

MinterEllison

# Remedies in Vertical Mergers in the Australian Context

Key considerations illustrated by a case study

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Break Out Session 7: Remedies in Vertical Mergers  
ICN Merger Workshop  
7 November 2018

## Australian regulatory context

- ❖ Australian Competition & Consumer Commission (“**ACCC**”)
- ❖ Competition and Consumer Act 2010 (Cth) (“**CCA**”)
- ❖ Section 87B CCA – enforcement of undertakings



### **s. 87B**

**(1)** The Commission may accept a written undertaking by a person for the purposes of this section in connection with a matter in relation to which the Commission has a power or function under the CCA

**(1A)** The Commission may accept a written undertaking by a person for the purposes of this section in connection with a merger authorisation

**(2)** The person may withdraw or vary the undertaking at any time, but only with the consent of the Commission

- ❖ Use of s. 87B undertakings to address competition concerns in vertical mergers

## Theories of harm – foreclosure

The key theory of harm in non-horizontal mergers is the risk of anti-competitive foreclosure, including through:

- ❖ Charging higher prices for production inputs of downstream rivals;
- ❖ Limiting or denying access (including through a reduction in quality of goods or services supplied) by downstream non-integrated rivals to important inputs or services;
- ❖ Limiting or denying access by upstream non-integrated rivals to a sufficient customer base;
- ❖ Raising the cost of access by upstream non-integrated rivals to a sufficient customer base; or
- ❖ The merged firm, through its supply of an input or distribution services, obtaining competitively sensitive information on rivals.

To be detrimental to competition foreclosure need not remove rivals from the market. It is enough that rivals incur increased costs for key inputs or are otherwise discouraged from further expansion or entry.

## Use of enforceable undertakings by the ACCC

The ACCC assesses the use of s87B undertakings on the merits and circumstances of a proposed merger to address any potential harm identified.

Before accepting an undertaking, the ACCC will need to be satisfied that the proposed undertaking:

- ❖ Is customised to the merger, any competition concerns raised, and the industry or industries involved;
- ❖ Imposes clear obligations on the relevant party, including delineation of assets/business covered by the remedy, timeframes, and consequences of non-performance;
- ❖ Is capable of being performed by the undertaking party and the remedy cannot be frustrated by 3<sup>rd</sup> parties (e.g. minority shareholders);
- ❖ Is capable of preventing a substantial lessening of competition as a result of the merger; and
- ❖ For mergers involving firms operating in jurisdictions other than Australia, can be enforced by the ACCC and coordinated with any other relevant jurisdictions.

