Office of the
NSW Anti-slavery
Commissioner

Sustainability collaborations and Australian competition law: A guide for business

Submission to the Australian Competition & Consumer Commission by the NSW Anti-slavery Commissioner

26 July 2024

Acknowledgement of Country

As New South Wales Anti-slavery Commissioner, I acknowledge that Aboriginal and Torres Strait Islander peoples are the first peoples and traditional custodians of Australia and the oldest continuing culture in human history.

I acknowledge that First Nations communities in New South Wales have survived practices that today we call modern slavery. The legacies of that treatment continue to affect Aboriginal and Torres Strait Islander people today, and through them affect the New South Wales community and economy.

My Office and I pay our respects to elders past and present and commit to respecting the lands we walk on, and the communities we walk with.

We celebrate the deep and enduring connection of Aboriginal and Torres Strait Islander peoples to country and acknowledge their continuing custodianship of the land, seas and sky. We acknowledge their ongoing stewardship and the important contribution they make to our communities and economies.

We reflect on the continuing impact of government policies and practices and recognise our responsibility to work together with and for Aboriginal and Torres Strait Islander peoples, families and communities, towards improved economic, social and cultural outcomes, self-determination and for real freedom.

We advise this resource may contain images, or names of deceased persons in photographs or historical content.

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Sustainability collaborations and Australian competition law: A guide for business

Published by the Office of the Anti-slavery Commissioner

dcjnsw.info/antislaverycommissioner

First published: July 2024

Acknowledgements

This submission was prepared by Dr James Cockayne, NSW Anti-slavery Commissioner.

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Executive summary

This submission argues that the ACCC draft Guide, *Sustainability collaborations and Australian competition law: A guide for business*, risks unintentionally impeding, rather than facilitating, sustainability collaborations that aim to combat modern slavery. This will put Australian business at a clear global competitive disadvantage and have a disproportionate negative impact on small and medium enterprises (SMEs), not-for-profits (NFPs) and charities, and suppliers.

By treating many sustainability collaborations as presumptively unlawful, the draft Guide has already begun to sow significant confusion amongst business and NFPs. Many have responded to more than 5 years of active, explicit encouragement from Australian governments to collaborate to tackle modern slavery by initiating a range of collaborations amongst buyers, suppliers, investors and civil society. These suddenly now risk being perceived as unlawful. Many organisations have indicated they will suspend participation in those collaborations until the ACCC and/or federal government clarify the legality of such cooperation.

The draft Guide diverges significantly from stated government policies in several other areas:

- It does not reflect established international understandings of sustainability, to which Australia has long been committed, which do not separate environmental and social efforts in the way that the draft Guide does.
- It does not appear to reflect Australia's commitment in particular to the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, which address both sustainability and competition considerations, and were developed in collaboration with the OECD Competition Committee. Authoritative OECD guidance specifically states that "typically [sustainability] collaborations will **not be in breach of [competition] laws"** (emphasis added).
- It fails to refer to existing federal and State legislation and guidance on business anti-slavery collaborations, which specifically exhort businesses to collaborate with each other to identify, manage and remedy modern slavery risks and harms.

The submission suggests that the draft Guide could place Australian businesses at a competitive disadvantage to foreign peers and impede access to US and EU markets and capital. And it suggests the approach laid out in the draft Guide is likely to have a disproportionately negative impact on small and medium enterprises (SMEs), not-for-profits (NFPs) and charities, and on suppliers.

The submission offers a series of Recommendations to the ACCC, including:

- clarifying its commitment to the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct and the UN Guiding Principles on Business and Human Rights;
- clarifying if anti-slavery collaborations pursuant to the *Modern Slavery Act 2018* (Cth) and *Modern Slavery Act 2018* (NSW) fall within an exception under section 51(1) of the *Competition and Consumer Act 2010* (Cth);
- considering issuing a class exemption for anti-slavery collaborations that reflects the approach to sustainability collaborations now being adopted in the UK, EU and elsewhere.
- entering into consultation with anti-slavery stakeholders in a manner that signals that they will not be subjected to enforcement actions for sharing information about anti-slavery collaborations already under way.

