FEDERAL COURT OF AUSTRALIA

Woodman Beenleigh Pty Ltd v Bunnings Group Limited (no adverse costs order) [2026] FCA 1231

File number(s):	NSD 1509 of 2025
Judgment of:	**BROMWICH J**
Date of judgment:	27 August 2026
Catchwords:	**COMPETITION** – application for a no adverse costs order (**NACO**) under s 82(3) of the *Competition and Consumer Act 2010* (Cth) – whether the Court is satisfied of the criteria in s 82(5) – interpretation of criteria under s 82(5) – application of criteria to the present proceeding – whether order should be made in exercise of discretion under s 82(4) – HELD: each criterion under s 82(5) satisfied – NACO made under s 82(4)
Legislation:	*Competition and Consumer Act 2010* (Cth) ss 4E, 46, 46(1), 80, 82(1), 82(3), 82(4), 82(5), 82(5)(a), 82(5)(b), 82(5)(c), 82(6), 82(7), Sch 2 (*Australian Consumer Law*) s 18 *Competition and Consumer Amendment (Misuse of Market Power) Act 2017* (Cth) *Competition and Consumer Legislation Amendment (Small Business Access to Justice) Bill 2017* (Cth) *Federal Court of Australia Act 1976* (Cth) s 31A *Treasury Laws Amendment (2018 Measures No. 5) Act 2019* (Cth) *Federal Court Rules 2011* (Cth) r 40.51 Explanatory Memorandum, Competition and Consumer Legislation Amendment (Small Business Access to Justice) Bill 2017 (Cth) *Judicial Review Act 1991* (Qld) s 49(2)
Cases cited:	*Anthony v Apple Inc* [2025] FCA 902 *Armitage v Parole Board Queensland (No 2)* [2023] QSC 236 *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46; 227 CLR 57 *Australian Competition and Consumer Commission v BlueScope Steel Limited (No 5)* [2022] FCA 1475 *Australian Competition and Consumer Commission v*

Pacific National Pty Limited (No 2) [2019] FCA 669

Boral Besser Masonry Ltd v Australian Competition and Consumer Commission [2003] HCA 5; 215 CLR 374

Croc's Franchising Pty Ltd v Alamdo Holdings Pty Ltd [2023] NSWCA 256

Epic Games Inc v Apple Inc [2025] FCA 900; 189 IPR 1

Epic Games Inc v Google LLC [2025] FCA 901

Hall v Jones (1942) 42 SR (NSW) 203

Hamilton v Meta Platforms, Inc (Leave to appeal stay and costs orders) [2024] FCA 1078

Hamilton v Meta Platforms, Inc. (Costs) [2023] FCA 1496

Houston v State of New South Wales [2020] FCA 501

Kuzmanovski v New South Wales Lotteries Corp [2010] FCA 876; 270 ALR 65

Northern Territory v Sangare [2019] HCA 25; 265 CLR 164

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; 194 CLR 355

Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd (1991) 25 NSWLR 541

Queensland Wire Industries v Broken Hill Proprietary Co Ltd (1989) 167 CLR 177

Re Queensland Co-operative Milling Association Ltd (1976) 25 FLR 169

Sellars v Adelaide Petroleum NL; Poseidon Ltd v Adelaid Petroleum NL [1994] HCA 4; 179 CLR 332

Spencer v The Commonwealth [2010] HCA 28; 241 CLR 118

SZTAL v Minister for Immigration and Border Protection [2017] HCA 34; 262 CLR 362

Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission [2003] FCFCA 193; 131 FCR 529

Division:	General Division
Registry:	New South Wales
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Number of paragraphs:	166
Date of hearing:	12 June 2026

Counsel for the Applicant:	Mr P Strickland and Ms E O'Connor-Jardine
Solicitor for the Applicant:	Resolve Litigation Lawyers
Counsel for the Respondent:	Mr G Rich SC and Mr T Rogan
Solicitor for the Respondent:	Herbert Smith Freehills Kramer

ORDERS

NSD 1509 of 2025

BETWEEN:	**WOODMAN BEENLEIGH PTY LTD (ACN 105 899 689)** Applicant
AND:	**BUNNINGS GROUP LIMITED (ACN 008 672 179)** Respondent

ORDER MADE BY: **BROMWICH J**

DATE OF ORDER: **27 AUGUST 2026**

THE COURT ORDERS THAT:

1. Pursuant to s 82(4) of the *Competition and Consumer Act 2010* (Cth), the applicant is not liable for the costs of the respondent in this proceeding, regardless of the outcome or likely outcome of the proceeding.
2. The respondent pay the costs of the applicant of and incidental to the interlocutory application dated 12 December 2025 and filed 15 December 2025.

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

REASONS FOR JUDGMENT

BROMWICH J:

Introduction

1 This proceeding was commenced on 27 August 2025, by an originating application and concise statement. By an interlocutory application, the applicant, **Woodman** Beenleigh Pty Ltd, applies under s 82(3) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) for a "no adverse costs order" (**NACO**). The respondent, **Bunnings** Group Limited, opposes the order being made.

2 If a NACO is made, Woodman will not be liable for any legal costs incurred by Bunnings regardless of the outcome of the proceeding. Woodman had foreshadowed the bringing of the NACO application in its concise statement. No concise statement in response has been filed by Bunnings, such that its position in relation to the case articulated in the concise statement is only apparent insofar as it is reflected in the evidence and submissions it has relied upon to oppose the NACO application.

3 Woodman is the owner of two Mitre 10 branded hardware stores, operated under licence from Mitre 10 Australia Pty Ltd. Woodman alleges that Bunnings has engaged or will engage in conduct that has, will have, or is likely to have the effect of substantially lessening competition in the market for the supply of hardware products to retail customers in and around the outer-Brisbane suburb of Jimboomba. That conduct and prospective conduct relates to Bunnings' proposed opening of a hardware store in in Jimboomba (**Bunnings Jimboomba**) adjacent to Woodman's existing Mitre 10 store. Woodman also alleges that Bunnings possesses a substantial degree of market power as an acquirer in the wholesale market in Australia for the supply of hardware products to hardware retailers. Woodman contends that Bunnings' past and future conduct relating to the opening of Bunnings Jimboomba is in contravention of the proscription against the misuse of market power in s 46 of the CCA, which prohibits a corporation which has a substantial degree of market power from engaging in conduct which has the effect or likely effect of substantially lessening competition in a relevant market.

4 In the concise statement, Woodman does not allege that Bunnings has also breached s 46 on the basis that its conduct has the purpose (as opposed to effect) of substantially lessening competition.

5 By its originating application, Woodman seeks a declaration that Bunnings has breached s 46 in the manner broadly outlined above, an injunction under s 80 of the CCA preventing it from progressing its plans to open Bunnings Jimboomba, damages under s 82(1) (which are alleged to be in the form of its loss of profits and the diminution in value of its Jimboomba store), and related orders.

The "no adverse costs order" (NACO) application

6 An applicant seeking damages under s 82(1) of the CCA may apply for a NACO under s 82(3). In response to such an application, the Court may make a NACO under s 82(4) in the exercise of its discretion, provided that the mandatory criteria under s 82(5) are satisfied. Those provisions are set out below at [45]. The criteria in s 82(5) have not been the subject of detailed judicial scrutiny before now. In summary, those cumulative criteria are that:

(a) the action raises a reasonable issue for trial: s 82(5)(a);

(b) the action raises an issue which may be significant for others: s 82(5)(b); and

(c) the disparity between the financial position of the applicant and the respondent is such that the applicant might be deterred by the possibility of an adverse costs order: s 82(5)(c).

7 The case brought by Woodman is novel, as it freely acknowledges. That is in part because it relies upon the amended form of s 46, introduced by the *Competition and Consumer Amendment (Misuse of Market Power) Act 2017* (Cth). The amended form of s 46 prohibits conduct which has an anticompetitive *effect*, in addition to the longstanding prohibition on conduct engaged in with an anticompetitive *purpose*. Those changes are particularly significant to the present proceeding because, as noted above, Woodman does not, by its concise statement, make any allegation at all as to the purpose behind Bunnings' conduct.

8 The expanded version of s 46 has only received limited judicial consideration despite being in force for almost nine years, with only one set of proceedings, all heard and determined by Beach J, resulting in contested findings as to liability on the basis of the "effects" test: ***Epic Games*** *Inc* ***v Apple*** *Inc* [2025] FCA 900; 189 IPR 1; *Epic Games Inc v Google LLC* [2025] FCA 901; and *Anthony v Apple Inc* [2025] FCA 902. This proceeding is also novel in that s 46 has apparently not, in either current or its previous form, been applied in any circumstances akin to those relied upon by Woodman, being the expansion of a competitor.

9 Bunnings in substance contends that Woodman's case is, at best, very weak, and that it is misconceived. There is a substantial dispute about the application of s 46 to the circumstances of this case. The determination of this application does not properly call for an adjudication of that dispute. However, the nature of that dispute is relevant to whether the proceeding raises any reasonable issues for trial, one of the three criteria which must be satisfied for a NACO to be granted.

10 For the reasons that follow, I am satisfied the NACO sought by Woodman should be made under s 82(4), including because I am satisfied as to the three mandatory criteria contained in s 82(5), and that the exercise of the discretion to make the NACO is appropriate in all the circumstances. That does not entail underestimating the challenges that Woodman faces in bringing this proceeding. But in my view, a case such as this is precisely what the NACO regime was intended to facilitate.

Summary of the relevant facts

11 Before considering the NACO regime in detail, and its application to the present case, it is convenient to set out the relevant facts on which this proceeding is brought.

12 The evidence relied upon at the hearing of the NACO application included the following:

(a) four affidavits of Mr Michael Paul Francis Daniel, solicitor for Woodman;

(b) an initial report, supplementary report, and reply report prepared by Mr Greg Houston as independent expert economist engaged by Woodman, opining on matters of economic principle relevant to s 46 and its application to Bunnings' conduct;

(c) a report prepared by Mr George Siolis as independent expert economist engaged by Bunnings, responding to the initial and supplementary reports of Mr Houston; and

(d) other documents admitted without objection, including financial reports and statements for two entities and the Notice of Competition Concerns published by the Australian Competition and Consumer Commission (**ACCC**) in respect of the proposed acquisition by Coles Supermarkets Australia Pty Ltd of a leasehold interest over a site in Kalgoorlie, WA.

13 The expert reports prepared by Mr Houston and Mr Siolis were prepared for and in the context of this application. No conference of the experts was held, and no joint report was prepared, as often occurs in this Court at trial in cases involving contested matters of expert opinion: see Expert Evidence Practice Note (**GPN-EXPT**) Part 7. Similarly, neither expert was required

for cross-examination or concurrent oral evidence: GPN-EXPT Part 8 and Annexure B. All of this is generally reflective of the early stage of the proceedings, and the potential for the opinion offered by each expert to be expanded and refined over time, subject to certain restrictions.

14 The general facts and circumstances in which this proceeding has been commenced are outlined in the affidavit evidence of Mr Daniel, based on his knowledge, information, and belief, and summarised in Woodman's written submissions. Bunnings does not appear to take issue with that general summary for the purposes of the present application. It is therefore convenient to set out key aspects of those circumstances largely as summarised in Woodman's written submissions (supplemented by the other documents filed to date), as a starting point to frame the dispute about the case brought by Woodman.

15 The evidence of Mr Daniel regarding the underlying circumstances of the dispute, which forms the basis for what follows, is largely based on his own knowledge and what he has been told by others and verily believes. This includes in particular what he has been told by Mr David Woodman, hereafter referred to as **Mr Woodman**, whose pivotal role at Woodman is described below. Although Bunnings did not, for the purpose of this application, object to Woodman relying on the evidence given by Mr Daniel based on his knowledge and belief, they do dispute the correctness of key underlying assertions relied upon. As outlined in more detail below, Bunnings casts doubt upon Woodman's prospects of proving various of those facts at trial.

Bunnings

16 Bunnings, the largest retail supplier of hardware products in Australia, is owned by ASX-listed **Wesfarmers** Limited and operates over 300 Bunnings stores in Australia. This includes 285 large-format Bunnings Warehouse stores and two specialist hardware retailers, Tool Kit Depot and Beaumont Tiles. In the 2025 financial year:

(a) Wesfarmers reported revenue of $45.7 billion and net profit after tax of $2.9 billion; and

(b) Bunnings reported revenue of $19.6 billion and earnings before tax of $2.3 billion.

17 Bunnings supplies some 300,000 products from around 2,000 suppliers, including around 40 of its own brands. Bunnings also exclusively supplies hardware products from around 38 suppliers.

18 Bunnings generally sets its prices at a national and/or state level. It sometimes reduces the price of products in a local area depending on local competitor pricing.

