

ACCC GRANTED FIRST INTERLOCUTORY INJUNCTION TO PREVENT MERGER IN NEARLY 30 YEARS

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Legal Briefings - By **Linda Evans, Liza Carver, Christine Wong, Shannan Casey, Rebecca Cook, Jennifer Catterson and Sita Mason**

For the first time in 27 years, the ACCC has succeeded in obtaining an interlocutory injunction preventing an acquisition from completing until final determination of the proceeding¹.

In *TPC v Santos*², the Trade Practices Commission (**TPC**) applied unsuccessfully for an interim injunction. Two years later, in 1994, the TPC was granted an injunction in *TPC v Rank*.³ More recently, the Federal Court in *ACCC v Metcash*⁴ dismissed the ACCC's application for an injunction preventing the transaction from completing until determination of the ACCC's appeal to the Full Federal Court. These cases are discussed in further detail below.

The decision on 25 October 2021 in *ACCC v IVF Finance*⁵ shows the ACCC's ability to oppose mergers in the Courts, and highlights its wide range of powers under the *Competition and Consumer Act 2010* (Cth) (**CCA**) to enforce the prohibition in s 50 even when there is no ACCC condition precedent. Under the CCA, the ACCC may seek an order restraining the merger under s 80, requiring divestiture under s 81 or imposing a pecuniary penalty under s 76.

The outcome questions the ACCC's justification for its [proposed reform to merger laws](#), namely that the current laws are failing to adequately protect competition and are skewed towards letting acquisitions through. This decision demonstrates that the Commission's powers, where used appropriately, are effective and adequate.

ACCC V IVF FINANCE: BACKGROUND TO PROCEEDINGS

Virtus Health Limited (**Virtus**) is an ASX-listed global provider of fertility services, operating fertility clinics throughout Australia. Adora Fertility is a wholly owned subsidiary of Healius Limited (**Healius**), an ASX-listed healthcare company. Adora Fertility operates four fertility clinics and laboratories located in Brisbane, Sydney, Melbourne and Perth.

On 23 August 2021, Virtus announced its proposed acquisition of Adora Fertility and three co-located day hospitals (**Adora**) from Healius (**Proposed Acquisition**). On 10 September 2021, prior to the conclusion of the ACCC's public review, Virtus advised the ACCC of imperatives necessitating prompt completion and agreed to provide the ACCC advance notice of completion. Virtus provided notice to the ACCC on 8 October 2021 that it intended to complete the transaction on 15 October 2021.

ORIGINATING APPLICATION AND INTERIM INJUNCTION

On 13 October 2021, the ACCC filed an application in the Federal Court of Australia for urgent interim and interlocutory injunctions under s 80 of the CCA, that, until the hearing and determination of the proceeding or further order, Virtus be restrained from acquiring any shares in or assets of Adora.

On 25 October 2021, Justice O'Bryan granted the ACCC's application for an interlocutory injunction until final determination of the proceedings.⁶

THE LEGAL PRINCIPLES

Section 80 of the CCA confers on the Court the power to grant injunctive relief for infringements of Part IV of the CCA. Injunctions restraining anti-competitive mergers under s 50 of the CCA may only be sought by the ACCC.⁷

Section 80(1) of the CCA provides that the Court may grant an injunction where the Court is satisfied a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute a contravention of a provision of Part IV of the CCA. Section 80(2) of the CCA allows an interim injunction to be granted pending determination of an application for final injunctive relief under section 80(1) of the CCA where the Court considers "it is desirable to do so."

The test for consideration by the Court in determining the grant of an interlocutory injunction is whether:

- the applicant has a prima facie case; and
- the balance of convenience favours the grant of the injunction.

PRIMA FACIE CASE

To find a prima facie case, the Court must be satisfied that the applicant (ACCC) has established a sufficient likelihood of success to justify the preservation of the status quo by the grant of the injunction, pending the trial.

ACCC's case

The ACCC's application alleged the Proposed Acquisition would be likely to have the effect of substantially lessening competition for supply of fertility services (or, in the alternative, supply of low cost fertility services) in two geographic markets, the Brisbane metropolitan region and the Melbourne metropolitan region. The ACCC submitted the Proposed Acquisition would:

- remove a vigorous and effective competitor to Virtus in Adora;
- increase concentration of suppliers in the relevant markets; and
- increase Virtus' market share.

Court's findings

Justice O'Bryan found that the ACCC established a prima facie case that the acquisition of Adora by Virtus would be likely to have the effect of substantially lessening competition in contravention of s 50 of the CCA. His Honour was satisfied that the ACCC had an arguable case that the Proposed Acquisition will *"give rise to a competitively significant increase in market concentration, which is usually associated with a lessening of competition"*. O'Bryan J was unable, based on the evidence, to form any solid view concerning the significance of barriers to entry or the importance of product differentiation and brand reputation to competition in the relevant markets. These matters will be determined in any final proceedings.

BALANCE OF CONVENIENCE

The question for the Court is whether the inconvenience or injury that the applicant would be likely to suffer if an injunction were refused outweighs the inconvenience or injury that the respondent would suffer if an injunction were granted.⁸ Where the applicant is the competition regulator, an assessment of the balance of convenience requires *"consideration of the inconvenience, injury or injustice to the public interest, market actors and consumers flowing from potentially detrimental effects on competition in the relevant markets if the injunction sought were to be refused"*.⁹

ACCC's case

The ACCC argued that the balance of convenience favoured the granting of an injunction because:

- substantial and irreversible harm would arise to competition in the relevant markets for an indeterminate but significant period;
- the status quo would be properly preserved by granting the injunction over the 'hold separate' undertaking offered by Virtus; and
- Virtus and Healius would be unlikely to suffer any significant prejudice or inconvenience that would outweigh the harm caused.

