PwC International Business Reorganisations Network – Monthly Legal Update

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Contents

Welcome

Welcome to the eighth edition of the PwC International Business Reorganisations (**IBR**) Network Monthly Legal Update for August 2017.

The PwC IBR Network provides legal services to assist multinational organisations with their cross-border reorganisations. We focus on post-deal integration, pre-transaction separation and carve outs, single entity projects, and legal entity rationalisation and simplification as well as general business and corporate and commercial structuring.

Each month our global legal network brings you insights and updates on key legal issues and developments relevant to multinational organisations.

We hope that you will find this publication helpful, and we look forward to hearing from you.

In this issue

In our August 2017 issue:

- PricewaterhouseCoopers (Australia) reports on a recent High Court of Australia decision confirming the offshore reach of 'market in Australia'; and
- Cabrera & Co. (Philippines) discusses the *Data Privacy Act* 2012, in particular its scope, its requirements and how it works to protect privacy and personal information in the Philippines.

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PricewaterhouseCoopers (Australia) – High Court confirms offshore reach of 'market in Australia'

At a glance

The High Court of Australia (**High Court**) has unanimously dismissed appeals by Air New Zealand and PT Garuda Indonesia Ltd (**airlines**) from the Full Federal Court's decision which had found that the air cargo services of the airlines from Hong Kong, Singapore and Indonesia to Australia were supplied in a market 'in Australia'. This recognition of a market in Australia effectively exposed the conduct of the airlines to the price fixing regime under the former *Trade Practices Act 1974* (Cth) (**TPA**).

Whilst this case examined the price fixing provisions under the old TPA, it is likely to have implications for the cartel offences in the *Competition and Consumer Act 2010 (Cth)* (**CCA**). While the new cartel offences are not focused on whether goods or services are supplied or acquired in a market 'in Australia', the case has implications for how the High Court will interpret the competition condition under the new cartel regime. The High Court decision sends a clear warning to multinational companies to appreciate that any anticompetitive arrangements entered into overseas may still be found to have occurred in a market 'in Australia', particularly where the ultimate consumers of the services tainted by the conduct are in Australia.

In detail

History and background of the long-running battle

In March 2016, on appeal to the Full Federal Court, the Australian Competition and Consumer Commission (**ACCC**) successfully argued that the airlines cooperated and fixed fuel and insurance surcharges on the carriage of cargo from Hong Kong, Singapore and Indonesia to destination ports in Australia, in contravention of sections 45 and 45A of the former TPA.

The Full Federal Court focused on the key issue of whether the airlines' conduct had, or was likely to have, an impact of substantially lessening competition in a market for goods and services in Australia. The Full Court by a 2-1 majority found that the market definition for goods and services must be interpreted in a broad manner and that the price fixing conduct occurred in a market 'in Australia' from the point of shipment onwards. The majority applied a two-fold market test comprising of a relevant market identification and analysis of the entire market rather than geographical dimensions alone.

Factors considered by the High Court

In the High Court's unanimous view, there was a relevant market in Australia for the airlines' air cargo services, and the appeals of the airlines were dismissed. It was deemed that a market in Australia, according to the statutory provisions, referred to the fixing of prices in any market in Australia in which the companies competed to supply services. Chief Justice Kiefel, Justice Bell and Justice Keane (**Kiefel, Bell and Keane**) issued a joint judgement. Justice Gordon (**Gordon**) and Justice Nettle (**Nettle**) issued individual and separate judgements, although all five judges stated that they agreed with, and adopted, the extensive reasoning and summary provided by Gordon J in her Honour's individual judgement.

Market definition and statutory framework

The High Court affirmed the Federal Court's principle outlined in *Australian Competition and Consumer Commission v ANZ Banking Group*[1] and stated that the market definition process required identification of the contravening conduct, consideration of the interactions between, and perceptions of, all relevant actors and participants in the commercial community involved, and consideration of the statutory terms governing the conduct. Gordon J believed that it was the flow-on effect for consumers and not the effect on other competitors that should be considered when identifying the market.[2]

The relevant facts considered included that the airlines flew freight to ports in Australia which involved transporting cargo from an origin port to a destination port, ground handling services at both origin and destination ports, inquiry services for tracking delays and lost shipments, and dealing with damaged cargo issues at destination ports. The services were acquired by freight forwarders or shippers as a single package or suite of services. The airlines obtained the cargo from freight forwarders at an origin airport, and the service of taking possession of the cargo at the port of origin, in order to fly it to a destination port in Australia, was an act that could only be performed at the origin port. Although freight forwarders directly entered into contracts with airlines in origin ports such as Hong Kong and other jurisdictions, the High Court was of the view that main importers and shippers in Australia had the ability to influence and direct the decision as to which airline should be used in some cases, and airlines would compete for cargo directly from those large shippers. The presence of this rivalry in a destination port in Australia pointed to competition in that location, and therefore a market 'in Australia'.

