

**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v PACIFIC NATIONAL
PTY LIMITED (NO 2) [2019] FCA 669:
ACCESS UNDERTAKING DERAILS ACCC CASE UNDER SECTION 50**

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**I Court-ordered access undertaking without ACCC monitoring or enforcement
role saves vertical merger from substantially lessening competition**

In *Australian Competition and Consumer Commission v Pacific National Pty Limited (No 2)*¹ (Aurizon decision) the Federal Court of Australia (Justice Beach) held that the acquisition of the Acacia Ridge Terminal (ART) in Brisbane by Pacific National Pty Limited (Pacific National) from Aurizon Holdings Limited (Aurizon) would not breach s 50 of the *Competition and Consumer Act 2010* (Cth) (CCA). An access undertaking given by Pacific National to the Court (the Undertaking) was found to make it unlikely that the vertical merger would substantially lessen competition.² The ACCC has announced that it will appeal. This commentary focusses on the Undertaking; it does address the Court's decision on the ACCC's case under s 45 of the CCA.

The ART is a major facility for rail linehaul services in interstate and Queensland markets. It contains two terminals: the Brisbane Multi User Terminal (BMUT) connected to the standard gauge network, and the Queensland Terminal connected to the narrow gauge network. The ART is not an open access terminal and is an important strategic asset for a new operator wishing to provide interstate rail linehaul services and within Queensland. No alternative terminals would support new entry on the relevant routes.

The ACCC challenged the acquisition of the ART terminal by Pacific National on the basis that the acquisition was likely to substantially lessen competition in the interstate and intrastate markets for rail linehaul services. The acquisition would confer ownership and control of the terminal to Pacific National, the dominant supplier of rail linehaul services in those markets. That ownership and control would create a material barrier to entry by potential competitors given the power of Pacific National to discriminate against new entrants. Pacific National

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¹ [2019] FCA 669.

² [2019] FCA 669, [1427]-[1609], [1611]-[1612].

submitted an access undertaking to the ACCC under s 87B of the CCA but the ACCC rejected it.³ On the last day of the trial Pacific National submitted a revised access undertaking to the Court – the Undertaking.⁴ The Undertaking was similar to the s 87B undertaking that had been proposed to and rejected by the ACCC but, unlike that undertaking, did not give the ACCC the role of monitoring and enforcing compliance with the obligations imposed. The Court accepted the Undertaking and found that the constraints imposed by it were sufficient to prevent an otherwise likely substantial lessening of competition in the relevant markets.⁵ The Undertaking is not limited to 3 years or any other fixed period.

The Undertaking and the reasons given by the Court for accepting it are outlined in Part II below. Part III summarises the main concerns that appear to be raised by the Undertaking. The conclusion (Part IV) expresses the view that undertakings like that accepted in the Aurizon decision seem unsatisfactory. They are avoidable by interpreting the SLC test in s 50 as a competition test (which it is) and thereby reflecting the approach to behavioural undertakings taken in the ACCC *Merger Guidelines*.

II The Undertaking

A Main elements of Undertaking⁶

Non-discrimination obligations

In owning, managing or operating the ART, Pacific National is required to comply with “Access Conditions”. Under these Conditions, Pacific National must:

- offer “Terminal Services” to any “Applicant” on terms no less favourable than those it supplies to any other “Terminal User”, including itself
- not discriminate between Applicants and Terminal Users in offering and providing Terminal Services.
- not engage in conduct that prevents or hinders a Terminal User conducting its business using Terminal Services supplied under a “Terminal Services Agreement” (as defined), including the supply of any services by the Terminal User to third parties.

³ [2019] FCA 669, [1427], [1429].

⁴ [2019] FCA 669, Annexure. In *Australian Gas Light Company v Australian Competition & Consumer Commission (No 3)* [2003] FCA 1525 an undertaking was also submitted towards the end of the trial (see at [359]).

⁵ [2019] FCA 669, [1427]-[1609], [1611]-[1612].

