

PRI RESPONSE

ACCC CONSULTATION ON GUIDE TO SUSTAINABILITY COLLABORATIONS

July 2024

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To inform this briefing, the following investor group has been consulted: PRI Regional Policy Reference Group for Australia. This consultation is not an endorsement or acknowledgement of the views expressed in this briefing.

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United Nations
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ABOUT THE PRI

The Principles for Responsible Investment (PRI) works with its international network of signatories to put the six Principles for Responsible Investment into practice. Its goals are to understand the investment implications of environmental, social and governance (ESG) issues and to support signatories in integrating these issues into investment and ownership decisions. The PRI acts in the long-term interests of its signatories, of the financial markets and economies in which they operate and ultimately of the environment and society as a whole.

The six Principles for Responsible Investment are a voluntary and aspirational set of investment principles that offer a range of possible actions for incorporating ESG issues into investment practice. The Principles were developed by investors, for investors. In implementing them, signatories contribute to developing a more sustainable global financial system.

The PRI develops policy analysis and recommendations based on signatory views and evidence-based policy research. The PRI welcomes the opportunity to respond to the Australian Competition and Consumer Commission (ACCC) call for feedback on their draft guide to sustainability collaborations and Australian competition law.

ABOUT THIS CONSULTATION

On 8 July 2024, the ACCC published [a draft guide](#) on sustainability collaborations and Australian competition law and has exposed it to public feedback until 26 July 2024. The draft guide is designed to help businesses understand the competition law risks that may arise when contemplating working together to achieve positive environmental outcomes.

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KEY RECOMMENDATIONS

The PRI welcomes the ACCC’s publication of the draft guide on sustainability collaborations and Australian competition law. Collaboration is an increasingly important approach that broad stakeholders in the market are considering as they seek to address sustainability outcomes that in particular are associated with system-level risks. This guidance can provide further clarity consistent with the A Legal Framework for Impact (LFI) findings that investor cooperation at some level is clearly permitted, although there are legal constraints which must be respected.¹ There are many ways in which regulators can ensure that competition law and rules do not unnecessarily restrict stewardship activity and sustainability factors, such as establishing a favourable presumption, establishing a safe harbour, implementing an open-door policy for support, providing leniency towards good faith practitioners, and finally as this draft guide does, provide guidance on what collaborations are permissible. The draft guide is already comprehensive, building on case studies and incorporating an authorization process, but can better serve its users with even greater detail and clarity on what is and isn’t considered permissible, as well as greater clarity on the scope of “sustainability” collaborations.

The PRI’s key recommendations are:

- Further reduce ambiguity on the potential degree to which ACCC and the guide support investors carrying out collaborative engagement in compliance with competition law.
- Better clarify the scope of sustainability objectives that fulfil the definition of “sustainability” collaboration, especially in terms of encompassing social outcomes in addition to those that are environmental.

Beyond the draft guide, the PRI further recommends:

- Clarifying that investors can consider sustainability collaboration to achieve sustainability objectives
- Adopting a whole of government approach to better integrating sustainability concerns in the administration of competition law

¹ Freshfields Bruckhaus Deringer, PRI, United Nations Environment Programme Finance Initiative, Generation Foundation (2021), [A Legal Framework for Impact: Sustainability impact in investor decision-making, 15.](#)

DETAILED RESPONSE

CLARIFYING THE COVERAGE OF INVESTOR COLLABORATIONS BY THE GUIDE

FINDINGS FROM A LEGAL FRAMEWORK FOR IMPACT

[A Legal Framework for Impact \(LFI\)](#), authored by Freshfields Bruckhaus Deringer and commissioned by the PRI, UNEP FI and the Generation Foundation, is a ground-breaking legal study on whether the law in 11 jurisdictions around the world **permits** and even in some cases **requires** investors to tackle some of the world's most urgent sustainability challenges, by setting and pursuing sustainability impact goals.

