FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Pacific National Pty Limited [2020] FCAFC 77

|  |  |
| --- | --- |
| Appeal from: | *Australian Competition and Consumer Commission v Pacific National Pty Limited (No 2)* [2019] FCA 669*Australian Competition and Consumer Commission v Pacific National Pty Ltd (No 3)* [2019] FCA 866  |
|  |  |
| File number(s): |  |
|  |  |
| Judge(s): | **MIDDLETON, PERRAM AND O'BRYAN JJ** |
|  |  |
| Date of judgment: | 6 May 2020 |
|  |  |
| Catchwords: | **COMPETITION** – proposed acquisition of the Acacia Ridge Terminal in Brisbane – alleged contravention of s 50 of the *Competition and Consumer Act 2010* (Cth) – market definition – economic tests for defining a price discrimination market – whether conduct likely to have the effect of substantially lessening competition in a market – meaning of “likely” – standard of proof to be applied to predictions about future facts and circumstances – vertical merger – ability and incentive to engage in price discrimination – whether raising barriers to entry sufficient to establish a substantial lessening of competition – likelihood of new entry – new entry a mere possibility**UNDERTAKING** – whether undertaking to the Court proffered by acquirer should be accepted – whether Court has power to accept the undertaking – whether power arises under the *Federal Court of Australia Act 1976* (Cth) or only under s 80 of the *Competition and Consumer Act 2010* (Cth) – whether acceptance of the undertaking would infringe Chapter III of the Constitution by attempting to confer a non-judicial power on the Federal Court ­– where undertaking is outside of the relief sought by the Australian Competition and Consumer Commission – whether undertaking is sufficiently certain as to be enforceable – whether primary judge erred in fact or principle in accepting undertaking  |
|  |  |
| Legislation: | *Competition and Consumer Act 2010* (Cth) ss 2, 4E, 4G, 45AD, 45D, 45DA, 45DB, 46, 47, 50, 50A, 52, 80, 87B, 90, 163A*Competition and Consumer Amendment (Misuse of Market Power) Act* *2017* (Cth)*Corporations Act 2001* (Cth)*Evidence Act 1995* (Cth)*Federal Court of Australia Act 1976* (Cth) *Judiciary Act 1903* (Cth)*Statute Law (Miscellaneous Provisions) Act (No 1) 1983* (Cth)*Trade Practices Amendment Act 1977* (Cth)*Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth)*Federal Court Rules* *2011* |
|  |  |
| Cases cited: | *Air New Zealand Ltd v Australian Competition and Consumer Commission* (2017) 262 CLR 207*Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* (2018) 261 FCR 301*Arnotts v Trade Practices Commission* (1990) 24 FCR 313*Assistant Minister for Immigration and Board Protection v Splendido* [2019] FCAFC 132 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157*Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Limited* (2015) 236 FCR 78*Australian Competition and Consumer Commission v Cascade Coal Pty Ltd* [2019] FCAFC 154*Australian Competition and Consumer Commission v Cement Australia Pty Ltd* (2013) 310 ALR 165*Australian Competition and Consumer Commission v Flight Centre Travel Group Pty Ltd* (2016) 261 CLR 203*Australian Competition and Consumer Commission v Liquorland (Australia) Pty Ltd [2006] ATPR 42-123**Australian Competition and Consumer Commission v Metcash Trading Ltd* (2011) 198 FCR 297*Australian Competition and Consumer Commission v Metcash Trading Ltd* (2011) 282 ALR 464*Australian Competition and Consumer Commission v Pacific National Pty Ltd* [2018] FCA 1221*Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc* (1999) 161 ALR 79*Australian Competition and Consumer Commission v Z-Tek Computer* (1997) 78 FCR 197*Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483*Australian Gas Light Company v Australian Competition and Consumer Commission (No 2)* [2003] FCA 1229*Australian Gas Light Company v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317*Australian Telecommunications Commission v Krieg Enterprises Pty Ltd* (1976) 14 SASR 303*BMW Australia Ltd v Brewster* (2019) 94 ALJR 51*Boral Besser Masonry Ltd v Australian Competition & Consumer Commission* (2003) 215 CLR 374*Boughey v The Queen* (1986) 161 CLR 10*Branir v Owston Nominees (No 2)* (2001) 117 FCR 424*Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592*Byrne v Australian Airlines Ltd* (1995) 185 CLR 410*Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380*The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64*Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482*Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* (1982) 64 FLR 238*Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1991) 30 FCR 385*Fisher v Fisher* (1986) 161 CLR 438*Foster v ACCC* (2006) 149 FCR 135*Fox v Percy* (2003) 214 CLR 118*Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82*House v The King* (1936) 55 CLR 499*Iberian Trust Ltd v Founders Trust and Investment Ltd* [1932] 2 KB 87*ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248*In re Tooth & Co Ltd; In re Tooheys Ltd* (1979) 39 FLR 1*Jackson v Sterling Industries Ltd* (1987) 162 CLR 612*James Hardie Industries NV v Australian Securities and Investments Commission* (2010) 274 ALR 85*Jungarrayi v Olney* (1992) 34 FCR 496*Kirkpatrick v Kotis* (2004) 62 NSWLR 567*Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638*Masson v Parsons* (2019) 93 ALJR 848*Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council [No 2]* (2001) 50 NSWLR 665*Momcilovic v The Queen* (2011) 245 CLR 1*Monroe Topple & Assocs Pty Ltd v Institute of Chartered Accountants in Australia* (2002) 122 FCR 110*News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410*News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563*NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90*Outboard Marine Australia Pty Ltd v Hecar Investments No 6 Pty Ltd* (1982) 66 FLR 120*Owners of the Ship “Shin Kobe Maru” v Empire Shipping Co*mpany *Inc* (1994) 181 CLR 404*Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1*Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379*Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167*Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169*Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177*R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254*Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 62 FLR 437*Rural Press Ltd v ACCC* (2003) 216 CLR 53*Sellars v Adelaide Petroleum* (1994) 179 CLR 332*Seven Network Limited v News Ltd* (2009) 182 FCR 160*State Rail Authority of NSW v Earthline Constructions Pty Ltd* (1999) 73 ALJR 306*Stirling Harbour Services Pty Ltd v Bunbury Port Authority* (2000) ATPR 41-752*Stirling Harbour Services Pty Ltd v Bunbury Port Authority* (2000) ATPR 41-783*Tabcorp Holdings Ltd v Victoria* (2016) 90 ALJR 376*Thomas v Mowbray* (2007) 233 CLR 307*Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150*Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees’ Union* (1979) 42 FLR 331*Trade Practices Commission v Ansett Transport Industries (Operations) Pty Ltd* (1978) 32 FLR 305*Trade Practices Commission v TNT Management Pty Ltd* (1985) 6 FCR 1*Universal Music Australia Pty Ltd v ACCC* (2003) 131 FCR 529*White v Director of Military Prosecutions* (2007) 231 CLR 570*Witham v Holloway* (1995) 183 CLR 525*WorkPac Pty Ltd v Skene* (2018) 264 FCR 536 |
|  |  |
| Date of hearing: | 17-20 February 2020 |
|  |  |
| Registry: | Victoria |
|  |  |
| Division: | General Division |
|  |  |
| National Practice Area: |  |
|  |  |
| Sub-area: |  |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 440  |
|  |  |
| Counsel for the Appellant: | Mr J Gleeson SC with Mr A McClelland QC, Mr C Lenehan SC, Ms C Van Proctor, Mr C Tran and Ms A Muhlebach |
|  |  |
| Solicitor for the Appellant: | DLA Piper |
|  |  |
| Counsel for the First to fourth Respondents: | Mr N Hutley SC with Ms R Higgins SC, Mr A Barraclough and Mr B Lim |
|  |  |
| Solicitor for the First to Fourth Respondents: | Clayton Utz |
|  |  |
| Counsel for the Fifth to Eighth Respondents: | Mr C Moore SC with Mr D Roche, Mr A d’Arville and Ms D Forrester |
|  |  |
| Solicitor for the Fifth to Eighth Respondents: | Ashurst |

ORDERS

|  |  |
| --- | --- |
|  | VID 695 of 2019 |
|   |
| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSIONAppellant |
| AND: | PACIFIC NATIONAL PTY LIMITED (ACN 098 060 550) (and others named in the Schedule)First Respondent |
|  |  |
| AND BETWEEN: | PACIFIC NATIONAL PTY LIMITED (ACN 098 060 550) (and others named in the Schedule)First Cross-Appellant |
| AND: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSIONCross Respondent |

|  |  |
| --- | --- |
| JUDGES: | MIDDLETON, PERRAM AND O'BRYAN JJ |
| DATE OF ORDER: | 6 may 2020 |

THE COURT ORDERS THAT:

1. Within 14 days, the parties confer, and file in the Court an agreed minute of order (including as to the costs of the trial, the appeal and cross-appeals) and in default of agreement, short written submissions of no more than 3 pages in length as to each party’s proposed minute of order.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MIDDLETON AND O’BRYAN JJ:

# Introduction

1. This proceeding concerns the proposed sale of the Acacia Ridge Terminal (**ART**) by entities within the Aurizon group of companies (**Aurizon**) to entities within the Pacific National group of companies (**Pacific National**) pursuant to a Business Sale Agreement executed on 28 July 2017. The ART is a rail terminal located in Queensland, approximately 16 km south of the Brisbane central business district. It contains two terminals: the Brisbane Multi User Terminal, which is a standard gauge rail terminal that connects to the standard gauge interstate rail network; and the Queensland Terminal, which is a narrow gauge rail terminal that connects to the narrow gauge rail network within Queensland. Pacific National supplies rail linehaul services on the North-South and East-West standard gauge interstate railway lines and between terminals on the narrow gauge railway line in Queensland that runs along the coast between Brisbane and Cairns, referred to as the North Coast Line. Pacific National is the largest provider of rail linehaul services in Australia by revenue and volume of freight transported.
2. Pursuant to clause 5.1 of the Business Sale Agreement, completion of the sale was conditional on, amongst other things, the parties receiving competition law clearance for the sale in one of three ways: written confirmation from the Australian Competition and Consumer Commission (**ACCC**) that it did not propose to intervene in the acquisition pursuant to s 50 of the *Competition and Consumer Act 2010* (Cth) (**Act**) (commonly referred to as informal clearance); authorisation of the acquisition by the Australian Competition Tribunal under Part VII of the Act; or the Federal Court declaring or making orders to the effect that the acquisition would not contravene s 50 of the Act.
3. The ACCC did not give the parties informal clearance. On 18 July 2018, it commenced a proceeding in the Federal Court alleging, amongst other things, that the sale of the ART pursuant to the Business Sale Agreement would contravene s 50 of the Act and sought orders restraining the parties from completing the sale. At the time of trial, the ACCC’s allegation was that the acquisition of the ART by Pacific National would be likely to have the effect of substantially lessening competition in markets (defined with greater specificity below) for interstate rail linehaul services on the North-South corridor (essentially between Melbourne, Sydney and Brisbane) and on the East-West corridor (essentially between Perth, Adelaide and either Melbourne or Sydney), whether considered as separate markets or part of a single market. The relief sought by the ACCC included a declaration pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) that the acquisition would contravene s 50 of the Act and an injunction under s 80(1)(a)(i) of the Act restraining Pacific National from acquiring the ART.
4. On 15 May 2019, the primary judge delivered judgment: *Australian Competition and Consumer Commission v Pacific National Pty Limited (No 2)* [2019] FCA 669. His Honour concluded that, upon the Court accepting an undertaking proffered by Pacific National relating to the future conduct of the ART (the **Undertaking**), the proposed sale of the ART by Aurizon to Pacific National would not contravene s 50 of the Act (at [1611]). The primary judge stated that, if he had not accepted the Undertaking (which he referred to as a hypothetical scenario), “on balance, and not without some hesitation” he would have accepted the ACCC’s s 50 case (at [1612]). More specifically, his Honour would have found that the acquisition of the ART by Pacific National would be likely to have the effect of substantially lessening competition in either:
	1. a single market comprising 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 services nor sea services provides an effective substitute for rail linehaul services; or
	2. separate markets for the North-South and East-West corridors,

which are referred to in the reasons of the primary judge as the “Interstate markets” (adopting a definition used in the ACCC’s pleading). We prefer to use the descriptive term “interstate rail linehaul markets” to distinguish these markets from markets in which freight owners and freight forwarders consider that road services or sea services provide an effective substitute for rail linehaul services (which might be described as intermodal transport markets). His Honour found that the analysis of the competitive effects of the proposed acquisition of the ART is not affected by whether the relevant markets are defined as a single combined market or two separate markets, and there is no challenge to that finding on the appeal.

1. The primary judge made final orders on 6 June 2019, dismissing the ACCC’s application and ordering the ACCC to pay 50% of the respondents’ party-party costs of the proceeding: *ACCC v Pacific National Pty Ltd (No 3)* [2019] FCA 866.
2. On 26 June 2019, the ACCC filed a notice of appeal, which was subsequently amended on 26 November 2019. By the amended notice of appeal, the ACCC challenged the primary judge’s acceptance of, and reliance on, the Undertaking in finding that the sale of the ART would not contravene s 50. The ACCC advanced two principal contentions.
3. First, the ACCC contends that the primary judge did not have power to accept the Undertaking. A central argument advanced by the ACCC is that the power to accept an undertaking in the circumstances of a case such as the present is a power that is enlivened once a contravention of s 50 is found, and the Court may then accept an undertaking in lieu of granting injunctive relief as a remedy for the contravention. The ACCC submitted that the primary judge erred by taking the Undertaking into account as part of the factual matrix in assessing whether the sale of the ART would contravene s 50.
4. Second, the ACCC contends in the alternative that, if the primary judge was empowered to accept the Undertaking, his Honour erred in doing so. The central argument advanced by the ACCC was that the primary judge erred in concluding that the Undertaking would be effective in preventing Pacific National from engaging in anti-competitive conduct in the operation of the ART following the acquisition and that the Undertaking was not formulated with the necessary precision such as to be capable of being readily obeyed and enforced.
5. On 18 July 2019, each of Pacific National and Aurizon filed notices of cross-appeal, which were subsequently amended on 8 November 2019. The grounds of cross-appeal raised by the respondents were similar but not identical. However, because the interests of the respondents in the appeal are mutual, if a ground of appeal of either respondent is upheld by the Court, the other respondent will benefit from the successful appeal. Substantively, the respondents challenged the primary judge’s reasoning with respect to market definition and the assessment of the likely competitive effects of the sale of the ART.
6. In relation to market definition, the respondents contend that the primary judge erred in concluding that interstate rail linehaul markets exist that are confined to a subset of Pacific National’s rail linehaul customers, being those customers for whom neither road services nor sea services provides an effective substitute for rail linehaul services (so-called “captive” customers). The respondents contend that the primary judge erred in failing to find that the existence of such markets is dependent on two preconditions: first, that suppliers can identify and target “captive” customers with higher prices (that is, price discriminate); and, second, that profitable arbitrage must not be possible (that is, the non-captive customers must not be able to resell the product to the captive ones or purchase it on their behalf, thereby defeating the price discrimination). The respondents contend further that the evidence did not support a conclusion that Pacific National could identify and target “captive” customers with a sufficient degree of accuracy to engage in price discrimination profitably.
7. In relation to the likely effect of the acquisition on competition, the central argument advanced by the respondents was that the primary judge erred in concluding that the acquisition of the ART by Pacific National would have the likely effect of substantially lessening competition by increasing barriers to entry into the interstate rail linehaul markets in circumstances where: (i) in the medium term, a competing rail terminal would be built (through the Inland Rail Project); and (ii) barriers to entry were already high and there was no realistic prospect of new entry within that timeframe in any event.
8. Aurizon also advanced the contention that the primary judge erred in construing the word “likely” in s 50 as synonymous with there being a “real chance”. Aurizon contends that the word means “more probable than not”.
9. The respondents further contend that, if the primary judge erred by taking the Undertaking into account as part of the factual matrix in assessing whether the sale of the ART would contravene s 50 as the ACCC contends, his Honour should have accepted the Undertaking in lieu of granting the injunction sought by the ACCC because, for substantially the reasons his Honour gave, the Undertaking sufficiently addressed the likely anti-competitive effects of the acquisition.
10. On 26 November 2019, the ACCC filed a notice of contention in response to the respondents’ amended notices of cross-appeal. The notice raises two matters. The first concerns the assessment of the competitive effect of the acquisition, and specifically the timeframe within which the primary judge ought to have considered the potential for new entry. The second concerns the Undertaking and advances a contention that the Court is not empowered to accept the Undertaking in lieu of the injunctive relief sought by the ACCC for reasons that include:
	1. the power to accept an undertaking in lieu of injunctive relief granted pursuant to s 80(1) of the Act is limited to an undertaking in a form that reflects the relief sought by the ACCC; and
	2. the acceptance of the Undertaking would not involve an exercise of the judicial power of the Commonwealth and would infringe Chapter III of the Constitution.
11. For the reasons that follow, we would allow the cross-appeals and dismiss the appeal.
12. By way of summary, in respect of the respondents’ cross-appeals, we are of the view that:
	1. the primary judge did not err in defining the relevant markets in which to assess the competitive effects of the proposed acquisition;
	2. the primary judge did not err in construing the word “likely” in s 50 as meaning a real commercial likelihood, whether or not the likelihood is greater or less than 50%;
	3. respectfully, the primary judge erred in concluding that, in the absence of the Undertaking, the proposed acquisition would contravene s 50.
13. The finding that the proposed acquisition would not contravene s 50 requires the dismissal of the ACCC’s appeal and renders the ACCC’s grounds of appeal moot. Although it is not strictly necessary to address the ACCC’s grounds of appeal, it is appropriate to do so in case the matter goes further and also because the issues are of some importance and the Court has heard full argument. In summary, we are of the view that the power to accept an undertaking in the circumstances of a case such as the present is a power that is enlivened once a contravention of s 50 is found, and the Court may then accept an undertaking in lieu of granting injunctive relief as a remedy for the contravention. It follows, in our respectful view, that the primary judge erred in taking the Undertaking proffered by the respondents into account as part of the relevant factual matrix and, on that basis, reaching a conclusion that the acquisition of the ART by Pacific National would not contravene s 50. However, the form of undertaking that may be accepted by the Court in lieu of injunctive relief is not limited to the form of injunctive relief sought by the ACCC in the proceeding. It would therefore have been open to the primary judge, as a matter of legal power, to accept an undertaking that ameliorated the anti-competitive effects of the proposed acquisition in lieu of granting an injunction to prevent the proposed acquisition. We are not persuaded that, if the primary judge had exercised the discretionary power to accept the Undertaking in lieu of injunctive relief, the exercise of power would have been erroneous.

# Background facts

1. The following is a summary of the background facts, as found by the primary judge, which are relevant to the disposition of the appeal and are not contested on the appeal. It should be noted that there are many facts referred to in the reasons of the primary judge that were relevant to the allegations made by the ACCC at trial, including the allegations concerning the Terminal Services Subcontract, but which are not relevant to the issues raised on the appeal. In particular, at trial, the ACCC alleged that the interstate rail linehaul markets also comprised the supply of services for the transport of bulk steel, and there were a large number of findings made in respect of the transport of bulk steel. The primary judge concluded that the transport of bulk steel comprised a separate market (at [371], [520] and [529]), and there is no challenge to that finding by the ACCC. Accordingly, it is unnecessary to refer to the bulk steel aspect of the case below.
2. Certain findings made by the primary judge were redacted for confidentiality in the published reasons. Unless necessary to explain our reasons, we have not referred to those findings that were redacted.

## B.1 The parties to the sale transaction

1. As already noted, the parties to the sale transaction were entities within the Aurizon group and entities within the Pacific National group.

### Aurizon

1. Aurizon is and was a vertically integrated rail linehaul operator and freight forwarder. It continues to own the ART, pending the outcome of this litigation initiated by the ACCC. The business of the ART is described below.
2. At all relevant times until December 2017, Aurizon operated an interstate intermodal business that provided rail linehaul services for intermodal freight on interstate routes. When Aurizon provided rail linehaul services on interstate routes to or from Queensland, Aurizon’s trains travelled to and from the Brisbane Multi User Terminal (within the ART), where they were unloaded and loaded. Aurizon elected to close its interstate intermodal business in December 2017.
3. Up to 14 January 2019, Aurizon also operated a Queensland (intrastate) intermodal business. Through that business, Aurizon supplied rail linehaul services between terminals on the North Coast Line to freight forwarders and freight owners. Aurizon offered freight owners a full freight solution, including both rail linehaul services on the North Coast Line and “pick-up and delivery services”, and, in some cases, also services to consolidate and deconsolidate freight owners’ freight. When Aurizon provided rail linehaul services on the North Coast Line, Aurizon’s trains travelled to and from the Queensland Terminal (within the ART). Aurizon was the only rail operator that used the Queensland Terminal. On 14 January 2019, Aurizon sold its Queensland intermodal business to Linfox Australia Pty Ltd (**Linfox**).
4. Aurizon does not provide road freight services or sea freight services.

### Pacific National

1. Pacific National provides rail linehaul services on interstate routes and between terminals on the North Coast Line. It is the largest provider of rail linehaul services in Australia by revenue and volume of freight transported. It principally supplies those services to freight forwarders, such as Toll and Linfox, rather than directly to freight owners.
2. When Pacific National provides rail linehaul services for intermodal freight on interstate routes to or from Queensland, Pacific National's trains travel to and from the Brisbane Multi User Terminal, where they are unloaded and loaded. Since Aurizon's closure of its interstate intermodal business in December 2017, Pacific National has been the only rail operator to use the Brisbane Multi User Terminal.
3. When Pacific National provides rail linehaul services on the North Coast Line for intermodal freight, Pacific National's trains travel to and from the narrow gauge terminal located at Tennyson (**Tennyson terminal**), where they are loaded and unloaded. The Tennsyon terminal is located approximately 10 km from the ART and approximately 9 km from the Brisbane CBD. Freight from far north Queensland to be moved interstate by rail is transported by truck between the Tennyson terminal and the ART, and vice versa for freight moving from interstate to far north Queensland.
4. Pacific National does not provide road services or sea services or, generally, “pick-up and delivery” services.

## B.2 The Acacia Ridge Terminal

1. The ART is a rail terminal located in Queensland, approximately 16 km from the Brisbane central business district. The ART contains two terminals: the Brisbane Multi User Terminal, which is a standard gauge terminal that connects to the standard gauge interstate network; and the Queensland Terminal, which is a narrow gauge terminal that connects to the narrow gauge network within Queensland. The Brisbane Multi User Terminal and the Queensland Terminal are connected by a dual gauge railway line, and serviced by marshalling yards and associated sidings and facilities.
2. The ART facilitates the movement of intermodal freight into, out of and within Queensland, as it connects to both the standard gauge interstate network from the south and the narrow gauge rail network to the north, leading to the North Coast Line. The ART also facilitates transhipment of intermodal freight from standard to narrow gauge and vice versa, whether by rail, in which case trains can be broken up and shunted from the Queensland Terminal to the Brisbane Multi User Terminal and vice versa, or by road, in which case containers are transported by truck between the two terminals.
3. The ART is located near to rail sidings, depots, distribution centres and warehouses that are owned or operated by major customers of the rail operators which use the ART, including logistics companies and freight owners.
4. Currently, the ART is owned by Aurizon. As part of the transaction entered into between Aurizon and Pacific National described below, Aurizon engaged Pacific National to provide certain terminal services at the Brisbane Multi User Terminal with effect from 1 December 2018 pursuant to a contract called the Terminal Services Subcontract. Until 30 November 2018, Aurizon engaged Qube Logistics (Qld) Pty Ltd, an entity within the Qube group of companies (**Qube**), to provide similar terminal services at the Brisbane Multi User Terminal. The Terminal Services Subcontract does not apply to the Queensland Terminal.

## B.3 The relevant transactions

1. The primary judge set out the background to the relevant transactions at [9]-[13] and [51]-[80]. Given the narrowing of the ACCC’s case at trial, and the further narrowing of issues on this appeal, it is unnecessary to refer to the detailed chronology of the relevant transactions. The following is a summary of the principal events.
2. In February 2017, Aurizon initiated Project Eyre, which was an assessment of market interest in the sale or shutdown of, or joint venture to own and operate, its intermodal business including the ART, the interstate intermodal business and the Queensland intermodal business.
3. From April 2017, Aurizon conducted a sale process for the ART, the interstate intermodal business and the Queensland intermodal business. In May 2017, Aurizon received six non-binding offers for parts or all of that business:
	1. two indicative offers from Qube and Oaktree for the whole of the intermodal business, including the ART, the interstate intermodal business and the Queensland intermodal business;
	2. two indicative offers from Genesee & Wyoming and Pacific National for the Queensland intermodal business and the ART only; and
	3. two indicative offers from the Australian Rail Track Corporation (**ARTC**) and Charter Hall for the ART.
4. Aurizon invited Pacific National, Qube and three other bidders to make binding bids by 4 August 2017.
5. On 20 July 2017, Pacific National made a pre-emptive binding bid for the ART. Following subsequent negotiations, on 28 July 2017 Aurizon and Pacific National entered into a package of agreements:
	1. the Business Sale Agreement, pursuant to which Aurizon agreed to sell, and Pacific National agreed to buy, the ART for a purchase price of $170 million, as adjusted in accordance with the terms of the agreement; and
	2. the Terminal Services Subcontract, pursuant to which Pacific National was appointed as operator of the Brisbane Multi User Terminal in place of Qube from 1 December 2018.
6. On 11 August 2017, Aurizon and Pacific National also executed an agreement under which Pacific National agreed to acquire the Queensland intermodal business for a payment of $20 million, also conditional on competition law clearance. On the same day, Aurizon resolved to close its interstate intermodal business, which was announced on 14 August 2017. In December 2017, Aurizon closed its interstate intermodal business.
7. On 12 February 2018 and 15 March 2018, Aurizon announced that it would close its Queensland intermodal business if it was not able to gain ACCC approval for its sale to Pacific National.
8. In its originating application filed on 18 July 2018, the ACCC sought an interlocutory injunction requiring Aurizon to carry on its Queensland intermodal business in the ordinary and usual course. On 13 August 2018, the primary judge granted that interlocutory injunction: *Australian Competition and Consumer Commission v Pacific National Pty Ltd* [2018] FCA 1221.
9. In January 2019, Aurizon sold its Queensland intermodal business to Linfox under arrangements whereby Aurizon supplies a “hook and pull” service to Linfox, described below.

## B.4 Intermodal freight

1. Intermodal freight is freight that is packed in containers or pallets, which allow the freight to be transferred between modes of transport such as road, rail and/or sea without the freight itself being handled. A wide variety of products can be transported as intermodal freight, including food, beverages, finished steel products and household and personal effects.
2. Intermodal freight can be distinguished from freight known as "bulk freight", which generally refers to large quantities of homogenous, loose commodity products such as coal, minerals and agricultural products where they are not containerised. The present proceeding does not concern the transport of any form of "bulk" freight, except to the extent that "bulk" freight is on occasion transported in containers (in which case it is categorised as "intermodal" freight).

## B.5 Relevant railway infrastructure

1. The railway networks that are relevant to this proceeding are either narrow or standard gauge. Locomotives and rail wagons (together referred to as rolling stock) can generally only be used on either narrow or standard gauge railway lines. However, it is possible for sections of a railway to be dual gauge; that is, to be built such that there are more than two parallel rails on the track placed in a way that enables both standard gauge and narrow gauge rolling stock to use the track.
2. The interstate railway network for rail linehaul services is a standard gauge network, which runs from the southern entrance of the ART, via Sydney to Melbourne, and through to Kalgoorlie in Western Australia. This network is owned or operated under long term leases by the ARTC.
3. Within Queensland, railway lines are almost exclusively narrow gauge. Three parts of the Queensland railway network, each of which are owned by Queensland Rail, are relevant to this proceeding:
	1. the North Coast Line, which is a narrow gauge railway line that runs along the coast between Brisbane and Cairns, and various destinations in between.
	2. the dual gauge section of railway track that runs from the border of the ARTC network at the southern entrance to the ART to Fisherman Island at the Port of Brisbane, where it terminates (dual gauge section); and
	3. the narrow gauge metropolitan network in and around Brisbane.
4. The use of different gauges between the interstate routes and within Queensland means that freight travelling by rail into Queensland and then north beyond Brisbane must be transferred from the standard gauge network to the narrow gauge network. Freight travelling by rail from within Queensland to Brisbane and then interstate must be transferred from the narrow gauge network to the standard gauge network.

## B.6 Movement of intermodal freight within Australia

1. Intermodal freight can be transported by one or more of road, rail and, in some cases, sea. In some cases, transport providers deal directly with the party seeking transport for their freight, and in other cases a freight forwarder organises transport on behalf of that party.
2. Intermodal rail terminals play an important role in the transport of intermodal freight because they are the location at which intermodal freight is transferred from road transport to rail transport (or vice versa), and at which numerous other significant ancillary services are provided.
3. The movement of intermodal freight within Australia predominantly occurs using rail and/or road, with sea used to a smaller extent. Rail transport involves the movement of freight using a rail network, and can be combined with the use of a second mode of transport, usually road, for some legs of the journey. Road transport involves the movement of freight using vehicles travelling by road. It is also used in conjunction with other modes of transport, to transport freight on the first and last leg of a journey. Coastal shipping is used for transport between mainland ports and Tasmania. There is limited coastal shipping between mainland ports, but coastal shipping has in some instances been used to move freight between the east and west coasts of Australia.
4. The movement of intermodal freight by rail typically involves three distinct stages. The first stage is the use of a truck to collect freight from the origin point nominated by the customer, and the transport of that freight by road to a terminal where it is loaded onto a train. The second stage is the transport of that freight by train from the terminal (the terminal of origin) to a terminal near to the customer's nominated destination point (the destination terminal), where it is unloaded from the train. The third stage is the use of a truck to collect the freight from the destination terminal and deliver it to the destination point nominated by the customer ("pick-up and delivery" services).
5. The movement of intermodal freight by road can occur in two ways. In some cases, the process is similar to that described above. The truck collects the freight from the customer, and transports it to a depot or terminal. At the depot or terminal, the freight is loaded on to a truck that is suitable for transporting intermodal freight over long distances. The freight is transported by truck from the depot or terminal of origin to a depot or terminal near to the customer's nominated destination point, where the freight is loaded onto a truck that is suitable for transporting intermodal freight over shorter distances (“pick-up and delivery” services). In other cases, it may not be necessary for the freight to be taken to some or all of the depots or terminals referred to. That is, a truck may collect the freight from the customer's nominated origin point and transport it directly to the customer's destination point, without the need to attend any depot or terminal. Alternatively, a truck may collect the freight from the customer's nominated origin point and transport it directly to the destination depot/terminal without attending a depot/terminal of origin or collect the freight from the depot/terminal of origin and transport it directly to the customer's destination point.
6. The movement of freight by sea occurs in the same way as described in relation to rail freight above, except that the freight is transported to and from a terminal for loading onto a ship rather than a train.
7. For each of rail, road and sea transport, the long-distance leg of the freight task is referred to as the "linehaul" component and the service of supplying this component of the freight task is referred to as a "linehaul" service. In these reasons, the terminals at which freight is transferred from one mode of transport to another are referred to as "intermodal terminals".
8. Broadly speaking, there are up to three participants involved in the transport of intermodal freight being:
	1. freight owners, which are the ultimate owners of the freight to be transported;
	2. freight forwarders, which are businesses that organise the entire movement of the freight from its point of origin to its point of destination on behalf of the freight owner; and
	3. linehaul providers, which operate the rail, road or sea linehaul service used to transport the freight owner's freight.
9. Freight owners often contract with a freight forwarder to arrange the movement of intermodal freight, but in some instances contract directly with a rail linehaul provider. The freight forwarder often operates one or more of the transport modes themselves (for example, they may operate the “pick-up and delivery” services and, in some cases, also rail or road services), and otherwise acquires from another operator any transport services that they do not themselves provide. In some cases the freight forwarder's service includes the service of packing freight into containers, and in other cases this task is undertaken by the freight owner. The freight forwarder is, in this sense, an intermediary between the freight owner and the transport provider.
10. If a freight owner requires transport for a volume of intermodal freight that is less than a full container load, a freight forwarder may combine that freight with other freight (referred to as consolidation). This allows the freight forwarder to increase container utilisation, and thereby decrease the unit costs of transporting the freight. If a freight forwarder does this, they may transport the freight from the freight owner's point of origin to an intermediate facility (such as its own depot) for consolidation before the freight is further transported as described above, and then to another intermediate facility to separate a freight owner's consolidated freight from other freight (referred to as deconsolidation), before the freight owner's freight is transported to the destination point.

## B.7 Rail transport suppliers

1. The businesses of Aurizon and Pacific National have been described above. As there noted, Aurizon closed its interstate intermodal business in December 2017 and sold its Queensland intermodal business to Linfox in January 2019. At the time of the proceeding, the other suppliers of rail linehaul services in Australia were SCT Logistics and Linfox (following its acquisition of the Queensland intermodal business).

### SCT Logistics

1. At all relevant times, SCT was, and continues to be, a vertically integrated rail operator and freight forwarder, operating rail linehaul services for intermodal freight on interstate routes, and also providing associated “pick-up and delivery” services. SCT supplies services directly to freight owners and does not generally deal with other freight forwarders.
2. In December 2014, SCT sought access to the Brisbane Multi User Terminal, but was refused access by Aurizon on the basis that the Brisbane Multi User Terminal was capacity constrained. Until January 2017, SCT provided intermodal rail services between Melbourne and Brisbane under a "hook and pull" arrangement with Aurizon. In January 2016, Aurizon gave SCT twelve months' notice of its intention to cancel the hook and pull arrangements it had previously agreed with SCT. As a result, SCT constructed its own intermodal terminal at Bromelton to service customers on the Melbourne–to-Brisbane corridor. That terminal opened in January 2017.
3. Historically, the majority of the intermodal freight SCT has transported was non-containerised. SCT principally provides rail linehaul services using a fleet of louvered vans (also referred to as "wagons"), although SCT's terminals have container handling facilities and SCT provides container haulage on both the North-South and East-West corridors.
4. When SCT provides rail linehaul services for intermodal freight on interstate routes, its trains travel to and from a standard gauge intermodal terminal at Bromelton. SCT does not operate any rail linehaul services on narrow gauge railways within Queensland.

### Linfox

1. Mr Ian Strachan, President of Linfox’s intermodal operations across Australia, whose evidence was accepted by the primary judge, deposed that Linfox is a vertically-integrated road linehaul operator and intermodal freight-forwarder with operations in all states of Australia, other than Tasmania. Prior to acquiring Aurizon’s Queensland intermodal business, Linfox’s operations in Queensland were very limited.
2. On 12 October 2018, Aurizon and Linfox entered into the following agreements in relation to the Queensland intermodal business:
	1. A Business Sale Agreement to transfer ownership of the Queensland intermodal business, excluding Aurizon's fleet of locomotives and certain other assets relating to rail haulage services, to Linfox.
	2. A Hook/Pull and Maintenance Services Agreement under which Aurizon provides Linfox with rail haulage services for the Queensland intermodal business. Under that agreement, Aurizon provides locomotives (which are retained by Aurizon) to pull wagons (which would then be owned by Linfox) to carry out the rail haulage required for the Queensland intermodal business. Aurizon also provides Linfox with the requisite rail infrastructure access rights so that the wagons can be hauled under Aurizon's rail operator accreditation for the purposes of the rail safety legislation. Aurizon also provides maintenance services in respect of Linfox's wagons. Linfox has an option to purchase Aurizon's Queensland intermodal business fleet of locomotives at the end of the term of the agreement.
	3. A RIM Services Agreement under which Aurizon provides Linfox with rail infrastructure manager services (for the purposes of the rail safety legislation) at various terminal locations used by the Queensland intermodal business for a period of five years from completion of the Queensland intermodal business sale or until Linfox obtains the requisite regulatory accreditations.
	4. Three Terminal Services Agreements under which Aurizon provides terminal services to Linfox at the Aurizon terminals at Townsville and Mt Miller and at the Queensland Terminal for a period of five years from completion of the sale of the Queensland intermodal business, with a further two five-year periods at Linfox's option.
	5. A Transitional Services Agreement under which Aurizon provides Linfox with information technology services on a transitional basis following completion of the business sale.
3. Aurizon and Linfox also agreed on leases over the business sites at Townsville, Emerald, Rockhampton and Mackay and a licence over certain areas (including the freight distribution centre) located at the ART.
4. According to Mr Strachan, Linfox's acquisition of the Queensland intermodal business is important because it facilitates Linfox's entry into Queensland. As a result of the transactions with Aurizon, Mr Strachan deposed that Linfox will obtain:
	1. a national footprint to compete with other national competitors like Toll, i.e. by offering a national end-to-end freight forwarding service;
	2. the ability to undertake services into and out of Far North Queensland;
	3. the opportunity to compete for and win new freight forwarding customers and other contract logistics opportunities in Queensland; and
	4. access to terminals and other facilities including the ART in Queensland.
5. In relation to Linfox’s use of the Queensland Terminal within the ART, Mr Strachan gave evidence that Linfox has executed a terminal services agreement and freight distribution centre licence with Aurizon which enable Linfox to access relevant parts of the ART as part of its operation of the Queensland intermodal business and to receive certain services from Aurizon, such as the loading and unloading of trains, shunting and container storage. Such arrangements specifically contemplate that Aurizon will novate these arrangements to Pacific National in the event that Aurizon sells the ART to Pacific National. Mr Strachan understands that this will also require Pacific National's consent to the novation and that Pacific National has agreed to give its consent. Such arrangements also contemplate novation if the ART is sold to another party.
6. In relation to the Brisbane Multi User Terminal within the ART, Linfox has a rail linehaul agreement with Pacific National under which Linfox freight carried by Pacific National can access the Brisbane Multi User Terminal. For the term of Linfox's rail linehaul agreement with Pacific National, Mr Strachan said that he was not presently concerned about the Terminal Services Subcontract between Aurizon and Pacific National. Given the arrangements described in the previous paragraph, and given that the Queensland Terminal is separate from the Brisbane Multi User Terminal, according to Mr Strachan, the provision of terminal services by Pacific National at the Brisbane Multi User Terminal would not affect Linfox's access to, or use of, the Queensland Terminal.

## B.8 Pricing of rail linehaul services

1. Pacific National and Aurizon adopt different contractual arrangements for the supply of rail linehaul services to freight forwarders and to freight owners.

