Kluwer Competition Law Blog

Australia's Competition Law Overhaul

Nick Taylor, Prudence Smith (Jones Day) · Friday, September 30th, 2016

Following an extensive inquiry into Australia's competition laws, the Australian government has released its proposed overhaul of the law.

The amendments expand the law's two most significant existing prohibitions, now designed to enable the Australian regulator to take action for information sharing between competitors and to take 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 include:

Expanded prohibition on information exchanges and other concerted practices. In order to overcome the existing evidentiary hurdle that exchanges of information will be only prohibited where it can be established that there was a "meeting of the minds" between competitors to use information to affect price, the Government has prosposed inserting the term "concerted practices" into the conspiracy prohibition, 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, EU competition authorities challenging similar conduct can treat confidential information exchanges as "by object" contraventions or automatically illegal.

Expanded prohibition on misuses of market power with an anticompetitive effect. The Australian standard for abuse of a dominant position applies only to conduct taken with an anticompetitive purpose (that is, where business executives have a guilty mind) and not on the basis of effects. Therefore, well-counseled businesses rarely record evidence of the purpose of their conduct and the ACCC's enforcement actions for such misuses of market power have rarely been successful. Taken in isolation, the proposed amendment would bring this aspect of Australia's law closer to its equivalents in other countries. But the failure to adopt other aspects of other jurisdictions' systems may bring unintended consequences. Unlike other countries, Australia may fine both companies and employees for such conduct. Adopting the "effects test" without protection for employees from such fines is likely to result in conservative business decisions; for example, businesses may fear that offering large discounts raises the risk of a predatory effect and therefore an enforcement action.

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 intended that the process for obtaining an exemption when there is evidence pointing to procompetitive reasons for the practice (such as free riding by distributors that do not provide ancillary services) will be eased.

European-style "block exemptions" from the prohibition against anticompetitive collaborations. The proposed amendments would bring Australia closer to European and Asian competition systems, which may assist in markets with unusual features (e.g., news agencies or motor vehicle distribution) or to create a "safe harbor" providing generalized standards for exempting procompetitive resale price maintenance.

Expansion of the existing exception from cartel laws that enable joint ventures to be created so as to also protect ancillary restraints. Ever since Australia adopted a criminal standard for "hard core" cartels, it has been difficult to find a crisp and effective standard to mark what constitutes a permissible joint venture from an antitrust conspiracy. Previously conduct that was "for the purpose of" a joint venture was exempt from the cartel prohibition and the Government's proposal would extend the protection to conduct that is "reasonably necessary" for the undertaking a joint venture.

Abolition of the "per se" prohibition against "third line forcing". The practice of two unrelated suppliers together offering customers a product bundle or bundled discount is presently prohibited by the Australian competition laws per se. 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 issues by the regulator. The Australian regulator has long expressed dissatisfaction at the penalties available to it where individuals and corporations fail to properly respond to notices served by it for information, documents or evidence relating to an investigation. Failure to comply with such notices attracts criminal sanctions but the proposed amendments increased the financial penalty 5 times over the previous position to $18,000 and the term for imprisonment will increase from 1 to 2 years. The ACCC has demonstrated that it is prepared to seek these remedies with a growing number of company directors serving time for their part in a false or absent response.

Revised merger authorization regime. The vast majority of mergers in Australia are considered under the regulator's informal process. However, the Australian law does also offer statutory protection for mergers where the parties might prefer the added certainty. The proposed amendments provide a consolidated provision for all authorizations which will make the ACCC the first instance decision-maker for all authorisations, including for mergers. Parties will no longer be able to seek a merger authorisation directly from the Australian Competition Tribunal. Decisions of the ACCC will be reviewable by the Tribunal on application from the parties, but only insofar as they relate to the ACCC's reasons for its determination (and not as a full re-hearing of any matter). This is intended to ensure that all matters relevant to the merger authorisation are put to the ACCC in the first instance.

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 case." Additionally, calls for simplification, particularly of

the cartel provisions have not been accommodated in the exposure draft, leaving the Australian Competition law among the most complex particularly having regard to what is at stake.

The draft text of the amendments can be found here: https://consult.treasury.gov.au/market-and-competition-policy-division/ed_competition_law_amendments. Comments are due 30 September 2016.

The draft ACCC guidelines can be found here: https://www.accc.gov.au/media-release/accc-seeks-feedback-on-a-framework-for-guidance-on-competition-law-reforms. Comments are due 3 October 2016.

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