Introduction: the purpose of the draft Guide – "to assist businesses to understand"

1. On 8 July the Australian Competition and Consumer Commission ('ACCC') published a draft Guide for consultation, the *Sustainability collaborations and Australian competition law: A guide for business* ('draft Guide'). The draft Guide purports to

> "assist businesses considering working together to achieve positive environmental outcomes to understand:
>
> (a) when collaboration between businesses is likely to breach Australian competition law and when it is unlikely to do so, and
>
> (b) whether the businesses may have the option to seek an exemption from Australian competition law, through ACCC 'authorisation', when there is a risk of breaching the Competition and Consumer Act (2010) (Cth)".

2. In its own terms, "the ACCC particularly wants to address misconceptions about the operation of the Act which might stop businesses from jointly pursuing environmental initiatives which are not prohibited by the Act."

3. It does this by highlighting circumstances in which 'sustainability collaborations' are likely to be anti-competitive, and then highlighting the process of ACCC authorisation that is provided for by the *Competition and Consumer Act 2010* (Cth) as a way that businesses can ensure the lawfulness of such collaborations, *before* embarking upon them.

The draft Guide instead risks unhelpfully sowing confusion on the lawfulness of anti-slavery collaborations

4. Yet the approach taken by the ACCC is likely to have the opposite of the intended result of improving understanding of the legality of sustainability collaborations, at least in the context of anti-slavery collaborations. It will almost certainly chill – or perhaps freeze – numerous responsible business conduct collaborations that are already under way, particularly those that aim at discharging business' established responsibility to respect human rights, including fighting modern slavery.

5. These include sectoral collaborations to identify, mitigate and remediate modern slavery risks in the construction, finance, cleaning, consumer goods, ICT hardware and other sectors. Some of these collaborations are sizable. Investors Against Slavery and Trafficking Asia Pacific, for example, involves 49 institutional investors with AUD 12 trillion assets under management.

6. The draft Guide will sow confusion amongst businesses collaborating to combat modern slavery in three ways.

1.1 Lack of clarity on application to non-environmental aspects of sustainability

7. The draft Guide is unclear on how the principles it identifies will apply to non-environmental aspects of sustainability, such as the fight against modern slavery. Footnote 1 states simply: "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." The phrasing used here ('may') is likely to increase uncertainty. Do the principles apply or not? If not, why not, or when not?

8. Australian government and business has long been committed to the prevailing international definitions of and approaches to 'sustainability', which tend to treat sustainability in much broader terms than the ACCC draft Guide. Most corporate sustainability functions encompass not only environmental but also wider functions. Environmental sustainability tends to encompass climate and nature-related sustainability, as well as other environmental thematic concerns such as pollution. Social sustainability tends to encompass considerations relating to human rights including modern slavery, as well customer vulnerability and taking into consideration the risks of social harms associated with technology including artificial intelligence.

9. This reflects the prevailing international understanding of 'sustainability', which treats environmental and social issues as inter-related – not separate. In 1987, the United Nations Brundtland Commission defined sustainability as "meeting the needs of the present without compromising the ability of future generations to meet their own needs."[1] The UN expanded upon this, with the articulation of the Sustainable Development Goals, adopted by all UN members in 2015 – with the 17 inter-connected goals established to drive action across the environmental, social and economic aspects of sustainability.[2]

10. This is also the approach reflected in prevailing global sustainability frameworks, which guide significant government and corporate action under way in Australia:

    - IFRS's Institute for Sustainability Standards Board (ISSB), which has established standards for sustainability disclosure (S1) and climate disclosure (S2) forming the basis of the Australian government's mandatory climate disclosures, now widened to encompass wider sustainability disclosures.
    - Industry specific frameworks, such as the UN Global Compact (UNGC), Principles for Responsible Investment (PRI) and Principles for Responsible Banking (PRB), take a wider approach to defining sustainability, encompassing environmental, social and governance considerations.
        - With 7,000 corporate signatories in 135 countries, the UNGC is the world's largest voluntary corporate sustainability initiative
        - As of March 2022, the PRI had more than 4,800 signatories from over 80 countries, representing approximately US$100 trillion – this includes most of Australia's superannuation funds
        - The PRB has over 330 signatory banks, representing over half the global banking industry, including Australia's four major banks.
    - Thematic guidance, such as the Taskforce on Nature-related Guidance identifies intersecting considerations, specifically those relating to indigenous communities .The

[1] See https://www.un.org/en/academic-impact/sustainability.