19 Bunnings also maintains a "Lowest Price Policy" under which if a customer finds a competitor's lower price on the same in-stock item, Bunnings will beat that price by 10%. Woodman alleges that while this policy conveys an impression of offering the lowest prices, in practice Bunnings' exclusive supply agreements with leading hardware brands means the policy does not apply to a significant proportion of its range, because those goods can only be bought at Bunnings.

Mitre 10, Metcash and the Hardware Group

20 **Mitre 10 Australia** Pty Ltd is owned by **Metcash** Limited through its Total Tools and **Hardware Group**. The Hardware Group operates a hardware wholesaling business and banner group for a network of around 733 hardware stores including 380 Mitre 10 stores. Around 281 of those stores are independently owned, operating under licence from Mitre 10 Australia. Mitre 10 Australia has seven private label brands and has exclusive arrangements with six brands.

21 The Hardware Group estimates that:

(a) Bunnings' revenue accounted for around 23% to 24% of total hardware sales in Australia in the 2024 and 2025 financial years, and around 55% of retail hardware sales in Australia in the 2025 financial year; and

(b) sales by stores in its network in the 2025 financial year accounted for around 5.43% of the national retail sales of hardware products.

Woodman and Mitre 10 Jimboomba

22 Woodman is a family-owned hardware business owned by **Garnet** Enterprises Pty Ltd. Equal shares in Garnet are held by Mr Woodman, his brother Mr Kerry Woodman, and their father, Mr Garnie Woodman. The Woodman family has been in the hardware business since the early 1950s and has operated stores trading under the Mitre 10 banner since about the 1970s. Woodman operates two independent Mitre 10 near Brisbane, which are:

(a) a large-format store built and opened around 2004: Mitre 10 Beenleigh;

(b) a smaller-format store acquired by Woodman in November 2018, located at 20 Anders Street, Jimboomba: **Mitre 10 Jimboomba**.

Mr Woodman is responsible for the oversight of day-to-day operations of both stores. The present case concerns Mitre 10 Jimboomba.

23 Mitre 10 Jimboomba has a floor space of approximately 1,770 m² and currently stocks a wide range of around 17,000 hardware products. The shop price matches on products stocked by Bunnings and otherwise offers a market price or better on products not stocked by Bunnings. According to Mr Woodman, Mitre 10 Jimboomba strives to differentiate from other multi-category hardware stores by offering personalised service and advice to customers. The majority of its customers are 'do-it-yourself' or other retail customers, as opposed to trade customers. In the 2025 financial year, it had gross sales of $6,138,793, of which approximately 95% were sales to retail customers. Over the last five financial years, Mitre 10 Jimboomba has generated a net profit of between less than $500,000 and less than $900,000 per annum.

24 Bunnings currently operates two Bunnings Warehouse stores within 20-30 kilometres of Mitre 10 Jimboomba:

(a) Browns Plains, with a floor space of about 12,500m^2; and

(b) Springfield Central with a floor space of about 16,000m^2.

Mr Woodman perceives these two Bunnings stores to be Mitre 10 Jimboomba's main competitors, as opposed to Mitre 10 Beenleigh and Mitre 10 Beaudesert which are also within 20-30km. Mr Woodman considers that Mitre 10 Jimboomba does not compete particularly closely with specialist retailers in its local area.

The conduct and its alleged effects

25 Bunnings intends to open a new Bunnings Warehouse on the same street as and adjacent to Mitre 10 Jimboomba. Woodman's case is that Bunnings has engaged in conduct including the following, alleged to be in contravention of s 46 of the CCA:

(a) On 28 August 2019, Bunnings submitted a development application to Logan City Council for 26-46 Anders Street, Jimboomba (the **Jimboomba site**), seeking permission to use the site for hardware and trade supplies, a showroom, and a garden centre. It obtained development approval (**DA**) on 18 September 2020.

(b) On or about 24 September 2021, Bunnings announced it would spend approximately $36 million to develop and open a 15,000 m^2 Bunnings Warehouse store at the site at Jimboomba.

(c) In May 2025, Bunnings publicly confirmed it was progressing plans to develop the site at Jimboomba and expected to complete construction in 2026.

26 Further, once construction has been completed, Bunnings will open and operate a Bunnings Warehouse at the Jimboomba site (defined above as **Bunnings Jimboomba**). Woodman alleges that this prospective conduct of opening and operating a Bunnings Warehouse will also contravene s 46 of the CCA.

27 Before September 2019, Mr Woodman states that he had been considering and formulating a plan to expand Mitre 10 Jimboomba by adding around 700m^2 of floor space at the rear and a 40m^2 nursery at the front. The purpose of this planned expansion was to increase and improve the product range and stock depth supplied by Mitre 10 Jimboomba and, in turn, to continue to attract a wide and growing customer base to the store.

28 Mr Woodman states that he anticipated this planned expansion would take approximately two years. However, once Mr Woodman became aware of the Bunnings DA in late September 2019, he paused the planned expansion. Once Bunnings obtained approval and made the 24 September 2021 announcement, he made a final decision to abandon the planned expansion.

29 Mr Woodman's prior experience in hardware retailing includes having a Bunnings store open near a Woodman family Mitre 10 store in Mackay, which he asserts resulted in the store's closure. Based on this prior experience, he concluded that Mitre 10 Jimboomba would not remain viable if a Bunnings Warehouse opened on the Jimboomba site. But for Bunnings' conduct, Mr Woodman states that he would have undertaken the planned expansion of Mitre 10 Jimboomba.

Summary of the allegations brought by the action

30 Woodman alleges in this proceeding that Bunnings' past and future conduct relating to Bunnings Jimboomba (broadly summarised at [25] and [26] above) contravene the misuse of market power prohibition in s 46. That provision relevantly provides:

> **46 Misuse of market power**
>
> (1) A corporation that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in:
>
> (a) that market; or
>
> (b) any other market in which that corporation, or a body corporate that is related to that corporation:
>
> (i) supplies goods or services, or is likely to supply goods or services; or
>
> (ii) supplies goods or services, or is likely to supply goods or

services, indirectly through one or more other persons; or

(c) any other market in which that corporation, or a body corporate that is related to that corporation:

(i) acquires goods or services, or is likely to acquire goods or services; or

(ii) acquires goods or services, or is likely to acquire goods or services, indirectly through one or more other persons.

31 As is seen in the chapeau to s 46(1), the prohibition applies to conduct with an anticompetitive *effect*, *and* to conduct with an anticompetitive *purpose*. Either or both may be alleged in a given case. This was the effect of amendments to s 46 which applied from late 2017, before which s 46 only prohibited conduct with anticompetitive *purpose*. Importantly, Woodman does not allege in this case that Bunnings engaged in conduct with any anticompetitive purpose. Rather, its allegation is focussed squarely on the conduct's effect.

32 With this in mind, to show a contravention of s 46, Woodman must prove that:

(a) Bunnings has a substantial degree of power in a market; and

(b) Bunnings has engaged in conduct with the effect or likely effect of substantially lessening competition in that or another market.

33 The application of the concept of a "market" tends to be highly contested in litigation under Pt IV of the CCA. For a contravention of s 46 to be made out, the market in which Bunnings is said to have market power, or in which its conduct is said to have the effect or likely effect of substantially lessening competition, must be a "relevant market" for the purpose of the CCA. For present purposes, it is sufficient to observe that s 4E provides that:

> ***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.

34 In this case, Woodman alleges the existence of two relevant markets:

(a) *First*, a national wholesale market for the supply of hardware products to hardware retailers and/or wholesalers (**national wholesale market**), noting that the concise statement at [23] describes the market as for supply to hardware retailers, but Mr Houston includes the acquisition of products by hardware wholesalers as well as retailers (at [216] of his first report). Mr Houston opines that competitors in this market include Bunnings, which acquires products directly from suppliers to sell to consumers,

and Mitre 10 Australia, which purchases products from suppliers and then supplies those products to members of the Mitre 10 network, such as Woodman.

(b) *Second*, a local market for the supply of hardware products to retail customers around Jimboomba (**Jimboomba retail market**). Mitre 10 Jimboomba is said to compete in this market, alongside the Bunnings Warehouse stores at Brown Plains and Springfield Central, as well as Mitre 10 Beenleigh (also operated by Woodman), Mitre 10 Beaudesert, and various specialty stores.

35 Woodman alleges that Bunnings has a substantial degree of market power in the acquisition of hardware products in the *national wholesale market*, including on the following bases:

(a) it accounts for a substantial share of hardware product volume in the market in general and for individual upstream suppliers;

(b) there are high barriers to entry in the market; and

(c) Bunnings has exclusive supply arrangements with certain suppliers.

36 Woodman then alleges that Bunnings' conduct to date has or is likely to have the effect of substantially lessening competition in the *Jimboomba retail market* because it deterred Woodman from carrying out the planned expansion of the Mitre 10 Jimboomba store, which would have been beneficial for the competitive process. It also alleges that if Bunnings opens Bunnings Jimboomba as planned, that future conduct will have or be likely to have the effect of substantially lessening competition in the *Jimboomba retail market* because it will cause Mitre 10 Jimboomba to exit that market in the near future. Woodman relies on Bunnings' "Lowest Prices Policy" and exclusive supply arrangements as relevant in that regard.

37 Woodman contends that its exit from the Jimboomba retail market is likely to occur because Bunnings will "deprive Mitre 10 Jimboomba of sufficient sales volume so it would no longer be rational for Woodman to operate the store". In this way, Woodman says that it is implicit in its case that Bunnings' expansion in the local market will create some degree of overcapacity, in the sense that if it did not, it would be unlikely to deprive Woodman of sufficient sales volume to continue to operate. However, Woodman does not presently allege (for example) that Bunnings' conduct is intended to create a degree of excess capacity in the market such that its expansion will only be profitable if it induces the exit of Mitre 10 Jimboomba, a situation which was described by the parties as a "predatory capacity expansion." Woodman is very clear that it makes no allegation at all of any predatory intent or purpose, and to the extent that

it submits Bunnings' conduct was "akin to" a predatory capacity expansion, that was said to be a description of its exclusionary *effect* on competitive process, in potentially inducing the exit of a competitor.

38 Woodman's allegations of substantial market power and substantial lessening of competition relate to different markets. On the face of s 46(1), that is permitted. In opposition to the present application, Bunnings criticises the absence of a meaningful relationship between its alleged market power and its allegedly anticompetitive conduct as a defect in Woodman's case, citing the opinion of Mr Siolis, and a particular interpretation of part of what was said by Beach J in *Epic Games v Apple* at [3719], at the bolded section of the following extract:

> **If conduct is shown to have been engaged in with the effect or likely effect of substantially lessening competition in a market, it is a fair if not strong assumption that that can be sourced to and causally related to the possession of a substantial degree of market power.** The legislature may have so assumed, and so nothing further needed to be shown or demonstrated. If the second level of causation was established, that is, a causal connection between the conduct and its effect, then nothing further needed to have been said concerning the first level of causation, that is, a causal connection between the possession of market power and the conduct, or so the legislature assumed.
>
> (Emphasis added)

39 Mr Houston opines that Mr Siolis' criticism of the applicant's case is not in fact made out. Notwithstanding that response, my preliminary view is that Beach J's comments, when read in context, tend to support the view that Woodman is not required to prove any such causal connection. In any case, this issue, like many others raised by Bunnings as reasons for not making the NACO, is not properly determined at this early stage of the proceeding. But this does serve to indicate the sorts of disputes that may exhibit or constitute a reasonable issue for trial, as contemplated by the mandatory criterion in s 82(5)(a) which is addressed below.

40 Woodman alleges that as a result of Bunnings' alleged contravention, it has suffered damages in the form of the lost profits that it otherwise would have earned from increased sales based on the planned expansion, and the diminution in the value of its store by reason of the expectation it will have to exit once the Bunnings Warehouse opens in Jimboomba. It also seeks injunctive relief to prevent Bunnings Jimboomba from opening.

Overview of the no adverse costs order (NACO) regime

41 The NACO regime contained in s 82(3)-(7) of the CCA was inserted by the Commonwealth Parliament with effect from 13 March 2019: Sch 5, item 7, *Treasury Laws Amendment (2018*

Measures No. 5) Act 2019 (Cth) (**Amending Act**). An earlier proposed form of the NACO regime had originally been introduced to parliament by the *Competition and Consumer Legislation Amendment (Small Business Access to Justice) Bill 2017* (**Original Bill**). The Original Bill was a Private Senator's Bill. Such Bills often undergo changes from what was originally proposed as they progress through parliament, not least because they are not legislation proposed by the government of the day. In relation to the NACO regime, the version that was ultimately legislated had undergone confined, but important, changes from what was originally contemplated. In particular, the mandatory criterion contained in s 82(5)(a) was substantially amended, with those amendments having particular significance for present purposes, as explained below.

