

Australian Competition Law system and legal practice experience

-----Comparison of Australian Trade Practices Act and Chinese Anti-Monopoly Law

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Preface

On 1 August 2008, China's Anti-Monopoly Law (AML) took effect after more than 10 years of draft and preparation. This China's "economic constitution", which marks an important progress in China's legal history, is deemed to produce influential implication to China's future economic development. Although this AML covers the main areas of competitive matters following the international experience, it still suffers quite a few questions and controversies from international society for its vague rule and some particular Chinese stipulations. Australia as a typical developed country has the most mature and advanced institutions and abundant experience in this area. Its competition legal system has lead the world experiencing more than 100 years development and plays enormous role to the nation's economic operation and citizens' regular life. Understanding Australian experience is imperative to China's ongoing development of competition law. In my three month of placement at AGS (Australian Government Solicitor) as one member of the Australia-China legal professional program, I am very lucky to specialize in the study and research in this area from Australian competition law professionals. I am very grateful Australian experts, my mentors, AGS Senior lawyers Lici and Angela,

Matthew and other colleagues give me great favor and careful direction in my research and good suggestions on this paper. This paper consists of three parts. In part I, I will give a brief introduction of Australia competition law. In Part II, I will introduce the general outline of Chinese anti-monopoly law, Part III is the relevant lesson from Australia competition law. I try to give a general knowledge as to these two countries' competition law systems system though a brief introduction and preliminary comparison below.

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Part I A Brief Introduction to Australian Competition Law

1. A brief introduction to the background and the history of Australian competition law

Australian competition policy dates from 1906 when the first Federal law dealing with restrictive practices was enacted. The contemporary Australian competition policy stems from the 1965 Trade Practices Act. Then, amendments to this Act to address resale price maintenance matters were passed in 1971. The Whitlam Labor Government, elected in 1972, set about designing a new competition and consumer protection statute for Australia. After heated debate, the Trade Practices Bill 1974 eventually became a law on 1 October 1974. Trade Practices Act 1974 (TPA) took a new approach to competition law, based on prohibition rather than administrative investigation of conduct; it also provided for authorization of anti-competition conduct in the public interest. Over following years, considerable ongoing fine tuning of the Act has taken place.

2. The Current legal system of Australia competition law

2.1 The main stipulations of Australian competition law

As mentioned, the TPA is Australia's the foundation of competition law system. It seeks to prevent and deter anti-competitive conduct through effective enforcement of competition laws. It states that its objective is to "enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection" (section 2). The competition provisions of the TPA apply broadly to all businesses and persons within Australia.

2.2 The main structure of Australian competition law

The main contents concerning anti-unfair competition are set forth in the Part III of the TPA 1974. In promoting competition, the TPA prohibits arrangements between competitors which substantially lessen competition, divide markets, restrict output or fix prices. So, the cartels are caught by these prohibitions.

The TPA also prohibits mergers and acquisitions which have the effect of substantially lessening competition in Australian markets.

Unilateral conduct by firms can also harm competition, and for this reason the TPA prohibits misuse of market power, exclusive dealing and resale price maintenance.

All of these arrangements and conduct are prohibited because they restrict competition in ways that are harmful to consumers, commonly by increasing prices, stifling innovation and producing goods of inferior quality. However, in certain cases where it can be shown that anti-competitive conduct has a net public benefit the ACCC can grant immunity with respect to the conduct. Other conduct is regarded as sufficiently detrimental to the objects of competition law that

There are significant penalties for companies and individuals that contravene the competition laws. Companies can be punished by an amount being the greater of \$10 million, or 3 times the value of the benefit obtained from the anticompetitive conduct or, where that value cannot be determined, 10% of the group's annual turnover in Australia.

2.3 The Institutional Arrangements

There are a number of institutions which play a key role in relation to competition policy and law in Australia.

The Treasury

Competition policy is essential to well-functioning markets. Treasury is responsible for advising the Government on competition policy and for overseeing competition policy reform programs and their governance arrangements. It includes responsibility for developing legislation giving effect to Government policy in the area of competition, most frequently as part of the TPA.

National Competition Council

The NCC was established in November 1995. The NCC is an independent statutory authority established primarily to assess progress made by State and Territory governments in opening up to competition their agencies undertaking business activities up to competition and to make recommendations to the federal government on compensation payments to be made under the *Implementation Agreement*.