[2] See https://sdgs.un.org/goals.

TFND guidance, while focused on environmental sustainability, acknowledges its own intersection with social sustainability.
- The Australian Sustainable Finance Taxonomy, now under development, includes a component specifically intended to ensure that environmental sustainability measures meet minimum social safeguards.
- The Australian Modern Slavery Act requires large Australian organisations to prepare annual modern slavery statements. These statements are generally prepared and supported by corporate sustainability management, and with oversight by sustainability-related management committees and ultimately the board, typically alongside or integrated with sustainability disclosures.

11. These approaches do not treat environmental and social impacts as divisible. And to do so risks creating unnecessary and unhelpful confusion.

12. The lack of clarity is exacerbated by sub-optimal consultation practice. ACCC appears not to have engaged in systematic consultation with relevant anti-slavery (or broader business and human rights) stakeholders prior to publication of the draft and has provided only 18 calendar days for public submissions on the draft Guide. This increases the likelihood both that stakeholders will not understand how the draft Guide will be applied to their activities, and that ACCC will not have the benefit of the views of a diverse group of stakeholders when it revises this draft. This increases the chances of a Guide being published that impedes, rather than assists, these types of sustainability collaborations.

1.2 Lack of clarity on whether anti-slavery collaborations are excepted under section 51(1)

13. The draft Guide notes that "[t]here are a number of exceptions in the Act and if any of these apply, the sustainability collaboration will not breach the prohibitions on cartel conduct or other key anticompetitive practices." It goes on to note that one of these exceptions, under section 51(1), is for "conduct specifically authorised by Commonwealth, State or Territory legislation", which includes regulations.

14. It is unclear whether business collaborations to combat modern slavery would fall within this exception, not least because the term 'specifically authorised' is not defined in the draft Guide or the *Competition and Consumer Act 2010* (Cth).

15. The *Modern Slavery Act 2018* (Cth) does not specifically *require* businesses to collaborate to tackle modern slavery. Nor are there regulations in place with this effect. Yet the official *Guidance for Reporting Entities* issued by the Commonwealth Attorney-General's Department repeatedly encourages such collaboration by businesses when implementing that Act:

> *"It is important that entities take a collaborative approach to combating modern slavery."*
> *"If you lack leverage, you should consider ways to increase your leverage, including by collaborating with other entities."*
> *"Take steps to build supportive, transparent and collaborative relationships with suppliers, including encouraging suppliers to be open with you about modern slavery risks."*[3]

[3] Commonwealth of Australia, *Commonwealth Modern Slavery Act 2018: Guidance for Reporting Entities*, May 2023, pp 57, 51 and 53, respectively. Available at https://modernslaveryregister.gov.au/resources/Commonwealth_Modern_Slavery_Act_Guidance_for_Reporting_Entities.pdf.

16. This Guidance was developed by the Commonwealth Government through extensive consultation with business and civil society, and has been updated more than once. It forms the basis of concerted and ongoing efforts by the federal Government to support reporting entities (e.g. businesses) to implement the Act, and has been promoted as the authoritative source of guidance to these entities around the country over several years. Indeed, one of the advertised functions of the Modern Slavery Business Engagement Unit in the Commonwealth Attorney-General's Department is to "Help you [i.e. businesses acting in accordance with the *Modern Slavery Act 2018* (Cth)] to collaborate with other organisations."

17. Similarly, the *Modern Slavery Act 2018* (NSW) does not specifically mandate business collaboration to combat modern slavery. But it does require a wide range of public entities, including certain state owned corporations and 10 universities, to take reasonable steps, to ensure they do not procure goods or services made with modern slavery, and/or to report on their modern slavery due diligence efforts. The NSW Anti-slavery Commissioner has a statutory mandate to oversee the effectiveness of this due diligence, and has issued detailed *Guidance on Reasonable Steps to Manage Modern Slavery Risks in Operations and Supply-chains*, which specifically calls for collaborative approaches to risk identification, management and remediation.