The High Court referred to the following factual characteristics to confirm the proposition that the airlines were in competition in a market, and that market was 'in Australia', even though the market was also in another country (geographical characteristics were not sufficient alone to prove that the market was in Australia):

a Economically significant demand from multiple markets including a market in Australia.

b Physical negotiations and partnering with relevant consumers and targets that were shipping or forwarding freight to consumers in Australia.

c Marketing in cargo magazines and sales targeting strategies which showed that the shippers in Australia were 'objects to be pursued'.

d Product design specifications designed to pursue customers in Australia.

Whether substitutability of a product could be an indicator of competition in a relevant market

The trial judge had earlier concluded that the substitutability of products occurred primarily in the foreign jurisdictions, and therefore that the relevant competitive behaviour occurred in those jurisdictions and not in Australia. However, the High Court noted that while this argument was persuasive and not unimportant, and could have ultimately been a decisive factor in a market definition,[3] the location of substitutability and where a contract is entered into was not conclusive for defining the market.[4] Kiefel, Bell and Keane JJ, with whom Nettle and Gordon JJ agreed, stated that although execution of contracts for supply of services could occur in origin ports overseas, the location where contracts may be switched or substituted between service providers should not be the sole indicator to prove that the market was in a foreign or Australian market. Kiefel, Bell and Keane JJ mentioned that the contravening conduct of the airlines and its range of effects required consideration. The High Court concluded that:

[1] (2015) 236 FCR 78 at 108 [138].

[2] Gordon J at 68.

[3] Kiefel CJ, Bell J, Keane J at 26.

[4] Kiefel CJ, Bell J, Keane J at 29.

The airlines were actively engaged in attempting to capture the demand for services emanating from shippers in Australia as an integral part of their business. The airlines' deliberate and rivalrous pursuit of orders emanating from Australian shippers was compelling evidence that they were in competition with each other in a market that was in Australia.[5]

The High Court confirmed that the use of a range of techniques, that included targeted marketing and sales strategies to try and compete for the demand of shippers requiring a destination port in Australia, met the definition of rivalrous behaviour and therefore the essence of competition in that specific market.

The airlines' submissions that were dismissed in the High Court

Inflexible aspects of the market

In support of its appeal, Air New Zealand submitted that all sources of its supply were located at the port of origin and substitution could only occur in those origin port jurisdictions. Garuda submitted that demand for delivery services was met by freight forwarders and these parties were considered to be the consumers and not the shippers located in Australia. The High Court did not find these arguments to be determinative, as they did not accurately or realistically describe the actual interactions, perceptions and actions among the relevant actors and participants in the alleged market or commercial community, as established in the case of ANZ Banking Group[6] and affirmed by the High Court in the current case.

Foreign state compulsion to impose surcharges

The airlines also submitted that they were compelled by foreign law to engage in the impugned conduct, and were therefore not engaging in conduct to lessen competition. They argued that to establish a contravention of the TPA, there needed to be evidence that the airlines chose to engage in such conduct. They submitted that the airlines had no choice but to charge a fuel surcharge. The trial judge, Full Federal Court and High Court all confirmed that neither foreign law nor foreign practice compelled the airlines to impose a fuel surcharge - the foreign law merely required the airlines to not to impose a surcharge at all or to seek approval from the Hong Kong Civil Aviation Department for the surcharge. It was deemed that the airlines sought relevant approval for the surcharge devised, applied the surcharge, and the Hong Kong regulations did not impose any requirement to compulsorily charge this fee.

Alleged inconsistency in laws

Garuda submitted that the fuel surcharges on transport of air cargo were a tariff within the meaning of the Australia-Indonesia Air Services Agreement (**ASA**) of 1969 and the *Air Navigation Act* 1920 *(Cth)* (**ANA**). It was also submitted that the TPA could not apply to the ASA, as the ANA and prohibitions in the TPA on prices and competitors were inconsistent both practically and operatively. The High Court found that the alleged inconsistency did not exist and that Article 6 of the ASA required a setting of minimum tariffs and not imposition of fixed tariffs. It further stated that the actions of Garuda and other airlines in specifically meeting in Hong Kong and Indonesia to fix and charge fuel and other surcharges were independent of any minimum requirements imposed by an ASA.

Implications

The High Court decision confirms that a relevant market cannot be identified or defined in a vacuum. The place of destination in the supply of goods or services is likely to be considered in order to determine the overall interactions between, perceptions and actions of, the actors and participants within the commercial community. In particular, where there is unidirectional transportation of goods or services from one location to another as part of a service provided, the place where the contract was signed or the place where goods or services can be substituted are unlikely to be the only indicators for identifying whether the market was overseas or 'in Australia'.