⁶ See [2019] FCA 669, [1421]-[1463]

- not engage in conduct in relation to its management or operation of the ART that prevents or hinders a third party acquiring any services from, or supplying any services to, a Terminal User.
- not engage in discriminatory conduct in respect of storage of containers, discriminatory conduct between users of the Terminal of the same class or discriminatory conduct in favour of Pacific National in the allocation of train schedules or yard space at the Terminal.

Pricing

The Undertaking imposes a cap at current rates on the access fees that Pacific National can charge until 30 June 2019. Thereafter, if or when Pacific National proposed to increase its prices, any user can object to the proposed price increase and refer the matter to an appointed “Independent Price Expert”. The Independent Price Expert determines whether the increase is “reasonable and appropriate” having regard to specified principles. Those principles include:

- the interests of all users of the Terminal Services for which the proposed charges relate, including the extent to which the proposed charges reflect actual or likely use of the Terminal by different users, including use of facilities and equipment;
- the reasonableness and appropriateness of, and justification for, the existing charges for the supply of the Terminal Services.

Reporting requirements

Every six months Pacific National must prepare and publish reports on its website that record its performance against key performance indicators (KPIs) for any services provided by Pacific National to itself and any services provided to other Terminal Users. Those KPIs include:

- (a) whether trains are ready for departure on time, with the objective of 90% of trains departing the Terminal within 30 minutes of the scheduled departure time;
- (b) truck turnaround times, with the objective of trucks spending no more than 35 minutes on average at the Terminal picking up or delivering freight;

- (c) freight availability, with the objective of 80% of freight being available within one hour of the time that the train is made available to Pacific National for unloading;
- (d) transaction times per container, with the objective that the time it takes to process a container from truck to ground, truck to train, train to truck and ground to truck is no more than 25 minutes on average;
- (e) load to train load plan, with the object of 80% of containers being loaded according to the operator's train load plan; and
- (f) freight dwell time, with the objective of 95% of freight being picked up within the "free time".

Independent audit

Pacific National must appoint an "Independent Auditor" to report annually on its compliance with the Undertaking and to facilitate this process. The Independent Auditor must, inter alia:

- (a) thoroughly audit Pacific National's compliance with the Undertaking;
- (b) outline areas of uncertainty or ambiguity in the auditor's interpretation of any obligations in the Undertaking;
- (c) report any issues that arise in relation to Pacific National's compliance with the Undertaking; and
- (d) identify any recommendations to improve, inter-alia:
 - (i) Pacific National's processes for reporting systems in relation to compliance with the Undertaking;
 - (ii) the KPIs in Sch 3; and
 - (iii) the requirements and obligations in the Undertaking to achieve the objectives of the Undertaking.

Capacity allocation

Pacific National is not responsible for determining capacity allocation. If Pacific National receives a request for access to the ART, and has not entered into a terminal services agreement with any other user at the time, it would have to appoint an "Independent Expert" to prepare a "capacity allocation protocol" (CAP) that will apply to the ART. The Independent Expert's CAP must not permit Pacific National to favour

any one user (including itself) over another. Pacific National must then allocate capacity in accordance with that protocol.

Capacity expansion

There is a detailed process by which Applicants and Terminal Users can request that Pacific National expand the capacity of the Terminal and, if Pacific National does not agree, request an Independent Expert to require that Pacific National expand the capacity of the Terminal.

B. Rejection of ACCC arguments against the Undertaking

The ACCC raised numerous arguments against the Undertaking. None prevailed.⁷

It was argued that s 23 of the Federal Court of Australia Act did not empower the Court to require the ACCC to monitor and enforce the Undertaking.⁸ However, unlike the earlier s 87B undertaking proposed to the ACCC but rejected by the ACCC, the Undertaking did not impose any monitoring or enforcement obligations on the ACCC.