1.3 Inconsistency with Australia's commitment to the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct and to the UN Guiding Principles on Business and Human Rights

18. Both the Commonwealth Guidance and NSW Guidance promote anti-slavery collaboration because this is the expectation articulated in international standards and frameworks to which Australia committed more than a decade ago.

19. As written, the ACCC draft Guide is difficult to reconcile with Australia's well-established and long-standing commitment to the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct ('OECD Guidelines'). The official commentary on those Guidelines states:

> *26. ...Where entities with which an enterprise has a business relationship are potentially exposed to conflicting requirements, imposed for example by different buyers or service providers, **enterprises are encouraged, with due regard to anti-competitive concerns, to participate in industry-wide collaborative efforts with other enterprises to coordinate due diligence policies and risk management strategies, including through information-sharing.***
> *(emphasis added)*
> ...
> *29. Finally, it is important to note that self-regulation and other initiatives in a similar vein, including the Guidelines, should not unlawfully restrict competition, nor should they be considered a substitute for effective law and regulation by governments. It is understood that multinational enterprises should avoid potential trade or investment distorting effects of codes and self-regulatory practices when they are being developed.*
> ...
> *121. While enterprises and the collaborative initiatives in which they are involved should take proactive steps to understand competition law issues in their jurisdiction and avoid activities which could represent a breach of competition law, **credible responsible***

> ***business conduct initiatives are not inherently in tension with the purposes of competition law and typically collaboration in such initiatives will not be in breach of such laws.***[4] *(emphasis added)*

20. The ACCC's draft Guide seems to imply the opposite: that pre-competitive responsible business conduct collaborations are presumptively unlawful and therefore require application for a formal authorisation. This is notable given that:

    - The OECD Guidelines include a chapter on Competition, and the OECD Competition Committee was consulted in the development and in the 2022 update of the OECD Guidelines.
    - Australia has always purported to support and implement the OECD Guidelines.
    - The Australian Government has established a National Contact Point within the Department of Treasury that promotes the OECD Guidelines and provides conciliation services where complaints are brought against multinational enterprises for failure to abide by the Guidelines.

21. The ACCC draft Guide's failure to refer at any point to the OECD Guidelines, which address environmental issues amongst other things, suggests that the ACCC has simply not factored Australia's long-standing international commitment to this framework into its analysis. This is obviously problematic and should be addressed through consultation with relevant stakeholders, including the Australian National Contact Point, if indeed that has not already taken place.

The approach taken in the draft Guide is out of step with the approach to sustainability collaborations in other jurisdictions

22. Many foreign jurisdictions not only tolerate but actively promote collaborations amongst business, unions and civil society to reduce the negative impacts associated with certain supply-chains.

23. **Belgium**: A sustainability initiative of five major retailers with support of IDH –Sustainable Trade Initiative to achieve living wages in the banana sector was cleared by the Belgium Competition Authority in March 2023.

24. **Germany**: The German Retailers Working Group on Living Income and Living Wages, under which participating German food retailers voluntarily committed to set common standards for wages in the banana sector, was cleared of any competition concerns by the German competition authority, the Bundeskartellamt, in January 2022. The Bundeskartellamt also indicated in June 2023 that it would not conduct a detailed examination of the German Initiative on Sustainable Cocoa (**GISCO**) after finding 'no indications that the initiative would incur a clear risk of a restraint of competition'. GISCO is a joint initiative of government and participants in the sweets, confectionary and chocolate industries to "conserve and protect

[4] OECD (2023), OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, OECD Publishing, Paris, https://doi.org/10.1787/81f92357-en. Available at https://www.oecd-ilibrary.org/deliver/81f92357-en.pdf?itemId=%2Fcontent%2Fpublication%2F81f92357-en&mimeType=pdf

natural resources and biodiversity in cocoa producing countries as well as to increase the cultivation and commercialization of sustainably produced cocoa".

