FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v IVF Finance Pty Limited (No 2) [2021] FCA 1295

File number:	VID 587 of 2021
Judgment of:	**O'BRYAN J**
Date of judgment:	25 October 2021
Catchwords:	**COMPETITION** – application by the Australian Competition and Consumer Commission for an urgent interlocutory injunction under s 80(2) of the *Competition and Consumer Act 2010* (Cth) to restrain the first respondent from acquiring a fertility services business from the second respondent – where the Commission contends that the acquisition would contravene s 50 of the *Competition and Consumer Act 2010* (Cth) – injunction granted **PRACTICE AND PROCEDURE –** Interlocutory injunction – relationship between statutory and equitable injunctions – whether prima facie case of contravention established – whether balance of convenience favours the grant of an injunction – where respondents offered an undertaking to the Court to hold separate the acquired business until the final determination of the proceeding – whether an order for divestiture as final relief is equivalent to an injunction preventing the acquisition – statutory provision excluding undertaking as to damages
Legislation:	*Competition and Consumer Act 2010* (Cth), ss 50, 80
Cases cited:	*APM Investments Pty Ltd v Trade Practices Commission* (1983) 49 ALR 475 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 *Australian Competition and Consumer Commission v Allphones Retail Pty Ltd* [2009] FCA 17; 253 ALR 324 *Australian Competition and Consumer Commission v IVF Finance Pty Limited* [2021] FCA 1266 *Australian Competition and Consumer Commission v Metcash Trading Ltd* [2011] FCA 1079 *Australian Competition and Consumer Commission v Pacific National* (2020) 277 FCR 49

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] FCA 18; 161 ALR 79
Australian Consolidated Press Ltd v Morgan (1965) 112 CLR 483
Beecham Group Ltd v Bristol Laboratories Pty Ltd (1968) 118 CLR 618
Bullock v The Federated Furnishing Trades Society of Australasia (No 1) (1985) 5 FCR 464
Cardile v LED Builders Pty Ltd (1999) 198 CLR 380
Foster v Australian Competition and Consumer Commission (2006) 149 FCR 135
ICI Australia Operations Pty Ltd v Trade Practices Commission (1992) 38 FCR 248
OD Transport Pty Ltd v WA Government Railways Commission (1987) 13 FCR 500
Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (1998) 195 CLR 1
SCI Operations Pty Ltd v Trade Practices Commission (1984) 2 FCR 113
Thomson Australian Holdings Pty Ltd v Trade Practices Commission (1981) 148 CLR 150
Trade Practices Commission v Rank Commercial Ltd (1994) ATPR 41-324
Trade Practices Commission v Santos (1992) 38 FCR 382
Trade Practices Commission v Santos Limited (1992) ATPR 41-194
Witham v Holloway (1995) 183 CLR 525

Division:	General Division
Registry:	Victoria
National Practice Area:	Commercial and Corporations
Sub-area:	Economic Regulator, Competition and Access
Number of paragraphs:	156
Date of hearing:	19 October 2021
Counsel for the Applicant:	Mr PW Collinson QC with Ms C van Proctor and Mr NC Dour

Solicitor for the Applicant:	DLA Piper
Counsel for the First Respondent:	Mr AJL Bannon SC with Mr C Colquhoun and Mr S Snow
Solicitor for the First Respondent:	Gilbert + Tobin
Counsel for the Second Respondent:	Mr JA Arnott SC
Solicitor for the Second Respondent:	Herbert Smith Freehills

ORDERS

VID 587 of 2021

BETWEEN:	**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION** Applicant
AND:	**IVF FINANCE PTY LIMITED (ACN 129 644 846)** First Respondent
	HEALIUS LIMITED Second Respondent

ORDER MADE BY: **O'BRYAN J**

DATE OF ORDER: **25 OCTOBER 2021**

THE COURT ORDERS THAT:

1. Subject to further order, until the determination by this Court of the applicant's originating application dated 13 October 2021, the first respondent, whether by itself, its officers, servants, agents or otherwise howsoever, is restrained from acquiring directly or indirectly any shares in, or assets of, Adora Fertility Pty Ltd (ACN 616 422 818), Darlinghurst Day Hospital Pty Ltd (ACN 639 120 291), Greensborough Day Hospital Pty Ltd (ACN 639 120 899), and Craigie Day Hospital Pty Ltd (ACN 639 116 500).
2. Until further order, these reasons not be made available to or published to any person save for the parties' legal advisors and staff members and Commissioners of the applicant.
3. Within 7 days of the date hereof, the parties are to file agreed proposed orders or, failing agreement, each party is to file proposed orders addressing:
   (a) any redactions to these reasons on the grounds of confidentiality; and
   (b) the preparation of the proceeding for trial on an expedited basis.
4. The proceeding be listed for further case management at 9.00am on 3 November 2021.
5. Costs be reserved.
6. Liberty to apply.

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

REASONS FOR JUDGMENT

O'BRYAN J:

Introduction

1 On 22 August 2021, the first respondent, IVF Finance Pty Ltd (**IVF Finance**), and its parent company Virtus Health Ltd (**Virtus**), entered into a **Share Sale Agreement** with the Second Respondent, Healius Ltd (**Healius**) pursuant to which IVF Finance agreed to acquire from Healius (and its subsidiary, Montserrat DH Pty Ltd) all of the issued share capital in:

(a) Adora Fertility Pty Ltd (**Adora**), which operates four fertility clinics located in Brisbane, Sydney, Melbourne and Perth respectively; and

(b) Darlinghurst Day Hospital Pty Ltd (**Darlinghurst**) which operates a day hospital called the Sydney Day Surgery in the Sydney suburb of Darlinghurst, Greensborough Day Hospital Pty Ltd (**Greensborough**) which operates a day hospital called the Greensborough Day Surgery in the Melbourne suburb of Greensborough, and Craigie Day Hospital Pty Ltd (**Craigie**) which operates a day hospital called the Craigie Day Surgery in the Perth suburb of Craigie,

which I will refer to as the "**Adora Acquisition**".

2 The Adora Acquisition is yet to be completed. The Share Sale Agreement contained a number of conditions precedent which were required to be fulfilled before completion. Those conditions have now been fulfilled and the parties to the Share Sale Agreement wish to complete the acquisition.

3 On 8 October 2021, the respondents informed the applicant (**ACCC**) that they intended to complete the Adora Acquisition on 15 October 2021. The ACCC requested the respondents to delay completion until the ACCC had concluded its review of the proposed merger. The respondents refused that request and the ACCC commenced this proceeding on an urgent basis to restrain the respondents from completing the acquisition.

4 By its originating application dated 13 October 2021, the ACCC seeks an order under s 80(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**) restraining IVF Finance from acquiring directly or indirectly any shares in, or assets of Adora, Darlinghurst, Greensborough and Craigie. By its concise statement also dated 13 October 2021, the ACCC alleges that the acquisition of Adora by IVF Finance would contravene s 50 of the Act because it would have

the effect, or be likely to have the effect, of substantially lessening competition for the supply of low cost fertility services, or alternatively, fertility services, in the Brisbane metropolitan region and in the Melbourne metropolitan region. In the evidence, fertility services are also referred to as assisted reproductive services or assisted reproductive therapies.

5 It can be observed immediately that there is an inconsistency between the ACCC's allegation in the concise statement and the relief sought in the originating application. The concise statement alleges only that the acquisition of Adora would contravene s 50, and makes no allegation that the acquisition of Darlinghurst, Greensborough and Craigie would contravene s 50. I will return to that aspect of the application later in these reasons.

6 By an interlocutory application also dated 13 October 2021 (the **interlocutory application**), the ACCC sought urgent interim and interlocutory injunctions under s 80(2) of the Act restraining IVF Finance from acquiring Adora, Darlinghurst, Greensborough and Craigie. The Court heard the application for interim relief on 14 October 2021 and granted an injunction until 5pm on 19 October 2021: *Australian Competition and Consumer Commission v IVF Finance Pty Limited* [2021] FCA 1266. The Court heard the application for interlocutory relief (an injunction until the final determination of the ACCC's originating application) on 19 October 2021 and granted a further injunction until the determination of the interlocutory application.

7 In lieu of the grant of an interlocutory injunction, Virtus and IVF Finance have offered two forms of "hold separate" undertaking to the Court, a short form and a long form, which would continue until the final determination of the ACCC's originating application. The undertakings assume the completion of the acquisition of Adora by IVF Finance, and contain undertakings to keep the Adora business separate and independent from Virtus' operations, both in terms of ownership of the assets and the management of its operations. The terms of the proposed undertakings are considered in more detail below.

8 As is apparent from the above, the interlocutory application has been made to the Court on an urgent basis. The application was heard expeditiously. These reasons for decision are abbreviated in order to provide the parties with the earliest practicable decision on the application.

9 For the reasons that follow, I grant the interlocutory injunction sought by the ACCC at paragraph 2 of the interlocutory application.

The ACCC's allegations

10 As noted above, in its concise statement the ACCC alleges that the proposed acquisition of Adora by IVF Finance would contravene s 50 of the Act because it would have the effect, or be likely to have the effect, of substantially lessening competition in two alternative markets in the Brisbane metropolitan region and in the Melbourne metropolitan region. The alternative markets are the supply of fertility services and the supply of low cost fertility services.

11 The concise statement provides the following description of fertility services:

> 5. Infertility is the inability to conceive or maintain a pregnancy to the point of a live birth. It affects about one in six Australian couples of reproductive age.
>
> 6. There are two types of infertility: medical infertility and social infertility. The causes of medical infertility are varied and include problems with the production of sperm or eggs, the structure or function of male or female reproductive systems, or hormonal and immune conditions. Social infertility refers to single individuals and LGBTQI couples who wish to conceive children but are unable to do so because of their social circumstances. For many people suffering from infertility, the only opportunity to have children is with the assistance of fertility services.
>
> 7. The core form of fertility services in Australia is in vitro fertilisation (IVF). Generally, IVF treatment refers to a series of procedures in which eggs (or oocytes) and sperm or embryos are handled outside of the body (in vitro) with the purpose of achieving a pregnancy. This series of procedures usually takes between four and six weeks and is generally referred to as a cycle of treatment. The IVF cycle starts on the first day of a woman's period and ends when a pregnancy blood test is taken after the embryo has been transferred into the patient's uterus.
>
> 8. Fertility specialists are qualified doctors whose role it is to manage and oversee the patient's engagement with the IVF process, typically following a referral from a General Practitioner. Fertility specialists can operate independently, be affiliated with a supplier of fertility services, or be employed directly by a supplier of fertility services.
>
> 9. The supplier of fertility services provides diagnostic testing services (for example, genetic testing), laboratory services carried out by fertility scientists, nursing and administration related to the IVF treatment, and the facilities used for medical procedures associated with IVF treatment (generally through privately owned day surgeries or through existing relationships with hospitals).

12 As to the distinction between low cost fertility services and fertility services, the concise statement provides the following description:

> 10. There is a spectrum of different fertility services at different price points, catering to the priorities of different patients. However, the industry typically categorises these broadly into two types of service:
>
> (a) **Low cost**: Low cost services do not include all of the additional treatments that form part of full-service treatment and patients are typically offered a

standardised service. The service is structured to bulk bill Medicare eligible expenses and minimise out-of-pocket costs for patients. Low cost clinics often have stricter eligibility criteria than full-service clinics, relating to patient characteristics such as weight, and are more likely to share patient care among a team of specialists.

(b) **Full-service**: Full-service is a comprehensive and individualised offering that will typically include a number of 'add-on' services not covered by Medicare (such as genetic screening, additional diagnostic testing and access to donor egg programs). Patients using full-service clinics are still eligible to receive Medicare rebates, however, their aggregate costs will often be significantly higher than the aggregate value of their Medicare rebates because they are paying for additional services. For this reason full-service fertility services are more expensive than low cost fertility services.

11. A patient's decision whether to seek full-service or low-cost services will often be influenced by their particular financial circumstances. Patients who are not financially constrained will generally choose a full-service provider, due to a perceived greater likelihood of success. Some patients choose a full-service provider initially, then switch to a low-cost provider after one or more unsuccessful cycles, because they cannot afford to continue with the full-service provider. However, for some patients low-cost services will be their only chance to have a child. For these patients, full service options are not substitutable for low cost services.

13 In relation to competition between the merger parties and more generally, the concise statement contains the following allegations:

12. Virtus is an ASX-listed global provider of fertility services. Virtus operates clinics throughout Australia. In Brisbane, Virtus operates a full-service fertility clinic group branded as Queensland Fertility Group (**QFG**). Virtus also operates a low-cost clinic branded as The Fertility Centre (**TFC**) in Brisbane. Virtus engages fertility specialists as independent contractors to assist in providing fertility services through Virtus' clinics.

13. Adora is owned by healthcare company Healius Limited (**Healius**). Adora commenced operations in Australia in 2014 and has been an aggressive low-cost competitor rapidly building market share. Adora operates four low-cost clinics across Australia, including a clinic in Brisbane.

14. Virtus and Adora are close and substantial competitors in the Low Cost Markets / Fertility Services Markets, in Brisbane and Melbourne:

(a) they each have a substantial share of the relevant markets. The table below sets out the ACCC's estimate of each party's market share, having regard to the number of IVF cycles. While the ACCC does not have data for Melbourne low cost services alone, as there are few low cost providers in Melbourne, the parties' market shares in the Melbourne Low Cost Market are likely to be substantially higher than their shares in the Fertility Services Market;

Fertility Clinic / Group	**Estimated market share (% of total**

	cycles)
Brisbane Low Cost Market	
Virtus	18%
Adora	35%
Brisbane Fertility Services Market	
Virtus	35%
Adora	14%
Melbourne Fertility Services Market	
Virtus	43%
Adora	10%

(b) a significant number of fertility patients are likely to consider Virtus and Adora as alternates, in deciding which fertility service provider to use;

(c) Virtus competes directly with Adora in the supply of substantially similar low-cost services in Brisbane and Melbourne; and

(d) Adora's growth in providing fertility services in the Brisbane and Melbourne regions has come at the expense of other providers, including Virtus (Virtus, being the largest provider of fertility services in the Brisbane and Melbourne regions).

Barriers to entry

15. Barriers to entry or expansion into the Low Cost Markets (alternatively the Fertility Services Markets) in Brisbane and Melbourne are significant, with new entrants facing:

(a) the need to build an established reputation and evidence of success;

(b) significant establishment costs, including

(i) the establishment of clinical facilities, including the establishment of laboratories; and

(ii) marketing costs needed to establish a presence in an industry which is largely driven by word-of-mouth recommendations;

(c) onerous regulatory requirements that differ state-to-state;

(d) the need to attract qualified specialists, embryologists and other clinical staff;

(e) prevalent restraint of trade clauses preventing fertility specialists from establishing a practice (sometimes within a certain geographical

boundary from their previous practice) and within specified time periods, and competing fertility clinics with a track record of bringing proceedings to enforce those restraint of trade clauses; and

(f) a time-lag before operations become profitable, due to the need to build economies of scale, especially in the lower margin Low-cost Market.