The NCC has three main roles:

- (i) Providing advice on the design and coverage of access rules and making recommendations to the federal Treasurer and to the responsible State and Territory Minister.
- (ii) Making declarations in relation to services under the essential facilities provisions of Part III A of the TPA; and
- (iii) Communicating with and educating the community in relation to both specific reform implementation matters and National Competition Policy (NCP) generally.

Australian Competition and Consumer Commission (ACCC)

The ACCC was created out of the National Competition Council competition reforms in 1995 but formally existed as the Trade Practices Commission from 1974. ACCC is the most principal organization on competitive matters. Matters considered by the ACCC include mergers, authorizations and notifications, whether to begin court proceedings, and decisions about access to specific infrastructure telecommunication.

The ACCC is the independent statutory authority responsible for administering the TPA. Its powers and functions, which are drawn from a wide range of provision in the Act, include:

- i. Investigating possible breaches of competition and consumer protection provisions of the TPA and instituting court proceedings accordingly;
- ii. Considering applications for immunity from the TPA in a range of public interest grounds;
- iii. Arbitrating on disputes over access to essential facilities and in telecommunications industry;
- iv. Assisting consumers who have suffered as a result of breaches of the TPA to obtain compensation or redress.
- v. Generally ensuring a culture of compliance with the TPA through education and research.

The ACCC applies the TPA with the aim of ensuring, as far as it is possible, universal compliance by businesses, including government businesses, across Australia with its provisions. Appeals against some of the ACCC 's decisions can be made to the Australian Competition Tribunal Other decisions can be taken to the Federal Court seeking judicial review..

Australian Competition Tribunal

The Australian Competition Tribunal is a quasi-judicial review body constituted under the TPA. The Tribunal consists of a President and such number of Deputy Presidents and other members as appointed by the Governor-General. A presidential member must be a judge of a federal court. Other members must have knowledge or experience in industry, commerce, economics, law or public administration.

The Tribunal's primary role is to reconsider certain matters on which the ACCC has made a decision. It does so only on the application of a person who is not happy with the decision of the ACCC. Decisions of the ACCC which may be referred to the Tribunal for reconsideration are: Decision on whether or not to grant immunity (authorization); Decisions to take away the immunity (revocation of authorizations or notifications); and Arbitration decisions in cases involving access to essential facilities such as in the telecommunication area

The Federal Court

The Federal Court is the only court in which the ACCC can bring actions to enforce the competition provisions under Part of the TPA. Many of the ACCC 's decisions are also subject to judicial review in the Federal Court. Affected consumer or businesses can also commence proceedings for breaches of the TPA in the Federal Magistrate court as well.

Part II A Brief Introduction to Chinese Anti-monopoly Law

1. A brief introduction to the background and the history of Chinese anti-monopoly law

After more than 10 years of drafting and preparing, the National People's Congress passed the Anti-Monopoly Law (AML) on 30 August 2007, which went into effect on 1 August 2008. The AML marks an important moment in China's legal history as the "economic constitution". This AML is China's first comprehensive and unified legislation regulating competition. It borrows from EU and US law and practice, but also has concepts that are unique to China. The AML applies to acts committed within China, as well as those that have an anticompetitive effect in China. As China's economy continues to grow in size and importance, this law will have broad implications for businesses operators in China and other countries.

2. The Current legal system of Chinese anti-monopoly law

2.1 The main stipulations of Chinese anti-monopoly law

The AML covers the areas of monopoly agreements, abuse of dominant market position, market concentration by business operators and abuse of administrative powers to restrict competition. It also stipulates the process for investigating suspicious monopoly behavior and the legal liability for monopoly behavior. It states that it is enacted for the purpose of preventing and restraining monopolistic conducts, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, promoting the healthy development of the socialist market economy.

2.2 The main structure of Chinese anti-monopoly law

The AML targets three general categories of prohibited behavior:

Monopoly Agreements. The AML prohibits agreements or concerted actions among competitors or counterparties that eliminate or restrict competition. For example, agreements between competing businesses to fix prices, limit production or sales, or divide markets, or agreements between trade counterparties to set minimum resale prices, are prohibited by the AML. These so-called “monopoly agreements” may be exempted in certain circumstances, such as where the agreement is entered into to improve technology or product quality and it does not materially restrict competition.