Initially Pacific National offered the Undertaking conditionally in the event that the acquisition breached s 50. That amounted to a request for an advisory opinion that s 50 would be contravened and the Court was not empowered to give such an opinion. However, that issue evaporated when Pacific National later offered the Undertaking unconditionally.⁹

The Undertaking did not impose an undue burden of supervision on the Court. A similar argument was made by the ACCC in *Australian Gas Light Company v Australian Competition & Consumer Commission (No 3)*¹⁰ (the AGL case) and rejected by French J. Monitoring and enforcement would occur in the following ways:¹¹

The Court is not monitoring anything as such. The Undertaking and Pacific National's behaviour will be observed by market participants and in one sense monitored by them; further, there is the role of the expert(s) and auditor under the Undertaking. If anyone seeks to enforce any breach of the Undertaking, then of course that will be a matter for the Court.

If there is Court enforcement, this can in one sense be more direct than proceeding through the enforcement of a s 87B undertaking. Moreover, the Court's powers to impose relevant sanctions for contempt are broad, carrying with them significant deterrence effect such as to realistically

⁷ The discussion below is a very selective summary. See in full [2019] FCA 669, [1464]-[1609].

⁸ [2019] FCA 669, [1429]-[1430].

⁹ [2019] FCA 669, [1431].

¹⁰ [2003] FCA 1525.

¹¹ [2019] FCA 669, [1433].

discipline behaviour both of Pacific National and any officers or employees who may have potential accessorial exposure.

The Undertaking imposes obligations on Pacific National without altering the underlying market structure and thus, on the ACCC's submission, Pacific National is required to operate in a manner inconsistent with its own profit maximising incentives.¹² However, the ACCC accepted that where the Undertaking imposes an obligation on Pacific National that is certain and not discretionary, then it may be effective despite Pacific National's contrary incentives.¹³ The ACCC had considerably exaggerated the "significant discretionary matters which cannot be avoided".¹⁴ Further, Pacific National has an incentive to operate the ART in an efficient manner which maximises the throughput of the terminal. Any breach of the Undertaking can attract the sanction of contempt of court, "which potential consequence would discipline Pacific National's profit maximising incentives."¹⁵

In summary, the Undertaking was found by the Court to provide "a suitable and useful mechanism to ensure access to the ART by operators other than Pacific National":¹⁶

- The Undertaking requires Pacific National to publish a pro-forma terminal services agreement along with an application form and information in relation to access charges so that potential users can understand the obligations of each party prior to considering whether to apply for access.
- The Undertaking contains a compulsory mechanism for Pacific National to abide by the terms of a CAP applicable to all users of the Terminal which has been prepared by an Independent Expert. Users may then seek variations to the protocol, to be determined by the Independent Expert.
- The Undertaking contains a compulsory mechanism for the expansion of capacity at the ART. Subject to any agreement with the access seeker, the determination of costs and other terms which apply in respect of that expansion is ultimately the subject of decision by an Independent Expert.
- The Undertaking contains provisions requiring Pacific National to keep users' information confidential and to set up the Acacia Ridge Terminal Business Unit (ARTBU) that is separate from the remainder of the Pacific National haulage business. It contains restrictions on the

¹² [2019] FCA 669, [1474].

¹³ [2019] FCA 669, [1475].

¹⁴ [2019] FCA 669, [1477].

¹⁵ [2019] FCA 669, [1478].

¹⁶ [2019] FCA 669, [1585]. The bullet points below closely reflect [2019] FCA 669, [1586]-[1593].

ARTBU employees reporting to, being seconded to or working in the Pacific National haulage business.

- The Undertaking contains compulsory price and non-price dispute resolution mechanisms. Both are robust and lead to an ultimate determination by an Independent Expert. The Undertaking also allows a user to have the Independent Auditor carry out an ad hoc audit.
- The Undertaking contains various non-discrimination obligations on Pacific National including an obligation not to engage in conduct which prevents or hinders users from gaining access or providing services to their customers.
- There are various audit and compliance requirements. An auditor is appointed specifically to monitor Pacific National's compliance with the Undertaking and to take action in respect of any breaches.
- If Pacific National does not come to an agreement with a user, an outcome may be imposed by one of the processes set out in the Undertaking.

