

Dear ACCC,

## **Consultation on draft guidance on Sustainability Collaborations**

Thank you for seeking feedback from stakeholders on the draft guide, “*Sustainability collaborations and Australian competition law. A Guide for business.*” Fair Futures is a for-purpose consultancy, working at the intersection of human rights and sustainability, specialising in modern slavery risk management. Our comments draw from our experience advising investors, businesses and civil society organisations.

We are very supportive of any efforts to enable businesses to collaborate in the service of sustainability. Doing these efforts well requires specialist inputs, and is time consuming and expensive, making it largely outside the reach of all but the largest businesses. Key aspects of environmental and human rights due diligence, such as verifying whether a supplier is paying its workers in accordance with minimum legal standards, or has confiscated the passports of its workers, legitimately sit outside the areas that we want companies to compete on. Yet, given the realities of the current Australian competition law framework, we see companies that want to collaborate with their peers on these issues but are not able to do so. This leads to unnecessary duplication of efforts, with multiple companies doing their own sustainability due diligence on a fairly limited set of suppliers. This is time consuming for the companies and for their suppliers.

Enabling greater collaboration on corporate environmental and social due diligence could potentially reduce or enable companies to share costs, while still meeting environmental and social targets. Joint efforts would also increase the leverage that companies need, if they are to progress sustainability goals. While the current draft Guidance is a step in the right direction, in our view, the current ACCC guidance falls well short of clearing the path to corporate collaboration on the genuinely pre-competitive aspects of sustainability due diligence.

We note several concerns:

1. The current guidance focuses only on *environmental* aspects of sustainability and overlooks other important areas, notably *human rights*. We urge the ACCC to take a broader view of sustainability, in line with international standards, that recognises the interconnections and importance of both environmental and social goals, usually expressed as human rights<sup>1</sup>. Just as there is a legitimate case to be made for some forms of pre-competitive collaboration on environmental objectives, there are good

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<sup>1</sup> The OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (Chapter 4 and 6) and the EU Corporate Sustainability Due Diligence Directive (Article 3) approach sustainability from an environmental and human rights perspective. Environment and human rights each have their own distinct criteria defining what they constitute under these standards, but they are both considered integral parts of the overall concept of sustainability.

public policy reasons why businesses should also be collaborating on human rights objectives, whether this concerns child labour or slavery.

2. The ACCC guidance suggests that companies need to seek authorisation to collaborate, even where this collaboration is in line with government policy. We suggest this approach be reconsidered. For example, in the Australian context, large businesses have legislative obligations under the *Modern Slavery Act 2018* (Cth) to report on the steps taken to identify and respond to risk of modern slavery in their supply chains.<sup>2</sup> This reflects a policy understanding that some conduct, such as subjecting workers to forced labour or slavery, is illegal and unacceptable. As such, the Federal Government has set a minimum standard, “a floor” not a ceiling for business due diligence, below which no companies should be allowed to compete. It is disappointing that this reality has not yet flowed through into competition law reform. In sectors like renewable energy, large numbers of individual businesses are undertaking due diligence and traceability efforts on a finite set of suppliers. These efforts would be more efficient if businesses could share information with one another relevant to the human rights aspects of suppliers.
3. There is no mention in the current guidance on the prospect of the ACCC being more forward-facing on sustainability, and considering whether there is a case to be made for a broader reform agenda. The European Union has recognised the shared public interest in corporate collaboration on sustainability, and has introduced a specifically designed, fit for purpose regime to enable this to happen. Chapter 9 in the European Competition Law, discussed below, is a good example of fit for purpose regulation. We believe that similarly decisive steps, including potential regulatory change, may be needed in the Australian context, to ensure competition law meets the challenges facing government, society and businesses today.