### Pacific National

1. Pacific National's contracts with customers seeking rail linehaul services for intermodal freight consist of standard terms and conditions, a rate card which identifies the rates to be charged for the relevant rail linehaul services, and, in some instances, a rail haulage agreement (sometimes referred to as a "partnership agreement") that generally has a term of 3 to 5 years and contains terms and conditions specific to the customer.
2. Pacific National has five categories of rate cards that apply nationally: one rate card offers Pacific National's standard prices, and the other four rate cards each offer different levels of discounts to Pacific National's standard prices. Pacific National applies different rates cards to different customers, based principally on the volume of freight that the customer transports. The particular prices that a customer pays under any one rate card depend on the size of the container, the volume being shipped, the origin-destination pair of the route over which the freight is shipped, the direction of travel and the day of the service. In addition to these five rate cards, Pacific National also applies specialised rate cards for customers with particular freight types, such as removalists, and customers transporting automotive or express freight.
3. Approximately 80% of Pacific National's customers receive services under a rate card and Pacific National's standard terms and conditions without a rail haulage agreement; approximately 20% of Pacific National's customers have a rail haulage agreement. Customers with a rail haulage agreement generated 55% of Pacific National's intermodal freight volume in the 2018 financial year.
4. In addition to the arrangements described above, there are also occasions when Pacific National provides customers, usually freight forwarders, with rate assistance for a particular tender. Pacific National does this by entering into a commodity rate agreement. This is an agreement negotiated between Pacific National and its customer under which Pacific National agrees to provide transport for a specific freight task or tasks at a specific rate (a "commodity rate") that is lower than the rate that would otherwise apply under the arrangements described above. The commodity rate is negotiated between Pacific National and its customer. If the customer is successful in winning the tender, the commodity rate applies to the particular freight task won under that tender. That freight task is defined, and hence the application of the commodity rate is limited, by reference to one or more of the following factors: the routes over which transport is to be provided; the nature of the freight to be carried; and the identity of the freight owner whose freight is to be carried. So, for example, if Pacific National offered a freight forwarder commodity rates to help it to win work to carry particular volumes for a particular freight owner on particular routes, and the freight forwarder won that tender, the freight forwarder would pay Pacific National the relevant commodity rates for that particular volume on those particular routes. But the commodity rates would not apply to any other volumes or routes carried for that particular freight owner or to freight carried for other freight owners. Commodity rate agreements require the customer to identify the commodity rate code when seeking to use that rate.
5. Most commodity rate agreements apply to customers who have a rail haulage agreement, and have the effect of modifying the rates payable under the rail haulage agreement in relation to the particular business the subject of the relevant tender. However, Pacific National has also entered into commodity rate agreements with customers, such as removalists, who are not a party to a rail haulage agreement. The particular prices that a customer pays under any one commodity rate agreement depend on the size of the container, the volume being shipped, the origin-destination pair of the freight being shipped and the day of the service.
6. In the period from 1 October 2016 to 30 September 2018, Pacific National had at least 650 commodity rate agreements in place in relation to services provided on the North-South corridor.

### Aurizon

1. Aurizon has supplied rail linehaul services, including as part of its freight forwarding services, on both a contracted and uncontracted basis. For uncontracted customers, Aurizon supplied rail linehaul services in accordance with its standard terms and conditions. For contracted customers, Aurizon supplied such services in accordance with its standard terms and conditions and rates agreed between Aurizon and the customer. The rates that applied to a particular customer could be either scheduled rates or negotiated rates. Scheduled rates are rates set out in one of four separate schedules of rates - one schedule contains "standard" rates, one contains rates specific to removalists, and the two other schedules contain rates at two different levels of discounts from the standard rates. The selection as to which scheduled rates apply to a particular customer depends on whether the customer is contracted or uncontracted, the volume of freight they wish to have transported and, in the case of removalists, the nature of that freight. However, contracted customers who have been prepared to make a volume commitment to Aurizon and/or to do so on a desirable corridor where Aurizon had linehaul capacity, could generally negotiate lower rates with Aurizon. In some other cases high volume customers could receive rail linehaul services at costed rates, which could be significantly lower than the scheduled rates.
2. In addition, further charges, discounts, rebates, rate review mechanisms and sign-on payments for contracted customers have been negotiated between Aurizon and the customer, and additional fees could be added for particular contracted and uncontracted customers depending on the nature of the service they required.

## B.9 The role of intermodal rail terminals

1. Generally speaking, the following activities take place at the ART and other intermodal terminals:
	1. freight forwarders or freight owners deliver intermodal freight, which are stored until they are loaded onto trains;
	2. trains arrive at the terminal and are allowed to enter the terminal from the connecting rail network under the management of train controllers who manage the terminal's interface with the provider of access to the connecting network;
	3. trains are unloaded using equipment such as forklifts and gantry cranes and freight is moved from the train to the ground (for later relocation), a waiting truck, another train or a storage area;
	4. the unloaded containers are, if not directly loaded onto another train or truck, stored;
	5. if the terminal is a dual gauge terminal, freight may be moved from a standard gauge train to a narrow gauge train and vice versa;
	6. trains are subject to safety checks;
	7. wagons may be stored for periods of time;
	8. trains undergo a level of servicing, including wagon checks or repairs, locomotive fuelling and locomotive provisioning, which involves supplying the rail operator with water, fuel and sand required for the locomotive;
	9. damaged or unsafe wagons are removed from trains;
	10. trains are reconfigured, meaning that they are broken up and reassembled into different length trains - for example, trains may need to be reconfigured into smaller lengths if they would otherwise be too long to use the terminal or particular infrastructure at the terminal, which involves attaching and detaching locomotives, uncoupling and stowing wagons and shunting (that is, pushing or pulling) wagons;
	11. trains are loaded;
	12. trains are allowed to exit the terminal onto the connecting rail network, under the management of train controllers who manage the terminal's interface with the provider of access to the connecting network;
	13. freight forwarders or freight owners collect intermodal freight for delivery to its final destination; and
	14. the track and loading equipment at the terminal undergo maintenance.
2. Because of the wide range of activities conducted at a terminal, rail operators, freight forwarders, freight owners and road operators each "use" a rail terminal. Rail operators use a terminal for operating, servicing and loading or unloading trains. Freight forwarders, freight owners and their road operators use a terminal for delivering and collecting freight in the course of providing “pick-up and delivery” services.
3. In order to use a rail terminal, a rail operator requires:
	1. access to capacity on the rail network that connects to the terminal - rail capacity is allocated in the form of a "train path", which is the right granted by the relevant track owner to run a train of specified maximum length and weight from an origin to a destination at a specified time; and
	2. access to capacity at the terminal - terminal capacity is allocated in the form of a "terminal window", which is a defined period of time during which a train can occupy rail tracks within a terminal for loading and unloading, train storage and, potentially, provisioning.
4. A rail operator needs to obtain terminal windows and train paths that align, in the sense that the train path must allow the train to arrive at and depart from the terminal within its terminal window. But not all capacity is "equal" and differing train paths and terminal windows will have different attractiveness to a rail operator's customers, different operating efficiency and cost implications and differing interconnectivity with other networks.
5. From the perspective of a rail operator, the fundamental task of any intermodal rail terminal is to allow rail operators to load containers onto, or unload containers from, trains and trucks at the terminal in an efficient and timely manner. It is important to rail operators that they can provide a cost-effective and competitive rail haulage offering, which requires the following things:
	1. First, rail operators require terminal windows of adequate quality to enable them to compete with other rail providers. For instance, a rail operator requires windows that align with relevant train paths, are at an appropriate time of day to allow the operator to meet their own customers' needs, and are of an appropriate duration to allow them to load, unload and provision their locomotives. An important consideration for interstate departures from Queensland is to avoid the train being held up on the outskirts of Sydney during peak passenger periods, when restrictions are imposed on freight trains operating in the Sydney network.
	2. Second, rail operators require that the terminal windows allocated to the operator are in fact made available to the operator on a day-to day-basis in accordance with that allocation.
	3. Third, rail operators require that trains that are not running to timetable (that is, running early or late) are still serviced quickly and efficiently.
	4. Fourth, rail operators require that services at the terminal are provided quickly and efficiently, including that loading occurs according to the loading plan provided by the rail operator.
6. Where a terminal is operated by a rail operator which uses the terminal, it is important to other rail operators that:
	1. they receive service quality and pricing that is comparable to that which the terminal operator applies in relation to its own rail operations;
	2. the terminal is operated safely, and that safety requirements are implemented in a pragmatic and non-discriminatory way; and
	3. their confidential information is protected and not able to be used by the terminal operator to assist them in their own rail business.
7. In selecting a freight forwarder for a freight task and, where relevant, in selecting rail as the freight mode of choice, a freight owner usually obtains a commitment from the freight forwarder that the freight owner’s freight will arrive at its destination according to schedule. As a result of its obligations to the freight owner, the freight forwarder will have regard to a range of services provided at an intermodal rail terminal, including the following:
	1. the time by which they must deliver goods to the terminal in order for those goods to be loaded onto a particular train (the "cut-off time");
	2. whether the train can depart on time;
	3. the time it takes for a truck to enter the terminal, deliver or collect freight and leave the terminal (referred to as the "truck turnaround time");
	4. whether containers are damaged whilst at the terminal; and
	5. the time that their freight is available for collection at its destination (known as "freight availability").

## B.10 Choice of transport mode

1. Freight forwarders or freight owners consider a wide range of factors when deciding whether to acquire rail linehaul services or to acquire road or sea linehaul services instead. For some freight forwarders and freight owners, having regard to the characteristics of their freight, the transport they require and the routes over which they require it, neither road linehaul services nor sea linehaul services are an effective substitute for rail linehaul services. Before Aurizon closed its interstate intermodal business, such freight forwarders and freight owners benefitted from competition between Pacific National and Aurizon in relation to the supply of the relevant rail linehaul services in the form of lower prices and improved service quality.
2. Acquirers of rail linehaul services (whether freight forwarders or freight owners) usually consider a variety of factors specific to their needs in deciding whether to acquire a rail linehaul service. Those factors include the following:
	1. The total cost of using the rail linehaul service, any required “pick-up and delivery” services and any costs to the freight owner that are associated with use of those services arising due to internal processes such as inventory management (for example, business costs relating to the need to maintain inventory, or the fact that particular stores only have limited off-shelf storage).
	2. The total cost of using road or sea linehaul services instead of a rail linehaul service, any required “pick-up and delivery” services and any associated internal costs of the type just referred to.
	3. The freight owner's requirements about delivery, including speed of delivery, frequency of delivery and the degree to which the freight owner requires a time or date specific delivery window.
	4. Whether the attributes of the freight being transported, including the volume, weight, perishability, number of products to be transported or other characteristics of the relevant freight, leads the freight owner to favour a particular transport mode.
	5. The appropriateness of any relevant schedules, flexibility in the departure time and the effect of service interruptions like breakdowns or flooding.
	6. The ability of a rail linehaul service, a road service and/or a sea service to meet the freight owner's needs for reliable delivery, including guaranteed capacity for high volumes of freight.
	7. The origin and destination of the transport service the customer requires, and the distance of a suitable terminal or port from the origin and destination points for the freight. For example, the greater the distance between the rail terminal and the customer's origin or destination point, the greater the cost of “pick-up and delivery” services. These increased costs may reduce or eliminate a freight forwarder's competitive advantage having regard to the location of its existing facility, and can affect the choice between rail linehaul services and road services.
	8. Whether the freight owner has invested in, or is otherwise effectively tied to, using particular infrastructure that is specific to a particular mode of transport, for example, rail sidings or delivery docks that are not suitable for receiving freight from the types of trucks used for long distance transport.
	9. Safety considerations.
	10. Environmental concerns.
3. A number of factors can lead freight owners or freight forwarders to acquire a rail linehaul service or a road service, rather than a sea service, notwithstanding that sea services can be cheaper than road or rail linehaul services. These include the following factors:
	1. The location of ports relative to the points of origin and destination may mean that delivery by sea services involves additional handling and delivery costs compared to rail linehaul services or road services.
	2. Sea services are typically less frequent than rail linehaul services. There are no regular services of the kind that are often needed by freight owners (e.g. a daily or twice-weekly service), which means that a higher volume of freight must be shipped at any one time. Those higher volumes may exceed a freight owner's demand for transport. But even if they do not, the need to transport greater volumes on a single service could increase inventory management costs.
	3. The availability of sea services is less reliable than road services or rail linehaul services. Sea services are provided by international container vessels and their availability depends on shipping lines having capacity to take containers for domestic legs of their journeys.
	4. Door-to-door transit time is generally longer, meaning that it takes longer to transport freight using sea services than it does using rail linehaul services.
	5. Sea is not suitable for certain goods, such as steel grades which may rust.
	6. Unlike road services and rail linehaul services, it is not possible to guarantee the price of sea services on a long-term basis. Rather, the pricing of sea services is volatile, particularly when chartered opportunistically.
4. A number of factors can lead freight owners or freight forwarders to acquire a rail linehaul service rather than a road service. These include the following factors:
	1. Overall cost: rail linehaul services are more cost effective than road services over longer distances.
	2. Volume: rail linehaul services may better accommodate the transportation of larger volumes than road services, and may be scaled up without as much investment.
	3. Safety: rail linehaul services have a lower interaction with the public, given that they run on a fixed line. Heavy vehicles on the road may pose a particular danger to the public particularly, for example, in far north Queensland where road access is limited.
	4. Environmental concerns: rail linehaul services create less road traffic and air pollution than do road services.
	5. Time: rail linehaul services may be quicker over longer distances than road services, although this may not be true for shorter and medium distances.

## B.11 Historical competition in the supply of rail linehaul services

### North-South rail linehaul services

1. North-South rail linehaul services are rail linehaul services supplied interstate and over long distances between terminals in Queensland, New South Wales and Victoria.
2. Prior to the closure of Aurizon’s interstate intermodal business in December 2017, Aurizon, Pacific National and SCT supplied North-South rail linehaul services in relation to intermodal freight. Aurizon and Pacific National were each other’s closest competitors. SCT was not as close a competitor, as SCT did not generally deal with freight forwarders and SCT’s louvered wagons were not suitable for most customers who sought to transport containerised freight. Following the closure of Aurizon’s interstate intermodal business, Pacific National and SCT are each other’s only competitors, but some of the limitations affecting SCT persist.
3. As a result of the factors set out in section B.10 above, there are some freight owners (or freight forwarders acting on their behalf) requiring transport of intermodal freight between cities serviced by North-South rail linehaul services for whom road services and sea services do not provide an effective substitute. Those customers include:
	1. Woolworths, a grocery retailer, which uses North-South rail linehaul services for part of its secondary freight from Melbourne to Brisbane due to a mix of safety, service, cost and corporate and community objectives;
	2. Metcash, a grocery wholesaler and retailer, which transports freight from its distribution centre in Laverton to Queensland using North-South rail linehaul services;
	3. Wridgways, a removalist, which uses North-South rail linehaul services between Brisbane, Sydney and Melbourne;
	4. Allied Pickfords, a removalist, which uses rail for part of its interstate freight tasks;
	5. K&S, a freight forwarder, which uses North-South rail linehaul services;
	6. Austrans, a freight forwarder of ambient goods (goods that can be transported at room temperatures), which uses North-South rail linehaul services between Melbourne and Brisbane;
	7. Orica, a provider of explosives and blasting systems, which transports sodium cyanide from Brisbane to Kalgoorlie and relies on North-South rail linehaul services for the north-south leg of this route; and
	8. McColl’s Transport, a transport company, which regularly uses North-South rail linehaul services to transport bulk chemicals.

### East-West rail linehaul services

1. East-West rail linehaul services are rail linehaul services supplied interstate and over long distances:
	1. between terminals in Western Australia and terminals in one or more of New South Wales, Victoria and South Australia; and
	2. between terminals in South Australia and terminals in one or more of Western Australia, New South Wales and Victoria.
2. Prior to the closure of Aurizon’s interstate intermodal business in December 2017, Aurizon, Pacific National and SCT supplied East-West rail linehaul services in relation to intermodal freight. Aurizon and Pacific National were each other's closest competitors. SCT was not as close a competitor to those businesses for the reasons given in respect of the North-South route. Following the closure of Aurizon’s interstate intermodal business, Pacific National and SCT are each other’s only competitors, but some of the limitations affecting SCT persist.
3. In like manner to the North-South corridor, there are some freight owners (or freight forwarders acting on their behalf) requiring transport of intermodal freight between cities serviced by East-West rail linehaul services for whom road services and sea services do not provide an effective substitute.

# RELEVANT LEGISLATIVE PROVISIONS

1. Section 50(1) of the Act provides:

(1) A corporation must not directly or indirectly:

(a) acquire shares in the capital of a body corporate; or

(b) acquire any assets of a person;

if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market.

1. In determining whether a proposed acquisition would have the effect, or would be likely to have the effect, of substantially lessening competition, s 50(3) provides a non-exhaustive list of factors that must be taken into account:

(3) Without limiting the matters that may be taken into account for the purposes of subsections (1) and (2) in determining whether the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market, the following matters must be taken into account:

(a) the actual and potential level of import competition in the market;

(b) the height of barriers to entry to the market;

(c) the level of concentration in the market;

(d) the degree of countervailing power in the market;

(e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;

(f) the extent to which substitutes are available in the market or are likely to be available in the market;

(g) the dynamic characteristics of the market, including growth, innovation and product differentiation;

(h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;

(i) the nature and extent of vertical integration in the market.

1. Section 50(6) stipulates that “market” means any market for goods or services in Australia, a State, a Territory or a region of Australia.
2. The concept of a market in the Act is further defined in s 4E as follows:

For the purposes of this Act, unless the contrary intention appears, market means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first‑mentioned goods or services.

1. The concept of lessening competition is expanded by s 4G as follows:

For the purposes of this Act, references to the lessening of competition shall be read as including references to preventing or hindering competition.

1. The principal concept in s 50, competition within a market, has been the subject of considerable judicial analysis and is well understood. For present purposes, it is unnecessary to go further than the oft-cited statements of the Trade Practice Tribunal in *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169 (***QCMA)*** at 187-189:

Competition may be valued for many reasons as serving economic, social and political goals. But in identifying the existence of competition in particular industries or markets, we must focus upon its economic role as a device for controlling the disposition of society’s resources. Thus we think of competition as a mechanism for discovery of market information and for enforcement of business decisions in the light of this information. It is a mechanism, first, for firms discovering the kinds of goods and services the community wants and the manner in which these may be supplied in the cheapest possible way. Prices and profits are the signals which register the play of these forces of demand and supply. At the same time, competition is a mechanism of enforcement: firms disregard these signals at their peril, being fully aware that there are other firms, either currently in existence or as yet unborn, which would be only too willing to encroach upon their market share and ultimately supplant them.

This does not mean that we view competition as a series of passive, mechanical responses to “impersonal market forces”. There is, of course, a creative role for firms in devising the new product, the new technology, the more effective service or improved cost efficiency. And there are opportunities and rewards as well as punishments. Competition is a dynamic process; but that process is generated by market pressure from alternative sources of supply and the desire to keep ahead.

…

Competition expresses itself as rivalrous market behaviour. In the course of these proceedings, two rather different emphases were placed upon the most useful form such rivalry can take. On the one hand it was put to us that price competition is the most valuable and desirable form of competition. On the other hand it was said that if there is rivalry in other dimensions of business conduct — in service, in technology, in quality and consistency of product — an absence of price competition need not be of great concern.

In our view effective competition requires both that prices should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price-product-service packages offered to consumers and customers.

Competition is a process rather than a situation. Nevertheless, whether firms compete is very much a matter of the structure of the markets in which they operate. The elements of market structure which we would stress as needing to be scanned in any case are these:

(1) the number and size distribution of independent sellers, especially the degree of market concentration;

(2) the height of barriers to entry, that is the ease with which new firms may enter and secure a viable market;

(3) the extent to which the products of the industry are characterized by extreme product differentiation and sales promotion;

(4) the character of “vertical relationships” with customers and with suppliers and the extent of vertical integration; and

(5) the nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities.

Of all these elements of market structure, no doubt the most important is (2), the condition of entry. For it is the ease with which firms may enter which establishes the possibilities of market concentration over time; and it is the threat of the entry of a new firm or a new plant into a market which operates as the ultimate regulator of competitive conduct.

1. As also explained in *QCMA*, it follows that the identification of markets must be the essential first step in assessment of present competition and likely competitive effects (at 190). The Tribunal explained:

A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them (if there is no close competition there is of course a monopolistic market). Within the bounds of a market there is substitution - substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive. Let us suppose that the price of one supplier goes up. Then on the demand side buyers may switch their patronage from this firm’s product to another, or from this geographic source of supply to another. As well, on the supply side, sellers can adjust their production plans, substituting one product for another in their output mix, or substituting one geographic source of supply for another. Whether such substitution is feasible or likely depends ultimately on customer attitudes, technology, distance, and cost and price incentives.

1. As discussed further below, while the concept of a market is well understood, the identification of markets may involve a fact-intensive exercise (*Air New Zealand Ltd v Australian Competition and Consumer Commission* (2017) 262 CLR 207 (***Air New Zealand***) at [39] per Nettle J) and the boundaries of markets may be blurred and overlap with other markets (*Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 (***Queensland Wire***) at 196 per Deane J; *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 at [68] per McHugh ACJ, Gummow, Callinan and Heydon JJ). Recently, in *Australian Competition and Consumer Commission v Flight Centre Travel Group Pty Ltd* (2016) 261 CLR 203 (***Flight Centre***), Kiefel and Gageler JJ summarised the necessary factual and conceptual enquiry as follows (at [69], citations omitted):

…Because “the economy is not divided into an identifiable number of discrete markets into one or other of which all trading activities can be neatly fitted", the identification and definition of a market for particular services will often involve "value judgments about which there is some room for legitimate differences of opinion". Identifying a market and defining its dimensions is "a focusing process", requiring selection of "what emerges as the clearest picture of the relevant competitive process in the light of commercial reality and the purposes of the law". The process is "to be undertaken with a view to assessing whether the substantive criteria for the particular contravention in issue are satisfied, in the commercial context the subject of analysis". "The elaborateness of the exercise should be tailored to the conduct at issue and the statutory terms governing breach". Market definition is in that sense purposive or instrumental or functional.

1. The prohibition in section 50 uses the conditional (or hypothetical) future tense: the prohibition applies if the acquisition would have the effect or would be likely to have the effect of substantially lessening competition. The test is in relevantly the same form as sections 45 and 47 and, since 6 November 2017, section 46. It is well settled that the test requires a comparison between the nature and extent of competition in any market potentially affected by the acquisition in the future with the acquisition and without the acquisition: see, in the context of s 47, *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* (1982) 64 FLR 238 at 259-260 per Smithers J and *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* (2000) ATPR 41-752 (***Stirling Harbour (2000) ATPR 41-752***) at [113] per French J (approved on appeal at *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* (2000) ATPR 41-783 (***Stirling Harbour (2000) ATPR 41-783***) at [12] per Burchett and Hely JJ), and followed in the context of s 50 in *Australian Gas Light Company v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317 (***AGL No 3***) at [352] per French J and *Australian Competition and Consumer Commission v Metcash Trading Ltd* (2011) 282 ALR 464 (***Metcash 282 ALR 464***) at [130] and [343] per Emmett J (upheld on appeal in *Australian Competition and Consumer Commission v Metcash Trading Ltd* (2011) 198 FCR 297 (***Metcash 198 FCR 297***)).
2. The word “substantially” as used in the section is imprecise. However, the Courts have consistently said that, in each of sections 45, 47 and 50, the word does not connote a large or weighty lessening of competition, but one that is “real or of substance” and thereby meaningful and relevant to the competitive process: *Stirling Harbour* (2000) ATPR 41-752 at [114] per French J (approved on appeal at *Stirling Harbour* (2000) ATPR 41-783 at [13] per Burchett and Hely JJ); *AGL (No 3)* at [351] per French J; *Rural Press Ltd v ACCC* (2003) 216 CLR 53 (***Rural Press***) at [41] per Gummow, Hayne and Heydon JJ. The primary judge adopted that meaning and there is no challenge to his Honour’s approach.
3. The word “likely” is capable of more than one meaning. As discussed further below, it can mean more probable than not or it can mean a possibility that is real as opposed to remote. In the present case, the primary judge adopted the latter meaning. That aspect of his Honour’s reasons is the subject of challenge in this appeal, and is considered below.

# MARKET DEFINITION ISSUES

## (Pacific National grounds of cross-appeal 1 to 6; Aurizon grounds of cross-appeal 5)

## D.1 Primary judge’s findings

1. The primary judge determined (at [371], [413] and [414]) that the relevant markets in which to assess the effects on competition of the acquisition were:
	1. separate markets for the supply of rail linehaul services on the North-South corridor and the East-West corridor; or
	2. a single market for the supply of rail linehaul services on the North-South and the East-West corridors,

in each case for the transport of intermodal freight over long distances to freight owners and freight forwarders for whom neither road services nor sea services provides an effective substitute for rail linehaul services. As mentioned earlier, we will refer to those markets as the interstate rail linehaul markets. The markets so defined relate to a subset of users of rail linehaul services – users for whom neither road services nor sea services provided an effective substitute. Such customers may be referred to as “captive” customers. The primary judge considered that the transport of bulk steel by rail occurred in a separate market (at [520]–[529]) and there is no challenge to that finding.

1. There was no dispute between the parties that a market might be defined by a subset of customers, being customers for whom substitution possibilities differed from other customers. As the primary judge observed (at [111]), various regulatory guidelines in Australia and overseas confirm that market definition may be appropriately undertaken by reference to the identity or characteristics of captive customers if two conditions are satisfied: first, that the suppliers are able to identify who is a captive customer; second, the suppliers are able to prevent resale or arbitrage between the non-captive customers and the captive customers: see the ACCC’s Merger Guidelines (November 2008, but updated to include the Harper reforms) at [4.36], the Merger Assessment Guidelines (UK) jointly published by the Competition Commission and the Office of Fair Trading (September 2010) at [5.2.28] to [5.2.30], and the Horizontal Merger Guidelines (US) jointly published by the US Department of Justice and the Federal Trade Commission (August 2010) at sections 3 and 4.1.4. With respect to the underlying economic theory, the primary judge referred to a paper by Hausman J, Leonard G and Vellturo C titled “Market Definition Under Price Discrimination” (1996) 64 Antitrust Law Journal 367 at 369 and a paper by Baker JB titled “Market Definition: An Analytical Overview” (2007) 74 Antitrust Law Journal 129 at 151. Both papers explained that, for such a market to exist, it must be possible for the suppliers to be able to price discriminate between their customers, charging higher prices to captive customers in comparison to non-captive customers for the same service. The ability to price discriminate effectively required that the two conditions referred to above be satisfied: that the supplier is able to identify the customers to whom prices can be increased (which can be referred to as the “identification condition”) and that the product or service in question could not be profitably arbitraged between customers (which can be referred to as the “arbitrage” condition).
2. In the present case, the primary judge made the following findings.
3. First, his Honour found that there are some freight owners requiring transport of intermodal freight serviced by interstate rail linehaul services and for whom road services and sea services do not provide an effective substitute (at [238]–[300] in respect of North-South rail linehaul services and at [313]-[321] in respect of East-West rail linehaul services).
4. Second, his Honour found (at [377] and [378]) that the rates for the relevant interstate rail linehaul services have been frequently negotiated between Pacific National or Aurizon and their customer (the freight forwarder or freight owner to whom the services are supplied). The result of the negotiations is that rates may vary between freight forwarders and between the freight owners (even between freight owners using the same freight forwarder) and among the individual freight tasks of a particular freight owner. Consequently, price differentiation between customers is not unusual and price increases (or lesser discounts) may be targeted at individual customers.
5. Third, his Honour accepted the evidence of Dr Philip Williams that economic bargaining theory helped explain the manner in which negotiations for the supply of interstate rail linehaul services may occur (at [379]–[385]). Dr Williams explained that economic theory considers such negotiations as involving a bargaining over surplus. The “surplus” is the extra value generated by an activity compared to not engaging in that activity, net of any extra costs associated with the activity. Where a customer has a choice between using rail linehaul services and road services, the surplus available to them from using road services will constrain their negotiations with a supplier of rail linehaul services: that supplier must offer terms that at least leave the customer with the same surplus they could achieve by using road services, or else the customer will use road services instead. Where road services generate a particularly high surplus, it may be difficult or impossible for a supplier of rail linehaul services to negotiate terms that provide a comparable surplus to that available by using road services. This may prevent the supplier of rail linehaul services from reaching a bargain with the customer, and may also mean that the availability of rail linehaul services exerts little or no constraint on the supplier of road services when dealing with that customer. The same applies, in reverse, where rail linehaul services generate a particularly high surplus. Where a customer’s surplus from rail linehaul services and road services is comparable, the suppliers of each service will be closely constrained by each other. Dr Williams identified several users of interstate rail linehaul services on the North-South and East-West routes for whom neither road services nor sea services provided an effective substitute. The primary judge accepted that evidence.
6. Fourth, the primary judge did not accept that interstate rail linehaul markets for supply to captive customers could exist only if the two preconditions stated by Pacific National existed (at [464]). As this aspect of his Honour’s reasoning is central to the cross-appeals on market definition, it is helpful to reproduce the paragraphs in full:

463 I accept that the ability of providers of North-South Rail Services, East-West Rail Services and Queensland Rail Services (collectively or partly, Rail Services), which I have defined in terms of rail linehaul services provided to users who have no relevant substitutes, to be able to identify and negotiate different terms for the supply of services to the relevant users is relevant to assessing the extent to which the ART acquisition and provisions of the TSS are likely to substantially lessen competition in the relevant markets.

464 But the proposition that a market may be defined by reference to a subset of customers only when PN's two theoretical preconditions for price discrimination are satisfied may be going too far. A market is an area of close competition or a field of rivalry between firms. It is a field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive. Moreover, as I have already explained, market definition is purposive. It is undertaken to facilitate the analysis of the conduct at issue, and the potential harm said to flow from it. As I have said based on the case law, market definition is therefore a focusing process, which involves value judgments about which there is some room for legitimate differences of opinion. And the same facts may well give rise to the identification of more than one market. In that context I am not necessarily required to satisfy myself of particular preconditions, such as those identified by PN, before identifying a market by reference to a particular subset of customers.

465 Now PN's preconditions may be justified as a matter of high economic theory, but there is no requirement that I necessarily need be satisfied of those preconditions in order to define markets by reference to a subset of customers in the present proceeding.

1. It is important to have close regard to the first of the two preconditions stated by Pacific National, which was not accepted by the primary judge. The first precondition was not merely that suppliers are able to identify and target captive customers (which is an accepted condition in the competition regulatory guidelines referred to above); it is that for anti-competitive price discrimination to be profitable, it must be “successful in a large percentage of cases” and be capable of implementation “with a high degree of accuracy” (see at [447] and [448]). Pacific National argued at trial (and in this appeal) that this requirement was particularly necessary in industries such as rail linehaul where fixed costs are high (as a percentage of total costs) and so an attempted price increase that fails will result in the loss of the customer and a relatively large loss of margin.
2. In relation to Pacific National’s ability to price discriminate between captive and non-captive customers, the primary judge found:
	1. (at [471]) Pacific National prices rail linehaul services for intermodal freight by reference to a range of different rate cards, with different rate cards offered to different customers depending on the volume of freight to be transported, and in some cases the nature of the customer’s business (for example, removalists or customers transporting automotive and/or express freight).
	2. (at [472]) For some customers, Pacific National enters into a separate rail haulage agreement, such that a customer is supplied pursuant to negotiated terms and not solely pursuant to a rate card and Pacific National’s standard terms. Pricing under rail haulage agreements can be further adjusted by the use of commodity rate agreements. The discount under the commodity rate agreement is referred to as a “commodity rate”. When Pacific National offers to enter into a commodity rate agreement with a freight forwarder, the commodity rates it offers are specific to the particular work that the freight forwarder is seeking to win, that is, specific to the particular freight owner, routes and freight the subject of the particular opportunity.
	3. (at [476]) Significant information is disclosed to Pacific National by a freight forwarder seeking a commodity rate including the identity of the freight owner; the characteristics of the relevant freight task (including the route and the volume, weight and nature of the freight to be transported); whether the freight task is currently or may in future be supplied by an alternative transport mode; and the level of competition in relation to the freight task.
	4. (at [477]) Pacific National makes a decision as to whether and what commodity rate it will apply in relation to a particular freight task having regard to the information provided by the freight forwarder. A key basis on which Pacific National offers, or declines to offer, commodity rates is Pacific National’s assessment of whether such rates are necessary in order for the freight forwarder to win the work in competition with Aurizon or SCT.
	5. (at [478]) The commodity rates granted by Pacific National are highly tailored.
	6. (at [479]) The fact that Pacific National can and does tailor its pricing to particular freight owners and freight tasks demonstrates that Pacific National has the ability to adjust its pricing to reflect the strength of the competitive constraints it faces in relation to the supply of particular rail linehaul services for a particular freight owner. It can now and may in the future be able to grant lower discounts, withhold discounts altogether, or increase prices where freight owners or freight forwarders acting on their behalf have less compelling outside options available to them, including for those freight owners who have no effective substitute for the use of rail linehaul services.
	7. (at 483) Pacific National is well placed to apply its own information and judgment in the pricing process. It is a well-experienced operator on each of the interstate routes and has familiarity with the demand for rail linehaul services on those routes and the nature of the businesses of many, if not all, of the users of those services.
	8. (at [484]) Pacific National’s own internal documents evidence the importance it places on understanding the commercial and competitive environment that influences the demand for rail linehaul services, including the particular circumstances of individual freight owners, as well as freight forwarders.
	9. (at [485]) The evidence shows that the information available to Pacific National is sufficient to enable it to tailor prices in response to the competitive environment it faces. Pacific National may not be able to tailor its prices perfectly to match its customers’ willingness to pay, or be able in all cases to tailor its prices to customers without risk of pricing higher than a customer will tolerate and losing the customer, or pricing lower than a customer would tolerate and forgoing margin. But Pacific National can and does engage in significant tailoring of its prices, notwithstanding that it lacks perfect information, faces uncertainty, and cannot perfectly tailor its prices to match its customers’ willingness to pay.
3. The primary judge concluded (at [492]) that the conditions for competition in the supply of interstate rail linehaul services to captive customers are different to those concerning supply to other freight owners and freight forwarders (who are not captive), such that the potential harm from the acquisition arises for the captive customers in a way that it would not arise for non-captive customers. His Honour determined that, for the purposes of market definition, no further inquiry into Pacific National’s preconditions is necessary or desirable.

## D.2 Contentions of the respondents

1. By their cross-appeals, the respondents contend that the primary judge erred in finding that markets existed for the supply of interstate rail linehaul services for the transport of intermodal freight over long distances to freight owners and freight forwarders for whom neither road services nor sea services provided an effective substitute for rail linehaul services.
2. The respondents’ 6 grounds of cross-appeal on market definition were expressed in ways that appeared to overlap. Further, the respondents’ submissions did not always articulate the differences between the various grounds. Nevertheless, the grounds and submissions can be distilled into the following contentions (which we will label as 1 to 5 for convenience):
	1. Contention 1 is that the primary judge erred, as a matter of law, in concluding that it was unnecessary, in order to find a market for supply of rail linehaul services to captive customers, to find that Pacific National was able to identify the captive customers “with a high degree of accuracy”.
	2. Contention 2 is that the primary judge erred in failing to find, as a matter of fact, that Pacific National was not able to identify captive customers “with a high degree of accuracy” and therefore would be unable to engage in price discrimination.
	3. Contention 3 is that the primary judge erred in finding that Pacific National can now, and could in the future, grant lower discounts, withhold discounts, or increase prices to captive customers.
	4. Contention 4 is that the primary judge erred in relying on Dr Williams’ evidence concerning bargaining theory, because a predicate of bargaining theory is that all parties know the surplus likely to be created by all possible deals and that predicate was not able to be established in this case.
	5. Contention 5 is that the primary judge erred in making specific factual findings, set out below.
3. In relation to contention 1, the respondents argued that the primary judge erred at [464] in reasoning that, because market definition is purposive and can involve value judgements and give rise to identification of more than one market, it was unnecessary to be satisfied of the “identification” condition. The respondents submitted that the purposive nature of market definition means no more than that the process is undertaken with a view to assessing whether the substantive criteria for the particular contravention in issue are satisfied, in the commercial context that is the subject of analysis: *Flight Centre* at[69] per Kiefel and Gageler JJ). It does not abrogate the need for analysis in accordance with economic principle: *Australian Competition and Consumer Commission v Liquorland (Australia) Pty Ltd* [2006] ATPR 42-123at [438] per Allsop J. A market is essentially an economic concept: *Air New Zealand* at [41] per Nettle J and at [59], [63], [65] per Gordon J; *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Limited* (2015) 236 FCR 78 at [136]. The task of defining it must always be conducted in accordance with economic principle and based on commercial reality and real world facts: *Boral Besser Masonry Ltd v Australian Competition & Consumer Commission* (2003) 215 CLR 374 (***Boral***) at [247] per McHugh J; *Air New Zealand* [60] per Gordon J. The fact that market definition can involve value judgements and (in some cases) give rise to identification of more than one market is a product of the application of economic principle and not a basis for declining to apply it.
4. The respondents submitted that the test applied by the primary judge for market definition, at [492], was whether there existed rail linehaul customers for whom transport by road or sea was not an effective substitute. They submitted that that test was wrong. The existence of such customers does not define a market unless the supplier is able to price discriminate in respect of such customers, which requires the customers to be identifiable by the supplier.
5. In relation to contention 2, the respondents submitted that the findings of the primary judge only supported the conclusion that Pacific National can and does charge different prices to different customers (for the same service). However, that finding does not support a further finding that Pacific National is able to target captive customers (contrary to the primary judge’s reasons at [479]). A supplier may charge different prices for reasons that have nothing to do with anti-competitive price discrimination such as variations in the cost of serving different customers, the volume and/or term of the customer’s contract, and demand and the supplier’s capacity at the particular time.
6. The respondents argued that in an industry with high fixed costs and low marginal costs, such as rail linehaul, price discrimination must be successful in a high percentage of cases for it to be profitable (because the loss of a customer results in a large loss of profit margin, measured as the difference between revenue and marginal cost). It would therefore be necessary for the supplier to be able to identify and target captive customers with a high degree of accuracy, and not have a “rough” understanding as opined by Dr Williams, which evidence was relied on by the primary judge (at [486]).
7. The respondents further argued that the primary judge erred in finding that Pacific National received sufficient information from freight forwarders to enable it to identify captive customers by exercising its commercial judgement (at [482]-[484]) and making educated guesses (at [486]). They submitted that the information available to Pacific National would provide limited insight into its customers’ willingness to use different modes of transport for the following reasons:
	1. First, freight owners’ willingness to use different modes of transport is based on a range of considerations, the identity of which vary from freight owner to freight owner, and the information that freight forwarders supply to Pacific National does not enable Pacific National to determine the mix of considerations that any particular freight owner takes into account.
	2. Second, according to Dr Williams’ analysis (which the trial judge accepted), for much of the cargo that some identified captive customers carry on rail, road services are a substitute. This meant that simply targeting these users with higher prices would fail, because it would result in most of their freight moving to road. To be profitable, Pacific National would need to identify the particular portion of the users’ freight for which road is not a substitute, and target only that portion of freight with higher prices. The respondents submitted that the primary judge did not undertake that analysis.
	3. Third, many freight owners transport a range of products and their willingness to use rail may vary considerably between the products that are transported. To engage in price discrimination of the type alleged, Pacific National would need to be able to estimate reliably not only the willingness of freight owners to pay for rail services for a particular product, but the combination of products that the freight owner transports.
	4. Fourth, commodity rate agreements have a term of up to 12 months and merely give freight owners the option of Pacific National transporting their cargo by rail at a particular price. The freight owner can, at any time, move its cargo to road (or sea). Accordingly, for price discrimination to be effective, Pacific National would need to be able to estimate reliably users’ willingness to use rail not only at the commencement of the commodity rate agreement, but throughout its (up to 12 month) term. The respondents submitted that the notion that Pacific National could *ex ante* reliably predict a user’s willingness to use rail services for the entire term of the commodity rate agreement has an air of commercial unreality.
	5. Fifth, freight owners’ willingness to use rail services is idiosyncratic. Freight owners that transport similar products on the same routes may take different matters into account when deciding whether to use rail services, and may ascribe different value to the matters they do take into account.
	6. Sixth, even if Pacific National could form a reliable view that a particular freight owner considered road (or sea) services to be a limited substitute for rail services, to engage profitably in price discrimination, Pacific National would need also to know how much the freight owner is willing to pay for rail services.
8. In relation to contention 3, the respondents submitted that a conclusion that substantial market power could be exercised by controlling the level of a discount off a standard rate necessarily implies that the standard rate itself involves an exercise of substantial market power. The respondents submitted that that was not put and not found and is contrary to unchallenged evidence and the commercial reality of the use of standard rates by Pacific National and its users. They further submitted that:
	1. There was evidence that road linehaul has very low barriers to entry. Consequently, the supply of road linehaul services is highly competitive.
	2. The evidence disclosed that for many, if not most, freight owners, road is a substitute for rail.
	3. Consequently, when Pacific National is setting prices for those customers - including its standard rates - there was nothing to suggest that Pacific National was other than constrained by road prices.
	4. Given that road linehaul prices are highly competitive, in the absence of evidence to the contrary, Pacific National’s standard rates can also be inferred to be competitive.
	5. Put differently, it could be inferred that Pacific National does not have substantial market power when it is setting its standard rates. If offering no, or lower, discounts would not involve an exercise of substantial market power, it would not constitute a substantial lessening of competition.
9. In relation to contention 4, the respondents referred to Dr Williams’ evidence (at paragraph 54(a) of Dr Williams report) that according to bargaining theory, if all parties know the surplus that is likely to be generated by all possible deals, parties will always bargain to an economically-efficient solution and each party must receive at least its best outside option. They argued that it followed that a predicate of bargaining theory is that all parties know the surplus likely to be created by all possible deals. The respondents submitted that that predicate was not established on the facts of the case and therefore the theory was inapplicable.
10. In relation to contention 5, the respondents submitted that the following factual findings made by the primary judge were erroneous:
	1. First, the trial judge found (at [466]) that the level of discount that freight owners receive from Pacific National’s standard rates varies depending on the competitive options the freight owners have available to them but there was no evidence to support that finding.
	2. Secondly, the trial judge found (at [479], [480], [485]-[487] and [1339]) that Pacific National can now, and may in the future be able to, grant lower discounts, withhold discounts altogether, or increase prices where freight owners or freight forwarders acting on their behalf have less compelling outside options. The respondents submitted that that finding was a conclusion apparently based on the fact that Pacific National can and does charge different prices to different customers and/or Pacific National’s ability to make “educated guesses” about users’ willingness to use rail services rather than road or sea services, neither of which supported the finding.
	3. Thirdly, the trial judge found (at [476]) that, when a freight forwarder seeks to negotiate a commodity rate agreement with Pacific National, the freight forwarder discloses to Pacific National the “level of competition” in relation to the freight task. The respondents submitted that the trial judge nowhere explained what disclosing the “level of competition” meant and, to the extent that it meant users disclosed to Pacific National what they considered their outside options to be, it was an error because there was no evidence to support it.
	4. Fourthly, the trial judge found (at [477]) that, when deciding whether and what commodity rate it will apply in relation to a freight task, Pacific National considers: (i) the costs incurred by an alternative supplier of rail linehaul services, and (ii) the freight owner’s willingness to pay for rail linehaul services. The respondents submitted that the evidence did not support that finding.
11. For the reasons set out below, we reject each of the respondents’ grounds of appeal and contentions on market definition.