42 The **Explanatory Memorandum** for the Original Bill makes it clear that this was part of a proposed legislative package directed to small business, by amending not just the CCA, but also the *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth). The Explanatory Memorandum described the proposed legislation as allowing "judges in the Federal Court to waive liability for adverse costs to small business private litigants in cases related to the misuse of market power" and also allowing "the Small Business and Family Enterprise Ombudsman to provide assistance to small businesses in preparing these cases".

43 Under the heading "Misuse of market power", the Explanatory Memorandum stated:

> Since its inception, the *Trade Practices Act 1974* (now the *Competition and Consumer Act 2010*) has had section 46, designed to prevent firms with substantial market power from deliberately using that power to eliminate or substantially damage a competitor, prevent the entry of a competitor, or to deter or prevent competition.
>
> However, there is concern that there is an uneven playing field between large and small businesses in Australia. The Australian Competition and Consumer Commission (ACCC) has taken action in this space, although it has been suggested that this is insufficient relative to the number of allegations.
>
> This Bill addresses a prominent problem with the operation of section 46 without changing the intention. The problem relates to private parties litigating breaches of the competition law, namely the risk of significant adverse cost orders should an applicant lose and the time taken to finalise action in the Courts.
>
> This issue was addressed by the Harper Competition Review that found small business access to remedies to be wanting, stating:
>
> > "From submissions and consultations with small business, the Panel is convinced that there are significant barriers to small business taking private action to enforce the competition laws"
>
> [A description was then given of the Harper Competition Review's recommendations concerning the ACCC's approach in relation to small business, and improvement of support services for advice and dispute resolution.]

> Allowing judges in the Federal Court to waive liability for costs to small business private litigants will empower private litigants under Part IV of the *Competition and Consumer Act 2010* to bring litigation without the burden of prohibitive legal fees.
>
> At an early stage of the court case, the private litigant will be able to request a 'no adverse cost order', preventing large legal fees of the defendant being transferred to the litigant. The judge will then assess the initial arguments and decide whether there is merit to the application. If merit is established, any liability for the defendant's legal fees will be waived.

44 The portion of the Explanatory Memorandum for the Original Bill referring to the new provisions provides no meaningful guidance as to the meaning intended by the specific language proposed for the mandatory criteria to enliven the exercise of the power and discretion to make a NACO. In any case, an amendment was made to the language from what was initially proposed, including in particular in s 82(5)(a), as mentioned above and discussed further below.

45 The NACO regime ultimately legislated forms a discrete part of s 82, and is as follows:

> *No adverse costs orders*
>
> (3) A person who brings an action under subsection (1) in relation to a contravention of a provision of Part IV may at any time during proceedings on the matter seek an order under subsection (4) from the court hearing, or that will hear, the matter.
>
> (4) The court may order that the applicant is not liable for the costs of any respondent to the proceedings, regardless of the outcome or likely outcome of the proceedings.
>
> (5) The court may only make an order under subsection (4) if the court is satisfied that:
>
> (a) the action raises a reasonable issue for trial; and
>
> (b) the action raises an issue that is not only significant for the applicant, but may also be significant for other persons or groups of persons; and
>
> (c) the disparity between the financial position of the applicant and the financial position of the respondent or respondents is such that the possibility of a costs order that does not favour the applicant might deter the applicant from pursuing the action.
>
> (6) The court may satisfy itself of the matters in subsection (5) by having regard only to the documents filed with the court in the proceedings.
>
> (7) A person who appeals a decision of the court under subsection (4) is liable for any costs in relation to the appeal.

46 As noted at the beginning of these reasons, Woodman alleges a misuse of market power having the effect of substantially lessening competition, contrary to s 46 of the CCA, and seeks, inter alia, damages. As such, there is no doubt that this proceeding falls within the description of

being an action under s 82(1) in relation to a contravention of a provision of Pt IV of the CCA, so as to enliven the jurisdiction to entertain this NACO application.

47 As outlined above, the original form of the NACO provisions were introduced to parliament with s 46 proceedings expressly in mind, notwithstanding their availability in other actions brought under s 82(1). The relevant context is that when a misuse of market power proceeding is contemplated being brought by someone other than the ACCC as the competition regulator, it is all but inevitable that they are going to be brought by a lesser player in a given market rather than by a greater player, irrespective of whether or not they meet any particular definition of being a small business. At least some degree of disparity of resources is going to be commonplace, if not invariable and inevitable. That is ordinarily going to be evident in the resources that can be brought to bear in the conduct of litigation itself, including the legal costs which the respondent is able to incur. The present case is an example of this.

48 As discussed further below, on the evidence before me, the disparity of available resources as between Woodman and Bunnings is undeniably enormous, notwithstanding the support that Woodman has apparently received from the Mitre 10 umbrella organisation. Bunnings does not dispute that evidence, but rather relies upon a particular interpretation of the criterion in s 82(5)(c), as will be explained.

49 As such, a market participant considering litigation as an option to address what they consider to be a misuse of market power by a larger competitor faces the critical risk of not only having to pay the legal costs they will themselves incur in bringing and running such litigation, but also the legal costs of the opposing party that they may be required to meet if the proceeding fails. Those costs may be significant relative to their own legal costs, especially when the resources of the respondent are borne in mind. That risk alone can be enough for it to simply not be worth bringing even an ostensibly strong case in an area of settled law. It will be even more so when the case in contemplation carries with it a measure of uncertainty in terms of the reach of the s 46 proscription, the evidence might emerge, and what is required to be established.

50 Relatively few misuse of market power cases have been brought by anyone other than the ACCC, and the success rate has not been high. The purpose test under the previous iteration of s 46 was very difficult to establish. Indeed, that is part of the historic background leading to the introduction of an additional and alternative effects test rather than just a purpose test. If bringing misuse of market power cases remains almost exclusively the domain of the ACCC,

the law in relation to misuse of market power will likely develop much more slowly, and in a narrower range of cases. The problem of misuse of market power will likely be less constrained. The interests of consumers in the benefits of true, lasting, and sustainable competitive processes will likely be more slowly and less effectively advanced.

51 By a rough illustrative analogy, it is difficult to imagine that the misleading or deceptive conduct jurisprudence, brought about by the introduction of s 52 in the *Trade Practices Act 1974* (Cth), now s 18 of the *Australian Consumer Law*, would have been as thoroughly developed if it had turned out to be confined to the relatively few cases brought by the ACCC, including under its former name of the Trade Practices Commission, rather than the widely used statutory cause of action that it became from the outset.

52 The NACO regime was apparently introduced to address some of these difficulties faced by certain private litigants considering an allegation of a contravention of s 46. Even so, s 46 will still probably remain at the relative fringe of competition law. The most that the NACO regime might accomplish in its application to s 46 litigation is that it becomes a more viable option for smaller market participants attempting to remedy instances of anticompetitive conduct. But the difficulty invoking s 46 does not detract from its importance, and the importance of the development of the jurisprudence concerning that section.

53 These matters continue to ring true notwithstanding the relatively recent amendments to the misuse of market power provisions, which included expanding the proscription from only conduct with an anticompetitive *purpose* to also encompass conduct with an anticompetitive *effect* or likely effect, a wider and generally easier threshold to establish. But easi*er* does not mean easy. As Beach J observed shortly after these amendments took effect in *Australian Competition and Consumer Commission v Pacific National Pty Limited (No 2)* [2019] FCA 669 at [836], when considering the potential deterrent effect of s 46 on market participants contemplating conduct which might offend the prohibition:

> True it is that s 46 and the potential for substantial penalties may operate as a potential discipline on behaviour. But it would be appreciated that a s 46 case, even with its recent amendments, is difficult and expensive to get up, let alone in a timely timeframe. Moreover, in any event it may not be an answer to some of the behaviour under discussion. I do not see this potential deterrent effect as sufficiently ameliorating or removing the relevant ability to discriminate.

54 The prospects of an applicant successfully bringing litigation under the amended s 46 are further complicated by the fact that jurisprudence in relation to that relatively new test is still

at an embryonic stage. As mentioned above, the only contested liability decisions under the provision as amended were those delivered by Beach J in relation to the *Epic Games v Apple* and related proceedings. The jurisprudence as to the metes and bounds of the generally broader effects proscription remain in their relative infancy, and substantial questions remain as to what the provision now covers: see, for example, *Epic Games v Apple* at [3701]-[3722], [3798]-[3802].

55 It was in this general context that the Parliament decided to enact a regime which deliberately and expressly empowers the Court to depart from the ordinary rule that an unsuccessful party in civil litigation compensates for costs incurred by the successful party, often referred to as costs following the event: see *Northern Territory v* ***Sangare*** [2019] HCA 25; 265 CLR 164 at [25], [27] (Kiefel CJ, Bell, Gageler, Keane and Nettle JJ). There is no need to consider *Sangare* further, nor cite any of the usual well-known authorities for that usual ordinary proposition, because little assistance is derived from any further consideration of a regime that is to be departed from if this NACO application succeeds. Parliament has deliberately enacted laws which provide that, in certain situations, a successful respondent may not be able to obtain a costs order in its favour. In those circumstances, that deviation from the ordinary rule does not involve some injustice to the respondent, any more than it does in other areas of law in which parliament has legislated a no-costs regime: see, eg, *Fair Work Act 2009* (Cth) s 570 (subject to exceptions that are infrequently applied, such as for vexatious proceedings).

56 If the state of satisfaction necessary for the grant of a NACO set out in s 82(5) is reached, the Court is then asked to exercise the discretion in s 82(4) and make that order. That is undoubtedly a major and fundamental departure from longstanding and otherwise hallowed legal costs principles. However, that departure is not in itself a reason not to make a NACO in an appropriate case, because it would be no more than giving effect to what the Parliament has legislated to take place when the statutory threshold is met and the discretion is exercised.

Section 82(5) – the state of satisfaction required

57 As adverted to above, a NACO may only be made under s 82(4) if the Court is satisfied as to the mandatory criteria set out in subsection (5). These criteria were briefly considered in *Hamilton v Meta Platforms, Inc. (Costs)* [2023] FCA 1496 at [20]-[24] (Cheeseman J) and *Hamilton v Meta Platforms, Inc (Leave to appeal stay and costs orders)* [2024] FCA 1078 at [86]-[94] (O'Sullivan J), but the parties have not identified any other authority which provides guidance as to their proper interpretation.

58 The usual principles apply to construing the meaning of the criteria in s 82(5) enacted by the Parliament. The Court is to have regard to the provision's text, context and purpose, with the text being the primary guide. In *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 (***Project Blue Sky***), McHugh, Gummow, Kirby and Hayne JJ noted the importance of the context of a provision in determining its meaning (at [69]):

> The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". *In Commissioner for Railways (NSW) v Agalianos* [(1955) 92 CLR 390 at 397], Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.
>
> (Footnotes omitted)

59 Similarly, in in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362, Kiefel CJ, Nettle and Gordon JJ framed the inquiry as one focussed on the text of the statute understood in its context (at [14]):

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.
>
> (Footnotes omitted)

60 It follows that the Court should strive to give effect to the words that have been used, not other words that could have been used but were not, especially if any such other words were expressly contemplated but not enacted.

61 It is worth repeating the three mandatory criteria in s 82(5) for ease of reference, to maintain a sense of context between the three as part of a coherent and consistent regime, and to emphasis the key phrases that must be read together as well as individually (emphasis added):

> The court may only make an order under subsection (4) if the court is satisfied that:
>
> (a) the action **raises a *reasonable issue* for trial**; and
>
> (b) the action **raises an issue that is not only significant for the applicant, but *may* also be significant for other persons or groups**

of persons; and

(c) the **disparity** between the **financial position** of the applicant and the financial position of the respondent or respondents is such that the **possibility** of a costs order that does not favour the applicant ***might*** **deter the applicant** from pursuing the action.

62 I now turn to consider the interpretation of each of these criteria, and determine whether I am satisfied in relation to each.

Section 82(5)(a): the action raises a reasonable issue for trial

63 The parties are in sharp disagreement as to what this statutory test requires. It is convenient to resolve that disagreement first, before applying the test to the case at hand.

Interpretation of s 82(5)(a)

64 It is convenient to deal first with the submissions put by Bunnings as to the interpretation of this statutory threshold in s 82(5)(a). Bunnings contends that the phrase "raises a reasonable issue for trial" necessitates, at the least, a prima facie case, or serious question to be tried, akin to what is required for the grant of an interlocutory injunction. This is said in turn to entail a sufficient likelihood of success at trial to justify the order sought, citing *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46; 227 CLR 57 at [65] and [68]-[72] (Gummow and Hayne JJ).

65 Having proper regard to the text of s 82(5)(a) in its context, as required by the authorities cited above, it is clear that Bunnings' submission must be rejected. The drafting of the criterion as it appeared in the Original Bill required that the action "has a reasonable prospect of success": Original Bill Sch 2 item 1. This was then changed to require that the action raise "a reasonable issue for trial" in the final version of the legislation as enacted in s 82(5)(a). The explanatory material to the Amending Act does not shed any light on the intention behind the amendment.