Substantial lessening of competition

16. The Proposed Acquisition would:

(a) substantially increase the level of concentration of suppliers in the Low Cost Markets (alternatively the Fertility Services Markets) in Brisbane and Melbourne, which are already highly concentrated;

(b) remove the substantial competition between Virtus and Adora in the Low Cost Markets (alternatively the Fertility Services Markets); and

(c) significantly reduce choice for patients seeking fertility services in the Brisbane and Melbourne region, particularly in the Low Cost Market.

17. The market share of the combined entity will be approximately 53% of the Low Cost Market (49% of the Fertility Services Market) in Brisbane and approximately 53% of the Fertility Services Market (and likely higher in the Low Cost Market) in Melbourne.

18. The Herfindahl-Hirschman Index (HHI) is a measure of market concentration calculated by squaring the market share of each entity competing in a market and then summing the resulting numbers. The ACCC's merger guidelines explain that the ACCC will generally be less likely to identify horizontal competition concerns when the post-merger HHI is less than 2000, or greater than 2000 with a delta of less than 100. Similarly, the US Department of Justice Horizontal Merger Guidelines provide that mergers resulting in highly concentrated markets (with an HHI of above 2500) that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power.

19. The Proposed Acquisition substantially exceeds these thresholds. In Brisbane, the HHI for the Low Cost Market after the Proposed Acquisition would be 3762 and the transaction would increase the HHI by 1305. The HHI for the Fertility Services Market after the Proposed Acquisition in Brisbane would be 3301 and the transaction would increase the HHI by 993. In Melbourne, the HHI for the Fertility Services Market after the Proposed Acquisition would be 3506 and the transaction would increase the HHI by 862.

20. The Proposed Acquisition would also be likely to substantially diminish the extent to which Adora competes to supply fertility services in Brisbane and Melbourne. After taking control of Adora, Virtus has strong incentives to cease the current aggressive price competition offered by Adora for fertility services, which has historically dented Virtus' profitability.

21. In the likely future with the Proposed Acquisition, the removal of a successful low-cost competitor that has acted as an effective pricing constraint on the market, would in turn reduce the competitive response from Virtus and other fertility clinics that supply fertility services in the Fertility Service Markets / Low Cost Markets in Brisbane and Melbourne.

22. Any likely entry into the Low Cost Markets / Fertility Services Markets in Brisbane and Melbourne will not be of a sufficient scale or sufficiently timely to ameliorate the loss of competitive rivalry resulting from the Proposed Acquisition.

23. In contrast, in the likely future without the Proposed Acquisition, Adora would continue to impose a substantial and effective competitive constraint on Virtus in the supply of fertility services, and in particular low-cost services.

Overview of the evidence

14 Evidence on the interlocutory application was primarily by way of affidavit. The deponents were not cross-examined. The affidavits made by the lay witnesses exhibited a large number of documents. A small number of additional documents were tendered by the parties.

15 In support of its application for an interlocutory injunction, the ACCC relied on affidavits made by the following deponents:

(a) Simon Uthmeyer affirmed two affidavits on 13 October 2021 and 14 October 2021 respectively that were read in the hearing for an interim injunction before Moshinsky J, and affirmed a third affidavit on 18 October 2021 that was read in the hearing on 19 October 2021. Mr Uthmeyer is a partner of DLA Piper Australia, the solicitors acting for the ACCC. Mr Uthmeyer gave evidence on information and belief as to information gained by the ACCC through its process of market enquiries in respect of the Adora Acquisition. The sources for Mr Uthmeyer's information were largely ACCC staff who had undertaken the market enquiries, although Mr Uthmeyer also adduced a large quantity of documents of the merger parties that had been provided to the ACCC. Some limited objections were made to Mr Uthmeyer's evidence.

(b) Dr Philip Laurence Williams affirmed an affidavit on 16 October 2021 which annexed an expert report. Dr Williams is an economist with very extensive expertise and experience in industrial economics and its application in competition law. He gained a PhD from the London School of Economics in 1977 and taught full-time at the University of Melbourne from 1978 to February 2002, his final position being Professor of Law and Economics in the Melbourne Business School. Since February 2002, Dr Williams has been the leader of the Competition and Legal Group of Frontier Economics Pty Ltd, an economic consulting firm. Dr Williams has written extensively on industrial economics and competition law issues and has given expert testimony in a large number of competition law cases in Australia. Dr Williams expressed some

preliminary views, based on the information available to him, with respect to the likely effect on competition of the Adora Acquisition.

(c) Dr Stephen King affirmed an affidavit on 16 October 2021 which annexed an expert report. Dr King is also an economist with very extensive expertise and experience in industrial economics and its application in competition law. He gained a PhD from Harvard University in 1991 and has held numerous teaching roles at various universities, including as Professor of Management (Economics) in the Melbourne Business School between January 2002 and June 2004, Professor of Economics, Department of Economics at the University of Melbourne between January 1998 and June 2005 and the Dean of the Faculty of Business and Economics at Monash University between January 2009 and December 2011. Dr King was also a Commissioner of the Australian Competition and Consumer Commission between June 2004 and January 2009. He is currently a Commissioner at the Productivity Commission and Adjunct Professor of Economics at Monash University. Dr King has written extensively on industrial economics and competition law issues and has given expert testimony in a large number of competition law cases in Australia. Dr King was asked to express his opinion on, in substance, the likely efficacy of the undertakings offered by Virtus and IVF Finance in terms of maintaining competition between Virtus and Adora in the short term pending trial and in the longer term assuming the ACCC were to be successful in the proceeding.

16 In opposition to the interlocutory injunction, IVF Finance relied on affidavits made by the following deponents:

(a) Kate Munnings swore an affidavit on 14 October 2021 which was read in the hearing for an interim injunction before Moshinsky J and also swore a further affidavit on 18 October 2021. Ms Munnings is the CEO and Managing Director of Virtus. Ms Munnings gave evidence concerning the business of Virtus and the business of Adora, the fertility services industry including other providers of fertility services in Brisbane, Sydney and Melbourne, the transaction history resulting in the agreement between Virtus, IVF Finance and Healius for the acquisition of Adora, the risks to the Adora business if the acquisition is restrained, Virtus' dealings with the ACCC and the undertaking offered by Virtus and IVF Finance.

(b) Matthew Prior affirmed an affidavit on 18 October 2021. Mr Prior is the Group Chief Financial Officer of Virtus. Mr Prior gave evidence concerning the provision of fertility services in Australia, the medical and commercial relationships between the medical practitioners who are fertility specialists and provide fertility services (or procedures) to patients, clinics which provide medical rooms, theatres, equipment and laboratories for use by fertility specialists in providing fertility services to patients and the patients receiving fertility services, the cost to the patient of different fertility services and the application of Medicare benefits, the history of entry to the market for the provision of fertility services, the financial model that underpinned Virtus' decision to acquire Adora, the metrics used to measure the performance of fertility businesses and market share estimates.

(c) Dr Peter Illingworth affirmed an affidavit on 18 October 2021. Dr Illingworth gained a Bachelor of Medicine and Surgery in 1981 and a Doctorate of Medicine with honours from Dundee University in 1988. He has specialist qualifications in obstetrics and gynaecology and is a Fellow of the Royal Australian and New Zealand College of Obstetricians and Gynaecologists and a Fellow of the Royal College of Obstetricians and Gynaecologists in London. He has worked in medical research and held clinical positions as a fertility specialist. Dr Illingworth is now the Medical Director of IVF Australia, managing the IVF Australia clinics as well as the specialists practising at those clinics. Dr Illingworth gave evidence about fertility clinics and services including the provision of affordable fertility services, the medical and commercial relationships between fertility specialists and clinics, the barriers to entry and expansion in the provision of fertility services and the providers of fertility services in Brisbane, Sydney and Melbourne.

(d) Gregory Houston affirmed an affidavit on 18 October 2021 which annexed an expert report. Mr Houston is an economist with extensive experience in industrial economics and its application in competition law. He gained a BSc (First Class Honours) in Economics from the University of Canterbury, New Zealand in 1982. Since the late 1980s, Mr Houston has worked as an economic consultant, first at NERA Economic Consulting and, since 2014, at HoustonKemp Consulting. In that capacity, Mr Houston has prepared reports and given expert testimony in a large number of cases and enquiries. Mr Houston expressed opinions in respect of the primary contentions advanced by the ACCC in its case, particularly the definition of the relevant market(s),

the appropriate way to calculate and estimate market shares, the pricing of fertility services and its relevance to the assessment of the competitive effects of the proposed transaction and the nature and extent of barriers to entry. Mr Houston also responded to the opinions expressed by Dr Williams. No doubt reflecting the extent of the information available to him, many of the opinions expressed by Mr Houston were of a negative kind, to the effect that the information available to him did not support the primary contentions advanced by the ACCC.

17 In opposition to the interlocutory injunction, Healius relied on an affidavit affirmed by Mark Ellis on 14 October 2021 which was read in the hearing for an interim injunction before Moshinsky J, and a further affidavit of Mr Ellis affirmed 18 October 2021. Mr Ellis is the General Manager – Corporate Development of Healius. Mr Ellis gave evidence concerning the background to the sale transaction, the Healius business and the Adora business, detriment to Adora from delay in completion of the sale and Healius' likely decisions with respect to Adora if an injunction were to be granted.

18 The factual findings made in these reasons are based on the evidence presently before the Court recognising that, in the circumstances of an urgent interlocutory hearing, the deponents of the affidavits were not cross-examined and the evidence was not challenged in a material way. My impression is that much of the primary evidence before the Court is uncontroversial. The areas of controversy concern the issues that are most directly relevant to the analysis of s 50 of the Act, which might be regarded as matters of commercial and economic inference arising from the primary evidence, particularly the factors bearing upon market definition, the best measures of market concentration, the height of barriers to entry, the nature of product differentiation and the extent of market power that may arise from branding and reputational factors.

19 Parts of the affidavits and other documents exhibited or tendered by the parties contain commercially confidential material. Orders will be made in due course to protect the confidentiality of material where the Court is persuaded that such orders are necessary to prevent prejudice to the proper administration of justice (as per s 37AG(1)(a) of the *Federal Court of Australia Act 1976* (Cth)).

Description of the respondents and the history of the sale transaction

Healius

20 Healius is an ASX listed healthcare company. Its core businesses are its pathology, imaging and day hospital businesses:

(a) The pathology division operates 95 medical laboratories and over 2,000 patient collection centres across Australia. In FY21, that division earned $1,452.1 million in revenue and $428.3 million in earnings before interest, tax, depreciation and amortisation (**EBITDA**).

(b) The imaging division, Lumus Imaging, operates over 130 imaging centres and imaging facilities across Australia. In FY21, that division earned $406.9 million in revenue and $84.5 million EBITDA.

(c) The day hospitals division comprises 11 day hospitals conducted through the Montserrat Day Hospitals and Brookvale Day hospitals businesses (excluding Adora and the three day hospitals co-located with Adora which are part of the proposed sale). In FY21, that division earned $49.5 million in revenue and $15.5 million EBITDA.

21 Adora is a wholly owned subsidiary of Healius and has conducted a fertility business in Australia since 2014. Adora operates four fertility clinics and laboratories located in Brisbane, Sydney, Melbourne and Perth respectively. The clinics and laboratories are in the same building in each city other than Sydney, where the clinic and laboratory are located in adjacent suburbs. Adora's facilities are also co-located with day hospitals in Sydney, Melbourne and Perth (Darlinghurst, Greensborough and Craigie) which are part of the proposed sale and a day hospital in Brisbane which is not part of the sale. The evidence indicates that Adora employs about 120 employees including lab technicians, nurses and sonographers, and has commercial arrangements with approximately 20 fertility specialists and general practitioners.

22 The evidence indicates that Adora's commercial arrangements with fertility specialists and general practitioners who provide fertility medical services at Adora's clinics take a number of forms. The primary commercial arrangement is documented in an agreement titled either "Provision of Services to Medical Practitioners" or "Facilities and Services Agreement". In broad terms, Adora agrees to provide the fertility specialist or general practitioner with medical rooms, medical and scientific equipment, and staff and administrative services necessary to enable the doctor to provide medical services (being fertility services) from the designated premises. In return, the fertility specialist or general practitioner authorises Adora to render

accounts to patients on behalf of the doctor, to receive payment of the accounts (including from Medicare) and to retain a specified percentage of the income received (with the balance being remitted to the doctor). The agreement makes clear that the fertility specialist or general practitioner is responsible for the medical services rendered at the clinic and Adora is not permitted to direct the doctor with respect to the provision of medical services. The fertility specialist or general practitioner is liable for any default in the provision of medical services and must hold a specified level of professional indemnity insurance. Adora has also engaged fertility specialists in a management role, titled "clinical director", to oversee the provision of medical services at each clinic in return for remuneration as specified in the agreements.

23 In FY21, Adora earned $22 million in revenue and $2.22 million in EBITDA. Mr Ellis stated that, over the last few years, Adora's fertility clinics in Brisbane and Melbourne have struggled to generate the type of growth and earnings that were expected when they opened in 2016. In support of that statement, Mr Ellis adduced financial results for the Sydney, Perth, Melbourne and Brisbane clinics for FY19, FY20 and FY21, which included revenue figures in those financial years. I give Mr Ellis' statement very little weight having regard to the potential impact of the COVID-19 pandemic on the ability and incentive of patients to receive fertility treatment in FY20 and FY21, particularly in light of the very different restrictions on movement that have applied in Melbourne compared with each of Brisbane and Perth during that period. The Healius Annual Report for FY20 recorded that there had been "significant and sharp volume reductions in March and April during national lock-down". While that statement was general in nature, it is reasonable to infer that the Adora business would have suffered impacts in line with COVID-19 restrictions imposed in different states and cities. That inference is also supported by the statement in the Healius results for the half year ending December 2020 which reported that the Adora/day hospital business delivered a maiden profit "despite Victorian lockdown", indicating that the Victorian and Melbourne lockdowns had a more severe impact than in other states and cities. Ms Munnings also gave evidence about the impact of COVID-19 on the Adora business.

24 In terms of revenues and operations, Adora comprises a small proportion of Healius' business. On 5 May 2021, Healius announced publicly that it was exploring potential sale options for the Adora business. Healius' Chief Executive Officer is recorded in an Australian Financial Review article published on the same day as saying that Adora "will never be a significant contributor, and [Adora] adds complexity without a lot of benefit" and further that "[a]n ideal scenario for us would be to come to an arrangement with one of the other IVF providers in

Australia, where we provide some of their pathology services and they provide all the IVF. That's what we're going to test the market with." In its Annual Report for FY21, Healius stated that, over the past two years, "Healius has pursued a strategy to realign its portfolio in order to deliver higher returns and a strong growth profile, strengthen its balance sheet, and focus on its core diagnostic and growing day hospitals businesses" and that, as a result (amongst other things), the Adora business had been "brought to market" and a sale announced in August 2021.

Virtus

25 Virtus is an ASX-listed, global provider of fertility services. Its head office is in Greenwich, New South Wales and it has operations in New South Wales, Victoria, Queensland and Tasmania, as well as in four other countries. It has a market capitalisation of approximately $466.17 million. In Australia, Virtus operates:

(a) nine fertility clinics in New South Wales and the Australian Capital Territory through its IVF Australia business;

(b) four fertility clinics in Victoria through its Melbourne IVF business;

(c) eight fertility clinics in Queensland through its Queensland Fertility Group business;

(d) two fertility clinics in Tasmania through its TasIVF business; and

(e) five fertility clinics in New South Wales, Victoria and Queensland through a business called The Fertility Centre (**TFC**).