## D.3 Contentions of the ACCC

1. The ACCC advanced 2 primary contentions in response.
2. First, the ACCC contended that there was no need for the primary judge to satisfy himself of what the respondents call the “identification” condition in finding that markets existed for the supply of interstate rail linehaul services for the transport of intermodal freight over long distances to “captive” freight owners and freight forwarders. The ACCC argued that it was not necessary to satisfy the “identification” condition in circumstances where the evidence showed that price discrimination is currently being practised in the proposed market. The ACCC submitted that the primary judge found that Pacific National was tailoring its prices for rail services by reference to the competitive constraints Pacific National faced (or did not face) in supplying rail services to a particular user for a particular freight task. In that regard, the ACCC’s submissions supported the reasoning of the primary judge, which has been summarised above and is considered below. The ACCC also referred to the underlying evidence that was before the primary judge, which is also considered below.
3. In respect of its first contention, the ACCC submitted that the respondents’ submissions misunderstand the economic theory underlying the Hausman article on which they rely. The article recognises that a key question for defining a “price discrimination” market is whether a hypothetical monopolist could profitably price discriminate. However, the ACCC submitted that the article does not (nor could it) purport to mandate a methodology by which that question must be answered. There may be many approaches to establishing the feasibility of such discrimination. One approach is to demonstrate that price discrimination is currently being practised in the proposed market. On the other hand, where such discrimination is not currently being practised, the question whether it is feasible might be determined in a theoretical way, including by considering the so-called identification condition. That is to say, where price discrimination is not currently being practised, consideration may be given to conditions which predict whether price discrimination could, in theory, be practised.
4. The ACCC’s second contention, put in the alternative, is that if and to the extent that it was necessary for the primary judge to be satisfied of the identification condition, that satisfaction is to be established in a pragmatic “real world” business-like fashion, not in an overly exacting or theoretical textbook sense, and that the trial judge’s findings amount to such satisfaction. In particular, the ACCC submitted that it was not necessary for Pacific National to have near complete information about a freight owner’s willingness to pay in order for Pacific National to be able to tailor its prices to reflect a freight owner’s competitive options.
5. For the reasons set out below, we accept the ACCC’s second contention, but not its first contention. In our view, the first contention fails to explain how the practice of price discrimination by a business can be observed or identified as a matter of fact if customers with differing competitive options cannot be observed or identified. The relevant principle is uncontroversial and, as noted earlier, is stated in the ACCC’s merger guidelines. Expressed in the language of the Hausman article, a key question for defining a “price discrimination” market is whether a hypothetical monopolist could profitably price discriminate between customers according to their individual competitive options. It may be accepted that that ability could be proved in a number of ways, including by evidence of the fact of relevant discrimination. However, proof of the fact of relevant discrimination necessarily involves proof that the supplier is able to identify, or at least make informed guesses about, customers who have more limited competitive options. It is an obvious business fact that a supplier is not able to price discriminate between customers according to their individual competitive options unless the supplier is able to make informed assessments of such options.

## D.4 Consideration of the respondents’ contentions

1. As already noted, there was no dispute between the parties that the evidence showed that Pacific National’s pricing framework resulted in significantly differentiated prices between categories of customers and between individual customers. However, the fact of differentiated prices may have no particular implications for market definition. As the respondents submitted, price differentiation will often exist where customers have heterogeneous demand causing differences in the economic cost of supply. The differing demand factors may relate to the volume, weight or type of freight to be carried and the route, time, frequency and urgency of the transport service required. Those factors do not reflect competitive constraints and therefore the resulting differences in prices do not inform market definition.
2. In industrial economics, the phrase “price discrimination” has a defined meaning, to distinguish it from mere price differentiation. As Dr Williams stated in the Joint Statement of the economic expert witnesses, a firm engages in price discrimination if it charges different categories of customer different unit prices for the same service. The essential point is that price discrimination refers to differences in price that reflect differences in competitive constraints in supplying different customers. The respondents submitted that to observe price differentiation is not necessarily to observe price discrimination. So much may be accepted. The respondents’ further submission, that the available evidence did not permit the primary judge to find price discrimination, cannot be accepted for the reasons discussed below.

### Contention 1

1. The respondents’ first contention is that the primary judge erred, as a matter of law, in concluding that it was unnecessary, in order to find a market for supply of interstate rail linehaul services to captive customers, to find that Pacific National was able to identify the captive customers “with a high degree of accuracy”. In our view, the primary judge did not err. The respondents’ contention is based on a misstatement of the primary judge’s reasons, and underpinning the contention is an incorrect view that, for the purposes of establishing a contravention of s 50 of the Act, markets must be proved with a high degree of empirical certainty.
2. Contrary to the respondents’ argument, the primary judge did not reason (at [464]) that, because market definition is purposive and can involve value judgements and give rise to identification of more than one market, it was unnecessary to be satisfied of the “identification” condition. Rather, the primary judge rejected the identification condition stipulated by Pacific National, namely that suppliers must be able to identify and target captive customers with a high degree of accuracy (at [448]). What was rejected was the degree of empirical certainty sought to be imposed by Pacific National.
3. The primary judge accepted the economic theory underpinning the existence of markets defined by a subset of customers who have more limited substitution options compared to other customers. That is clear from his Honour’s discussion of the theory (at [100]-[116]). His Honour explained the concept of price discrimination (at [102]), being the incentive and ability to charge customers different prices depending on their willingness to pay for the product (which is affected by their competitive options). His Honour accepted the two conditions associated with the existence of such markets, the first being that the supplier is able to identify the customers to whom prices can be increased (at [105]). His Honour accepted that the necessity for that condition was obvious because if a supplier could not identify customers who are willing to pay a price above the competitive level, the supplier cannot sensibly price discriminate let alone profitably (at [106]). His Honour also recognised that a supplier’s knowledge of its customers’ competitive options may be less than perfect, and the implications for pricing behaviour in those circumstances (at [114]-[115]).
4. However, his Honour did not accept that it was necessary to find that Pacific National could identify customers for whom road or sea services were not an effective substitute with a high degree of accuracy. Rather, his Honour assessed whether the evidence showed that Pacific National’s pricing structures enabled it to price discriminate in respect of captive customers (for example, at [469]-[475]), and whether Pacific National had sufficient information about its customers in order to engage in such price discrimination effectively (for example, at [476]-[486]). His Honour’s ultimate conclusion was that the conditions for competition in the supply of rail linehaul services to captive customers are different to those for supply to non-captive customers (at [492]), thus defining a separate market for the purposes of applying s 50. The ability of Pacific National to identify captive customers is implicit in his Honour’s conclusion that the conditions for competition in the supply of rail linehaul services to captive customers are different to those for supply to non-captive customers. It is that ability that results in the different conditions for competition.
5. Contrary to the respondents’ submissions, there is nothing erroneous or unorthodox in his Honour’s approach. It is consistent with the policy objectives of the legislation and well-established principles. Two points can be made. First, the application of s 50 to a given acquisition is necessarily an evaluative exercise. The relevant legal standard, whether the acquisition would have, or be likely to have, the effect of substantially lessening competition in a market involves an enquiry into the nature and extent of competition in relevant markets and a hypothetical prediction of the extent to which such competition may be lessened if the acquisition were allowed to proceed (which necessarily requires an evaluation of the means or processes by which competition may be lessened). The degree of lessening that satisfies the legal standard is encapsulated by the word “substantially” which, as observed earlier, is imprecise but has been interpreted as meaning real or of substance, thereby connoting a lessening that is meaningful to the competitive process. Second, the task of defining markets is undertaken for the purpose of applying the legal standard in s 50. As observed by Professor M Brunt in an article that has been referred to many times in the cases, the “market” concept is an instrumental concept designed to assist in the analysis of processes of competition and sources of market power; “market definition is but a tool to facilitate a proper orientation for the analysis of market power and competitive processes – and should be taken only a sufficient distance to achieve the legal decision” (*Market Definition Issues In Australian And New Zealand Trade Practices Litigation* (1990) 18 Australian Business Law Review 86 at 93 and 126-7). Market definition is also an evaluative exercise because its object is to describe, and thereby define, in a given area of trade and commerce the competitive constraints affecting suppliers and acquirers.
6. Underpinning the respondents’ contention is a view that markets must be proved with a high degree of empirical certainty. It can be accepted, as the respondents submitted, that a market is an economic concept and the task of defining it must be conducted in accordance with economic principle and be based on commercial reality and real world facts. However, the Courts have long recognised that because “[t]he economy is not divided into an identifiable number of discrete markets into one or other of which all trading activities can be neatly fitted”, the identification and definition of a market for particular goods or services will often involve “value judgments about which there is some room for legitimate differences of opinion”: *Queensland Wire* at 196. In the present case, the primary judge was required to assess, for the purposes of applying s 50 to the ART acquisition, whether Pacific National was competitively constrained by road linehaul services in respect of its entire business, or whether there was a section of that business in respect of which the competitive constraints differed and Pacific National had greater market power to increase prices (or reduce discounts) such that the area should be considered to be a separate market. Evaluating the evidence before him, the primary judge came to the view that a separate market existed. Of course, there must be a sufficient evidentiary basis for that conclusion, which is considered under the respondents’ further contentions. But there was no legal error in the primary judge’s approach.

## Contentions 2 and 5

1. There is overlap between contentions 2 and 5 and it is convenient to address them together.
2. The respondents’ second contention is that the primary judge erred in failing to find, as a matter of fact, that Pacific National was not able to identify captive customers “with a high degree of accuracy” and therefore would be unable to engage in price discrimination. For the reasons already given, in our view it was not necessary for the primary judge to find that Pacific National was able to identify captive customers with a high degree of accuracy. However, in their submissions, the respondents advanced a broader argument to the effect that the evidence at trial did not support a finding that Pacific National was able to identify and target captive customers with higher prices (or lower discounts). That argument is also taken up in the respondents’ fifth contention.
3. For the reasons that follow, we reject contentions 2 and 5.
4. The respondents do not challenge the primary judge’s findings concerning Pacific National’s pricing structure and the primary judge’s conclusion that Pacific National applies differentiated pricing to many customers using a combination of rate cards, rail haulage agreements and commodity rate agreements. Nor do the respondents challenge the primary judge’s findings concerning individual customers of Pacific National for whom road transport was not an effective substitute. Rather, the respondents challenge the finding that, in negotiating rail haulage agreements and commodity rate agreements, Pacific National has sufficient information about its customers’ competitive options that it can target higher prices (in effect, lower discounts) to those customers for whom road or sea services are not an effective substitute (ie, engage in price discrimination).
5. The thrust of the respondents’ challenge is that the evidence at trial was insufficient to establish that factual finding made by the trial judge. In the course of the four-day appeal, the Court was taken to a sample of the evidence before the primary judge. However, it was not possible for the Court to be taken to, or be referred to, the entirety of the evidence before the primary judge. In those circumstances, the respondents face a significant challenge in demonstrating that the factual findings made by the primary judge were wrong. As observed by Kirby J in *State Rail Authority of NSW v Earthline Constructions Pty Ltd* (1999) 73 ALJR 306 at [90] (in a passage referred to with approval by Gleeson CJ, Gummow J and Kirby J in *Fox v Percy* (2003) 214 CLR 118 at [23]):

The true advantages in fact-finding which the trial judge enjoys include the fact that the judge hears the evidence in its entirety whereas the appellate court is typically taken to selected passages, chosen by the parties so as to advance their respective arguments. The trial judge hears and sees all of the evidence. The evidence is generally presented in a reasonably logical context. It unfolds, usually with a measure of chronological order, as it is given in testimony or tendered in documentary or electronic form. During the trial and adjournments, the judge has the opportunity to reflect on the evidence and to weigh particular elements against the rest of the evidence while the latter is still fresh in mind. A busy appellate court may not have the time or opportunity to read the entire transcript and all of the exhibits. As it seems to me, these are the real reasons for caution on the part of an appellate court where it inclines to conclusions on factual matters different from those reached by the trial judge. These considerations acquire added force where, as in the present case, the trial was a very long one, the exhibits are most numerous, the issues are multiple and the oral and written submissions were detailed and protracted. In such cases, the reasons given by the trial judge, however conscientious he or she may be, may omit attention to peripheral issues. They are designed to explain conclusions to which the judge has been driven by the overall impressions and considerations, some of which may, quite properly, not be expressly specified. (references omitted)

1. Bearing those considerations in mind, we are not satisfied that there is any error in the primary judge’s finding that Pacific National has sufficient information about its customer’s competitive options that it can target higher prices (in effect, lower discounts) to those customers for whom road or sea services are not an effective substitute. We will refer to a sample of the evidence that the Court was taken to:
	1. Mr Andrew Adam, the President of Freight for Pacific National, deposed that Pacific National will agree a commodity rate agreement with a freight forwarder to provide them with rate assistance for a particular tender and Pacific National evaluates the request based on factors that include the incumbent transport provider (which may be road or another rail operator). Mr Adam exhibited a sample spreadsheet created by Pacific National which records requests for commodity rate agreements and contained information about the incumbent transport providers in respect of freight tasks for which commodity rate agreements were sought from Pacific National. This included information as to the type of incumbent transport provider (road or rail) and the percentage of the customer’s freight needs met by the transport provider.
	2. In evidence were a considerable number of emails from freight forwarders to Pacific National containing requests for commodity rate agreements, and internal Pacific National emails considering such requests. Consistently with the evidence of Mr Adam, the freight forwarders requesting a commodity rate agreement identified the incumbent transport supplier of the freight task or the likely competitive supplier (which was commonly Aurizon). Some of the emails provided an indication of the pricing being offered by the competitive transport provider. Some emails also contained Pacific National’s view on the extent to which its current rates were competitive with the likely alternative transport providers.
	3. Mr Ian Strachan, the President of Intermodal at Linfox, gave testimony that, when negotiating a commodity rate agreement with Pacific National, a relevant consideration is the level of competition for the freight task.
2. The primary judge also found (at [484]) that Pacific National’s own internal documents evidence the importance it places on understanding the commercial and competitive environment that influences demand for rail linehaul services. His Honour provided an example of such an internal document, although its contents were redacted for confidentiality. It is not revealing a confidence to observe that the document records, amongst other things, Pacific National’s commercial objective of understanding the key decision-making criteria of freight forwarders and freight owners in selecting the mode of transport.
3. Further, the primary judge found (at [483] that Pacific National is a well-experienced operator on the North-South and East-West corridors and has familiarity with the demand for rail linehaul services on those routes and the nature of the business of many, if not all, of the users of those services. Given the scale of Pacific National’s business, it would be expected that it pays close attention to the commercial activities and decisions, including pricing decisions, of its actual or potential competitors, and makes pricing decisions based on a careful assessment of its customers’ needs and the competitive choices available to them.
4. Giving due regard to the advantages of the primary judge in hearing the totality of the evidence, we are not persuaded that his Honour erred by making findings without a sufficient evidentiary foundation.

### Contention 3

1. The respondents’ third contention is that the primary judge erred in finding that Pacific National can now, and could in the future, grant lower discounts, withhold discounts, or increase prices to captive customers. As noted earlier, the argument was to the effect that it is not possible to exercise market power (ie, price less competitively) by refraining from offering a discount to a standard rate unless the standard rate itself involved an exercise of market power. The respondents argued that that was not put and not found and is contrary to unchallenged evidence and the commercial reality of the use of standard rates by Pacific National and its competitors. The contention was rejected by the primary judge, in our view correctly (at [488]-[491]).
2. In advancing this contention, the respondents do not rely on any economic evidence adduced at the hearing. Rather, they put the argument as a syllogism. As outlined earlier, the steps in the reasoning are that: (i) there was evidence that road linehaul has very low barriers to entry and therefore it should be concluded that the supply of road linehaul services is highly competitive; (ii) the evidence disclosed that for many, if not most, freight owners, road is a substitute for rail; (iii) it follows that, when Pacific National is setting prices for those customers - including its standard rates - there is nothing to suggest that Pacific National was other than constrained by road prices; and (iv) given that road linehaul prices are highly competitive, in the absence of evidence to the contrary, Pacific National’s standard rates can also be inferred to be competitive. In our view, the syllogism suffers from a number of flaws.
3. First, the primary judge did not accept Mr Morton’s hypothesis that Pacific National’s “standing offer”, being its pricing under its rate cards, was set based on road prices (at [431]-[434]). Amongst other things, his Honour observed that Mr Morton acknowledged that he could not prove that that is what Pacific National does and Pacific National did not lead evidence from those responsible for setting Pacific National’s prices as to the validity or otherwise of Mr Morton’s hypothesis. Thus, the starting point for the syllogism breaks down.
4. Second, (at [440]) the primary judge took account of Mr Morton’s evidence that demonstrated that Pacific National’s prices do not reflect its standard tariff, but vary materially below that tariff. The respondents’ use of Pacific National’s standard rates as some kind of benchmark competitive price does not reflect the evidence. The evidence established that, for a large volume of freight carried by Pacific National, prices were set by individual negotiation.
5. In a pricing framework which involves a high proportion of individually negotiated prices, “standard rates” cannot be characterised as competitive or uncompetitive. The primary judge found that Pacific National’s rate cards were a standardised reference point from which discounts were allowed based on the requirements (and no doubt bargaining power) of individual customers. It is meaningless to describe the standard rate, to which a discount is applied, as either competitive or uncompetitive – it is not the applicable price for the customer concerned. For some customers (such as customers who have small quantities of freight to be transported on infrequent occasions), the standard rate may be competitive. For other customers, the standard rate would not be a competitive rate, but nor is it charged. The primary judge found (at [466]) that competition often occurred through Pacific National offering individually-tailored discounts to freight forwarders to win the business of particular freight owners, where the level of discount varied depending on the competitive options those freight owners had available to them - the freight owners with more attractive outside options in negotiation processes were able to extract better discounts. Within that pricing framework, the respondents’ contention is simply inapplicable.

### Contention 4

1. The respondents’ fourth contention was based on Dr Williams’ evidence concerning bargaining theory. The respondents argued that Dr Williams’ evidence showed (at paragraph 54(a) of his report) that a predicate of bargaining theory is that all parties know the surplus likely to be created by all possible deals. The respondents submitted that that predicate was not established on the facts of the case and therefore the theory was inapplicable.
2. The contention is based on a misstatement of Dr Williams’ evidence. At paragraph 54(a) of his report, Dr Williams referred to two points arising from bargaining theory. The first is that, if all parties know the surplus that is likely to be generated by all possible deals, parties will always bargain to an economically-efficient solution. The second is that each party must receive at least its BATNA (best alternative to a negotiated agreement) and may also receive a share in the extra surplus produced once each party has received its BATNA.
3. The respondents’ contention that a predicate of bargaining theory is that all parties know the surplus likely to be created by all possible deals does not follow from either of those points. Dr Williams’ first point is a statement about the economically-efficient solution to the bargaining transaction. The statement is that an economically-efficient outcome will be achieved if the parties know the surplus likely to be generated by all possible deals. However, that does not suggest that bargaining only occurs under that condition. It is simply a statement that the outcome may not be economically-efficient if the parties have imperfect knowledge. Similarly, Dr Williams’ second point is the self-evident proposition that a party will not make a bargain that is less attractive than its next best option. Accordingly, if a customer has the option of transporting freight by road or rail, the customer will not make a bargain with Pacific National for transport by rail that is less attractive than an available road option. It does not follow that bargaining only occurs if both parties know the surplus likely to be created by all possible deals.

## D.6 Conclusion on market definition

1. In conclusion, we reject the respondents’ cross-appeals in so far as they relate to the primary judge’s findings on market definition.

# COMPETITION ISSUES

## (Pacific National ground of cross-appeal 7; Aurizon grounds of cross-appeal 1 to 4; ACCC’s notice of contention grounds 1 and 2)

## E.1 Primary judge’s findings

1. The primary judge’s ultimate finding on the question whether the acquisition would have, or would be likely to have, the effect of substantially lessening competition is stated at [1611] and [1612] as follows:

1611 As to the ACCC's s 50 case, upon my acceptance of the Undertaking which I consider to be part of the future with the ART acquisition, I would reject that case as well.

1612 Now an interesting hypothetical arises as to whether, if I had not accepted the Undertaking, I would have found for the ACCC on its s 50 case. On balance, and not without some hesitation, I would have accepted its case. In the absence of the Undertaking, barriers to entry, real or reasonably perceived, would be heightened, particularly in relation to the supply of North-South Rail Services whether constituting a separate Interstate market or being part of the one Interstate market which also includes East-West Rail Services. On that basis I do not need to concern myself with Aurizon's submission that the ART acquisition would not on any view affect the supply of East-West Rail Services. Now although Qube was not likely to enter in the factual or the counterfactual, the latter with the Terminal Services Subcontract, I could not rule out the realistic commercial chance of another potential new entrant emerging in the relevant timeframe. Further, the potential threat of such emergence could act as a discipline on PN's present behaviour concerning the supply of North-South Rail Services. But given that I have accepted the Undertaking, I do not need to elaborate further. And nor do I need to hypothesise further concerning the effect on any market for rail linehaul services concerning bulk steel if I had not accepted the Undertaking.

1. The following matters are immediately apparent from his Honour’s ultimate finding. First, his Honour found that the acquisition would not contravene s 50 because of the Undertaking offered by Pacific National which his Honour indicated he would accept. Second, it followed that his Honour’s assessment of the competitive effect of the acquisition in the absence of the Undertaking was, as his Honour said, hypothetical. Third, because the assessment in the absence of the Undertaking was hypothetical, his Honour did not elaborate on his ultimate finding. Fourth, his Honour’s assessment that, in the absence of the Undertaking, the acquisition would have contravened s 50 was “on balance, and not without some hesitation”. Fifth, the anti-competitive effect was focussed on the North-South rail linehaul market, whether defined as a separate market or part of a broader interstate rail linehaul market (which included the East-West corridor). Sixth, his Honour found that, in the absence of the Undertaking, s 50 would have been contravened because barriers to entry in the supply of North-South rail linehaul services, real or reasonably perceived, would be heightened by the acquisition. In that respect, his Honour concluded that he could not rule out the realistic commercial chance of another potential new entrant emerging in the relevant timeframe, and the potential threat of such emergence could act as a discipline on Pacific National's present behaviour concerning the supply of North-South rail linehaul services.
2. The following summary of the primary judge’s reasons identifies the principal legal conclusions and factual findings relevant to the grounds of cross-appeal on the question of the competitive effects of the acquisition.

### Meaning of likely

1. The primary judge discussed the key legal principles concerning the statutory test in s 50 at [1253] to [1279]. Most of those principles are uncontroversial on this appeal and have been referred to in section C above. In relation to the meaning of the word “likely”, the primary judge stated the following conclusions:

1274 First, the phrase "likely to have the effect" of a substantial lessening of competition requires only a real chance. There is no compelling reason why a test that is appropriate to determine the likely effect on competition in the context of s 45 should not also apply to s 50.

1275 Second, the standard of a real chance implicit in the concept of likely is to be understood at a level which is commercially relevant and meaningful. I am concerned with real commercial likelihoods, not with mere possibilities, however plausible they might be.

1276 Third, and importantly, the subject of the likelihood or real chance is singular in the sense that s 50 refers to the likely effect of substantially lessening competition and thus ultimately poses one question involving one evaluative judgment. In the present case, the application of s 50 turns on my satisfaction in relation to this single evaluative judgment, even though the exercise of determining whether the competitive effects of a transaction amount to a substantial lessening of competition involves multiple constituent inquiries, namely, identifying the futures with and without the transaction, identifying the effect on competition of each, and then making the relevant comparison leading to answering the one question that I have identified.

1277 In this regard, it is a distraction to ask what standards of proof apply at each of the atomised constituent steps involved in assessing competitive effects. I am inclined to follow Yates J's approach in *Metcash*. Yates J identified the potential problem with atomising s 50 in the following terms: "a counterfactual is no more than an element of [the] calculus … [I]t has no separate existence or purpose … other than as an aid to detect the existence and extent of change in the process of competition" (at [228]). That led his Honour to doubt the adoption of different legal standards for individual elements of the test because to do so could obliterate the statutory standard, which posed one question involving one evaluative judgment with that one evaluative judgment to be assessed on the basis of a real chance.

1278 Now in this context, the ACCC is going too far in saying that it can necessarily establish a contravention of s 50 by proof of a real chance of the existence of a counterfactual and a real chance of a substantial lessening of competition in the sense that one real chance is compounded with another. Indeed, to apply s 50 on the basis of a real chance of a substantial lessening of competition built upon a real chance in the counterfactual may, depending upon how one does it, be erroneous. In doing so I would not have directed myself to the single statutory question and may have inappropriately reduced the probability inherent in the real chance to be assessed for the ultimate question.

1279 Now I accept that the ACCC does not necessarily need to prove its counterfactual on the balance of probabilities. But the magnitude of any real chance that it demonstrates in respect of the alleged future states will practically and ultimately affect the magnitude of the real chance that it is able to demonstrate in respect of the alleged effects on competition and whether that rises to the requisite level of a likely effect of substantially lessening competition. Considering both the counterfactual and the alleged competitive effects together, the evaluation required compositely is whether a real commercial likelihood of a substantial lessening of competition has been shown.

### The ACCC’s case at trial

1. At [1280] to [1348], the primary judge set out the arguments advanced by the ACCC as to why and how the acquisition of the ART would be likely to have the effect of substantially lessening competition. The primary judge summarised the arguments as follows (at [1345] and [1346]):

1345 In summary, the ACCC says that comparing the future state of competition with and without the ART acquisition demonstrates that the likely effect of the ART acquisition is that:

(a) PN would have the ability and incentive, or perceived ability and incentive, to discriminate against third parties in favour of its own operations with respect to access to the BMUT;

(b) it would materially raise barriers to entry for the supply of North-South and/or East-West Rail Services for any party contemplating entry into the market(s) for the provision of these services; and

(c) as a result, it would be unlikely that Qube or any other party would commence supplying North-South or East-West Rail Services.

1346 It says that these factors would combine to materially reduce the competitive constraint on PN in the Interstate market(s) for the foreseeable future.

1. The ACCC did not suggest that there was any inaccuracy in that summary of its case. It is a case built on three asserted cumulative effects of the acquisition: that Pacific National would have the ability and incentive to discriminate against third party users of the Brisbane Multi User Terminal within the ART; that that would increase barriers to entry to the North-South rail linehaul market (the ACCC also relying on the East-West rail linehaul market); and that, as a result, it would be unlikely that Qube or any other person would enter that market. The ACCC argued that those effects gave rise to a contravention of s 50. It is convenient to consider the primary judge’s findings on each of those asserted effects. Before doing so, the primary judge’s findings with respect to alternative terminals to the ART should be noted.

### Alternative terminals to the ART

1. The primary judge found (at [538]) that the ART is the only terminal which provides a viable option in the short to medium term (three to five years) to support the provision of, relevantly, North-South rail linehaul services by a new entrant on the scale required to conduct a sustainable business. There was no challenge to that finding on the appeal.
2. In terms of alternatives, the primary judge found (at [559]) that, for a potential new entrant into the interstate rail linehaul market, the only potential alternatives in respect of standard-gauge accessible terminals are the SCT-owned Bromelton terminal, the Brisbane Multi-modal Terminal located at the Port of Brisbane and a new (as yet unbuilt) terminal. The primary judge found (at [560]) that none of the alternatives to the ART would realistically be available to a new entrant to use in the next three to five years and offer comparable benefits to those of the ART.
3. The building of a new rail terminal in connection with the Inland Rail Project is relevant to the respondents’ cross-appeals. On that topic, the primary judge made the following findings:
	1. (at [629]) The Inland Rail Project involves an upgrade of existing railway lines and construction of new railway lines for freight between Melbourne and Brisbane. It is currently proposed to enter Queensland at a point west of Toowoomba and approach Brisbane from the west, joining the existing railway line just south of the ART.
	2. (at [630]) The most cogent evidence for when the Queensland parts of the Inland Rail Project will be completed came from Mr Keyte (the chief operating officer of the Port of Brisbane), who estimated that it would take ten years from the date of trial, i.e. the end of 2028.
	3. (at [631]) As a result of the Inland Rail Project having been approved, it is likely that new terminals will be constructed in South-East Queensland, which could potentially include a terminal constructed by the ARTC at Bromelton. No such terminals are likely to be built within the short to medium term of three to five years.
	4. (at [632]) Mr Keyte gave evidence about various limitations on the ART itself, including road congestion and ultimately capacity limitations, and that he did not expect the ART to have a life expectancy beyond 10 years from the date of trial. Further, he expected to see another terminal or terminals being developed during the construction phase of the Inland Rail Project, whether that be by the ARTC at Bromelton, Greenbank or Ebenezer.
4. The primary judge returned to the building of a new rail terminal as a result of the Inland Rail Project at [1364], finding that a new terminal is likely to be built in no later than 10 years. His Honour observed that the ARTC has already acquired land at Bromelton to build such a terminal and the ARTC’s proposed terminal at Bromelton may be completed in as little as 3 to 5 years.
5. Accordingly, the primary judge found (at [640]) that he cannot be satisfied that any potential alternative terminals to the ART would be or would be likely to be available for a potential new entrant to commence a sustainable business providing rail linehaul services in the short to medium term (by which his Honour meant in the next 3 to 5 years).

### Ability and incentive to discriminate

1. The primary judge set out his findings with respect to Pacific National’s future ability and incentive to discriminate against new entrants, by reason of both the Terminal Services Subcontract (the legality of which is no longer challenged in this appeal) and the ART acquisition, at [775] to [937]. There was no challenge to those findings on the appeal.
2. At [827], the primary judge concluded that Pacific National would not have a meaningful ability to discriminate against new entrants if the ART acquisition does not occur and it is not the owner of the ART, even if it is a party to the Terminal Services Subcontract (and thereby provides services at the ART). That conclusion resulted from his Honour’s analysis of the terms of the Terminal Services Subcontract. Conversely, at [828], the primary judge found that, in the absence of the Undertaking, ownership of the ART would give Pacific National complete commercial and operational control of the Brisbane Multi User Terminal, including over whether, when and on what terms it would allow a third party to use the Brisbane Multi User Terminal to operate rail linehaul services in competition with Pacific National. His Honour concluded that in the absence of an appropriate undertaking, Pacific National could decide not to grant access to the Brisbane Multi User Terminal, to charge an increased price for such use, to grant access only on terms that leave the potential new entrant at a competitive disadvantage and to refuse or inhibit any expansion of capacity of the Brisbane Multi User Terminal in such a way that disadvantages a potential new entrant.
3. At [903] and [904], the primary judge concluded that Pacific National, as the owner of the ART, and without any undertaking to discipline its behaviour, would have an incentive to discriminate against a new entrant. However, the primary judge also accepted that there would be some downsides or disincentives in doing so if a new entrant was allowed access by Pacific National and discriminatory conduct occurred during such access. His Honour concluded that, on balance, Pacific National would have greater incentives than disincentives to bar access to the ART to an actual or potential downstream competitor in the provision of rail linehaul services or to engage in opportunistic discriminatory behaviour to the extent that it perceived it could get away with it. At [905] and [906], the primary judge found that neither Aurizon, nor an alternative purchaser of the ART such as Qube, would have an incentive to foreclose a competing user of the ART, in contrast with Pacific National.
4. At [916]-[918], the primary judge also found that, if Pacific National acquired the ART, a potential new entrant would reasonably perceive that Pacific National would have the incentive to operate the ART in a way that favours its own provision of rail linehaul services in the relevant markets. Further, a potential new entrant seeking to establish a business supplying rail linehaul services in competition with Pacific National could be expected to proceed carefully in circumstances where the cost of new entry is exceedingly high, a potential new entrant would know that if it entered it would have no real choice but to use the ART, and Pacific National would be a very substantial and well-established competitor of the new entrant in relation to the supply of rail linehaul services. His Honour concluded that, in those circumstances, there is a real chance that a potential new entrant would be deterred by its reasonable perception that Pacific National, as the owner of the ART, would have the ability and incentive to discriminate against it in the absence of any undertaking.

### Barriers to entry

1. At [938]-[940], the primary judge found that a new entrant seeking to provide, relevantly, North-South rail linehaul services would need to make substantial capital and other investments, obtain necessary accreditations and approvals, and enter into contractual commitments regarding access to relevant rail and terminal infrastructure. They would need to make such arrangements at considerable scale in order to achieve economies that would allow them to compete with incumbent rail operators. Moreover, there is a significant lead time and a long-term investment horizon associated with making these investments. The combination of the sunk costs associated with these investments, and the importance of a new entrant achieving economies of scale, would have the effect that a new entrant seeking to provide, relevantly, North-South rail linehaul services would face substantial barriers to entry. Specifically, a new entrant would need to:
	1. obtain rolling stock (which alone can take approximately two years);
	2. obtain access to qualified maintenance services to undertake service programs required for rolling stock and equipment, and access to maintenance facilities across the rail network;
	3. obtain rights to use train paths;
	4. obtain rights to access various rail terminals;
	5. recruit accredited drivers and other personnel;
	6. obtain accreditations from relevant rail authorities and regulators; and
	7. acquire or obtain access to intermodal containers.
2. At [941], the primary judge also found that a new entrant would likely require access to the ART. In that regard, his Honour referred to his earlier findings regarding alternative terminals (which are summarised above).

### Likelihood of new entry

1. The primary judge discussed the evidence concerning the likelihood of new entry by Qube at [943]-[989]. However, ultimately his Honour rejected the ACCC’s case in so far as it relied on the prospect of new entry by Qube. His Honour found (at [1293] and [1361]) that Qube would not enter the market in the future with the acquisition or without the acquisition owing to the fact that Pacific National would provide services at the ART pursuant to the Terminal Services Subcontract.
2. In relation to other potential new entrants, the primary judge observed (at [1005]) that, other than Qube, the ACCC did not expressly identify other potential new entrants in the relevant timeframe. His Honour recorded the ACCC’s submission that all that was necessary to show by the ART acquisition was that barriers to entry had been heightened to establish its s 50 case. In response to that submission, his Honour said:

1005 …But to disembody the question of whether barriers to entry had been heightened from the question of whether there was potential for new entry in the relevant timeframe has its difficulties. One is usually addressing the former insofar as it impacts on or affects the likelihood of the latter. And indeed one is considering relevant competition consequences flowing from an increase in barriers to entry in the relevant timeframe. If there is likely to be none as there would be no new entry anyway, then the ACCC’s case theory based on a barriers to entry argument becomes more problematic. But having said that, I cannot rule out a real chance of new entry into the relevant markets of either Qube or another entity in, say, 5 years. Moreover, such potentiality could discipline PN’s behaviour now and in the short to medium term in terms of its pricing of Rail Services. …

1. At [1307], the primary judge reiterated that the ACCC’s case that the ART acquisition would increase barriers to entry is focussed upon a hypothetical new entrant that the ACCC has not been able to identify.

### Substantial lessening of competition

1. The primary judge’s conclusions showed that, on the ACCC’s case theory, the window of time in which competition might be substantially lessened by the ART acquisition was relatively narrow. The primary judge observed:

1387 …the Inland Rail Project will likely be completed in no later than 10 years. Other terminals will be built during the course of construction of that project. ARTC has already acquired land to construct a terminal at Bromelton site. That new terminal in Bromelton may be completed within 5 years.

1388 I agree with the respondents that there is no realistic possibility that any lessening of competition could continue after the completion of the Inland Rail Project. And before then, the only potential entrant that the ACCC can identify is Qube. But as the respondents correctly contend, that is unsurprising given that barriers to entry are high in any event. But even if Qube were to enter, it would at best be targeting entry in 3 to 5 years. More generally, whether entry would occur in the window in which any lessening of competition could realistically occur is to some extent speculative.