66 The change in drafting from referring to the "prospect of success" of an action to instead refer to whether it raises a "reasonable issue for trial" was a substantial amendment to the proposed drafting of a provision which was otherwise largely consistent throughout its passage through the Parliament. This is a significant contextual factor when it comes to interpreting and understanding this aspect of the mandatory criteria. It suggests a deliberate intention to move away from an assessment of the strength of the case being brought overall, or its likelihood of success, to an assessment of the reasonableness of an underlying issue sought to be litigated and determined.

67 What, then, is meant by the reference to the "issue" raised by a case, which replaced the previous reference to the "prospect of success"? In considering this question, some limited assistance can be obtained from dictionaries, largely to reinforce the ordinary meaning of the words that parliament has chosen to deploy, keeping steadily in mind the limitations inherent in relying on such sources, as discussed in, for example, ***Provincial Insurance*** *Australia Pty Ltd v Consolidated Wood Products Pty Ltd* (1991) 25 NSWLR 541 at 560-561 (Mahoney JA) and ***Kuzmanovski*** *v New South Wales Lotteries Corp* [2010] FCA 876; 270 ALR 65 at [38]-[40] (Rares J) and the appellate authority cited.

68 The most apt definition of "issue" in the Online Macquarie Dictionary as presently available, being the fifth definition, is: "a point in question or dispute, as between contending parties in an action in law". That definition has not changed in over 20 years, since at least the fourth printed edition published in 2005.

69 The online Oxford English Dictionary includes as the most apt definition of "issue":

(a) "An outcome or result, and related senses"; and

(b) "A point of contention or significance."

Each of the senses given for the first definition at (a) is described as now being rare or obsolete. The second definition at (b) seems apt for present purposes: a point of contention or significance.

70 Each of those dictionary definitions, as illustrative of the ordinary or natural meaning of the word "issue" as used by parliament, tends to confirm that the focus of the test in s 82(5)(a) is upon whether the case raises at least one reasonable dispute or point of contention between the parties, as opposed to an assessment of the likelihood of the applicant succeeding in that dispute.

71 There are also other features of the NACO regime which weigh against reading s 82(5)(a) as requiring an assessment of the prospects of success of a given action, including that:

(a) an application for a NACO can be brought "at any time during the proceedings," including at or soon after their commencement: s 82(3); and

(b) relatedly, the Court may satisfy itself that the criteria in s 82(5) have been met, including paragraph (a), having regard only to the documents filed with the Court: s 82(6).

72 Additionally, it is relevant that a NACO only has meaningful effect if the applicant is ultimately unsuccessful such that it would otherwise be required to pay the respondent's legal costs. As a result, imposing a high threshold as to the likelihood of success as part of either any of the criteria in s 82(5), or as part of the exercise of the discretion in s 82(4), would reduce the scope for a NACO to be obtained in the circumstances where it is likely to be most effective, and where the possibility of an adverse costs order is likely to be most powerful as a deterrent. This would be contrary to the overall intent of the provision, as evident in the discussion of its legislative history above, and, for example, the criterion in s 82(5)(c).

73 In light of the above, I reject Bunnings' submission that satisfaction of s 82(5)(a) requires me to undertake an assessment of the likelihood that Woodman will ultimately be successful in its action as part of an assessment of whether it has a prima facie case or whether its prospects are sufficient to justify the making of a NACO. That submission has the effect of clinging to the framing of the threshold which was proposed in the Original Bill but ultimately not enacted. All that I consider is required is that the action raises a "reasonable issue for trial" as specifically enacted, as opposed to forming a view as to whether Woodman has a prima facie case or sufficient likelihood of success. If the replacement threshold of "a reasonable issue for trial" has any connection to the prospects of success of the action at all, it can only be so far as that informs the reasonableness of the underlying issue at stake in the proceeding.

74 The above does not directly answer the question as to precisely what is required for the Court to be satisfied that a particular dispute or issue constituting some part or aspect of a proceeding is a "reasonable issue for trial". I return to this question below. However, at this stage the "issue" in question must be one which goes, at least, to liability. It seems unlikely that s 82(5)(a) would be satisfied by a case which raised a "reasonable issue" as to some preliminary matter (for example, some question of jurisdiction or Crown immunity), in circumstances where the remainder of the case was manifestly hopeless. It does not seem to be in dispute that questions about whether Bunnings' conduct has or is likely to substantially lessen competition, or whether it has substantial market power, were capable of being issues for the purpose of s 82(5)(a).

75 As Woodman points out, the phrase "raises a reasonable issue for trial" in s 82(5)(a) is, at least at first blush, unlike the current tests (at least in this Court) for applications such as strike out or summary dismissal which focus on the strength or viability of the case as pleaded, rather than the issues raised. Woodman goes further to submit that it is also unlike the test for the

grant of an interlocutory injunction, and that its legislative history suggests something different from "reasonable prospects of success". As outlined above, that submission must be accepted in light of the deliberate abandonment of that test as had appeared in the Original Bill.

76 Woodman suggests that the closest test to that in s 82(5)(a) is that for summary dismissal which existed prior to the introduction of s 31A into the *Federal Court of Australia Act 1976* (Cth). Under that test, the Court was required to consider whether there was "*no real question*" to be tried: ***Spencer*** *v Commonwealth* [2010] HCA 28; 241 CLR 118 at [24] (French CJ and Gummow J) and at [54] (Hayne, Crennan, Kiefel and Bell JJ). Section 31A of the *Federal Court of Australia Act* then changed the test for summary dismissal to one which considered whether there was a "no reasonable prospect" of success in prosecuting the proceeding, with s 31A(3) specifying that a defence or proceeding need not be hopeless or bound to fail for this to be the case.

77 In *Spencer*, the plurality observed, in relation to the test under s 31A as compared to the previous test for summary dismissal:

> [52] … effect must be given to the negative admonition in sub-s (3) that a defence, a proceeding, or a part of a proceeding may be found to have no reasonable prospect of successful prosecution even if it cannot be said that it is "hopeless" or "bound to fail". It will be necessary to examine further the notion of "no reasonable prospect". But before undertaking that task, it is important to begin by recognising that the combined effect of sub-ss (2) and (3) is tha**t the inquiry required in this case is whether there is a "reasonable" prospect of prosecuting the proceeding, not an inquiry directed to whether a certain and concluded determination could be made that the proceeding would necessarily fail**.
>
> [53] In this respect, s 31A departs radically from the basis upon which earlier forms of provision permitting the entry of summary judgment have been understood and administered. Those earlier provisions were understood as requiring formation of a certain and concluded determination that a proceeding would necessarily fail. That this was the basis of earlier decisions may be illustrated by reference to two decisions of this Court often cited in connection with questions of summary judgment: *Dey v Victorian Railways Commissioners* [(1949) 78 CLR 62 (***Dey***)] and *General Steel Industries Inc v Commissioner for Railways (NSW)* [(1964) 112 CLR 125 (***General Steel Industries***)].
>
> [54] In *Dey*, the defendants moved for summary judgment on the grounds that the action was frivolous, vexatious and an abuse of process. In a passage often later cited, Dixon J said that "[a] case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court with or without a jury". What Dixon J meant by "very clear" was identified by his observation that "once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process" (emphasis added). And there would be a "real question" unless the defendant could "show that it was so certain that [the question]

must be answered in the [defendant's] favour that it would amount to an abuse of the process of the court to allow the action to go forward for determination according to the appointed modes of procedure" (emphasis added). The test identified by Dixon J in *Dey* can thus be seen to be **a test requiring certain demonstration of the outcome of the litigation, not an assessment of the prospect of its success**.

[55] In *General Steel Industries*, Barwick CJ pointed out [at 129] that previous decisions about summary termination of actions on the motion of a defendant had been given in cases in which the so-called "inherent" jurisdiction of a court to protect itself and its processes from abuse had been invoked, and in cases where the defendant had relied upon a particular rule of court permitting the court to strike out pleadings or dismiss an action on it being shown that a pleading "does not disclose a reasonable cause of action" or the action "being shown by the pleadings to be frivolous or vexatious" [*High Court Rules 1952* (Cth), O 26, r 18(1)-(2)]. The material available to the court might differ, depending upon which power was invoked, but all the cases emphasised the need for "exceptional caution" in exercising a power to dismiss an action summarily. As Barwick CJ also pointed out in *General Steel Industries* [at 129], the test to be applied was expressed in many different ways, but in the end amounted to different ways of saying [at 130] "that the case of the plaintiff is so *clearly* untenable that it cannot *possibly* succeed" (emphasis added). As that formulation shows, the test to be applied was one of demonstrated certainty of outcome.

(Emphasis added, footnotes omitted)

78 Woodman also relied on the observations of French CJ and Gummow J in *Spencer* as to the comparison between the "no real question" test and the new test in s 31A, and the appropriate response by this Court to contestable factual and legal propositions in relation to the latter:

[24] The exercise of powers to summarily terminate proceedings must always be attended with caution. That is so whether such disposition is sought on the basis that the pleadings fail to disclose a reasonable cause of action or on the basis that the action is frivolous or vexatious or an abuse of process. The same applies where such a disposition is sought in a summary judgment application supported by evidence. As to the latter, this Court in *Fancourt v Mercantile Credits Ltd* [(1983) 154 CLR 87 at 99] said:

> "The power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried."

More recently, in *Batistatos v Roads and Traffic Authority (NSW)* [(2006) 226 CLR 256 at 275 [46]] Gleeson CJ, Gummow, Hayne and Crennan JJ repeated a statement by Gaudron, McHugh, Gummow and Hayne JJ in *Agar v Hyde* [(2000) 201 CLR 552 at 575-576 [57]] which included the following:

> "Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way."

There would seem to be little distinction between those approaches and the requirement of a "real" as distinct from "fanciful" prospect of success contemplated

> by s 31A. That proposition, however, is not inconsistent with the proposition that the criterion in s 31A may be satisfied upon grounds wider than those contained in pre-existing Rules of Court authorising summary dispositions.
>
> [25] Section 31A(2) requires a practical judgment by the Federal Court as to whether the applicant has more than a "fanciful" prospect of success. That may be a judgment of law or of fact, or of mixed law and fact. Where there are factual issues capable of being disputed and in dispute, summary dismissal should not be awarded to the respondent simply because the Court has formed the view that the applicant is unlikely to succeed on the factual issue. Where the success of a proceeding depends upon propositions of law apparently precluded by existing authority, that may not always be the end of the matter. Existing authority may be overruled, qualified or further explained. Summary processes must not be used to stultify the development of the law. But where the success of proceedings is critically dependent upon a proposition of law which would contradict a binding decision of this Court, the court hearing the application under s 31A could justifiably conclude that the proceedings had no reasonable prospect of success.
>
> (Footnotes omitted)

79 Woodman ultimately submits that the test in s 82(5) requires no more than that the issues raised are "sufficiently arguable for it to be reasonable for them to go to trial". By reference to the High Court's observations in *Spencer* in relation to the tests for summary dismissal, it argues that if an action were to raise reasonably arguable factual issues, capable of being disputed and in dispute, then that would be a reasonable issue for trial under s 82(5)(a); and similarly, if an action depended upon legal propositions that were not contrary to binding authority, that too would raise a reasonable issue for trial.

80 The comments of the plurality in *Spencer* at [52] to [55] extracted above are illustrative of the general difference between the "reasonable prospect of success" threshold (as required under s 31A of the *Federal Court of Australia Act*), and a threshold focussed on the question or issue raised by the action. The former requires "an assessment of the prospects of success", whereas the latter, in the summary judgment context, requires "certain demonstration of the outcome": see, eg, the final sentence of [53]. Those comments serve to underscore the significance of the legislative history of s 82(5)(a), and confirm the inappropriateness of importing back into that provision an assessment of the prospects of success. Beyond that, I consider the discussion of what was required for summary judgment, both under the earlier "real question" threshold, which applied prior to s 31A, and the "reasonable prospect of success" threshold, which applied thereafter, can only be of limited assistance to understanding the "reasonable issue" test under s 82(5)(a).

81 As the plurality in *Spencer* went on to observe at [56]-[57], there are real dangers in attempting to apply authority under one test to understand what is required by another, particularly where

the two tests are deployed in different contexts and for different purposes. For the same reason, while Woodman relies on the comments of French CJ and Gummow J at [25] only as an illustration of what it says may or may not satisfy the test under s 82(5)(a), the mere fact that that is how the test under s 31A of the *Federal Court of Australia Act* has been interpreted does not itself provide a basis to understand that that is what parliament intended by the use of different words in a different context.