26 Virtus established TFC at the beginning of 2012 with the object of improving access to fertility services by providing an affordable option. Virtus opened the first TFC clinic in Springwood, Queensland in January 2012, the second TFC clinic in Dandenong, Victoria in October 2012, the third TFC clinic in Liverpool, New South Wales in December 2012 and the fourth TFC clinic in Werribee, Victoria in May 2013. These four clinics opened prior to the first Adora clinic opening in Sydney in August 2014.

27 Virtus also owns seven day hospitals located in New South Wales, Victoria, Queensland and Tasmania which are small facilities utilised for both fertility services and by other operating specialists. Virtus does not currently have any activities in South Australia, Western Australia or the Northern Territory.

28 Virtus' commercial arrangements with fertility specialists and general practitioners who provide fertility medical services at Virtus clinics are structured differently to Adora. The arrangements are recorded in a letter agreement, a pro forma of which was in evidence, which

incorporates by reference the terms set out in a document titled Medical Practitioner Code of Conduct and a Fees and Services Schedule. Under the agreement, Virtus engages the doctor as an independent contractor to provide specified fertility medical services to patients at a Virtus fertility clinic. The doctor has full responsibility for the provision of medical services at the clinic and must maintain professional indemnity insurance. The Code of Conduct contains [redacted].

Virtus agrees to provide medical consulting rooms including a reception, secretarial and billing services, a medical theatre and clinical and technical support to enable the doctor to provide fertility medical services. Virtus also agrees to refer patients to the doctor and agrees to engage in promotion and marketing of the doctor. Although not stated expressly in the agreement, it is implicit that Virtus issues an invoice to patients for the medical services provided to them and receives payment from patients. Under the agreement, Virtus agrees to pay the contracted doctors the fees for particular medical services specified in the Fees and Services Schedule, less amounts payable by the doctor [redacted].

The sale transaction

29 As noted above, Healius sought buyers for the Adora business in May 2021. Initially, the sale process was concerned only with the Adora business and did not include the three day hospitals.

30 Virtus considered the acquisition of Adora at its board meeting on 14 May 2021. Ms Munnings gave evidence that, at that board meeting, the board considered that it was in Virtus' interests to bid for Adora's operations in each of the four states in which it operated (Brisbane, Sydney, Melbourne and Perth). That evidence is not supported by the minutes of that board meeting, which state that "[w]e have asked Jefferies to approach Adora with a proposal to buy their WA business only. This would be part of our national coverage." Jefferies were Virtus' financial advisors on the transaction. The minutes indicate that, at that time, Virtus was contemplating the acquisition of Adora's Perth clinic and facilities, where Virtus did not have its own clinic.

31 In June 2021, Healius amended the process to include the three day hospitals. At that time, Healius issued an information memorandum in respect of the business being offered for sale. The information memorandum included the following statements:

(a) The Adora business was described as a market leader in the provision of "low cost" IVF with an approximate [redacted] market share (based on the number of treatment cycles submitted to Medicare in the last 12 months to March 2021).

(b) Bulk billing had provided a competitive advantage by attracting a large proportion of the population to access fertility services that had previously been unaffordable.

(c) The creation of a bulk billed IVF model had enabled Adora to take market share from established competitors and grow the market.

32 Virtus submitted its indicative bid on 12 July 2021, and was selected by Healius as the preferred bidder on 31 July 2021. Due diligence inquiries and negotiations between Virtus and Healius followed.

33 An internal presentation to the Virtus board dated 25 July 2021 (and which was presented at a board meeting on 28 July 2021) considered the proposed offer to Healius for the Adora business. The board presentation included the following statements:

(a) The Adora business was a "low cost" IVF business.

(b) Virtus believed that there were [redacted] bidders in the sale process (including Virtus), which very likely were [redacted].

(c) In addition to price, Healius' key consideration had been the risk to transaction completion in the event of any conditions precedent being required by a bidder, for example a condition that the transaction be subject to ACCC review and approval. The presentation stated that that concern had been diminished with regard to Virtus because it proposed to submit a share sale agreement with limited conditions precedent to completion.

(d) The presentation stated that the Adora business had transformed the fertility landscape in Australia, with a business model and platform well placed for future growth. The Adora business was described as a market leader in supporting the provision of "low cost" IVF with a footprint across four states and as having modern laboratories / clinics and attractive opportunities to leverage recent investment. Its key features included a growing brand with a large organic social media audience which provided a strong base for further growth.

(e) Virtus' rationale for the acquisition was stated to be:

(i) Adora provided a unique scale national low-cost operating model;

(ii) strategic benefits of scale through incremental cycle volumes in each area of operation;

(iii) complementary to TFC to enhance patient marketing and targeting;

(iv) synergies through enhanced operations; and

(v) equity market likely to be highly supportive for Virtus to add scale and presence with a low-cost offering.

34 I infer from the statement referred to in paragraph (c) above that Healius was aware of the possible application of s 50 of the Act to the sale and had informed bidders that it would not accept a sale that was conditional on the receipt of formal or informal approval from the ACCC. Further, the board presentation contained a section headed "Competition & Regulation" which was redacted for legal professional privilege. I infer that Virtus turned its mind to the possible application of s 50 of the Act, but elected to enter into a share sale agreement without seeking formal or informal approval from the ACCC and without a condition that such approval be obtained.

35 A supplementary presentation dated 28 July 2021 focussed on an updated valuation of the Adora business, and recorded that the estimated net synergies from an acquisition (staffing optimization, IT integration costs and sonography restructure) would be approximately [redacted] in the first year rising to approximately [redacted] per annum in subsequent years.

36 The minutes of the Virtus board meeting on 28 July 2021 record that:

> The rationale for this acquisition was the geographical expansion opportunity including a WA clinic & day hospital, a clinic & day hospital in the Greensborough, more than 20km North East of the East Melbourne clinic, a clinic & day hospital in Darlinghurst and a clinic in Brisbane. It also allows for the introduction of an alternative model of care into the Virtus suite of services.

37 A further briefing presentation was made to the Virtus board dated 5 August 2021 (and which was presented at a board meeting on 9 August 2021) in relation to the proposed acquisition of the Adora business. The briefing summarised "bidder feedback" presumably received from Healius, which compared aspects of the bids that had been made by Virtus and by [redacted]. The briefing expressly noted that Virtus' offer was not conditional on ACCC approval, while also noting that Adora was a competitor of Virtus. In a section summarising key issues, the document identified the following key issue to be discussed by the Virtus board:

> For completeness, it is noted that the agreement will not have a competition-related condition precedent, nor any termination rights associated with competition law issues

38 In a section headed recommendation and next steps, the briefing referred to "Discussion with ACCC pre market announcement – jointly between HLS and VH" and "Aiming for signing and announcement either over the weekend or early next week, allowing time for ACCC liaison". Despite those statements, the ACCC was not consulted by the parties prior to execution of the Share Sale Agreement or the public announcement of the sale. There was no evidence given about that decision.

39 The minutes of the Virtus board meeting on 28 July 2021 refer to the Adora Acquisition and the impact of the "worsening COVID-19 situation" on value. Nevertheless, the minutes record, in relation to the acquisition, that:

> The Managing Directors of Virtus agree that Virtus failing to buy the asset will result in pressure from a competitor if a competitor is successful at buying the Adora business, so the proposal is both an offensive and defensive strategy.
>
> On balance it is agreed that we should proceed with the acquisition.

40 Ms Munnings gave evidence about that statement as follows:

> We were not aware of who the alternative bidders were, but there was some speculation that they were [redacted] The Board presentation dated 25 July 2021 at page 3 includes a comment that Jefferies understood that these were the alternative bidders. [redacted] The speculation at the time had not identified a current competitor or a party with experience in a low cost model of service as a bidder. If anything, the reference to "pressure that will be experienced if a competitor acquired Adora" and "on balance it is agreed that we should proceed with the acquisition" related to a recognition by the state operational managers that both an acquisition by a hypothetical competitor and implementation of the acquisition would create operational pressure they would need to manage while also managing a serious COVID outbreak. As the pressure on operations from implementing transition did not outweigh the benefits to the business of the acquisition as identified in paragraphs 10, 13 and 15 above the state operations managers agreed we should proceed and that they would work to smoothly implement the acquisition.

41 Ms Munnings was not cross-examined on that evidence, but the ACCC invited me not to accept the evidence because it was inconsistent with the minutes. I agree that the evidence is inconsistent with the minute; it is also incoherent and not credible. The briefing presentation that was made to the Virtus board at that meeting contained very detailed information about the competing bidders for the Adora business. The information in the briefing presentation could hardly be described as "some speculation" about who the bidders were. The suggestion that the board minute was referring to operational pressure that would be faced by a competing bidder if they acquired the Adora business is not credible because it is not what the minute says

and it is hard to understand why that would be recorded in the board minute in any event. The further suggestion that the board minute was also referring to the same operational pressure that would be faced by Virtus if it acquired the business is again not credible because it is not what the minute says. In my view, the minute records a concern held by Virtus that if it did not acquire the Adora business, and the business was acquired by a competitor, Virtus would face increased competitive pressure.

42 The Share Sale Agreement was executed on 22 August 2021. The purchase price for the Adora business (and the three day hospitals) was $45 million. Under the agreement, completion of the sale was subject to a number of conditions precedent including the assignment of leases or premises. The agreement was not conditional on formal or informal ACCC approval. Each party was given the right to terminate the agreement if the conditions precedent were not satisfied by the "Cut Off Date" which was defined as 6 months after the date of the agreement (ie 22 February 2022).

43 The transaction was announced publicly by each of Virtus and Healius on 23 August 2021.

ACCC notification

44 There is no requirement at law for companies to notify the ACCC of a merger or acquisition or to seek ACCC approval of a merger or acquisition. Nevertheless, it is widely known across the business community, and must be assumed to be known, that the ACCC is empowered to enforce the prohibition in s 50 of the Act by seeking an order under s 80 to restrain a merger or acquisition that contravenes s 50, an order under s 81 requiring the divestiture of shares or assets acquired in contravention of s 50 and/or an order under s 76 imposing a pecuniary penalty on a person who has acquired shares or assets in contravention of s 50 and any person knowingly concerned in the contravention. If an acquisition gives rise to a risk of contravention of s 50, the parties may seek formal approval of the acquisition from the ACCC by way of authorisation under Part VII of the Act. Alternatively, under a well-recognised administrative process that is the subject of a guideline published by the ACCC (Informal Merger Process Guidelines), the parties may seek informal approval of the acquisition which consists of a public statement by the ACCC that it will not oppose the acquisition. The Informal Merger Process Guidelines contemplate that parties may contact the ACCC on a confidential basis to seek a confidential review of a proposed acquisition (referred to as "pre-assessment"). The Guidelines state that, if possible, the ACCC will provide a conditional confidential assessment to the parties. The ACCC may determine that a public review of the acquisition is not required,

and the parties will be notified accordingly. Alternatively, if the ACCC notifies the parties that a public review will be required, the parties can then elect to proceed with the acquisition subject to the ACCC's review, or not proceed with the acquisition. It is lawful for the parties to enter into an agreement for the acquisition which is conditional upon formal or informal ACCC approval.

45 I infer from the evidence referred to above that the respondents were aware of the requirements of s 50 and the available processes for seeking formal or informal approval of the Adora acquisition from the ACCC, but chose not to seek approval. The evidence suggests that Healius would not have agreed to sell the Adora business subject to a condition that required ACCC approval and both parties took the risk of the ACCC opposing the acquisition and seeking injunctive relief.

46 Ms Munnings deposed that the ACCC was notified orally of the acquisition on 23 August 2021 prior to the opening of the stock market and contemporaneously with the ASX release announcing the transaction. Ms Munnings also stated that Virtus has provided material co-operation to the ACCC review of the acquisition and that her instructions to Virtus' legal advisors, Gilbert + Tobin, were to communicate to the ACCC that Virtus would fully cooperate with any ACCC review. That statement is not supported by the record of communications between Gilbert + Tobin and the ACCC.

47 On 30 August 2021, the legal advisors to Virtus, Gilbert + Tobin, wrote to the ACCC to inform it of the Adora Acquisition and "to provide the ACCC with confidential background information" regarding the transaction. The letter noted that the transaction was conditional on certain steps being taken and that there was no defined date by which that was to occur but it was expected to be in the second quarter of FY2022, in a couple of months. The letter asserted that there was no potential for the transaction to result in a substantial lessening of competition in any relevant market within the meaning of s 50. The letter enclosed an industry brief "to assist the ACCC with background information" regarding the transaction. The letter requested that the information be treated as confidential under the ACCC's Informal Merger Process Guidelines. The letter did not, in terms, seek any approval from the ACCC. Nevertheless, the ACCC treated the 30 August 2021 letter as an application for confidential pre-assessment of the acquisition.

48 On 30 August 2021, the ACCC requested that Virtus provide a clear indication of the expected completion date. On 31 August 2021, Gilbert + Tobin replied stating that "the current

expectation is that it is more likely that this transaction will be completed on either 1 November or 1 December 2021".

49 On 3 September 2021, the ACCC wrote to Gilbert + Tobin advising that the ACCC had decided that Virtus' proposed acquisition of Adora could not be pre-assessed (on a confidential basis), and it would be necessary to conduct a public review which would commence with a provisional 12 week timeframe following the receipt of contact information from the parties (in order to make market enquiries). The ACCC also requested written confirmation that Virtus would not complete the transaction without the ACCC finalising its public review. The ACCC did not receive a response to that request.

50 On 7 September 2021, the ACCC again wrote to Gilbert + Tobin and repeated its request that Virtus confirm in writing that it would not complete the proposed acquisition without the ACCC finalising its public review. The ACCC also repeated its request for contact details of fertility specialists who might be contacted for the purpose of market enquiries.

51 On 8 September 2021, Gilbert + Tobin provided the ACCC with a supplementary submission with respect to the proposed acquisition.

52 On 10 September 2021, Gilbert + Tobin wrote to the ACCC and summarised matters communicated at a virtual meeting held the previous day, specifically "commercial concerns informing our client's need to complete the transaction in accordance with the contractual obligations and strong preference for a confidential ACCC review". The "commercial concerns" were said to be:

(a) performance of contractual obligations to complete as required under the Share Sale Agreement;

(b) business deterioration risks arising from an extended period between signing and completion due to the de-prioritisation of Adora by Healius;

(c) exposure of Adora specialists and staff to escalated poaching efforts by competitors; and

(d) risk to reputation of Virtus and Adora and the health and safety of specialists, staff and patients at Adora clinics due to a lack of a COVID-safe plan and COVID vaccination policy for Adora, and risk of continuity of access to vital information on IT platforms which is required for the delivery of care to patients and for the care of their embryos and eggs.