25. **Netherlands:** The Dutch government has backed a series of International Responsible Business Conduct agreements involving partnerships between businesses, trade associations, government, unions and NGOs, to implement the OECD Guidelines in specific sectors. These now cover garments and textile, banking, gold, stone, food products, insurance, pension funds, metals, floriculture, sustainable forestry and renewable energy.[5]

26. **United Kingdom:** The **Retailer Cocoa Collaborative** is a group that assesses the progress of cocoa traders in cocoa sustainability, covering topics such as deforestation, traceability, gender equality, farmer incomes, and child and forced labour. Their joint annual research is used to recommend and drive change in the cocoa industry. **Unseen** is a charity that facilitates reporting of modern slavery. Unseen then coordinates remediation in farms and manufacturers and provides updates and coordination on the case with all retailers who use that supplier. This mechanism saves time and resources, and facilitates retailers working together, which also reduces the strain on the supplier with a single coordination point. In the **Banana Retail Commitment on Living Wage**, nine UK retailers joined forces to commit to a living wage for banana workers in their international supply chains.

The draft Guide will impose real costs on Australian business and may jeopardise their access to certain foreign markets and capital

27. The uncertainty injected by the draft Guide will likely lead many participants in ongoing anti-slavery collaborations – and some environmental sustainability collaborations – to revisit the question of the lawfulness of those collaborations. Many may choose to minimise risk by suspending active participation in the collaborations until ACCC authorisation for the initiative has been secured.

28. The draft Guide in its current form, and specifically the case studies presented, is reportedly already leading many businesses to withdraw from current sustainability collaborations. And it makes it much less likely that such collaborations will proceed in the future due to the requirement to proceed with lengthy and expensive ACCC authorisation and associated extensive internal approvals from within the organisations considering collaboration. With corporate sustainability teams already over-burdened with disclosure requirements, progressing with collaborations to innovate and accelerate practical solutions will be less likely to proceed.

29. The International Chamber of Commerce has warned against the 'chilling effect' of competition policy on collaboration in pursuit of climate action. A November 2022 ICC white paper provided examples of the inhibition of collaboration in the genuine pursuit of climate change objectives caused by misapplication of competition law.[6]

30. Similarly, the Chief Executive of the UK Competition and Markets Authority (CMA) noted in January 2023 that competition law can pose an unnecessary barrier to companies seeking to

[5] See https://www.imvoconvenanten.nl/en/agreements.

[6] International Chamber of Commerce (ICC) white paper published in November 2022.

collaborate to pursue sustainability initiatives.[7] The UK's Competition and Markets Authority published Green Markets Guidance in 2023. This guidance helpfully notes:

> *"Given the scale and urgency of the challenge to ensure environmental sustainability and particularly to combat climate change, and the degree of public concern about such issues, the CMA is keen to help businesses take action on climate change and environmental sustainability, without undue fear of breaching competition law. This is particularly important for climate change because industry collaboration is likely to make an important contribution to meeting the UK's binding international commitments and domestic legislative obligations to achieve a net zero economy, and to play an essential part in delivering the UK's net zero ambitions."*

Notably, the UK Guidance does not require formal (pre-)authorisation before such collaborations proceed.

31. The draft Guide's approach will also have a disproportionate effect on small and medium enterprises. Authorisations will cost $7,500 plus lawyer's fees for each initiative. This self-evidently has a greater, and arguably disproportionate, effect on small and medium enterprises (SMEs), which will mean SMEs are less likely to be able to participate in anti-slavery collaborations. As governments – including the NSW government – turn towards requiring anti-slavery due diligence in their procurement (as Australia, Canada, New Zealand, the US and UK all committed to do several years ago[8]), this will create a new and unexpected barrier to SME participation in government procurement.