…

1402 Now even assuming that entry by Qube was likely, in my view any such entry is likely to be no earlier than the next 5 years. And it may be that an alternative terminal would be constructed within as early as 5 years.

1. Thus, the potential for competitive harm was squeezed between the likely lead time for new entry and the construction of a new rail terminal in Brisbane.
2. The primary judge summarised his conclusions about the effect on competition of the acquisition (in the absence of the Undertaking) at [1417]-[1418]:

1417 …in the future without the ART acquisition, the Terminal Services Subcontract remains in place and as I have said does not give rise to any s 45 question. But in such a scenario, that is, where the Terminal Services Subcontract is in place, Qube has in my view definitively said that it will not enter. But what then is the ACCC's case?

1418 The ACCC says that because Qube at least would not enter in that scenario, the substantial lessening of competition arises due to increased barriers to entry only. It is said that if I find that Qube's reason for not entering is irrational and idiosyncratic, it follows that there remains the potential for a rationally acting new entrant to enter the Interstate market(s). But in some respects this is speculation. No one else has been realistically identified by the ACCC although I invited the ACCC to identify others. Moreover, the question of barriers to entry is not to be assessed in a vacuum. The question is whether realistically there are other potential entrants who may or would be likely to enter in the relevant timeframe absent the barrier or increased barrier to entry created by the acquisition. Raising barriers to entry does not necessarily establish a s 50 case. Having said that, I am inclined to accept Dr Williams' evidence that raising barriers will more likely preserve the current high market concentration and act less as a discipline on PN's behaviour because the threat of new entry is less. But that is all in the absence of an undertaking. With an undertaking and the ART acquisition I do not consider that there is likely to be any substantial lessening of competition comparing the likely relevant futures.

## E.2 The Respondents’ contentions

1. By their cross-appeals, the respondents contend that the primary judge erred in finding that, absent the Undertaking, the acquisition of the ART by Pacific National was likely to have the effect of substantially lessening competition in contravention of s 50. The grounds of cross-appeal are not identical between the respondents. The grounds can be distilled to the following two principal contentions:
	1. Contention 1 is that the primary judge erred in finding that (in the absence of the Undertaking) the acquisition of the ART would be likely to have the effect of substantially lessening competition through raising barriers to entry to the North-South rail linehaul market because:
		1. the finding that new entry may occur was mere speculation (being ground 1 of Aurizon’s amended notice of cross-appeal);
		2. the evidence showed that new entry was dependent on the acquisition of an existing intermodal business and, because Aurizon had sold its intermodal business, there was no longer any realistic prospect of new entry (being ground 2 of Aurizon’s amended notice of cross-appeal); and
		3. the evidence showed that the potential for anticompetitive harm from the acquisition would cease with the completion of the Inland Rail Project in 2028 and there was no realistic prospect of new entry in that time period (being ground 3 of Aurizon’s amended notice of cross-appeal and ground 7 of Pacific National’s amended notice of cross-appeal).
	2. Contention 2 is that the primary judge misinterpreted the word “likely” in s 50 - Aurizon contends that the word means “more probable than not”, whereas the primary judge interpreted the word to mean a “real chance” (being ground 4 of Aurizon’s amended notice of cross-appeal).
2. Each of the contentions is independent of each other. In particular, the first contention, and each of its subsidiary contentions, proceeds on the basis that the word “likely” in s 50 means “a real commercial likelihood” rather than “more probable than not”. In that sense, the second contention is put in the alternative.
3. Although some of the above contentions were formally advanced by Aurizon rather than Pacific National, the submissions of the respondents were somewhat interwoven and each adopted submissions made by the other. For that reason, in the following summary of the respondents’ contentions, we will not distinguish between the respondents.

### Contention 1

1. In relation to contention 1(i), the respondents submitted that the ACCC’s case about potential entry relied solely on Qube. The ACCC did not lead evidence of any other potential entrant to the industry. The respondents argued that if the ACCC had propounded any other potential entrant then this would have led to a range of further factual enquires by the respondents about the likelihood of entry by such postulated entrants. The evidence from Qube was that it would not enter the market if the Terminal Services Subcontract with Pacific National remained in place. The respondents interpolated that that evidence was in support of the ACCC’s case that the Terminal Services Subcontract would lead to a substantial lessening of competition, but the primary judge rejected that aspect of the ACCC’s case and the Terminal Services Subcontract therefore has remained in place. Accordingly, Qube’s evidence was that it will not enter the market because of the Terminal Services Subcontract with Pacific National, which the primary judge accepted (at [1293], [1307], [1351] and [1355] – [1361]). Having made that finding, there was no evidentiary basis for the primary judge to conclude that there was a real chance of any other person entering the market. His Honour rightly identified that this would be to engage in speculation (at [1418]). Despite that, the primary judge makes reference to the evidence of Dr Williams as supporting a conclusion that raising barriers (alone) might constrain Pacific National less. The respondents submitted that Dr Williams’ evidence, reproduced by the primary judge at [1299], did not support that conclusion because it recognised, apart from Qube, that the prospect of new entry was speculative.
2. In relation to contention 1(ii), the respondents submitted that not only was there no evidence to support a conclusion that there was a realistic possibility of new entry, the evidence before the Court adduced by the ACCC was to the contrary. The ACCC adduced evidence from Mr Nacey, the General Manager Commercial at Qube, to the effect that for Qube to enter the market it would be necessary to acquire an existing intermodal business such as the business then operated by Aurizon. The respondents submitted that it is clear from Mr Nacey’s evidence as a whole that he regarded the acquisition of existing customer relationships as a prerequisite to Qube commencing the supply of interstate intermodal rail services. There was no evidence from Mr Nacey that he would have considered commencing an interstate intermodal business without such a stepping stone and his evidence was to the effect that commencing an intermodal business without acquiring an existing business was not viable. The ACCC also adduced evidence from Mr James, Qube’s Managing Director, who deposed that, despite the sale of Aurizon’s Queensland intermodal business to Linfox, Qube “maintained its aspiration” to commence interstate intermodal rail services. The primary judge found, however, that Mr James accepted in cross examination that Qube may need to acquire an established intermodal rail business in order to enter (at [988]). The respondents submitted that, consistent with this evidentiary position, the primary judge concluded that Qube was “highly unlikely” to enter the relevant markets without first acquiring an established interstate intermodal business (at [962]). Despite that, the primary judge concluded that “although Qube was not likely to enter in the factual or the counterfactual … I could not rule out the realistic commercial chance of another potential new entrant emerging in the relevant timeframe” (at [1612]). The respondents submitted that there were two errors in that conclusion. First, the conclusion effectively reversed the onus, requiring the respondents to negative the possibility of new entry rather than the ACCC proving the realistic possibility of new entry. Second, the conclusion was contrary to the evidence adduced from Qube about the commercial need to acquire a customer base for entry to be viable.
3. In relation to contention 1(iii), the respondents submitted that the primary facts found by the primary judge lead inexorably to the conclusion that there is no real chance of new entry. The respondents relied on five matters:
	1. First, any new entry would need to occur by no later than 2028, when the Inland Rail Project is expected to complete (as found by the primary judge at [1364] and [1388]). That is because new rail terminals will be constructed in South East Queensland in the course of the project that will provide effective substitutes for the ART (as found by the primary judge at [1364]). Once one of those terminals has been constructed, any increase in barriers to entry that Pacific National’s ownership of the ART would create will dissipate, such that the ART acquisition would not have any relevant effect on competition. Indeed, the new terminals may be constructed within as little as three to five years from the date of the reasons (as found by the primary judge at [631]). Hence, throughout the reasons, the primary judge’s focus was on the lack of substitutes for the ART within three to five years, and not out to 2028 (see at [538], [560], [561], [562], [631], [942], [1525]).
	2. Secondly, the process of planning for and commencing supply of rail services takes years (as found by the primary judge at [1459], [1463] and [1529]).
	3. Thirdly, the primary judge referred to Mr Keyte’s evidence that the ART was unlikely to have a life expectancy beyond 10 years (at [632]) and therefore any potential entrant will, over the coming years, have an increasingly strong incentive to delay entry until one or more of the new terminals being constructed concurrently with the Inland Rail Project is complete.
	4. Fourthly, barriers to commencing supply of rail services are high (as found by the primary judge at [938]-[940] and [1388]).
	5. Fifthly, the trial judge found that Qube would not commence supply of rail freight services if the ART acquisition does not proceed (at [1293], [1307], [1351] and [1361]). That finding was significant, not only because it highlights the absence of evidence to support a finding of a real commercial chance of entry, but also because it positively suggests that entry would not occur.

### Contention 2

1. In relation to contention 2, the respondents submitted that the trial judge erred by interpreting the word “likely” as meaning a “real chance” rather than its ordinary meaning “more probable than not”. The respondents observed that the “real chance” test follows a line of authority about the meaning of the word “likely” in provisions of the Act that traces back to the decision of Deane J in *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees’ Union* (1979) 42 FLR 331 (***Tillmanns***) where his Honour interpreted the meaning of the word as it appeared in s 45D. The approach of Deane J has been adopted in the different statutory contexts, in most cases without substantive analysis or challenge from any party. There are no binding decisions of the Full Court as to the meaning of the term in s 50 of the Act. There are some obiter observations of the Full Court in *Metcash 198 FCR 297*, but no party in that case contended that “likely” bore its ordinary meaning.
2. Starting with the text, the respondents submitted that the natural and ordinary meaning of the word “likely” is “probable”, i.e. more probable than not, relying on definitions provided by the Oxford English Dictionary and the Macquarie Dictionary. That the ordinary meaning of “likely” is “probable” is confirmed by judicial decisions which have considered the meaning of the word, citing as examples *Australian Telecommunications Commission v Krieg Enterprises Pty Ltd* (1976) 14 SASR 303 at 312-313 per Bray CJ and *Assistant Minister for Immigration and Board Protection v Splendido* [2019] FCAFC 132 at [57] per Mortimer J, with whom Moshinsky J agreed, and at [127] per Wheelahan J.
3. The respondents submitted that neither the statutory context nor the statutory purpose of s 50 provides a justification for departing from the ordinary meaning of the word “likely”.
4. The respondents observed that *Tillmanns* concerned s 45D of the Act which relevantly provided that a person shall not, in concert with another person, engage in conduct that hinders or prevents the supply of goods or services by a third person to a corporation where the conduct is engaged in for the purpose, and would have or be likely to have the effect, of causing substantial loss or damage to the business of the corporation. The respondents submitted that that provision is materially different from the current s 50, in that it requires the existence of both a relevant purpose and the effect of causing substantial loss or damage to the business of the corporation. Bowen CJ (with whom Evatt J agreed) noted (at 339) that “the word ‘likely’ is one which has various shades of meaning”, but concluded (at 340) that it was unnecessary to determine its meaning in the context of s 45D because “whichever meaning is adopted the evidence leads me to the conclusion that the likelihood of substantial loss or damage has been established”. While Deane J concluded that, in s 45D, “likely” means a real chance or possibility, the respondents submitted that that conclusion was affected by the terms of s 45D which required proof of purpose and effect. Deane J’s conclusion was as follows (at 347-348):

Section 45D (1) proscribes conduct only if it be engaged in for the purpose of causing loss or damage to the business of the relevant corporation. Even though conduct be engaged in for such a purpose it will be outside the proscription contained in the subsection unless it "would have or be likely to have" that effect. Plainly the reference to "would be likely to have" is meant to convey a lower degree of likelihood than the reference to "would have". In the case where conduct has not occurred, a court would be constrained to determine whether conduct "would have" the specified effect by reference to the ordinary standard of whether it was more likely than not that it would. In such a case, if "likely" is interpreted as meaning "more likely than not", it would add little to the practical scope of the section. On the other hand, if conduct had run its ordinary course and had not had the specified effect, it would be but rarely that a court would feel justified in disregarding the lesson of the event and finding that while the conduct did not have the specified effect it had been more likely than not that it would have that effect (see per Dixon J. *Willis v. Commonwealth* (20)).

The conclusion which I have reached is that, in the context of s. 45D (1), the preferable view is that the word “likely” is not synonymous with “more likely than not” and that if relevant conduct is engaged in for the purpose of causing loss or damage to the business of the relevant corporation, it will suffice, for the purposes of the subsection, if that conduct is, in the circumstances, such that there is a real chance or possibility that it will, if pursued, cause such loss or damage. Whether or not such conduct is likely (in that sense) to have that effect is a question to be determined by reference to well-established standards of what could reasonably be expected to be the consequence of the relevant conduct in the circumstances. In determining the answer to that question, it will be relevant that the persons engaging in the conduct did so with the purpose of causing such loss or damage.

1. The respondents acknowledged that there are two strands to the above reasoning. One strand, relied on by the respondents, is the fact that the section depends upon proof of purpose as well as effect. The second strand concerns the use, in the statutory provision, of two tests or legal standards: whether the conduct would have the effect, or whether the conduct would be likely to have the effect, of causing substantial loss or damage to the business of the corporation. Deane J reasoned that the latter test must be intended to convey a lower degree of likelihood in comparison to the former test. However, as the application of the ordinary standard of proof has the consequence that the former test requires proof of the effect on the balance of probabilities, it must follow that the latter test requires proof to a lower standard of certainty. The respondents noted that similar reasoning was applied by French J in *AGL* *No 3* at [347]. The respondents submitted that the second strand of reasoning conflates the relevant fact to be proved with the standard of proof required to establish that fact. They illustrated the difficulty in that strand of reasoning by reference to the prohibition of cartel conduct in Division 1 of Part IV of the Act. Relevantly, under s 45AD(2), a provision of a contract, arrangement or understanding between competitors will be a cartel provision if it has or is likely to have the effect of fixing prices. It can be observed that the definition uses two tests: has the effect or is likely to have the effect. Under Division 1, cartel conduct is both a criminal offence (see Subdivision B) requiring proof beyond reasonable doubt and a civil wrong (see Subdivision C) requiring proof on the balance of probabilities. The respondents submitted that the meaning of the word “likely” in the definition of the prohibited conduct cannot be determined by whether the criminal or civil provisions are applied.
2. The respondents acknowledged that Deane J’s interpretation of “likely” has been applied in relation to other provisions of the Act that use the expression “likely”, but they submitted that that has been done with little critical examination or challenge. The respondents provided the Court with a table highlighting the common drafting technique in Part IV of the Act that uses a dual legal standard: viz whether conduct “is or is likely to be”, “has or is likely to have the effect” or “would have the effect or be likely to have the effect”. That drafting technique appears in the definition of cartel provisions in s 45AD and in ss 45, 45D, 45DA, 45DB, 46, 47, 50 and 50A and related provisions. The same drafting technique is used in s 18 of the Australian Consumer Law (Schedule 2 to the Act) (**ACL**), which prohibits conduct that is misleading or deceptive or is likely to mislead or deceive. Section 18 is the successor to s 52, which was formerly in Part V of the Act. The respondents referred the Court to the following appellate authorities (set out below in chronological order) in which Deane J’s reasoning in *Tillmanns* has been applied with (on the respondents’ submission) little critical examination:
	1. In *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82 (***Global Sportsman***) at 87, the Full Federal Court concluded that “likely”, in the context of s 52(1) of the Act (now s 18 of the ACL) meant “real or not remote chance or possibility regardless of whether it is less or more than fifty per cent”, referring to Deane J’s reasoning in *Tillmanns*.
	2. In *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 (***News Limited***) at 564-565, the Full Federal Court adopted the real chance test in relation to the prohibition of exclusionary provisions, previously defined in s 4D (now repealed), referring to both Deane J’s reasoning in *Tillmanns* and *Global Sportsman*.
	3. In *Monroe Topple & Assocs Pty Ltd v Institute of Chartered Accountants in Australia* (2002) 122 FCR 110 (***Monroe Topple***), the Full Federal Court concluded that the reasoning of Deane J in *Tillmanns* was equally applicable to s 45 (at [111] per Heerey J, with whom Black CJ and Tamberlin J agreed.
	4. In *Universal Music Australia Pty Ltd v ACCC* (2003) 131 FCR 529 (***Universal Music***) at [247], the Full Federal Court adopted the real chance test in the context of s 47, following *Monroe Topple*.
	5. In *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, another case concerning s 52 of the Act, Gleeson CJ, Hayne and Heydon JJ referred to the real chance test in *Global Sportsman* with apparent approval (at [112]).
	6. In *Seven Network Limited v News Ltd* (2009) 182 FCR 160 (***Seven Network***), News Limited contended that the word “likely” did not mean “real chance” in the context of s 45(2) of the Act. Dowsett and Lander JJ said that “there is a substantial body of authority which supports” the real chance meaning, “in particular the decision of the Full Court in *Monroe Topple*”. Their Honours concluded that they should follow *Monroe Topple* unless satisfied that it was clearly wrong (at [750]).
	7. In *Australian Competition and Consumer Commission v Cascade Coal Pty Ltd* [2019] FCAFC 154 (***Cascade Coal***) at [148], the Full Federal Court again construed “likely” as meaning real chance in the context of s 4D.
3. The respondents observed that the meaning of “likely” in the context of s 50 was considered in *Metcash 198 FCR 297*, but none of the parties in that case sought to argue that the “real chance” meaning was wrong (although Metcash and Franklins formally reserved their rights to do so) (at [218]). Nor did the case turn on the question, because the Court found that the ACCC’s case did not even satisfy the lower threshold (at [230]-[231] per Yates J, with whom Finn J agreed). Nevertheless, in *obiter dicta* remarks, Buchanan J concluded that the real chance test should not be applied to s 50 (at [37]-[89]). His Honour observed that the reasoning of Deane J in *Tillmanns* was influenced by the particular statutory context of s 45D, and that none of the Full Court decisions applying the reasoning of Deane J involved any detailed consideration.
4. The respondents submitted that there are a number of reasons for not applying the “real chance” test when considering s 50. First, it does not reflect the ordinary meaning of the words of the statute. Second, the relevant extrinsic materials acknowledge that mergers can lessen competition or improve efficiencies, which requires a line to be drawn between those mergers that are likely to be beneficial and those which are likely to be detrimental to the community (Commonwealth, Parliamentary Debates, House of Representatives, 3 November 1992, 2405-2406 (Michael Duffy, Attorney-General). This suggests that the prohibition is only intended to operate if the anti-competitive effects are likely in the sense of being probable. Third, the real chance test is inherently uncertain because it does not define the level of probability that is sufficient for the chance to be “real”.
5. An alternative argument advanced by the respondents is that, even if the word “likely” means “real chance”, the ACCC could not succeed in a case under s 50 unless the Court concludes: (i) that it is more probable than not that one of the ACCC’s counterfactuals will come to pass if the proposed acquisition does not proceed; and (ii) that there is a real chance that, if the proposed acquisition does proceed, that would result in a substantial lessening of competition compared to the scenario in which one of the ACCC’s counterfactuals comes to pass. The respondents submitted that that was the approach adopted by Emmett J at first instance in *Metcash 282 ALR 464* (at [146]). On appeal in *Metcash 198 FCR 297*, Yates J (with whom Finn J agreed) refrained from expressing a concluded view on the proper construction of, and standard of proof that is to be applied in relation to, s 50, but expressed the provisional view (at [227]) that there was but a single question. As noted earlier, Buchanan J concluded that the real chance test should not be applied at all, but that if it was appropriate to apply that test at all, he agreed with the approach taken by Emmett J (at [90]).

## E.3 The ACCC’s contentions

### The ACCC’s notice of contention

1. By ground 1 of its notice of contention, the ACCC contends that the “relevant timeframe” in which the primary judge could not rule out the commercial chance of another potential new entrant emerging (at [1612]) should be understood as meaning within ten years. By ground 2, the ACCC contends that if the primary judge did not mean that timeframe, his Honour should have applied that timeframe. The respondents accepted that the relevant timeframe applied by the primary judge in assessing the competitive effects of the sale of the ART was the anticipated period of 10 years until the completion of the Inland Rail Project (in 2028), and did not challenge that approach. Accordingly, it is unnecessary to consider ground 2 of the ACCC’s notice of contention.

### Response to the respondents’ first contention

1. The ACCC submitted that the primary judge was correct to find that, absent the Undertaking, the acquisition of the ART would be likely to have the effect of substantially lessening competition. It argued that the respondents’ contentions with respect to that finding misunderstand the significance of the primary judge’s finding that the acquisition would materially heighten barriers to entry (at [1353], [1612]), thereby eliminating the threat of entry as a competitive constraint on Pacific National (at [1005], [1418], [1612]). The ACCC argued that a finding that an acquisition will heighten barriers to entry permits a court to conclude that there is a real chance of competition being substantially lessened, unless new entry is impossible or so close to impossible as to not warrant further scrutiny; i.e. unless the barriers to entry are already so high that there can be no harm in raising them further. In that respect, the ACCC referred to various authorities establishing that barriers to entry are a significant factor in assessing the competitiveness of a market and that an increase in barriers to entry may be a significant factor in assessing whether competition is substantially lessened, including *Queensland Wire* at 189 per Mason CJ and Wilson J and at 201 per Dawson J, *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [100] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, and *QCMA* at 189, amongst others. The ACCC argued that a court should conclude that heightened barriers to entry are of no competition concern only if, even without the acquisition, new entry was impossible or so close to impossible as not to warrant further scrutiny, relying on the following passage of the Trade Practices Tribunal in *In re Tooth & Co Ltd; In re Tooheys Ltd* (1979) 39 FLR 1 (***Re Tooth and Tooheys***) at 69:

The applicant Tooth sought to convince us that barriers to entry by a new brewer were so high in this industry that, realistically, the existence of the ties could have no effect upon prospects for entry. That contention, however, would require a finding that entry is impossible. Our review of the evidence points to the characterization of the condition of entry as difficult but not impossible.

1. The ACCC argued that this approach is consistent with the fundamental principle that s 50 has an important role to play to prevent “relevant and meaningful” accretions of market power for firms otherwise sheltered from constraints including high barriers to entry: *Rural Press* at [41] per Gummow, Heydon and Hayne JJ. The ACCC submitted that facilitation of any competition in markets with high barriers to entry is of significance: *Rural Press* at [46] per Gummow, Heydon and Hayne JJ; *Universal Music* at 590; *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* (2013) 310 ALR 165 at [3180]-[3182]; and *Arnotts v Trade Practices Commission* (1990) 24 FCR 313 at [107].
2. The ACCC submitted that the primary judge accepted (at [1418]) the following opinions of Dr Williams (recorded at [1297]-[1299]):
	1. The presence of substantial barriers to entry in the relevant markets has important implications for assessing the effects of the impugned conduct on competition. If the impugned conduct further deters entry when some entry is possible, it may well be the case that the markets will need to wait a long time before another potential entrant is willing to accept the risks associated with entry.
	2. The acquisition of the ART is likely to raise barriers to entry to the North-South rail linehaul market because the Pacific National group of companies will have (i) the ability to discriminate against rail providers in relation to their actual or potential access to, or use of, any services at the Brisbane Multi User Terminal and/or the Queensland Terminal; and (ii) an incentive to discriminate against any potential entrant in the terms of access to the Brisbane Multi User Terminal.
3. The ACCC submitted that the primary judge’s finding that he could not rule out a real chance of new entry did not involve any reversal of onus and was supported by the evidence. The ACCC referred to the following:
	1. Pacific National’s business documents indicating that Pacific National regarded the future where it did not acquire the ART as a future in which there was a prospect of new entry, referring particularly to a memorandum dated 18 July 2017 provided to Pacific National’s President of Intermodal, Andrew Adam, two days before Pacific National’s bid for the ART (Exhibit A37) and a Pacific National Board Paper dated July 2017 (Exhibit A43).
	2. Mr Morton, Pacific National’s expert economist, gave evidence that customer-sponsored entry was viable and “common”, concluding that there are several freight owners that are likely to have sufficient scale to support a new entrant in their own right.
	3. Various facts showed that the rail market is dynamic, including the closure of Aurizon’s interstate intermodal business in December 2017, SCT’s entry into the North-South market in January 2017 and Linfox’s entry into Queensland from October 2018.
	4. Aurizon received six non-binding bids for the ART in its initial sales process from Qube, Oaktree, Genesee & Wyoming, Pacific National, ARTC and Charter Hall (as recorded by the primary judge at [62]).
	5. While Aurizon originally proposed to close its Queensland intermodal business, following the grant of an interlocutory injunction Linfox purchased the business and entered that market, presenting a future threat of entry to the interstate market.
	6. One of the original bidders for the ART, Genesee & Wyoming, is the monopoly interstate intermodal rail operator on the Adelaide-to-Darwin rail corridor (as the primary judge found at [912]).
4. In relation to the position of Qube, the ACCC submitted that its case at trial was not confined to Qube as the sole potential new entrant if the acquisition did not proceed, referring to its written and oral submissions at trial. We accept that submission. However, as observed by the primary judge, the ACCC did not identify, or adduce evidence concerning, any other potential new entrant at trial.

### Response to respondents’ second contention

1. The ACCC submitted that the primary judge was correct to interpret the word “likely” in s 50 as meaning a “real chance”.
2. The ACCC argued that, in applying s 50, and understanding the work done by the word “likely”, four interrelated matters should be considered:
	1. the burden of proof (which, in the present case, was borne by the ACCC as applicant, although in a case for a negative declaration, such as *AGL No 3*, the burden will be borne by the merging parties seeking the declaration);
	2. the standard of proof (which, being a civil case, is “on the balance of probabilities”);
	3. the ultimate issue to be proved (which is whether the acquisition “would have the effect, or be likely to have the effect, of substantially lessening competition in any market”, which issue must be proved on the balance of probabilities); and
	4. the primary facts to be proved (which, in the context of a future acquisition, will necessarily concern future events and effects and will therefore involve possibilities and chances where some will be more certain than others and some will be more material in consequence than others to the ultimate issue).
3. In relation to the primary facts, the ACCC submitted that it is not necessary for the ACCC to establish every fact on the balance of probabilities. Only the ultimate issue must be proved to that standard. The likelihood of certain events occurring in the future, and the significance for competition should they occur, are matters that fall to be considered by the Court in evaluating whether the acquisition would have, or be likely to have, the effect of substantially lessening competition on the balance of probabilities. Whether any particular fact to be taken into account in the evaluative analysis is so important that it must be determined on the balance of probabilities will depend on the specific circumstances of the case. In that context, the ACCC submitted that a useful analogy can be drawn with the approach to proof of hypothetical events in *Sellars v Adelaide Petroleum* (1994) 179 CLR 332 (***Sellars***) and *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 (***Malec***).
4. The ACCC supported the reasoning of Deane J in *Tillmanns* and French J in *AGL No 3* to the effect that the words “would have the effect, or be likely to have the effect”, contains two limbs. The first, ‘would have the effect”, requires the Court to be satisfied on the balance of probabilities. The second, “would be likely to have the effect”, is satisfied if the acquisition could reasonably be expected to lead to the effect, whether the likelihood is greater or less than 50%.
5. The ACCC observed that the “real chance” meaning of “likely” in the provisions of Part IV of the Act has been followed on numerous occasions by intermediate appellate courts, including in *News Limited*, *Monroe Topple*, *Seven Network* and *Cascade Coal* (and, in the context of provisions based on s 18 of the ACL such as s 1041E of the *Corporations Act 2001*, by the NSW Court of Appeal in *James Hardie Industries NV v Australian Securities and Investments Commission* (2010) 274 ALR 85 at [184]). To adopt a different meaning in the context of s 50 would require at least *News Limited* and *Monroe Topple* to be overruled, because the word “likely” in each two-limbed collocation in the Act should be given the same interpretation (in accordance with the usual presumption that the same words be given the same meaning wherever they appear in the same statute: *Tabcorp Holdings Ltd v Victoria* (2016) 90 ALJR 376 at [65]).
6. The ACCC says that the ordinary meaning of the word “likely” is not limited to “probable”, referring to the definition “to be reasonably expected to do, to be” in the Oxford English Dictionary and by the definition “reasonably to be believed or expected” in the Macquarie Dictionary. Further, the authorities support the propositions that “likely” is “capable of a number of different meanings” (*Jungarrayi v Olney* (1992) 34 FCR 496 (***Jungarrayi***) at 506) and that it is a “protean” word that “has more than one usual meaning” and “always takes its colour from its surroundings … The context in which the word is used in a particular statute will usually indicate the intended meaning” (*Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council [No 2]* (2001) 50 NSWLR 665 (***Deerubbin***) at [52] per Spigelman CJ). The ACCC observed that, even in the context of a single-limbed expression, in *Boughey v The Queen* (1986) 161 CLR 10 (***Boughey***), Mason, Wilson and Deane JJ interpreted the word “likely” in the expression “likely to cause death” by adopting its “ordinary meaning” of “a substantial – a ‘real and not remote’ – chance regardless of whether it is less or more than 50 per cent” (at 21).
7. In relation to contextual considerations, the ACCC submitted that Parliament has repeatedly re-enacted provisions in Part IV of the Act, including s 50, using the two-limb formulation of anti-competitive effect. In particular, s 50 was amended to include the two-limb formulation in 1992, well after *Tillmanns* and *Global Sportsman*. The most recent example is the amendment to s 46 to include the two-limb formulation enacted by the *Competition and Consumer Amendment (Misuse of Market Power) Act* *2017* (Cth). The Explanatory Statement to the amending Bill stated (at para 1.22):

The concept of the purpose, effect or likely effect of substantially lessening competition is new to section 46. This concept already exists in a number of provisions in Part IV of the Act, and it is intended that the existing jurisprudence will inform the application of this concept in the context of section 46.

1. The ACCC submitted that the “existing jurisprudence” endorsed by the Explanatory Statement includes the “real chance” meaning of the word “likely”. The ACCC submitted that when Parliament repeats words that have been judicially considered, the usual presumption is that it is taken to have intended the words to bear the meaning already judicially attributed to them: *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536 at [107] (referring to the relevant authorities for that presumption).
2. In relation to purposive considerations, the ACCC submitted that the respondents’ argument based on beneficial mergers overlooks the fact that such mergers can be exempted from the prohibition in s 50 by administrative authorisation under s 88. The ACCC argued that the object of s 50 is to prohibit mergers if there is a proven risk of a substantial lessening of competition. The availability of authorisation also addresses the respondents’ concern that the real chance test is uncertain. The ACCC referred to the second reading speech for the Trade Practices Bill 1974 (Cth) in which the Attorney-General, Senator Lionel Murphy, said “[q]uestions will of course arise as to whether particular mergers are likely to have such an effect on competition. In this regard the provisions for clearances and for authorisations will be available and will enable businesses to resolve their uncertainties” (Attorney General Senator Lionel Murphy, Second Reading Speech, Trade Practices Bill 1974 (Cth), 30 July 1974, p 545 quoted in *AGL No 3* at [322]). The ACCC argued that the concern about uncertainty is, in any event, overstated given that the “real chance” test has been applied workably in numerous statutory contexts.
3. In relation to the respondents’ alternative argument based on the reasoning of Emmett J in *Metcash 282 ALR 464*, the ACCC submitted that the reasoning must be understood in the factual context of the case. The Court took the view that, for the ACCC to succeed, it had to prove that, in the likely future without the merger, a third party would acquire the unprofitable and failing Franklins enterprise, and do so in a way that was successful and enduring so as to provide a real competitive input into a market dominated by Woolworths and Coles. Unless that counterfactual could be established, there could be no lessening of competition. Emmett J concluded that the possibility of the consortium purchasing the assets and exerting any meaningful competition was “a matter of pure speculation” (at [425]). The case is distinguishable from the present and the reasoning does not stand for some broader proposition.

## E.4 Consideration of the respondents’ contentions

1. As noted earlier, the respondents’ first contention on the competition issue, and each of its subsidiary contentions, proceeds on the basis that the primary judge’s construction of the word “likely” in s 50, a real commercial likelihood rather than more probable than not, is correct. The second contention, that “likely” means probable, is put in the alternative. It is nevertheless convenient to commence with the meaning of the statutory language.

### The statutory language and the meaning of “likely”

1. Before turning directly to the meaning of the word “likely”, a number of preliminary matters about s 50 should be noted. There was no material dispute between the parties about these matters.
2. First, a contravention of s 50 is a civil wrong which must be proved on the balance of probabilities: s 140 of the *Evidence Act 1995* (Cth). The matter that must be proved on the balance of probabilities is that the impugned acquisition would have, or be likely to have, the effect of substantially lessening competition in any market.
3. Second, the matter that must be proved - the effect on competition of the acquisition - might be described as an “economic fact”. It is a conclusion about a condition of the real world - it is in one sense observable - but the condition is observed and described through the tools and language of the social science of economics. Competition describes the nature and extent of rivalry between firms engaged in trade and commerce. Many of the observable facts that contribute to a conclusion about competition are listed in s 50(3) of the Act and include:
	1. whether products and sources of supply are substitutes for acquirers (on the demand side) or for suppliers (on the supply side);
	2. the level of concentration in a given market;
	3. the height of barriers to entry to a given market, which necessarily requires an understanding of the nature or cause of the barriers;
	4. the extent of vertical integration in a given market;
	5. whether acquirers have countervailing power, which also requires an understanding of the commercial conditions that cause that power to exist;
	6. the dynamic characteristics of the market, including growth, innovation and product differentiation over time; and
	7. pricing behaviours which might reveal market power or the absence of market power.
4. Third, the prohibition in s 50 is a forward-looking test and requires a comparison between the nature and extent of competition in the future with the acquisition and without the acquisition in any market potentially affected by the acquisition. It involves a prediction about the future. While the subject of the prediction - the effect on competition of the acquisition - must be proved on the balance of probabilities, it is not necessary that each relevant predicted fact be proved on the balance of probabilities.
5. An analogy, although imperfect, can be drawn with the Court’s assessment of damages in respect of future periods of time, for example loss of earning capacity or the loss of a contractual opportunity. In *Malec*, the High Court confirmed that, in such circumstances, the court does not ignore a possible eventuality because the likelihood of it occurring is less than 50%. Rather, the court evaluates the possibilities, applying an appropriate discount to reflect the likelihood of the eventuality occurring in arriving at an assessment of damages (at 639-640 per Brennan and Dawson JJ and at 642-643 per Deane, Gaudron and McHugh JJ). While *Malec* concerned damages for personal injuries, that approach has been applied in the context of contractual damages (*The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64) and statutory damages in respect of a contravention of s 52 of the Act (*Sellars*). The analogy is imperfect because the assessment of damages differs in many respects from the assessment required by s 50. In the context of damages, the court is concerned about the unfairness that would arise for a plaintiff that has been wronged if future eventualities (which would be otherwise compensable) could not be proved on the balance of probabilities (*Malec* at 643 per Deane, Gaudron and McHugh JJ). Nevertheless, s 50 requires the court to undertake a forward-looking assessment of the effect on competition of the acquisition. A common sense approach requires the court to assess what may occur in the relevant market in the future, taking into account the likelihood as a matter of possibility as well as probability, and weigh such predictions in the overall assessment of whether the acquisition would have, or be likely to have, the effect of substantially lessening competition on the balance of probabilities.
6. In the usual case, predictions about the nature and extent of competition in the future with and without the acquisition will be rooted firmly in past and present market conditions, which are susceptible of proof in the ordinary way. Most markets have a history from which an assessment of substitution possibilities, concentration, barriers to entry and other commercial behaviours and conditions can be undertaken and reliable predictions about the future can be made. Further, some future facts are more certain than others. For example, commercial firms and governments make plans about investment or entry into markets, which are observable facts able to be proved in the ordinary way. Such facts provide a platform on which a court is able to undertake the assessment required by s 50.
7. Fourth, the matter that must be proved is a substantial lessening of competition. “Substantial” is an evaluative, rather than a precise, legal standard. In *Rural Press*, in the context of s 45 of the Act, Gummow, Hayne and Heydon JJ adopted with apparent approval the statement of French J in *Stirling Harbour (2000) ATPR 41-752* that the relevant question is whether the effect is substantial in the sense of being meaningful or relevant to the competitive process (at [41]). However, at footnote 67, their Honours noted that French J had referred to three authorities: *Tillmanns* in which Deane J expressed the view that “substantial” (in s 45D) meant “real or of substance and not insubstantial or nominal”; *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 62 FLR 437 in which Lockhart J said that (at 445) “[in s 45] the lessening of competition must be at least real or of substance”, and said that he saw “considerable force in the view . . . that, in the context of s 45, the word means substantially in the sense of considerably”; and *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1991) 30 FCR 385 in which Wilcox J rejected the view that an effect on competition which was more than insignificant was, for that reason alone, substantial (at 420-422). Their Honours observed that it was not necessary to decide between the foregoing statements, but concluded that it is plain that the authorities do not support the proposition that it would be sufficient for liability if the relevant effect on competition was quantitatively “more than insignificant” or “not insubstantial”. The current state of the authorities shows that “substantial” means “real or of substance” and, in that sense, meaningful or relevant to the competitive process.
8. Fifth, s 50 contains two legal standards or limbs. The section is contravened if the acquisition would have the effect of substantially lessening competition; and the section is also contravened if the acquisition would be likely to have the effect of substantially lessening competition. No party suggested that the two legal standards have the same meaning. Each party accepted that the first limb imposes a higher standard of certainty than the second limb. Each party also accepted that the lower standard in the second limb effectively rendered the first limb redundant, although the ACCC emphasised that the redundancy was not impermissible and that it is a frequent redundancy in the law that a norm may be stated in two forms, one of which is more difficult to satisfy than the other. It should be observed, however, that there are two legal standards; it may well be, for instance, after looking at the evidence, a court could be satisfied to the necessary level of satisfaction that the acquisition would have the effect of substantially lessening competition. The dual legal standard in s 50 is also to be found in ss 45, 46, 47 and 50A, and a similar form of language is to be found in ss 45AD, 45D, 45DA and 45DB. It must be accepted that the same redundancy exists in each of those provisions and the language used is a form of drafting that has been replicated throughout the provisions of Part IV of the Act.
9. With that background, the meaning of “likely” can be considered in light of textual, contextual and purposive considerations.
10. As to the text, in our view the ordinary meaning of the word “likely” in everyday language is “probable” (in the sense of more probable than not) and that meaning is consistent with dictionary definitions. The ACCC argued that the definition in the Macquarie Dictionary, “reasonably to be believed or expected”, conveyed a lower degree of expectation than “more probable than not”. However, the whole definition is “seeming like truth, fact, or certainty, or reasonably to be believed or expected; probable”, which conveys the sense of “more probable than not”. The ACCC also relied on a passing comment of Mason, Wilson and Deane JJ in *Boughey* to the effect that the ordinary meaning of “likely” included “a substantial – a ‘real and not remote’ – chance regardless of whether it is less or more than 50 per cent” (at 21). However, the ratio of the case was the meaning to be given to the word in its statutory context (s 157(1) of the *Criminal Code Act 1974* (Tas)), not the meaning of the word in ordinary language. Gibbs CJ, in agreement as to the result, considered that the ordinary meaning of the word is “probable” (at 14), and Brennan J, in dissent, observed that the dictionary definitions treat “likely” and “probable” as synonyms (at 42). The more significant point to be taken from cases such as *Boughie*, *Jungarrayi* and *Deerubbin* is that the word is capable of bearing a meaning of a real or substantial chance, even if it is less than 50%.
11. The juxtaposition of the dual legal standards in the section also supports the conclusion that “likely” means “probable”. The first legal standard is that the acquisition would have the effect of substantially lessening competition, which conveys certainty. Of course, that standard must be proved to the civil standard on the balance of probabilities, but the language in which the standard is expressed conveys certainty of outcome. The second legal standard is that the acquisition would be likely to have the effect of substantially lessening competition. As a natural counterpoint to the first legal standard, the second legal standard would be expected to convey a probable outcome, not a “real chance”. Respectfully, the reasoning of Deane J in *Tillmanns,* also adopted by French J in *AGL No 3*, that the first legal standard is concerned with the balance of probabilities conflates the standard of proof of the contravention with the legal test for contravention. The two matters are conceptually separate. As Middleton J observed in *Vodafone Hutchison Australia Pty Limited v Australian Competition and Consumer Commission* [2020] FCA 117 at [68] and the parties before us accepted:

…One must distinguish between the requirements of the substantive law (s 50) and the principles or rules of evidence. The content of s 50 is not addressing the evidentiary burden. … The burden of proof is set out in s 140 of the *Evidence Act 1995* (Cth), …This does not take away from the evaluative or quantitative judgment a Court still needs to make, which will involve the concepts referred to by French J in *AGL*: ‘commercially relevant or meaningful’ (at 420 [355]), not ‘a mere possibility’ (at 416-417 [348]), and operating ‘in the real world’ (at 416-417 [348]). These concepts are relevant to the substantive requirement of s 50 to give effect to competition law and policy in the context of merger management. …

1. As to context, it is relevant to consider the legislative history and the broader statutory framework. It is also relevant to have regard to the decided cases in the context of the legislative history.
2. The original form of s 50, enacted in 1974, was similar to the present form, but it contained a single legal standard (likely to have the effect) rather than a dual standard. It stipulated that a corporation shall not acquire, directly or indirectly, any shares in the capital, or any assets, of a body corporate where the acquisition is likely to have the effect of substantially lessening competition. The relevant extrinsic materials are uninformative about the meaning of the word “likely”.
3. As at 1974, the prohibition in s 45(1) was directed to contracts, arrangements or understandings in restraint of trade. However, s 45(4) used a dual legal standard. It stipulated that a contract, arrangement or understanding is not in restraint of trade unless the restraint has, or is likely to have, a significant effect on competition. Similarly, the form of s 47 as enacted in 1974 also used a dual legal standard. Section 47(10) stipulated that s 47(1) did not apply to the practice of exclusive dealing unless engaging in that practice has the purpose, or has or is likely to have the effect, of substantially lessening competition.
4. In 1977, s 50 was amended by the *Trade Practices Amendment Act 1977* (Cth). The new section also contained a dual legal standard, but of a different kind. The section prohibited acquisitions if, as a result of the acquisition, the acquirer would be, or would be likely to be, in a position to control or dominate a market. The section also prohibited acquisitions by an acquirer that was already in a position to control or dominate a market where the acquisition would, or would be likely to, substantially strengthen the power to control or dominate that market. Section 45 was also amended to a form very similar to its present form. It prohibited the making of contracts, arrangements or understandings that contained a provision that has the purpose, or would have or be likely to have the effect, of substantially lessening competition, and the giving effect to such a provision. Section 45D was also enacted at that time. It prohibited what are colloquially called secondary boycotts. An element of the prohibition is that the conduct is engaged in for the purpose, and would have or be likely to have the effect, of causing substantial loss or damage to the business being boycotted.
5. The amended s 50 was considered by Northrop J in *Trade Practices Commission v Ansett Transport Industries (Operations) Pty Ltd* (1978) 32 FLR 305. His Honour construed the word “likely” as meaning more probable than not (see for example at p 344 and 346), although it does not appear that the meaning of the word was the subject of debate.
6. The newly inserted s 45D was considered in *Tillmanns*. Bowen CJ, with whom Evatt J agreed, preferred not to put a gloss on the word “likely” by preferring one meaning over another as it was unnecessary in deciding the case (at 340). The relevant part of Deane J’s reasons has been reproduced earlier. His Honour construed the word to mean “a real chance or possibility”, although his Honour qualified those words by explaining: “Whether or not such conduct is likely (in that sense) to have that effect is a question to be determined by reference to well-established standards of what could reasonably be expected to be the consequence of the relevant conduct in the circumstances” (at 347-348). The qualification highlights the difficulties with synonyms.
7. A case that is often overlooked in this context is *Trade Practices Commission v TNT Management Pty Ltd* (1985) 6 FCR 1 (***TNT Management***). It involved a contravention of the original form of s 45(1), and considered the meaning of the word “likely” in s 45(4). Franki J noted the warning given by Bowen CJ in *Tillmanns* not to place a gloss on the section by preferring one meaning of "likely" rather than another if that is not necessary for the determination of a particular case. However, his Honour expressed a preference for the view that, whilst the meaning need not be restricted to a situation where the odds are greater rather than equally balanced or somewhat less than equally balanced, the probability must be something not very far short of “more probably than not” (at 49). His Honour also considered that the word "has" requires the question to be tested against the established facts, whereas the words "likely to have" allows any reasonable inference to be drawn (at 50).
8. As noted earlier, s 50 took its present form (in relevant respects) in 1992 by amendments enacted under the *Trade Practices Legislation Amendment Act 1992* (Cth). The Explanatory Memorandum to the enacting Bill made the following observations:

11. The previous test of market dominance has been interpreted by the court as a situation where one firm has a commanding influence in the market. It is a test which focuses largely on changes to the structure of a market that would be affected by the acquisition but it also takes some account of the likely effect on the competitive process of such an acquisition. The substantial lessening test focuses on changes to the state of competition in the relevant market. As the Trade Practices Act is about competition, a test which concentrates on competition and whether there is a lessening of that competition is more consistent with the policy underlying the legislation.