53 In light of the evidence adduced at the interlocutory hearing, the stated "commercial concerns" of Virtus were somewhat disingenuous. The first concern was entirely self-imposed in that the parties took a conscious risk when entering into a contract which was not conditional on ACCC approval that completion of the agreement might be restrained by ACCC legal proceedings. The fourth concern was effectively abandoned by the respondents in the course of the interlocutory hearing. As submitted by the ACCC, it is implausible that a corporation the size of Healius did not have in place a COVID-safe plan and COVID vaccination policy for Adora and would in any way jeopardise continuity of access to its IT systems. For reasons discussed further below, in my view the evidence does not support the asserted concern of business deterioration risks arising from "the de-prioritisation of Adora by Healius". It may be accepted that a delay in completion might expose Adora specialists and staff to escalated poaching efforts by competitors, but that risk was assumed by the respondents when entering into an agreement without prior conferral with the ACCC. Further, the Share Sale Agreement had expressly contemplated, and the parties had contracted on the basis, that the conditions precedent in the agreement might not be fulfilled until 22 February 2022 (the Cut Off Date).

54 The letter concluded by stating that Virtus was not in a position to confirm that it would not complete without the ACCC finalising its review, but that Virtus would provide the ACCC with written notification 5 business days prior to completion.

55 On 16 September 2021, the ACCC wrote to Gilbert + Tobin stating that the ACCC would proceed to conduct a public review of the acquisition and would set an initial decision date of 25 November 2021. Mr Uthmeyer deposed that the ACCC commenced its public review on 21 September 2021.

56 On 8 October 2021, the ACCC received a letter from Gilbert + Tobin stating that Virtus would complete the transaction on 15 October 2021. The letter asserted two reasons the parties were proceeding notwithstanding the ACCC's intended public review. The first reason was said to be "operational imperatives requiring completion to occur as soon as possible". In that respect, the letter asserted that "the businesses are currently navigating numerous significant challenges in relation to which Virtus needs to step in and support Adora as soon as possible", particularly providing essential services during the COVID pandemic, managing staff levels to comply with Public Health Orders and anticipated high demand for services. None of those concerns were maintained on the interlocutory application. No evidence was adduced as part of the interlocutory application to suggest that Healius is unable to provide essential services to Adora

during the COVID pandemic, manage staff levels to comply with Public Health Orders or manage high demand for services. In my view, Virtus had no basis for those assertions made through its legal advisors, Gilbert + Tobin. The second reason was said to be "performance of contractual obligations to complete". As stated earlier, that reason was wholly self-imposed (in that the parties elected to enter into an agreement that was not conditional on ACCC approval).

57 The ACCC replied on the same day requesting an undertaking that Virtus not complete the acquisition before 25 November 2021. The letter advised that, if Virtus did not provide the undertaking by 10 October 2021, the ACCC may take legal action in respect of the proposed acquisition without further notice, including seeking an urgent interlocutory injunction to restrain completion.

58 On 10 October 2021, Gilbert + Tobin wrote to the ACCC refusing to provide the undertaking sought by the ACCC and instead offering an undertaking to hold separate the Adora business post-completion.

59 Following further correspondence between the ACCC and Gilbert + Tobin, on 12 October 2021 the ACCC wrote to Gilbert + Tobin notifying it of the intended commencement of this proceeding.

Undertakings offered to the Court

60 In lieu of the grant of an interlocutory injunction, Virtus and IVF Finance have offered two forms of undertaking to the Court, a short form and a long form, which would continue until the final determination of the ACCC's originating application.

61 The short form undertaking is in the following terms:

COMPETITION AND CONSUMER ACT 2010

Undertaking to the Federal Court of Australia given by Virtus Health Limited (Virtus) and IVF Finance Pty Limited (IVF Finance) in connection with proceeding VID587/2021

1 This undertaking (the **Undertaking**) is given to the Court by Virtus and IVF Finance.

2 Virtus and IVF Finance undertake to comply with the requirements imposed upon them in this document from the Control Date until the determination of the ACCC's original application by the Court (Undertaking Period).

3 From the Control Date and throughout the Undertaking Period, each of Virtus and IVF Finance will:

(a) operate the Adora Fertility Clinic Business separately and

independently from Virtus's existing operations;

(b) hold its interest in the Adora Fertility Clinic Business separately from Virtus's other assets;

(c) appoint an Independent Manager with responsibility for the day-to-day competitive operations and decision making of the Adora Fertility Clinic Business;

(d) ensure that Virtus is not involved in the day-to-day competitive operations and decision-making of the Adora Fertility Clinic Business;

(e) ensure that the Adora Fertility Clinic Business continues to be an viable, effective and independent business; and

(f) not access, use or disclose any competitively sensitive confidential information relating to the Adora Fertility Clinic Business.

4 Virtus and IVF Finance further undertake that as soon as practicable after the Control Date, it will direct its personnel, including directors, contractors, managers, officers, employees and agents, not to do anything inconsistent with Virtus's and IVF Finance's obligations under paragraph 3 of this Undertaking.

5 Paragraphs 3 and 4 of this Undertaking above do not apply to actions that Virtus and IVF Finance reasonably take to:

(a) provide the services set out in Schedule 1, Clause 4 of the Transitional Services Agreement;

(b) provide services during the COVID-19 pandemic in order to comply with Public Health Orders issued in any Australian State or Territory and manage instances of COVID-19 exposure at clinics, comply with quality and accreditation obligations, protect the health and safety of patients, specialists and staff, or avoid negative impacts to patient, egg and/or embryo care;

(c) comply with legal and regulatory obligations including obligations relating to taxation, accounting, financial reporting or stock exchange disclosure requirements.

6 For the purposes of this Undertaking:

ACCC means the Australian Competition and Consumer Commission.

Adora means Adora Fertility Pty Ltd.

Adora Fertility Clinic Business means the business operated by Adora.

Adora Share Sale Agreement means the share sale agreement between Healius, IVF Finance and Virtus dated 22 August 2021 in respect to the sale of the shares in Adora.

Control Date means the date of completion of the Adora Share Sale Agreement, which is currently scheduled to be 15 October 2021.

Healius means Healius Limited.

Independent Manager means an independent manager of the Adora Fertility Clinic Business. The identity and terms of employment of the Independent Manager are to be notified to the ACCC.

IVF Finance means IVF Finance Pty Limited.

Transitional Services Agreement means the Transitional Services Agreement between Healius and Adora dated 22 August 2021 as amended on 5 October 2021.

Undertaking Period as defined in paragraph 2 of this Undertaking.

Virtus means Virtus Health Limited.

62 The long form undertaking is in the following terms:

COMPETITION AND CONSUMER ACT 2010

Undertaking to the Federal Court of Australia given by Virtus Health Limited (Virtus) and IVF Finance Pty Limited (IVF Finance) in connection with proceeding VID587/2021

Recitals

1 Virtus Health Limited (**Virtus**) is the ultimate holding company of IVF Finance Pty Limited (**IVF Finance**) and Guarantor of IVF Finance as Buyer under the Share Sale Agreement with Healius Limited (**Healius**) dated 22 August 2021 (**the Adora Share Sale Agreement**).

2 Upon completion of the Adora Share Sale Agreement IFV Finance will acquire the relevant shares and assets of Adora Fertility Pty Ltd ACN 616 422 818 (**the Adora Fertility Clinic Business**).

3 Healius and Virtus had agreed that the Adora Share Sale Agreement would be scheduled for completion on 15 October 2021 but have now further agreed that completion would be scheduled for 22 October 2021

4 The Australian Competition and Consumer Commission (ACCC) has commenced Federal Court proceedings alleging that the Adora Share Sale Agreement will contravene s 50 of the Competition and Consumer Act 2010 (Cth) (CCA) and seeking an interim order to restrain completion of the Adora Share Sale Agreement.

5 Adora has operated and will operate until completion as a division of Healius, supported by services provided by Healius to companies within its group. For a transitional period Healius and Virtus have agreed for those services to be provided to Adora from completion by each of them providing certain services set out in Schedule 1, Clause 4 of the Amended and Restated Transitional Services Agreement.

6 Virtus and IVF Finance offer these undertakings to the Court to maintain the Adora Fertility Clinic Business as a separate business from completion of the acquisition of the Adora Share Sale Agreement (**the Control Date**) until the determination of the ACCC's original application by the Court.

Undertakings

7 This undertaking is given to the Court by Virtus and IVF Finance.

8 Virtus and IVF Finance undertake to comply with the requirements imposed upon them in this document from the Control Date until the determination of the ACCC's original application by the Court (**Undertaking Period**).

Hold separate obligations

9 From the Control Date and throughout the Undertaking Period, each of Virtus and IVF Finance will:

(a) keep the Adora Fertility Clinic Business separate and independent from Virtus' operations and managed and maintained separately as a going concern;

(b) hold its interest in the Adora Fertility Clinic Business separate from Virtus' other assets;

(c) ensure that the Adora Fertility Clinic Business continues to be a viable, effective, competitive and stand-alone businesses;

(d) appoint an Independent Manager with principal responsibility and control over the management and operations of the Adora Fertility Clinic Business, being a manager with the requisite skills and experience to manage the business and who is not a former or current employee or officer of Virtus;

(e) ensure that the Adora Fertility Clinic Business is managed and operated by the Independent Manager in the ordinary course of business as a fully operational, competitive going concern and in such a way that preserves the economic viability, marketability, competitiveness and goodwill of the Adora Fertility Clinic Business as at the Control Date; and

(f) ensure that Virtus is not involved in the day-to-day management and competitive operations of the Adora Fertility Clinic Business;

10 Further, to give effect to and without limiting the Undertakings in clause 9, and unless clause 11 otherwise provides, Virtus and IVF Finance will take all steps reasonably available to them to:

(a) ensure that the Adora Fertility Clinic Business are operationally and financially separate from Virtus' other assets and business;

(b) ensure that the books and records of the Adora Fertility Clinic Business are kept from those of Virtus, unless the information is required by Virtus for a permitted purpose pursuant to clause 14;

(c) not directly procure, promote or encourage the redeployment of personnel necessary for the operation of the Adora Fertility Clinic Business as at the Control Date to any other business operated by Virtus;

(d) ensure that the Adora Fertility Clinic Business has, at Virtus's cost, access to and use of the personnel required by the Independent Manager so that the Adora Fertility Clinic Business can continue to operate as a viable, competitive, going concern;

(e) continue to provide access to working capital and sources of credit for the Adora Fertility Clinic Business in a manner which is consistent with the financing of the Adora Fertility Clinic Business before the Control Date;

(f) continue to provide administrative and technical support for the Adora Fertility Clinic Business in a manner which is consistent with the

operation of the Adora Fertility Clinic Business before the Control Date and in accordance with any plans established before the Control Date;

(g) ensure that the Independent Manager continues existing Agreements relating to the Adora Fertility Clinic Business with customers, suppliers and/or other third parties that are in place at the Control Date;

(h) ensure that the Independent Manager renews or replaces upon expiry Material Contracts for the provision of services and/or goods to the Adora Fertility Clinic Business on commercial terms favourable to the Adora Fertility Clinic Business;

(i) ensure that the Independent Manager maintains the supply of those services and/or goods that are part of the Adora Fertility Clinic Business to existing customers in a manner consistent with the supply of those services and /or goods as at the Control Date;

(j) ensure that the Independent Manager maintains the standard of manufacture, production, supply, distribution, promotion and sale of those services and/or goods which form part of the Adora Fertility Clinic Business as at the Control Date; and

(k) ensure that the Independent Manager carries out promotion and marketing of the services and/or goods which form part of the Adora Fertility Clinic Business in accordance with any plans established before the Control Date, or such other plans which the Independent Manager considers necessary to maintain the Adora Fertility Clinic Business as an ongoing competitive concern.

11 Clauses 9 and 10, do not apply to actions that Virtus or IVF Finance reasonably take to:

(a) support Adora in a manner which is consistent with its current operations by providing services set out in Schedule 1, Clause 4 of the Amended and Restated Transitional Services Agreement; or

(b) provide services during the COVID-19 pandemic, comply with Public Health Orders issued in any Australian State or Territory and manage instances of COVID-19 exposure at clinics, comply with quality and accreditation obligations, protect the health and safety of patients, specialists and staff, or avoid negative impacts to patient, egg and/or embryo care.

Direction to personnel of Virtus

12 As soon as practicable after the Control Date, Virtus and IVF Finance will direct their personnel, including directors, contractors, managers, officers, employees and agents not to do anything inconsistent with their obligations under this Undertaking.

Competitively Sensitive Confidential Information

13 Subject to clause 14, Virtus and IVF Finance must not, at any time during the Undertaking Period access, use or disclose any competitively sensitive confidential information about the Adora Fertility Clinic Business gained through:

(a) ownership of the Adora Fertility Clinic Business; or

(b) fulfilling any obligations pursuant to this Undertaking.

14 Clause 13 does not apply to information that Virtus or IVF Finance require to:

(a) comply with legal and regulatory obligations including obligations relating to taxation, accounting, financial reporting or stock exchange disclosure requirements; or

(b) carry out their obligations pursuant to this Undertaking; or

(c) support Adora in a manner which is consistent with its current operations including providing services set out in Schedule 1, Clause 4 of the Amended and Restated Transitional Services Agreement; or

(d) provide services during the COVID-19 pandemic, comply with Public Health Orders issued in any Australian State or Territory and manage instances of COVID-19 exposure at clinics, comply with quality and accreditation obligations, protect the health and safety of patients, specialists and staff, or avoid negative impacts to patient, egg and embryo care;

provided such information is only used for that purpose and is only disclosed to those officers, employees, contractors and advisers of Virtus who need to know the information to carry out the permitted purpose.

Obligations and powers of the Independent Manager

15 Virtus and IVF Finance will direct that the Independent Manager:

(a) act in the best interests of the Adora Fertility Clinic Business at all times including ensuring that the Adora Fertility Clinic Business is managed and operated in the ordinary course of business as a fully operational, competitive going concern and in such a way that preserves the economic viability, marketability, competitiveness and goodwill of the Adora Fertility Clinic Business at the Control Date;

(b) not use any confidential information gained through the management of the Adora Fertility Clinic Business other than for performing his or her functions as Independent Manager;

(c) make only those Material Changes to the Adora Fertility Clinic Business which the ACCC does not object to;

(d) operate and manage the Adora Fertility Clinic Business in a manner which is financially and operationally separate from Virtus, subject to clause 11;

(e) keep the books and records of the Adora Fertility Clinic Business separate to the maximum extent practicable from those of Virtus, subject to clause 14;

(f) provide directly to the ACCC a timely report where he becomes aware of any matter that would constitute a non-compliance with this Undertaking.

16 Virtus and IVF Finance must procure that the Independent Manager will retain the sole authority to:

(a) decide whether or not to provide access and the manner of such access to competitively sensitive confidential information relating to the Adora Fertility Clinic Business requested by Virtus or IVF Finance, in accordance with this Undertaking and subject to clause 14;

(b) renew or replace upon expiry Material Contracts and enter into new contracts for the provision of services and/or goods to the Adora Fertility Clinic Business on commercial terms favourable to the Adora Fertility Clinic Business;

(c) engage, redeploy or make redundant personnel employed in the Adora Fertility Clinic Business as the Independent Manager determines necessary; and

(d) engage any external expertise, assistance or advice required by the Independent Manager to perform his or her functions as the Independent Manager.