32. The draft Guide's chilling effect on anti-slavery collaborations in Australia will also put Australian businesses at a disadvantage compared to global peers that are able with confidence to benefit from participation in sustainability collaborations. And it may make it difficult for Australian businesses to:

    - **Access the European single market.** The European Union has just adopted new legislation (the Corporate Sustainability Due Diligence Directive, and the Forced Labour Regulation), which will have the effect of requiring companies to demonstrate that they are meeting certain anti-slavery (and broader human rights and environmental) due diligence standards, in order to supply into the single European market and, in some cases, access European capital. The inability to participate – even if only for 6 months while awaiting ACCC authorisation – in anti-slavery collaborations will greatly increase the chances that Australian firms are unable to demonstrate that they meet the requisite standards, and end up missing out on European business or being *de facto* excluded from the market.

    - **Access the US market.** The United States has legislation in place that allows goods to be detained at the point of entry on suspicion of having been made with various forms of forced labour. In the last 2 financial years, around AUD 6 billion worth of goods have been so detained. Securing the release of these goods into the US market typically requires answering detailed questions from the US government about the goods' supply-chains. The inability to participate in sustainability collaborations will make it more difficult for Australian business to map and manage supply-chains and

[7] https://www.gov.uk/government/speeches/sustainability-exploring-the-possible.

[8] Principles to guide Government action to combat human trafficking in global supply chains, Joint Statement of the Governments of Australia, Canada, New Zealand, United Kingdom and United States, 24 September 2018, available at https://www.foreignminister.gov.au/minister/marise-payne/media-release/principlesguide-government-action-combat-human-trafficking-global-supply-chains.

increase risks of their goods' exclusion from the US market. This can have financially material implications: when Malaysian PPE manufacturer Top Glove was targeted by the US government for action under this framework, it suffered at 5.4% share-price drop in one day.[9]

33. This link to potentially financially material impacts means that the draft Guide is also likely to have implications for Australian company directors. Boards will need to consider whether their organisation is already involved in a collaboration that is, based on the draft Guide, presumptively unlawful, and whether appropriate authorisations and safeguards are in place; and/or whether opting out of such a collaboration could lead to financially material negative impact on revenues or increased costs (for example due to exclusion from foreign markets or capital). Failure to consider these impacts could expose directors to liability for breaches of their fiduciary duties, especially given the foreseeability of the harms described above, since the publication of the draft Guide.

34. First movers on sustainability principles and credentials often bear the brunt of reputation risk, free-rider concerns, sunk research and development costs, and inefficiency due to competing standards and approaches. It is generally much easier, more effective and less risky to work as a group, typically with or through an industry body, to define principles or criteria.

35. The barriers to Australian business developing Australian approaches created by the approach proposed in the ACCC draft Guide will mean that Australian businesses will increasingly need to rely on off-shore sustainability standards. These are likely to be blunter and less attuned to Australian conditions than locally-developed solutions would be. For example, in the case of net zero Science Based Targets Initiative (SBTi) accreditation and underlying net zero sector scenarios require financial institutions to commit to limit/exclude certain fossil fuels within set time frames. This may not be consonant with Australian market expectations and regulatory requirements.

The ACCC should issue a class exemption for anti-slavery collaborations

36. The ACCC arguably has two tools available that could solve many of these problems – the exception under section 51(1) of the *Competition and Consumer Act 2010* (Cth), discussed above; and the class exemption. But the draft Guide does not contemplate the use of either tool in this particular case.

37. A class exemption is a way for the ACCC to grant businesses an exemption for specific conduct that may otherwise risk breaching the *Competition and Consumer Act 2010*, without having to lodge an authorisation application. The class exemption describes the conduct and the businesses that are covered. It also includes the specified circumstances or conditions that apply. Once a class exemption is in place, businesses can self-assess whether their planned activity is covered by the class exemption. If covered by the class exemption, the business does not need to separately apply to the ACCC for an exemption.

[9] Philip Heijmans and Yantoultra Ngui, "Top Glove Tumbles on U.S. Order to Seize Goods Over Forced Labor", *Bloomberg*, 30 March 2021.

38. To grant a class exemption, the ACCC must be satisfied that the conduct would not be likely to substantially lessen competition, nor be likely to result in overall public benefits. There is only one such class exemption in place – for small business collective bargaining.