Abuse of Dominant Market Position. The AML prohibits abuse of market power by “dominant” firms. A firm may be presumed dominant under the AML if its market share meets or exceeds certain thresholds. Under the AML, acts such as tying, exclusive dealing, refusal to deal, price discrimination and predatory pricing, among others, are considered abusive and thus prohibited, unless otherwise “justified”. The possibility of justification suggests that a US-style rule of reason analysis may apply.

Anticompetitive “Concentrations”. The AML is formulated to prohibit mergers and acquisitions that eliminate or restrict competition. It also provides for pre-merger notification and review.

Penalties. The AML also, for the first time, expressly grants the enforcement authorities the power to penalize violations. It does not impose criminal liability for violations, although there is some interest in amending the law to do so. Nonetheless, the AML does provide for substantial monetary and injunctive penalties, including fines of one to ten percent of an offender’s revenue from the preceding year. It also allows for civil actions by private third parties.

2.3 The Institutional Arrangements

The responsibility for the AML is shared by the Antimonopoly Commission and three enforcement departments—Ministry of Commerce (MOFCOM), State Administration

for Industry & Commerce (SAIC) and National Development and Reform Commission (NDRC). The first court cases have been brought, and the Supreme People's Court has specified how administrative law cases alleging anti-monopoly conduct will be adjudicated.

The Enforcing Agencies. The AML enforcement authority is allocated among three different agencies:

- (iv) **The Ministry of Commerce (MOFCOM)** will handle merger notifications and review;
- (v) **The State Administration for Industry and Commerce (SAIC)** will enforce prohibitions against monopoly agreements and abuses of market dominance, save any aspects that involve pricing; and
- (vi) **The National Development and Reform Commission (NDRC)** will deal with price abuses by dominant firms and related issues under the AML.

This division of authority reflects the historical responsibility of these agencies and is perceived to be a balance-preserving political compromise after years of wrangling among the agencies.

The AMC. At the top, an Anti-Monopoly Committee (AMC) is to be established directly under the State Council and will formulate overall policies and act as an overseer of AML administration.

In an important recent development, the State Council announced that the administrative office of the new and powerful AMC will be located at MOFCOM. This no doubt will enhance the importance of MOFCOM in the enforcement process. Vice Premier Wang Qishan, whose policy portfolio includes finance and foreign trade, reportedly will chair the AMC.

Internal Changes. The enforcing agencies have announced internal reorganizations and measures to prepare for the enhanced importance of their roles under the AML. MOFCOM announced the creation of a department-level Anti-Monopoly Bureau at the same time as the AML took effect. Likewise, SAIC has also announced the creation of an Anti-Monopoly and Anti-Unfair Competition Bureau. The NDRC stated that it has recently completed a set of draft rules on implementing the AML's prohibition against price abuses by dominant firms.

Part III Lessons from Australian competitive law for China

Clearly, Australia is a big step ahead in the competition law and practice. Australia

now has in place a strong competition law, with an independent and effective regulator in the ACCC. In addition, the Government is seeking to build upon the NCP reforms in the areas of structural reform, third party access and competitive neutrality. In short, Australian competition law is building on its mature legislation and transparent enforcement proceeding and bring large advantage to the society and general public.

The Chinese Anti-Monopoly Law (AML) has set forth the general principles and broad rules. Numerous questions, however, remain as to how to interpret those principles and rules. Till now, it lacks the detailed stipulation and specific standards as to the application of the AML. At this point, therefore, the current enforcement authorities have enormous discretion in interpreting the rules and providing exemption to any specific cases. This uncertainty has lead to the fears and criticisms by some foreign governments and multinationals, which undermines Chinese further development and its trade with other countries. Moreover, it lacks an independent and powerful enforcement agency such as Australia's ACCC. Having complicated and overlapping enforcement agencies not only decreases the efficiency but also produce the unnecessary conflicts. Another uncertainty lies in how the AML will be enforced against state-owned businesses and joint ventures in which they participate. The insufficiency of the further interpretation and lack enough transparency impact on the effectiveness of this significant law. So, the rules will need to evolve in practice in order to be clearer and therefore provide better guidelines for business activities. It is very likely that the State Counsel or the enforcement agencies will issue implementing regulations as they gain more practical experience in resolving enforcement issues in the near future.

References:

MILLER'S Annotated Trade Practices Act 30th Edition 2009

**<COMPETITION POLICY: THE AUSTRALIAN EXPERIENCE> Jim
Murphy, 9 July 2007**

<Client Alert> White & Case August 2008