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FULL FEDERAL COURT DISMISSES ACCC'S APPEAL AGAINST PACIFIC NATIONAL'S INTERMODAL TERMINAL ACQUISITION

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Legal Briefings – By **Patrick Gay and Paul Burton**

The Full Federal Court has dismissed the ACCC's appeal in respect of its case against Pacific National and Aurizon.[1] In dismissing the ACCC's appeal, the Full Federal Court confirmed the test to be applied when assessing whether a firm's conduct will be *likely* to have the effect of substantially lessening competition.

While this case centred around section 50 of the *Competition and Consumer Act 2010* (**CCA**), which prohibits mergers or acquisitions having the effect or "likely" effect of substantially lessening competition in a market in Australia, the case is significant as it confirms the standard to be applied in relation to all of the competition provisions that contain a substantial lessening of competition or "SLC" test.

The Full Court confirmed that the word "likely" means "real commercial likelihood". Hence, an acquisition will contravene section 50 of the CCA where there is a real commercial likelihood of it having the effect of substantially lessen competition in a market in Australia.

The Full Court also confirmed that the Court has power to accept an undertaking proffered by an acquiring party in lieu of the grant of an injunction in circumstances where the relevant acquisition would contravene section 50. Further, the Court may accept an undertaking as it considers appropriate in the circumstances of a case.

These issues arise out of Pacific National's proposed acquisition of various intermodal assets from Aurizon in 2017.

AURIZON'S SALE TO PACIFIC NATIONAL

In August 2016, Aurizon announced it would undertake a strategic review of its freight business. In April 2017, Aurizon conducted a competitive bid process for the sale of its interstate and Queensland intermodal businesses as well as the Acacia Ridge Intermodal Terminal (**Terminal**). A number of bids were received in May 2017.

In July 2017, Pacific National made a pre-emptive binding bid for the Terminal. Following further negotiations, on 28 July 2017, Aurizon and Pacific National entered into a suite of agreements comprising:

- a Business Sale Agreement for the sale of the Terminal to Pacific National;
- a Terminal Services Subcontract under which Pacific National would, from 1 December 2018, perform lifting and associated services at the Terminal (i.e. load and unload freight trains at the Terminal).

Subsequently, on 11 August 2017, Aurizon and Pacific National executed a further Business Sale Agreement for the sale of Aurizon's Queensland Intermodal Business (**QIB**) to Pacific National.

However, unlike Pacific National which only supplies rail linehaul services to freight forwarders, Aurizon supplied a combined freight forwarding and rail linehaul service directly to beneficial freight owners. Therefore, the agreement for the sale of the QIB involved a sale of the rail linehaul assets to Pacific National, with the remaining assets, commonly referred to as the "Pick-up and Delivery" (**PUD**) business being transferred to Linfox on settlement of the transaction.

A few days later, Aurizon announced its decision to close its interstate intermodal business on 31 December 2017.

Both Business Sale Agreements were subject to Pacific National obtaining competition approval. In relation to Pacific National's proposed acquisition of the Terminal, it had submitted an informal merger clearance application to the ACCC on 11 July 2017. Accompanying its application was a draft section 87B undertaking under which it agreed, amongst other things, to provide access to the Terminal to third parties on a non-discriminatory basis.

OBJECTION OF THE ACCC

At the conclusion of its informal merger clearance investigation in July 2018, the ACCC decided to object to the transaction. Consequently, the ACCC commenced proceedings in the Federal Court against Pacific National and Aurizon alleging that:

- Pacific National's proposed acquisition of the Terminal would have the likely effect of substantially lessening competition in a number of interstate rail linehaul markets;
- Pacific National's proposed acquisition of the QIB would have the likely effect of substantially lessening competition in the market for the supply of rail linehaul services in Queensland;
- by their entry into a separate Terminal Services Subcontract, under which Pacific National would perform lifting and associated Terminal services, the parties had made an agreement containing provisions having the purpose or effect of substantially lessening competition; and
- the parties had also entered into an overarching arrangement or understanding containing provisions facilitating the parties entry into the various agreements, having the purpose or effect of substantially lessening competition.

