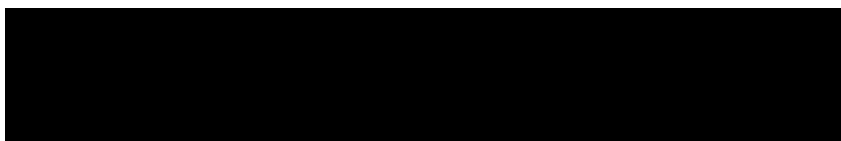
<sup>4</sup> Commerce Act 1986, s58 and s58A

<sup>5</sup> Climate Change Response Act 2002, s5Q

business practices sits a significant quantity of engagement, including between competitors, to limit modern slavery and exploitative conditions in the supply chain. These collaborations are generally readily self-assessed, but have the same social good drivers as discussed above, and could be better facilitated by also falling within the wider definition of collaboration to promote sustainable business practices, in the Draft Guidelines.

- (c) *Further guidance on circumstances in which the potential impact of an initiative being an increase in market price would be treated as reasonably necessary or giving rise to a net public benefit:* There has been debate internationally on the extent to which price increases that recover costs for transition to industry-wide sustainable business practices would be reasonably necessary for the purposes of a collaboration (or, as described in the EU/UK context, “indispensable” to the collaboration). The CMA Guidance provides specific commentary about the circumstances in which agreements on price would not be justifiable,<sup>6</sup> and when a higher price outcome for a more sustainable industry practice would be, if supported by evidence.<sup>7</sup> We would encourage the Commission to build out its discussion in the Draft Guidelines along similar lines, to provide businesses with the confidence to engage on these issues which can have significant benefits to society as a whole.
- (d) *Adopting the “safe harbours” approach of the European Commission (EC)<sup>8</sup> for “start-up” or “innovation lab” collaborations:* Safe harbours provide a “bright line” of combined market shares, and other criteria an agreement must meet, below which parties can self-assess with confidence. This approach would likely have the effect of encouraging the number and frequency of “start-up” collaborative sustainability initiatives being developed. This can be particularly helpful in the early testing phases of development when undertaken by a small number of market participants, before expanding the scope of application of the collaboration more widely once the likely benefits of the collaboration are able to be predicted and demonstrated with greater confidence.

11. Thank you for consideration of these suggestions. If the Commission has any questions on this submission they may be directed to:



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<sup>6</sup> CMA Guidelines, 4.6 and 5.14

<sup>7</sup> CMA Guidelines 5.18-20, 5.23

<sup>8</sup> See Guidelines on the applicability of Article 101 of the “Treaty on the Functioning of the European Union to horizontal co-operation agreements” C259/1 Official Journal of the European Union at [538].