Ultimately, the Undertaking provides for obligations with which Pacific National is required to comply:¹⁷

The threat of being found to have breached that Undertaking, which would be a contempt of court, is a powerful incentive for Pacific National to comply. Further, a significant part of the Undertaking is the requirement that Pacific National make its standard terminal services agreement terms available. Accordingly, once a terminal services agreement is entered into, the user has its usual contractual remedies.

C. Pro-competitive effect of the Undertaking

In finding that the acquisition was not likely to substantially lessen competition in the relevant markets, the Court took account of the pro-competitive effect of the Undertaking.¹⁸

- (a) with the ART acquisition, Pacific National will provide the Undertaking, which imposes substantial access obligations on Pacific National should a potential entrant ever come forward; and
- (b) without the ART acquisition, the owner of the terminal (whether Aurizon or another) will have complete discretion in respect of any new user, and the various obligations contained in the Undertaking discussed earlier will not apply.

¹⁷ [2019] FCA 669, [1594].

¹⁸ [2019] FCA 669, [1608].

III Main concerns raised by the Undertaking

The Undertaking has been criticised by the Chairman of the ACCC,¹⁹ a former Chairman of the Commission,²⁰ and by a Commissioner.²¹ If the Undertaking is ineffective, the resulting bottleneck control may adversely affect significant businesses including Coles, Woolworths and Bluescope.²² Nonetheless, the Aurizon decision has been received without demur by some.²³

More specifically, the main concerns about the Undertaking appear to be as follows.

First, the Undertaking is difficult to reconcile with the orthodox view, as expressed in the ACCC *Merger Guidelines*,²⁴ that, in applying the SLC test under s 50, behavioural undertakings are rarely appropriate alone but may be used as an adjunct to structural undertakings.²⁵ The *Merger Guidelines* state that:

11. The ACCC has a strong preference for structural undertakings — that is, undertakings to divest part of the merged firm to address competition concerns. Structural undertakings provide an enduring remedy with relatively low monitoring and compliance costs.
12. On occasion, behavioural undertakings — that is, undertakings by the merged firm to do, or not do, certain acts (for example, meet specified service levels) — may be appropriate as an adjunct to a structural remedy. Behavioural remedies are rarely appropriate on their own to address competition concerns. ...
20. Generally, behavioural undertakings are only likely to address the ACCC's competition concerns if they foster the development or maintenance of enduring and effective competitive constraints within a short and pre-specified period of time. It is particularly rare for the ACCC to accept behavioural remedies that apply on a permanent basis due to the inherent risk to competition combined with the monitoring and enforcement burden such remedies create.

¹⁹ A Fels, 'Mergers law in trouble if courts just ignore Hayne's disapproval', Australian Financial Review, 30 May 2019, 43.

²⁰ R Sims, 'Address to the 2019 Competition Law Conference', 25 May 2019, at: <https://www.accc.gov.au/speech/address-to-the-2019-competition-law-conference>.

²¹ P Durkin, 'ACCC slams courts over mergers', Australian Financial Review, 11 June 2019, 10.

²² See P Hatch, "'We've got a problem": Sims questions laws after rail go-ahead', Sydney Morning Herald, 15 May 2019.

²³ See eg, Herbert Smith Freehills, 'ACCC Case Theory Terminal', 29 May 2019, at: <https://www.herbertsmithfreehills.com/latest-thinking/accc-case-theory-terminal>.

²⁴ November 2008, at: <https://www.accc.gov.au/publications/merger-guidelines>.

²⁵ As in the Ampol-Caltex merger undertakings in 1995: TPC News Release, 'Consumers to Win From Merger Deal', 28 March 1995; TPC, Undertakings Given by Pioneer International Limited, Caltex Australia Limited and Ampol Limited to the Trade Practices Commission on 28 March 1995; J Walker & L Woodward, 'The Ampol/Caltex Australia Merger: Trade Practices Issues' (1996) 4 Trade Practices LJ 21.

