

Australian Legal Sector Alliance Modern Slavery Co-Lab

Guidelines around anti-competitive or collusive behaviour, or cartel conduct

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When competitors interact with one another, including through industry collaborations such as the Australian Legal Sector Alliance (AusLSA) Modern Slavery Collaboration (Co-Lab), it is important that they carefully manage any flow of information or arrangements between them in order to comply with Australian competition laws.

These laws relate in particular to the cartel and concerted practice prohibitions within the Competition and Consumer Act 2010, which prohibits anti-competitive conduct, including:

- a) Cartel conduct: arrangements between competitors to fix prices, restrict the supply or acquisition of goods or services by parties to the arrangement, allocate customers or territories, or rig bids.
- b) Concerted practices: other cooperation between competitors which has the purpose, effect or likely effect of substantially lessening competition, in particular, sharing Competitively Sensitive Information with competitors such as future pricing intentions
- c) Any contract, arrangement or understanding which has the purpose, effect or likely effect of substantially lessening competition
- d) Any conduct by a company with market power which has the purpose, effect or likely effect of substantially lessening competition
- e) Collective boycotts: where a group of competitors agree not to acquire goods or services from, or not to supply goods or services to, a business with whom the group is negotiating, unless the business accepts the terms and conditions offered by the group.

Any contravention of the Act could result in significant penalties for participants and their respective employees. Cartel conduct may also result in criminal sanctions, including jail terms for individuals.

From the commencement of this AusLSA Modern Slavery collaboration, the key principles for the Workshops and related initiatives have been to:

1. Provide a confidential and collaborative environment.
2. Offer information, advice, case studies and potential solutions.
3. Articulate a set of shared issues and actions.
4. Encourage supplier education.
5. Promote more sustainable procurement practices.
6. Reduce administration.
7. Stay impartial.
8. Support cross-culture communication and transparency.

N.B. These Guiding Principles are still in draft form and will be agreed by the AusLSA Co-Lab.

Bearing these principles in mind, and in order to comply with Australian competition laws:

- The Australian Legal Sector Alliance and its members are committed to ensuring that its operations, initiatives, working groups and meetings are conducted in compliance with Australian competition laws.
- The Australian Legal Sector Alliance and Co-Lab representatives must not disclose or elicit disclosure of any competitively sensitive information relating to their organisations; 'competitively sensitive information' includes information about an organisation's current or proposed prices or pricing methods, terms or product offerings, business plans or any aspect of commercial strategy; information that has been disclosed publicly is not competitively sensitive information.

- The Australian Legal Sector Alliance and Co-Lab representatives should also not discuss actions that their organisation may take independently to address issues considered, or to address issues identified with specific suppliers.
- Nothing discussed or disclosed, and no recommendation or decision, is intended to affect competition between Co-Lab representatives in any way.
- No decision, arrangement or commitment will be reached as to the adoption or non-adoption of any recommendations, or any other co-ordination or common approach without legal advice, and any regulatory approvals that may be required, being obtained.
- The Australian Legal Sector Alliance and Co-Lab representatives should review the table of 'Dos and Don'ts for dealing with competitors' regularly (p2).

| CONTEXT | DOs | DON'Ts |
|-------------------------------------|---|--|
| Discussions with competitors | <p>DO make sales, marketing and procurement decisions independently of your competitors</p> <p>DO seek independent legal advice before engaging in communications with competitors</p> <p>DO prepare agendas and minutes for all meetings with competitors</p> <p>DO remove yourself from any discussions with competitors that you consider may involve breaches of competition law and alert your legal team</p> <p>DO ensure that the language you use in communications reflects your legitimate independent commercial strategies and does not inadvertently suggest and intention to engage in anti-competitive conduct</p> <p>DO consider preparing a competition protocol if you and your competitors are considering sharing information, or collaborating in relation to potential procurement or supply decisions including based on modern slavery risks. Subject to independent legal advice, the protocol should recommend first seeking independent legal advice and at least require that the parties:</p> <ul style="list-style-type: none"> - not make any form of arrangement to not acquire or supply goods or services to or from particular persons; - make supply and/or procurement decisions independently of, and without discussion with competitors - not discuss or agree with a competitor the terms of a party's supply or procurement arrangements; and - not discuss customers or suppliers with a competitor. | <p>DON'T discuss Competitively Sensitive Information¹ with competitors</p> <p>DON'T reach an understanding or enter into a contract or arrangement with a competitor to not acquire goods or services from suppliers who do not meet criteria</p> <p>DON'T reach an understanding or enter into a contract or arrangement with a competitor to not supply goods or services to customers who do not meet criteria</p> <p>DON'T discuss with your competitors the reasons for your use of a certain supplier or supply of services to a certain customer (e.g. that they comply with modern slavery requirements)</p> <p>DON'T make contracts (or enter into an understanding or arrangement) with a competitor to:</p> <ul style="list-style-type: none"> - fix the prices at which goods or services are acquired or supplied by one or more of the parties; - limit, restrict or prevent the capacity, production, supply or acquisition of goods or services by one or more parties; - allocate between the parties any customers, suppliers or territories; or - influence the bids of the parties in a tender or bid process. <p>DON'T agree with another party to hinder or prevent third parties from dealing with certain people</p> <p>DON'T assume that your collaborations or discussions with competitors are automatically protected because they relate to sustainability, modern slavery or another purpose which gives rise to public benefits.</p> |

¹ Competitively Sensitive Information includes information about a party that is not public and could influence or affect a competitor's decision making in respect of its production, supply or acquisition of goods or services in relation to which it competes with the party. It includes: current and future pricing, cost and profit information; current or forecast production or supply volumes; detailed customer or supplier information; intentions in relation to competitive tender processes; and current or future procurement, sales and marketing strategies.

It is proposed that these Guidelines are noted as an Agenda item at the start of every Workshop and/or AusLSA Modern Slavery Co-Lab meeting and attached as an Appendix to the Agenda, and the following six-point reminder read out by the Meeting Chair or Facilitator:

- i. *“The Australian Legal Sector Alliance and Co-Lab representatives are committed to ensuring that its operations, initiatives, working groups and meetings are conducted in compliance with Australian competition laws.*
- ii. *The Australian Legal Sector Alliance and Co-Lab representatives must not disclose or elicit disclosure of any competitively sensitive information relating to their organisations, such as current or future pricing or procurement, and must not discuss whether to acquire or not acquire goods or services from a particular supplier with another Co-Lab member nor enter into any form of arrangement to do so.*
- iii. *The Australian Legal Sector Alliance and Co-Lab representatives should make their decisions on whether to use a supplier independently of, and without discussion with, other Co-Lab members, and should not discuss actions that their organisation may take independently to address issues considered, or to address issues identified with specific suppliers.*
- iv. *The Australian Legal Sector Alliance and Co-Lab representatives should not discuss or agree on the terms of a Co-Lab member’s supplier arrangements or agreements and should not discuss a supplier’s information with another C-Lab member.*
- v. *Nothing discussed or disclosed, and no recommendation or decision, is intended to affect competition between The Australian Legal Sector Alliance and Co-Lab representatives in any way.*
- vi. *No decision, arrangement or commitment will be reached as to the adoption or non-adoption of any recommendations, or any other co-ordination or common approach without legal advice, and any regulatory approvals that may be required, being obtained.”*