No adverse costs, greater private enforcement risk:

The Bunnings decision

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The usual rule for litigation in Australia is that "costs follow the event". In other words, the party that loses will usually be ordered to make a payment in respect of the legal costs incurred by the winning party.

One exception to the usual rule is where a losing claimant has successfully obtained a "no adverse costs order" (NACO) from the court. As the name suggests, a NACO prevents a claimant from being liable for the other party's costs if the legal claim fails at trial. This is a highly beneficial outcome for a claimant because legal costs associated with defending a complex legal claim can easily run into the millions of dollars.

NACOs are able to be made in legal proceedings brought by parties alleging breaches of Australia's competition laws under Part IV of the *Competition and Consumer Act 2010* (Cth) (CCA). Under sections 82(4) and (5) of the CCA, the court has the discretion to make a NACO where the action raises a reasonable issue for trial, that issue may also be significant for other parties and the financial disparity between the parties means that a potential adverse costs order might deter the applicant from continuing the action.

The NACO regime was introduced in 2019, to address concerns highlighted by the 2015 Harper Competition Policy Review about the barriers smaller businesses face in privately enforcing competition law.

The recent decision in *Woodman Beenleigh Pty Ltd v Bunnings Group Ltd (no adverse costs order)* [2026] FCA 1231 appears to be the first reported instance in which the Federal Court has granted a NACO under section 82(4) of the CCA, and is the first detailed judicial consideration of the statutory criteria. In that proceeding, Woodman – the operator of two Mitre 10 hardware stores in Jimboomba – alleges that Bunnings has substantial market power in a national wholesale hardware market.

It claims that Bunnings' conduct in developing and proposing to open a new Bunnings Warehouse adjacent to Woodman's Mitre 10 store in Jimboomba has deterred Woodman from expanding its store, and will ultimately force it to exit the local retail market as a result of the retail overcapacity that will be caused by the opening of Bunnings' store, thereby substantially lessening competition in the local hardware retail market in contravention of section 46(1) of the CCA. Those allegations have not been determined.

On the application of Woodman, the Federal Court was persuaded that the statutory criteria for the grant of a NACO were satisfied and ordered that Woodman not be liable for Bunnings' costs, regardless of the outcome of the legal proceeding. Bunnings was also ordered to pay Woodman's costs of obtaining the order.

A key issue was what constitutes a "reasonable issue for trial". Bunnings argued that Woodman needed to establish at least a *prima facie* case or a "serious question to be tried", involving a sufficient likelihood of success. Bromwich J rejected that approach, holding that an issue need only be capable of being reasonably argued or contested at trial. Notably, Bromwich J held that detailed opposition to a legal claim may itself reinforce the conclusion that there are genuinely contestable issues. In this case, the court considered that Bunnings' arguments and competing expert evidence supported the existence of serious legal and factual issues requiring determination at trial.

His Honour reasoned that a higher threshold would undermine the regime because a NACO has practical significance precisely where an applicant may ultimately lose, and described Woodman's proceeding as "precisely what the NACO regime was intended to facilitate".

On the other elements required to be satisfied before exercising its discretion to order a NACO, the court found:

- Woodman's claim raised issues potentially significant for other independent hardware retailers "contending with Bunnings in a way that imperils their commercial viability"
- Notwithstanding Woodman had received some financial support from the Mitre 10 group, the disparity in available resources between Bunnings, owned by Wesfarmers, operating over 300 stores nationally and with revenue and profit in the billions of dollars, and Woodman, a family-owned operator of two Brisbane hardware stores, was "undeniably enormous" and the possibility of an adverse cost order could deter Woodman from pursuing its case

To be clear, the court has not decided that opening a store next to a competitor constitutes misuse of market power by Bunnings. That remains to be determined at trial.

Key takeaways

1. Even a successful respondent may have to bear its own substantial defence costs in competition law litigation.
2. By reducing the deterrent effect of potential adverse costs exposure, NACOs give smaller market participants a more viable path to trial in competition cases.
3. While a NACO should not support a plainly hopeless case, an applicant need only raise a reasonable issue for trial. A difficult case with uncertain prospects may still qualify, although its merits may inform the court's ultimate discretion.
4. Respondents should carefully calibrate their opposition to a NACO application. Detailed opposition to a NACO application may itself reinforce the conclusion that there are genuinely contestable issues.

It remains to be seen whether the Bunnings decision will encourage more claimants to seek a NACO in competition cases or, indeed, will lead to legislators considering the need for equivalent protections in other areas of the law where the risk of an adverse costs order acts as a deterrent for small businesses seeking redress. In that regard, while there are already various mechanisms allowing courts to depart from the usual rule on costs in particular circumstances, few of those mechanisms provide the level of comfort that a litigant enjoys when a court makes a NACO at an early stage of the litigation.

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