82 Woodman, in support of its contention that a "reasonable issue for trial" is one which is reasonably or sufficiently arguable, also relied by analogy to other legislative regimes relating to costs orders in which such an approach is taken. Under s 49(2) of the *Judicial Review Act 1991* (Qld), one of the criteria to which a Court must have regard prior to making an order that a judicial review applicant will only bear its own costs or have its costs indemnified is whether the proceeding "discloses a reasonable basis" for the review application. Woodman relied upon the interpretation of that test as being met if it the proceeding was arguable, with the bar for that to be satisfied not being high, citing *Armitage v Parole Board Queensland (No 2)* [2023] QSC 236 (Hindman J). Her Honour said:

> [7] Whilst the applicant ultimately failed in his application, I do not consider that there was no reasonable basis for the application. The applicant's application was arguable; the bar for an application to be arguable is not high.
>
> [8] Therefore I conclude that the application was reasonable, but note that reasonableness can be assessed on a spectrum. Here, for the reasons given in the substantive decision, I consider the applicant's application was only just arguable and properly described as somewhat ambitious or speculative. The construction contended for by the applicant was not consistent with the statutory purposes, and providing cooperation should not have been onerous for the applicant. The proceeding had the sense of the applicant attempting to avoid providing the cooperation required by the no body-no parole provisions by employing linguistic gymnastics. The respondent's decision that was subject to review was both clear and sound.

83 Woodman also draws some support from the regime for making maximum costs orders under r 40.51 of the *Federal Court Rules 2011* (Cth), relying upon the observations by Griffith J in *Houston v State of New South Wales* [2020] FCA 501 from part of [17] (emphasising in bold the elements which it submits bear some similarity with the criteria under s 82(5)):

> The discretion is to be exercised judicially, having regard to all the relevant circumstances. Those circumstances include the nature of the relief sought, the complexity of the litigation and the interests of the parties in both prosecuting and defending the litigation, **whether the applicant's claims are reasonably arguable, whether a party would otherwise be forced to abandon a proceeding if such an order were not made, whether there was a public interest element to the proceeding**, the costs which are likely to be incurred in the proceeding, the timing of

> the maximum costs application and whether the party opposing the making of the orders has been uncooperative and/or delayed the proceedings.

84 Again, I consider that caution must be exercised in relying upon this authority to interpret s 82(5)(a), lest it result in an unnecessary or inappropriate gloss being put over the words which parliament deliberately chose.

85 Based on the text of the provision in its context and having regard to its purpose, an issue raised by a case is a reasonable issue for trial under s 82(5)(a) if it is capable of being reasonably argued or contested at trial. For the reasons outlined above, this does not require a conclusion to be reached that a case has a reasonable or sufficient likelihood of success. As outlined above, it is a test focussed on the point of contention between the parties, rather than the likelihood of the applicant succeeding on that point. However, that does not mean that prospects of success are entirely irrelevant. A NACO should not be made if it does no more than support the maintenance of a plainly misconceived or otherwise hopeless case. If a case is in that way doomed to fail, it is difficult to see how it could "raise a reasonable issue for trial". A difficult case with identifiable problems and perhaps uncertain prospects is not necessarily hopeless, and such a case could certainly raise a reasonable issue for trial notwithstanding those difficulties. To read the provision in that way accords with the text of the provision and with its context within the NACO regime and the CCA more broadly, and within the broader policy and legislative history of the regime as outlined above.

86 Finally, it is worth briefly addressing Bunnings' submission that the standard under s 82(5)(a) should not be interpreted to be the same as, let alone lower than, the standard required to survive an application for summary dismissal under s 31A of the *Federal Court of Australia Act*, being that the action has at least a "reasonable prospect of success". I do not accept that the s 31A standard represents a minimum threshold which constrains the interpretation of s 82(5)(a) in the manner for which Bunnings contends. Section 82(5)(a) must be interpreted by reference to its text, context, and purpose. Bunnings' reliance in this way on the test under s 31A is not helpful in advancing that reasoning. That is especially so when regard is had to the fundamental problems which plague any attempt to draw any direct comparison between differently drafted thresholds contained in different Acts, which apply in different circumstances, are used for different purposes, and may contemplate a different allocation of the burden of persuasion.

Application of s 82(5)(a) to the present case

87 I now turn to the parties' competing arguments as to whether the present case meets the threshold set by s 82(5)(a). In this regard, Bunnings attacks various aspects of the action brought by Woodman, in support of its submission that the case lacks a reasonable prospect of success and hence does not raise any reasonable issue for trial. It submits, for example, that the case brought by Woodman or aspects thereof are variously "decidedly weak" or "strange", are characterised as a "novel claim for which there is no existing authority", and rest on "weak foundations". On that basis, it contends that the threshold in s 82(5)(a) is not met.

88 As explained above, that submission misconceives of the inquiry under s 82(5)(a) as requiring me to decide whether the action has sufficient prospects of success to warrant making a NACO.

89 Nonetheless, it remains appropriate to consider Bunnings' criticisms insofar as they may be capable of addressing the reasonableness of the issues advanced for trial, remembering once again the early stage at which this arises for consideration. Bunnings also contends that the prospects of success are generally relevant beyond s 82(5)(a) to the exercise of the Court's discretion to make the order once the mandatory criteria are satisfied, as addressed in more detail from [159] below.

90 At the outset, it should be observed that Bunnings, in opposition to the present application, filed a 30-page independent expert economist report prepared by Mr Siolis, and advances detailed and complex arguments as to why I should accept and prefer the evidence of their expert over that of Mr Houston, the expert engaged by Woodman. Ironically, given that this is not the occasion upon which any such adjudication can or should take place, the very existence of such competing arguments has tended to advance the impression that there are seriously contestable legal and factual questions for adjudication at trial. As discussed above, the question is not whether one side of that debate may seem stronger or weaker, but rather whether there exists a reasonable issue or point of contention between the parties to be ventilated at trial. The whole approach taken by Bunnings tends to reinforce the impression that there is.

91 Similarly, Bunnings contends at various junctures that the evidence filed by Woodman before the Court is insufficient to establish various factual allegations, including, for example, that Mr Woodman had been planning to expand Mitre 10 Jimboomba and abandoned that plan as a result of Bunnings' conduct; and that if Bunnings Jimboomba opens and begins trading, then that will force Mitre 10 Jimboomba will exit. Again, having regard to the threshold in s 82(5)(a), the early stage of this proceeding, and the necessarily limited material before me (as

contemplated by s 82(6)), I do not consider that the present application is the occasion for me to adjudicate on those issues. To the extent that Bunnings disputes the factual allegations contained in the evidence relied upon by Woodman for the purpose of this application, I consider that the resolution of that factual dispute itself to be a reasonable issue for trial.

92 It is also worth addressing at the outset Bunnings' repeated references to what it contends has and has not been "pleaded", and its reliance on pleadings rules such as those concerning the inclusion of material facts. Given that Woodman has commenced this proceeding by a concise statement, there is no pleading as such filed by Woodman, and those references by Bunnings need to be treated with some caution accordingly. A concise statement is deliberately not meant to adhere to the strictures, and benefits, of pleadings. It is meant to be what the title conveys: a concise statement of a moving party's case. As such, a concise statement inevitably tends to permit more detail about a case to emerge, that might otherwise be expected to appear in a pleading, in the evidence adduced, including expert economic evidence adduced only for the purposes of an interlocutory application. That can sometimes be unsatisfactory, but it is what is before me, including for the purposes of s 82(6). To the extent that Bunnings sought to rely upon the omission of certain allegations from Woodman's concise statement as a basis on which to find that there was no reasonable issue for trial, those submissions cannot be accepted as being determinative.

93 As outlined above at [5], Woodman seeks declarations of contravention, an injunction preventing Bunnings from opening its planned store in Jimboomba, and damages to compensate it for the profit it contends that it has foregone as a result of the abandonment of the planned expansion of Mitre 10 Jimboomba, and for the diminution in the value of that store by reference to the expectation it will exit after Bunnings Jimboomba begins trading. Bunnings first attacks the case advanced by Woodman in support of that relief, if a contravention is shown. I do not consider that is helpful for the present inquiry, especially at this very early stage of this proceeding. In that regard, it should be noted that although Bunnings contends that Woodman's case as to damages was weak, it did not submit that it had no case for showing at least some loss, such that there would be no cause of action at all under s 82(1): see *Sellars v Adelaide Petroleum NL; Poseidon Ltd v Adelaid Petroleum NL* [1994] HCA 4; 179 CLR 332 at 356 (Brennan J). If Woodman succeeds on liability, it may, as Bunnings argues, be difficult for it to obtain injunctive relief to restrain Bunnings from opening its proposed new warehouse, and damages may be difficult to quantify beyond the existence of at least some loss or damage

sufficient engage liability under s 82(1). But those are largely evidentiary issues which are difficult, if not impossible, to assess, either way, at this stage.

94 This application does not properly require me to engage in what I regard as amounting to little more than speculation as to relief this early in the proceeding. That is especially so as it is common, if not invariable, for questions of liability and remedies to be heard separately in competition cases, and for the relief sought to change according to the basis upon which a finding of liability is reached. The focus at this stage must, at least as a practical and reasonably assessable matter in the early stages of a proceeding, be on whether the issues in dispute as to liability are reasonable to take to trial.

95 Turning now to the main criticisms outlined by Bunnings as to the case brought for a contravention of s 46, its primary contention seems to be that, having regard to the authorities as to the nature of the concept of competition which underpins the CCA, Woodman's claim will fail to show that its conduct has or is likely to effect a substantially lessening of competition.

96 In *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169 (***QCMA***), the then Trade Practices Tribunal observed at 187-188 (Woodward J, Mr Shipton and Prof Brunt):

> Thus we think of competition as a mechanism for discovery of market information and for enforcement of business decisions in the light of this information. It is a mechanism, first, for firms discovering the kinds of goods and services the community wants and the manner in which these may be supplied in the cheapest possible way. Prices and profits are the signals which register the play of these forces of demand and supply. At the same time, competition is a mechanism of enforcement: firms disregard these signals at their peril, being fully aware that there are other firms, either currently in existence or as yet unborn, which would be only too willing to encroach upon their market share and ultimately supplant them.
>
> This does not mean that we view competition as a series of passive, mechanical responses to "impersonal market forces". There is of course a creative role for firms in devising the new product, the new technology, the more effective service or improved cost efficiency. And there are opportunities and rewards as well as punishments. Competition is a dynamic process; but that process is generated by market pressure from alternative sources of supply and the desire to keep ahead.

97 The Tribunal in *QCMA* then went on to state that competition "expresses itself as rivalrous market behaviour" (at 188), and "is a process rather than a situation" (at 189).

98 In ***Queensland Wire*** *Industries v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177, Mason CJ and Wilson J observed at 191 (in relation to s 46 as then in force):

> But the object of s. 46 is to protect the interests of consumers, the operation of the

> section being predicated on the assumption that competition is a means to that end. Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to "injure" each other in this way. This competition has never been a tort […] and these injuries are the inevitable consequence of the competition s. 46 is designed to foster.

99 In ***Boral*** *Besser Masonry Ltd v Australian Competition and Consumer Commission* [2003] HCA 5; 215 CLR 374 at [87], Gleeson CJ and Callinan J cited those observations and stated to similar effect (omitting citations):

> The purpose of the Act is to promote competition, not to protect the private interests of particular persons or corporations. Competition damages competitors. If the damage is sufficiently serious, competition may eliminate a competitor.

100 In *Boral*, McHugh J also stated (at [260]):

> In [*Queensland Wire* at 191], Mason CJ and Wilson J said that the object of s 46 – the protection of consumer interests – is to be achieved through the promotion of competition, even though competition by its nature is deliberate and ruthless and competitors injure each other by seeking to take sales from one another. A rational business firm seeks to maximise profit and to increase its share of the market. However, the very nature of such conduct is detrimental to other competitors in the market and may cause some of those competitors to leave the market.

101 The observations of Mason CJ and Wilson J in *Queensland Wire* were also cited by the Full Federal Court in *Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission* [2003] FCFCA 193; 131 FCR 529 at [242] (Wilcox, French and Gyles JJ) as follows:

> Competition is a process and the effect upon competition is not to be equated with the effect upon competitors, although the latter may be relevant to the former. Competition is a means to the end of protecting the interests of consumers rather than competitors in the market (*Queensland Wire* per Mason CJ and Wilson J at 191). Competition is defined to include competition from imported goods (s 4). The court has to make a qualitative judgment about the impact of the impugned conduct on the competitive process. For example, a short term effect readily corrected by market processes is unlikely to be substantial. The lessening of competition must be adjudged to be of such seriousness as to adversely affect competition in the market place, particularly with consumers in mind. It must be "meaningful or relevant to the competitive process": *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] ATPR 40,696 (41-752) at [114].

102 Bunnings also cited O'Bryan J's comments in *Australian Competition and Consumer Commission v BlueScope Steel Limited (No 5)* [2022] FCA 1475 at [125]-[126] that "[t]he basic aim of business competition is to win sales", "[c]ompetitors strive to replace each other in the supply of products (whether goods or services) sought by customers", and "[t]he key

mechanism of competition is through substitution – to supply products to customers in place of another competitor's supply."

