

Competition & Consumer Law Alert

Now both you and the ACCC are interested in beer at your local!

July 2012

On 28 June 2012, the Australian Competition and Consumer Commission (**ACCC**) warned ALH Group Pty Ltd (**ALH**) that if it proceeds with some of its proposed purchases the result is likely to substantially lessen competition. The ACCC reserved its right to take steps to prevent some of the purchases of additional liquor outlets from proceeding.

What concerns the ACCC about your access to, and the price of, a six pack of beer from your local – and why?

Background

ALH is 75% owned by Woolworths Limited and owns and operates hotels, liquor outlets and gaming machines around Australia. Woolworths group owns and operates take-away liquor retail outlets under the Woolworths Liquor, Dan Murphy's and BWS brands. ALH proposed to acquire over 30 hotels and liquor retailers in a suite of transactions with three vendors - the Laundry Hotel Group, the Waugh Hotel Group and the De Angelis Hotel Group.

On 21 December 2011, the ACCC commenced an informal review of ALH's proposed acquisitions to identify whether they would be likely to have the effect of substantially lessening competition.

The Law

Section 50 of the *Competition and Consumer Act 2010* (Cth) (**CCA**) prohibits mergers and acquisitions that would have the effect (or likely effect) of substantially lessening

competition in a market. Importantly, on 6 February 2012, amendments to section 50 removed the requirement that the market must be a "substantial" market. That amendment was said to clarify that the ACCC may oppose "creeping acquisitions", being acquisitions which individually may not have an effect on a substantial market (when compared to the entire market in Australia), but which may nevertheless have the effect of substantially lessening competition in a smaller market, for example, the market for particular goods in a small country town.

Before the ACCC can determine what effect on competition a given acquisition may have, it must first identify what market(s) may be affected. For example, if the ACCC were considering what effect the acquisition of one pub may have on the national market for liquor from licensed venues, the effect would clearly be insignificant (irrespective of the players in the market). However, if the ACCC were to consider that same acquisition against the market for liquor from licensed venues within a 3km radius of that pub, and the acquirer already owned two of the other three pubs in that area, the effect on competition in that 3km radius market definition may, and likely will, be substantial.

Identifying the appropriate market definition is vitally important in then assessing what effect the acquisition may have on competition in that market.

The relevant market for the ALH transaction

The relevant market definition will depend on a number of factors, including consumer behaviour. For these transactions, the ACCC was concerned with ascertaining patterns of consumer behaviour – particularly, the distance that consumers are prepared to travel in order to purchase liquor. Information provided to the ACCC indicated that consumers generally travel less than 3km to purchase liquor for off-site consumption and that they generally only travel further than 5km in particular circumstances.

It appears (but will soon be clarified by the ACCC) that the ACCC considered that the relevant market for assessing the effect on competition for these transactions was the market for liquor for off-site consumption within 3-5km of the relevant liquor sites to be acquired by ALH.

The outcome

The ACCC notified ALH that it considered the acquisition of five takeaway packaged liquor retailers in Chittaway Bay, Albion Park and Umina Beach in New South Wales will likely substantially lessen competition in their relevant local markets in and around each of those towns.

The ACCC did not oppose the acquisition of 28 other hotels by ALH (some of which incorporate takeaway packaged liquor retail outlets).

Commentary

The ACCC is yet to issue a Public Competition Assessment in relation to the proposed transactions. When it is released, that assessment will provide further details of the ACCC's analysis for this transaction. However, in the interim, businesses can draw certain inferences from the ACCC's decision to oppose aspects of these transactions.

First, the decision highlights that the ACCC is prepared to consider the effect of proposed transactions on highly localised markets in certain circumstances.

Secondly, the acquisition of any one particular retailer would be unlikely to substantially increase ALH's share in the national market (being the market in which ALH generally operates in) for the retail sale of liquor. Nonetheless, the acquisition of individual retail outlets can increase concentration in a local market to the point that the ACCC considers that the acquisition of individual retailers will have the likely effect of substantially lessening competition in those local markets. This shows that a transaction that on its face might appear insignificant can raise real and serious competition law concerns,

particularly where those acquisitions affect regional areas that might inherently already have reduced levels of competition. The ACCC's opposition to aspects of ALH's proposed acquisition is an illustration of the ACCC taking a narrow view in the definition of the relevant market and its opposition to acquisitions that may substantially lessen competition in a minor or regional market.

Thirdly, it is important to seek ACCC review of mergers and acquisitions in cases where competition law concerns may arise, even if only in small, local and regional markets. There are serious consequences for a breach by of section 50 of the CCA, including the potential for:

- pecuniary penalties (fines) in excess of \$10 million;
- pecuniary penalties against individuals;
- injunctions preventing the transaction from proceeding;
- declarations that any completed acquisition is void;
- orders to divest assets;
- disqualification orders; and
- orders to pay damages to any person suffering loss or damage.

Companies should therefore seek competition law advice before proposing or agreeing to mergers and acquisitions to determine whether any competition law issues arise and whether an ACCC merger review should be sought. Please contact our competition team if you have any queries about the effect of the competition provisions of the CCA on transactions involving your business.

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