21. An effective behavioural undertaking must contain an effective mechanism for the on-going monitoring and compliance and investigation of suspected breaches of the undertaking by the merged firm. Commonly, behavioural undertakings provide for the appointment of an ACCC-approved auditor to monitor compliance and report back to the ACCC.

The position expressed in the *Merger Guidelines* is similar to that taken in the USA,²⁶ the UK,²⁷ and the International Competition Network's *ICN Recommended Practices for Merger Notification and Review Procedures* (2017).²⁸

Secondly, the Aurizon decision seems to proceed on the assumption that, when assessing the likelihood of a substantial lessening of competition, the constraint of sanctions for contempt of court for non-compliance with the Undertaking, together with the constraint of remedies for breach of contract, are in the same bag as the constraint of competitive market forces.²⁹ A contrary view is that the constraint of competitive market forces is qualitatively and materially different from regulatory constraints:³⁰

... a firm exposed to active and vigorous competition from competitors has no real alternative but to compete vigorously itself. The firm's response is driven by competitive necessity, rather than by its assessment of the effectiveness, scope, timing and likelihood of ongoing competitive safeguards or ad hoc regulatory intervention to redress or restrain use of the firm's market power. By contrast, .. a firm subject only, or primarily, to regulatory constraints rather than to the discipline of the market will generally have a considerable discretion as to whether or not it will act in a "competitive" manner.

²⁶ US, Department of Justice, *Antitrust Division Policy Guide to Merger Remedies*, October 2004, at: <https://www.justice.gov/atr/antitrust-division-policy-guide-merger-remedies-october-2004>. The 2011 DOJ Guide did not express a preference for conduct remedies but was withdrawn in 2018: "Assistant Attorney General Makan Delrahim Delivers Remarks at the 2018 Global Antitrust Enforcement Symposium," Washington, DC, September 25, 2018, at: <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-2018-global-antitrust>. See further J Kwoka, *Mergers, Merger Control, and Remedies* (MIT Press, 2015) ch 8.

²⁷ Competition & Markets Authority, *Merger Remedies* (2018) 52-62, at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/764372/Merger_remedies_guidance.pdf

²⁸ Part XI C, at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf.

²⁹ See, by implication, [2019] FCA 669, [1433], [1478], [1585]-[1593], [1594]. Compare *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko*, 540 U.S. 398 (2004) (regulation and antitrust treated as substitutes); TJ Brennan, 'Essential Facilities and Trinko: Should Antitrust and Regulation Be Combined?' (2008) 61 *Federal Communications Law Journal* 133 (regulation is a complement to antitrust, not a substitute).

³⁰ B Fisse and A Simpson, 'Compelled to Compete: Assessing Market Power in Regulated Industries' (1995) 3 *Competition & Consumer LJ* 113, 15-16.

If weight is to be given to regulatory constraints such as the obligations under the Undertaking, those constraints need at least to be monitored and enforced effectively.³¹ As discussed below, it is questionable whether the Undertaking is likely to be effective given the exclusion of the ACCC from monitoring and enforcement and the non-applicability of the powers of investigation under s 155.

Thirdly, the ACCC's submissions that the Undertaking was unduly limited in scope and prone to manipulation and evasion were not accepted.³² The Court found that the Undertaking was sufficiently comprehensive and that the risk of evasion was unlikely. This finding is based on the evidence before the Court. However, not all will agree that the Undertaking is watertight. Access prices are set at current rates, which seem likely to include some monopoly rents and there is no incentive mechanism to spur efficiency. The KPIs in the Undertaking lack the force they could have if there were enforced by service level rebates.

