Australia's Competition Law Overhaul


The Australian Competition Law Overhaul

The amendments expand the law’s two most significant existing prohibitions, now designed to enable the Australian regulator to take active role in information sharing between competitors and to base action against the anticompetitive effects of conduct undertaken by firms with a substantial degree of market power.

The text of the proposed amendments and draft enforcement guidelines have been released for comment and review.

Expanded prohibition on information exchanges and other concerted practice. In order to ensure that existing prohibition against information exchanges is not compromised, it can be established that there was a “meeting of the minds” between competitors, to see information to affect their own prices. The amendment has expanded the term “concerted” practice, i.e., the type of prohibited conduct, in addition to the existing “contract, arrangement or understanding” elements. However, the ACCC still would be required to prove that the concerted practice had the purpose or effect of substantially lessening competition; by contrast, all competition authorities challenging cartel conduct can treat confidential information exchanges as “by object” cartels under Australian law.

Abolition of the “per se” prohibition against “third line forcing”. Under the proposal, third line forcing would be prohibited only if it had the purpose or effect of substantially lessening competition.

Increased penalties for failing to comply with compulsory Notices. Failure to comply with such notices attracts criminal sanctions but the proposed amendments provide a consolidated “safe harbor” providing generalized standards for exempting procompetitive resale price maintenance.

Simplified application process for exemption from the prohibition against resale price maintenance. Although it is proposed that resale price maintenance would remain per se illegal in Australia, it is expected that the process for obtaining an exemption when there is evidence proving it is not contrary to the public interest will be simplified.

European-style “black exemptions” from the prohibition against anticompetition collaborations. The proposed amendments would bring Australia closer to European and Asian competition systems, which more readily recognize the importance of cooperation in certain contexts. As a result, the ACCC would be able to grant an exemption from the prohibition on resale price maintenance.

Expanded prohibition on misuses of market power with an anticompetitive effect. The Australian standard is a strict one of a “per se” prohibition against any conduct that is anticompetitive per se that it, where business executives have a guilty mind and act on the basis of effects. Therefore, well-crafted businesses must provide evidence of the purpose of their conduct and the ACCC’s enforcement actions for such cases have rarely been successful. Tarns is identical; the proposed amendments would bring the aspect of Australian law closer to its counterparts in other countries, that the failure to adopt other aspects of other jurisdictions' systems may bring unintended consequences.

Comment

In general, some aspects of these amendments would move in the direction of harmonization and make doing business in Australia easier. In other respects, the proposed amendments entrench idiosyncratic aspects of Australia’s competition law and reaffirm the need for multinational suppliers to treat Australia as a “special business in Australia”. In other respects, the proposed amendments would move in the direction of harmonization and make doing business easier. In other respects, the proposed amendments would move in the direction of harmonization and make doing business easier.