Virtus' and IVF Finance's obligations in relation to the Independent Manager

17 Without limiting its obligations in this Undertaking, Virtus and IVF Finance must:

(a) ensure that the Independent Manager is fully able to acquire and pay for sufficient and timely delivery of all goods and services (including from third parties) which the Independent Manager considers are required by the Adora Fertility Clinic Business; and

(b) provide and pay for any external expertise, assistance or advice required by the Independent Manager to perform his or her functions as the Independent Manager; and

(c) not interfere with the authority of, or otherwise hinder, the Independent Manager's ability to carry out his or her obligations as the Independent Manager, including:

(i) accepting (and directing its directors, contractors, managers, officers, employees and agents to accept) direction from the Independent Manager as to the control, management, financing and operations of the Adora Fertility Clinic Business, and for the Adora Fertility Clinic Business to meet all legal, corporate, financial, accounting, taxation, audit and regulatory obligations;

(ii) providing access to the facilities, sites or operations of the Adora Fertility Clinic Business required by the Independent Manager;

(iii) providing to the Independent Manager any information or documents that he or she considers necessary for managing and operating the Adora Fertility Clinic Business or for reporting to or otherwise advising the ACCC; and

(iv) not requesting information or reports regarding the Adora Fertility Clinic Business from the personnel of the Adora Fertility Clinic Business except through the Independent Manager.

(d) take all steps to ensure that the Independent Manager complies with the directions given in accordance with clause 15.

Obligation to procure

18 Where the performance of an obligation under this Undertaking requires a Related Body Corporate of Virtus to take or refrain from taking some action, Virtus will procure that Related Body Corporate to take or refrain from taking that action.

Definitions

For the purposes of this Undertaking:

ACCC means the Australian Competition and Consumer Commission.

Adora means Adora Fertility Pty Ltd.

Adora Fertility Clinic Business means the business operated by Adora.

Adora Share Sale Agreement means the share sale agreement between Healius, IVF Finance and Virtus dated 22 August 2021 in respect to the sale of the shares in Adora.

Control Date means the date of completion of the Adora Share Sale Agreement, which is currently scheduled to be 22 October 2021.

Healius means Healius Limited.

Independent Manager means an independent manager of the Adora Fertility Clinic Business. The identity and terms of employment of the Independent Manager are to be notified to the ACCC.

IVF Finance means IVF Finance Pty Limited.

Transitional Services Agreement means the Transitional Services Agreement between Healius and Adora dated 22 August 2021 as amended on 5 October 2021.

Undertaking Period as defined in clause 8 of this undertaking.

Applicable legal principles

63 Section 80 of the Act confers on the Court power to grant injunctive relief in respect of infringements of Part IV of the Act. Section 80(1) provides:

(1) Subject to subsections (1A), (1AAA) and (1B), where, on the application of the Commission or any other person, the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute:

(a) a contravention of any of the following provisions:

(i) a provision of Part IV;

…

(b) attempting to contravene such a provision; or

(c) aiding, abetting, counselling or procuring a person to contravene such a provision; or

(d) inducing, or attempting to induce, whether by threats, promises or otherwise, a person to contravene such a provision; or

(e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or

(f) conspiring with others to contravene such a provision;

the Court may grant an injunction in such terms as the Court determines to be appropriate.

64 Injunctions restraining anti-competitive mergers under s 50 of the Act may only be sought by the ACCC. In this respect, s 80(1A) provides:

(1A) A person other than the Commission is not entitled to make an application under subsection (1) for an injunction by reason that a person has contravened or attempted to contravene or is proposing to contravene, or has been or is proposing to be involved in a contravention of, section 50, 60C or 60K.

65 The Court is also empowered to grant an interim injunction pending the determination of final relief under s 80(1). Section 80(2) provides:

(2) Where in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of an application under subsection (1).

66 The ACCC is not required to give an undertaking as to damages when seeking an interim injunction. Section 80(6) provides:

(6) Where the Minister or the Commission makes an application to the Court for the grant of an injunction under this section, the Court shall not require the applicant or any other person, as a condition of granting an interim injunction, to give any undertakings as to damages.

67 It has long been held that s 80 of the Act is an exclusive charter to grant injunctions restraining, or relating to, contraventions of the Act: *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 162; *Australian Competition and Consumer Commission v Pacific National* (2020) 277 FCR 49 (***Pacific National***) at [326]. The power to grant an injunction is expressed in wide terms and confers a broad discretion on the Court: *Foster v Australian Competition and Consumer Commission* (2006) 149 FCR 135 (***Foster***) at [30]-[32].

68 The factors that are generally considered relevant to the grant of an interlocutory injunction in equity are usually considered applicable to the grant of an interim injunction under s 80(2). However, the Court's discretionary power under s 80 is not limited by equitable principles and factors relevant to the exercise of the discretion will also be informed by the subject matter and purpose of the Act: *OD Transport Pty Ltd v WA Government Railways Commission* (1987) 13

FCR 500 at 508 per French J, referred to with approval in *Foster* at [32]. As observed by the majority (Gaudron, McHugh, Gummow and Callinan JJ) in *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at [28]:

> The term "injunction" is used in numerous statutes to identify a particular species of order, the making of which the law in question provides as part of a new regulatory or other regime, which may be supported by penal provisions. Notable examples in statutes presently in force nationally are found in s 80 of the Trade Practices Act … . These provisions empower courts to give a remedy in many cases where none would have been available in a court of equity in the exercise of its jurisdiction …

69 In *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 (***ICI***), Lockhart J (with whom French J agreed) observed (at 255-257) that:

> Section 80 is essentially a public interest provision. Conduct of the kind proscribed by both Pts IV and V may be detrimental to the public interest because many persons can be affected and considerable loss or damage may be sustained by them.
>
> …
>
> Injunctions are traditionally employed to restrain repetition of conduct. A statutory provision that enables an injunction to be granted to prevent the commission of conduct that has never been done before and is not likely to be done again is a statutory enlargement of traditional equitable principles. But this is because traditional doctrine surrounding the grant of injunctive relief was developed primarily for the protection of private proprietary rights. Public interest injunctions are different. Parts IV and V of the Act involve matters of high public policy. Parts IV and V relate to practices and conduct that legislatures throughout the world in different forms and to different degrees, have decided are contrary to the public interest … These are legislative enactments of matters vital to the presence of free competition and enterprise and a just society. This does not mean that the traditional equitable doctrines are irrelevant. For example, it must be relevant to consider questions of repetition of conduct or whether it has ever occurred before or whether imminent substantial damage is likely: but the absence of any one or more of these elements is not fatal to the grant of an injunction under s 80.

70 In separate reasons, Gummow J expressed agreement with the view that, whilst in concept the statutory remedy provided for in s 80 is different from the equitable remedy of injunction as administered in the inherent jurisdiction of courts of equity, nevertheless in many practical respects it is not fundamentally distinct from the equitable remedy (at 266).

71 The equitable principles that guide the discretion to grant interlocutory relief are well established: see *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 (***ABC v O'Neill***) at [65]-[72], per Gummow and Hayne JJ, affirming *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 (***Beecham***) per Kitto, Taylor, Menzies and Owen JJ at 84-86. As explained in *Beecham* and *ABC v O'Neill,* two main inquiries arise for the Court's consideration:

(a) first, whether the applicant has a prima facie case; and

(b) second, whether the balance of convenience favours the grant of the injunction sought.

72 In respect of the prima facie case limb, the Court must be satisfied that the applicant has established a sufficient likelihood of success to justify the preservation of the status quo by the grant of the injunction, pending the trial. It is not necessary for the applicant to show that it is more probable than not that it will succeed at trial. How strong the likelihood needs to be, and whether it is "sufficient", will depend on the nature of the right asserted and the practical consequences likely to flow from an injunction, if granted: *ABC v O'Neill* at [65]-[66]; *Beecham* at 84-86. If there is a prima facie case, the Court must then consider the balance of convenience limb. The Court is to consider whether the inconvenience or injury that the applicant would be likely to suffer if an injunction were refused outweighs or is outweighed by the inconvenience or injury that the respondent would suffer if an injunction were granted: *ABC v O'Neill* at [65]-[66]; *Beecham* at 84-86.

73 The rights of the applicant and respondent are not the only rights considered in determining where the balance of convenience lies: *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 (***Stevedores***) at [65]. In *Stevedores*, the High Court adopted the following passage from Spry, *The Principles of Equitable Remedies* (5th ed, 1997) p. 402:

> … the interests of the public and of third persons are relevant and have more or less weight according to the other material circumstances. So it has been said that courts of equity 'upon principle, will not ordinarily and without special necessity interfere by injunction, where the injunction will have the effect of very materially injuring the rights of third persons not before the courts'. Regard must be had 'not only to the dry strict rights of the plaintiff and the defendant, but also the surrounding circumstances, to the rights or interests of other persons which may be more or less involved'. So it is that where the plaintiff has prima facie a right to specific relief, the court will, in accordance with these principles, weigh the disadvantage or hardship that he would suffer if relief were refused against any hardship or disadvantage that might be caused to third persons or to the public generally if relief were granted, even though these latter considerations are only rarely found to be decisive. (Conversely, detriment that might be caused to third persons or to the public generally if an injunction were refused is taken into account.)

74 The prima facie case and balance of convenience questions are not independent of each other, although it will often be convenient to consider them successively: *Trade Practices Commission v Santos* (1992) 38 FCR 382 (***Santos***) at 392. Once the Court is satisfied that the first limb of the test is satisfied, the strength or weakness of the applicant's case may become a relevant factor in assessing the balance of convenience and whether to exercise the Court's

discretion to grant the interlocutory relief sought: *Santos* at 396; *Bullock v The Federated Furnishing Trades Society of Australasia (No 1)* (1985) 5 FCR 464 at 472 per Woodward J (with whom Smithers and Sweeney JJ agreed).

75 Applications for interlocutory injunctions to restrain an acquisition alleged to contravene s 50 of the Act have been considered in a number of cases.

76 In *Trade Practices Commission v Santos Limited* (1992) ATPR 41-194, Heerey J considered an application by the Trade Practices Commission for an interim injunction to restrain a public takeover bid made by Santos for Sagasco Holdings Ltd. Santos proffered undertakings to the court to facilitate the making of a divestiture order if a breach of s 50 were established after acquisition. Justice Heerey refused the application for an injunction, deciding that the balance of convenience weighed in favour of accepting the Santos undertakings. In so finding, his Honour noted (at [40,622]) that:

> The sort of considerations I have mentioned flow from the right to invest and trade freely in the securities of public listed companies — including the right to make and accept takeover bids which comply with the Corporations Law. This right should in my opinion be accorded value and respect by the courts. Without that right companies like Santos and Sagasco could not raise capital to carry on business, to create prosperity and employment and, incidentally, to compete with one another in the way the *Trade Practices Act* requires.

77 The Full Federal Court refused an application for leave to appeal from the decision of Heerey J: *Santos* (cited above). The Court formed the view that, in the case of a public takeover bid, where the only relief sought in the proceeding was injunctive relief to prevent the public bid proceeding, the determination of interlocutory relief would be determinative of final relief. In respect of a decision to grant injunctive relief, Hill J observed (at 393):

> It is true that if ultimately the matter were decided favourably to Santos, that company would be in a position to renew a bid to purchase Sagasco shares. From a practical point of view, however, it is unlikely that the terms and conditions of the new bid would be identical to those presently offered. But whether or not that was so, inevitably it would be necessary for Santos to lodge new Part A statement and initiate a new takeover scheme, assuming that in the meantime no steps had been taken by the South Australian Government to dispose of its shares in Sagasco to some other purchaser. In a real and practical sense, therefore, the granting of an injunction restraining Sagasco from proceeding with its takeover offer has, vis-a-vis Santos, the consequence of finally determining the proceedings against it, so far as the present takeover scheme is concerned.

78 In respect of a decision to refuse injunctive relief, Hill J concluded (at 394):

> It follows that the failure to grant an interlocutory injunction, in a case such as the present, would amount to a destruction of the very subject matter of the litigation itself.

> Failure to grant an injunction would remove any impediment upon Santos proceeding with its bid and ultimately, assuming that that bid is successful, acquiring the shares. Once there is an acquisition and unless the application now before the Court is amended, no relief thereafter could be granted to the Commission.

79 His Honour summarised the position as follows (at 394):

> Thus, in a real sense, the issue, in a case such as the present, involves the court, when weighing the balance of convenience, being confronted with the starkest of possible alternatives: either the injunctive relief is granted, in which case as a practical matter the relief is permanent as against the respondent, or the injunction is refused, in which case the relief may be permanent as against the applicant.

80 His Honour recognised, though, that once the acquisition had been completed, it would be open to the Trade Practices Commission to seek an order for divestiture (at 397):

> The remedy of divestiture is in reality an alternative remedy open to the Commission, albeit that it is one which could not be sought by the Commission until at least there had been an acquisition of the shares. In my view, a court considering whether to grant an interim injunction, in a case such as the present, must weigh up the real consequences to each party, taking in mind not only the public interest but also the private interests involved. There is, in my view, no presumption that an interim injunction should be granted, nor is there a presumption that an interim injunction should not be granted. The matter is one for a judicial exercise of discretion, taking into account all relevant matters.

81 Two years later, in *Trade Practices Commission v Rank Commercial Ltd* (1994) ATPR 41-324, Beaumont J granted an interim injunction restraining Rank Commercial (a New Zealand company that had entered into a form of joint venture with Coles Myer in relation to the division of the assets of Foodland post-acquisition) from proceeding with a takeover bid for shares in the capital of Foodland pending the final hearing of the principal proceeding. Rank Commercial and Coles Myer had offered a form of undertaking to the Court to preserve the independence of Foodland pending the determination of the proceeding. Notwithstanding the undertaking, Beaumont J considered that the balance of convenience favoured the grant of an injunction. His Honour took into account that shares in Foodland were reasonably widely held, and that undesirable complications in a bid proceeding could impact adversely on a significant section of the public. If the bid were to proceed upon the footing that, instead of restraining it, the Court accepted the undertakings, the bidder would face a dilemma with respect to the information it should provide in its Part A statement and uncertainty could be created in the minds of shareholders. Beaumont J determined that the interests of Foodland shareholders should be accorded substantial weight in judging where the balance of convenience lay.

82 The decision of Beaumont J was upheld on appeal to the Full Court: *Trade Practices Commission v Rank Commercial Ltd* (1994) 53 FCR 303. The Full Court disagreed, however,

with Beaumont J's assessment of the confusion of shareholders as a significant, if not decisive, matter to be taken into account in assessing the balance of convenience. Their Honours observed (at 319) that:

> But the interests of the shareholders, qua shareholders to whom a takeover offer is proposed, are not those which it is the object of s 50 of the TPA to protect. The protection of those interests is one of the objectives of the Corporations Law. It is not easily seen why those shareholders should be considered a section of the public so significant that their interests in certainty concerning takeover offers should be accorded substantial weight, as distinct perhaps from some relatively minor weight, in the exercise of a discretion conferred by s 80(2).

83 The Full Court discussed the factors taken into account by the Court in *Santos*, particularly the public interest in investing and trading freely in the securities of public listed companies (at 319). However, the Full Court also recognised that the ownership, control and structure of a commercial enterprise should not be altered by a transaction that is undertaken in contravention of s 50 of the Act. The Court observed (at 319-320):

> In our view however this approach involves the error of overlooking or giving little weight to the fact that changes in the status quo affecting [Foodland], its ownership, control and structure would be likely, and they would be brought about by a number of steps constituting conduct as to the lawfulness of which there is a serious question to be tried.