[5] Kiefel CJ, Bell J, Keane J at 34.

[6] (2015) 236 FCR 78 at 108.

Further, economically significant demand from a particular destination location may be persuasive but will not be the sole market identifier. Businesses should be aware of the significance of where meetings are held, negotiations and business partnerships entered into, targeted marketing or sales strategies, and product design tailored towards specific customer needs, as these can cumulatively assist to establish the relevant market in respect of which the conduct occurred. As such, multinational corporations should be aware of the extensive ambit of the 'market' definition.

The High Court's decision will remain relevant, even if the current legislation is amended by the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* (which is currently before Parliament). This Bill (if passed) will add a note to section 44ZZRD(4) to specify that 'trade or commerce' in section 4 means trade or commerce within Australia or between Australia and places outside Australia. The High Court's decision effectively anticipates this proposed legislative clarification by recognising a market the outer geographical dimensions of which includes places outside Australia.

The case has been remitted back to the Federal Court to determine relief (including penalty).

The takeaway

The ACCC's win in the High Court reflects an effective prosecution trend by competition regulators worldwide against global and domestic cartels. In particular, the High Court has confirmed a broadened approach to market definition. It enlarges the geographic dimension of markets and expands the reach of competition laws into other jurisdictions. It is a warning to businesses that their conduct overseas (including the entry into contracts) could fall within the Australian competition framework's reach, especially where the conduct impacts Australian consumers. It is increasingly important for businesses to recognise and define the markets they operate in, take effective measures to deter cartel conduct by their branches and operations that may have an impact on Australian consumers, seek ACCC approval for any proposed conduct or arrangements if there is uncertainty on implications, consider a legal review of current agreements and supply chains for compliance with the CCA, seek legal advice for the structuring of proposed agreements, and avoid price fixing conduct by any means.

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PricewaterhouseCoopers (Philippines) – Data Protection and Privacy in the Philippines: What you need to know

At a glance

As technology advances, so does the dependency of the people on it. Social media and information technology have become the best platforms for building connections, conducting business, providing services and spreading information globally. To attest, aside from being proclaimed as the top social media user worldwide, the Information Technology and Business Process Outsourcing (**IT-BPO**) have become the two of the fastest growing industries in the Philippines.

Currently, companies registered and operating in the Philippines have until 9 September 2017 to initially comply with the registration requirement of the National Privacy Commission by virtue the Data Privacy Act.

With the deadline for the initial compliance near approaching, this article aims to discuss what you need to know about the Data Privacy Act, its scope, its requirements and how it works to protect privacy and personal information in the Philippines.

In detail

The Data Privacy Act of 2012

Republic Act No. 10173, otherwise known as the *Data Privacy Act* of 2012 (**Act**) is anchored on the policy of the State to protect the fundamental human right of privacy of communication while ensuring free flow of information to promote innovation and growth.

Scope of the law

The Act applies to the processing of all types of personal information. It covers natural and juridical persons involved in the processing of such personal information who are referred to as personal information controllers (**PIC**) and personal information processors (**PIP**).

What information is covered?

The Act only covers personal data. Personal data, as defined in the Act, is any information whether recorded in a material form or not, from which the identity of an individual is apparent or can be reasonably and directly ascertained by the entity holding the information, or when put together with other information would directly and certainly identify an individual. Thus, juridical information, such of a corporation, is not covered by the Act.

There are three types of personal data which the Act covers. First is actual personal information which refers to, among others, an individual's race, ethnic origin, marital status, age, colour, and religious, philosophical or political affiliations, health or education. The second is sensitive personal information which is information issued by government agencies peculiar to an individual. Lastly, information which is established by an executive order or an act of Congress to be kept classified or otherwise known as privileged information.

Who are parties involved in data processing?

The Act involves three main parties:

a Data Subject - the person whose personal data is being processed;

b The PIC and PIP - The PIC can be a natural or juridical entity, who controls the processing of personal data, or instructs another to process personal data on its behalf. It decides what information is collected and how it is processed. The PIP on the other hand are entities whom a PIC may outsource personal data pertaining to the data subject; and

c National Privacy Commission (**NPC**) - the independent body mandated to administer the Act, and to monitor and ensure compliance of the country with international standards set for personal data.

PIC and PIP obligations

The PIC is obligated to:

a uphold the rights of the data subjects;

b ensure the implementation of personal information processing/general data privacy principles;

c ensure the compliance of PIPs under the Act and provide safeguards in the latter's data processing;

d implement reasonable and appropriate organizational, physical and technical measures intended for the protection of personal information; and

e notify the NPC and affected data subjects of data breach.

