

28 August 2023

Antonia Horrocks
General Manager, Competition
Commerce Commission

Submitted to: competition@comcom.govt.nz

Dear Ms Horrocks

Re: Commerce Commission Consultation – Collaboration and Sustainability Guidelines

Thank you for the opportunity to comment on the draft Collaboration and Sustainability Guidelines. We support the Commerce Commission's (the Commission) work in this space and applaud your efforts to develop clear and useful guidelines in this area. We encourage the Commission to continue to lead on issues at the intersection of sustainability, climate change, competition and consumer law.

We make four points in response to the Commission's consultation.

1. *The XRB's work to develop climate standards, among other drivers, is leading to an increased need for, and examples of, collaboration among competitors and across sectors*

The XRB released Aotearoa New Zealand Climate Standards in December 2022, consistent with the legislation enabling the XRB to issue a climate-related disclosure framework (the framework) passed in 2021. The standards, together with the supporting guidance, apply to around 170 of our largest listed debt and equity issuers, banks, insurers, and managers of registered investment schemes (who manage ~900 underlying funds). Through a letter of expectation from the Minister of Finance, we also expect some of our Crown Financial Institutions to report. Our comments in this letter relate specifically to this mandatory regime and are therefore limited to climate change as opposed to broader matters of sustainability.

As you are aware, the XRB has been actively encouraging collaboration among competitors and across sectors, particularly on sector level climate-related scenario analysis. We have engaged directly with entities, industry associations, membership-based private sector sustainability groups and public/private partnerships. We continue to support a community of practice of leaders from across sectors to disseminate knowledge on scenario analysis. This collaborative sector-led work, among other drivers, is leading to an increased need for, and examples of, collaboration among competitors and across sectors.

Collaboration is important in the context of the transition to a low-emissions, climate resilient economy, because the transition is novel, systemic and urgent. As just one example, the first report

of the Breakthrough Agenda 2022¹, of which New Zealand is a signatory, notes:

International collaboration will be critical to success, given the global scale and fast pace of change required. Action by governments and businesses individually is necessary, but not sufficient. Well-targeted international collaboration can make low carbon transitions faster, less difficult, and lower cost. By aligning and coordinating actions internationally, countries and businesses can accelerate innovation, create stronger signals for investment and larger economies of scale, and establish level playing fields where needed to ensure that competition is a driver of the transition, and not a brake. International assistance, finance, and the sharing of best practice can support widespread adoption of effective policies and available technologies. International infrastructure can enable cross-border flows of clean energy. Without international collaboration, the transition to net zero global emissions could be delayed by decades.

We see strong alignment between the need for this type of collaboration and the Commission's vision that New Zealanders are better off when markets work well and consumers and businesses are confident market participants.

- 2. We encourage the Commission to ramp up its existing efforts to work collaboratively with standard setters to reduce concerns over anti-competitive conduct*

The Commission notes in its draft guidelines that 'sustainability standards might restrict competition'. The Commission lays out a series of actions to mitigate this risk, such as ensuring a transparent and inclusive process for developing standards. As you will be aware, setting standards transparently with due process is one of the fundamental roles of the XRB, as it is for other standard setters. We encourage the Commission to continue to work closely with us and other relevant standard setters to ensure standards are developed and written in a manner that address any competition concerns from the outset.

- 3. We encourage the Commission to address transition planning in the guidance*

Transition planning² is an important element of Aotearoa New Zealand Climate Standards and is a topic of significant interest both domestically and internationally. We encourage the Commission to focus on how competition law applies to transition planning in its guidelines, including referencing the different approaches that are being taken at a sector level globally and domestically.³ We do however acknowledge that some of these transition planning approaches are just emerging and so can be difficult to identify due to various labels and methods being used, such as mitigation plan, adaptation plan, climate action plan, etc.

- 4. Further policy work on collaboration relating to the intersection of competition and consumer law and climate change may be required*

We note that the Commission's guidelines build on the work of the United Kingdom's Competition Markets Authority (CMA) whose first guidance on climate change and collaboration was released in

¹ See Breakthrough Agenda Report 2022 [here](#).