84 The Court further observed that, if the acquisition were allowed to proceed, it would be too late to restrain it and that irreversible changes would have taken place in the ownership, control and structure of Foodland (at 321). The Court concluded that it would place "considerably less importance upon the offer of undertakings" than Beaumont J in the assessment of the balance of convenience (at 322).

85 In *Australian Competition and Consumer Commission v Metcash Trading Ltd* [2011] FCA 1079, Jacobson J refused an application for an interlocutory injunction to restrain the completion of a share sale agreement pending the determination of an appeal brought by the ACCC against a primary judgment of the Federal Court which had dismissed the ACCC's application for final injunctive relief. In assessing the balance of convenience, his Honour received evidence that the business to be acquired was performing poorly; that the uncertainty and delay was making it increasingly difficult to operate the business (particularly dealing with staff, bankers, suppliers and landlords); and that given the continued deterioration of the business, its continued existence depended upon the proposed acquisition being completed within a short period.

86 The more recent decision of Beach J in *Australian Competition and Consumer Commission v Pacific National Pty Ltd* [2018] FCA 1221 (***ACCC v Pacific National***) should be referred to, although the facts and allegations in that case differed from the present case, as did the form of injunctions sought (a mandatory injunction to maintain and operate a business that Aurizon intended to close failing a sale to Pacific National). The facts were that Aurizon had agreed to sell its Queensland Intermodal Business to Pacific National, conditional on ACCC approval. Aurizon announced that, if ACCC approval were not forthcoming, it would close the Queensland Intermodal Business. The ACCC commenced proceedings alleging, amongst other things, that that decision was part of an arrangement reached with Pacific National in contravention of s 45 of the Act. In determining whether to grant the mandatory injunction, his Honour observed (at [14]) that in circumstances where the applicant was the competition regulator, an assessment of the balance of convenience required consideration of the inconvenience, injury or injustice to the public interest, market actors and consumers flowing from potentially detrimental effects on competition in the relevant markets if the injunction sought were to be refused.

87 As noted above, s 80(6) provides that the ACCC is not required to give an undertaking as to damages when seeking an interim injunction. Different views have been expressed as to whether, in an application by the Commission under s 80(2) for an interim injunction, the absence of an undertaking as to damages should be taken into account in assessing the balance of convenience. The weight of authority appears to favour the view that the absence should be taken into account. In support of that view are the following authorities: *APM Investments Pty Ltd v Trade Practices Commission* (1983) 49 ALR 475 (***APM Investments***) at 485 per Smithers J and 508-509 per Fitzgerald J; *Australian Competition and Consumer Commission v Allphones Retail Pty Ltd* [2009] FCA 17; 253 ALR 324 at [26] per Foster J; *ACCC v Pacific National* at [15] per Beach J. The opposite view was expressed by Sheppard J in *SCI Operations Pty Ltd v Trade Practices Commission* (1984) 2 FCR 113 at 187 and by Davies J in *Santos* at 389.

88 I consider that there is considerable force in the following observation of Davies J in *Santos* (at 389), based upon his Honour's review of the legislative history:

> … the intent of s 80(6) would not be given effect if possible detriment arising from the grant of the injunction were taken into account and weighed against the lack of any countervailing undertaking by the Minister or the Commission. In my view, s 80(6) intends that the matter of the grant of an interim injunction will be considered as if the applicant had given an undertaking as to damages but that, in the formulation of its orders, the court shall not actually require an undertaking to be given.

89 Despite that, I consider that I should follow the view expressed by a majority of the Full Court in *APM Investments*. As a result, while the ACCC is not required to give an undertaking as to damages, that is a factor to be considered in the assessment of the balance of convenience.

Prima facie case

90 The respondents submitted that the ACCC's application for an interlocutory injunction should be dismissed because the evidence adduced by the ACCC did not establish a prima facie case that the proposed acquisition would be likely to have the effect of substantially lessening competition in contravention of s 50. Unusually in a case of this kind, a substantial body of evidence was adduced by both the ACCC and the respondents addressing that primary question, including preliminary expert reports from Dr Williams and Mr Houston. It is therefore necessary to assess that evidence to determine whether the ACCC has satisfied the prima facie case threshold.

Section 50

91 Section 50(1) of the Act provides as follows:

> (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.

92 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.

93 Section 50(6) stipulates that "market" means any market for goods or services in Australia, a State, a Territory or a region of Australia. 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.

94 The principles of s 50 are well known and do not require any great elaboration. It is sufficient to refer to the statement of principles contained in the joint reasons of Middleton J and myself in *Pacific National* at [100]-[104] and [246].

Market definition

95 In its concise statement, the ACCC alleges alternative product markets, being fertility services and low cost fertility services, and two relevant geographic markets, being the Brisbane metropolitan region and the Melbourne metropolitan region.

96 On this application, the respondents did not challenge the existence of a market for the provision of fertility services, although they submitted that the market was more complex than propounded by the ACCC, and they did not challenge the geographic market descriptions propounded by the ACCC. The geographic market descriptions reflect the practical need of patients receiving fertility services to be located within reasonable proximity of the service provider.

97 The evidence strongly supports a conclusion that there is a market or markets for the provision of fertility services which are provided by or through clinics dedicated to that area of medical treatment. Each of Virtus and Adora describe themselves as providers of fertility services. In its initial confidential briefing paper given to the ACCC, Virtus provided the following description of the core form of fertility treatment:

> The core form of fertility treatment in Australia (which is also the most advanced) is in vitro fertilisation (IVF) treatment. Generally, IVF treatment refers to a series of procedures in which human eggs (or oocytes) and sperm or embryos are handled

outside of the body (in vitro) with the purpose of achieving a pregnancy. This series of procedures usually takes between four and six weeks and is generally referred to as a cycle of treatment. A cycle of IVF treatment typically involves:

- Retrieving a woman's eggs directly from her ovaries. This procedure can be performed under light sedation or general anaesthetic and involves guidance from an ultrasound device. Prior to egg retrieval, a woman may undergo ovarian stimulation using fertility medication, also referred to as ovarian induction to produce more eggs (see Table 1 below).
- Fertilising the eggs in a laboratory setting. The retrieved eggs are fertilised by either mixing the eggs and sperm together to allow fertilisation to create an embryo or intracytoplasmic sperm injection (ICSI) (see Table 1 below). The eggs and sperm usually come from the couple planning to parent the child but can also be provided by donors.
- Growing embryos for three to six days in embryo culture. This step is performed in a laboratory where the embryos are monitored for development and quality. Viable embryos can be selected for fresh embryo transfer or frozen (cryopreserved) and used in a future embryo transfer cycle (frozen embryo transfer) (see Table 1 below).
- Transferring a single embryo into the woman's uterus through the cervix. This procedure is performed using a fine plastic catheter and usually does not require any anaesthetic.

Depending on the characteristics of patients, such as age, weight and medical conditions, and the cause of infertility, certain services might be recommended to patients to increase the chances of success. Ovarian stimulation is often used in advance of IVF treatment and the dosage level of the medication will be influenced by patient characteristics and preferences. If fertility is affected by issues with the sperm, an additional procedure to fertilise the eggs using ICSI (injecting sperm into the egg) might be recommended. A patient might also undergo further monitoring of their health if a higher dose of ovarian stimulation medication is administered.

The success of an IVF treatment cycle can be affected by patient characteristics and the cause of infertility. If an IVF treatment cycle is unsuccessful, a patient may decide to undertake further IVF cycles, which could involve frozen embryo transfers. Table 1 below sets out the key fertility services of Ol, IUI, IVF, ICSI and FET which are offered by almost all fertility clinics, regard less of their model of care.

Table 1: Fertility services and IVF treatment

Fertility service	**Description**	**Medical item**
Ovarian stimulation or ovulation induction (**OI**)	A simple treatment that uses medication over a couple of weeks to help stimulate a woman's hormones and encourage ovulation. Blood tests and ultrasounds may also be performed during this time to monitor how the woman is responding to the treatment. As indicated above, IVF often occurs after a course of OI. Ol can also be used in advance of IUI.	13206 (for oral medication) Prescription fertility medication is subsidized through the Pharmaceutical Benefits Scheme.

Artificial insemination or intrauterine insemination (**IUI**)	A technique that involves inserting prepared sperm into a woman's uterus close to the time of ovulation.	13203 (artificial insemination)
In vitro fertilisation (**IVF**) treatment	Eggs are collected from the ovaries and fertilised with sperm in a laboratory. One of the resulting embryos is then transferred back into the uterus. The IVF treatment cycle is described in more detail above this table.	13200 (IVF initial cycle) 13201 (IVF subsequent cycle) 13202 (IVF cancelled cycle prior to egg retrieval)
Intracytoplasmic sperm injection (**ICSI**) treatment	A variation to IVF treatment where a single sperm is injected into the egg to assist fertilisation. This technique is typically used with IVF treatment if there are issues with the sperm or fertilisation does not occur in previous IVF cycles.	13251 (intracytoplasmic sperm injection)
Frozen embryo transfer (**FET**)	Any additional embryos created from an IVF cycle can be frozen and stored for future use. These embryos can then be thawed and transferred if more than one treatment cycle is needed.	13218 (frozen embryo cycle)

98 The core fertility services involve medical procedures that must be performed by doctors, whether specialists or general practitioners. The evidence indicates that the provision of such services requires access to a range of facilities including medical consulting rooms, medical theatres, technical equipment and laboratory services as well as administrative services. The evidence also indicates that doctors providing fertility treatments to patients find it convenient to do so from clinics or centres that have the necessary facilities and support services.

99 As set out earlier, evidence was given about the commercial arrangements entered into by each of Virtus and Adora with doctors who provide fertility treatments through those clinics. While those arrangements differed to some extent, the key components of the arrangements are:

(a) the contracted doctors are responsible for the provision of the medical fertility services to patients;

(b) the clinic provides the doctor with all necessary facilities and support services;

(c) the revenue earned from the provision of fertility services to patients, whether received from the Government through Medicare or as an additional charge to the patient, is shared between the doctor and the clinic.

100 I infer from the evidence that each clinic markets and promotes itself as a provider of fertility services, and no doubt the reputation of the clinic in the market is dependent on the reputation of the doctors who provide services at the clinic. In the respondents' submissions there was a suggestion that the relevant suppliers in the market are the doctors who are all competitive with each other. The evidence presently before the Court does not support that characterisation of the market. To the contrary, the evidence indicates that clinics are commercial operations that invest in both physical facilities and in retaining skilled doctors in order to market and sell fertility services to patients who require such services. It appears that the custom of patients is attracted by the clinic's brand reputation.

101 A key issue in dispute between the parties is whether there is a separate market for "low cost" fertility services. It is an important issue because, if such a market exists, the proposed acquisition may have more substantial competitive effects in that market. In its concise statement, the ACCC defines a low cost service as one which is structured to bulk bill Medicare eligible expenses and minimise out-of-pocket costs for patients. Bulk billing occurs when a doctor bills Medicare directly for the medical services and accepts the Medicare benefit as full payment for the services such that the patient does not incur any out-of-pocket expenses.

102 The evidence adduced on this application indicates that the existence of a low cost fertility services market is plausible. Dr Illingworth gave evidence about the establishment of clinics offering "affordable" fertility services which was started by Virtus through the establishment of its TFC clinics and then followed by other clinics including Adora, First Step Fertility, Genea Elements and Connect IVF. In internal documents, each of Virtus and Healius describe Adora as a "low cost" supplier of fertility services and Adora's business model is to bulk bill its fertility services. The Healius Information Memorandum offering Adora for sale contained comparative data for Adora and four other clinics (Virtus, Monash IVF, Genea and City Fertility) which included FY20 revenue and the number of treatment "cycles" supplied in FY20. As explained in Virtus' briefing paper to the ACCC, a treatment cycle refers to a series of procedures in which human eggs and sperm are handled outside of the body (in vitro) with the purpose of achieving a pregnancy. The revenue earned per cycle by Adora in FY20 was very substantially less than that earned by Virtus, Monash IVF and Genea (cycle data was not available for City Fertility).

103 Mr Houston expressed the opinion that the evidence did not support there being a distinct market for the supply of low cost fertility services. I did not find his opinion persuasive and I

consider that the existence of such a market is suggested by the evidence. One of the arguments advanced by Mr Houston against the existence of such a market is that the existence of two separate markets for the provision of the same good or service to different groups of customers is only possible when suppliers are able to discriminate in the prices they set as between those groups. However, that opinion assumes that the services supplied in the low cost market are the same as the services supplied in the "full service" market. The evidence given by Dr Illingworth indicates that the range of services is not the same, and necessarily the services offered by low cost clinics is a more limited range. For that reason, Dr Illingworth explains that the services available at low cost clinics may not be appropriate for all patients seeking fertility treatments. A second argument advanced by Mr Houston is that he considers it likely that there is a high degree of supply-side substitution from full service to low cost services. Competitive constraint afforded through supply-side substitution is a relevant consideration in defining markets, but Mr Houston's report does not canvass all factors that may bear upon such substitution including the availability and willingness of doctors to provide fertility services on a bulk-billing basis.

104 On the evidence adduced on this application, I consider that the ACCC may be able to establish at a final hearing that there is a separate market for low cost fertility services, and there seems no real dispute about the existence of a market for fertility services.

Market concentration

105 In its initial confidential briefing paper given to the ACCC, Virtus provided the following description of fertility services clinics in the Brisbane and Melbourne metropolitan regions:

(a) In Brisbane, there are six fertility services providers operating 14 clinics: City Fertility Centre (5 clinics); Virtus (3 clinics); CARE Fertility (2 clinics); Life Fertility (2 clinics); Monash IVF (1 clinic); and Adora (1 clinic). Of those clinics, 6 can be characterised as offering low cost services: First Step Facility (3 clinics, owned by City Fertility); The Fertility Centre (1 clinic owned by Virtus); IVF 4 Family (1 clinic owned by CARE Fertility); and Adora (1 clinic).

(b) In Melbourne, there are six fertility services providers operating 15 clinics: Virtus (4 clinics); Monash IVF (4 clinics); City Fertility Centre (3 clinics); Genea (1 clinic); Newlife IVF (1 clinic); No 1 Fertility (1 clinic); and Adora (1 clinic). Of those clinics, 2 can be characterised as offering low cost services: The Fertility Centre (1 clinic owned by Virtus); and Adora (1 clinic).

106 In its concise statement, the ACCC has measured market concentration of fertility clinics based on the number of treatment cycles supplied by the clinic in a given period. In respect of the Brisbane market, the ACCC has measured market concentration in both the low cost market and in the full service market but in the Melbourne market the ACCC presently only has data in respect of the full service market. The ACCC adduced evidence as to the source of the data on which its calculations are based. That measure of market concentration shows that the Adora acquisition will result in the combined entity holding a very large share of the propounded markets as follows:

(a) in the Brisbane low cost fertility services market, the combined market share would be [redacted];

(b) in the Brisbane fertility services market, the combined market share would be [redacted]; and

(c) in the Melbourne fertility services market, the combined market share would be 53%.