There is also widespread general scepticism in the community about the trustworthiness of corporations and their ability to avoid unlawful conduct.³³ Examples of dominant incumbents obstructing new entry pervade the history of interconnection in telecommunications and access arrangements in other networks and major facilities.³⁴ Moreover, finding loopholes in legal rules is a deeply ingrained practice in the corporate sector³⁵ and the loopholes found will not always be predictable by judges or regulators. Where loopholes are predictable, a regulator may lack evidence about a respondent's internal corporate management and

³¹ See JE Kwoka and DL Moss, 'Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement' (2011) at: <https://www.antitrustinstitute.org/work-product/aa-i-releases-white-paper-behavioral-merger-remedies-evaluation-and-implications-for-antitrust-enforcement/> [2019] FCA 669, [1427]-[1609], [1611]-[1612].

³² See eg Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry on Financial Services, *Final Report* (2019) at: <https://financialservices.royalcommission.gov.au/Pages/reports.aspx>; S Simpson, *Corporate Crime, Law and Social Control* (2002); WS Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (2006).

³³ See eg A Grant & D Howarth, *Australian Telecommunications Regulation* (CCH, 4th ed, 2011) ch 5; CD Foster, *Privatization, Public Ownership and the Regulation of Natural Monopoly* (Coopers & Lybrand, 1992) 5.5, RA Posner, 'The Decline and Fall of AT&T: A Personal Recollection' (2008) 61 *Federal Communications Bar Journal* 11; D Geradin & M Kerf, *Controlling Market Power in Telecommunications* (OUP, 2005); PL Joskow & R Schmalensee, *Markets in Power* (MIT Press, 1983); PJ Weiser, 'Regulating Interoperability: Lessons from AT&T, Microsoft, and Beyond' (2009) 76 *Antitrust LJ* 271.

³⁴ See eg, L Katz, 'A Theory of Loopholes' (2010) 39 *The Journal of Legal Studies* 1; SL Dogan & MA Lemley, 'Antitrust Law and Regulatory Gaming' (2009) 87 *Texas LR* 685; SW Buell, 'Good Faith and Evasion' (2011) 58 *UCLA LR* 611.

managerial proclivities to be able to show in a court of law that a breach of an undertaking is likely.³⁶

Fourthly, the Undertaking did not give the ACCC any role in relation to monitoring and enforcing compliance.³⁷ Monitoring would be up to the parties and the expert and the auditor appointed under the Undertaking.³⁸ In the event of non-compliance with the Undertaking, a complaint could be made to the Court which could then take action for contempt of court.³⁹ Non-involvement of the ACCC in the process of monitoring and enforcing the Undertaking is problematic. One major concern is that, in the event of a breach of the Undertaking, the expert, the auditor, users, potential new entrants and the ACCC itself⁴⁰ will not have the power under s 155 to investigate the breach. The process of monitoring and enforcing the Undertaking seems unlikely to work effectively unless it is bolstered by the ACCC powers under s 155.

Fifthly, the Undertaking is not merely a short-term or interim solution.⁴¹ It is not limited to 2 or 3 years or any other fixed period.

Sixthly, the Court referred to *Australian Gas Light Company v Australian Competition & Consumer Commission (No 3)*⁴² (AGL case) as “a persuasive precedent justifying my acceptance of the Undertaking”.⁴³ However, compared with the Undertaking, on one view the undertaking accepted in the AGL case⁴⁴ was relatively narrow in scope and did not pose the same challenge to monitoring and enforcement.

Seventhly, the efficacy of the Undertaking depends partly on the deterrent and preventive threat of liability for contempt of court.⁴⁵ Query the likely efficacy of the threat of liability for contempt of court. Fines against corporations are often less effective than what they are

³⁶ As a constituent element of the required single evaluative judgment that the acquisition was likely to substantially lessen competition in a market: [2019] FCA 669, [1276]-[1278].

³⁷ See [2019] FCA 669, [1429]-[1430].

³⁸ See [2019] FCA 669, [1433].

³⁹ See further *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd* [1986] HCA 46; *Vaysman v Deckers Outdoor Corporation Inc.* [2011] FCAFC 17; FCA, General Practice Note, Enforcement, Endorsement and Contempt Practice Note (GPN-ENF), 25 October 2016.