The findings of *A Legal Framework for Impact* show that if an investor concludes that one or more sustainability factors poses a material risk to its ability to achieve its financial investment objectives, the investor will generally have a legal obligation to consider what, if anything, it can do to mitigate that risk (using some or all of its investment powers, stewardship, policy engagement or otherwise) and to act accordingly. This means that investors have an obligation to consider pursuing sustainability impact goals where doing so can contribute to managing risks and achieving their financial objectives.

Increasingly, investors are seeking to participate in collaborative initiatives alongside other investors in pursuit of common sustainability impact goals. Largely, this is because collaborative initiatives are likely to reduce the costs of engagement, while also enhancing the prospects of a successful sustainability outcomes. By extension, this can also help investors to achieve their broader financial objectives where they have identified sustainability impact goals as instrumental to achieving them.

While an investor may decide to act individually, collaboration is a significant additional lever for investors to encourage investee companies or the real economy to address system level risks. It is more foreseeable that a group of investors, acting collaboratively could achieve transformative sustainability impacts².

Across jurisdictions, the LFI research finds that investor cooperation at some level is clearly permitted, although there are legal constraints which must be respected.³ What investors' duties permit with regard to collaborative action will depend on their circumstances. Some large investors may be in a position to catalyse wider collaborative action because of the way their portfolio is exposed to sustainability risks, the resources at their disposal, and the broader influence they wield. Smaller investors may find that joining established collaborative initiatives is a cost-effective way to serve beneficiaries whose interests may be threatened by declining sustainability.

ADDRESS AMBIGUITIES IN THE GUIDANCE THAT COULD INHIBIT SUSTAINABILITY COLLABORATIONS

In the section titled "sustainability collaborations and Australian competition law", the guide provides clarity on how businesses and investors considering sustainability collaboration should interpret

² Especially in relation to publicly traded investee enterprises, stewardship and public policy engagement are likely to be a particular focus for investors considering instrumental IFSI.

³ Freshfields Bruckhaus Deringer, PRI, United Nations Environment Programme Finance Initiative, Generation Foundation (2021), [A Legal Framework for Impact: Sustainability impact in investor decision-making, 15](#).

existing ACCC guidance on Australian competition law. This provides an important basis for businesses and investors to consider the scope of collaborative initiatives that they can or should be considering, especially in the context of pursuing sustainability impact objectives.

In this section of the draft guidance, however, the ACCC can **consider providing users of the guide with greater clarity on what kinds of collaborations are likely and unlikely to breach prohibitions**. While the case studies illustrating low-risk conduct are helpful, the guidance can go further. For example, the Japan Fair Trade Commission's [Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society under the Antimonopoly Act](#) provides extensive case studies around acts that would and would not pose concerns of breaching prohibitions. These case studies are provided for various dimensions of potential breaches, which the ACCC's draft guidelines do not provide and could aid in supporting practitioners. The ACCC can also **consider providing a rationale of why certain case studies exemplify a case where the agreement is or is not likely to breach prohibitions**. Providing examples more extensively will aid in clarifying the degree to which sustainability collaborations are permissible, and can provide a more enabling environment for existing and prospective collaborations.

In a similar manner, the ACCC can **consider providing more clarity on how the 'authorization' provision will be applied**, such as by providing an exhaustive and clear list of requirements to fulfil the streamlined consideration instead of providing a non-exhaustive list of examples. In the EU, the [European Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of European Union to horizontal co-operation agreements](#) introduces a "soft safe harbour". The provision clarifies that "sustainability standardisation agreements are unlikely to produce appreciable negative effects on competition as long as ... six cumulative conditions are met". In a similar manner, the UK Competition and Markets Authority's [Green Agreements Guidance](#) clarifies cases where sustainability agreements can infringe prohibitions, in addition to cases where they are unlikely to. Building upon this delineation, the Green Agreements Guidance provides a mechanism for exemption for sustainability agreements, setting out four conditions to be met for the exemption to be granted.