103 Bunnings relies on the above authority to submit that any effect of its conduct on Mitre 10 Jimboomba cannot establish a contravention of s 46 because it is nothing more than the ordinary workings of the dynamic process of competition which, by its very nature, is often bound to damage competitors, including by putting them out of business. It characterises any exit by Woodman from Jimboomba as a result of increased competition, not any lessening of competition. Relatedly, Bunnings relied upon the opinion of its expert, Mr Siolis, that "[t]o establish that conduct is anti-competitive, one must advance a plausible theory of harm: the mechanism by which the conduct crosses the line from competition on the merits into exclusionary conduct". It makes much of the absence from Woodman's case of any such "theory of harm", contending that in its absence, it is unable to show that its conduct has the effect of substantially lessening competition.

104 As Woodman submits, one problem with Bunnings' reasoning is that characterising its conduct as bearing the hallmarks of competition on the merits does not necessarily foreclose a finding that it substantially lessens competition under s 46. Competition law in general, and the concept of misuse or market power specifically, acknowledge that sometimes conduct which might otherwise be part of the ordinary competitive process can ultimately result in damage to that process. To that end, one of the important features of s 46 is that the conduct by one competitor without substantial market power may be viewed differently from like conduct engaged in by a competitor who does have substantial market power. The expansion of s 46 from a prohibition based only on the purpose of conduct to one which might be established based on its effect enables a more holistic assessment of the interaction of impugned conduct with the competitive process, beyond its mere characterisation as pro-competitive or anti-competitive, especially at a single point in time. The process of competition is generally more complex than that. That may readily include consideration of the effects or likely effects of conduct over a longer period of time than Bunnings' argument seems to contemplate.

105 Woodman submits that the relevant question is thus not whether Bunnings' conduct can be described as "competition on the merits". Similarly, it rejects the suggestion that it *needs* to establish a theory of harm to demonstrate that that is not the case (implicitly at least leaving open the possibility that it might advance an evidentiary case that includes proof of this). Instead, Woodman contends that the relevant question is what effect the conduct will have on

the competitive process, and whether that effect amounts to a substantial lessening of competition. On that view, Bunnings' suggestion that the introduction of additional competition by the opening of a new Bunnings Warehouse next door to Mitre 10 Jimboomba cannot contravene s 46 because it is nothing more than competition in action begs the relevant question rather than answering it.

106 Woodman submits that in this case, Bunnings' expansion and the likely resultant exit of Mitre 10 Jimboomba will bring about a change in the structure of the market, marked by increased concentration and fewer independent competitors. It submits that this change would amount to a substantial lessening of competition, relying on the opinion of Mr Houston to that effect, and the Tribunal's comments in *QCMA* as to the importance of market structure for the competitive process (at 189):

> Competition is a process rather than a situation. Nevertheless, **whether firms compete is very much a matter of the structure of the markets in which they operate. The elements of market structure which we would stress as needing to be scanned in any case are these: (1) the number and size distribution of independent sellers, especially the degree of market concentration;** (2) the height of barriers to entry, that is the ease with which new firms may enter and secure a viable market; (3) the extent to which the products of the industry are characterized by extreme product differentiation and sales promotion; (4) the character of "vertical relationships" with customers and with suppliers and the extent of vertical integration; and (5) the nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities.
>
> (Emphasis added)

107 To that end, Bunnings' criticism of Woodman's submission that the relevant conduct here is "akin to a predatory capacity expansion that has the effect of forcing a rival to exit the market" is not to the point. Bunnings contends that this submission was a belated attempt by Woodman to address what is otherwise a hole in its case, by adding a theory of harm which was not alleged in the concise statement and for which no evidence has been adduced, being that Bunnings' conduct deviates from ordinary competition because it would only be profitable if, and when, Mitre 10 Jimboomba exits. However, Woodman expressly disclaims any allegation of a predatory intent or anticompetitive purpose on behalf of Bunnings.

108 As outlined at [37] above, I regard Woodman's submission as more of an exercise in characterising the effect of Bunnings' conduct, than an attempt to bring an allegation of a predatory capacity expansion in the sense referred to above. At this stage, Woodman alleges in the concise statement only that Bunnings will deprive Mitre 10 Jimboomba of sufficient sales volume to remain viable, which would usually imply that some excess capacity will be

created in the relevant market. It does not go beyond this to allege explicitly that the creation of this excess capacity is predatory or represents a deviation from competition, and on its submissions in relation to the present application, it contends that it does not need to do so. In any case, Bunnings' reliance on what has or has not been pleaded to date must be treated with some caution for the purpose of this application, for the reasons outlined at [92] above.

109 Regardless of whether that correctly characterises Woodman's position, the arguments outlined above as to whether Bunnings' conduct might be found to substantially lessen competition clearly indicate the existence of a reasonable issue for trial. That ultimate issue is not necessarily or appropriately decided in determining the present NACO application, noting yet again that this proceeding is at a very early stage. While I have read the competing expert witness reports, I do not think I should attempt at this stage to adjudicate between them, or even endeavour to assess their various strengths and weaknesses. No such inquiry is required by s 82(5)(a). Bunnings' submissions do little more than highlight the live and complex debate to be had as to how s 46 is to be applied to the circumstances presently before the Court, especially in relation to anticompetitive effects. Ultimately, given the reasonable and live debate between the parties on these issues, I am comfortably satisfied that they amount to one or more reasonable issues for trial.

110 That is not necessarily to conclude that Woodman has a strong case on these issues, or indeed more generally. Rather, it is a reflection of the fact that different views may reasonably be advanced on these points, as has already been illustrated in the course of the hearing of the present application.

111 The foregoing illustrates the largely misconceived approach by Bunnings to this application, which again, seemed to be largely based on its misapprehension as to what s 82(5)(a) requires. I do not propose to canvas in a similar way the other areas of Woodman's case which Bunnings also impugns in an attempt to show the NACO should be refused. These criticisms include what it describes as weaknesses within Mr Houston's approach to:

(a) defining the relevant wholesale market for the purpose of assessing Bunnings' market power;

(b) assessing the extent of Bunnings' market power within that market;

(c) analysing the change of constraints and effect on competition which would prevail in the local retail market after Woodman's exit; and

(d) identifying a connection between the market in which it is said to have power and the impugned conduct.

112 On each of these points, Bunnings in substance and perhaps in form as well submits that the opinion of its own expert, Mr Siolis, should be preferred to that of Mr Houston. That contention only needs to be stated for it to be apparent that this approach does not properly engage with s 82(5)(a). As mentioned at [13] above, for the purpose of this application, neither expert was required for cross-examination, to give concurrent oral evidence, or to engage in any of the other processes increasingly deployed in this Court in cases of contested expert opinion at the trial stage. It would be unusual for that to occur at this early and interlocutory stage.

113 The Court is not at this stage tasked with adjudicating on the differences of opinion between the expert economists, or even their comparative weaknesses or strength, as that would revert the inquiry to a form of prospects assessment. Those differences of opinion raise what are clearly reasonable issues for trial. I do not need to be satisfied that Woodman's case on these issues is likely to prevail, or even that it is particularly compelling, but rather the different although not entirely unrelated conclusion that these are reasonable issues for adjudication at a trial. There is more than sufficient material before me to reach that different state of satisfaction.

114 I am satisfied that the case brought by Woodman raises one or more reasonable issues for trial as required by s 82(5)(a).

Section 82(5)(b): the action raises an issue that is not only significant for the applicant, but may also be significant for other persons or groups of persons

115 Having regard to the drafting of s 82(5)(b) considered in its context and by reference to its purpose, the following may be observed. First, this criterion is evidently directed to whether the action raises *an* issue of significance for persons other than Woodman. Not every issue raised in this proceeding must reach that threshold, but I must be satisfied that at least one of them is not just significant for Woodman but potentially also for other persons or groups of persons. Second, the threshold is not that that an issue *does* bear significance for other persons or groups of person, but only that it *may* do so. I would take that to require that there is a realistic, or put another way, not fanciful, possibility that the issue raised is or will be significant for such third parties.

116 Properly understood, s 82(5)(b) is not a demanding threshold to meet. It ensures that a NACO is not made in cases that the Court cannot be satisfied have wider significance beyond a given applicant. This analysis is an important prism through which to evaluate the competing arguments, with the parties again sharply divided on this topic.

117 In its oral submissions, Woodman identifies two issues which it contends meet the relevant threshold. These are whether Bunnings has substantial market power in the national wholesale market, and whether its conduct is capable of substantially lessening competition in the Jimboomba retail market, to the extent that it forces Woodman to exit. Broadly, the persons for which it submits these issues may be significant are other independent hardware retailers facing similar circumstances involving the opening of a Bunnings Warehouse in their local area, and the possibility or probability of exit of the existing retailer as a result.

118 As an example of persons within this cohort, Woodman relies on the evidence given by Mr Daniel on information and belief, which identifies and refers to the experiences of two other operators of independent hardware stores. Both these individuals had reportedly seen a decline in sales after Bunnings opened a store nearby or in the same region as their own locations. For one of these operators, this occurred in relation to 16 of his stores. The evidence indicates that on each occasion that this occurred, they were eventually forced to change the operation of the affected store to focus on trade rather than retail sales, sell the store to Bunnings, or close it altogether. Both these individuals reportedly fear the consequences for their businesses if Bunnings opens a store near their remaining hardware retail locations.

119 Additionally, Woodman relies on evidence derived from the Hardware Group business records indicating that a total of 119 hardware stores associated with it closed between June 2017 and July 2025. Of those, 89 were said to have a Bunnings Warehouse located nearby, with around 17 stores closing within 36 months of the nearby Bunnings Warehouse opening. Woodman did not contend that in all these cases the closing of the independent hardware store was caused by the presence or opening of a Bunnings store. However, it submits that the Court should infer that the circumstances it describes in relation to Mitre 10 Jimboomba do not represent an isolated problem.

120 Bunnings criticises this evidence. It points out that the basis on which Bunnings stores were identified as "nearby" a Hardware Group store was unclear and overly broad, sometimes extending up to hundreds of kilometres. Additionally, it submits that the evidence also goes to show that, in 80% of cases, independent hardware stores operating "nearby" a Bunnings store

are still operating more than 36 months later. Further, it contends that there was insufficient detail provided about the experience of the other operators referred to in the evidence of Mr Daniel to determine whether they were persons in relation to which s 82(5)(b) was met.

121 Although there are some limitations on the evidence relied upon by Woodman, these granular criticisms do not necessarily mean s 82(5)(b) cannot be satisfied, given its inherently low threshold, as addressed further below.

122 More broadly, Bunnings submits that the significance of this proceeding for other independent hardware retailers who have had or are likely to have a Bunnings hardware store open nearby is limited by the inevitable differences between the local retail hardware market in Jimboomba and the markets in which other independent hardware stores are operating. It states that each of those markets will have "different participants, different geographic and demographic features, and different competitive dynamics", and as a result, findings about the effect of Bunnings' entry on competition in the Jimboomba area retail market will not be generalisable to their situation. Accepting that proposition to be sound in principle, the problem for Bunnings is that it fails to engage with the statutory test. All that is required is that an issue raised *may* also be *significant* for other persons or groups of persons, not that it *will be* in some way *determinative*.

123 One of the central issues raised by this proceeding, as outlined above, is whether Bunnings' conduct is nothing more than the ordinary workings of, and advancement of, competitive processes as it contends, or goes beyond that to constitute a misuse of market power likely to have the overall effect of substantially lessening competition as Woodman contends. I consider that, at the very least, the resolution of that question in relation to the Jimboomba retail market *might* well be significant to other independent hardware retailers operating in different local markets which are facing increased competition from a new Bunnings Warehouse store in their area, and resultant the threat of declining sales to the point of no longer remaining viable. The resolution of issues raised in one action can be significant for a person considering another action without the two cases being on all fours, or even substantially the same. It is enough that the resolution of this action will help to establish the metes and bounds of the application of s 46 for other market participants facing broadly similar challenges as a result of Bunnings' expansion, albeit with inevitable differences in the precise conduct that is taking place and the relevant circumstances including the local market conditions.

124 The range of outcomes might be that, following the determination of this action, no such retailers have any case at all, or that some of them might well have a case. It might be that some of them have a stronger potential case than Woodman, or a weaker potential case, depending on the particular circumstances and the details of the conduct. I am satisfied that various of these possible outcomes meet the test of being significant for them under s 82(5)(b).

125 In addition, as Woodman points out, Bunnings' criticism does not address the fact that a further issue raised by this proceeding is whether Bunnings has substantial market power in the national wholesale market. Given that that is alleged to be a national market, the resolution of that question is likely to be significant for any hardware retailer in Australia facing adverse commercial outcomes as a result of Bunnings expanding in its area.