Prior to the commencement of the trial, Pacific National's agreement with Aurizon to acquire the QIB expired. Aurizon subsequently sold the QIB to Linfox under arrangements whereby Aurizon would supply a "hook and pull" service to Linfox. Therefore, the ACCC withdrew its allegation that Pacific National's acquisition of the QIB would contravene section 50.

The ACCC also withdrew its allegations regarding the existence of an overarching anticompetitive "arrangement or understanding" between Aurizon and Pacific National.

THE DECISION OF THE TRIAL JUDGE

On 15 May 2019, Justice Beach of the Federal Court delivered his judgment.[2] His Honour dismissed the ACCC's case. His Honour concluded that upon the Court accepting an undertaking which had been proffered by Pacific National during the trial, the proposal sale of the Terminal to Pacific National would not contravene section 50 of the CCA.

Although his Honour noted that had he not accepted Pacific National's undertaking, then he would have concluded that Pacific National's acquisition of the Terminal would have been likely to have the effect of substantially lessening competition in either:

- a single market for the supply of rail linehaul services for the transport of intermodal freight (excluding bulk steel) over long distances on the North-South and East-West corridors to beneficial freight owners and freight forwarders for whom neither road nor sea services provided an effective substitute for rail linehaul services; or

- separate markets for the North-South and East-West corridors.

In coming to his view regarding the likely effect of the acquisition, absent the undertaking, his Honour said that barriers to entry, real or reasonably perceived, would have been heightened, particularly in relation to the supply of rail linehaul services on the North-South corridor. Further, while Qube would not be likely to enter the market in either the factual or counter-factual scenarios, his Honour could not exclude the realistic commercial chance of another potential new entrant emerging in the relevant timeframe (five years), and the potential threat that such emergence could have to discipline Pacific National's behaviour in the supply of rail linehaul services on the North-South corridor. Hence, the proposed acquisition would have been likely to have the effect of substantially lessening competition in the relevant market/s.

The ACCC appealed the decision of the trial judge. The ACCC submitted that:

- the trial judge did not have the power to accept the undertaking that was proffered by Pacific National. That is, the judge should not have taken the undertaking into account as part of the factual matrix in assessing whether Pacific National's acquisition of the Terminal would contravene section 50; and

- alternatively, if the judge was empowered to accept the undertaking, his Honour should not have done so as the undertaking would not be effective in preventing Pacific National from engaging in anticompetitive conduct in the operation of the Terminal once it had acquired it.

Pacific National and Aurizon cross-appealed, submitting that the trial judge erred:

- in defining the relevant markets in which to assess the competitive effects of the proposed acquisition of the Terminal;

- in construing the word "likely" in section 50 as synonymous with there being a "real chance". Aurizon contended that the word meant "more probably than not";

- in concluding that, in the absence of the undertaking, the proposed acquisition of the Terminal would contravene section 50. The parties contended that the judge had effectively reversed the onus of proof of requiring them to negative the possibility of new entry, rather than the ACCC proving the realistic possibility of new entry, and that his Honour's conclusion was inconsistent with the evidence at trial.

WHEN WILL A MERGER BE "LIKELY" TO HAVE THE EFFECT OF SUBSTANTIALLY LESSENING COMPETITION?

According to the Full Court, a transaction will be "likely" to have the effect of substantially lessen competition where there exists a "real commercial likelihood" of it happening.

While the term "likely" has been previously considered by the Federal Court in a number of cases, this case represented the first time that the Full Court was asked to consider the meaning of the term.

Justices Middleton and O'Bryan stated that if the word was being considered for the first time, they would have been inclined to adopt the meaning of "more probable than not". However, their Honours held that there was no reason to overturn what had become the accepted meaning of "real chance" or "real commercial likelihood".

The accepted meaning or the "real chance test" was first adopted by the Court in the AGL case in 2003 when AGL successfully sought to acquire a 30 percent interest in the Loy Yang power station.[3] That test has generally been applied since then, most recently by Justice Middleton in the Vodafone/TPG merger case.[4]

The Court's decision on this issues is also significant at it will have wider implications than just the assessment of mergers and acquisitions under section 50. The "competition test" or "SLC test" as it is commonly known appears in a number of the competition provisions under the CCA, including:

- section 45 which prohibits the making or giving effect to contacts, arrangements or understandings containing provisions having the purpose or *likely effect* of substantially lessening competition;
- section 46 which prohibits a firm with a substantial degree of market power engaging in conduct having the purpose or *likely effect* of substantially lessening competition; and
- section 47 which prohibits the engaging in of exclusive dealing conduct having the purpose or *likely effect* of substantially lessening competition.

