

Article Information

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Competition Law: Could your sale or acquisition attract ACCC scrutiny?

The Australian Competition and Consumer Commission has recently exercised its competition oversight powers to intervene in proposed acquisitions by one of Australia's largest alcoholic drinks retailers.

This is an important reminder for those entering into transactions for sales, mergers or acquisitions in the hospitality and retail liquor sector to consider whether your transaction could raise competition concerns.

Endeavour's proposed acquisitions

Endeavour Group Limited is a major Australian alcoholic drinks retailer and hotel operator. Its portfolio of brands includes Dan Murphy's, BWS and Cellarmasters.

In October 2022, Endeavour entered into transactions to acquire four South Australian hotels - the Beach Hotel, the Crown Inn, the Tower Hotel and the Whitehorse Inn - and the bottle shops attached to the hotels, which were operated under the Cellarbrations brand.

The ACCC intervenes

The acquisitions were subject to approval by the ACCC, the national competition regulator. The ACCC decided to conduct a public review of the proposed acquisitions.

During the review process, Endeavour withdrew its proposed acquisitions of the Crown Inn and the Whitehorse Inn. This left the ACCC to decide whether to approve the remaining two transactions.

The Beach Hotel was the ACCC's main concern.

- Endeavour had an existing bottle shop (a BWS store in the same suburb), which was the closest competitor to the Beach Hotel bottle shop. If the acquisition went ahead, Endeavour would own two of the six bottle shops within a 5 kilometre radius of the Beach Hotel.
- The ACCC was concerned that, if the acquisition went ahead, Endeavour "*would not be sufficiently constrained by other competitors in the local area*", which could disadvantage consumers by lessening price competition and reducing consumers' choice of packaged liquor products.
- To resolve this concern, Endeavour offered an undertaking to the ACCC. Endeavour agreed to divest its existing BWS store in Seaford to a purchaser approved by the ACCC to ensure there was a viable independent competitor for the local market.

As a result of the divestiture undertaking, the ACCC ultimately decided not to oppose Endeavour's acquisition of the Beach Hotel.

In relation to the Tower Hotel, the ACCC concluded that "*the proposed acquisition would be unlikely to substantially lessen competition*" in any of the relevant markets and did not oppose the acquisition.

- Following the acquisition, Endeavour would own 8 of 30 bottle shops within a 5 kilometre radius of the Tower Hotel - while this was an increase in market concentration, the ACCC considered that it was only a minor increase.
- Post acquisition, consumers would continue to have access to a range of alternative price and value offerings from competitors.

Key takeaways

- Keep in mind that the ACCC has the power to investigate any acquisitions that have the potential to raise competition concerns - this could delay or ultimately prevent your proposed transaction. The ACCC can apply to the Federal Court to stop an acquisition if it thinks it is likely to substantially lessen competition.
- The types of acquisitions which can be investigated by the ACCC are broad - it is not limited to acquisitions of companies carrying on a business. It includes acquisitions of shares or controlling interests in companies, intellectual property such as trademarks, and plant and equipment.
- When considering whether a transaction could raise competition concerns, ask yourself whether the proposed acquisition or sale would be likely to lead to:
 - a **reduced number of competitors** in the market, particularly in the nearby geographic area, for the relevant goods and services;
 - a **reduced range of alternative offerings** of that good or service - such as price points, products lines or brands, and service offerings - available to consumers in the area;
 - **less price competition**, which typically pushes prices down or encourages different promotional offers, by loss of local competition or weakening of competitors' brand awareness or scale.