12. The term 'substantially lessening competition' is used widely through the Principal Act. It is here intended to mean an effect on competition which is real or of substance, not one which must be large or weighty. While in many cases, a merger or acquisition would be caught by either the 'dominance' or the 'substantial lessening' test, there are some acquisitions that are more likely to be subject to the new test, for example, where an acquisition of a small effective competitor resulted in two well-matched competitors being left in the market.

1. The foregoing statements provide limited assistance in the interpretation of the word “likely”. The language in paragraph 11 is consistent with a higher degree of certainty in the test (whether there is a lessening of competition) but does not directly address the intended meaning of the word “likely”. Paragraph 12 makes clear that the phrase “substantial lessening of competition” was intended to have the same meaning as had been given to that phrase in other provisions of Part IV, namely “real or of substance”. Again, though, the paragraph does not directly address the meaning of the word “likely”. As at 1992, *Tillmanns, TNT Management* and *Global Sportsman* had been decided, but there is no reference to those cases or the “real chance” test (or any other test) in the Explanatory Memorandum.
2. The legislative history makes clear that the use of a dual legal standard in the provisions of Part IV was a legislative drafting style incorporated into the Act when it was first enacted (albeit not in the case of s 50) and was subsequently continued. As each of ss 45, 47 and 50 address a similar subject matter, trading and commercial conduct that harms competition, the dual legal standard must be given the same meaning in each provision.
3. As already noted in connection with the parties’ submissions, the interpretation favoured by Deane J in *Tillmanns* has been followed on a number of occasions by the Full Federal Court: *News Limited* in 1996 in relation to s 4D (now repealed); *Monroe Topple* in 2002 in relation to s 45; *Universal Music* in 2003 in relation to s 47; *Seven Network* in 2009 in relation to s 45; and, most recently, *Cascade Coal* in 2019 in relation to s 4D (now repealed).
4. The prohibition of cartel conduct in Division 1 of Part IV was enacted in 2009 by the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth). As enacted, s 44ZZRB (now s 45AB) contained a definition of the word “likely” as including “a possibility that is not remote”. In Division 1, the word “likely” is used in connection with the definition of cartel conduct, which is a different use to the competition tests in ss 45, 47 and 50. The Explanatory Memorandum to the enacting Bill explained the inclusion of the definition in the following terms (at 1.51):

The term likely appears in the purpose/effect condition, the purpose condition and the competition condition. It enables a court to look not only at what has been established on the facts, but also to infer, from those facts, the likely consequences of the provision of the contract, arrangement or understanding. The term is also used in other provisions of the Bill in so far as they relate to those conditions. Likely is defined to include a possibility that is not remote, in relation to four fact situations: a supply of goods or services, an acquisition of goods or services, the production of goods, or the capacity to supply services. This clarifies the position following judicial observations made in the case law in relation to the term (for example, in *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees’ Union* (1979) 42 FLR 331, 27 ALR 367, by Bowen CJ at 339 and by Deane J at 346).

1. The first two sentences of the Explanatory Memorandum appear to be referencing Franki J’s observation in *TNT Management* that the word “likely” allows the Court to have regard to reasonable inferences arising from the established facts. The latter sentences express a legislative preference for the “real chance” test in *Tillmanns*. However, the amending Act was not concerned with the prohibitions in ss 45, 47 and 50.
2. Section 46 was amended in 2017 by the *Competition and Consumer Amendment (Misuse of Market Power) Act* 2017 (Cth). The section now prohibits a corporation with substantial market power from engaging in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition. Thus, the prohibition now has a similar form to ss 45, 47 and 50. The Explanatory Statement to the amending Bill stated (at para 1.22):

The concept of the purpose, effect or likely effect of substantially lessening competition is new to section 46. This concept already exists in a number of provisions in Part IV of the Act, and it is intended that the existing jurisprudence will inform the application of this concept in the context of section 46.

1. At the time of enactment, the “existing jurisprudence” must be taken to include, at the least, *Monroe Topple*, *Universal Music* and *Seven Network*.
2. The legislative history reveals the following matters. First, the prohibitions in Part IV of the Act have been drafted with a dual legal standard from their enactment in 1974. Second, from a relatively early date, the word “likely” was not interpreted as being synonymous with “probable”, although a number of phrases have been used to express the necessary degree of likelihood from time to time (even within *Tillmanns* itself). Third, the provisions of Part IV of the Act have been amended on a regular basis over the past 46 years, without any change to the use of the dual legal standard. A conclusion which can be drawn is that the judicial approach to the interpretation of the dual legal standard has not caused any perceived difficulties requiring legislative intervention.
3. As to the broader statutory framework, the ACCC referred to the fact that acquisitions that would contravene s 50 are able to be authorised by the ACCC if it is satisfied that the acquisition would result or be likely to result in a net public benefit (see s 90(7)). The contention was to the effect that the legislative policy was to prohibit mergers where there is a risk of competitive harm that is less than probable, because beneficial mergers can be authorised. In our view, the availability of administrative authorisation of mergers does not assist in the construction of the word “likely”. Whichever legal standard applies under s 50, administrative authorisation will be applicable to allow mergers that can be shown to generate public benefits that outweigh anti-competitive detriments.
4. As to statutory purpose, s 2 states that the object of the Act is to enhance the welfare of Australians through, relevantly, the promotion of competition. It can be accepted that the Act reflects a policy objective of promoting competition in Australian markets, and that policy is believed to enhance the welfare of Australians. It is consistent with that policy objective to prohibit conduct that creates a risk of substantially harming competition, even if that result is not certain. However, the statutory purpose does not otherwise assist in defining the degree of risk that must exist for the prohibitions in Part IV to apply.
5. Turning to the existing authorities, the respondents correctly submitted that, in almost all of the Full Federal Court decisions since *Tillmanns*, the meaning of the word “likely” has not been contested and the Court has generally adopted the approach of Deane J without further analysis. The one exception is *Seven Network*. In that case, the Full Court concluded that it should follow *Monroe Topple*, observing (at [750]):

… We therefore consider that we should follow the decision in applying s 45 unless we are satisfied that it is clearly wrong. Reconsideration of policy matters will not generally be an appropriate basis for such satisfaction, at least in the absence of any evidence as to wide-spread inconvenience or injustice caused by the established approach. The decision in *Monroe Topple* 122 FCR 110 has stood since 2002. News’s submissions do not cause us to doubt its correctness.

1. We are of the same view. Strong arguments, based on the statutory text, can be made for construing the word “likely” to mean “probable”. However, the word “likely” has been construed to mean a likelihood that is less than probable for 40 years (from *Tillmanns*) and there is no evidence of widespread inconvenience in the application of the law. To the contrary, the law has been amended on numerous occasions without any suggestion that the dual legal standard should be changed. In an analogous context in *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563, coincidentally involving the interpretation of a provision of the Act, McHugh J observed (at [42]) that questions of statutory construction are notorious for generating opposing answers, none of which can be said to be either clearly right or clearly wrong. His Honour concluded that he would not overrule the subjective interpretation of the word “purpose” in s 4D, reasoning (at [41]):

If the interpretation of s 4D was being considered for the first time, I would prefer the view that, for the purposes of s 4D, the purpose of an alleged exclusionary provision is to be determined objectively without regard to the mental state of the parties who made the provision. But the subjective interpretation has stood for seventeen years, been approved by the Full Court of the Federal Court and been followed on numerous occasions. Given the terms of s 4F, s 4D is clearly open to the construction that “purpose” in both sections means the subjective purpose of the makers of the provision. Certainly, it is impossible to hold that the subjective interpretation is plainly wrong.

1. Similarly, if the meaning of the word “likely” was being considered for the first time, we would have been inclined to adopt the meaning probable, but there is insufficient reason to change course at this point in time. For those reasons, we reject ground 4 of Aurizon’s amended notice of cross-appeal.
2. Nevertheless, substituting a synonym such as “real chance” for the statutory word “likely” creates the risk that the synonym may convey a different standard to the statutory language and may introduce a further element of uncertainty. As already noted, in *Tillmanns* Deane J observed that likelihood ought to be determined by reference to well-established standards of what could reasonably be expected to be the consequence of the relevant conduct in the circumstances. Similarly, in *AGL No 3*, French J observed (at [348]) that:

The meaning of “likely” reflecting a “real chance or possibility” does not encompass a mere possibility. The word can offer no quantitative guidance but requires a qualitative judgment about the effects of an acquisition or proposed acquisition. The judgment it requires must not set the bar so high as effectively to expose acquiring corporations to a finding of contravention simply on the basis of possibilities, however plausible they may seem, generated by economic theory alone. On the other hand it must not set the bar so low as effectively to allow all acquisitions to proceed save those with the most obvious, direct and dramatic effects upon competition. By the language it adopts and the function thereby cast upon the Court and the regulator in their consideration of acquisitions s 50 gives effect to a kind of competition risk management policy. The application of that policy, reflected in judgments about the application of the section, must operate in the real world. The assessment of the risk or real chance of a substantial lessening of competition cannot rest upon speculation or theory. To borrow the words of the Tribunal in the *Howard Smith* case, the Court is concerned with “commercial likelihoods relevant to the proposed merger”. The word “likely” has to be applied at a level which is commercially relevant or meaningful as must be the assessment of the substantial lessening of competition under consideration — *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at [41].

1. In the present case, the primary judge followed the authorities referred to above in construing the word “likely” as meaning “real commercial likelihood” (at [1275]), as explained by French J in *AGL No 3*. In our view, there is no error in his Honour’s interpretation of the statutory language. We also respectfully agree with his Honour’s statement of the proper approach to the application of s 50, namely:
	1. the application of s 50 requires a single evaluative judgment (at [1276]);
	2. it is a distraction (and, we would add, wrong) to ask what standards of proof apply to the primary facts which will involve predictions about the future (at [1278]);
	3. however, the degree of likelihood of any particular future fact existing or arising will be relevant to the assessment of the likely effect on competition of the acquisition (at [1279]).

### Would the acquisition be likely to have the effect of substantially lessening competition?

1. As has been noted earlier, the ACCC’s case narrowed during the course of the proceeding below, and narrowed further on appeal. At the commencement of the proceeding, the ACCC alleged a broad arrangement between Pacific National and Aurizon arising out of Aurizon’s decision to exit its interstate and Queensland intermodal businesses and to offer its suite of businesses for sale. Between the commencement of the proceeding and trial, Aurizon closed its interstate intermodal business and sold its Queensland intermodal business to Linfox. Before trial, the ACCC abandoned its allegations concerning a broad arrangement and confined its challenge to the commercial agreements affecting the remaining asset, the ART, alleging that the Terminal Services Subcontract between Aurizon and Pacific National contravened s 45 and that the proposed sale of the ART would contravene s 50. The primary judge found against the ACCC in respect of both allegations. Now on appeal, the only allegation maintained by the ACCC is that the proposed sale of the ART to Pacific National would be likely to have the effect of substantially lessening competition.
2. The ACCC’s case is that the likely effect of the sale of the ART to Pacific National is that: (i) as owner, Pacific National would have the ability and incentive to discriminate against third-party users of the Brisbane Multi User Terminal (within the ART) in favour of its own operations; (ii) that would raise barriers to entry to the interstate rail linehaul market; (iii) that would deter new entry; and (iv) that would materially reduce the competitive constraint on Pacific National in the interstate rail linehaul market.
3. The primary judge concluded that the Undertaking offered by Pacific National (and which would be accepted by the Court) removed the threat of discrimination and thereby removed the postulated anti-competitive harm of the acquisition. On that approach to the issues, it was not necessary for his Honour to determine whether, in the absence of the Undertaking, the acquisition would have contravened s 50. Nevertheless, the primary judge considered the position if Pacific National had not offered the Undertaking, albeit relatively briefly, and concluded, on balance and not without some hesitation, that he would have upheld the ACCC’s case. A critical finding in support of that conclusion was that his Honour “could not rule out the realistic commercial chance of another potential new entrant emerging in the relevant timeframe” and that “the potential threat of such emergence could act as a discipline on Pacific National's present behaviour concerning the supply of North-South Rail Services” (at [1612], and to similar effect at [1005], [1388] and [1418]).
4. On this appeal, the respondents did not contest the primary judge’s findings that:
	1. the ART is the only terminal which provides a viable option in the short to medium term (three to five years) to support the provision of North-South rail linehaul services by a new entrant on the scale required to conduct a sustainable business;
	2. in the absence of the Undertaking, Pacific National, as the owner of the ART, would have the ability and incentive to discriminate against a new entrant; and
	3. in the absence of the Undertaking, a potential new entrant would likely be deterred by the perception that Pacific National would have the ability and incentive to discriminate against it as the owner of the ART.
5. It should also be noted that the ACCC did not contest the primary judge’s findings that:
	1. a new intermodal terminal would be constructed by 2028 at the latest, and possibly as early as 5 years, in conjunction with the Inland Rail Project;
	2. there is no realistic possibility that any lessening of competition could continue after the completion of the Inland Rail Project;
	3. the barriers to entry to the interstate rail linehaul market were already high, and it would take a new entrant many years, possibly up to 5 years, to plan for and enter the market; and
	4. as a consequence of the above factors, the window of time in which competition could be lessened by virtue of the acquisition of the ART was relatively limited.
6. Ultimately, the assessment of the effect on competition of the acquisition turned on the likelihood of new entry if the acquisition did not proceed. In other words, did the evidence show that, if Aurizon retained the ART or sold it to another buyer such as Qube, that there was a realistic prospect of new entry into the interstate rail linehaul market, and did the evidence show that that prospect would be deterred or materially discouraged were Pacific National to acquire the ART?
7. The respondents challenge the primary judge’s conclusion that, if the acquisition did not proceed, he could not rule out the realistic commercial chance of another company wishing to enter the North-South rail linehaul market in the relevant timeframe. The respondents say that, by that critical finding, his Honour reversed the onus of proof or made a finding that was not supported by the evidence.
8. With the greatest respect to the primary judge, we accept the respondents’ submission that the conclusion stated at [1612] reveals error. However, we disagree that the error can be characterised as reversing the onus of proof. Rather, we would characterise the error as a misapplication of the applicable legal standard, being whether the evidence established on the balance of probabilities that the acquisition would have the likely effect of substantially lessening competition.
9. As discussed earlier, s 50 requires a comparison between the nature and extent of competition in a relevant market in the future with the acquisition and without the acquisition. That enquiry requires predictions about various facts and circumstances in the future, which will have different degrees of likelihood or probability. In the present case, one such future fact is the likelihood that, if Pacific National were to own the ART, it would have the ability and incentive to discriminate against potential new entrants. The primary judge found that that was likely. Another future fact concerned the development of the Inland Rail Project and the timeframe in which another rail terminal would be built. Yet another future fact concerned the likely timeframe within which it was feasible for a new entrant to enter the North-South rail linehaul market. And yet another future fact was the likelihood that any company would enter the North-South rail linehaul market before another rail terminal was built. None of those facts must be proved to any particular degree of likelihood as a matter of law. In particular, it is wrong to assume that each relevant fact must be shown to be “likely” within the meaning of s 50 in order to take the fact into account in assessing whether s 50 has been contravened. What must be shown to be “likely” is that the acquisition would have the effect of substantially lessening competition. That assessment is to be made on the basis of an overall evaluation of the evidence, taking account of the significance of the predicted facts and circumstances to competition and the likelihood of such facts and circumstances occurring in the future.
10. Thus, it was not an error in itself for his Honour to make the negative finding that he could not rule out the realistic commercial chance of another company wishing to enter the North-South rail linehaul market in the relevant timeframe. Nor was it an error to apply the description “realistic commercial chance” to the prospect of new entry, although it was not necessary to apply that description to every fact relevant to the s 50 enquiry. However, the relevant question is: what did his Honour mean by that negative finding and how did it bear upon the ultimate conclusion under s 50?
11. Ordinarily, there is a difference between a negative finding that a fact cannot be ruled out and a positive finding of the existence of the fact. The negative finding conveys that the fact is a possibility. His Honour’s conclusion at [1612] (repeating what was said at [1005]) appears to be a finding that, if the acquisition does not proceed, there is a possibility of a real chance of new entry in 5 years. It is not a positive finding that there is a real chance of new entry in 5 years. The negative finding made by his Honour is consistent with his Honour’s other findings. His Honour made clear that the case advanced by the ACCC at trial identified Qube as the most likely new entrant, and the ACCC’s case was focussed on Qube. The primary judge discussed the evidence concerning the likelihood of new entry by Qube (at [943]-[989]) but ultimately found that Qube would not enter the market (at [1293] and [1361]). While the primary judge accepted that the ACCC’s case also postulated the possibility of new entry by another company, no such company was identified by the ACCC and his Honour characterised that prospect as speculative (at [1388], [1418]).
12. On the appeal, the ACCC argued in effect that his Honour’s negative finding should be understood as a positive finding that, if the acquisition did not proceed, there is a real chance of new entry into the North-South rail linehaul market in 5 years. The ACCC referred to various pieces of evidence at trial that it said supported such a finding.
13. There are two difficulties with the ACCC’s argument. First, the evidence relied on by the ACCC on the appeal was not relied on by the primary judge to make a positive finding about the likelihood of new entry (his Honour only making the negative finding which recognises the possibility of new entry). Second, when analysed, the evidence does not support the ACCC’s argument. It is necessary to address each item of evidence in turn.
	1. First, the ACCC relied on Pacific National’s internal documents, particularly a memorandum dated 18 July 2017 provided to Pacific National’s President of Intermodal, Andrew Adam, two days before Pacific National’s bid for the ART (Exhibit A37) and a Pacific National Board Paper dated July 2017 (Exhibit A43). Contrary to the ACCC’s submission, the documents did not indicate that Pacific National thought that new entry was likely if it did not acquire the ART. The documents reveal that Pacific National regarded Qube as a possible new entrant if it acquired the ART, the case advanced by the ACCC.
	2. Second, the ACCC relied on the evidence of Mr Morton, Pacific National’s expert economist, who expressed the opinion that customer sponsored entry was viable and “common”, concluding that there are several freight owners that are likely to have sufficient scale to support a new entrant in their own right. However, the ACCC did not support or rely on Mr Morton’s evidence at trial. Mr Morton’s evidence was not generally accepted by the primary judge and that aspect of his evidence was not referred to by the primary judge.
	3. Third, the ACCC argued that various facts showed that the rail market is dynamic, including the closure of Aurizon’s interstate intermodal business in December 2017, SCT’s commencement of rail services on the North-South corridor in January 2017 and Linfox’s commencement of Queensland intrastate rail linehaul services from October 2018. However, those events do not show that new entry into the interstate rail linehaul market is likely. Indeed, the closure of Aurizon’s interstate intermodal business suggests that new entry is unlikely rather than likely. Despite Aurizon having a substantial share of the North-South rail linehaul market (referred to below), the interstate intermodal business was closed because it was not profitable. Mr Lippiatt, Head of Strategy and Corporate Development of Aurizon, gave evidence of the very substantial losses incurred by Aurizon in conducting its interstate intermodal business, with the greatest losses being sustained on the North-South corridor. The primary judge described Mr Lippiatt as “frank, well prepared and reliable” (at [773]). In relation to SCT, the primary judge found (at [622]) that SCT’s commencement of services on the North-South corridor was underpinned by pre-existing customer relationships and volumes by reason of SCT’s established East-West operation and its hook and pull arrangement with Aurizon, circumstances that are not analogous to those that would confront a potential new entrant. Linfox commenced supplying Queensland intrastate rail linehaul services by acquiring Aurizon’s Queensland intermodal business. Further, Mr Strachan, President of Intermodal at Linfox, gave evidence about Linfox’s business operations. He did not refer to any intention to enter the interstate rail linehaul market and that suggestion was not put to him in cross-examination by the ACCC.
	4. Fourth, the ACCC referred to the fact that, in its initial sales process, Aurizon received six non-binding bids for the ART from Qube, Oaktree, Genesee & Wyoming, Pacific National, ARTC and Charter Hall (as recorded by the primary judge at [62]). The ACCC argued that an independent owner of the ART would seek to maximise utilisation and encourage new entry into the interstate rail linehaul market (relying on the primary judge’s findings at [1174], although that finding only related to Aurizon’s incentives). In our view, the established facts concerning Aurizon’s sale process do not support a conclusion that new entry is likely. If any company was interested in entering the interstate rail linehaul market, the sale of Aurizon’s interstate intermodal business provided a significant opportunity to acquire, at the very least, a customer base to underpin entry. Despite that, of the parties that participated in the sale process, only two, Qube and Oaktree, expressed any interest in acquiring the interstate intermodal business. Ultimately, the business was closed rather than sold.
	5. Fifth, the ACCC relied on the fact that, while Aurizon originally proposed to close its Queensland intermodal business, following the grant of an interlocutory injunction Linfox purchased the business, presenting a future threat of entry to the interstate rail linehaul market. However, as already noted, evidence was given by a senior representative of Linfox and there was no suggestion that Linfox planned to enter the interstate market and he was not asked about that prospect in cross-examination by the ACCC.
	6. Sixth, the ACCC relied on the fact that one of the original bidders for the ART, Genesee & Wyoming, is the monopoly interstate intermodal rail operator on the Adelaide to Darwin rail corridor (as the primary judge found at [912]). However, as already noted, Genesee & Wyoming did not lodge a bid for Aurizon’s interstate intermodal business and there was no evidence of it having any interest in supplying North-South rail linehaul services. The ACCC did not contend at trial that it was a likely or possible new entrant.
14. We accept the respondents’ submission that the detailed evidence given by senior employees of Qube, Mr James and Mr Nacey, adduced by the ACCC establishes the commercial difficulties associated with entering the interstate rail linehaul market and the likely timeframe for new entry. The primary judge found that Qube wished to enter the market (if the Terminal Services Subcontract was not enforceable) and it owned and operated existing facilities that would assist new entry (at [972]-[980]). Despite having those advantages, the primary judge found (at [988]):

988 …I do accept that if Qube were to acquire the ART and consider commencing supply of interstate intermodal services without having first acquired an intermodal business, the prospect and timing of it commencing supply of those services would be uncertain to say the least. Qube estimated that even with the benefit of customer contracts from the QIB it would take at least 3 to 5 years to commence supplying Rail Services in the Interstate markets. Without those contracts it would take longer, with 3 to 5 years simply a target. Mr James’ affidavit evidence was to the effect that whether entry occurs at all appears to depend on whether Qube can somehow find additional volumes, acquire a freight forwarding business or enter into a joint venture with Linfox. In cross-examination, he accepted that Qube may need to acquire an established intermodal rail business, an even less likely prospect.

1. In our view, the reasons of the primary judge at [1005] and [1612] must be understood as a finding that, if the sale of the ART to Pacific National were not to proceed, there is a possibility of new entry to the North-South rail linehaul market in about 5 years’ time. The prospect cannot be put higher than a mere possibility and, in that sense, is speculative. The evidence adverted to by the ACCC on the appeal only serves to confirm that finding. New entry would be difficult because, as the primary judge found, barriers to entry are high, requiring substantial capital and other investments, significant lead time and a long-term investment horizon (at [938]). The likelihood of new entry was tested in the market when Aurizon offered its interstate intermodal business for sale. Although the figures were redacted for confidentiality in the reasons of the primary judge, we consider it appropriate to refer to the primary judge’s finding (at [235]) that, in the 2016 financial year, the approximate shares of North-South rail linehaul services estimated on the basis of twenty-foot equivalent units (TEUs) were Pacific National 67%, Aurizon 28% and SCT 5%. Thus, Aurizon held a substantial share of the market and offered it for sale. However, the business was not profitable and the sale was not successful. Ultimately the business was closed.
2. It should be emphasised that, in a given case, findings about the prospect of new entry may be capable of being made without identifying a specific potential entrant or direct evidence of an intention to enter. Such a finding could be supported by evidence concerning the nature of the market in question, the nature of the barriers to entry and the history of entry to and exit from the market. Further, in many cases the likelihood and timing of new entry is not central to the competition analysis. In the present case, however, the likelihood and timing of new entry was central. The postulated competitive harm turned on whether Pacific National’s ownership of the ART would deter new entry by reason of its ability to discriminate against a new entrant wishing to use the ART. The primary judge found that Pacific National’s ability to deter entry would cease on the construction of a new rail terminal as part of the Inland Rail Project. Accordingly, whether new entry was likely, and when it might occur, were key facts to be assessed. The ACCC’s case on new entry was focussed on Qube, but Qube’s own evidence negatived an intention to enter (because of the Terminal Services Subcontract). The ACCC did not adduce evidence concerning the likelihood of entry by any other company. As a result, the evidence at trial only supported a finding that new entry was possible (in the sense of a mere possibility).
3. Respectfully, we consider that the primary judge erred in concluding that, in the absence of the Undertaking, the sale of the ART to Pacific National would contravene s 50. That is because, assuming the acquisition does not proceed: the prospect of new entry does not rise higher than a mere possibility and can rightly be regarded as speculative; even if entry were to occur, it would be unlikely to occur in the next 5 years; and, even if it were to occur, an alternative terminal is likely to be built as early as 5 years hence but at least in the ensuing few years. Accordingly, if the acquisition were to proceed, the deterrent effect of the acquisition on new entry, arising from Pacific National’s ability to discriminate against a new entrant, is based on the speculative prospect of new entry within that window of opportunity. Given that the prospect of new entry within the relevant timeframe is speculative, the competitive constraints facing Pacific National in that timeframe will not differ in any real or substantive way whether Pacific National acquires the ART or does not acquire the ART. It follows, in our view, that the acquisition of the ART would not be likely to substantially lessen competition. To the contrary, that prospect is unlikely.
4. The ACCC advanced the further argument that a finding that an acquisition will heighten barriers to entry permits a court to conclude that the acquisition is likely to substantially lessen competition unless new entry is impossible or so close to impossible as to not warrant further scrutiny; i.e. unless the barriers to entry are already so high that there can be no harm in raising them further. In support of that argument, the ACCC relied on a statement of the Trade Practices Tribunal in *Re Tooth and Tooheys* (reproduced earlier), and the evidence of Dr Williams that was accepted by the primary judge.
5. It is uncontroversial that the height of barriers to entry is relevant to the assessment of competition in a market and, as a general proposition, increasing barriers to entry would be expected to lessen competition (by lessening the competitive constraint afforded by the potential for new entry): see *QCMA* at 189; *Outboard Marine Australia Pty Ltd v Hecar Investments No 6 Pty Ltd* (1982) 66 FLR 120 at 123 per Bowen CJ and Fisher J; *Queensland Wire* at 189 per Mason CJ and Wilson J, at 201 per Dawson J. However, it does not follow that in every case in which barriers are raised by an acquisition that competition will be substantially lessened unless new entry is impossible or close to impossible.
6. The statement in *Re Tooth and Tooheys* relied on by the ACCC is a factual conclusion that, in that case, it could not be concluded that the vertical restraints in issue could have no effect on new entry unless entry was impossible (at 69). The decision did not concern s 50, nor an assessment whether conduct was likely to *substantially* lessen competition. Rather, the decision involved the test for authorisation under Part VII of the Act, which was whether the conduct to be authorised was likely to result in a benefit to the public which outweighed the detriment to the public constituted by *any* lessening of competition that would be likely to result from the conduct. Further, the decision involved the assessment of vertical restraints of very long duration. The Tribunal accepted that, in the counterfactual (without the restraints), entry was not realistic for the foreseeable future, but found that the foreseeable future was "not a very long time in comparison with the length of the ties or the life of the tie system" and "certainly short of the year 2000" (at 67). The duration of the restraints meant that there was such a long time period over which relevant entry could occur that there was a realistic chance of entry in the counterfactual, despite the already high barriers to entry.
7. The evidence of Dr Williams as to economic principles concerning barriers to entry was also uncontroversial. The ACCC relied on Dr Williams’ evidence that barriers to entry influence the possibility that market concentration may decrease or increase over time, whether or not one could identify a potential entrant (recorded by the primary judge at [1298]). The ACCC submitted that that evidence was accepted by the primary judge when his Honour stated (at [1418]) that: “I am inclined to accept Dr Williams’ evidence that raising barriers will more likely preserve the current high market concentration and act less as a discipline on Pacific National’s behaviour because the threat of new entry is less”. However, acceptance of Dr Williams’ evidence was not determinative of the ultimate issue to be decided in the case: whether, on the balance of probabilities, the acquisition would be likely to have the effect of substantially lessening competition. While the primary judge accepted Dr Williams’ evidence, his Honour also recognised that raising barriers to entry does not necessarily establish a s 50 case (at [1418]). As a general proposition, it can be accepted that increasing barriers to entry lessens competition (to some extent), unless new entry is impossible. However, to apply s 50, it remains necessary to assess the likelihood of new entry in the relevant timeframe and the factors bearing upon that likelihood, and make an assessment whether any perceived increase in barriers to entry caused by the acquisition would result in a substantial lessening of competition.

## E.5 Conclusion on the competition issues

1. In conclusion, we reject the respondents’ cross-appeals in so far as they relate to the primary judge’s conclusions concerning the meaning of the word “likely” (ground 4 of Aurizon’s cross-appeal). However, we accept the respondents’ cross-appeals in so far as they relate to the primary judge’s conclusion, stated at [1612], that in the absence of the Undertaking the sale of the ART to Pacific National would be likely to substantially lessen competition. Aside from Qube, the evidence adduced at trial did not support a finding that new entry is likely in the relevant timeframe; the evidence only supported a finding that new entry was a possibility in that timeframe. In all of the circumstances, including particularly the relatively narrow window in which Pacific National’s ownership of the ART would create the opportunity to deter entry (before a new terminal is built), in our view the acquisition would not be likely to have the effect of substantially lessening competition in the North-South rail linehaul market. We note for completeness that the primary judge found it unnecessary to determine whether the acquisition of the ART would be likely to have the effect of substantially lessening competition in the East-West rail linehaul market (if it be a separate market). The ACCC did not contend that such a finding should be made and therefore it has not been necessary to consider that market separately.

# the undertaking

**(ACCC amended notice of appeal; PN amended notice of cross-appeal ground 8; Aurizon amended notice of cross-appeal ground 6; ACCC notice of contention ground 3)**

1. The finding that the proposed acquisition would not contravene s 50 requires the dismissal of the ACCC’s appeal and renders the ACCC’s grounds of appeal moot. Although it is not necessary to address the ACCC’s grounds of appeal, it is appropriate to do so because the issues are of some importance and the Court has heard full argument. The following discussion proceeds on the assumption (contrary to our conclusion) that the proposed acquisition would contravene s 50.

## F.1 Background and reasons of the primary judge

1. In accordance with clause 5.1 of the Business Sale Agreement, in July 2017 Pacific National sought informal clearance from the ACCC for the acquisition of the ART. In connection with that application, it offered the ACCC an undertaking under s 87B of the Act, and subsequently offered the ACCC different versions of the undertaking, the last of which was offered on 15 June 2018. The undertakings related to the provision by Pacific National to third parties of access to the ART on a non-discriminatory basis. The ACCC did not accept the undertakings offered and refused to grant informal clearance (see [1429]).
2. By its amended defence, Pacific National denied that its acquisition would contravene s 50 of the Act and said further that it “will offer to the Court on the hearing of the matter an undertaking in a form that is consistent with the undertaking offered by it on 15 June 2018…if and to the extent that the Court considers such an undertaking to be necessary for it to be satisfied that the ART Acquisition does not contravene s 50 of the CCA”. Two matters can be noted about that aspect of Pacific National’s defence. First, the defence assumed that the undertaking offered by Pacific National could be taken into account in the assessment of whether the acquisition of the ART would contravened s 50. It was not an undertaking offered in lieu of the grant of injunctive relief. Second, the undertaking was offered conditionally – if the Court were to otherwise find that the acquisition would contravene s 50.
3. On the last day of the trial, Pacific National offered a new undertaking (which is referred to herein as the Undertaking) unconditionally (see [49]). The offer was made unconditionally to overcome a concern that, by offering the undertaking conditionally, Pacific National was seeking an advisory opinion from the Court (see at [1431]). It is unnecessary to consider the validity of that concern.
4. The primary judge concluded (at [838]) that the Undertaking offered by Pacific National to the Court would prevent Pacific National from engaging in discriminatory conduct in the operation of the ART. His Honour found that the Undertaking “contains a range of measures that would prohibit Pacific National from engaging in discriminatory conduct, that would ensure that any discrimination could be detected, and that would provide any reasonable access seeker with confidence that it would not face any discrimination”. As a result, the primary judge concluded that if Pacific National acquires the ART and gives the Undertaking, Pacific National would not have the ability to discriminate against new entrants, thereby removing the anti-competitive effects of the acquisition (at [839], [1609]).
5. In his reasons, the primary judge addressed many specific criticisms of the Undertaking made by the ACCC. A number of those criticisms are repeated on this appeal and are considered below together with the primary judge’s reasons rejecting those criticisms. His Honour summarised his overall conclusions about the effectiveness of the Undertaking as follows:

1585 Drawing the relevant threads together, in my view the Undertaking provides a suitable and useful mechanism to ensure access to the ART by operators other than PN by reasons of, in summary, the following matters.

1586 First, it requires PN 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.

1587 Second, it contains a compulsory mechanism for PN 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.

1588 Third, it 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.

1589 Fourth, the Undertaking contains provisions requiring PN to keep users' information confidential and to set up the ARTBU that is separate from the remainder of the PN haulage business. It contains restrictions on the ARTBU employees reporting to, being seconded to or working in the PN haulage business.

