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COMMENTARY

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IN SHORT

The Situation: Australia has adopted a package of changes to its antitrust laws that are designed to give more power to its antitrust enforcement agency, the Australian Competition and Consumer Commission, and to increase private antitrust litigation.

Looking Ahead: Companies that are involved in the exchange of competitive information or that could be accused of having a substantial degree of market power should quickly review their practices in light of the new laws.

SKIP TO THE FULL VERSION

On November 10, 2017, Australia adopted a package of changes to its antitrust laws that enhance the Australian Competition and Consumer Commission's ("ACCC") power and increase exposures to private litigation.

The key changes concern:

Misuse of Market Power (aka Single Firm Monopolization)

Old Rule: Misuse of market power cases used to be very rarely taken, and liability was found even more rarely for two reasons. The ACCC (or private plaintiff) had to prove that the defendant: (i) was in possession of a substantial degree of market power and "took advantage" of market power; and (ii) had one of three specific anticompetitive *purposes*. The *effect* of the conduct was not directly relevant to liability.

New Rule: The new rule is that a person with a significant degree of market power must not engage in any conduct that has the *purpose or effect* of substantially lessening competition.

By adopting an "effects" standard and removing the "taking advantage" requirement, Australia moves closer to the general standards applying internationally. However, an important remnant of the old rule remains—liability can exist based on the "purpose" of conduct even if there is no evidence of the anticompetitive effects the conduct will have.

Key Point: Firms that have structured their distribution systems and other business affairs based on exculpatory evidence that the conduct in question would not fall foul of the "taking advantage" or "purpose" elements required by the old rule must urgently review and potentially reform their conduct.

Concerted Practices

Old Rule: There are a multitude of Australian prohibitions against different forms of coordinated anticompetitive conduct, and these used to require the ACCC (or a private plaintiff) to prove that there was a "contract, arrangement or understanding" between two entities. It was not sufficient to prove a mere "concerted practice".

The term "concerted practice" is used in Europe, most of Asia, and many other parts of the world. It means to engage in:

> Co-ordination between entities which, without having reached the stage of concluding a formal agreement, have knowingly substituted practical co-operation for the risks of competition.

The ACCC lost cartel prosecutions where it could show only repeated disclosures of confidential information by some competitors to others without proving that the recipients of the information had entered into any form of understanding to alter their behavior in response.

New Rule: The prohibitions against coordinated conduct have been amended so that the ACCC or a plaintiff can base their suit on a "concerted practice" without having to prove "contract, arrangement or understanding".

The ACCC (or private plaintiff) will still have to prove that any concerted practice had the "purpose or effect" of either "fixing, controlling or maintaining prices" or "substantially lessening competition".

Key Point: Any arrangements concerning information exchange of any nature between competitors should be reviewed.

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Abolition of Forum Shopping for Merger Clearances

Old System: Australia has long provided an option for merging parties between two statutory standards for merger clearances. The standard rule provides that a merger is prohibited if it has the *effect of substantially lessening competition.* However, there has been an alternative by which a merger can be approved if it results in *such benefit to the public as to outweigh any competitive detriment*.

For the last decade, any applications under the public benefit test were made directly to the Australian Competition Tribunal ("ACT"), which generally has required any complainant to meet a higher standard of proof than the ACCC does.

New System: The new law restores the pre-2006 system whereby any application for a merger to be approved on public benefit grounds must first be made to the ACCC, not the ACT.

Other Amendments

The new law will essentially remove the specific Australian blanket prohibition against "third line forcing", permitting firms to engage in such conduct if they are confident that the conduct will not have the purpose or effect of significantly lessening competition. It will no longer be necessary to approach the ACCC for an exemption.

Although resale price maintenance will remain *per se* illegal, a more streamlined exemption process known as "notification" will be available rather than full-blown "authorization" for companies wishing to engage in the conduct.

The new law permits the ACCC to make class exemptions equivalent to the European and Asian "block exemption" concept, although whether this mechanism will ever be used is an open question.

The law also amends other aspects of the competition law, such closing a loophole that enabled certain "buy side" cartels to avoid prohibitions and seeking to better align the legal drafting for the joint venture exception from the cartel provisions with the original legislative intent.

THREE KEY TAKEAWAYS

1. Misuse of market power cases may now be brought by the ACCC or plaintiffs alleging conduct that has either the *purpose or effect* of substantially lessening competition.
2. Firms should review any practices that involve sharing information with competitors, although Australia's rules regarding "concerted practice" cases still differ from the rules in much of Europe and Asia.
3. Any application for a merger to be approved on public benefit grounds must now first be made to the ACCC, not the ACT.

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