Strengthening clarity around the permissibility of sustainability collaborations and providing mechanisms to positively accommodate them will also support practitioners in understanding the degree to which they need to consider the authorization process as provided in the draft guide. The authorization process outlined is potentially time consuming, costly and public, requiring certainty for businesses going through the process about its applicability to their situation. To this end, the ACCC can **consider providing greater clarity on the requirements to qualify for low-risk cases that benefit from the streamlined process**. It may, for example, also be beneficial to provide authorization timelines as is done in the Singapore Competition and Consumer Commission's [Guidance Note on Business Collaborations Pursuing Environmental Sustainability Objectives](#).

CLARIFYING THE SCOPE OF SUSTAINABILITY OBJECTIVES RELEVANT TO THE GUIDE

The guide defines the term sustainability collaboration as "discussions, agreements or other practices amongst businesses which are aimed at preventing, reducing or mitigating the adverse impact that economic activities have on the environment", also noting 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".

This definition can be strengthened with greater clarity provided on sustainability objectives that the ACCC recognizes. For example, in Japan, the Fair Trade Commission contextualizes the global nature of sustainability crises, and references the nation’s 2050 carbon neutrality goal as a key sustainability objective that potentially benefits from publication of its guidelines. Similarly, the Competition and Consumer Commission of Singapore clarified in its [Guidance Note on Business Collaborations Pursuing Environmental Sustainability Objectives](#) that they recognize the need for such a guidance in light of Singapore’s sustainability and net-zero commitments, and importantly highlight that the Guidance Note supports a whole-of-nation effort under the Singapore Green Plan 2030. Contextualizing this guide in relation to national commitments and objectives can help to clarify to a greater extent what sustainability objectives are relevant under this definition of “sustainability collaboration”.

Furthermore, referring to national sustainability commitments can also lead to a more holistic understanding of the scope of sustainability, especially where social sustainability objectives may be more prominent as opposed to environmental sustainability objectives. Such social aspects can include labour rights, gender equality and modern slavery, which are integral to a holistic understanding of sustainability, and economic externalities where the Government has clarified mechanisms and objectives to address them.

RECOMMENDATIONS FOR FURTHER CONSIDERATION

CLARIFY THAT INVESTORS CAN CONSIDER SUSTAINABILITY COLLABORATION TO ACHIEVE SUSTAINABILITY OBJECTIVES

Investors addressing sustainability challenges through collaboration is widespread. However, investor-focused guidance could make clear that investors can consider collaborative action in seeking to achieve their objectives and that this can assist in discharging their duties even if the investor's contribution and the portfolio benefit cannot be precisely measured (since, like political security, the benefits of sustainable systems as a whole are enjoyed by each person that relies on them). As an alternative, this could be in the form of a prima facie legal presumption in favour of cooperation unless there are solid reasons against.

ADOPT A WHOLE OF GOVERNMENT APPROACH TO BETTER INTEGRATING SUSTAINABILITY CONCERNS IN THE ADMINISTRATION OF COMPETITION LAW

Competition law and acting in concert regulations should evolve and adapt to the new market reality to meet the twenty-first century challenge, particularly system-level risks such as climate change. A whole of government approach is crucial to strike the right balance between enabling investors to pursue sustainability impacts and ensuring the concerted investor power is not abused to the detriment of fair competition and market integrity. Historically, competitor collaborations have been assessed using the lens of maximizing efficiency, rather than wider sustainability benefits. For sustainability gains to be considered and recognized in the assessment of the benefits and harms of investor collaboration, competition or securities regulators need insights from other government departments, such as agencies that govern environmental protection, climate change, or human rights to develop new tools for measuring when and how investor collaboration can produce sustainability gains and collect more evidence to inform tailored decision making.⁴

⁴ Denise Hearn, Cynthia Hanawalt, and Lisa Sachs, [Antitrust and Sustainability: A landscape analysis](#)

The PRI has experience of contributing to public policy on sustainable finance and responsible investment across multiple markets and stands ready to support the work of the ACCC further to provide regulatory clarity and support for sustainability collaborations in the context of competition law in Australia.

Please send any questions or comments to policy@unpri.org.

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