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Fortune Telling: Australian Competition Law in 2013

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I. ROADMAP 2013

“Trying to predict the future is like trying to drive down a country road at night with no lights while looking out the back window.”² Predicting the path of Australian competition law in 2013 may be more difficult still. It is an election year in Australia³ and, if history is any guide, this will generate some populist political promises, frequently at odds with sound competition policy. Political debate is likely to focus on the need, or otherwise, for a major review of Australia’s competition laws and see philippics over who’s policies are most likely to support small business, or curtail the market power allegedly enjoyed by big supermarkets, banks, and petrol companies.

Also, the Australian Competition and Consumer Commission (“ACCC”) is likely to have an active schedule in 2013, having repeatedly touted an increase in competition law litigation, particularly where it might be useful to resolve ambiguity in the law. It is also possible we will witness our first criminal cartel prosecution this year, although the effect of the election on the ACCC’s appetite for litigation remains to be seen. On the merger front, following a significant defeat in the courts late in 2011, the ACCC’s merger processes were under close scrutiny in 2012 and this will continue into 2013 with the possibility of an update to the merger process guidelines to reflect new ACCC practice.

It is also likely that throughout the year attention will focus on Australia’s essential facilities access regime, currently undergoing a major review by the Productivity Commission.

In brief, we can expect an active—if somewhat unpredictable—year for competition law and policy in Australia.

II. POLITICS AND ELECTION PROMISES

The political posturing that inevitably accompanies Australian federal elections has, in recent years, made for some bad policy decisions in the realm of competition law. This situation is not helped by the existence of a hung Parliament,⁴ which increases the potential—and necessity—for political deal-making.

The most infamous political compromise affecting competition policy was the “Birdsville” amendment, an embarrassing example of what not to do in relation to predatory pricing. This amendment to Australia’s misuse of market power provision was introduced for the

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² Attributed to Peter F Drucker.

³ It is for the Prime Minister to nominate the date of the election, but it must be called by no later than November 30, 2013.

⁴ Neither major party (the Labor or Liberal party) holds a majority of seats. The Labor party formed a government with the support of minor parties and independents.

purpose of small business protection⁵ and prohibits sustained below-cost pricing by companies with substantial market share where their *purpose* is to harm competition or competitors. More recently, complex sector-specific “price signalling” laws were introduced, giving effect to promises made at the last federal election. This law, which had its genesis in concerns about petrol price coordination among retailers, morphed into a law targeting banks when fears about interest rate rises became an important political issue.

Although competition policy is unlikely to be a central issue in election campaigning, it will play an important role in securing support of small businesses and farmers. It is also likely to be utilized to support grand promises to curtail the power of big business, especially in concentrated industries, of which Australia, by virtue of its size and geographic isolation, has many. Particular attention will be given to petrol companies, banks, and especially the major supermarket chains, which have received unprecedented political attention in recent years, triggered by complaints that their milk prices were too low and thereby harmful to farmers (popularly referred to as the “milk wars”).

The incumbent Labor party is likely to be reserved in its promises for change and instead tout its “success” in introducing a number of recent reforms, however questionable they might be from a competition policy standpoint. In response to a recent Senate Committee recommendation for a review of the competition legislation, the Government responded by observing that, while “committed to ensuring the ongoing effectiveness” of competition laws, given a number of relatively recent changes the law should not be reviewed until these changes have been tested in the courts and any weaknesses identified.⁶ The perception that the Government believes it has finished with significant competition review is, perhaps, also evidenced by its decision to jettison a dedicated ministerial role from the cabinet, subsuming competition policy into the broader Treasury portfolio.

The opposition Liberal Party, on the other hand, has appointed a Shadow Minister for Competition (Bruce Billson MP), although his portfolio also extends to Small Business, and in recent months has reiterated the position it adopted at the 2010 federal election; namely if elected, it will initiate a review of competition laws. Both Bruce Billson MP and the Opposition Leader have repeatedly stated that they will establish “a genuine root and branch review of competition laws, to ensure that small business can compete equally with big business.”⁷ While short on detail and failing to articulate any specific deficiencies in the existing law, Billson has been careful to mention the words “supermarket” and “petrol station” in his speeches on the

⁵ When introducing the bill the Government was careful to emphasize that the bill was not about protecting any specific interest group, but the true purpose of small business protection was evidenced by Senator Barnaby Joyce, who was responsible for the introduction of the bill and who made no secret of its genesis in his desire to protect small business. See further Julie Clarke, *Australia’s Radical Predatory Pricing Reforms: What business must know*, DEAKIN BUS. REV 6 (2008).

⁶ Government Response to the Senate Economics References Committee’s 2011 Final Report on *The Impacts of Supermarket Pricing Decisions on the Dairy Industry*, pp. 3-4.

⁷ See, e.g., ACCC hints at need for change (<http://www.liberal.org.au/latest-news/2012/09/13/accc-hints-need-change>, (September 13, 2012) and Tony Abbott, *Small businesses to grow under the Coalition* (<http://www.liberal.org.au/latest-news/2012/11/15/small-businesses-grow-under-coalition>, (November 15, 2012).

matter to maximize small business and public appeal. Given this small business focus, any more specific proposals are likely to revolve around bolstering abuse of power and merger control laws.