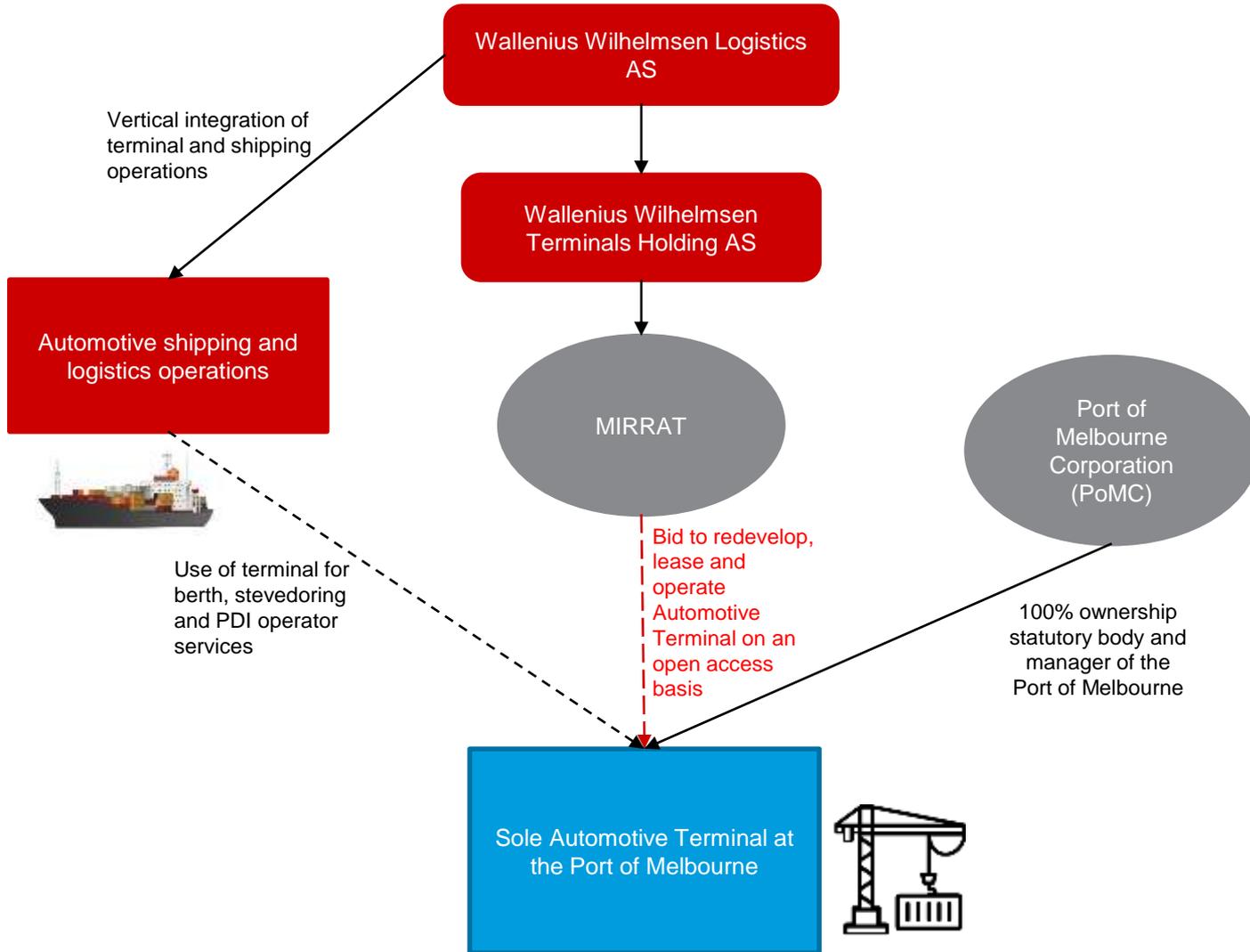


# Case study

Melbourne International RoRo & Auto Terminal Pty Ltd (MIRRAT)

Undertaking given to the ACCC under s. 87B on 27 March 2014

# MIRRAT proposed acquisition of Automotive Terminal Lease





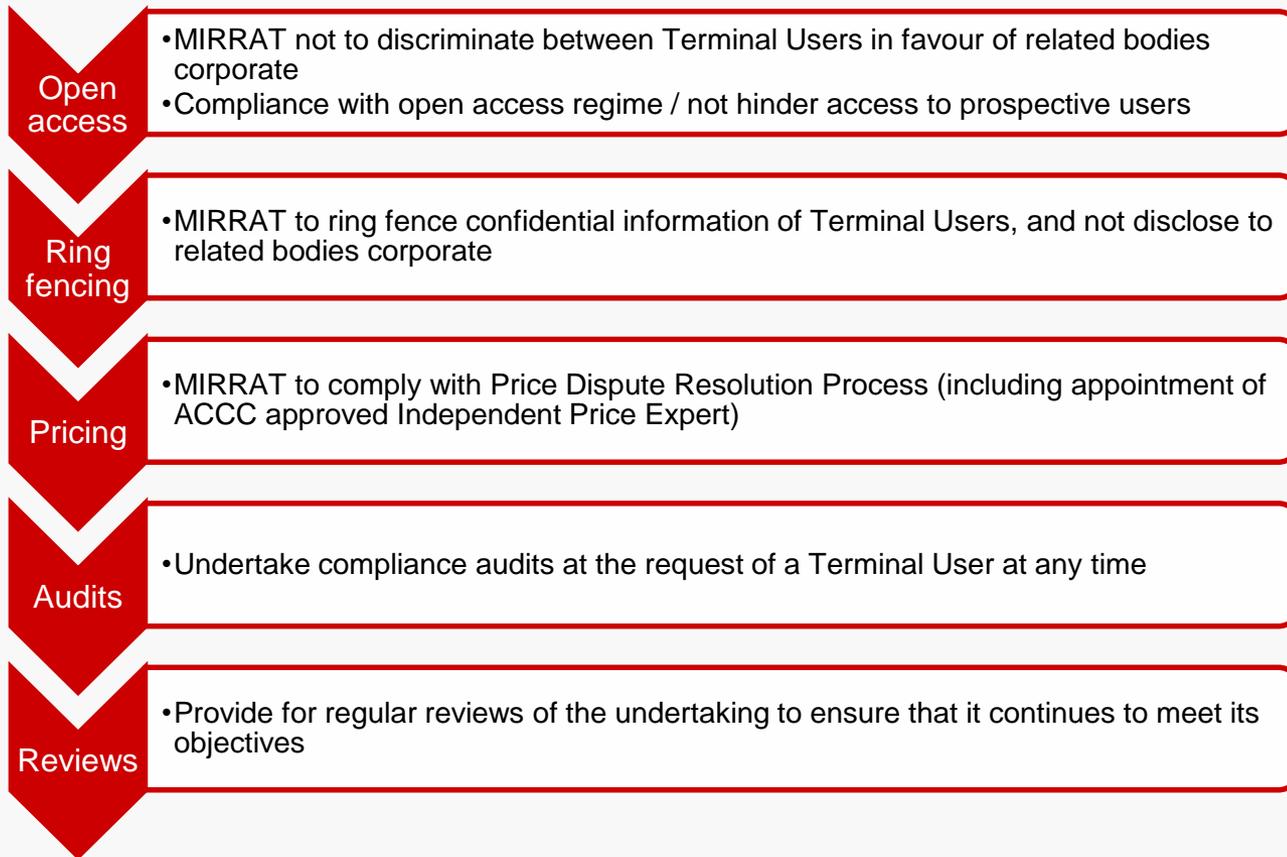
## **ACCC's concerns with MIRRAT merger**

