14th January 2025

Update – CSSB Climate Disclosure Standards

We will be closely reviewing the Competition Bureau's Draft Guidelines in the coming weeks, and will be following the public consultation process more generally. However, our preliminary view is that the Draft Guidelines, if and when adopted, will do nothing to meaningfully clarify or limit the scope of the new provisions, and therefore will not in any way mitigate the significant restrictions on free expression imposed by the new provisions. We say that for a number of reasons, including:

1. The Draft Guidelines are often themselves vague, equivocal, or qualified, and do little to resolve concerns about the sweeping and uncertain nature of the new provisions. To use just one example, in relation to the controversial requirement that certain environment statements must be substantiated in accordance with 'internationally recognized' methodologies, the Draft Guidelines state:

> The Bureau will likely consider a methodology to be internationally recognized if it is recognized in two or more countries. Further, the Bureau is of the view that the Act does not necessarily require that the methodology be recognized by the governments of two or more countries.

Even leaving aside the equivocal nature of this claim – i.e. in relation to what the Bureau will 'likely' consider to satisfy this requirement – this proposed guidance raises far more questions than answers. For instance, what does it mean for a methodology to be 'recognized in' a country? Recognized by who in the country? Do governments typically 'recognize' scientific methodologies? If so, what constitutes such 'recognition'? What if the government of a country changes, and an incoming government has a different view on the value of a certain methodology? And, if a

methodology can be sufficiently recognized by non-governmental actors, who else within a country may authoritatively 'recognize' a methodology, and through what process? Does it matter which countries have supposedly recognized the methodology, and whether they have any particular authority or expertise in relation to the matter at hand? These questions are only the tip of the iceberg in attempting to apply the new provisions, even in light of this proposed guidance.

Put simply, the Draft Guidelines often provide no meaningful guidance as to the actual scope of the new provisions, and do not allow businesses to know with any degree of certainty whether they may be held liable for certain representations under the new provisions.

2. Even if the Draft Guidelines did provide meaningful guidance, they are non-binding, even in relation to the Bureau and the Commissioner. This is acknowledged in the Draft Guidelines themselves:

> These guidelines do not constitute a binding statement of how the Commissioner will proceed in specific matters. The decisions of the Commissioner and the ultimate resolution of issues will depend on the particular circumstances of the matter in question.
>
> The Commissioner has broad discretion in determining whether to proceed with enforcement action in a particular case.

3. Similarly, the Draft Guidelines properly acknowledge that adjudicators under the *Competition Act* – i.e. the Competition Tribunal and the courts – may not adopt the Bureau's preferred definitions, understandings, or interpretations of the new provision: see e.g.

> While key concepts from each provision are explained, it is ultimately up to the courts to interpret the language of the Act…

> It remains to be seen how the courts will interpret many of the key concepts set out in this new provision… This provision is also new, and has yet to be interpreted by the courts…
>
> Further, the Competition Tribunal, which makes the decisions in such matters, is not bound by the Bureau's Guidelines.

4. While the Draft Guidelines suggest that the Bureau is likely to take certain positions regarding the scope of the new provisions, there is nothing requiring private challengers to adopt similar positions before challenging representations, which they are now entitled to do under the new provisions without leave of the Bureau or Commissioner. The Draft Guidelines themselves also make this clear:

> The Bureau's guidelines are not law but set out our perspective on environmental claims and, not the perspectives of potential private applicants.

Therefore, there is no guarantee that any guidance provided by the Bureau will be followed by even the Bureau or the Commissioner, much less by private applicants or adjudicators under the *Competition Act*, which significantly limits their efficacy and value to businesses seeking to understand their obligations under the new provisions.

In short, the Draft Guidelines provide very little guidance to resolve the considerable uncertainty arising as a result of the new provisions, or to provide clarity on the vague standards or concepts that must be applied under the new provisions. And even if they did provide any meaningful guidance, they are non-binding, even with respect to the Bureau itself, much less private applicants or adjudicators. As such, they do nothing to meaningfully clarify or limit the scope of the new provisions, or to mitigate their significant and harmful impact on freedom of expression.