Depending on the timing of the election and its outcome, we may well see the initiation of a major review of Australia's competition laws toward the end of 2013 or early in 2014. Regardless of political persuasion, most competition lawyers will be hoping for a respite from further reviews; while the last major independent review of Australia's competition laws was conducted in 2002-2003, the passage of reforms occurred over several years and was accompanied by numerous reactive and often industry-specific inquiries into aspects of competition policy.

Our best hope in this election cycle is that other more popular issues draw attention away from competition policy so that the current laws are given time to settle and policy issues can be considered calmly and rationally and away from the maelstrom of partisan political debate.

III. ACCC PRIORITIES

Consistently with his promise to test some new or ambiguous elements of Australia's competition laws, ACCC Chairman, Rod Sims, recently stated that "the number of times the ACCC takes people to court for competition cases is about to increase quite significantly."⁸ He has also repeatedly indicated that particular attention will be paid to supermarkets and petrol retailers and has specifically identified "the online economy," "cartels," and "misuse of market power and other anti-competitive conduct, particularly in concentrated markets" as likely subjects for competition litigation.⁹

In relation to cartels it is anticipated that we will see our first criminal cartel case this year. On top of several civil cases currently before the courts, the ACCC has indicated that it is engaged in a number of active cartel investigations. Following an education campaign and the release of its ACCC's cartel movie, *The Marker*, in 2012, the ACCC will no doubt be keen to demonstrate the power of the criminal cartel laws which were introduced in 2009.

The ACCC has also been investigating the competitive implications of "shopper docket discounts" between the supermarket and petrol sectors and it is possible the ACCC will revise its stance on these tying schemes, which to date it has viewed as benign.

IV. MERGERS

As with most jurisdictions, Australian merger cases rarely reach the courts. Although we have no mandatory merger review system, most parties seek informal clearance from the ACCC before merging as a means of achieving some security against future challenge. The time-sensitive nature of mergers means that where the ACCC indicates that it will challenge a merger, or only approve one if certain undertakings are provided, the matter is normally not pursued in the courts. As a result, the current Australian merger provision has only been tested in the courts twice, most recently in 2011. On both occasions the ACCC lost. In its most recent defeat before

⁸ Rod Sims, quoted in Patrick Durkin, *ACCC ramps up assessment*, AUSTRALIAN FIN. REV., 8 (December 4, 2012) and see Rod Sims, *Current ACCC Priorities* (Speech at Australia Israel Chamber of Commerce Western Australia Business Leaders Lunch, Perth, (September 13, 2012).

⁹ *Id.* Rod Sims, *Current ACCC Priorities*

the full Federal Court, the ACCC was subjected to considerable criticism in relation to the case it put and evidence provided. This critique set the scene for the Commission's approach to merger clearance in 2012, which was more cautious and, as a result, slower.

The ACCC has acknowledged it is aware of the impact of longer clearance periods on commercial time frames and is taking steps to address the issue. However, no further specifics on what might be expected are provided.¹⁰

In part to address concerns about delays in merger clearance throughout 2012, the ACCC entered into discussions with Australia's two major supermarket chains, Coles and Woolworths, about streamlining the merger clearance process. While a trial protocol has been reached with Coles (the full details of which are not public, but which involves Coles agreeing to "notify the ACCC of all acquisitions in exchange for quicker pre-assessments and shorter timelines for the first stage of a merger review"¹¹), discussions with Woolworths broke down toward the end of 2012. Woolworths argued that any streamlined merger clearance process ought to apply to all sectors and not just the supermarket industry, a position with which it is difficult to take issue. It is possible, though perhaps not likely, that we may see a revision of the broader merger clearance process guidelines, rather than just an isolated protocol, to reflect any new ACCC approach throughout the course of the year.

On a purely aesthetic note, we are also hoping for a makeover of the ACCC website, which is now looking a bit tired and is not as user-friendly as one would like.

V. ACCESS

The final area likely to attract attention in the competition community in 2013 is facilities access. After some recent legislative changes to this Regime and high profile court decisions, the Productivity Commission is in the process of undertaking a 12-month inquiry into the Regime and is expected to report in September. This will include examining the rationale, objectives, and framework of the Regime and assessing its performance in meeting its objectives. It will make recommendations for improvement and comment on any measures that might help ensure "effective and responsive delivery of infrastructure services over both the short and long term."¹²

In short, although we are unlikely to see any fundamental changes to Australia's competition laws, there will be plenty to keep competition observers interested in 2013.

¹⁰ *Id.*

¹¹ Cara Waters, *Woolworths ditches agreement with ACCC on retail acquisitions*, Smart Company (Monday, December 10, 2012) at <http://www.smartcompany.com.au/advertising-and-marketing/053345-woolworths-ditches-agreement-with-accs-on-retail-acquisitions-2.html>. See also, *Only limited acceptance by the major supermarket chains of ACCC's proposed streamlined acquisition assessment protocol*, <http://www.accc.gov.au/content/index.phtml/itemId/1092869/fromItemId/142> (Press Release, December 7, 2012).

¹² Inquiry Home Page: <http://www.pc.gov.au/projects/inquiry/access-regime>.