² The XRB's climate standard NZ CS 1 defines transition planning as 'An aspect of an entity's overall strategy that describes an entity's targets, including any interim targets, and actions for its transition towards a low-emissions, climate-resilient future'. This therefore includes adaptation as well as mitigation actions.

³ An international example of this type of collaboration is the Mission Possible Partnership's seven sector transition plans for global 'hard to abate' sectors (see [here](#)). A range of domestic examples continue to emerge which we can provide further information on as desired.

January 2021.⁴ The CMA's openly published advice⁵ in response to the 2021 letter from the then UK Secretary of State for Business, Energy and Industrial Strategy, Kwasi Kwarteng,⁶ also provides a further form of guidance. The Secretary of State sought advice from the CMA on whether competition and consumer law change is necessary. As you are aware given your active involvement in international discussions on competition law issues, this is consistent with international conversations on climate change in different international competition and consumer fora, including the OECD, the International Competition Network (ICN), the International Consumer Protection and Enforcement Network (ICPEN) and The United Nations Conference on Trade and Development (UNCTAD).

The CMA is now in the process of updating its original guidance, and importantly, it has also supplemented this original guidance with further guidance relating specifically to agreements which 'combat or mitigate climate change' (such as transition planning).⁷ The CMA has adopted a 'more permissive approach' including an 'open-door policy' to such agreements.

It is possible that the emerging global guidance in this area is effective at allaying concerns from the New Zealand market that competition law could be a barrier to genuine, ambitious climate-related collaboration. That avenue would fit firmly within the confines of the current legal framework and would almost certainly be a preferable way forward. However, if those concerns are not ultimately addressed through the emerging global guidance, then expectations could quickly shift in the market to a position of 'things need to change'⁸ given the degree to which entities are now expected to take climate action to mitigate and adapt. Given this alternate possibility, even if the Commission considers it a remote one, we suggest that the Commission accelerate its policy thinking as early as possible given the urgency of climate change and complexity of the competition law framework.

Further work on the intersection of competition and consumer law and climate change by the Commission, including building on its existing work, could include to:

- continue to monitor feedback, lessons learned from the UK and the CMA's publicly stated position that its *"view of whether additional legislative change is necessary may evolve, in light of further evidence and/or our experience in this area. We will keep the question of legislative change under active review"*⁹;
- continue to engage directly with those private sector leaders currently designing and implementing climate-related (particularly on transition planning) collaborations globally and domestically to ensure that the guidelines being released are effective at allaying their stated concerns, including engagement with legal advisors;
- continue to contribute to the international policy discussion via the ICN and other channels, drawing on real world active examples of collaborations;
- continue to have climate change as one of the Commission's internal priorities through its own resourcing and understanding, building on existing progress outlined in the Commission's statement of intent¹⁰ and following the leadership of the CMA as outlined in its Annual Plan, such as the creation of a Sustainability TaskForce;¹¹ and

⁴ See [here](#).

⁵ See [here](#).

⁶ See [here](#).

⁷ See [here](#).

⁸ See for example the report by the International Chamber of Commerce [here](#).

⁹ See above n4.

¹⁰ See [here](#).

¹¹ See [here](#).

- engage in an open dialogue with policymakers and the market in this area, following the approach of the CMA and the UK Secretary of State for Business, Energy and Industrial Strategy, including the CMA's approach to issue a call for inputs.

The Commission's role is critical in this area given its expertise and understanding of the dynamics of competitive markets and the real-world complaints and intelligence it receives from consumers and the market. This expertise should continue to inform appropriate enforcement of competition and consumer law and policy development in relation to its intersection with climate change. We encourage the Commission to continue to play an active leadership role in this area and reiterate our view regarding its importance.

If it is considered useful, we can provide further information to the Commission on the methods being used by entities underlying climate reporting and examples of collaboration taking place.

If you have any queries or require clarification of any matters in this letter, please contact Jack Bisset (jack.bisset@xrb.govt.nz) or me.

Yours sincerely

A handwritten signature in black ink, appearing to read 'April Mackenzie', with a long horizontal line extending to the right.

April Mackenzie
Chief Executive