⁴⁰ See CCA, s 155 (2)(a). In some circumstances, a breach of the Undertaking may amount to a contravention of the Act (eg misuse of market power; unconscionable conduct), in which event it would of course be open to the ACCC to rely on s 155.

⁴¹ The Undertaking, cl 4. Compare Competition & Markets Authority, *Merger Remedies* (2018) 7.2(b), 7.29, at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/764372/Merger_remedies_guidance.pdf

⁴² [2003] FCA 1525.

⁴³ [2019] FCA 669, [1609].

⁴⁴ See [2003] FCA 1525, Annexure 8.

⁴⁵ See [2019] FCA 669, [1594].

assumed to be.⁴⁶ They tend to be treated as a cost of business and the cost can often be passed on to shareholders and/or customers without much ado. Sequestration of corporate assets is possible but rarely a practical solution. The prospect of accessorial liability will not scare managers who, following standard operating practice, position themselves to lack the essential element of knowledge.⁴⁷

Lastly, are compensatory remedies available to a potential new entrant who, as a result of the breach of the Undertaking, is prevented from getting access to the ART? The Court envisages that a user with an access contract will have remedies for breach of contract in the event of breach of that contract but does not refer to the position of a potential user who is denied access in breach of the Undertaking.⁴⁸ The availability of compensatory orders was recommended by the Australian Law Reform Commission in its 1987 Report, *Contempt*.⁴⁹ However, the *Federal Court of Australia Act 1976* and the Federal Court Rules relating to contempt of court do not expressly provide for compensatory orders for breach of an undertaking accepted by the Federal Court. It is arguable that breach of the Undertaking will constitute “unlawful means” in the context of the tort of conspiracy by unlawful means.⁵⁰ In some cases a rejected potential user may be able to rely on the prohibition against misuse of market power under s 46 of the CCA. However, the SLC test under s 46 today creates a higher barrier than the former elements of taking advantage of market power for the purpose of preventing a competitor from entering a market.⁵¹

IV Conclusion: Back to the future?

Undertakings like that accepted in the *Aurizon* decision seem unsatisfactory. They rely heavily on the discretion of dominant market participants and little on the constraint of market forces. They lack monitoring and enforcement by the ACCC.

⁴⁶ See B Fisse, ‘Penal Designs and Corporate Conduct: Test Results from Fault and Sanctions in Australian Cartel Law’ (2019) Adelaide LR, forthcoming; B Fisse, “Australian Cartel Law: Biopsies” (2018) 25-26, at: https://www.brentfisse.com/images/Australian_Cartel_Law_Biopsies_050518_2.pdf; Brent Fisse, ‘Cartel Offences and Non-Monetary Punishment: The Punitive Injunction as a Sanction against Corporations’, in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) ch 14; Christopher Hodges and Ruth Steinholtz, *Ethical Business Practice and Regulation: A Behavioural and Values-Based Approach to Compliance and Enforcement* (Bloomsbury, 2017) ch 3.

⁴⁷ See C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (CUP, 2011) 6.5.

⁴⁸ [2019] FCA 669, [1594].

⁴⁹ Report No 35, [554].

⁵⁰ See *Dresna Pty Ltd v Misu Nominees Pty Ltd* [2004] FCAFC 169, [14]-[19] (in relation to breach of s 87B undertaking).

⁵¹ See further K Kemp, *Misuse of Market Power* (CUP, 2018).

It is submitted that the courts should re-examine the purpose of s 50, focus on the core feature of the SLC test (namely that it is a competition test), and interpret s 50 as excluding undertakings that are predominantly behavioural in nature and not merely adjunctive to structural remedies.⁵² On that approach, the parties to an acquisition that is likely to substantially lessen competition would still have the options of: seeking a s 87B undertaking; applying for an authorisation; or, in cases of access to major infrastructure, developing a statutory access regime.⁵³

⁵² In line with the ACCC *Merger Guidelines* [11]-[12], [20]-[21].

⁵³ See generally A Duke, Corones' *Competition Law in Australia* (Lawbook Co, 7th ed, 2018) ch 13.