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Commercial Law E-alert

Anti-cartel laws

In its attempt to tighten up cartel conduct, the Australian Government has released the final draft of the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008*. Has it gone too far?

On 27 October, Hon Chris Bowen MP released a revised draft of the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* ("Bill"). The Bill proposes to create two new criminal offences and two new civil cartel offences in Part IV of the *Trade Practices Act 1974 (Cth)* ("TPA"). The proposed offences extend well beyond the current prohibitions on price-fixing and exclusionary arrangements, resulting in significant changes to Part IV of the TPA.

Individuals convicted of a cartel offence can now face a maximum sentence of ten years imprisonment and a fine of up to \$220,000. It is anticipated that the Bill will be introduced into Parliament at the end of the year.

Practical implications of the Bill

Companies and individuals currently compliant with the TPA may, in fact, be in breach of the new cartel prohibitions.

The effect of the proposed cartel provisions is to prohibit conduct which is currently subject to a "lessening of competition" test. The significance of failing to retain the "lessening of competition test" is far reaching. Under the current law, certain conduct is only prohibited if it has the purpose, or has or is likely to have the effect of, substantially lessening competition. However, under the proposed Bill, if the parties to the contract, arrangement or understanding are in competition with one another, the new prohibitions potentially extend to prohibit some forms of vertical exclusive dealing arrangements. Territorial exclusivity and price setting (for example, specifying a maximum resale price) between competitors may now be caught by the cartel prohibitions.

Vertical supply agreements

Notably, anti-overlap provisions are not incorporated into the Bill. Current anti-overlap provisions contained in Part IV of the TPA serve an important function, as they ensure vertical supply arrangements containing exclusivity clauses are subject only to the "lessening of competition test" and are not caught by the absolute prohibitions in Part IV of the TPA such as price-fixing and exclusionary provisions. Under the proposed amendments, a business that appoints an exclusive distributor, while retaining a right to compete against the distributor, may find itself in breach of the new cartel prohibitions.

Where to from here?

It remains to be seen whether the practical implications mentioned are unintended drafting consequences. There is currently no explanatory memorandum to the Bill to provide guidance. However, should the Government pass the Bill in its current form, many existing commercial arrangements will need to be reviewed, including 'exclusive' distribution agreements, which, as a result of the proposed amendments, may no longer be compliant with Part IV of the TPA.

We will continue to keep you updated on the progress of the Bill. Should you require any further information in the interim, please do not hesitate to contact us.

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