### **Australia’s international commitments to sustainability**

The Australian Government has numerous binding commitments regarding environmental objectives and human rights. These include treaties concerning prohibitions on child labour, forced labour, slavery, human trafficking, and decent work.<sup>3</sup> The Paris Agreement’s preamble also notes that when taking action to address climate change, human rights obligations must be respected, promoted and considered to achieve a just transition.<sup>4</sup>

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<sup>2</sup> Modern Slavery Act Cth (2018). Available at: <https://www.legislation.gov.au/C2018A00153/latest/text>

<sup>3</sup> Australia is a party to several core international treaties on human rights, including the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD). Australia is also party to many environmental treaties, including: Convention to Combat Desertification; the Paris Agreement; the Kyoto Protocol; Convention on Biological Diversity; and the United Nations Framework Convention on Climate Change. The full list of environmental commitments and treaties can be accessed here: <https://soe.dccceew.gov.au/overview/management/legislation-policy-and-international-obligations>

<sup>4</sup> The Preamble to the Paris Agreement notes that “Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities,

From a business perspective, key international standards are set out in the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (OECD Guidelines), which addresses both environmental and human rights considerations.<sup>5</sup> More broadly, these are given shape through the UN SDGs, which are used by many businesses as part of target setting. The ACCC needs to consider these obligations, when articulating what “sustainability” means in the Australian context.

At present, the ACCC draft Guidance includes a footnote to the effect that, 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”. But it does not expand further. Given Government policy on the role of business and modern slavery, and Australia’s commitments on human rights more broadly, further clarity is needed.

### **International trends in regulation of “sustainability”**

The *Corporate Sustainability Due Diligence Directive* in Europe includes considerations of both environmental and human rights impacts, within the concept of “sustainability”.<sup>6</sup> Similarly, the OECD Guidelines were updated in 2023, noting that for businesses to contribute to “sustainable development”, they need to consider both human rights and environmental considerations. The OECD Guidelines now include chapters on human rights (chapter 4) and environment (chapter 6). We recommend the ACCC consider following this approach in how it defines “sustainability”.

European competition law recognises that “sustainability”, which includes environmental and human rights, requires specific treatment outside of the usual competition law framework. In July 2023, the European Commission amended its competition laws, introducing a specific Chapter on Sustainability Agreements, and specifically exempting “horizontal cooperation

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migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity”.

[https://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/paris\\_agreement\\_english\\_.pdf?qclid=CjwKCAiAq4KuBhA6EiwArMAw1Bvn\\_1249NGUCVOARLgAfTYxKskppSVV\\_thbES3BBMLiU06-QjNo5RoCT7IQAvD\\_BwE](https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf?qclid=CjwKCAiAq4KuBhA6EiwArMAw1Bvn_1249NGUCVOARLgAfTYxKskppSVV_thbES3BBMLiU06-QjNo5RoCT7IQAvD_BwE)

<sup>5</sup> The Guidelines approach sustainable development as “Development that meets the needs of the present without compromising the ability of future generations to meet their own needs. Global goals to eradicate global poverty, protect the planet, and ensure that all people enjoy peace and prosperity are an important reference point in this regard.” The OECD draws on the following mechanisms to define human rights issues: United Nations ‘Protect, Respect and Remedy Framework for Business and Human Rights, UN Guiding Principles on Business and Human Rights for its implementation as well as the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. The OECD draws on the following mechanisms to define environmental issues: Rio Declaration on Environment and Development, United Nations 2030 Agenda for Sustainable Development, UN Framework Convention on Climate Change, the Paris Agreement, the Convention on Biological Diversity, Kunming-Montreal Global Biodiversity Framework, and the UN Convention to Combat Desertification. OECD (2023) Guidelines for Multinational Enterprises on Responsible Business Conduct. available at: <https://www.oecd-ilibrary.org/docserver/81f92357-en.pdf?expires=1721979377&id=id&accname=quest&checksum=BCDAC4A44AF59681F2EF73E4695AE6BF>

<sup>6</sup> Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU)2019/1937 and Regulation (EU) 2023/2859, [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L\\_202401760](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L_202401760)

agreements” that address "sustainability" objectives.<sup>7</sup> The new Chapter defines “sustainable development” as follows:

*“In broad terms, sustainable development refers 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. It encompasses activities that support economic, environmental and social (including labour and human rights) development. The notion of sustainability objectives therefore includes, but is not limited to, addressing climate change (for instance, through the reduction of greenhouse gas emissions), reducing pollution, limiting the use of natural resources, upholding human rights, ensuring a living income, fostering resilient infrastructure and innovation, reducing food waste, facilitating a shift to healthy and nutritious food, ensuring animal welfare, etc.”<sup>8</sup>*

We recommend that the ACCC adopt a similar approach, defining “sustainability” in the draft Guidelines to include both environmental and human rights considerations.