126 Although Bunnings points to significant limitations on the evidence relied upon by Woodman to identify those persons, I do not consider that that means s 82(5)(b) cannot be satisfied. There is evidence before me of two other operators who have faced similar circumstances, with one of those in relation to a large number of stores. Mr Daniel's evidence also indicates that Mr Woodman himself faced similar circumstances relating to his store in Mackay, prior to the present situation in Jimboomba. Additionally, although the evidence indicates that a majority of retailers with a Bunnings Warehouse nearby did not close within 36 months of that store opening, 17 did. Of those 17, seven had a Bunnings store open within the same suburb. Although I cannot be certain that the closure of those stores was caused by that development, when seen in light of the balance of the evidence, it supports a finding that there is a group of persons who may be facing or may have faced similar conduct to that which is impugned by Woodman, for whom the issues raised in this proceeding may thereby be significant.

127 In its written submissions, Woodman additionally contends that s 82(5)(b) was satisfied because the action raises novel questions of general importance concerning the application of the s 46 of the CCA and the "effects test" to circumstances where an existing market participant expands its capacity with the effect that one of its competitors may be forced to exit. It submits that this specific situation has not been addressed by existing authority and involves an element of public interest in the contested facts and application of economic principles. The action is thus said to be likely to raise issues of significance in the development of the s 46 jurisprudence following the introduction of the effects test. Woodman also contends that this jurisprudence may be significant in its application to other retail markets, referring as an example to the review application currently before the Australian Competition Tribunal concerning whether

Coles' expansion in a market in which it already operates may substantially lessen competition by inducing the exit of a competitor.

128 It is unnecessary for me to decide whether this additional basis, which was only squarely advanced in written submissions, indeed provides an alternative path by which s 82(5)(b) may be satisfied, given my conclusion as to the basis advanced in oral submissions above. However, it is worth noting that there is some force in Bunnings' submission that the criterion in s 82(5)(b) is not satisfied by appeals to the general importance of questions going to the proper construction of and application of Pt IV of the CCA, or novel issues raised in that regard, in the absence of the identification as to the persons for whom those issues may be significant.

129 I am satisfied that, as Woodman contends, this proceeding raises issues that might well be significant for independent hardware retailers contending with Bunnings in a way that imperils their commercial viability. I am satisfied that they will have the benefit of a determination as to whether Bunnings has substantial market power in the national wholesale market, and some exposition as to how the effects test in s 46 can, or cannot, operate to constrain conduct of this kind. The criterion in s 82(5)(b) has therefore been met to my satisfaction.

Section 82(5)(c): the disparity between the financial position of the applicant and the financial position of the respondent or respondents is such that the possibility of a costs order that does not favour the applicant might deter the applicant from pursuing the action

130 Having regard to the general tenor of the NACO regime, the terms of this criterion need to be read and understood in light of the mischief sought to be addressed, namely that the prospect of an adverse costs order might deter an applicant from pursuing a proceeding against a better resourced respondent. Because a proceeding has to have been commenced for a NACO application to be made, the word "pursuing" should be understood as referring to continuing or maintaining the proceeding, but only in the sense that this *might* be deterred, not that it necessarily will be. The test does not require the outcome of deterring to be proven to be likely, let alone certain. I further consider that undue technicality in reading, understanding, interpreting, and applying this consideration is to be eschewed.

131 This aspect of the statutory test can be broken down into two questions before being read as a whole. The first question is whether there is a financial disparity between Woodman and Bunnings. The revenue and profit figures identified in the summary of the relevant facts at [16] to [23] above, amply supported by the affidavit evidence from Mr Daniel, denies any serious doubt that this is so. This is not some marginal difference: the revenue and profit figures

of Bunnings (and its parent if that really be relevant) are in the billions of dollars, and those of Woodman in the relatively low millions of dollars. It is chalk and cheese. Sensibly, Bunnings does not dispute that there *is* a large disparity between their financial positions. Instead, it focusses on whether the balance of the test is satisfied.

132 The second question is whether the obvious and very substantial financial disparity described above is *such that* the *possibility* of an adverse costs order *might deter* Woodman from pursuing the action in the sense that I have identified above. This is the aspect of the threshold which was contested by Bunnings.

133 Mr Daniel deposes to an estimate of its own costs as likely to be at least $3.94 million, and its estimated adverse costs exposure to Bunnings' recoverable costs as likely to exceed this amount, applying a two-thirds rule of thumb to an estimate of Bunnings' actual costs being in excess of $6 million.

134 Having regard to these estimates, Woodman's evidence via Mr Daniel, goes beyond the *might deter* test in s 82(5)(c), in that it indicates that Woodman *will be* deterred from pursuing the proceeding if there is even a possibility that it may be ordered to pay Bunnings' recoverable costs, informed by the undeniable fact that Bunnings has the capacity to outspend Woodman significantly and that Bunnings' total costs are estimated to be a substantial multiple of Mitre 10 Jimboomba's annual profit.

135 Mr Daniel deposes as follows (at [197] of his first affidavit):

> I am informed by David Woodman and verily believe that **[Woodman] will be deterred from pursuing its action against Bunnings if there is a possibility that it may be ordered to pay Bunnings' recoverable costs of the proceedings** and that he is likely to cause [Woodman] to discontinue the proceeding if [Woodman] is to be exposed to that risk. This is because David Woodman does not consider that it is commercially rational to expose [Woodman] to the risk of an adverse costs order in the Proceedings for the following reasons:
>
> a. **Having regard to the financial positions of Wesfarmers and Bunnings, David Woodman considers that Bunnings has the capacity to significantly outspend [Woodman] in the Proceeding.**
>
> b. **If [Woodman] is not successful in its action against Bunnings and is ordered to pay Bunnings' recoverable costs of the Proceeding, its total costs exposure is likely to be at least twice the amount of [Woodman]'s actual costs. There is a real possibility that the costs could exceed this estimate.**
>
> c. This minimum likely adverse costs exposure if [Woodman] pursues its action against Bunnings (which I describe above) would significantly exceed the annual net profits of [Woodman] which, as I describe in paragraph 147 above,

were less than $1 million for the 2023/2024 financial year.

d. The largest contributors to the total net assets of [Woodman] are the trade receivables assets, inventories, and right of use assets for Mitre 10 Jimboomba and Mitre 10 Beenleigh. The nature of those assets is such that they could not be liquidated readily in order to pay the costs of the Proceeding.

[e.] Over the past five financial years Mitre 10 Jimboomba has generated net profit of between less than $500,000 and less than $900,000 (which is recorded in the Management Statement of Financial Performance (Actuals) for the financial years 2020/2021 to 2024/2025 […]. It does not make sense to expose WBPL to a possible substantial adverse costs order to protect this profit from the Mitre 10 Jimboomba store, particularly in circumstances where this money can be invested elsewhere and if Bunnings succeeded in the proceeding, David considers there will be no Mitre 10 Jimboomba business left to protect reasonably shortly after the Bunning store opens in Jimboomba.

(Emphasis added)

136 Mr Daniel further deposes, based on information and belief, that the only external financial support it has received is from a fund established by the Mitre 10 "National Advisory Council". That Council is made up of 16 members including ten representatives from independently owned Mitre 10 stores, and six members representing the Hardware Group national office. The fund in question was comprised of monthly contributions from independent store owners, paid from the time it was established in 2020 up until June 2024 when calls on members were suspended. As at 10 June 2026, $366,715.81 from the fund had been paid to Woodman to assist with its costs in the proceeding, and a further invoice was outstanding for the payment of the balance of the fund, being $198,478.55. There is no indication that any other external funding will be made available to Woodman to assist with the litigation. Bunnings submits that contributions to the fund could be resumed, with the result that additional funds are made available to Woodman in the future. I regard this as little more than speculation. In any event, the contribution made by the fund to date is relatively modest. It does not go very far to offset the massive disparity of resources as between Woodman and Bunnings, and the relatively large adverse costs exposure which flows from that disparity. It is better understood as assisting Woodman to pay its own costs, rather than addressing the possibility of having to pay Bunnings's costs.

137 On the evidence and submissions advanced by Woodman, prima facie, there is a sound basis for satisfaction that the test in s 82(5)(c) has been met.

138 Bunnings contends that the disparity in the financial position between the parties that exists will not meaningly deter Woodman from litigating this case because there is "no question" that

Woodman *could* fund these proceedings, including any adverse costs order. In support of that argument, Bunnings points to Woodman's sales, after-tax profit and net assets; its rental arrangements and the nature of its lease liabilities; its accumulated cash and equivalents (including moneys owed to it by a related company); and the financial position of its parent company Garnet, including its profits in the 2025 financial year (of $1 million on sales of about $55 million), net asset surplus and finance facilities of which some $3.55 million is unused. Bunnings therefore contends that on the evidence, Woodman has resources available to it which are more than sufficient to meet its own costs as well as any of its recoverable costs arising from an adverse costs order. The ultimate point advanced from these references to the absolute (rather than comparative) financial position of Woodman is that it could pay its own costs and Bunnings's recoverable costs twice over. Bunnings also points to the fact that its recoverable costs, estimated to be around two-thirds of its estimated actual costs, are not materially different from Woodman's actual costs.

139 The ultimate point made by Bunnings is that there can be no rational apprehension that Woodman may lose this case because it was outspent, or that it risks being ordered to pay an adverse costs order that is beyond its means, and as a result the financial disparity could not "rationally exert any deterrent effect upon Woodman". Instead, Bunnings contends that the risk of an adverse cost order may well discourage Woodman from bringing this action, but that was not an effect of the *disparity* between their financial positions, but rather the ordinary and expected effect of the exercise of the discretion to award costs against unsuccessful parties, regardless of their relative financial positions. Bunnings characterises Woodman's evidence as going no further than that, and therefore as failing to tie the deterrence it asserts to the financial disparity between them as required under s 82(5)(c).

140 In support of this submission, Bunnings again relies upon the asserted weakness of Woodman's case and what it characterises as the speculative nature of the damages claim. Bunnings contends that Woodman's reluctance to risk an adverse costs order in those circumstances is not surprising, characterising it as being irrational for Woodman to run the risks inherent in litigation of this kind to protect relatively modest income streams. This, it says, is reflected in the evidence of Mr Daniel that Mr Woodman does not consider it commercially sensible to pursue the litigation against the risk of an adverse cost order, having regard to the size of the interests to be protected.

141 Much of Bunnings' argument can be rejected because it so radically departs from the terms of the consideration set by parliament. The issue is not whether Woodman could, if forced to do so, pay an adverse costs order. It is whether it might be deterred from pursuing the proceeding because of that risk. However, the nexus required between that deterrence and the disparity of financial position of the parties contained in s 82(5)(c) is a problem for Woodman given the lack of clarity arising from how that provision has been drafted. Bunnings essentially contends that the disparity in the financial positions must be what creates the possibility that the applicant is deterred by the potential for an adverse cost order. Woodman, on the other hand, contends that it is enough if the disparity between the parties' financial positions contributes to the possibility of deterrence. I am satisfied that, for the following reasons, this issue must be resolved in Woodman's favour.

142 First, as I indicated above, I eschew undue technicality in reading, understanding, interpreting, and applying this criterion. The threshold which must be met is, to repeat, that:

> the disparity between the financial position of the applicant and the financial position of the respondent or respondents is such that the possibility of a costs order that does not favour the applicant might deter the applicant from pursuing the action.

143 That consideration makes little sense if it is read in the somewhat simplistic way that Bunnings advances, which attributes to the phrase a kind of exclusive causation: that the disparity in financial position is the reason why the applicant might be deterred by the possibility of an adverse costs order, such that the deterrent effect is solely attributable to that disparity, as opposed to any other contributing factors. That would seldom, if ever, be the case and I do not accept that is what is meant by the words enacted by parliament. However, even if Bunnings's interpretation is available, I would draw upon what Jordan CJ (with whom Halse Rogers and Street JJ concurred) said in *Hall v Jones* (1942) 42 SR (NSW) 203 at 208:

> … the authorities establish also that if words in a Statute when read in their primary or natural sense would produce a result which, in relation to the provisions of the Statute itself, are fantastic or absurd, a Court is entitled to pay the Legislature the not excessive compliment of assuming that it intended to enact sense and not nonsense. General words in an Act of Parliament must always be construed in accordance with the circumstances to which the Act is intended to apply …

144 As Payne JA (with whom Stern JA) more recently observed in *Croc's Franchising Pty Ltd v Alamdo Holdings Pty Ltd* [2023] NSWCA 256, applying *Hall v Jones* (footnotes embedded):

> *Reading as written*

> [213] One principle which has been identified, but quite rarely discussed, is to read the statutory instrument as one would any other document, "that is, from the beginning onwards". As explained by Priestley JA in *Patman v Fletcher's Fotographics Pty Ltd* [(1984) 6 IR 471 at 475]:
>
> > "It is preposterous, in the literal sense, to read s 4, make assumptions concerning its purpose based on its language, without reference to what has preceded and then to read s 3 in the light of the purpose thus discerned in s 4. A much sounder way of reaching what the draftsman's purpose was is to read his Act in the sequence in which he wrote it."
>
> [214] In this case, reading the Schedule in the order in which provisions appear requires the reader to put himself or herself in the shoes of the drafter. It requires an attempt to understand the logic by which the drafter constructed the document and why cl 4 was followed by cll 5, 6 and 7. If, as suggested below, there is a clear answer in the National Code, the Schedule can be construed in a constructive, rather than a destructive, manner: that is, one starts with the assumption that the drafter had a clear purpose and believed it had been transposed into the instrument to be construed. That that is the correct approach was identified in 1942 by Jordan CJ in *Hall v Jones* [(1942) 42 SR (NSW) 203 at 208]] stating "that a Court is entitled to pay the Legislature the not excessive compliment of assuming that it intended to enact sense and not nonsense".