107 The ACCC has also undertaken a Herfindahl-Hirschman Index (**HHI**) calculation for each of the above markets. The HHI is a measure of market concentration calculated as the sum of the squares of the market shares of each competitor in a market. In performing the calculation, it is common to express the percentage market share as a whole number (for example, the whole number 40 is used in the calculation instead of 40%). The mathematical effect of squaring the market shares is to increase the index calculation in markets that have fewer competitors with larger market shares. Like all market concentration analysis, the HHI is a static measure which provides information about market concentration but is not determinative of whether a market lacks workable competition. Nevertheless, the index is commonly used by competition authorities in Australia and other countries as a means of assessing the effect that a merger has on market concentration. The larger the increase in the index as a result of the merger, the more likely it is that the merger will harm competition. The ACCC's Merger Guidelines state that the ACCC will generally be less likely to identify horizontal competition concerns when the post-merger HHI is less than 2000, or greater than 2000 with a "delta" (change by reason of the acquisition) less than 100. The ACCC's market share data indicates that the Adora acquisition will result in the following HHI numbers:

(a) in the Brisbane low cost fertility services market, the post-merger HHI would be 3762 and the transaction would increase the HHI by 1305;

(b) in the Brisbane fertility services market, the post-merger HHI would be 3301 and the transaction would increase the HHI by 993; and

(c) in the Melbourne fertility services market, the post-merger HHI would be 3506 and the transaction would increase the HHI by 862.

108 The respondents submitted that treatment cycles was not an appropriate measure of market concentration. They acknowledged that measures relating to the number of cycles are used by fertility businesses in financial reports but submitted that this is because they are a convenient and accessible way of describing past performance. I do not accept that submission. The evidence indicates that cycle numbers is an important industry metric relating to the quantity of services supplied by clinics. A further submission was advanced that: to measure the market share of fertility clinic operators on the basis of number of cycles is to measure the market share of fertility clinic operators on the basis of a service which is not provided by them. The contention seemed to be that clinics supply facility and administrative services to doctors, while doctors supply treatments to patients. I reject that submission for the reasons explained above. The evidence shows that fertility clinics are businesses established to provide fertility services, albeit that the medical services must be provided by doctors contracted to the clinic.

109 It is apparent that treatment cycles are a measure of the quantity of services supplied by a clinic. It is therefore a relevant metric in the assessment of the competitive effects of the proposed acquisition. Further, as stated by Dr Williams in his report, cycles are likely to be a better measure of market share than revenue in a market, such as the present one, in which there are differentiated products. As discussed above, the evidence concerning revenue earned and treatment cycles performed across clinics suggests that there is a very wide divergence in revenue per cycle which no doubt reflects the different services offered per cycle and the different bases of charging (such as bulk billing).

110 Mr Houston expressed the view that the degree of excess capacity of rival firms determines the elasticity of supply in a market and is likely to impose an important competitive constraint on the merged firm. In Mr Houston's view, the capacity to supply fertility services is most likely best reflected by the number of clinics operated and the number of specialists employed by each competitor. Firms with a larger number of clinics and specialists are more likely to be able quickly to adjust their operating processes to expand output without significantly raising costs, thereby imposing a competitive constraint on rivals. I accept that capacity, measured by number of clinics and number of doctors contracted at the clinics, is a relevant factor in the

assessment of the competitiveness of the market. On that measure, Virtus is already the largest supplier across Australia (with 42 clinics and 120 doctors), while Adora is relatively small (with four clinics and 11 doctors). Monash IVF has 25 clinics, Genea has 12 and City Fertility has eight. However, the fact that Adora supplies a very large number of treatment cycles in proportion to its clinic numbers also indicates that, as a measure of market share and competitive constraint, clinic and doctor numbers are likely to have their limitations. Information is also required as to the proportion of time that each doctor makes available to a given clinic, as doctors may maintain a practice at public hospitals or in other spheres.

111 On the evidence adduced on this application, I consider that the ACCC has an arguable case that the Adora Acquisition will give rise to a competitively significant increase in market concentration, which is usually associated with a lessening of competition.

Barriers to entry

112 In its concise statement, the ACCC alleges that barriers to entry or expansion to the fertility services markets are significant, with new entrants facing:

(a) the need to build an established reputation and evidence of success;

(b) significant establishment costs, including:

(i) the establishment of clinical facilities, including the establishment of laboratories; and

(ii) marketing costs needed to establish a presence in an industry which is largely driven by word-of-mouth recommendations;

(c) onerous regulatory requirements that differ state-to-state;

(d) the need to attract qualified specialists, embryologists and other clinical staff;

(e) prevalent restraint of trade clauses preventing fertility specialists from establishing a practice (sometimes within a certain geographical boundary from their previous practice) within specified time periods, and competing fertility clinics with a track record of bringing proceedings to enforce those restraint of trade clauses; and

(f) a time-lag before operations become profitable, due to the need to build economies of scale, especially in the lower margin low-cost market.

113 The evidence adduced on the application supports a conclusion that each of the above factors is a necessary business requirement for the provision of fertility services. However, a contestable issue is whether those factors, in aggregate, create a substantial barrier to entry or

expansion in the fertility services markets. The evidence adduced by the ACCC on this application in support of its contentions on barriers to entry cannot be described as strong. The ACCC's contention is apparently supported by views expressed by market participants, and a preliminary statement from one market participant was adduced in evidence. While the statement confirms that the above factors are necessary to provide fertility services, the statement does not provide sufficient information to assess the extent of the barrier represented by those factors. The ACCC also relied on a statement contained in a slidepack presentation given by Virtus at the "UBS Healthcare Conference" in June 2014. The slidepack contains, as a bullet point on a slide headed "Virtus' competitive advantage", the assertion "high barriers to entry". Mr Uthmeyer also gave evidence that an article in Money Magazine reported that Virtus and Monash together spent close to $9m on marketing in 2016. In my view, that evidence has limited probative value.

114 The respondents submitted that the history of new entry to the fertility services market in recent years demonstrates that there are no significant barriers to entry. Mr Prior gave evidence that fertility specialists can and do leave clinics to start new fertility clinics and in so doing take their established reputation within the community with them, citing the following examples:

(a) Life Fertility Clinic in Brisbane was established by Dr Glenn Sterling after leaving City Fertility in 2003;

(b) No.1 Fertility in Melbourne was established by Dr Lynn Burmeister after leaving Monash IVF in 2017;

(c) Newlife IVF in Melbourne was established after six doctors, led by Dr Nicole Hope, left Monash IVF in 2019;

(d) Connect IVF in Sydney was established by Dr Julie Lukic, Dr Susan George and Brendan Ayres after they left Adora (and Dr Julie Lukic was previously at Monash IVF);

(e) Demeter Fertility in Sydney was established by Dr David Knight after he left Virtus in 2017; and

(f) a new clinic has been announced by Dr Anthony Lighten in Sydney, which will begin operating in August 2022 (Dr Lighten is currently employed by City Fertility Centre).

115 Mr Prior also gave evidence that, in his experience, capital costs in setting up a new clinic can be managed by accessing one of numerous available financing options. Mr Prior deposed that

there are numerous equipment suppliers from whom fertility specialists can acquire requisite laboratory and theatre equipment to set up a new clinic.

116 The evidence also indicates that, while it was previously common for clinics to impose contractual restraints of trade on doctors who depart a clinic, such restraints have been dropped in recent times.

117 It is not possible to form any solid view, based on the evidence adduced on this application, concerning the significance of barriers to entry to the fertility services market. The evidence given by Mr Prior would need to be tested. It seems likely that the success of a fertility services clinic will be heavily dependent on the availability of fertility specialists and their professional reputation, which in turn is likely to depend on the quantity of such specialists being trained and the freedom of specialists to move between clinics and set up new clinics. At this stage, the ACCC's evidence on barriers to entry is undeveloped and is not strong.

Product differentiation and brand reputation

118 There are likely to be a number of other factors that bear upon any assessment of the competitiveness of the fertility services markets and the effect of the acquisition on competition. One of those factors is likely to be the importance of brand reputation enjoyed by clinics, and how readily and at what cost a reputation can be established. In that respect, the evidence did not disclose a breakdown of the valuation of tangible and intangible assets of Adora that was implicit in the purchase price of $45 million, and the implicit value of goodwill (which reflects, in part, reputation and customer relationships).

119 Another factor that is likely to be important, which is also central to product market definition as discussed above, is product differentiation. The evidence adduced on this application shows that some of the fertility services providers have established dedicated clinics to offer low cost or "affordable" fertility services. In his affidavit, Dr Illingworth emphasised that Virtus was an initiator of such services through the establishment of TFC. He explained that TFC's affordable programmes provide a limited range of fertility services for a limited subset of patients with good health who do not have a complicated fertility history. He deposed that affordable IVF clinics generally make use of general practitioners and nurses to deliver treatment and patients typically have less direct interaction with the fertility specialist. Dr Illingworth also deposed that any existing clinic group that offers full service treatment could expand to offer affordable services if there was a market opportunity.

120 Again, it is not possible to form any solid view, based on the evidence adduced on this application, concerning the importance of brand reputation and product differentiation to competition in the fertility services market. The evidence shows that each of Virtus and Adora offer low cost or affordable fertility services in Brisbane and Melbourne, and combined they represent a very large share of treatment cycles in those geographic markets. In my view, the ACCC may establish at trial that Adora is an effective and vigorous competitor in those geographic markets offering low cost differentiated services, and that the acquisition would have a significant effect on competition by removing Adora as an independent competitor.

Conclusion on prima facie case

121 Having regard to the matters set out above, I am satisfied that the ACCC has shown a prima facie case that the acquisition of Adora by IVF Finance would be likely to have the effect of substantially lessening competition in contravention of s 50.

Balance of convenience

Overview

122 On the balance of convenience, the Court must consider whether the inconvenience or injury that the ACCC (which represents the public interest in the maintenance of effective competition in Australian markets) would be likely to suffer if an injunction were refused outweighs or is outweighed by the inconvenience or injury that the respondent would suffer if an injunction were granted. In the present case, in which the respondents have offered an undertaking in lieu of the grant of an injunction, the potential injury to the public interest if an injunction were refused must be assessed in light of the undertaking and whether the undertaking would remove or reduce the risk of such injury.

123 In assessing the balance of convenience, it is necessary to consider the likely duration of any injunction. The ACCC informed the Court that it could be ready for a trial of the proceeding in February 2022. I consider that to be a reasonable period for the parties to prepare the case for trial on an expedited basis in circumstances where the ACCC was only notified of the transaction in late August 2021 and where the respondents requested the ACCC not to undertake market enquiries until late September 2021. Accordingly, it is likely that any interlocutory injunction would remain in effect until mid-2022.

ACCC submissions

124 The ACCC submitted that the balance of convenience favours the grant of an interlocutory injunction for the following reasons.

125 First, if an interlocutory injunction is not granted, substantial and irreversible harm will arise to competition in the low cost markets, or alternatively, the fertility service markets, in each of Brisbane and Melbourne for an indeterminate but significant period.

126 Second, the undertakings proffered by Virtus and IVF Finance will not overcome the harmful competitive effects. The ACCC submitted that the effectiveness of an undertaking depends on the enforceability of its terms (the ACCC observing that, in order to establish a civil contempt for breach, each element must be proved beyond reasonable doubt: *Witham v Holloway* (1995) 183 CLR 525 (***Holloway***) at 534). The ACCC pointed to a number of difficulties associated with the proposed undertaking, including misalignment of incentives, asymmetric information, and incompleteness, matters which were addressed by Dr King. Further, there is inevitably risk to a business and its competitive position when a "hold separate" undertaking is in place, as companies that are "independently managed" can lose significant market share or capability, making ultimate divestment that seeks to restore competitive outcomes impossible. In this regard, the ACCC relied on the evidence of Dr King to the effect that delaying an acquisition is more likely to maintain competitive tensions in the relevant markets and ensure the vendor business remains viable as a separate competitive entity.

127 Third, an order for divestiture at the conclusion of a trial would not be an effective remedy to restore competition given the likely harm to the competitive position of Adora while held by IVF Finance.

128 Fourth, the respondents are unlikely to suffer any significant prejudice or inconvenience that would outweigh the harm caused if the interlocutory injunction is not granted. In this respect, the ACCC argued that:

(a) There is no commercial urgency to complete the acquisition – on 31 August 2021, Virtus notified the ACCC that there was no agreed completion date and the transaction was likely to be completed either on 1 November or 1 December 2021.

(b) There is no evidence that either party intends to terminate the Adora Acquisition, or that the parties will not defer completion until after the disposition of the proceeding

(noting that completion had already been deferred by the interim injunction granted on 14 October 2021).

(c) The evidence does not show any greater risk of staff attrition by reason of any "uncertainty" caused by a deferral of completion until trial compared with a "hold separate" arrangement pending a potential divestiture of the Adora business.

(d) Adora, like other fertility clinics, is subject to various legislative and regulatory requirements that mean that it will continue to be operated safely.

(e) Virtus courted the risk of interlocutory relief – cognisant of Healius' key consideration of avoiding the commercial risk of a condition precedent of ACCC approval, Virtus elected to assume the risk of regulatory action by offering a share sale agreement with no regulatory approval conditions precedent.

129 For these reasons, the ACCC submitted that any potential inconvenience or prejudice to Virtus caused by the grant of the interlocutory injunction is outweighed by the significant adverse consequences to the public interest if the transaction proceeds and the ACCC's claim is established at trial.

IVF Finance submissions

130 IVF Finance submitted that it and Adora would suffer significant irremediable prejudice if it is restrained from completing the Adora Acquisition as follows.

(a) First, there is a risk that specialists and other staff could choose to leave Adora, including by setting up their own practice or by joining Virtus' competitors.

(b) Second, there is a risk that the Adora business will diminish or fail, which Virtus submitted is particularly acute in circumstances where Healius considers the Adora business to be "non-core". Virtus submitted that if the injunction is granted and the Share Sale Agreement is not terminated, for the duration of the restraint Healius would be an unwilling operator of the business, noting that cl 4.1 of the Share Sale Agreement only requires the business to be conducted in the ordinary course. In this respect, Virtus referred to the evidence of Mr Ellis that Healius will operate the Adora business such that no material investment in the Adora business will occur, without any additional expenditure to grow the business, and with no recruitment of new staff, fertility specialists and fertility GPs. Alternatively, if the injunction were granted and Healius were to terminate the Share Sale Agreement following the issuance of a notice to

complete, the ACCC would in effect succeed in obtaining final relief without a final hearing.

(c) Third, Adora would face immediate and significant clinical and other risks. In this respect, IVF Finance referred to the evidence of Ms Munnings to the effect that Adora requires Virtus' assistance to meet work heath and safety requirements; for appropriate COVID management; to comply with public health orders; to maintain its accreditation; for egg and embryo care; and for procurement and supply management.

(d) Fourth, IVF Finance would suffer a significant financial and loss of bargain risk. Pursuant to cl 6.3 of the Share Sale Agreement, if completion does not occur by the designated date, Healius could issue a notice to complete within five business days, failing which Healius would be entitled, without limitation to any other rights it may have, to terminate by written notice to Virtus. IVF Finance referred to the evidence of Ms Munnings to the effect that there has been no indication from Healius that it intends to do anything other than insist upon its strict legal rights, and that Healius has historically required strict compliance with timelines during the sale process. IVF Finance submitted that if the transaction were terminated, Healius might sue IVF Finance and Virtus for breach of contract, with the potential consequence of significant financial loss. Given that the ACCC has not, and is not required to provide an undertaking as to damages as a condition of interim relief, those losses are liable to be borne by IVF Finance and Virtus alone.