Court's findings

Justice O'Bryan found that the balance of convenience favoured the granting of an interlocutory injunction. His Honour held the "*substantial public interest in preventing an acquisition that presents a real risk of substantially lessening competition*" outweighed the private interests of Virtus and Healius, especially where the inconvenience and harm caused was "*avoidable*". His Honour's reasons included the following matters:

- The opportunity Virtus had to consult with the ACCC before entering into a share sale agreement not conditional upon ACCC approval.
- The undertakings proffered by Virtus were imperfect solutions which "*would have uncertain effects and consequences and raise problems of enforcement*".
- An order for divestiture post-acquisition under s 81 would be less effective in preventing anti-competitive harm than an injunction.
- In respect of the negative impacts on the Adora business, any uncertainty caused by the grant of an injunction was not greater than the uncertainty generated by the proceedings more generally.

PREVIOUS INSTANCES

TPC V SANTOS (1992)¹⁰

The TPC unsuccessfully sought an interim injunction to restrain a public takeover bid made by Santos' for Sagasco Holdings Limited. Santos proffered undertakings to the court to facilitate the making of a divestiture order if a breach of s 50 were established after acquisition. In that case, the Court refused an application for an injunction, deciding that the balance of convenience weighed in favour of accepting the Santos undertaking, because:

- in a real and practical sense, it would have stymied the transaction and had the consequence of finally determining the proceedings brought against the parties to the transaction;
- it would have interfered with the trading of securities on the stock market and the ability of shareholders to accept a takeover offer; and
- it would have inhibited the South Australian State Government's opportunity to sell its substantial holding.

TPC V RANK (1994)¹¹

In *TPC v Rank*, Beaumont J granted an interim injunction restraining Rank Commercial¹² from proceeding with a takeover bid for shares in Foodland pending the final hearing of the principal proceeding. The purchaser had offered a form of undertaking to the Court to preserve the independence of Foodland pending determination of the proceeding. The decision was upheld on appeal by the Full Federal Court,¹³ however, the Full Court disagreed with the weighting of certain matters in the assessment of the balance of convenience, such as undertakings. Ultimately, the Full Court observed that if the acquisition were allowed to proceed, irreversible changes would have taken place in the ownership, control and structure of Foodland.

ACCC V METCASH¹⁴

In *ACCC v Metcash*, Jacobson J refused an application for an interlocutory injunction restraining Metcash from acquiring Franklins until determination of an appeal brought by the ACCC against a primary judgment of the Federal Court (which had dismissed the ACCC's application for final injunctive relief on the basis the acquisition did not contravene s 50). In that case, his Honour concluded that, even if interim relief was granted, it was unlikely to preserve the status quo and it was not possible for him to assume Franklins' business operations would continue in the same form for the duration of the relevant appeal period.

CONCLUSION

This decision shows the mechanisms available to the ACCC to seek to stop a transaction from proceeding. In his recent speech¹⁵ announcing [proposed reforms to Australia's merger laws](#), Rod Sims stated Australia's current merger laws are “*failing to adequately protect competition*”, out of step with merger regimes internationally (under which clearance must be obtained before parties can proceed) and “*skewed too far towards letting acquisitions through*”. This decision highlights the effectiveness of the ACCC's powers under the current regime, where used appropriately, in exercising regulatory oversight. In light of this, it is not clear that proposed reform to merger laws is needed.

1. In *Australian Competition and Consumer Commission v Pacific National Pty Ltd* [2018] FCA 1221, the acquisition of the Acacia Ridge terminal was subject to an ACCC condition precedent, but the ACCC was granted a mandatory injunction requiring the vendor to maintain a separate business, which was not part of the sale to Pacific National Pty Ltd.
2. *TPC v Santos Ltd* (1992) 38 FCR 382.
3. *Trade Practices Commission v Rank Commercial Ltd* (1994) ATPR 41-324; upheld on appeal in *Trade Practices Commission v Rank Commercial Ltd* (1994) 53 FCR 303.
4. *ACCC v Metcash Ltd* [2011] FCA 1079 at [75] (Jacobson J).
5. *Australian Competition and Consumer Commission v IVF Finance Pty Limited (No 2)* [2021] FCA 1295.
6. *Australian Competition and Consumer Commission v IVF Finance Pty Limited (No 2)* [2021] FCA 1295.
7. Section 80(1A) of the CCA.
8. *ABC v O'Neill* at [65]-[66].
9. *Australian Competition and Consumer Commission v IVF Finance Pty Limited (No 2)* [2021] FCA 1295 at [86] (O'Bryan J); referencing *Australian Competition and Consumer Commission v Pacific National Pty Ltd* [2018] FCA 1221 at [14] (Beach J).
10. *Trade Practices Commission v Santos Limited* (1992) ATPR 41-194 (Heerey J).
11. *Trade Practices Commission v Rank Commercial Ltd* (1994) ATPR 41-324 (Beaumont J).
12. Rank Commercial had entered into a form of joint venture with Coles Myer in relation to the division of the assets of Foodland post-acquisition.
13. *Trade Practices Commission v Rank Commercial Ltd* (1994) 53 FCR 303.

14. *Australian Competition and Consumer Commission v Metcash Trading Ltd* [2011] FCA 1079 (Jacobson J).
15. <https://www.accc.gov.au/speech/protecting-and-promoting-competition-in-australia>

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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