In its Public Competition Assessment, the ACCC expressed a number of concerns with the MIRRAT merger in the absence of an undertaking:

- ❖ MIRRAT would have the ability and incentive to discriminate against rival automotive shipping lines and other terminal users, including through shipping schedules, berthing allocations and the provision of ancillary services;
- ❖ MIRRAT's parent company is a full service global automotive shipping and logistics provider which provides services into and out of the Port of Melbourne;
- ❖ The potential for MIRRAT to vertically integrate in the provision of terminal services (such as stevedoring or PDI operator services) in the future;
- ❖ The potential for MIRRAT to access commercially sensitive information relating to its competitors;
- ❖ MIRRAT having the ability and incentive to foreclose the entry and expansion of its non-vertically integrated rivals by implementing a vertical price squeeze.

## MIRRAT – the undertaking remedy

The ACCC accepted a s.87B undertaking which addressed competition concerns in the following ways:



## **MIRRAT – the undertaking remedy**

The undertaking was effective in preventing foreclosure and other anti-competitive conduct by:

- ❖ Ensuring the terminal is managed on a non-discriminatory basis;
- ❖ Preventing MIRRAT from limiting or denying access - ensuring open access to all automotive shipping lines, stevedores, mooring service providers, PDI service providers, and automotive terminal end-users;
- ❖ Imposing oversight on price rises - implementing tariffs reflective of the costs and developing and operating the terminal, subject to independent regulatory price oversight;
- ❖ Ring fencing sensitive information - implementing confidentiality agreements to protect commercially sensitive information of terminal users; and
- ❖ Ongoing prevention of identified harm – an operative undertaking throughout the 30 year lease term to ensure competition is maintained for the entire term.

## **MIRRAT undertaking – efficiencies**

The s.87B undertaking given by MIRRAT facilitated economical efficient outcomes while mitigating vertical foreclosure concerns by:

1. Allowed the redevelopment and continued use of the single automotive terminal – given the constraints on available land and other trade uses within the Port it was not an efficient use of scarce resources to have more than one automotive terminal;
2. Allowed parties (shipping lines) with strong economic incentives to vertically integrate to do so by investing in needed infrastructure in an adjacent part of the supply chain;
3. Preserved the competitive environment for contestable parts of the supply chain (eg automotive stevedoring; PDI services).

## Conclusion

In the vertical merger context, an effective undertaking:

- ❖ Remedies a likely contravention of competition laws, preventing anti-competitive detriment that would otherwise result from the merger;
- ❖ Enables efficiencies and benefits arising from the transaction to be realised;
- ❖ Provides a flexible alternative to regulator opposition to vertical integration;
- ❖ Fosters the development and maintenance of enduring and effective competitive constraints; and
- ❖ Contains an effective mechanism for the ongoing monitoring and compliance of the undertaking and the competitive environment post-merger.



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