Hence, the Full Court's decision also confirms how the word "likely" should be construed when assessing whether a firm's conduct infringes any of these competition provisions.

WOULD THE TERMINAL ACQUISITION HAVE AN ANTICOMPETITIVE EFFECT?

The Court accepted Pacific National's and Aurizon's contentions that the trial judge erred when holding that, absent the undertaking, competition would have been substantially lessened in the relevant market because his Honour could not exclude the possibility of future new entry.

As Justice Perram observed: "*The question was not whether the likelihood of a new entrant could be excluded. It was whether it had been established. On the evidence before the trial judge there was no likelihood of a new entrant so that the acquisition of the terminal was not likely to substantially lessen competition in the relevant market*".

Justices Middleton and O'Bryan agreed finding that the prospect of new entry did not rise any higher than a mere possibility and could be regarded as "speculative". Further, any new entry would be unlikely to occur within the relevant timeframe (five years). On that basis, the competitive constraints facing Pacific National within this timeframe would not differ in any real or substantive way irrespective of whether Pacific National acquired the Terminal. Therefore, it followed that Pacific National's acquisition of the Terminal would not be likely to substantially lessen competition.

The Court noted that in this case this finding would have been reached irrespective of what meaning was attributed to the work "likely".

ACCEPTANCE OF UNDERTAKINGS

The other significant issue that was raised in the appeal was whether the Court has the power to accept an undertaking in the way the trial judge did. The ACCC submitted that in considering the undertaking as part of the factual matrix of Pacific National's acquisition of the Terminal, the trial judge erred by adopting this approach.

The ACCC also contended that:

- the power to accept an undertaking in lieu of the injunctive relief granted pursuant to section 80(1) of the CCA (the power to grant injunctions) is limited to an undertaking in a form that reflects the relief sought by the ACCC; and
- the acceptance of an undertaking would not involve an exercise of the judicial power of the Commonwealth and would, therefore, infringe Chapter III of the Constitution.

The Full Court held that the power to accept an undertaking in a case, such as this one, is a power that is enlivened once a contravention of section 50 is found, and the Court may then accept an undertaking in lieu of granting an injunction as a remedy for the contravention. Therefore, while the judge did err in taking Pacific National's undertaking into account as part of the relevant factual matrix leading him to conclude that the acquisition of the Terminal would not contravene section 50, the form of undertaking that could be accepted by the Court in lieu of injunctive relief is not limited to that form of relief sought by the ACCC. The Court rejected the ACCC's contention that it could only grant an injunction on the terms sought by the ACCC.

Hence, notwithstanding the ACCC's objections to Pacific National's undertaking on the basis that it contained "behavioural" rather than "structural" obligations, the Court considered that it was appropriate for the Court to grant an injunction in the form of the undertaking. The Court also rejected the ACCC's numerous objections regarding the adequacy of the undertaking to address the anticompetitive effects of the Terminal acquisition.

This means, that where the Court finds that a relevant acquisition would contravene section 50 of the CCA, if a remedial undertaking is also proffered by the acquiring party, then the Court, having established that the acquisition would contravene the CCA, may accept that undertaking where satisfied that it will ameliorate the anticompetitive effects of the acquisition, in lieu of granting an injunction to prevent the proposed acquisition. Such an undertaking may be in such form as the Court considers appropriate in the circumstances of the case.

ENDNOTES

1. *ACCC v Pacific National Pty Limited* [2020] FCAFC 77 (6 May 2020).
2. *ACCC v Pacific National Pty Limited (No 2)* [2019] FCA 669.
3. *AGL v ACCC (No 3)* (2003) 137 FCR 317.
4. *Vodafone Hutchison Australia Pty Ltd v ACCC* [2020] FCA 117 (13 February 2020).

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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