145 If necessary, I am prepared to pay parliament the not excessive compliment that it intended to enact sense and not nonsense. However, I do not think that compliment is necessary, although doubtless the drafting could be improved upon. The words used can readily be interpreted in a sensible, purposeful way, that is constructive rather than destructive, and in line with the evident purpose of the NACO regime. Section 82(5)(c) is to be read in the context and order of paragraphs (a) and (b), which should in turn be read as creating reasonable, but not insurmountable, considerations required to be met to the satisfaction of the Court before the power to make an NACO is enlivened.

146 The key issue is the meaning to be given to the causal phrase – *such that* – which draws the connection between the financial disparity (which is in this case very substantial and not in dispute) and the rest of the text of this criterion, being that "the possibility of a costs order that does not favour the applicant might deter the applicant from pursuing the action". The meaning of that connecting phrase is what needs to be interpreted having regard to text, context and purpose. One thing that is clear: *such that* does not require that the mere existence of a financial disparity, or the mere view that the applicant (Woodman) might have of that disparity as a bare circumstance, without anything more, is the basis on which the possibility of an adverse costs order might deter the applicant from pursing the action. That gives the phrase too much work to do, and certainly no sensible work to do. The term *such that* is evaluative and not prescriptive in nature. It calls for an examination of the nature and extent of the disparity, and

its casual connection to the possibility of an adverse costs order which *might* deter the applicant from pursing the action. It accommodates a wide range of circumstances in which the disparity might arise, and various ways in which that disparity might bear upon the deterrent effect of an adverse costs order.

147 To have anything to do with the overall objectives of the NACO regime, the phrase *such that* is necessarily concerned with such things as the magnitude of the disparity and what can potentially be done with it by a respondent, connected and contributing to the possibility of a deterrent effect arising from the potential for an adverse costs order. It should be understood to be directing attention to, amongst other things, the significance of that disparity to the realities of how costs can be incurred by a respondent who has greater financial resources to direct to the litigation in question and thereby incur costs that might be visited upon the applicant. The greater the disparity, the more scope there is for a respondent to deploy its ability to bear significant legal costs in a way that might deter the applicant from continuing the proceeding by reason of the risk and extent of a costs liability being created.

148 The degree of disparity that exists in a given case can be seen to influence the ability, need or incentive for a respondent:

(a) to compromise on points of procedure, pleadings, and evidence;

(b) to take every available point, however marginal;

(c) to run marginal arguments and adduce expensive evidence of marginal probative value; and

(d) without necessarily any hint of impropriety, to run a Rolls Royce case in terms of legal representation and preparation;

and the magnitude of the effect that those choices may have on an the applicant.

149 Those observations can readily apply to Bunnings' approach to this application, not in the sense of any impropriety, but in the sense of testing somewhat exhaustively every aspect of the terms of the NACO regime. It is something of a harbinger of what is to come if this proceeding does continue. The phrase "deep pocket" is well-known and not necessarily pejorative, reflecting the inherent ability of a well-heeled litigant to engage in conduct which has the effect of deterring a case being brought against it, or being maintained, as a matter of outcome rather than necessarily of intent.

150 It is no part of the test that a motive or purpose of deterring the applicant needs to be attributed to Bunnings. Bunnings did not seem to criticise the estimates of its likely costs provided by Woodman's solicitor, but stated that there was no evidence that it would rely on its financial capacity to would incur costs beyond these reasonable estimates. However, those estimates already adequately reflect the connection between the disparity in financial positions and the size of Woodman's potential adverse costs exposure. For example, Mr Daniel's estimates reflect the generally higher rates likely to be charged by the legal team employed by Bunnings compared to those representing Woodman, as a result of the representation each has chosen to engage.

151 These observations serve to illustrate how the financial disparity between an applicant and a respondent might bear upon the deterrent effect of the possibility of an adverse costs order. In my view, it will be a rare case indeed in which that is the only factor which creates the relevant deterrence. Generally, all the usual considerations will still be at play, including those emphasised by Bunnings in this case, being the prospects of success of the action and the magnitude of the commercial interests at stake. Indeed, if the applicant was certain of its prospects, then the potential size of any adverse cost order might be irrelevant. The relevant point is thus not whether the deterrent effect of an adverse costs order is entirely attributable to the financial disparity, but whether that financial disparity has some meaningful connection to its deterrent effect.

152 In this case, if the financial disparity between Woodman and Bunnings was not so large, then Bunnings would not be as likely incur costs which are so large relative to Woodman's own financial resources, and outspend Woodman such that its *recoverable costs* are likely to exceed Woodman's *actual costs*. It would also not be as likely that the size of the potential adverse costs exposure to be visited upon Woodman would be so large in comparison to the financial interests it seeks to protect. In this way, the size of the potential costs order, and its significance relative to Woodman's resources, are both at least partially attributable to the disparity in financial positions between the parties. In those circumstances, I am satisfied that substantial financial disparity between the parties contributes to the deterrent effect of the possibility of an adverse costs order, with the result that s 82(5)(c) is met.

Conclusion on the s 82(5) considerations

153 Section 82(5) provides that, if the mandatory thresholds set out in that subsection are met, the Court may make a NACO under s 82(4). As I am satisfied that each of the considerations in

s 82(5) have been established, I have reached the necessary state of mind to enliven that discretion to make a NACO, which must be exercised judicially. I now turn to the exercise of that discretion.

Whether the discretion should be exercised in favour of making the NACO: s 82(4)

154 In relation to the exercise of the discretion, Bunnings relies upon the comments of Cheeseman J in *Hamilton v Meta Platforms, Inc. (Costs)* [2023] FCA 1496, in particular at [24]. In that case, her Honour was dealing with the question of costs arising from a separate successful application for a stay of the proceeding in which the applicant had brought an undetermined application for a NACO. Her Honour rejected the applicant's submission that, if the criteria under s 82(5) were met, this had some bearing the Court's discretion as to costs, notwithstanding that an order had not actually been made under s 82(4). Her Honour observed, with respect correctly in my view, at part of [24]:

> The plain terms of s 82(4) make it clear that the power to make a NACO is discretionary. The discretion must be exercised by reference to the considerations in s 82(5)(a) to (c). An applicant for a NACO is not entitled as of right to a NACO even if the court is satisfied of the matters in s 82(5)(a) to (c). Absent the court being satisfied of those matters, a NACO cannot be made. It does not follow, however, as Mr Hamilton appears to submit, that where the matters in s 82(5)(a) to (c) are established, the court must make a NACO.

155 Bunnings appears to rely upon those comments to submit that satisfaction of the criteria in s 82(5) for the grant of a NACO did *no more than* enliven the discretion to make the order sought. Bunnings submits that the residual discretion must be exercised judicially by reference to relevant considerations, including the effect that the order would have on Bunnings, and whether it is just that Bunnings be deprived of any prospect of recovering its costs of defending this proceeding that Woodman had chosen to commence.

156 It is true that, upon being satisfied that the mandatory criteria in s 82(5) have been established, it remains for Woodman to satisfy me that the NACO should be made in the exercise of my discretion. But that does not mean that the fact that the criteria in s 82(5) are met are no longer relevant, or that I must take into account considerations that are in conflict with those criteria. To the contrary, the conclusion that each of the mandatory thresholds are satisfied, and potentially the ease or otherwise with which that conclusion is drawn, may be relevant to the exercise of the discretion. In the circumstances of this case, I consider that the conclusion I have reached about those criteria weigh heavily in favour of exercising my discretion to make a NACO.

157 The reliance Bunnings places on the effect that the order would have on Bunnings, and whether it is just that Bunnings be deprived of any prospect of recovering its costs of defending this proceeding that Woodman had chosen to commence, seem to me to be in conflict with those mandatory criteria and indeed with the whole scheme of the NACO regime. The plain intention of the legislature was that a NACO can be made if the criteria in s 82(5) are met, and as such, any adverse effect on a respondent against whom the order is made, and the deprivation of any prospect of recovering their costs if the action fails, are both implicitly contemplated and authorised.

158 Even if it is not correct to characterise these additional considerations as being in conflict either with any of the mandatory criteria or the legislative scheme as a whole, I am unable to give them any determinative weight when considered against the mandatory criteria that have been established to a reasonably high degree of satisfaction. In addition, I have considered the evidence before me regarding the substantial financial resources available to Bunnings. That financial capacity is a significant factor to which I have regard, independently of my satisfaction as to s 82(5)(c). Further, the evidence of Woodman's solicitor that Woodman *will* be deterred from pursuing its action if a NACO is not made is relevant evidence going beyond the threshold in s 82(5)(c) on which I place some real weight, having regard to the overall context and purpose of the NACO regime.

159 As outlined above, Bunnings made extensive submissions in support of the contention that the action does not raise a prima facie case, or have sufficient prospects of success to justify the order sought. Those submissions were intended to show that the action does not meet the threshold in s 82(5)(a), which, as already explained, fundamentally misconceives the relevant threshold. However, they were alternatively put as a basis on which the Court should not exercise the discretion to make a NACO.

160 I do not consider that a form of the abandoned threshold proposed in the Original Bill should be applied to the ultimate discretion to grant the relief of a NACO if the s 82(5) test as a whole is met, because that would entail thwarting the change made by parliament in what was ultimately legislated to focus on the issue sought to be litigated, rather than the overall prospects of success of the proceeding. That does not mean that prospects of success are entirely irrelevant to the exercise of the discretion. A case with evidently strong prospects may warrant the making of a NACO despite some countervailing discretionary factor, whereas a case which raises a reasonable issue for trial but which seems seriously at risk of failing on those issues,

or is a generally poor vehicle for them to ventilated, may not. In this way, Bunnings' contention that the action lacks substantial merit and is likely to fail may in principle be a factor which weighs against the making of a NACO in the Court's discretion, but in circumstances quite different to those in this case.

161 In the circumstances of this case, and having regard to the considerations referred to above, I do not consider that the difficulties and challenges that Woodman faces in bringing this proceeding, as identified in considerable detail by Bunnings, the main parts of which have been addressed in these reasons, constitute a compelling reason not to make the NACO sought by Woodman.

162 Additionally, as noted at [72] above, to impose an excessively burdensome requirement as to Woodman's prospects of success at this stage as part of the exercise of discretion would risk undermining the purpose of the regime, given that a NACO only has any practical effect if an applicant is unsuccessful.

163 In the course of addressing the s 82(5) criteria, Bunnings identifies a number of other factors which it submits weigh against the exercise of the discretion. These include:

(a) the relatively small value ($60,000) attributed to the goodwill associated with the business that is now Mitre 10 Jimboomba when it was purchased by Woodman in 2018;

(b) the fact that the evidence relied upon by Woodman shows that most Mitre 10 stores which have a Bunnings open nearby continue to trade for years after that occurring;

(c) the possibility that the fund administered by the National Advisory Council may again call on funds from its members to be provided to Woodman; and

(d) the fact that Metcash, a publicly listed company with an after-tax profit in the order of hundreds of millions of dollars and, through the Hardware Group, a competitor of Bunnings at multiple levels of the market, has an interest in the outcome of the action, and is represented at least indirectly on the National Advisory Council which operates the fund which has been assisting Woodman.

164 I have considered each of those submissions in turn and the submissions of Bunnings generally, and do not consider that they provide an adequate reason not to exercise the discretion as I am otherwise minded to do.

165 Having reached the satisfaction required by s 82(5), I am satisfied in all the circumstances that it is appropriate to make the NACO under s 82(4). In doing so, I am aware that the effect of

that order will be to deprive Bunnings from recovering its own costs regardless of the outcome of the litigation. That is expressly the outcome which parliament contemplated by the introduction of the NACO regime.

Conclusion

166 The NACO will be made. Bunnings must pay Woodman's costs of this application.

I certify that the preceding one hundred and sixty-six (166) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Bromwich.

Associate:

Dated: 27 August 2026