The PIP is obligated to comply with the requirements of the Act, the rules provided for by the Act, other applicable laws, and other issuances of the Commission, in addition to obligations provided in a contract, or other legal act with a PIC.

Rights of the data subject

Subject to limitations provided under the Act, the data subject is entitled to certain rights such as the following:

a the right to be informed of the use of data pertaining to him;

b the right to object in the use of such;

c the right to access, upon demand, information regarding the use and process of the data;

d the right to dispute any inaccuracy or error in the contents and use of the data and the immediate correction of it;

e the right to suspend, withdraw or order its blocking, removal or destruction of his personal data;

f the right to data portability or to obtain and electronically move, copy or transfer the data in a secure manner for further use;

g the right to ask for damages if the data subject sustained such in connection to the collection and processing; and

h the right to file a complaint in case of violation of the Act.

Data Life Cycle

The PIC and the PIP must lay down a concrete and secured system for the processing of data – from collection, actual use, storage and retention, access, disposal and sharing – depending on the type of data collected and its purpose.

Collection and processing

In the collection and use of data, the information must be collected in conformity with the rules provided by the Act and must adhere to the Act's principles of transparency, legitimate purpose, and proportionality.

The processing of the information must be secured with the data subject's consent or must be processed within the given conditions as prescribed by the Act. There is a valid consent if the data subject has agreed to the collection and processing of his or her data and such consent was freely given while being informed of the purpose and nature of the processing. This consent must be evidenced by either written, electronic or recorded means.

Access, storage and sharing

Security measures must be put in place in connection with the access, sharing and storage of data.

The PIP or PIC must implement physical, technical and organizational measures to ensure the protection of data against natural dangers such as accidental loss or destruction, and human dangers such as unlawful access, fraudulent misuse, unlawful destruction, alteration and contamination. Further, policies in cases of breach and security incidents must be in place.

Physical protection shall include the design of office space and work stations. The physical arrangement of furniture and equipment bearing personal data shall also be taken in consideration together with its effect to the environment and accessibility to the public.

Technical measures shall include safeguards to protect computer networks against accidental, unlawful or unauthorized usage, any interference which will affect data integrity or hinder the functioning or availing of the system, and unauthorized access through an electronic network shall also be implemented.

Disposal

Personal information must be disposed or discarded also in a secure manner in a way that the data would be unreadable or irretrievable and would prevent further processing, unauthorized access, or disclosure to any other party or prejudice the interests of data subjects. This also includes the secured disposal of computer equipment or any devices where the information is stored.

How to comply with the Act

The NPC has implemented the following steps towards compliance with the DPA:

a **Register** – the PIC or the PIP must register with and provide the NPC the relevant information regarding its personal data processing systems. However, registration is not required for PICs or PIPs that employ fewer than 250 persons unless the processing it carries out is likely to pose a risk to the rights and freedoms of data subjects, the processing is not occasional, or the processing includes sensitive personal information of at least 1,000 individuals.

b **Appoint a Data Protection Officer (DPO)** – PICs or PIPs are required to appoint a DPO who shall serve as the focal person to ensure the protection of the personal data. The DPO shall act independently and shall be in-charge of monitoring the PICs or PIPs compliance with the Act and other issuances by the NPC.

c **Conduct a Privacy Impact Assessment (PIA)** – all PICs or PIPs are required to conduct a PIA for each of their programs or activities involving processing of personal data. The PIA helps identify the risks in the system established and if it contains loopholes or susceptibilities which must be addressed. This includes submission of personal data inventory and data flow narratives (data life cycle).

d **Create a Privacy Management Program –** a program/privacy manual shall be formulated to apprise what systems are in place, how the data is collected, processed, accessed, managed, stored and disposed; the security measures established for its protection; the procedures available in case of data breach; and how can a data subject uphold its rights as provided by the Act.

e **Implement the Privacy and Protection Measures –** pertains to carrying out of the measures and procedures in the privacy program, which must continuously be assessed, reviewed, revised as necessary. Trainings must be regularly conducted.

f **Exercise Breach Reporting Procedures –** this requires the submission of a personal data breach management plan. The plan must comply with the given procedures in cases of data breach as provided under the implementing rules of the Act.

Non-compliance within the given deadline shall subject the violators to sanctions as NPC may impose.

Sanctions include the following:

a issuance of compliance or enforcement orders;

b issuance of cease and desist orders or imposing temporary or permanent ban on the processing of personal data, upon finding that the processing will be detrimental to national security or public interest, or if necessary to preserve and protect the rights of data subjects;

c awarding damages and indemnity to affected data subjects; and

d imposition of administrative fines or recommendation of the case for prosecution of crimes for the violations of the Act and its rules, involving penalties ranging from 6 months to 6 years, and fines from Php 500,000 to Php 5,000,000 depending on the violation committed.

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