39. The absence of any discussion of potential application of the class exemption in the draft Guide is made all the more striking by:

    - the fact that the ACCC has previously issued an authorisation for a collaboration to protect the labour rights of garment sector homeworkers,[10] which suggests that class exemptions around anti-slavery objectives might well meet the 'public benefit' test
    - the use of similar class exemptions or pre-authorisations for pre-competitive sustainability collaborations relating to labour rights in some foreign jurisdictions, such as the Netherlands.[11]

40. A well-designed class exemption could potentially offer better public policy outcomes than the approach proposed in the draft Guide. As the EU Commission has noted in recent Guidelines, pre-competitive collaboration – which in the EU includes what it terms 'cooperation agreements' – "may address residual market failures that are not or not fully addressed by public policies and regulation."[12] Such collaboration can foster progress towards sustainability goals by helping to overcome systemic barriers, removing system lock-ins, strengthening capabilities and raising ambition across the board. A class exemption for anti-slavery collaborations would foster, rather than freeze, such initiative, and offer market-wide efficiency gains over the slow, piecemeal – and expensive – individual authorisation approach proposed by the draft Guide.

41. The approach recently adopted by the European Union provides an important precedent to which the ACCC could look in developing a class exemption for anti-slavery collaborations. It specifies six criteria against which businesses must assess sustainability collaborations in order to determine whether they fall within the class exemption:

    1. transparency and inclusion in the development of the standard and its selection
    2. voluntary participation
    3. a floor, not a ceiling – i.e. participants can go further than the standard requires
    4. no exchange of commercially sensitive information that is not objectively necessary and proportionate for the development, implementation, adoption or modification of the standard
    5. effective and non-discriminatory access to the result of the collaboration (i.e. use of any agreed label, logo or brand name is open to newcomers that meet the standard)
    6. pricing and market-share considerations – namely, either:
        - the collaboration must not lead to a significant price increase or product quality reduction, or
        - the combined market share of the participants must not exceed 20% on any relevant market affected by the standard.[13]

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[10] https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/homeworker-code-committee-incorporated#:~:text=Businesses%20may%20be%20audited%20under,conduct%20until%2021%20September%202028..

[11] See the guidance on sustainability agreements published by the Netherlands Authority for Consumers and Markets in October 2023, which undertakes not to take action for certain types of sustainability collaborations that might otherwise breach the law. See https://www.acm.nl/en/publications/policy-rule-acms-oversight-sustainability-agreements.

[12] See European Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2023/C 259/01), 21 July 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52023XC0721(01), at para. 520.

[13] EU Guidelines, op. cit., para. 549.

42. The EU Commission Guidelines explain:

> *These conditions ensure that the sustainability standard does not lead to an appreciable restriction of competition (for example, by eliminating less expensive product variants from the market). Moreover, the conditions ensure that the standard does not foreclose alternative standards, or exclude or discriminate against other undertakings, and they ensure effective access to the standard. The condition not to exchange unnecessary commercially sensitive information ensures that information exchanges are limited to what is necessary and proportionate to the standard-setting procedure and that they are not used to facilitate collusion or restrict competition between the parties.*[14]

43. They go on to explain how the use of the EU equivalent of a class exemption can streamline oversight and produce efficiencies:

> *Failure to comply with one or more of the conditions ... does not create a presumption that the sustainability standardisation agreement restricts competition... However, if one or more of these conditions are not met, it is necessary to carry out an individual assessment of the agreement [against competition standards].*[15]

44. The EU Guidelines also identify specific types of agreements that are likely not to be found to be in breach of competition law, including:

- cooperation that aims solely to ensure compliance with fundamental social rights or prohibitions (e.g. the use of child labour, the logging of certain types of tropical wood or the use of certain pollutants);
- cooperation that doesn't relate to the economic activity of the organisations involved, but their internal corporate conduct (e.g. procurement).