131 IVF Finance submitted that its proposed "hold separate" undertaking would preserve the status quo pending the determination of the ACCC's claim by ensuring that the fertility clinic business continues to be operated independently of IVF Finance and Virtus, such that there could be no anti-competitive effects after acquisition. Further, IVF Finance submitted that both it and Virtus have made it clear that the hold separate undertaking is proffered to the Court on the basis that there would be an early final hearing of the ACCC's claim, such that any anticompetitive effects (which are not accepted) would be for a very limited period of time. Finally, the hold separate undertaking would ensure that the Adora fertility clinic business could be divested if the Court ultimately determined that the transaction contravened s 50(1) of the Act. If the Court were to find that a divestiture of any part of the Adora business was required, in view of the material purchase price paid by Virtus it would be important for Virtus' financial position that Adora retain its value for any required divestiture sale process.

Healius submissions

132 Healius supported the submissions advanced by IVF Finance and advanced the following additional submissions.

133 Healius submitted that there are three groups that would be affected adversely if the Court were to order an interlocutory injunction:

(a) the fertility specialists and general practitioners who practise within the four Adora clinics and who may decide to cease practising at those clinics given the uncertainty that will be created if the proposed sale is delayed;

(b) the patients of these fertility specialists and general practitioners, whose procedures may be delayed if staff shortages or the loss of fertility specialists and general practitioners impacts negatively on the volume of procedures that can be performed at each of the clinics; and

(c) Healius and its shareholders, who would be prevented from realising the benefits of the sale process, and the capital that will be released, if the proposed sale is delayed.

134 Healius submitted that the most likely scenario if an injunction is ordered is that, pending the determination of the ACCC's case by the Court, Healius will operate the Adora business so that no material investment occurs, with the minimum expenditure required to operate safely and consistently with all applicable regulatory requirements and without the recruitment of new staff, fertility specialists or fertility general practitioners. These constraints, and the uncertainty resulting from the injunction, will likely lead to higher levels of attrition of specialist staff, and a follow-on impact on the provision of timely patient care and services, as the availability of appointments for procedures will be diminished if staff shortages arise. This will occur in circumstances where there is likely to be an upshot in demand in Sydney and Melbourne as the public health restrictions are wound back.

135 Healius submitted that the ACCC's interests can be adequately protected by the availability of divestiture as a remedy in the event it is successful on a final basis, which remedy is supported in the interim by the undertaking from Virtus and IVF Fertility to hold the Adora business separately until the substance of the dispute is resolved.

Consideration of the balance of convenience

136 If an injunction were refused and an undertaking accepted by the Court in lieu, in my view there would likely be some harm to the public interest if the ACCC were ultimately to be successful at trial. In that regard, the following matters are significant.

137 First, the purpose of the prohibitions in Part IV of the Act, including s 50, is to protect the public interest by enhancing the welfare of Australians through the promotion of competition. That is a matter of large importance and the Court should be vigilant in preventing conduct that carries the risk of contravening those prohibitions. As stated by Lockhart J in *ICI*, Parts IV and V of the Act involve matters of high public policy – they relate to practices and conduct that legislatures throughout the world in different forms and to different degrees, have decided are contrary to the public interest. Section 80 is essentially a public interest provision. In seeking interlocutory relief, the ACCC is protecting the public interest in ensuring compliance with the requirements of s 50.

138 Second, in comparison to an injunction, a "hold separate" undertaking to the Court is a very imperfect instrument. An injunction will have a clear and certain effect, maintaining the status quo by keeping Adora under its current ownership and control by Healius. In comparison, the undertakings proffered to the Court would have uncertain effects and consequences and raise problems of enforcement. By necessity, the terms of the proffered undertakings, in both short and long forms, are written in broad and general terms.

139 The central undertakings proffered are that each of Virtus and IVF Finance will:

(a) operate the Adora Fertility Clinic Business separately and independently from Virtus' existing operations;

(b) hold its interest in the Adora Fertility Clinic Business separately from Virtus' other assets;

(c) appoint an Independent Manager with responsibility for the day-to-day competitive operations and decision making of the Adora Fertility Clinic Business;

(d) ensure that Virtus is not involved in the day-to-day competitive operations and decision-making of the Adora Fertility Clinic Business;

(e) ensure that the Adora Fertility Clinic Business continues to be an viable, effective and independent business; and

(f) not access, use or disclose any competitively sensitive confidential information relating to the Adora Fertility Clinic Business

140 Those undertakings are subject to a number of carve outs, including the provision of services to Adora of the kind set out in Sch 1, cl 4 of the Amended and Restated Transitional Services Agreement and the provision of services to ensure compliance with quality and accreditation obligations, protect the health and safety of patients, specialists and staff, or avoid negative impacts to patient, egg and/or embryo care.

141 Those core undertakings beg many questions. First, the carve outs are broad, permitting Virtus and IVF Finance to provide payroll, accounting and IT services to Adora and to provide any other service required for the purpose of compliance with quality and accreditation obligations. The carve outs suggest significant integration and involvement between the businesses during the period of the undertaking. Second, the appointment of an "Independent Manager" leaves unanswered the issue of that person's accountability for decisions made, and whether that person is accountable to anyone. Third, the requirement that Virtus is not involved in the day-to-day competitive operations and decision-making of Adora begs the question of who will define what is and what is not a "day-to-day competitive operation". It is not a criterion that has a clear meaning that could be enforced by the Court. Fourth, the requirement that Virtus ensure that Adora continues to be a viable, effective and independent business is largely devoid of practical content and again does not have a clear meaning that could be enforced by the Court. Fifth, the requirement that Virtus not access, use or disclose any competitively sensitive confidential information relating to the Adora business begs the question of who will define what is and what is not "competitively sensitive confidential information".

142 As the ACCC submitted, an injunction must be expressed in clear and unambiguous terms, leaving no room for confusion: *ICI* at 259. The same considerations apply to an undertaking offered in lieu of an injunction: *Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc* [1999] FCA 18; 161 ALR 79 at [17]-[18] per French J. A breach of an undertaking is, like breach of an injunction, a contempt of court: *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483 (***Morgan***) at 496 per Windeyer J. To establish civil contempt for breach of an order or undertaking, each element must be proved beyond reasonable doubt (*Holloway* at 534), and a finding of contempt will not be made where an undertaking is ambiguous, unclear or lacks precision: *Morgan* at 506 per Windeyer J and 516 per Owen J.

143 In his report, Dr King expressed his opinion, as an economist and former Commissioner of the ACCC, on the different effects of an injunction that maintained structural separation compared with a "hold separate" undertaking on the target business and competition. I am not persuaded that the opinions expressed by Dr King satisfy the requirements for expert opinion evidence under the *Evidence Act 1995* (Cth). I therefore receive Dr King's report as submissions on behalf of the ACCC. Nevertheless, I consider that many of the considerations raised by Dr King have force, particularly the submissions that:

(a) in comparison to a hold separate undertaking, an injunction restraining the acquisition is more likely to maintain competitive tensions in the relevant market and ensure the vendor business remains viable as a separate competitive entity;

(b) to be effective, a "hold separate" undertaking generally requires on-going compliance monitoring by an independent outside party; and

(c) the Court may have inadequate information about the businesses concerned to determine whether a "hold separate" undertaking will be effective in practice.

144 Third, from the perspective of the protection of the public interest, I do not accept the respondents' submission that an order for divestiture post-acquisition under s 81 is an equivalent remedy to an order for an injunction pre-acquisition under s 80. By their very nature, the two forms of remedy apply in different circumstances. At the risk of stating the obvious, an injunction applies pre-acquisition and prevents the acquisition occurring. It is therefore the most effective remedy to prevent anti-competitive harm from an acquisition that would otherwise contravene s 50. An order for divestiture applies post-acquisition. It is less effective in preventing anti-competitive harm for two reasons. First, the completion of the acquisition, even on a temporary basis, may harm competition because the acquiring company may gain access to information or other competitive advantages through its ownership of the target business and the target company may be weakened as an independent competitor in that period. Second, the divestiture of the target business under a process determined by court orders will not be a market process and has real potential to weaken further the competitive position of the target company.

145 If an injunction were granted, in my view there may be some inconvenience or injury to the respondents assuming the ACCC were to be unsuccessful in the proceeding. However, to the extent inconvenience or injury arises, in my view it is largely self-inflicted and was avoidable and, for that reason, I give it less weight.

146 It should be noted that the consequences of the grant of an injunction on the Share Sale Agreement are unknown. As the conditions precedent to the Share Sale Agreement have been fulfilled, I assume that Healius has a contractual right to require completion. The injunction would prevent completion occurring. The parties may elect to extend the date for completion until after the determination of this Court proceeding. Alternatively, Healius may seek to terminate the Share Sale Agreement on the basis of non-performance (although legal issues may arise as to the parties' rights and obligations in circumstances where performance has been restrained by an injunction granted under s 80 on the basis of a potential contravention of s 50). Although it was in a position to do so, Healius did not provide any clear statement to the Court as to its intended action if an injunction were to be granted. In those circumstances, I place no weight on Ms Munnings' opinion that Healius is likely to require completion.

147 It can be accepted, as submitted by the respondents, that an injunction would interfere with the contractual rights of the respondents with respect to the sale and acquisition of Adora. However, it is apparent that the parties courted the risk of a proceeding, such as the present one, being commenced. Although there are well established legal and administrative procedures that enable commercial parties to obtain a high measure of certainty with respect to mergers and acquisitions under Australia's competition law, the parties made a conscious choice not to utilise those procedures. They did not consult with the ACCC during the sale process, and elected to enter into a sale agreement that was not conditional on ACCC approval. The evidence shows that that was a risk they deliberately took. While there is a public interest in the free operation of markets for the sale and acquisition of shares and assets, that public interest is subject to a higher public interest in preventing sales and acquisitions that substantially lessen competition. If an injunction were to be granted, the respondents now have the choice of either delaying completion until the proceeding is finalised or terminating the Share Sale Agreement. If the ACCC were to be unsuccessful in this proceeding, delay causes commercial inconvenience and termination may result in some loss. However, in both cases, the inconvenience or loss could have been mitigated to a considerable extent if the parties had taken the step of consulting with the ACCC before entering into an unconditional agreement.

148 In relation to the effect of an injunction on the Adora business, I place little weight on Mr Ellis' evidence to the effect that, for such period in which Healius continues to hold Adora, Healius will likely operate the Adora business such that no material investment in the Adora business will occur, the business will be operated so that it expends the minimum required to operate it safely and consistent with all applicable regulatory requirements, and no new staff, fertility

specialists or fertility GPs would be recruited. In my view, Healius would have a strong commercial incentive to continue to manage Adora in a manner that maximises its value in any future sale, whether to Virtus (assuming the ACCC were to be unsuccessful in the proceeding) or to another company. I do not accept IVF Finance's submission that Adora would face immediate and significant clinical and other risks. For the reasons given earlier, I also do not accept Ms Munning's evidence to the effect that Adora requires Virtus' assistance to meet work heath and safety requirements, for appropriate COVID management, to comply with public health orders, to maintain its accreditation, for egg and embryo care and for procurement and supply management. While Virtus may have agreed to provide such services to Adora under the Transitional Services Agreement entered into between the respondents as part of the sale transaction, there is no basis in the evidence to conclude that those services cannot be provided to Adora by Healius. Certainly, no evidence was given by Mr Ellis of Healius to that effect.

149 Mr Ellis deposed that, if completion were to be delayed for a few months, he believed that significant detriment would be caused to Adora and its patients because of the resulting uncertainty. In that regard, Mr Ellis expressed the view that uncertainty surrounding the transaction is likely to mean that Adora experiences high levels of attrition with specialist staff, as well as fertility specialists and fertility GPs, that are critical to its operations and will be unable to attract new staff, fertility specialists and fertility GPs. Mr Ellis deposed that that would negatively impact Adora's provision of timely services to patients, which in turn would negatively impact Adora's ability to provide an attractive service to patients and compete in the market for the provision of fertility services.

150 I accept that the grant of an injunction may have a negative impact on Adora's business brought about because of uncertainty over its future ownership. However, even if an injunction were not granted (and an undertaking accepted in lieu), these proceedings will create uncertainty over Adora's future ownership. I am not persuaded that the uncertainty generated by the grant of an injunction is any greater than the uncertainty generated by the proceeding more generally. Thus, this factor does not greatly weigh in the balance. I reiterate that the uncertainty that now arises is largely self-inflicted by the respondents' choice not to utilise the available legal and administrative procedures to obtain ACCC approval for the acquisition (or, at the least, the ACCC's view).

151 As noted earlier, I take into account the fact that the ACCC is not required to give an undertaking as to damages. However, I give that factor limited weight in circumstances where

it is not at all clear that loss or damage will arise from the grant of an injunction and, even if it were to arise, it is loss and damage that could have been substantially mitigated by the parties through earlier engagement with the ACCC.

152 Weighing all of the considerations referred to above, in my view the balance of convenience favours the grant of an interlocutory injunction. There is a very substantial public interest in preventing an acquisition that presents a real risk of substantially lessening competition. The proffered undertakings are an imperfect solution to that risk. While an injunction presents some inconvenience and risk of loss to the respondents, I consider that their private interests weigh less than the public interest and should be further discounted in circumstances where the inconvenience and risk were largely avoidable. There is also some risk to the Adora business, but I am not persuaded that the risk generated by the grant of an injunction is any greater than the risk generated by the proceeding more generally.

Conclusion

153 In conclusion, I am persuaded that there is a prima facie case that the proposed acquisition of Adora by IVF Finance would be likely to have the effect of substantially lessening competition in breach of s 50 of the Act. I consider that the balance of convenience favours the grant of an injunction to prevent completion of the acquisition pending the final determination of this proceeding.

154 As noted at the commencement of these reasons, the concise statement alleges that the acquisition of Adora would contravene s 50, and makes no allegation that the acquisition of Darlinghurst, Greensborough and Craigie would contravene s 50. In the course of argument, the respondents did not distinguish between Adora on the one hand and Darlinghurst, Greensborough and Craigie on the other, and did not submit that the interlocutory injunction should exclude Darlinghurst, Greensborough and Craigie. That is likely to be because the respondents do not contemplate a sale of Darlinghurst, Greensborough and Craigie separately to a sale of Adora (the Adora business is co-located with the three day hospitals and the Share Sale Agreement provides for the sale of the four companies). In those circumstances, I will make the order sought by the ACCC, restraining the acquisition of Adora, Darlinghurst, Greensborough and Craigie by IVF Finance, but the respondents will have liberty to apply to vary the order in so far as it extends to Darlinghurst, Greensborough and Craigie if need be.

155 These reasons contain information that the parties consider is confidential. The reasons will not be released to the public until the parties have had an opportunity to make any application for redaction of those parts that they consider to be confidential.

156 I will also direct the parties to submit proposed timetabling orders for the trial of the proceeding on an expedited basis.

I certify that the preceding one hundred and fifty-six (156) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Bryan.

Associate:

Dated: 25 October 2021