1590 Fifth, 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.

1591 Sixth, it contains various non-discrimination obligations on PN, including an obligation not to engage in conduct which prevents or hinders users from gaining access or providing services to their customers.

1592 Seventh, it contains various audit and compliance requirements. An auditor is appointed specifically to monitor PN's compliance with the Undertaking and to take action in respect of any breaches.

1593 Eighth and more generally, if PN does not come to an agreement with a user, an outcome may be imposed by one of the processes set out in the Undertaking.

1594 Now as I have said, the ACCC complains that because the Undertaking is offered as an undertaking to the Court, that requires extensive supervision by me. But that is not correct. The Undertaking provides for obligations with which PN is required to comply. The threat of being found to have breached that Undertaking, which would be a contempt of court, is a powerful incentive for PN to comply. Further, a significant part of the Undertaking is the requirement that PN make its standard terminal services agreement terms available. Accordingly, once a terminal services agreement is entered into, the user has its usual contractual remedies.

## F.2 The ACCC’s contentions

1. By its amended notice of appeal and notice of contention, the ACCC advances the following contentions (which we will label 1 to 5 for convenience):
	1. Contention 1 is that the primary judge did not have power to accept the Undertaking because the power to accept an undertaking is limited to circumstances where the undertaking is in lieu of injunctive relief granted pursuant to s 80(1) of the Act in respect of conduct that constitutes or would constitute a contravention of (relevantly) s 50 of the CCA. The primary judge did not accept the Undertaking in lieu of an injunction but took the Undertaking into account as part of the factual matrix in assessing whether s 50 was contravened, and found that s 50 was not contravened (ACCC amended notice of appeal grounds 1(a)-(d)).
	2. Contention 2 is that if, contrary to the first contention, either the Act or the FCA Act purported to confer power on the Court to accept the Undertaking in the manner adopted by the primary judge, that would infringe Chapter III of the Constitution by attempting to confer a non-judicial power on the Federal Court and, accordingly, the relevant statutory provisions are to be construed as not authorising such an exercise of power (ACCC amended notice of appeal ground 1(e)).
	3. Contention 3 is that if, apart from the Undertaking, the primary judge found or should have found that the acquisition of the ART by Pacific National would have contravened s 50, neither the Act nor the FCA Act authorised the Court to accept the Undertaking in lieu of granting injunctive relief both as a matter of construction of the relevant provisions and because to do so would infringe Chapter III of the Constitution by attempting to confer a non-judicial power on the Federal Court and, accordingly, the relevant statutory provisions are to be construed as not authorising such an exercise of power (ACCC notice of contention ground 3).
	4. Contention 4 is that, if the primary judge did have power to accept the Undertaking in connection with the assessment of whether the acquisition would contravene s 50, the primary judge erred in doing so because the terms of the Undertaking do not have the requisite nexus with the proposed contravening conduct and the Undertaking would not be effective in preventing Pacific National from engaging in discriminatory conduct (ACCC amended notice of appeal ground 2).
	5. Contention 5 is that the primary judge erred in accepting the Undertaking because it was not formulated with the necessary precision such as to be capable of being readily obeyed and enforced and the Undertaking involves vague evaluative judgments and significant debates as to its interpretation (ACCC amended notice of appeal ground 3).

### Contention 1

1. In support of the first contention, the ACCC made the following submissions.
2. First, the primary judge reasoned that the unconditional offer of the Undertaking, and his Honour’s intention to accept it in due course as part of his final orders to dispose of the proceeding, was a “matter of fact” to be “considered as part of the future with the ART acquisition scenario” (at [49], 1307] and [1431]). His Honour found that, in the future with the acquisition and the Undertaking, Pacific National would not have the ability to discriminate as the owner of the ART (at [839]); that access seekers would not reasonably perceive that Pacific National would have the ability and incentive to discriminate against them (at [1352], [1368]-[1369], [1376]); and that heightened barriers to entry would be overcome (at [1353]).
3. Second, while it is well-established that the Court has the power to accept an undertaking in lieu of granting an injunction, an undertaking is treated as the equivalent of a court order for the purpose of enforcement and the Court cannot accept an undertaking in terms that exceed what the Court could order by way of an injunction: *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 (***Thomson***) at 165.
4. Third, s 23 of the FCA Act does not authorise the Court to grant injunctive relief where jurisdiction is acquired under another statute which provides an exhaustive code of the available remedies and that code does not authorise the grant of an injunction: *Thomson* at 161; *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 (***Jackson***) at 620 (Brennan J), 631-632 (Toohey J); *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 425-426, 456; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1 (***Patrick Stevedores***) at [27]-[28]; and *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 (***Cardile***) at [33].
5. Fourth, s 80 of the Act provides an exhaustive code for the grant of injunctions in respect of contraventions of the Act and, accordingly, s 23 of the FCA Act does not empower the Court to grant injunctions restraining or relating to contraventions of the Act in situations falling outside the boundaries drawn by s 80: *Thomson* at 160-162. Thus, the Court had no power to accept the Undertaking unless it had power under s 80 to grant an injunction in the same terms.
6. Fifth, there are four relevant limits to the power to grant an injunction under s 80: the power is only enlivened upon a finding of an existing or threatened contravention of (relevantly) s 50; s 80(1A) provides that only the ACCC can apply for an injunction as relief for a contravention or threatened contravention of s 50; the use of the word “injunction” in s 80 indicates that Parliament intended to refer to that remedy known to equity as a form of relief upon the Court being satisfied of a basis in law or in equity for granting it; and the nature of the relief that is sought in an application under s 80 in respect of conduct which would contravene s 50 is a prohibitive injunction. The ACCC submitted that the primary judge failed to abide by the foregoing limits to the power conferred by s 80. His Honour erred by taking the Undertaking into account in determining whether the acquisition would contravene s 50 and concluding, having regard to the Undertaking, that s 50 would not be contravened. That was not an exercise of power within s 80. The power to consider the acceptance of the Undertaking could only arise once a finding had been made that the acquisition would contravene s 80.
7. The ACCC also observed that, although the trial judge relied upon the example set by French J in *AGL No 3* in accepting an undertaking in the absence of a finding of contravention, no argument was directed to French J as to matters of power and, therefore, the case does not stand as authority against the ACCC’s submissions. The ACCC also noted that the circumstances in *AGL No 3* differed from the present case in that French J concluded that the acquisition did not contravene s 50 (without considering the undertaking), and then went on to accept the undertaking, which “reinforced” that conclusion (at [10] and [614]).

### Contention 2

1. In relation to contention 2, the ACCC relied on the basal principle that the judicial power of the Commonwealth can be exercised only by the courts referred to in s 71 of the Constitution, and federal courts can only exercise that judicial power and such non-judicial functions as are incidental thereto: *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254 (***Boilermakers***). With regard to the definition of judicial power, the ACCC relied on various statements of the High Court in *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 (***Precision Data***), particularly the statements (at 189) that “if the ultimate decision may be determined not merely by the application of legal principles to ascertained facts but by considerations of policy also, then the determination does not proceed from an exercise of judicial power” and “if the object of the adjudication is not to resolve a dispute about the existing rights and obligations of the parties by determining what those rights and obligations are but to determine what legal rights and obligations should be created, then the function stands outside the realm of judicial power”.
2. The ACCC submitted that the primary judge’s decision to accept the Undertaking did not constitute an exercise of judicial power for the following reasons:
	1. First, acceptance of the Undertaking created an entirely new set of rights and obligations, rather than declaring pre-existing rights and obligations.
	2. Second, the Court’s decision whether to accept the Undertaking, and if so in what terms, was not made by reference to any objective legal criteria, whether prescribed by statute or otherwise.
	3. Third, by accepting the Undertaking the Court “entered the fray” and became an actor in the hypothetical future with the proposed acquisition. The ACCC submitted that the hallmark of judicial power is the determination of controversies, not facilitating acquisitions that may contravene a statutory prohibition.
	4. Fourth, although a power which lacks the usual features of judicial power may still bear that character if it is of the same “jurisprudential character” as powers “historically” or “traditionally” exercised by courts (see for example *Thomas v Mowbray* (2007) 233 CLR 307 at [15]-[17] per Gleeson CJ and at [114]-[121] per Gummow and Crennan JJ), there is no such historical analogue for the Court accepting undertakings to facilitate particular commercial transactions that would otherwise contravene a statutory prohibition.
	5. Fifth, acceptance of the Undertaking was divorced from any anterior finding of a contravention and, as a consequence, it could not be said that the Undertaking was accepted in the exercise of some incidental function to give effect to a prior exercise of judicial power.

### Contention 3

1. Contention 3 addresses the question whether the Court has power to accept the Undertaking as a remedy for the acquisition contravening s 50. In support of the third contention, the ACCC made the following submissions.
2. First, even if the precondition to the exercise of power under s 80 is met (satisfaction of a likely contravention), the Undertaking is not within the scope of orders that are “appropriate”. A power contingent upon what is considered “appropriate” does not necessarily empower the Court to make any order it can offer a rational explanation for making: *BMW Australia Ltd v Brewster* (2019) 94 ALJR 51 at [3], [47], [49]-[53], [70] per Kiefel CJ, Bell and Keane JJ, [125] per Nettle J and [146]-[147] per Gordon J. Nor does *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 (***ICI***) support the acceptance of the Undertaking. The Undertaking is not a negative injunction – enjoining, stopping or preventing the contravention. Rather, it is a mandatory order imposing a suite of fresh duties on the wrongdoer. It allows conduct to proceed (the acquisition) that the Parliament would otherwise have commanded not to occur.
3. Second, recognising that s 80(1A) provides that only the ACCC can apply for an injunction as relief for an existing or threatened contravention of s 50, it cannot be “appropriate” for the Court to grant an injunction under s 80 which has no relationship to the injunction sought by the ACCC. It follows that the Court cannot accept an undertaking that has no relationship to the injunctive relief sought by the ACCC.
4. Third, the Constitutional considerations referred to in relation to the second contention are also applicable. The ACCC submitted that the legal criteria for contravention established by s 50 cannot provide suitable guidance for the assessment of the Undertaking as a remedy for the contravention.

### Contentions 4 and 5

1. In its submissions, the ACCC addressed contentions 4 and 5 collectively. Both contentions are advanced in the alternative, on the assumption that the Court had power to accept the Undertaking. Also, the same contentions are advanced in response to the respondents’ cross-appeals (referred to below): that if the primary judge erred in taking the Undertaking into account in concluding that the acquisition would not contravene s 50, and if this Court upholds the primary judge’s conclusion that (ignoring the Undertaking) the acquisition would contravene s 50, this Court should accept the Undertaking in lieu of the injunction sought by the ACCC. In support of these contentions, the ACCC made the following submissions.
2. First, the power to grant an injunction under s 80 can only be exercised if there is a “sufficient nexus” or relationship between the injunction and a contravention: *Australian Competition and Consumer Commission v Z-Tek Computer* (1997) 78 FCR 197 at 204. That nexus “goes to the appropriateness of the relief contemplated by the concluding words of s 80(1)”: *Foster v ACCC* (2006) 149 FCR 135 at [35]. Because the same limits on the Court’s power to issue injunctions apply to the power to receive undertakings, it follows that an undertaking must have a “sufficient nexus” to the proposed conduct. The ACCC argued that the requisite nexus did not exist in this case. The relevant contravening conduct was the proposed acquisition of the ART, but the Undertaking does not prohibit that conduct and instead assumes that the conduct will occur and seeks to ameliorate its effects.
3. Second, the primary judge erred in concluding that the Undertaking would be effective in preventing Pacific National from engaging in discriminatory conduct. In support of that submission, the ACCC relied on the following matters.
	1. The primary judge found that “any breach of the Undertaking would be expected to attract contempt proceedings” (at [1448]) which would “realistically discipline behaviour both of [Pacific National] and any officers or employees who may have potential accessorial exposure” (at [1433]). The ACCC argued that whether, and to what extent, the threat of contempt proceedings will discipline a person to comply with any undertaking, particularly one in the complex behavioural terms of the Undertaking, is an inherently problematic exercise for a court to predict.
	2. An injunction must be expressed in clear and unambiguous terms, leaving no room for confusion: *ICI* at 259; *Rural Press*. A finding of contempt will not be made where an injunction is ambiguous or lacks precision: *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483; *Iberian Trust Ltd v Founders Trust and Investment Ltd* [1932] 2 KB 87; *Kirkpatrick v Kotis* (2004) 62 NSWLR 567 at [48]-[49], [55]-[57]; *Witham v Holloway* (1995) 183 CLR 525 at 529. It follows that an undertaking accepted in lieu of an injunction must therefore also be couched in unambiguous language and should not inveigle the Court in the ongoing supervision of the conduct of the parties: *ACCC v Real Estate Institute of Western Australia Inc* (1999) 161 ALR 79 (***REIWA***) at [28] per French J. The ACCC argued that a number of the provisions of the Undertaking are vague.
	3. The ACCC has extensive and detailed experience regarding the development, application and enforcement of regulatory undertakings, and in particular behavioural undertakings. The ACCC expressed concern that, as a complex behavioural undertaking, the Undertaking cannot replicate the constraint of market forces which would prevail without the proposed acquisition and the mechanisms for monitoring and enforcing the Undertaking are inadequate and unworkable. The ACCC argued that the primary judge did not give these concerns the weight they deserved as coming from the regulator and did not expose a cogent basis for rejecting those concerns.
	4. The ACCC’s concerns about the efficacy of the Undertaking were supported by the expert evidence of Dr Kuypers, who gave evidence that the Undertaking would not remove Pacific National’s ability to engage in discriminatory conduct. The respondents led no evidence in response to Dr Kuypers’ evidence on the Undertaking and did not materially challenge Dr Kuypers on that evidence in cross-examination. No party sought, and the trial judge did not make, any adverse finding as to Dr Kuypers’ truthfulness. Despite this, the primary judge rejected several of Dr Kuypers’ criticisms of the Undertaking. The ACCC argued that the primary judge adopted a high level and generalised analysis, based substantially on his own reading of the terms of the Undertaking and divorced from any knowledge of, or findings on, the real-world challenges associated with assessing the cumulative efficacy of those terms in a complex multi-user terminal. The ACCC argued that it was not open to the primary judge to dismiss Dr Kuypers’ evidence in this way, nor to displace Dr Kuypers’ expert evidence with his Honour’s own textual analysis of the Undertaking and perception of its “real-world effect” in an operationally complex multi-user terminal. Alternatively, the ACCC argued that the trial judge’s approach led his Honour to pay little or no regard to Dr Kuypers’ evidence and thereby to make an error of fact in his Honour’s ultimate conclusion that the Undertaking would be effective to prevent Pacific National from discriminating against users (being an error of the nature identified by Perram J in *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* (2018) 261 FCR 317 (***Moroccanoil***) at [45], [47]).
4. The specific aspects of the Undertaking that are criticised by the ACCC, and which are the subject of Dr Kuypers’ evidence relied on by the ACCC, are considered below. The central argument of the ACCC is that many of the obligations imposed on Pacific National by the Undertaking are couched in vague terms which are incapable of enforcement in a contempt proceeding.

## F.3 The respondents’ contentions

### Response to the ACCC’s first contention

1. In respect of the ACCC’s first contention, that the Court had no power to accept the Undertaking absent a finding of contravention of s 50, there was some difference between the submissions of Pacific National and Aurizon. However, it is again unnecessary to differentiate the submissions of the respondents.
2. The respondents submitted that the primary judge had at least two independent sources of power to accept the Undertaking, reflecting two aspects of the relief sought by the ACCC. First, the ACCC sought a declaration pursuant to s 21 of the FCA Act that the ART acquisition would contravene s 50. That claim enlivened r 1.33 of the *Federal Court Rules* 2011 (**FCR**) which, read with r 1.32 and ss 22 and 23 of the FCA Act, empowered the Court to make an order dismissing the ACCC’s application “subject to any conditions the Court considers appropriate” including a condition, in effect, that Pacific National give the Undertaking. Second, the ACCC sought an injunction pursuant to s 80(1)(a)(i) of the Act that Pacific National be restrained from acquiring the ART. That claim enlivened the power of the Court to accept the Undertaking in lieu of granting an injunction pursuant to s 80: *Thomson* at 164. Each of the distinct sources of power must be construed broadly and without artificial limitations that are not found in the statutory words themselves, relying on *Owners of the Ship “Shin Kobe Maru” v Empire Shipping Company Inc* (1994) 181 CLR 404 at 421; *Weinstock v Beck* (2013) 251 CLR 396 at [55].
3. The respondents submitted that the first power, to make an order dismissing the ACCC’s application for a declaration subject to conditions, was not confined by the limits of s 80 of the Act. In respect of that power, jurisdiction was conferred by s 39B(1A) of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) and the power arose under the FCA Act. The respondents argued that, whether or not s 80 is an exclusive basis for granting injunctions in relation to contraventions of the Act, the Act is not an exclusive basis for granting declarations and power is conferred by ss 21 and 23 of the FCA Act to accept an Undertaking as a condition of making orders. The respondents submitted that the first power was exercised by French J in *AGL No 3*. The undertaking in that case was a condition of making the declaration that the acquisition did not contravene s 50: *AGL No 3* at [614]. The respondents argued that there is no relevant difference if the order is to refuse, instead of to grant, a declaration.
4. The respondents submitted that the primary judge also had power to accept the Undertaking in lieu of granting an injunction under s 80. While formally reserving their position on the correctness of *Thomson*, the respondents noted that *Thomson* concerned an earlier, narrower version of s 80, which authorised the Court to grant an injunction restraining a person from engaging in conduct that constitutes or would constitute, relevantly, a contravention of a provision of Part IV: *Thomson* at 158. Section 80 was subsequently amended to enable an injunction to be granted “in such terms as the Court determines to be appropriate”: *Statute Law (Miscellaneous Provisions) Act (No 1) 1983* (Cth), s 3 and Schedule 1. The stated purpose of the amendment was to “enable the Court to grant more effective injunctive relief, including mandatory injunctions and other injunctive relief”: Explanatory Memorandum to the *Statute Law (Miscellaneous Provisions) Bill (No 1) 1983* (Cth) at 112. As a consequence, the conduct to be restrained need not be contravening conduct, provided it has sufficient nexus with the contravention: *ICI* at 256 per Lockhart J and at 267 per Gummow J.
5. As to ACCC’s submissions concerning the limits on the power in s 80, the respondents made the following submissions.
	1. As to the first limit, the respondents accepted that the power to grant an injunction pursuant to s 80 was engaged only if the Court was satisfied that Pacific National was proposing to engage in conduct that would constitute a contravention of s 50. However, the respondents submitted that the primary judge formed the requisite satisfaction, having analysed the future with the acquisition both in contemplation of the Undertaking and without it: at [47], [49], [828], [830]-[831], [838]-[839], [1307], [1343], [1351]-[1353], [1368], [1375], [1431] and [1611]-[1612]. Section 80 is engaged by satisfaction that a person is “proposing to engage” in contravening conduct. There is no error in the Court being satisfied that a party is “proposing to engage” in an acquisition that would contravene s 50 but denying substantive relief in respect of the proposed conduct upon the giving of an appropriate undertaking.
	2. As to the second limit, the respondents also accepted that only the ACCC can apply for an injunction to restrain a threatened breach of s 50 of the CCA. However, the respondents submitted that it does not follow that the Court can grant an injunction only on terms sought by the ACCC. The statutory purpose of s 80(1A) is to prevent private parties using injunctions “as a device to defeat mergers, during the tactical battle between the parties, for reasons quite unrelated to competition”: Commonwealth, House of Representatives, Parliamentary Debates, 3 May 1977, p.1478 (Mr Howard) (Second Reading Speech on the *Trade Practices Amendment Bill 1977* (Cth). Section 80(1A) achieves that purpose by disentitling private parties from applying for an injunction. It does not confine the Court to granting an injunction on the terms the ACCC seeks. It expressly empowers the grant of an injunction in such terms as the Court considers appropriate.
	3. As to the third limit (that the Court should not have taken the Undertaking into account in its factual assessment of breach of s 50), the respondents submitted that as the Court is entitled to grant an injunction on terms other than those sought by the ACCC, and as it is entitled to accept an undertaking in lieu of enjoining a contravention, then it cannot be an irrelevant consideration to have regard to the undertaking as part of the assessment of contravention.
	4. As to the fourth limit, the respondents submitted that the ACCC’s argument wrongly assumes that only contravening conduct can be enjoined by s 80. However, the amendments made in 1983 to s 80(1) expanded the remedy to empower the Court to enjoin non-contravening conduct, provided that was an “appropriate” response to the contravention or proposed contravention. Section 50 only prohibits acquisitions that would have the effect, or would be likely to have the effect, of substantially lessening competition. Accordingly, an “appropriate” remedy to a prospective contravention is not confined to enjoining the acquisition, but can extend to actions that prevent the anti-competitive effects from arising.
6. In support of their argument that the Federal Court has broad powers to accept an undertaking in connection with the resolution of a dispute, the respondents referred to the range of circumstances in which a superior court may accept an undertaking, including in connection with the settlement of a proceeding; in connection with the making of search orders; in connection with interlocutory relief (in the form of an undertaking as to damages); or in connection with final relief (for example, an undertaking to publish an apology in a defamation case).
7. By their cross-appeals, the respondents say that, if this Court concludes that the acquisition would contravene s 50, and if this Court concludes that the primary judge lacked power to accept the Undertaking by having failed to find a contravention of s 50, then this Court can and should correct that error. The respondents submitted that this Court should determine, essentially for the reasons given by the primary judge, that it would be appropriate to accept the Undertaking in lieu of enjoining the ART acquisition entirely.

### Response to the ACCC’s second contention

1. The respondents submitted that the judicial power of the Commonwealth “is not to be defined or limited in any narrow or pedantic manner”: *Boilermakers* at 278. It is not possible to classify a power as judicial or administrative solely by reference to abstract characteristics of the power considered in a vacuum. A power may be classified “according to the way in which [it is] to be exercised” (*Precision Data* at 189) and may “take its character as judicial or administrative from the nature of the body in which the Parliament has located it” (*White v Director of Military Prosecutions* (2007) 231 CLR 570 at [48] per Gummow, Hayne and Crennan JJ). The ACCC’s argument gives insufficient weight to the fact that, in this case, the power was being exercised judicially and being exercised by a Chapter III Court.
2. The respondents submitted that a power does not cease to be judicial because it authorises the creation of rights: *Fisher v Fisher* (1986) 161 CLR 438 at 453 per Mason and Deane JJ; *Momcilovic v The Queen* (2011) 245 CLR 1 at [81] per French CJ; *Masson v Parsons* (2019) 93 ALJR 848 at [58] per Edelman J. It is in the nature of an undertaking to create rights and obligations, and the acceptance of undertakings has been a longstanding practice of courts in a range of circumstances. In the present case, the Court resolved a controversy between the parties as to whether the acquisition would contravene s 50.
3. The respondents argue that the decision to accept the Undertaking was guided by the specified criterion of whether it was “appropriate” (r 1.33 of the FCR; s 80 of the Act). A broad remedial standard such as “appropriate” is often of an ambulatory character, in the sense that it is given more precise content by the underlying normative context in which it may be applied from time to time. Here, the underlying norm was a proscription of an acquisition likely to have the effect of substantially lessening competition. In that normative context, whether a condition or undertaking is “appropriate” is not at large, but focuses on the more particular question whether the condition or undertaking is appropriate to remedy the apprehended substantial lessening of competition.
4. The primary judge did not “enter the fray”. His Honour considered whether it was appropriate to accept the Undertaking by considering the competition effects of the ART Acquisition on alternative hypotheses as to whether the Undertaking was in force or not. The trial judge did not, the respondents note, draft the terms of the Undertaking himself.

### Response to the ACCC’s third contention

1. The respondents’ submissions in response to the ACCC’s third contention are incorporated within the submissions summarised above. The central contention is that the Court’s power under s 80 is not limited to the grant of an injunction only on terms sought by the ACCC, and the statutory criterion of “appropriate” is given content by the statutory context of being a remedy for a contravention of s 50.

### Response to the ACCC’s fourth and fifth contentions

1. As to nexus, the respondents accept that whether it is “appropriate” to accept an undertaking in lieu of an injunction under s 80 depends on whether there is a sufficient nexus between the undertaking and the contravening conduct. They submitted that there will be sufficient nexus if the undertaking brings about a state of affairs in which there is no likely contravention (because the acquisition will not lessen competition).
2. As to the primary judge’s finding that the Undertaking would be effective in preventing Pacific National from engaging in discriminatory conduct, the respondents made the following submissions.
3. First, due weight should be given to the views of, and advantages held by, the trial judge particularly where findings of an evaluative nature are made “with the advantage of hearing the evidence in its entirety, presented as it unfolded at the hearing with the opportunity over the course of the hearing and adjournments for reflection and mature contemporaneous consideration and assessment”: *Branir v Owston Nominees (No 2)* (2001) 117 FCR 424 at [24] and [28] per Allsop J (with whom Drummond and Mansfield JJ agreed); *Moroccanoil*. In the present case, the effectiveness of the Undertaking was an evaluative matter. The question for the primary judge was whether it was sufficiently effective to prevent Pacific National from discriminating at the ART so that there was not likely to be a substantial lessening of competition on account of heightened barriers to entry. There was a range of evidence adduced on the topic including the terms of the Undertaking itself, lay evidence from Qube’s Mr Nacey and Pacific National’s Mr Graham Moore, as well as expert opinion evidence from Dr Kuypers. Matters of reliability were relevantly in issue: the primary judge found Mr Nacey’s evidence to be unconvincing, difficult and problematic (at [1437], [1600]-[1602]) and the primary judge found Dr Kuypers’ evidence was “opinion evidence at best and in most respects amounts to speculation” (at [1435]) and to be “flimsy or peripheral or both” (at [1438]).
4. Second, the Undertaking addressed directly the competitive concerns found by the primary judge. His Honour found that Pacific National would have the ability and incentive to discriminate in respect of key commercial matters: refusing access, higher prices, less favourable terms, no expansion (at [829]). However, his Honour also found that the Undertaking directly addressed those concerns (at [837]-[839]). It did so by, amongst other things, ceding control over those matters. In respect of each of the key matters, the terms of the Undertaking mean that Pacific National would not be in a position to make its own decisions.
5. Third, it was appropriate for the primary judge to find that the threat of the Undertaking being enforced would constrain Pacific National’s incentive to discriminate against a third party user of the ART. As observed by the High Court in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 at [131]: “Ordinarily, it is to be assumed that a contravener… will abide by [an] order rather than risk detection and punishment for contempt”. Further, as the primary judge recognised, once an entrant enters into a terminal services agreement with Pacific National, that user would also have contractual remedies against Pacific National (at [1594]).
6. Fourth, the primary judge was not obliged to place special weight on the ACCC’s regulatory role and its submissions were required to be considered on their merits.

## F.4 Consideration of the ACCC’s appeal

### Reasoning of the primary judge

1. In support of their submissions concerning judicial power, the parties emphasised different aspects of the primary judge’s reasons.
2. The ACCC focussed on the primary judge’s ultimate conclusion that, in circumstances where Pacific National had given the Undertaking unconditionally, its acquisition of the ART would not contravene s 50. Consistently with that conclusion, the primary judge dismissed the ACCC’s application and ordered the ACCC to pay 50% of the respondents’ costs. The ACCC argued that the primary judge’s acceptance of the Undertaking was not associated with a finding of contravention of s 50 and associated relief.
3. While accepting and supporting the primary judge’s ultimate conclusion, the respondents also emphasised the primary judge’s findings that, in the absence of the Undertaking, the acquisition of the ART by Pacific National would contravene s 50. The respondents argued that the acceptance of the Undertaking was a condition of the decision not to make a declaration of contravention and was in lieu of injunctive relief. As the acceptance of the Undertaking obviated the need for any other relief, the primary judge dismissed the ACCC’s application.
4. The primary judge’s reasons contain the elements emphasised by both the ACCC and the respondents. The primary judge reasoned that:
	1. the ACCC would have established its s 50 case (i.e. Pacific National’s acquisition would have contravened s 50) in the absence of the Undertaking (see [47], [49], [1418] and [1612]); however,
	2. in circumstances where Pacific National had given the Undertaking unconditionally, its acquisition of the ART would not contravene s 50 (see [49], [1418], [1426] and [1611]).
5. Subsidiary factual findings were made on the same basis. In particular, the primary judge found that, if Pacific National owned the ART, it would have the ability to discriminate against third party users, and that ability would deter new entry, in the absence of the Undertaking (see [828]-[831], [903]-[904], [918], [924], [1307] and [1351]-[1353]), but it would not have that ability having given the Undertaking (see [832], [838]-[839], [1005], [1307], [1343], [1351]-[1353] and [1376]).
6. The primary judge concluded expressly that the obligations imposed by the Undertaking could be taken into account in the assessment of competition in the future with the acquisition (at [49], [1431] and [1611]). The primary judge described as hypothetical the question whether, if he had not accepted the Undertaking, he would have found for the ACCC on its s 50 case (but went on to state that he would have accepted the ACCC’s case) (at [1612]).
7. The primary judge’s reasons with respect to the costs of the proceeding ([2019] FCA 866) do not advance the analysis. While his Honour ordered the ACCC to pay 50% of the respondents’ costs of the proceeding, on any view the ACCC had mixed success in the proceeding, having abandoned aspects of its case before trial and having failed on its s 45 allegations concerning the Terminal Services Subcontract. It is not possible to read the costs reasons as indicating that the primary judge found that the ACCC failed on its s 50 case. His Honour noted that: the ACCC won on market definition (at [24]); the parties had mixed success on the s 50 question (at [26]); by originally offering the Undertaking if the Court first concluded that the acquisition would contravene s 50, Pacific National had put the ACCC to proof on its s 50 case (at [27]); and the ACCC was justified in seeking to restrain the respondents from completing the acquisition and in seeking declarations that the acquisition would breach s 50, at least until when the Undertaking was given unconditionally (at [28]).
8. The arguments concerning judicial power advanced before this Court were not advanced in the same manner below. Before the primary judge, the arguments focussed on the Court’s power to impose monitoring and enforcement obligations on the ACCC (at [1429]), whether Pacific National was seeking an advisory opinion (at [1431]), whether the Court should make orders requiring it to monitor detailed contractual arrangements (at [1432]), and other asserted deficiencies in the Undertaking. In that context, the primary judge did not expressly address the power being exercised by the Court in accepting the Undertaking. Certainly, the primary judge did not say expressly that the Undertaking was being accepted in lieu of injunctive relief under s 80 of the Act; nor did the primary judge say that the Undertaking was being accepted as a condition of refusing to give declaratory relief under the FCA Act. While the primary judge referred (at [1433]) to the decision in *AGL No 3* in which French J accepted an undertaking in connection with declaratory relief sought by the parties to the transaction (declaring that the acquisition would not contravene s 50), no arguments were addressed to the primary judge about the power being exercised by French J in that case.
9. Ultimately, the question for determination is whether the primary judge had power to accept the Undertaking in the circumstances in which it was accepted, not whether the primary judge explained the power nor the reasoning for accepting the Undertaking. In the discussion that follows, we will address the ACCC’s grounds of appeal under three topics. The first will consider the powers available to the Court to accept an undertaking in connection with the resolution of a proceeding for contravention of s 50 of the Act. That part of the discussion will not address the specific form of the Undertaking, but will assume that it is an undertaking capable of enforcement and preventing (or deterring) the anti-competitive discriminatory conduct in issue in this proceeding. The second topic will consider the asserted Constitutional limits and other statutory limits to the acceptance of the Undertaking in this case. Again, that part of the discussion will not descend to the detail of the Undertaking, but consider the issues from the perspective of an undertaking of the kind accepted in this case. The third topic will consider the asserted defects in the Undertaking, addressing the questions whether the terms of the Undertaking are too uncertain to be accepted by the Court and whether the primary judge was correct to find that it would be effective in preventing Pacific National from engaging in anti-competitive discrimination at the ART.

### Power to accept the Undertaking

1. Although the respondents argued that there were a wide range of circumstances in which a superior court may accept undertakings, the circumstances adverted to are not analogous to the present. The respondents principally supported the power of the primary judge to accept the Undertaking on the basis of s 21 of the FCA Act, when read with FCR 1.33 and ss 22 and 23 of the FCA Act, and s 80 of the Act.
2. As noted earlier, by its originating application, the ACCC sought declaratory relief under s 21 of the FCA Act and injunctive relief under s 80 of the Act.
3. There was no dispute between the parties that the ACCC is entitled to seek declaratory relief under s 21 of the FCA Act, which provides that the Court may, in civil proceedings in relation to a matter in which it has original jurisdiction, make binding declarations of right, whether or not any consequential relief is, or could be, claimed. The parties agreed that the Federal Court is given original jurisdiction, in respect of cases brought by the ACCC for alleged contraventions of s 50 of the Act, under s 39B(1A) of the Judiciary Act, thereby enlivening the power under s 21.
4. The ACCC disputed, however, that the Court is empowered by FCR 1.33 to accept the Undertaking as a condition of dismissing the ACCC’s application for declaratory relief. FCR 1.33 states that the Court may make an order subject to any conditions the Court considers appropriate. The respondents argue that the power to impose a condition, referred to in FCR 1.33, is to be found in ss 22 and 23 of the FCA Act. Section 22 of the FCA Act provides that the Court shall, in every matter before the Court, grant, either absolutely or on such terms and conditions as the Court thinks just, all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward by him or her in the matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of proceedings concerning any of those matters avoided. Section 23 provides that the Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate.
5. It is therefore necessary to consider the nature of the powers conferred on the Court by, on the one hand, ss 21 to 23 of the FCA Act and on the other, s 80 of the Act, as well as the interaction between those powers.
6. It can be accepted that the powers conferred on the Federal Court by ss 21 to 23 of the FCA Act are broad. In the absence of other remedial powers given to the Court in respect of a matter before the Court, those sections confer the powers customarily exercised by a superior court. As observed by Deane J in *Jackson* (at 622), though the power in s 23 of the FCA Act is wide, it is nevertheless restricted to the making of the kinds of order, whether final or interlocutory, which are capable of properly being seen as appropriate to be made by the Federal Court in the exercise of its jurisdiction. In many contexts, for example the review of Federal administrative decisions pursuant to s 39B of the Judiciary Act, the Court may decline to give declaratory or injunctive relief sought under ss 21 to 23 of the FCA Act on acceptance of an undertaking by a respondent if the undertaking is appropriate (being clear in its terms, capable of enforcement and not inconsistent with the kinds of orders which are capable of being made by the Court).
7. However, it has long been held that “[w]hen a specific statute which invests the Court with jurisdiction in matters of a particular class does so in such a way as to limit the power of the Court to grant relief of a particular kind, there is no basis for transcending that limitation by recourse to the general provisions of the Federal Court of Australia Act”: *Thomson* at 161; see also *Patrick Stevedores* at [27]-[28] and *Cardile* at [33]. In *Thomson*, the High Court concluded that the provisions of that FCA Act do not empower the Court to grant injunctions restraining, or relating to, contraventions of the Act in situations falling outside the boundaries drawn by s 80 of that Act. One element of the High Court’s reasoning, which is no longer applicable, is that s 86 of the Act was the sole source of jurisdiction for the Court in respect of contraventions of the Act (at 162). As noted above, s 39B(1A) of the Judiciary Act, enacted after the decision in *Thomson*, is now also a source of jurisdiction. Nevertheless, the second element of the High Court’s reasoning remains relevant and has been followed in *Patrick Stevedores* and *Cardile*: that s 80 is an exclusive charter to grant injunctions restraining, or relating to, contraventions of the Act (at 162). That conclusion was based on the special provisions for such injunctions made in s 80. The High Court concluded that “The inference is irresistible that Parliament looked upon s 80 as a complete and comprehensive statement of the circumstances in which injunctions might be granted in respect of relief sought under the Trade Practices Act”.
8. While s 80 (and related provisions) have been amended since *Thomson*, the amendments do not detract from the High Court’s conclusion. As considered further below, s 80(1) now empowers the Court to grant an injunction “in such terms as the Court determines to be appropriate”. In contrast to the form of the provision considered in *Thomson*, it is clear that the Court’s power is not confined to granting an injunction enjoining contravening conduct (in the case of s 50, an acquisition), but the power is confined by what is appropriate. Other subsections regulate the grant of an injunction by consent of the parties, who can apply for an injunction, and whether an undertaking as to damages can be required in respect of an interim injunction. In our view, it continues to be the case that s 80 is a complete and comprehensive statement of the circumstances in which injunctive relief might be granted in respect of contraventions or threatened contraventions of the Act. It follows that the FCA Act is not an available source of power for injunctive relief in respect of a contravention of s 50.
9. That leaves open the question whether, and in what circumstances, the Federal Court may accept an undertaking from a respondent in answer to a claim under s 50 and decline other relief. Specifically, is the Court empowered to do so under the FCA Act, or is the necessary source of power derived from s 80?
10. In *Thomson*, the High Court said that the power to accept and to enforce an undertaking is an invariable attribute of a superior court whose proceedings are protected by rules relating to contempt of court and is inherent in the grant of jurisdiction to grant injunctive relief (at 164). The High Court went on to say (at 164-166):

An undertaking to the court is given in lieu of an injunction and, if broken, is treated as the equivalent of an order for the purpose of enforcement; it may therefore be enforced in the same manner as an injunction - *Milburn v. Newton Colliery Ltd*; *London and Birmingham Railway Co. v. Grand Junction Canal Co*; *In re National Federated Electrical Association's Agreement*; *Biba Ltd. v. Stratford Investments Ltd*.

As an undertaking is given in lieu of an injunction and is enforceable in like manner, the principles which govern the grant of an injunction by a court must guide it in deciding whether it should accept an undertaking. Limitations which affect the court's jurisdiction or power to grant a final injunction must be observed in the acceptance of an undertaking when it is offered as a substitute for a final injunction. The court cannot escape such limitations by the expedient of accepting an undertaking in lieu of an injunction. The court cannot put itself in the position of enforcing conduct which it has no capacity to command or compel. No doubt the Federal Court has power to accept an undertaking at an interlocutory stage when the undertaking is reasonably related to the orderly procedure of the Court or to the subject matter of the litigation, as Deane and Fisher JJ. observed, even though it is not in a form which falls within s. 80. But, with great respect to their Honours, this does not justify the conclusion that the Court has power to accept an undertaking by way of final disposition of the case when the Court lacks power to make a final order in that form and the effect of the undertaking is to restrain conduct which the Court has no power to restrain.

…

Nothing we have said is to be taken as throwing doubt on the practice of the courts in accepting undertakings to publish an apology in defamation cases and in accepting undertakings by a defendant to pay a particular account as a basis for assessing damages. In each of these two instances what the defendant undertakes to do is clearly relevant to the court's function in assessing damages - the publication of an apology mitigates damages and the payment of an account has a similar effect.