### **Situation regarding human rights due diligence in Australia**

In Australia, many companies are conducting due diligence on the risks of modern slavery (and other crimes like child labour) in their supply chains, alongside ambitious programs of work on their climate emissions. This is vital work but it involves time and cost. Allowing companies space to collaborate on supply chain due diligence, across both environmental and human rights considerations, could enhance efficiency by improving transparency across many businesses, without creating competitive issues like discussing prices or supplier merits.

Increasingly, companies are subject to specific legal obligations to conduct due diligence on modern slavery in supply chains. Federally, the *Modern Slavery Act* mandates companies to report on measures to identify and mitigate the risk of modern slavery in their supply chains.<sup>9</sup> New South Wales has also introduced modern slavery due diligence requirements for public procurement. Under the *Public Works and Procurement Act 1912 (NSW)*, government agencies must take reasonable steps to ensure that goods and services procured are not the product of modern slavery and must report on these steps and related matters.<sup>10</sup> These obligations are discussed in the “*Guidance on Reasonable Steps to Manage Modern Slavery Risks in Operations and Supply-Chains*”.<sup>11</sup> Renewable energy technologies are products

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<sup>7</sup> European Commission (1 June 2023) Antitrust: Commission adopts new Horizontal Block Exemption Regulations and Horizontal Guidelines. Available at: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_23\\_2990](https://ec.europa.eu/commission/presscorner/detail/en/IP_23_2990)

<sup>8</sup> Communication from the 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), [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52023XC0721\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52023XC0721(01))

<sup>9</sup> *Modern Slavery Act 2018* (Cth). Available at: <https://www.legislation.gov.au/C2018A00153/latest/text>

<sup>10</sup> Public Works and Procurement Act 1912 No 45. Available at: <https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-1912-045>

<sup>11</sup> NSW Office of the Anti-Slavery Commissioner (2023) *Guidance on Reasonable Steps*. Available at: <https://dcj.nsw.gov.au/documents/legal-and-justice/anti-slavery-commissioner/due-diligence-and-reporting/guidance-on-reasonable-steps.pdf>

identified by the NSW Anti-Slavery Commissioner to be at high risk of modern slavery, highlighting the importance of effective due diligence and supply chain transparency in this area to meet Australia's commitment to human rights and the energy transition.

The ACCC guidance, as drafted, gives examples of sustainability collaborations that would constitute cartel conduct, but could nonetheless potentially be approved for "authorisation". For example, Case Study 5 on page 18 gives a hypothetical example of a group of companies agreeing to buy only from suppliers who meet *environmental* standards. While human rights are not addressed in the ACCC guidance, this case study does seem directly relevant to the situation many companies are in, wanting to collaborate on *human rights* due diligence.

If that is the case, then the ACCC Guidance suggests that at present, if companies want to collaborate with peers on due diligence on the labour conditions of workers in their supply chains, this would constitute cartel conduct requiring an authorisation. In other words, where companies want to collaborate on supply chain due diligence on issues like slavery and child labour, they need to mount an application, pay a \$7500 fee and wait up to 6 months for a decision on authorisation to be made. Given the policy commitment of the Government to ensuring large business takes steps to address modern slavery risk, this case by case approach seems unnecessarily burdensome. Also, while seeking an exemption might be a feasible option for a very large company, it is unlikely to be a realistic option for small and medium enterprises. This is important as small and medium companies are also exposed to human rights risks in their supply chains.

## **Recommendations**

The Australian Government's commitment to the Paris Agreement, international human rights treaties, the SDGs and the OECD Guidelines underscores their responsibility to carve out space for businesses to collaborate, in the service of sustainability goals. However, it is not clear that we currently have the balance right, between the legitimate purpose of competition law, and the urgent need for business to push forward major investments to safeguard the environment and human rights. In light of these concerns, Fair Futures recommends that the ACCC:

1. Consult with stakeholders across business, unions and civil society to better understand the issues involved in collaboration on the human rights aspects of sustainability.
2. Update the draft Guidance to explicitly include human rights within the scope of "sustainability".
3. Consider making specific authorisations to more readily enable business to business collaboration on sustainability due diligence efforts.

4. Consider advancing a more substantive reform agenda on competition in the context of sustainability, with a view to updating Australia's competition regime to enable certain forms of collaboration on sustainability issues to proceed, without the need for costly, time-intensive individual applications.

We welcome discussing our recommendations with the ACCC if it would prove useful.

Your sincerely,

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