45. Notably, the EU precedent also suggests that the ACCC could design a class exemption in ways that forestall significant negative pricing impacts for consumers. Discussing the development of 'sustainability standards' through horizontal cooperation agreements, the recent EU Commission Guidelines acknowledge that

> *the cost of adhering to and complying with a sustainability standard can be high, particularly if this requires changes to existing production or distribution processes. Therefore, adhering to a sustainability standard may lead to an increase in production or distribution costs and consequently to an increase in the price of the products sold by the parties.* (para. 542)

46. But the Guidelines go on to note:

> *However, where the standard is adopted by undertakings representing a significant share of the market, it may allow undertakings to preserve the previous price level or to apply only an insignificant price increase. This will be particularly relevant where the product covered by the sustainability standard represents only a small input cost for the product.* (para. 549)

47. A class exemption could thus be designed to prevent negative pricing impacts by making participating businesses' (collaborative) commitment to absorption of cost increases a condition of the availability of the exemption. The draft Guide forestalls such an approach by signalling that any such collaborative agreement would be presumptively unlawful.

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[14] Ibid., para 550.

[15] Ibid., para 552.

Conclusion and recommendations

48. The ACCC draft Guide risks having a serious, immediate negative effect on ongoing anti-slavery collaborations that have emerged in part due to exhortations from Australian governments.

49. The draft Guide risks sowing confusion about the legality of such collaborations. As boards come to understand the legal and financially material reputational risks, they are likely to chill or freeze such activities until the ACCC provides clarification of their lawfulness.

50. The draft Guide appears not to consider Australia's long-standing commitment to the OECD Guidelines and the UNGPs, which are difficult to reconcile with the default presumption of unlawfulness the draft Guide conveys.

51. The draft Guide also fails to consider the alternative approaches available under Australian competition law – such as a class exemption – or how similar approaches have been, and are being, applied in foreign jurisdictions.

52. All of this risks putting Australian companies at a competitive disadvantage to their foreign peers as investors and regulators increasingly look to firms to demonstrate their sustainability credentials through such collaborations. This could cause Australian businesses financially material exclusions from US and EU business and markets, in particular.

Recommendation 1: The ACCC should immediately clarify its commitment to the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct

including the Competition Chapter, and also to the UN Guiding Principles on Business and Human Rights. The absence of any reference to these norms, to which Australia's commitment, to date, has been unquestionable, raises concerns about a lack of policy coherence across government on these issues.

Recommendation 2: The ACCC should clarify whether anti-slavery collaborations are excepted under section 51(1) or may receive a class exemption.

Given the confusion introduced by the publication of the draft Guide, it would be helpful for the ACCC to clarify if:

(a) It considers that anti-slavery collaborations undertaken in line with the federal Government's *Guidance to Reporting Entities* under the *Modern Slavery Act 2018* (Cth), or official guidance or Codes of Practice issued pursuant to the *Modern Slavery Act 2018* (NSW), fall within **an exception under section 51(1)** of the *Competition and Consumer Act*,

OR

(b) it will enter into consultation with anti-slavery stakeholders to explore a **class exemption for anti-slavery collaborations.** The ACCC should consult, at a minimum:

- the Australian Government (including the Commonwealth Attorney-General's Department and the Modern Slavery Expert Advisory Group);
- any new Australian Anti-Slavery Commissioner, once appointed;
- the Australian National Contact Point;
- the NSW Anti-slavery Commissioner;
- relevant business groups, unions and civil society groups.

Drawing on recent precedents in the EU and the UK, such a model could exempt anti-slavery collaborations that meet criteria relating to:

- transparency and inclusion in the development of the standard and its selection
- voluntary participation
- a floor, not a ceiling – i.e. participants can go further than the standard requires
- no exchange of commercially sensitive information that is not objectively necessary and proportionate for the development, implementation, adoption or modification of the standard
- effective and non-discriminatory access to the result of the collaboration (i.e. use of any agreed label, logo or brand name is open to newcomers that meet the standard)
- pricing and market-share considerations.[16]

Recommendation 3: The ACCC should announce that any information shared with it in the course of these consultations about ongoing anti-slavery collaborations initiated in response to the *Modern Slavery Act 2018* (Cth) or *Modern Slavery Act 2018* (NSW) will not form the basis of enforcement action.

The absence of such a signal may lead organisations that have already commenced such collaborations to stay mum. This will impede the ACCC's ability to develop a more effective evidence-base for determining whether or how to issue a class exemption.

Dr James Cockayne
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[16] EU Guidelines, op. cit., para. 549.

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