1. It is clear from the above passage that the High Court was referring to an undertaking that is offered as a substitute for a final injunction. The High Court distinguished undertakings given at an interlocutory stage of a proceeding that are related to the orderly procedure of the Court or the subject matter of the litigation and undertakings related to the assessment of damages. In the case of undertakings offered in lieu of a final injunction, the Court’s power to accept the undertaking is confined by the limits applicable to the grant of an injunction. Thus, *Thomson* is not entirely determinative of the question raised in this appeal.
2. In *AGL No 3*, the Australian Gas Light Company (AGL) brought an application in the Federal Court against the ACCC seeking a declaration that a proposed acquisition would not contravene s 50. The application was brought pursuant to s 163A of the Act and/or s 21 of the FCA Act, with jurisdiction invoked under s 163A of the Act and s 39B(1A) of the Judiciary Act. In *Australian Gas Light Company v ACCC (No 2)* [2003] FCA 1229, French J concluded that the Court had jurisdiction to hear the matter, observing (at [49]) that “the general jurisdiction conferred by s 39B(1A) coupled with the power of the Court to award declaratory relief under the provisions of the Federal Court of Australia Act would appear to be sufficient to support the grant of the relief sought by AGL”. In *AGL No 3*, French J concluded that the proposed acquisition would not contravene s 50 and that it was appropriate to make a declaration to that effect. His Honour also found (at [10]) that that “conclusion is reinforced by the structural arrangements which are the subject of the undertaking offered by AGL to the ACCC and which AGL has in turn offered to the Court. The declaration which I make is subject to that undertaking…” and (at [614]) that “the undertaking is…an appropriate condition for the grant of the declarations”. Thus, it was apparent from his Honour’s reasons that the undertaking was accepted as a condition of making the declaration under s 21 of the FCA Act. No argument appears to have been raised that the Court lacked power to accept the undertaking. Further, the case did not involve an application for an injunction under s 80 of the Act.
3. In the present case, we have no doubt that the Court has power, in lieu of granting an injunction requiring the respondents to do an act or thing (see subsection (5)), to accept an undertaking from the respondents to the same effect, provided the obligations imposed by the undertaking could be imposed by the Court under s 80. However, it is less clear that the Court has power to accept such an undertaking requiring the respondents to do an act or thing as a condition of declining to grant other relief. The doubt over the latter course arises because it would involve the use of the general powers in ss 21 to 23 of the FCA Act to outflank the regime for injunctive relief under s 80. For that reason, we prefer to base our decision on the power to accept an undertaking derived from s 80.
4. As noted earlier, the primary judge reasoned that the ACCC would have established its s 50 case (ie Pacific National’s acquisition would have contravened s 50) in the absence of the Undertaking, but in circumstances where Pacific National had given the Undertaking unconditionally, its acquisition of the ART would not contravene s 50 (at [49], [1431] and [1611]). The ACCC challenges that aspect of the primary’s judge’s reasoning, arguing that it was not permissible to take the Undertaking into account in determining whether the acquisition would contravene s 50 and, in doing so, the primary judge failed to make the finding of threatened contravention that was necessary to enliven the power to grant injunctive relief under s 80 and thereby accept an undertaking in lieu.
5. With respect to the primary judge, we accept the ACCC’s submission that an undertaking made to the Court by a respondent does not constitute part of the relevant facts on which the Court is to decide the issue of contravention. For the reasons already given, the Court’s power to accept an undertaking in the context of a proceeding under the Act for a contravention of s 50 must be regarded as remedial in nature, deriving from the Court’s power to grant injunctive relief under s 80. The power arises if the Court is satisfied that threatened conduct would constitute a contravention. There is a contradiction if the Court purports to take the undertaking into account in concluding that there would be no contravention. Respectfully, in our view, the primary judge’s conclusion that the Undertaking could be taken into account in the assessment of whether the acquisition would contravene s 50 was in error.
6. In the present case, however, the point is more semantic than substantive. That is because the primary judge also expressly found that, in the absence of the Undertaking, the ACCC had established its case. Further, the primary judge expressly found that the Undertaking would prevent Pacific National from engaging in anti-competitive discrimination as owner of the ART, and thereby prevent the acquisition from having the effect of substantially lessening competition. Accordingly, the primary judge made the requisite findings to enliven the Court’s power to accept the Undertaking in lieu of granting the injunctive relief sought by the ACCC.

### Constitutional and other limitations of the power to accept the Undertaking

1. We reject the ACCC’s contentions that the primary judge lacked the power to accept the Undertaking by reason of Constitutional limitations relating to the nature of judicial power or inherent limitations in the power conferred by s 80 of the Act.
2. As to Constitutional limitations, we accept the respondents’ argument that a power does not cease to be judicial because it authorises the creation of rights, and that it is in the nature of an undertaking to create rights and obligations, and the acceptance of undertakings has been a longstanding practice of courts in a range of circumstances. As the High Court explained in *Precision Data* at 191 (citations omitted):

The Parliament can, if it chooses, legislate with respect to rights and obligations by vesting jurisdiction in courts to make orders creating those rights or imposing those liabilities. It is an expedient which is sometimes adopted when Parliament decides to confer upon a court or tribunal a discretionary authority to make orders which create rights or impose liabilities. This legislative technique and its consequences in terms of federal jurisdiction were discussed by Dixon J. in *R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett*. Leaving aside problems that might arise because of the subject-matter involved or because of some prescribed procedure not in keeping with the judicial process, where a discretionary authority is conferred upon a court and the discretionary authority is to be exercised according to legal principle or by reference to an objective standard or test prescribed by the legislature and not by reference to policy considerations or other matters not specified by the legislature, it will be possible to conclude that the determination by the court gives effect to rights and obligations for which the statute provides and that the determination constitutes an exercise of judicial power.

1. In the present case, the primary judge’s decision to accept the Undertaking was not based on considerations of policy. The decision was based on the application of the legal standard under s 50 - the effect on competition of Pacific National’s ownership of the ART - to the facts as found. Applying the applicable legal principles, the primary judge found that Pacific National’s ownership of the ART would give it the ability to engage in anti-competitive discrimination against third party users of the ART, thereby raising barriers to entry. That finding involved an orthodox application of legal principle to the facts, and of course is supported by the ACCC on the appeal. The primary judge also found that the Undertaking imposed obligations on Pacific National that would prevent it from engaging in anti-competitive discrimination, thereby removing the anti-competitive effects of the proposed acquisition. That finding involved the application of the same legal principles.
2. As already noted, the primary judge did not expressly refer to the source of power to accept the Undertaking. Nevertheless, it is clear from the reasons that his Honour considered the acceptance of the Undertaking against the legal criterion in s 50: whether the Undertaking removed the commercial effects of the acquisition that would otherwise cause the likelihood of a substantial lessening of competition (the ability to engage in anti-competitive discrimination against third party users). In our view, his Honour had power, derived from s 80, to accept the Undertaking on that basis.
3. As to the inherent limitations derived from s 80, we accept that the primary judge could only accept the Undertaking if he had power to grant an injunction in the same form, consistently with the principles stated in *Thomson*. However, in the present case, the limitations relied on by the ACCC were not a barrier to the acceptance of the Undertaking.
4. Just as the power to grant an injunction pursuant to s 80 is engaged only if the Court is satisfied that Pacific National is proposing to engage in conduct that would constitute a contravention of s 50, the power to accept the Undertaking in lieu of an injunction is only engaged in the same circumstances. As noted earlier, the primary judge found that, in the absence of the Undertaking, he would have accepted the ACCC’s case. That finding provided the foundation for the acceptance of the Undertaking by the primary judge in lieu of an injunction.
5. While only the ACCC can apply for an injunction to restrain a threatened breach of s 50, we reject the ACCC’s contention that the Court may only grant an injunction on terms sought by the ACCC. None of the text, context or purpose of the power support such a limitation. Indeed, the text directly contradicts the ACCC’s contention by empowering the Court to grant an injunction in such terms as the Court determines to be appropriate. Thus, the terms of the injunction are in the discretion of the Court, subject to the test of appropriateness. As the respondents submitted, the statutory purpose of s 80(1A), restricting the ability of persons other than the ACCC to seek an injunction for a contravention of s 50, is to prevent private parties using injunctions as a device to defeat mergers. It is consistent with that purpose for the Court to retain the discretion whether and on what terms an injunction should be granted.
6. It is also clear from the text of s 80(1), as well as its legislative history, that the terms of an injunction need not be confined to enjoining contravening conduct, in this case, the acquisition that would contravene s 50. Originally, s 80 empowered the Court to grant an injunction restraining a person from engaging in conduct that constitutes or would constitute, relevantly, a “contravention of a provision of Part IV”. Thus, only conduct that constituted a contravention could be restrained. However, s 80 was subsequently amended by the *Statute Law (Miscellaneous Provisions) Act (No 1) 1983* (Cth) to enable an injunction to be granted “in such terms as the Court determines to be appropriate”. The Explanatory Memorandum to the amending Bill stated (at 112) that the amendment was to “enable the Court to grant more effective injunctive relief, including mandatory injunctions and other injunctive relief”. Express provision is made in s 80(5) for an injunction requiring a person to do an act or thing. The amended form of s 80 was considered by the Full Federal Court in *ICI*. Lockhart J described the power under s 80(1) as giving the Court capacity to formulate the appropriate remedy to suit the needs of the case (at 258). Gummow J observed that the terms of an injunction would not be appropriate if the conduct enjoined does not have the relationship required by s 80 with a contravention of the Act (at 267).
7. An injunction will be “appropriate” if there is a “sufficient nexus” or relationship between the injunction and the contravention that is found. In *Z-Tek Computer*, Merkel J said (at 202):

The width of the power conferred by s 80 and its public interest character obviously give the court great amplitude in determining appropriate injunctive orders in a particular case. However, there are limitations on the court's power under the section. Confinement of the power by reference to the scope and purpose of the TPA, and in particular s 80, is one limitation on the power. However, there are at least two further limitations. The power to make orders under s 80 is only enlivened in a proceeding which alleges that there has been a contravention of a provision of Pt IV, IVA or V of the TPA. As was said by Gummow J *ICI* at FCR 267, the terms of an injunction granted under s 80 must, on their face, operate upon a range of conduct which has "the relationship required by s 80 with contravention of the Act". Irrespective of whether the injunction is sought or granted under s 80(1) or s 80(1AA), there must be a nexus between the conduct alleged or found to constitute the relevant contraventions and the injunctions granted.

1. In our view, an injunction in the form of the Undertaking would have been appropriate for the Court to make under s 80, in that it was directed at preventing the anti-competitive conduct which was the reason that the acquisition would have contravened s 50. An acquisition only contravenes s 50 if it would have the effect, or be likely to have the effect, of substantially lessening competition. In the present case, Pacific National’s acquisition of the ART would only contravene s 50 because (making the necessary assumption contrary to our conclusion) it would give Pacific National the ability to engage in anti-competitive discrimination in the operation of the ART. As discussed earlier, the period of time in which Pacific National’s ownership of the ART has the potential to cause anti-competitive harm is limited and will end upon the construction of an alternative terminal as part of the Inland Rail Project. Accordingly, any competition problem that arises from the acquisition of the ART is a temporary problem, not a permanent problem. An injunction that prevents Pacific National from engaging in such anti-competitive discrimination, during the period in which it has the potential to cause anti-competitive harm, would have been an appropriate remedy for the contravention because it would have achieved the purpose of the prohibition in s 50. While the ACCC criticised the Undertaking because it was “behavioural” (requiring Pacific National to behave in a particular manner in the conduct of the business to be acquired) rather than “structural” (requiring actions that would alter the structure of the market), s 80(5) permits the Court to grant an injunction requiring a person to do an act or thing. Whether a “behavioural” injunction is an appropriate remedy to an acquisition that contravenes s 50 depends upon the nature and duration of the anti-competitive harm likely to arise from the acquisition. In the present case, we consider that an injunction in the form of the Undertaking would have been appropriate. For those reasons, in our view it was open to the primary judge to accept the Undertaking.

### The form of the Undertaking

1. In relation to the form of the Undertaking, the central argument of the ACCC is that many of the obligations imposed on Pacific National by the Undertaking are couched in vague terms which are incapable of enforcement in a contempt proceeding. As the primary judge’s decision to accept the Undertaking was discretionary, the ACCC must show that his Honour erred in the manner described in *House v The King* (1936) 55 CLR 499 at 504-505. In essence, the ACCC argues that the primary judge acted upon a wrong principle and made a mistake of fact. The error of principle was to accept an undertaking that was vague and uncertain and thereby incapable of enforcement in a contempt proceeding. The error of fact was the primary judge’s finding that the Undertaking would be effective in preventing anti-competitive discriminatory conduct.
2. The principle that an injunction must be framed in clear and unambiguous terms is well--established. In the context of s 80, Lockhart J observed in *ICI* (at 259):

Plainly injunctions should be granted in clear and unambiguous terms which leave no room for the persons to whom they are directed to wonder whether or not their future conduct falls within the scope or boundaries of the injunction. Contempt proceedings are not appropriate for the determination of questions of construction of the injunction or the aptness of the language in which they are framed…

1. To similar effect, French J observed in *REIWA* (at [26]):

Once an undertaking is accepted by the court or a consent order made, their breach is enforceable by proceedings for contempt. The undertakings and orders must therefore be formulated with precision so that they are capable of being readily obeyed. Undertakings or orders which are likely to involve vague evaluative judgments or significant debates on their interpretation are not likely to be given the court's sanction. Similarly, undertakings or orders which are likely to require the court to be concerned with the ongoing supervision of the conduct of the parties to them will also raise serious questions as to their appropriateness.

1. Before turning to the terms of the Undertaking, it is appropriate to address two general contentions advanced by the ACCC. The first is that the primary judge erred by failing to give sufficient weight to the ACCC’s concerns about the Undertaking, having regard to the ACCC’s experience regarding regulatory undertakings, and in particular behavioural undertakings. We reject that contention for two reasons. First, there is no legal requirement for the Court to give special status to the ACCC’s submissions. In *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482, the High Court confirmed (at [61]) that the submissions of a regulator will be considered on their merits in the same way as the submissions of a respondent and subject to being supported by findings of fact based upon evidence, agreement or concession. Second, the primary judge dealt with the ACCC’s submissions in great detail, thereby affording them considerable respect. The fact that the primary judge did not accept the ACCC’s submissions does not establish that his Honour failed to give them weight.
2. The second general contention is that it was not open to the primary judge to dismiss Dr Kuypers’ evidence, or the primary judge paid too little regard to Dr Kuypers’ evidence. The bases for the contention were that: there was no evidence contradicting Dr Kuypers’ evidence; Dr Kuypers was not materially challenged on his evidence in cross-examination; and the primary judge did not make adverse finding as to Dr Kuypers’ truthfulness. We also reject this contention. The relevant issues to be determined by the primary judge were the meaning and effect of the obligations in the Undertaking and whether they would prevent anti-competitive discrimination in the operation of the ART. While expert evidence may be admissible on those issues, expert evidence was not essential and could not be determinative. The determination of the meaning and effect of the obligations in the Undertaking was a task that is commonly undertaken by the Courts and is a task that is rarely assisted by expert evidence. The assessment of whether the obligations, so construed, would prevent anti-competitive discrimination in the operation of the ART was a task of the same kind as the application of s 50 to the facts of the case. While the assessment of the anti-competitive effects of conduct may be informed by expert (economic) evidence, it is ultimately for the Court to determine the issue, and the Court is not bound to accept the expert evidence: *Universal Music* at [163]. The reasons of the primary judge show that his Honour carefully assessed Dr Kuypers’ opinions about the Undertaking, but was not persuaded by them. We accept the submission of the respondent that there was a range of evidence on the issue of the meaning and effectiveness of the obligations imposed by the Undertaking starting, of course, with the Undertaking itself, but also lay evidence from Mr Nacey of Qube and Mr Graham Moore of Pacific National, as well as the opinion evidence from Dr Kuypers. The primary judge found Dr Kuypers’ evidence was “opinion evidence at best and in most respects amounts to speculation” (at [1435]) and to be “flimsy or peripheral or both” (at [1438]). The ACCC has not established that his Honour erred in reaching those findings. The ACCC relied on specific criticisms of the Undertaking made by Dr Kuypers which are addressed below.
3. In our view, the central issue is whether the Undertaking contained terms that were vague and incapable of enforcement in a contempt proceeding. That issue can only be answered by considering the ACCC’s criticisms in the overall context of the terms of the Undertaking. It is convenient to summarise the obligations imposed by the Undertaking under the following headings:
	1. the obligation to provide access to the ART to third parties and the terms and conditions of access including price;
	2. the allocation of capacity at the ART between Pacific National and third party users and capacity expansion;
	3. confidentiality and financial reporting obligations;
	4. compliance reporting by Pacific National; and
	5. independent auditing of Pacific National’s compliance.

#### The obligation to provide access

1. The obligations to provide access are stated in clause 5. Clause 5.1 stipulates that Pacific National must comply with the Access Conditions set out in Schedule 1. Clause 5.2 stipulates that Pacific National must ensure that the Charges imposed on any person for Terminal Services will be no higher than as set out in Schedule 1, clause 5(b). Clause 5.3 contains supplementary obligations prohibiting discrimination by Pacific National in its treatment of users.
2. Schedule 1 sets out the Access Conditions with which Pacific National is obliged to comply. It contains the following relevant obligations:
	1. Clause 2 stipulates that Pacific National must offer Terminal Services to an Applicant on terms no less favourable than terms offered to another Terminal User, must not discriminate between different Applicants and Terminal Users seeking Terminal Services, and must not engage in conduct that prevents or hinders a Terminal User conducting its business using Terminal Services. An Applicant is defined as any person or any other Terminal User seeking Terminal Services, and Terminal User is defined as a Rail Haulage Operator using the ART, which definition necessarily includes Pacific National.
	2. Clause 4 requires Pacific National to publish on its website an application form, current Charges for each Terminal Service, a pro-forma Terminal Services Agreement, and details of the Price Dispute Resolution Process and Non-Price Dispute Resolution Process. It also requires Pacific National to negotiate in good faith, and requires Pacific National to supply Terminal Services at prices no greater than the then current Charges payable for Terminal Services.
	3. Clause 5 requires Pacific National, 60 business days before the end of each financial year, to publish on its website the proposed Charges applicable for the next financial year, provide written notice of those Charges to each Terminal User and the Independent Auditor and include on its website, and the written notice, information about the Price Dispute Resolution Process. The clause also stipulates the Charges to apply until 30 June 2019, identifying the Terminal Service and the basis of the Charge.
3. The Price Dispute Resolution Process is governed by clause 10 of the Undertaking and Schedule 4. Clause 10.1 stipulates that Pacific National must comply with Schedule 4 in relation to the setting of Charges for Terminal Services and to determine disputes in relation to such Charges. Clause 10.3 requires Pacific National to appoint an Independent Price Expert to carry out the functions under Schedule 4.
4. Schedule 4 sets out the obligations that Pacific National must comply with and the functions to be performed by the Independent Price Expert. They include the following:
	1. Clause 1 stipulates that Pacific National must use the Price Dispute Resolution Process to notify price increases and resolve disputes relating to Charges at the Terminal.
	2. Clause 2.1 stipulates that Pacific National will conduct an annual review of its Charges and may propose a price increase which it considers reasonable and appropriate, taking into account the relevant considerations in Schedule 4, clause 3.4. Clause 2.2 requires Pacific National to provide notice of the proposed Charges applicable for the next Financial Year at least 60 business days before the end of each Financial Year. Clause 2.3 requires the notice to contain the amount of the proposed Charges, reasons for any proposed increase, and information about the Price Dispute Resolution Process.
	3. Clause 3 governs price disputes. Clause 3.1 empowers interested persons to raise a price dispute. Clause 3.3 stipulates that, when a dispute is raised, the Independent Price Expert will determine whether the proposed price increase is reasonable and appropriate having regard to the principles listed in Schedule 4, clause 3.4. The Independent Price Expert has the power to accept, reject, or vary the proposed increase, save that any variation cannot be higher than proposed by Pacific National or lower than the Charges that applied before the proposed increase. Pacific National is obligated to provide the Independent Price Expert with any information the expert requires. The Independent Price Expert's decision is final and binding. Clause 3.4 sets out the relevant considerations to be applied by the Independent Price Expert, including that Charges should be set so as to generate expected revenue that is sufficient to meet efficient costs and include a return on investment commensurate with the commercial risks involved.
5. The Non-Price Dispute Resolution process is governed by clause 11 of the Undertaking and Schedule 5. Clause 11.1 stipulates that Pacific National must comply with the Non-Price Dispute Resolution Process at Schedule 5 to determine disputes in relation to capacity and the granting, refusal to grant, conditions, or administration of a Terminal Services Agreement, other than in relation to the amount of any Charges.
6. Schedule 5 sets out the obligations that Pacific National must comply with under the Non-Price Dispute Resolution process. They include the following:
	1. Clause 2 allows an interested person to raise a Terminal Dispute by giving written notice to Pacific National.
	2. Clause 3 requires the interested person and Pacific National to undertake genuine and good faith negotiations with a view to resolving the Terminal Dispute expeditiously by joint discussion. If negotiation fails, the parties may, by agreement, refer the dispute to mediation, or either party may refer the dispute to expert determination or arbitration.
	3. Clause 4 governs the conduct of mediation.
	4. Clause 5 governs expert determination. The expert’s decision is binding on the parties. Pacific National is required to use all reasonable endeavours to ensure that the expert is provided with all relevant information.
	5. Clause 6 governs the conduct of arbitration. A determination by the arbitrator is binding on the parties, subject to any rights of review by a court of law.

#### The allocation of capacity at the ART

1. The allocation of capacity at the ART is governed by clause 6 of the Undertaking. Clause 6.1 stipulates that if Pacific National receives a bona fide request for access to the Terminal, and at that time Pacific National has not entered into any Terminal Services Agreements with any Terminal Users, Pacific National must appoint an independent expert to prepare a capacity allocation protocol in accordance with clause 6. Clause 6.2 requires Pacific National to publish the protocol on its website and to comply with it. Clause 6.3 stipulates that the capacity allocation protocol must not permit Pacific National to favour itself or another person over any other person, except to the extent required having regard to issues of safety, requirements of a third party master train plan or other third party operational considerations, such as in order to comply with a direction given by ARTC or Queensland Rail as the rail network operator in relation to a network maintenance program. Clause 6.4 governs the appointment of an independent expert for that purpose.
2. Clause 6.22 of the Undertaking stipulates that an Applicant or Terminal User may request Pacific National to undertake an assessment of works necessary to provide additional capacity to meet the applicant’s or Terminal User’s requirements for access. Clause 6.23 stipulates that, in response, Pacific National must either (a) notify the Applicant or Terminal User that additional works are not required to provide the requested capacity or (b) prepare and provide an indicative expansion plan. Clause 6.27 stipulates that if Pacific National and the Applicant or Terminal User cannot agree on an expansion plan, the matter can be referred to the independent expert to determine the expansion plan.

#### Confidentiality and financial reporting obligations

1. Clause 7 of the Undertaking contains a number of obligations on Pacific National to keep the ART business separate from its other operations (clause 7.1), to keep confidential information provided to Pacific National by Terminal Users (clause 7.4), to prepare separate financial reports for the ART business (clause 7.11), to appoint a compliance officer to monitor Pacific National’s compliance with the obligations in clause 7 (clause 7.12), and to report any breaches of these obligations to the Independent Auditor (clause 7.20).

#### Compliance reporting by Pacific National

1. Under clause 8 of the Undertaking, Pacific National is required to provide a compliance report to the Independent Auditor in respect of each half financial year which contains a record of Pacific National’s performance against KPIs in Schedule 3. The report must also be published on Pacific National’s website subject to redaction of confidential information. The KPIs in Schedule 3 stipulate targets or objectives in respect of the performance of the Terminal in areas such as on-time train departures, truck turnaround timers, and freight availability for collection.

#### Independent auditing of Pacific National’s compliance

1. Clause 9 of the Undertaking contains provisions for the independent auditing of Pacific National’s compliance with the Undertaking. Clause 9.1 stipulates that Pacific National must appoint an Independent Auditor for that purpose. Clause 9.7 stipulates that the Independent Auditor must conduct an audit of Pacific National’s compliance with the Undertaking and may make recommendations. Clause 9.13 stipulates when the reports are to be prepared. Clause 9.14 stipulates that Pacific National must implement recommendations of the Independent Auditor.

#### ACCC criticisms

1. The ACCC argued that a number of the provisions of the Undertaking are “strikingly vague”. We disagree. It is necessary to consider each in turn.
	1. Clause 2(a)(i) of Schedule 1 provides that “Pacific National must offer Terminal Services to an Applicant on terms no less favourable than terms for Terminal Services offered to another Terminal User.” The ACCC argued that, aside from specific examples provided in cl 5.3, the Undertaking provides no basis upon which the terms offered to an applicant are to be compared to those of another terminal user so as to determine whether the terms offered to an applicant meet the “no less favourable” standard. We disagree with the premise of the criticism, that such a stipulation is uncertain without further specification. A “no less favourable” clause is a common provision of commercial contracts which are enforced by courts. Further, compliance with the clause does not require adjudication by the Court. Clause 11.2 of the Undertaking makes clear that compliance with that clause (as part of the Access Conditions imposed by clause 5) is subject to the Non-Price Dispute Resolution Process.
	2. Clause 6.3 of the Undertaking provides a mechanism by which Pacific National’s capacity allocation protocol is permitted to favour itself or another person (including any of its related bodies corporate) over any other person “to the extent required…having regard to third party operational considerations”. The ACCC argued that the qualification is unclear. We disagree that the clause renders Pacific National’s obligations under the Undertaking impermissibly uncertain for two reasons. First, clause 6.3 is not an obligation imposed on Pacific National. It is a principle to be applied by an independent expert when preparing a capacity allocation protocol (with which Pacific National must comply). Second, the obligation is clear when read as a whole. Clause 6.3 contains a basic principle of no favouritism toward Pacific National and states a qualification. The qualification addresses issues of safety, the requirements of a third-party master train plan, or other third-party operational requirements such as requirements of the ARTC or Queensland Rail (who are the relevant rail network operators). In our view, the qualification is sufficiently clear to be applied by an independent expert.
	3. The ACCC submitted that clause 7.14(c) of the Undertaking permits Pacific National to disclose (and thus potentially make use of) confidential terminal information of an access-seeker or user in certain circumstances, in terms which are subjective and widely framed. The clause stipulates that “Pacific National may disclose Confidential Information of a Terminal User or Applicant…to a Senior Manager and the Boards of Pacific National and its ultimate holding company as required in the performance of its normal reporting functions, but only in such format (i.e. an aggregated format) so as not to disclose any commercially sensitive information relating to the Terminal User or Applicant as a competitor of Pacific National”. In our view, the ACCC is wrong to suggest that the clause permits Pacific National to make use of confidential information of an access applicant or terminal user. The clause stipulates that the disclosure is only permitted if required in the performance of Pacific National’s normal reporting functions. Further, the extent of disclosure is defined clearly: it must be in a format that does not disclose commercially sensitive information. Again, that is a common provision of commercial contracts which are enforced by courts.
	4. The ACCC criticises clause 3 of Schedule 1 on the basis that it requires applicants for access to demonstrate matters to Pacific National’s “reasonable satisfaction”. The matters about which Pacific National must be reasonably satisfied (for the purposes of negotiating access arrangements) are that the access applicant: (i) is solvent; (ii) has a sufficient capital base and assets of value to meet the actual potential liabilities under an agreement for the supply of terminal services, including the ability to pay any charges when they fall due; (iii) is able to provide credit support; and (iv) has in place appropriate occupational health and safety standards and rail safety standards. Read in context, we do not consider that an obligation about reasonable satisfaction is excessively vague. Further, Pacific National’s compliance with the clause does not require adjudication by the Court. Clause 11.2 of the Undertaking makes clear that compliance with that clause (as part of the Access Conditions imposed by clause 5) is subject to the Non-Price Dispute Resolution Process.
	5. The ACCC also criticises clause 6(b) of Schedule 1 on the basis that it requires Pacific National to exercise “reasonable endeavours” and “best endeavours” in providing terminal management services. The full clause stipulates that “In providing the Terminal Services, including managing or scheduling trains into and out of the Terminal, Pacific National must: (i) use all reasonable endeavours to maximise the use of the rail network through the optimum use of the Terminal; and (ii) use its best endeavours to accommodate Trains that present at the Terminal before or after the designated arrival time, but not disrupt Trains which arrive and depart the Terminal in accordance with their specified arrival and departure times”. Again, read in context, we do not consider that the obligation is excessively vague and, in any event, Pacific National’s compliance with the clause does not require adjudication by the Court (compliance with the clause is subject to the Non-Price Dispute Resolution Process).
	6. Clause 18.1(n) of the Undertaking provides that “in performing its obligations under this Undertaking, Pacific National will do everything reasonably within its power to ensure that its performance of those obligations is done in a manner which is consistent with promoting the purpose and object of this Undertaking”. Again, the ACCC argues that the clause is impermissibly vague. We disagree. Clause 18.1 is an interpretation clause. It commences “In the interpretation of this Undertaking, the following provisions apply unless the context otherwise requires”. Thus, clause 18.1(n) is a clause intended to guide the interpretation of other obligations. Unless the primary obligations are impermissibly vague (which has not been established by the ACCC), in our view clause 18.1(n) is not in itself impermissibly vague.
2. The ACCC also submitted that the primary judge erred in rejecting Dr Kuypers’ evidence that the Undertaking would not remove Pacific National’s ability to engage in discriminatory conduct. The ACCC relied on two specific matters:
	1. Dr Kuypers gave evidence that the Undertaking provided limited protection against discrimination because it did not include (and therefore there had been no opportunity for scrutiny of) a standard terminal services agreement or terminal protocol. The primary judge rejected Dr Kuypers’ concern because clause 4(a)(iii) of Schedule 1 requires Pacific National to publish on its website a pro forma terminal services agreement (at [1502]). We see no error in the primary judge’s reasoning. It can also be noted that clause 11.1 of the Undertaking requires Pacific National to comply with the Non-Price Dispute Resolution Process at Schedule 5 to determine disputes in relation to, amongst other things, the conditions and administration of a terminal services agreement. As seen earlier, at the election of an access applicant or terminal user, such disputes are resolved by expert determination or arbitration. In our view, that is an effective means to prevent discriminatory conduct.
	2. Dr Kuypers also criticised the mechanism for determining Charges for Terminal Services. The criticism was directed to the determination of the initial Charges and the stipulation that the Independent Price Expert cannot set future Charges at a level less than the existing Charges (which Dr Kuypers described as a “ratchet mechanism”). Dr Kuypers gave evidence that, although the initial Charges reflected the charges negotiated between Aurizon and Pacific National under the Terminal Services Agreement entered into between them, there was no way of knowing whether those charges reflected efficient costs. Dr Kuypers also gave evidence of the difficulties that an Independent Price Expert would face in assessing new Charges. All of these criticisms were considered by the primary judge (at [1535]-[1548]). As to the initial Charges, his Honour observed that they reflect arms-length prices negotiated between Aurizon and Pacific National and therefore the market price for Terminal Services (at [1545]). Implicit in his Honour’s observation is that it can be assumed that Pacific National would not have agreed to prices that are above market levels. We also add that the purpose of the Undertaking is to prevent discrimination by Pacific National; it is not to test whether the charges imposed by Aurizon were at an efficient level. If the acquisition did not proceed, Aurizon would be entitled to continue charging at the same level. As to future increases in the Charges, his Honour observed that the Independent Price Expert is given the function of determining whether a proposed increase is reasonable and appropriate and may accept, reject, or vary the proposed price increase; further, the considerations to be taken into account by the Independent Price Expert are similar to those governing ACCC price determinations under Part IIIA of the Act (at [1546]). We see no error in the primary judge’s reasoning.
3. We therefore reject the ACCC’s contentions that the primary judge acted upon a wrong principle in accepting an undertaking that was vague and uncertain and thereby incapable of enforcement in a contempt proceeding. We also reject the ACCC’s contentions that the primary judge made a mistake of fact in finding that the Undertaking would be effective in preventing anti-competitive discriminatory conduct.
4. As a general observation, it can be accepted that the Undertaking is not typical of injunctions granted or undertakings accepted by the Court. However, the boundaries of the Court’s powers, and the appropriateness of their exercise, are not defined by what is typical. The determination of the ACCC’s appeal requires the application of long-standing principles to the circumstances of this case, which involves an application under s 50 to prevent a vertical merger between a rail linehaul provider and a railway terminal. The case raised issues of the potential for anti-competitive discriminatory conduct in the operation of the ART, during a limited window of time, and whether that potential can be effectively prevented by an undertaking to the Court. The undertaking accepted in this case, while not typical, concerns the very subject matter of the proceeding which the Court must determine, having exclusive jurisdiction in the area of competition law under Part IV of the Act. In our view, no error has been shown in the primary judge’s conclusion that the Undertaking was capable of enforcement in contempt proceedings and would be effective. The fact that s 87B of the Act empowers the ACCC to accept undertakings of this kind in connection with a matter in relation to which the ACCC has a power or function under the Act (such as a potential contravention of s 50) does not affect the power of the Court to accept such an undertaking. The respective powers have a different basis and, to some extent, are governed by different principles, although it should be noted that an undertaking accepted by the ACCC under s 87B is also enforceable by the Court (see s 87B(4)). There is no difficulty arising from the fact that a party to an acquisition might offer an undertaking to the ACCC under s 87B and, if it is rejected by the ACCC and the ACCC brings a proceeding to prevent the acquisition under s 50, the party might then offer it to the Court in lieu of injunctive relief.

## F.5 Conclusions on the ACCC’s appeal

1. In conclusion, if it had been necessary to determine the ACCC’s appeal, we would not conclude that the primary judge erred in accepting the Undertaking. While we disagree with his Honour’s reasoning that the Court can take the effect of the Undertaking into account in determining whether the acquisition would contravene s 50, his Honour found that the acquisition would constitute a contravention (in the absence of the Undertaking), enlivening the power to accept the Undertaking in lieu of granting an injunction under s 80 (even though his Honour did not advert expressly to that power). His Honour also found that the Undertaking was effective to ensure that the acquisition would not have the effect of substantially lessening competition, thus making it appropriate to accept. Having accepted the Undertaking, his Honour determined that none of the orders sought by the ACCC on its application should be made. In those circumstances, there was no error in his Honour dismissing the ACCC’s application. For those reasons, we would not have set aside any of his Honour’s orders and would have therefore dismissed the ACCC’s appeal.

