Matthews Law

COMPETITION · REGULATION · POLICY · STRATEGY

Sustainability concerns may require businesses to work together. However, no matter how well-intentioned the collaboration, it can still raise competition law concerns.

Today, Australia's competition law regulator issued draft guidance to help business appreciate the competition law risks associated with collaborating for sustainable objectives.

New Zealand has similar guidance, as the New Zealand Commerce Commission released its Collaboration and Sustainability Guidelines in November 2023. Like Australia, New Zealand's guidelines provide some clarity about what sustainability-focused agreements the Commission considers are likely and unlikely to impact competition, but neither regulator have agreed not to bring cases in certain situations which would otherwise breach the law. This differs to the Netherlands, for example, where the competition regulator has committed not to take action for certain types of sustainability agreements. Instead, the New Zealand Commerce Commission notes in these guidelines that it will "not allow the use of sustainability objectives and initiatives as an excuse for collusion or other anti-competitive behaviour that harms New Zealanders".

A major risk for business seeking to collaborate for sustainability objectives is inadvertently breaching cartel laws. Cartels (i.e. agreements with competitors not to compete) risk serious penalties, for companies up to the greater of $10 million or three times any commercial gain (or 10% of New Zealand group turnover if the gain is not known), and for individuals penalties of up to $500,000 per contravention and a maximum imprisonment of 7 years.

Examples of sustainability collaborations which are likely to be a cartels are provided:

- if businesses that compete to acquire a certain type of input agree to only buy from suppliers that meet a particular sustainability criteria;
- suppliers agreeing to charge a levy on the sale of their products to customers to fund an industry recycling scheme for products at the end of their life; and
- rival manufacturers agreeing to use a new technology in their production process and to stop using older technology that emits more pollution.

There are some exceptions which allow businesses to enter into and give effect to a cartel provision, but these are highly technical and should generally only be relied on after seeking legal advice. For example, there is an exception for "collaborative activities", but this usually requires combining of the parties' businesses, assets or operations – not just an agreement to work together. For more information on the cartel prohibition and exceptions, see our guide here.

The other major risk associated with competitor collaboration to further sustainability aims is that parties may enter into an agreement that has the purpose, effect or likely effect of substantially lessening competition, which has similar penalties (with the exception of imprisonment).

Parties that want to collaborate can get an authorisation from the Commission, but this can be a costly and time-consuming process. For cartel conduct, parties will need to satisfy the Commission that the conduct is reasonably necessary for the purpose of a collaborative activity and is unlikely to substantially lessen competition. For conduct that substantially lessens competition, parties will need to demonstrate to the Commission that the public benefits (including positive sustainable benefits) outweigh the harm arising from the loss of competition. The ACCC guidelines make it clear that sustainability benefits can be considered public benefits for this purpose and this is consistent with the Commerce Commission's guidelines. The ACCC is actively encouraging parties to a sustainability collaboration to seek authorisation.

PLANNING A SUSTAINABLE INITIATIVE?

Please get in touch with a member of the Matthews Law team who can help you navigate this developing area of law.