# G. CONCLUSION

1. As a concluding remark, we note again that there was a substantial narrowing of the ACCC’s case against the respondents during the course of the proceeding at first instance and again on this appeal. At the commencement of the proceeding, the ACCC alleged (amongst other things) that the respondents had contravened s 45 of the Act by entering into a series of agreements following Pacific National’s pre-emptive bid for Aurizon’s intermodal business. The agreements included the Business Sale Agreement for the acquisition of the ART, the Terminal Services Subcontract for the operation of the ART and an agreement for Pacific National to negotiate exclusively for the acquisition of Aurizon’s Queensland intermodal business (these agreements, and the negotiations surrounding them, are described in the primary judge’s reasons at [10]-[13] and at [67]-[80]). While Pacific National was ultimately unable to acquire the Queensland intermodal business, what transpired subsequently was that Aurizon closed its interstate intermodal business and the Queensland intermodal business was sold as a separate business to Linfox. The opportunity for any other person, such as Qube, to acquire the whole of Aurizon’s intermodal business and use that acquisition as the basis to enter the various markets (including the interstate rail linehaul market) was lost. At the commencement of the proceeding, the ACCC alleged that the suite of agreements formed an arrangement between Aurizon and Pacific National that had the purpose or effect of substantially lessening competition in contravention of s 45. However, that allegation was abandoned by the ACCC before the end of the trial (as recorded by the primary judge at [20]). Accordingly, there was no need for the primary judge to consider whether the suite of agreements entered into between Aurizon and Pacific National pursuant to the pre-emptive bid had the likely effect of substantially lessening competition, including by foreclosing the opportunity for market entry by Qube. On the appeal, the only question raised for determination is whether the ART acquisition would be likely to have the effect of substantially lessening competition, and that question has to be answered in factual circumstances where Aurizon’s interstate intermodal business has been closed, Aurizon’s Queensland intermodal business has been sold to Linfox and Qube gave evidence, accepted by the primary judge, that it would not enter the interstate rail linehaul market. For the reasons given earlier, in our view that question, in the circumstances presented, must be answered in the negative.
2. In conclusion, it seems the appropriate orders to make are that the appeal be dismissed, the cross-appeals allowed and that Pacific National be released from its Undertaking. The parties should be given the opportunity to consider these reasons and confer as to the appropriate orders that should be made by the Court including as to the costs of the appeal and cross-appeals and any variation to the orders below. Therefore, we will order that within 14 days, the parties confer, and file in the Court an agreed minute of order (including as to the costs of the trial, the appeal and cross-appeals) and in default of agreement, short written submissions of no more than 3 pages in length as to each party’s proposed minute of order.

|  |
| --- |
| I certify that the three hundred and sixty-nine (369) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Middleton and O’Bryan. |

Associate:

Dated: 6 May 2020

REASONS FOR JUDGMENT

PERRAM J:

# INTRODUCTION

1. By s 50(1) of the *Competition and Consumer Act 2010* (Cth) (‘the Act’) it is unlawful for a corporation to acquire an asset of another person if the acquisition would be likely to have the effect of substantially lessening competition in any market. On 28 July 2017, Pacific National agreed with Aurizon to acquire the Acacia Ridge rail terminal. At the same time, it entered into a terminal service agreement with Aurizon under which it agreed to operate the terminal from 1 December 2018. On 18 July 2018 the Australian Competition and Consumer Commission (‘the Commission’) commenced a proceeding in the Federal Court seeking to restrain Pacific National and Aurizon either from completing the acquisition of Acacia Ridge or giving effect to the terminal services agreement on the basis that doing so would contravene ss 50(1) and 45(2) of the Act respectively.
2. The terminal is located about 16 km south of the Brisbane Central Business District. It is connected to both the standard gauge interstate rail network and to the narrow gauge rail network on both of which rail haulage and passenger carriage operations are conducted. The two different gauges are serviced by two separate terminals within Acacia Ridge which are physically separated. The terminal is proximate to freight forwarders and to firms which require rail haulage services.
3. Pacific National is presently the dominant firm in the interstate rail haulage market, the other firm being SCT. Pacific National hauls a number of different classes of freight including intermodal freight. Intermodal freight is containerised freight able to be transferred between one mode of transport and another without the necessity of unloading. An intermodal terminal is a terminal at which freight, including intermodal freight, may be transferred between different modes of transport. Acacia Ridge is such an intermodal terminal permitting the transfer of intermodal freight between the rail and road modes. Currently, Pacific National conducts its interstate intermodal operations using, inter alia, the standard gauge terminal at Acacia Ridge. Its customers include large users of intermodal freight such as, for example, Woolworths, Metcash and Orica.
4. SCT conducts its interstate rail haulage business from its own standard gauge intermodal terminal at Bromelton, a town about 70 km from Brisbane and inland from the Gold Coast. Some of the freight it hauls is intermodal but most of its rolling stock consists of louvered wagons which must be loaded and unloaded. Unlike Acacia Ridge, SCT’s terminal at Bromelton is not connected to the narrow gauge intra-state network.
5. Pacific National’s share of the interstate intermodal market is very much larger than SCT’s and it is the dominant firm.
6. Prior to December 2017, Aurizon operated interstate intermodal operations in competition with Pacific National and SCT. It used the standard gauge terminal at Acacia Ridge as part of those operations. At the end of 2017 it closed its interstate intermodal operations leaving Pacific National and SCT as the only firms providing interstate rail haulage services. Because SCT conducts its operations from Bromelton, Pacific National is presently the only firm using the standard gauge terminal at Acacia Ridge.
7. Pacific National is also the dominant intrastate intermodal operator. There is presently one other operator, LinFox. LinFox uses the narrow gauge terminal at Acacia Ridge for its intermodal operations. Pacific National does not use the narrow gauge terminal at Acacia Ridge for its intrastate intermodal operations but instead uses a narrow gauge intermodal terminal owed by it at Tennyson in Brisbane. Where necessary it transfers intermodal freight by road between Tennyson and the standard gauge terminal at Acacia Ridge.
8. The Commission is concerned that if Pacific National becomes the owner of Acacia Ridge it will be able to increase the prices it charges a certain class of its customers. This class consists of firms who need to move some, but not all, of their intermodal containerised freight interstate by rail and for whom road or sea transport are not substitutes.
9. In order for this concern to be realistic a number of matters must established. First, Pacific National must be able discern which particular freight needs of its customers cannot be switched to road or sea if it increases its freight charges (or reduces its discounts). For example, Woolworths may be able to transport breakfast cereals only by rail but may be able to transport cleaning products by rail, sea or road. Pacific National would need to know that fact and to increase the prices it charges for Woolworths only in relation to its haulage of containerised breakfast cereal. If it were to increase its prices in relation to containerised cleaning products Woolworths could switch to transporting these containerised products to sea or road modes, decreasing its use of Pacific National’s intermodal services and potentially reducing profitability. The trial judge accepted that Pacific National had sufficient knowledge to engage in price discrimination in this sense and that there was, in relation to these particular customers, an interstate intermodal market which could be monopolised.
10. Secondly, assuming Pacific National can price discriminate in that way, it then needs to be shown that the likely effect of permitting Pacific National to acquire the terminal will be substantially to lessen competition in that market. The principal way in which the Commission put its case at trial was that but for the acquisition of the terminal by Pacific National it was likely that another firm, Qube, would have entered the interstate intermodal market. The trial judge found, however, that this was not so and that Qube would not have entered the market whether Pacific National had acquired the terminal or not.
11. Despite that finding, the trial judge also concluded that he could not exclude the possibility that in the future some firm might enter the interstate intermodal market and that possibility would operate as a constraint on Pacific National’s behaviour. Consequently, he accepted that the effect of the acquisition of the terminal would be likely substantially to lessen competition under s 50 of the Act.
12. The trial judge rejected the Commission’s case that the terminal services agreement had the same effect as the acquisition of the terminal itself. His Honour felt that because the terminal was owned by Aurizon, and would continue to be owned by Aurizon if the acquisition did not proceed, Pacific National’s ability to use the terminal adversely to the interests of its competitors would be adequately constrained. Therefore he concluded that the terminal services agreement did not itself breach s 45.
13. In relation to the acquisition of the terminal, however, the trial judge also accepted that the adverse effect the acquisition would have on competition would be sufficiently neutralised if Pacific National submitted Acacia Ridge to an access regime which would prevent it being used to disadvantage any new entrant. Before the end of the trial, Pacific National proffered an undertaking to the Court to submit its operation of the terminal to such an access regime. An undertaking of this kind is known as a behavioural undertaking. Where an undertaking is proffered in lieu of the grant of an injunction, a failure to comply with it is a civil contempt and may be punished by fine or the sequestration of assets.
14. The undertaking required Pacific National to act reasonably in the making of decisions about access, price and non-price issues such as terminal slots. It also allowed Pacific National’s decisions on these matters to be challenged before independent experts. The evident intent of the undertaking was to require Pacific National to act contrary to its commercial interests and not to use the terminal as a strategic weapon against any future competitor.
15. The Commission, which has an administrative power to accept such an undertaking under s 87B of the Act, had rejected a very similar undertaking prior to the commencement of the litigation. The trial judge, however, took a different view to the Commission. His Honour accepted that the terms of the undertaking were legally effective to constrain Pacific National’s disadvantageous use of the terminal and that the threat of civil contempt proceedings would be sufficient to secure its obedience to those terms.
16. All parties have appealed. By their cross-appeals Pacific National and Aurizon contest the trial judge’s conclusion that the effect of the acquisition would be likely substantially to lessen competition in the relevant market. They dispute that the market identified exists because they submit that Pacific National lacks sufficient knowledge of the freight needs of its customers to engage in price discrimination. They also submit that even if Pacific National does not acquire the terminal, it is unlikely for the foreseeable future that any new firm would seek to enter the interstate intermodal market. Consequently, it was unlikely that the acquisition would result in a substantial lessening of competition since the competitive state of the market would remain the same. They also submit that the standard applied by the trial judge to determine whether a substantial lessening of competition was likely – whether there was a real commercial likelihood – was the wrong standard and that ‘likely’ in this context means more likely than not.
17. For the reasons which follow Pacific National and Aurizon’s cross-appeals should be allowed. His Honour was correct in his treatment of the relevant market and it is useful to assume in favour of the Commission that he applied the correct standard in analysing whether the acquisition of the terminal by Pacific National would be likely substantially to lessen competition. But his Honour answered that question in the affirmative only after asking himself whether he could exclude the possibility that there might be a new entrant in the market down the track. This involved a reversal of the onus of proof. 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 substantially to lessen competition in the relevant market. The correct conclusion was that the acquisition was not a threatened contravention of s 50(1) of the Act.
18. Once that conclusion is substituted for that of the trial judge, the Court has no power to accept the undertaking proffered by Pacific National and it should be released from that undertaking. The issues raised by the Commission’s appeal do not, therefore, arise. However, had they arisen, I would have accepted the Commission’s contention that the trial judge had, for somewhat technical reasons, failed to find that the acquisition contravened s 50(1) and its accompanying submission that without such a finding his Honour had lacked any power to accept the behavioural undertaking. I would have rejected the Commission’s submission that the Court has no power to accept an undertaking in a case under s 50(1) because of the existence of the Commission’s power to accept an undertaking under s 87B. I would have rejected also its submission that the Court has no power to remedy the breach of s 50(1) other than by means of an injunction restraining the sale of the terminal and its allied submission that the acceptance of the undertaking had impermissibly involved the Court in the exercise of non-judicial power contrary to Chapter III of the *Constitution*.
19. However, I would have acceded to the Commission’s submission that the Court should not have accepted the behavioural undertaking in the exercise of its discretion. The trial judge gave excessive weight to the feasibility of enforcing the undertaking by means of civil contempt proceedings.

# Market

1. Pacific National and Aurizon submit that his Honour should not have accepted the Commission’s case that there existed a market of users of intermodal rail services who could not switch to intermodal road or sea services for a portion or all of their freight needs (‘relevant customers’). Although they accepted that such firms existed, Pacific National and Aurizon submitted that because intermodal freight was containerised there was no way that Pacific National could know which consignments could only be shipped by rail and which could plausibly be switched to road or sea. Without that knowledge, there was no practical way that Pacific National could determine for which of these firms’ consignments it faced no competition from road or sea and for which it did. This meant there was no practical way that Pacific National could engage in price discrimination.
2. I do not accept this submission. At trial the Commission sought to prove its case by demonstrating that Pacific National would be able to identify the particular customers and their particular freight needs which could not be switched to road or sea. It is not in dispute as a matter of economic theory that a market may exist which is constituted by a particular subset of customers who are unable to acquire otherwise substitutable services even where other customers can. However, it is also accepted as a matter of economic theory that if a market is to be defined in that fashion it needs to be shown that the firm whose conduct is impugned is able to identify these customers. If the firm cannot identify the customers who are, for practical reasons, unable to use the services of competitors, the firm will not be able to engage in discriminatory pricing. In market theory, this need for the firm to be able to identify the customers who cannot switch to other firms is known as the identification condition. It is said that without satisfaction of the identification condition, it is not possible for a market of this kind to exist. At the trial, Pacific National asserted that this condition required Pacific National to be able to identify the relevant customers with a high degree of accuracy.
3. The trial judge examined closely the evidence of what Pacific National knew about its customers and their intermodal freight needs. He concluded that its knowledge was not perfect but was also far from non-existent. It included, for example, knowledge of the customers’ historical usage of its services and of at least the category of freight in each container, i.e., perishables. Pacific National also knew, in some detail, the extent to which the customers had been using other modes of transport. His Honour did not think that the identification condition was formally met, at least not to the high degree of accuracy contended for by Pacific National, but he was nevertheless satisfied that Pacific National knew enough, in a rough sort of way, to be able to engage in price discrimination in relation to the relevant customers.
4. In formal terms, Pacific National and Aurizon’s challenge is to the trial judge’s conclusion that the relevant customers formed a ‘market’ within the meaning of s 50(1). That question is a question of fact: *Air New Zealand Ltd v Australian Competition and Consumer Commission* [2017] HCA 21; 262 CLR 207 (‘*Air New Zealand*’) at 229 per Nettle J. This Court can depart from the factual findings of the trial judge only if it detects error in his Honour’s approach to that question or where this Court is of a sufficiently clear difference of opinion from that of the trial judge that it can be confident that his Honour was wrong: *Aldi* *Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93; 261 FCR 301 at [7], [45]-[46]. As that decision shows, in coming to its views, the appellate court accepts the instrumental advantages that the trial judge had in being immersed in the milieu of the trial and gives them due deference. In this case the instrumental advantages included seeing and hearing the evidence unfold over several weeks rather than the somewhat compressed four days which occupied this Court. And, of course, the trial judge is an experienced judge in the competition field whose views should be afforded weight.
5. With that in mind, I am not persuaded that any error has been shown in the approach of his Honour to the question of whether the relevant customers formed a ‘market’. Market definition in the domain of s 50(1) is a tool not a legal standard and it ‘is but a tool to facilitate a proper orientation for the analysis of market power and competitive processes’: *Air New Zealand* at [62] citing the now canonical views of Professor Brunt in Brunt “‘Market Definition’ Issues in Australian and New Zealand Trade Practices Litigation’, (1990) 18 *Australian Business Law Review* at 86 at 126-127.
6. While the trial judge did not apply the identification condition, he understood that the existence of the relevant market was determined by Pacific National’s knowledge of the particular rail freight needs of its customers. But I see nothing erroneous in accepting that something less than perfect information may lead to a situation where discriminatory pricing becomes possible. No doubt as the monopolistic firm’s state of knowledge becomes less perfect, its ability to engage in discriminatory pricing declines and will at some point dissipate altogether. Indeed, a firm’s knowledge and therefore ability to price discriminate will shape the scope of the market that exists. But this only demonstrates that the determination of whether there is a market in a case under s 50(1) is concerned with realities where bright lines can rarely be drawn. Those realities are, of course, to be interpreted in light of economic theory but that theory is only a guide to assist the Court obtaining an understanding of market power and competitive processes in a real world beset with empirical imperfection. Recourse to economic theory should not impose a standard of perfect knowledge which in reality will rarely be met. In my view, the trial judge was correct to proceed as he did.
7. Nor would I be disposed to accept Pacific National and Aurizon’s challenge to the conclusion that there was a market by seeking to demonstrate that the evidence before the trial judge ought to have led his Honour to a different conclusion. In this endeavour the Court was taken to swathes of evidence, much of it detailed and most of it isolated from its context at trial, in an effort to show that Pacific National did not have sufficient knowledge of its customers’ behaviour to engage in price discrimination. I am not persuaded that his Honour’s conclusions about this were incorrect.
8. The trial judge relied on a variety of evidence in concluding that Pacific National had enough knowledge to engage in price discrimination. His Honour noted that the information provided to Pacific National by freight forwarders when requesting commodity rates was indicative of the competitive landscape. While users may have only provided information which advanced their own interests, his Honour considered Pacific National well placed to assess the credibility of that information. Pacific National was a well-experienced operator who was familiar with the demand for rail haul services on interstate routes and the nature of the business of most users of those services. This gave Pacific National an educated perception of users’ willingness to pay and their likelihood of substituting to another mode of transport. His Honour also referred to Pacific National’s use of an electronic booking portal which enabled it to benefit from the large repository of information that users provided when making a booking including descriptions of freight, as well as freight weight and packaging. Indeed, Pacific National’s own internal documents evidenced it had enough information about particular users, albeit imperfect, to tailor its prices to their willingness to pay. The evidence before his Honour supported his finding that Pacific National had sufficient knowledge for the market to exist.
9. The trial judge’s conclusion that a market of the relevant customers existed should therefore be upheld.

# Substantial lessening of competition

1. Aurizon submitted that the trial judge erred in his approach to how a party might prove an acquisition would be likely to have the effect of substantially lessening competition under s 50(1). His Honour reviewed the authorities and concluded that the words ‘likely to have the effect’ required him to inquire into whether there was a real commercial likelihood of a substantial lessening of competition. Aurizon submitted that this approach was wrong and that the word ‘likely’ connoted a state of affairs more probable than not. In reaching his conclusion the trial judge followed the decision of French J in *Australian Gas Light Company v Australian Competition and Consumer Commission (No 3)* [2003] FCA 1525; 137 FCR 317 (‘*AGL*’). That decision about the meaning of s 50(1) rests on the reasons of Deane J in *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees’ Union* [1979] FCA 132; 42 FLR 331 (‘*Tillmanns*’) at 347 which concerned the meaning of the word ‘likely’ in s 45D of the Act. There are conflicting views on this question. Middleton J has recently conducted a comprehensive review of the authorities and came to the view, sitting at first instance, that he should apply the real chance test: *Vodafone Hutchinson Australia Pty Ltd v Australian Competition and Consumer Commission* [2020] FCA 117 at [52]-[65].
2. The meaning of the word ‘likely’ in s 50(1) need not be determined in this appeal, however, for as will be seen the Commission’s case fails on either standard. For the balance of these reasons I will assume therefore in the Commission’s favour that the appropriate standard is the one for which it contends and which the trial judge applied, namely, a real commercial likelihood of a substantial lessening of competition. I emphasise that this is an assumption, not a conclusion.
3. I accept Pacific National and Aurizon’s submission that the trial judge reversed the onus of proof in applying that standard. Part of Pacific National’s case was that the state of the market was such that there was no real commercial likelihood of any new competitor entering the market for the foreseeable future and therefore the acquisition was not likely substantially to lessen competition. His Honour surveyed the evidence on this issue and ultimately concluded that he could not ‘rule out the realistic commercial chance of another potential new entrant emerging in the relevant time frame’. With respect, I think this was the wrong question and the correct question was whether the Commission had established that there was a real commercial chance that a new firm would enter the market. Consequently, I accept that Pacific National and Aurizon have demonstrated error in his Honour’s treatment of this topic.
4. This Court is therefore obliged to come to its own view on the matter. However, as I have previously indicated, it is unnecessary in doing so for the Court to determine the meaning of ‘likely’ under s 50(1). This is because even on the Commission’s view that ‘likely’ means a real commercial likelihood, there was insufficient evidence before the trial judge to satisfy that standard (interestingly this was the approach taken by Bowen CJ in *Tillmanns* at 340). It is inherent in this finding that the alternative proposed meaning of ‘likely’, a state of affairs more probable than not, would also not be satisfied by the evidence. Thus, the applicable standard need not be decided.
5. The Commission’s case at trial was that there was a real chance if the acquisition did not proceed that Qube would enter the interstate intermodal market. The trial judge found two facts which are not challenged on appeal: (a) if the acquisition did not proceed then Pacific National would obtain control of Acacia Ridge under the terminal services agreement; and, (b) if Pacific National obtained control of Acacia Ridge under the terminal services agreement Qube would not enter the interstate intermodal market. There are two unavoidable consequences of these facts: there was no realistic commercial chance that Qube would enter the interstate intermodal market if the acquisition did not proceed; and the acquisition would not therefore be likely to lessen competition in the relevant market because the position of Qube on entry was not affected by the acquisition.
6. On appeal the Commission seeks to overcome this problem in two ways. First, it submits that whilst it may be the case that Qube would not have entered the interstate intermodal market it was possible some other firm might have and that possibility could have acted as a restraint on Pacific National’s behaviour. Secondly, it contended that once it was found that the acquisition did have the effect of raising barriers to entry then unless it was shown that entry was impossible or close to impossible it was open for the Court to conclude that the acquisition was likely substantially to lessen competition.
7. I do not accept either of these arguments. As to the first, it is apparent from the first day of the trial during an amendment application that the Commission’s case was based on Qube. This exchange occurred between the trial judge and senior counsel for the Commission at T49.27-50.24:

HIS HONOUR: Well, on your counter-factual it’s only Qube isn’t it? Put Aurizon to one side. It’s only Qube.

MR McCLELLAND: Well, we would say - - -

HIS HONOUR: You’ve got detailed evidence as to their perception.

MR McCLELLAND: Yes.

HIS HONOUR: So you can’t diminish the relevance of that. That’s - - -

MR McCLELLAND: No. We don’t your Honour.

HIS HONOUR: No, no.

MR McCLELLAND: And we would say that - - -

HIS HONOUR: Yes.

MR McCLELLAND: - - - new entrants would have that perception.

HIS HONOUR: Yes. Yes.

MR McCLELLAND: Qube is an example of it.

HIS HONOUR: Yes. But you’re not offering any other new entrant.

MR McCLELLAND: No, we’re not, your Honour.

HIS HONOUR: No. So the only one that you can potentially identify as a real chance that might exist, you say, is Qube.

MR McCLELLAND: Yes, your Honour.

HIS HONOUR: And Pacific National has not identified anybody else.

MR McCLELLAND: That’s so, your Honour.

HIS HONOUR: It’s an “ah”. We would have – one identified that person as a potential new entrant and we would have called evidence from that person to say that your risk is more perceived than real.

MR McCLELLAND: That’s right, you Honour.

HIS HONOUR: Yes. Okay. Understand. Right.

MR McCLELLAND: So in that respect we say the amendment is necessary to ensure that the parties are at – joining issue on the real issues before you. And that’s the way that it was put, and the amendment is simply to clarify that that is the way it was put.

1. One derives from this exchange two matters. First, insofar as the Commission was advancing a case about the existence of a realistic commercial chance of a new entrant, that case was based on Qube. Secondly, the Commission was also running a case that new entrants might be deterred by a perception of the capacity of Pacific National to use Acacia Ridge to their detriment. In that case it proffered Qube as ‘an example’ (T50.3). The difficulty is that it became clear by the end of the trial, contrary to the interests of the Commission, that if the acquisition did not proceed then Qube would still not enter the market (because of the terminal services agreement). It was, as events transpired, a poor example.
2. The question which then arises is whether as part of its case based on the perceptions of possible entrants the Commission is entitled to submit that other unidentified firms who might have entered the market would have been deterred by Pacific National’s acquisition of the terminal. Its entitlement to do so turns on its description of Qube as an ‘example’ and whether a case based on an example which has failed can survive by resort to other members of the genus which had not been exemplified. The word ‘example’ in this context is susceptible to two interpretations: (a) there was a class of firms whose existence would be demonstrated by proof that Qube was a member of it; (b) there was a class of firms who could enter and Qube was proffered not to prove the existence of the class but just as an example of it. On the former view, failure to prove that Qube was in the class entailed that the Commission failed to prove the class existed. On the latter, failure to prove Qube was a member of the class would entail that the Commission could still submit that there were other members of the class.
3. I would be disinclined to read the Commission’s use of the word ‘example’ as permitting it to run a case in accordance with (b). To do so, except in one instance, would be procedurally unfair for it would allow the Commission to say at the end of the trial that some other firm, perhaps Linfox or SCT, could have entered the market and thereby deny Pacific National and Aurizon the opportunity to prove that, in fact, those firms could not or would not have sought to enter. Thus, I do not accept that the Commission should be permitted to run a case other than in relation to Qube.
4. The one exception to this I would admit is that I see no procedural harm in permitting the Commission to submit that there could have been new unidentified or even potentially presently non-existing entrants. In effect, I would permit it to say that the course of human events is always unforeseeable and one cannot exclude the possibility that in the future new firms may be able to enter the interstate intermodal market. For example, the government may establish a new intermodal terminal in Brisbane in 2020 in response to the global pandemic and thereby upend the market dynamics upon which this litigation is premised. However, to permit the Commission to run such a case does not advance its cause. Inherently, the prospect of such an entrant would be speculative and cannot be described as a realistic commercial chance: *AGL* at [348].
5. Turning then to the second way the Commission puts its case, it was not in dispute that without the acquisition of the terminal by Pacific National the barriers to entry to the market were high. It is also not in dispute that the acquisition of the terminal would make the barriers higher. The Commission’s submission was that in that circumstance the acquisition was likely substantially to lessen competition unless it was shown, presumably by Pacific National and Aurizon, that there was no possibility of a new entrant. The reason for this was that the heightening of the barriers to entry, as the Commission put it in reply on the cross-appeal at para 75, eliminated the threat of entry as a competitive restraint on Pacific National and substantially lessened competition.
6. There is no doubt that a heightening of barriers to entry can have the effect of being likely substantially to lessen competition in a market: *Outboard Marine Australia Pty Ltd v Hencar Investments (No.6) Pty Ltd* (1982) 44 ALR 667 at 671 per Bowen CJ and Fisher J. But this does not entail, as the Commission submitted, that it must do so unless it is found that entry is impossible or so close to impossible as to not warrant further scrutiny. The Commission submitted to the contrary and relied upon a number of statements in the authorities that raising barriers to entry can be likely to have the effect of substantially lessening competition. That proposition is uncontroversial and does not assist the Commission. More persuasively, it also relied upon this statement by the Competition Tribunal in *In re Tooth & Co Ltd; In re Tooheys Ltd* [1979] ATPR 40-113 at 18,219 (9.6.1.4):

The applicant Tooth sought to convince us that barriers to entry by a new brewer were so high in this industry that, realistically, the existence of the ties could have no effect upon prospects for entry. That contention, however, would require a finding that entry is impossible. Our review of the evidence points to the characterization of the condition of entry as difficult but not impossible.

1. This does appear to support the Commission’s argument. Aurizon sought to distinguish this decision on the basis that it was an authorisation case and there was no need in such a case to prove a substantial lessening of competition. This is correct. The question for the Tribunal was whether it should grant authorisation under s 88(1)(b) to the applicants to enter into contracts containing exclusionary provisions (as defined in s 47) or to give effect to such contracts. There was no issue before the Tribunal as to whether the exclusionary provisions had the likely effect of substantially lessening competition. The inquiry the Tribunal was engaged in was whether it should grant authorisation to engage in what was otherwise proscribed conduct. The criteria for the grant of an authorisation were set out in s 90(6) and (7) and were that the Tribunal should be satisfied that the exclusionary provision in respect of which authorisation was sought would result in a benefit to the public and that this benefit would outweigh the detriment to the public constituted by any lessening of competition that would result.
2. In that context, the Tribunal had to look at the benefits and the detriments of the exclusionary provisions and these included their competitive benefits and detriments. But the competitive detriments did not need to rise so high as to the likelihood of a substantial lessening of competition. In the context of the Tribunal’s inquiry, it was relevant for it to investigate any competitive detriment including those falling short of a likelihood of a substantial lessening of competition. This Court has recently confirmed the orthodoxy of that view of authorisation proceedings: *Australian Competition and Consumer Commission v Australian Competition Tribunal* [2017] FCAFC 150 at [11]-[12].
3. Once that understanding is brought to account, the passage relied upon by the Commission takes on a different complexion. The applicants were submitting that there was *no* competitive detriment and what the Tribunal was saying was that whilst entry of a new brewer or interstate brewer into the market might be difficult, it was not impossible and hence that the submission that there was *no* competitive detriment could not be accepted. The statement is not authority for the proposition which the Commission now seeks to advance.
4. The question of whether a heightening of barriers to entry is likely to result in a substantial lessening of competition falls therefore to be decided on ordinary principles. One examines the acquisition in question and asks whether the heightening of the barriers to entry has the likely effect of substantially lessening competition. If there is no real commercial chance of any new entrant even before the barriers to entry are heightened it will be difficult to see that there can be a realistic commercial chance that competition will be substantially lessened once they are. The disciplining effect to which the Commission refers may, in principle, be accepted as an available informing concept but it is difficult to see it as plausible where the acquisition in question has no impact on the only firm nominated by the Commission as being likely to enter the market. Nor is this to say that the Commission is bound to nominate a particular entrant; rather, it is merely to enforce the procedural reality of the manner in which the Commission elected to run its case.
5. Consequently, I would conclude that the acquisition was not likely to have the effect of substantially lessening competition in the market of relevant customers. The cross-appeal must be allowed and Pacific National released from is undertaking.

# The Undertaking

1. That makes it strictly unnecessary to deal with the Commission’s various arguments as to why the trial judge erred in accepting the undertaking in the first place. As they raise matters which may be of importance, however, it is useful to deal with them briefly.
2. The first issue is a technical one of power. At [1611], the trial judge stated that:

As to the ACCC’s s 50 case, upon my acceptance of the Undertaking which I consider to be part of the future with the ART acquisition, I would reject that case as well.

1. The trial judge thus took the existence of the undertaking to be part of the factual landscape when considering the competitive effects of the acquisition of the terminal. This led him to the conclusion that the acquisition would not result in contravention of s 50(1). At [1612] his Honour said this:

Now an interesting hypothetical arises as to whether, if I had not accepted the Undertaking, I would have found for the ACCC on its s 50 case. On balance, and not without some hesitation, I would have accepted its case.

1. The power of the trial judge to accept the undertaking was coterminous with the power of the Court to grant an injunction: *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* [1981] HCA 48; 148 CLR 150 at 165 (‘*Thomson*’). The power of the Court to grant an injunction was constrained, in this case, by the terms of s 80(1) so as only to be available where a contravention was apprehended. The consequence of the trial judge regarding as hypothetical the question of whether the acquisition would contravene s 50(1) is that his Honour had no power to grant an injunction under s 80(1) and therefore no power to accept an undertaking either. This leads to an infinite regress of conclusions which endlessly cycle between a finding that s 50(1) was breached and a finding that it was not. The emergence of indeterminacy of that kind is a marker that something has gone awry. Useful comparison may be made with the sentence ‘This sentence is false’ which is similarly indeterminate.
2. What was the error? It was to include the remedy the Court might grant as part of the factual matrix which determined the logically anterior question of liability. It would, for example, be wrong to reason that because a plaintiff in a negligence suit was to receive an award of damages that it would follow that the plaintiff therefore failed to prove that they had suffered the gist of an action on the case, loss. There are, it is true, some areas of law where the notion of a right is inextricably intertwined with that of the remedy which vindicates it. However, this is not the case with the Act which locates the entire topic of remedies in Pt VI (‘Enforcement and Remedies’) separate from those other parts, such as Pt IV (‘Restrictive Trade Practices’), which erect prohibitions. I would reject Aurizon’s submission in reply that the forward looking nature of the word ‘would’ in s 50 would permit a curial remedy to be taken into account. Whilst it is true the provision is forward looking, it is nevertheless conceptually anterior to the remedy which flows from the assessment it contemplates.
3. Lest it be thought that it might be possible to construe the trial judge’s reasons more liberally so that he should be taken to have found a contravention of s 50(1), I do not think this so. The formal order his Honour made was to dismiss the Commission’s proceeding. If he had found a contravention and accepted an undertaking in lieu of granting an injunction, the order would have been that the Commission’s proceeding was otherwise dismissed. Moreover, the trial judge’s use of the word ‘hypothetical’ cannot be accommodated with a view that his Honour found s 50(1) had been contravened.
4. I also do not accept Pacific National’s submission that the trial judge found that the acquisition would have contravened s 50(1) prior to accepting the undertaking because the reasons were delivered on 15 May 2019 and the orders subsequently made on 6 June 2019. The noting of the undertaking and the dismissal of the proceeding happened at the same time on 6 June 2019.
5. I would also reject Pacific National’s related submission that the trial judge should be taken to have reached a conclusion about s 50(1) before deciding to accept the undertaking because of the order in which those conclusions sequentially appear in his Honour’s reasons. There are insurmountable objections to considering a judgment to have been assembled in such a sequential fashion. In any event, it is far from clear that the sequence of reasoning is as Pacific National submits.
6. I do not accept that the limitations inherent in s 80(1) can be outflanked by resort to s 23 of the *Federal Court of Australia Act 1976* (Cth) or s 39B(1A) of the *Judiciary Act 1903* (Cth). Resort to the former would be contrary to *Thomson* and the latter is concerned with jurisdiction not power. I do not accept Aurizon’s submission that *Thomson* in this regard is distinguishable and whilst I accept that s 80 has been amended since *Thomson* I do not think that those amendments in any way detract from the idea that s 80 is a provision whose focus is on injunctive relief related to contraventions.
7. I would prefer to express no definitive view on Pacific National’s submission that his Honour could have dismissed the Commission’s application for declaratory relief on condition that Pacific National proffer the undertaking: cf. r 1.33 of the *Federal Court of Australia Rules 2011* (Cth) (‘The Court may make an order subject to any conditions the Court considers appropriate.’). Whether *Thomson* extends to prevent the making of declarations without a contravention and hence whether the Court has a power to accept an undertaking as a condition imposed on an order that a claim for declaratory relief be dismissed is an interesting question. If Pacific National is correct it would appear to follow that the Court has the power to dismiss a proceeding brought by an applicant on condition that the respondent submit to a condition which need not be tied to any legal wrong. Without expressing a concluded view on the matter, that may be a difficult outcome. However, this is not in fact what his Honour did and it cannot be reconciled with the orders his Honour made noting the undertaking and dismissing the proceeding. No amount of interpretative enterprise can transmute the trial judge’s orders into an order dismissing the Commission’s application for declaratory relief on condition that Pacific National proffer the undertaking.
8. I therefore accept that the trial judge did not have the power to accept the undertaking under s 80(1). Had the issue arisen, this may have been a rather hollow victory for the Commission for if this Court otherwise agreed with his Honour’s substantive conclusions it would have been a straightforward exercise to reason in a way which avoided this pitfall for the substantive reasons proffered by his Honour. For example, this Court could have said that it found that the acquisition would contravene s 50(1) and that it accepted the undertaking in lieu of granting an injunction restraining the acquisition proceeding. Be that as it may, the Commission’s submission that the trial judge did not have power to accept the undertaking is correct and must be accepted.
9. I do not accept the Commission’s next point that the Court has no power to accept an undertaking because the existence of the Commission’s power to accept an undertaking administratively under s 87 B implicitly excludes it. Here the contention was that any decision by the Commission to reject an undertaking would be judicially reviewable in this Court but the scope of that review would not extend to a consideration of the merits of the decision. It was anomalous that in subsequent litigation brought under s 50(1) the Court would have an unfettered ability to accept or reject the undertaking on its merits. The fact that accepting an undertaking was a function which had been reposed in the Commission under s 87B therefore suggested that the Court did not have such a power. This submission was buttressed by reference to other examples in the Act where the Commission is given the power in the context of access regimes to accept undertakings such as Division 6 Subdivision A of Pt IIIA and Division 5 Subdivision B of Pt XIC.
10. The problem with this argument is that it must also entail that the Court has no power under s 80(1) to grant an injunction in the same terms as the putative undertaking rejected by the Commission. Any statutory prohibition on the Court accepting an undertaking would be pointless if the Court could grant such an injunction.
11. In response to that problem, the Commission submitted that the Court was limited in a case under s 50(1) (which could it noted only be brought by the Commission) in the remedies it could grant under s 80(1) to the relief sought by the Commission. Since the Commission had not sought an injunction in the terms of the undertaking it followed that the Court had no power to accept the undertaking.
12. I do not think that this is a plausible construction of the Act. In particular, if correct it would mean that the sole determinant of a remedy under the Act in litigation brought under s 50(1) would be the Commission and that the Court would be bound, on the finding of a contravention, only to do what the Commission thought should be done. It would need very plain words indeed to bring about such an outcome which I do not think can be found in the language of ss 50, 80 or 87B. The highest it can be put seems to me that by s 80(1A) only the Commission may seek an injunction to restrain a contravention of s 50(1) but this does not rise nearly high enough.
13. In that circumstance, it is not necessary to address Pacific National’s response that such an operation for s 87B would result in a usurpation of judicial power although my initial impression of the submission is that it may be correct: cf. *Chu Kheng Lim v Minister for Immigration* [1992] HCA 64; 176 CLR 1 at 27 at 36-37.
14. I do not accept therefore that the Court’s power to accept an undertaking in lieu of an injunction is constrained by the existence of a power in the Commission to accept an undertaking under s 87B.
15. I also do not accept the Commission’s submission that the only injunction that can be granted under s 80(1) is one which directly restrains the contravention, which in this case would be an order restraining the acquisition from proceeding. The language of s 80(1) is that the Court may grant ‘an injunction in such terms as the Court determines to be appropriate’ and this is too broad to sustain such a limitation. This is particularly so where s 80(1) formerly provided that the Court had the power to ‘grant an injunction restraining a person from engaging in conduct that constitutes or would constitute….a contravention of a provision of this Part’ and that it was amended to its current form after the Commission’s present submission about those words was accepted in *Thomson*.
16. I reject the Commission’s allied contention that the undertaking accepted by the trial judge involved the Court in the exercise of non-judicial power. Whilst it might be accepted, as the Commission submitted, that the framing of competition policy would involve a consideration of matters alien to the exercise of judicial power, the acceptance by the trial judge of the undertaking involved no such consideration. His Honour undertook a detailed analysis of the undertaking and was satisfied that its terms were appropriately adapted to prevent Pacific National from contravening s 50(1). No question of the formulation of competition policy arose and the premise for the Commission’s constitutional argument is not established. Nor do I accept that the undertaking created new rights and obligations in the sense that expression is used in discourse concerned with the exercise of judicial power. It was the fashioning of relief by the application of a legal norm, s 50(1), to facts found.
17. I would have accepted the Commission’s final point, however, which was that even if his Honour had the power to accept the undertaking, he should not have accepted it in the exercise of his discretion under s 80(1). The trial judge examined the undertaking in great detail and dealt with each of the Commission’s objections to it. A principal feature of the undertaking was the putting in place of procedures to permit decisions made by Pacific National to be reviewed by independent persons. The trial judge accepted that these provided some assurance that Pacific National would not be able to use the terminal to advance its own interests. Pacific National submitted that the undertaking was readily enforceable because it could be compelled to obey these determinations. However, I think his Honour erred in his treatment of this topic by erroneously overrating the effectiveness of the use of civil contempt proceedings to enforce the undertaking’s terms and in assuming that the undertaking might not be sabotaged by less direct means. Many of the obligations cast upon Pacific National in the undertaking are open textured in nature, such as obligations to use ‘reasonable endeavours’ and ‘best endeavours’ or to do ‘everything reasonably within its power’ and those standards are applied in a milieu in which Pacific National has possession of all of the documents relating to its compliance with the undertaking. I think it most unlikely that a conviction could be achieved for contravention of such obligations when any charge must be proved beyond reasonable doubt. Vaguely worded orders are difficult to enforce by means of civil contempt and it is established that contempt proceedings are inappropriate for the determination of questions such as the construction of an injunction or the aptness of the language in which it is framed: *ICI Australia Operations v Trade Practices Commission* (1992) 38 FCR 248 at 259 per Lockhart J. I do not accept that any efforts to ensure that Pacific National did not undermine the undertaking could realistically have been secured by an action for contempt. The trial judge erred in thinking otherwise.
18. In that circumstance, I would have concluded that the trial judge’s exercise of the discretion miscarried within the first limb of *House v The King* [1936] HCA 40; 55 CLR 499 at 505.
19. I would add to this some observations about behavioural undertakings. A profit maximising firm has strong incentives to locate and exploit any weaknesses it can discern in the text or practical operation of a behavioural undertaking. The question for the Court in assessing whether to accept such an undertaking will be whether it can be confident that the firm in question will fail to locate these weaknesses, despite its incentives to do so. It is a mistake in approaching that question to think that the only difficulties are those which the Commission has been able to formulate in the course of a hearing. The real problem lies not in those difficulties which are brought to light during the trial but rather in those which have not been foreseen by anyone and which become apparent only much later.
20. It will be rare indeed for a Court to be confident about this aspect of the problem. For if the detection of such unknowns is difficult for those skilled in commerce, it is much more the so for judicial officers who are not experts in commerce. There is a real difference between grasping precisely what a contract legally requires and how it may operate in practice and it is necessary, therefore, to keep in mind that expertise in the former does not imply expertise in the latter. In my view, undertakings of the present kind need to be approached with the greatest caution and with a weather-eye on the limitations of the legal imagination. I would not go quite so far as to say that such an undertaking must never be accepted for who can confidently foresee the course of all future cases? Nevertheless, the occasions on which such an undertaking might be appropriate will, in my opinion, be exceptional.
21. Had the question arisen, therefore, I would not have accepted the undertaking and the appropriate order would have been to grant the Commission an injunction restraining the acquisition from proceeding.

# relief

1. The trial judge’s reasoning led him to accept the proffered undertaking, to conclude in light of it that there was no apprehended contravention of s 50(1) and therefore to dismiss the Commission’s proceeding in its entirety. I too would conclude that there was no apprehended contravention of s 50(1) but for different reasons to the trial judge. In that circumstance, and perhaps curiously, his Honour’s order dismissing the Commission’s proceeding should remain in place. The only orders I would make therefore are that the appeal be dismissed, that the cross-appeals be allowed and that Pacific National be released from its undertaking. The parties should bring in short minutes of order giving effect to these conclusions and dealing with the costs of the appeal, the cross-appeals and the trial. If costs cannot be agreed there should be a further hearing on the papers to resolve that issue.

|  |
| --- |
| I certify that the preceding seventy-one (71) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram. |

Associate:

Dated: 6 May 2020

SCHEDULE OF PARTIES

|  |  |
| --- | --- |
|  | VID 695 of 2019 |
| Respondents |  |
| Second Respondent: | HV RAIL PTY LTD (ABN 26 615 302 111) |
| Third Respondent: | QUEENSLAND LH CO PTY LTD (ACN 620 979 768) |
| Fourth Respondent: | QUEENSLAND PUD CO PTY LTD (ACN 620 981 606) |
| Fifth Respondent: | AURIZON HOLDINGS LIMITED (ACN 146 335 622) |
| Sixth Respondent: | AURIZON OPERATIONS LTD (ACN 124 649 967) |
| Seventh Respondent: | AURIZON TERMINAL PTY LTD (ACN 145 991 555) |
| Eighth Respondent: | AURIZON PROPERTY PTY LTD (ACN 145 991 724) |
| Cross-Appellants |  |
| Second Cross-Appellant: | HV RAIL PTY LTD (ABN 26 615 302 111) |
| Third Cross-Appellant: | QUEENSLAND LH CO PTY LTD (ACN 620 979 768) |
| Fourth Cross-Appellant: | QUEENSLAND PUD CO PTY LTD (ACN 620 981 606) |
| Fifth Cross-Appellant: | AURIZON HOLDINGS LIMITED (ACN 146 335 622) |
| Sixth Cross-Appellant: | AURIZON OPERATIONS LTD (ACN 124 649 967) |
| Seventh Cross-Appellant: | AURIZON TERMINAL PTY LTD (ACN 145 991 555) |
| Eighth Cross-Appellant: | AURIZON PROPERTY PTY LTD (ACN 145 991 724) |