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Update Summary

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UPDATE 225

NOVEMBER 2021

TRADE PRACTICES LAW

Competition and Consumer Law

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Material Code 42609428

Print Post Approved PP255003/00340

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The Nature, Derivation and Administration of the Act

Amendments after 1977

In recent years, the Commission has increasingly sought to oppose proposed mergers in the Tribunal and Federal Court, without success. That has provoked the Commission to propose significant reform to s 50, mimicking aspects of the United States law. See [10.220].

Scheme of the Act suggests a duty to authorise

The Tribunal has considered a circumstance in which the Commission, in authorising an industry code subject to conditions, imposed a number of conditions requiring the authorisation applicants to submit annual reports to the Commission in respect of a range of actions and decisions taken under that Code. See [10.490].

Incriminating statements

A statement made by a corporate person in a response to a notice issued under s 155(1)(a) is capable of being used as an admission against it if it becomes a party to civil proceedings, even where prepared by a consultant for that party. See [10.710].

De novo character of Tribunal proceedings

In conducting a review of a determination by the Commission, the Tribunal will afford the modest status to that determination: Application by *Re Flexigroup Ltd (No 2)* [2020] ACompT 2 at [135]-[136]. See [10.800].

General procedural provisions

Where contradictors appear in the review, it will be unnecessary for the Commission to test the evidence before the Tribunal, present contrary material or make submissions putting forward an opposing point of view. See [10.860].

Interest and sufficient interest

Under s 109(2), the Tribunal may permit intervention upon such conditions as it thinks fit. Application by *Re Fortescue Metals Group Ltd* [2006] ACompT 6; (2006) 203 FLR 28 at [78]. That power has been exercised to grant leave in respect of one issue only, and to making written and oral submissions only, with a right to apply to the Tribunal to adduce evidence and to cross-examine. See [10.890].

Role of system and regularity

A State government which carried on the business of the State of operating ports through state owned corporations, was not, in deciding to privatise those ports, carrying

on that business, but was instead formulating and implementing government policy. See [10.1206].

Federal Constitutional Power: Extent and Limitations

Legislation narrowing the immunity

In formulating a State policy — to privatise two ports — the government of New South Wales was not carrying on a business, and hence was not subject to s 45. The decision to privatise those ports did not occur in the course of the State carrying on the business, through state owned corporations, of operating those ports (prior to privatisation) or another port within the state. See [20.113].

Derivative Crown immunity?

A legal right may be divested in whole or part. Whether an interference for a legal reason with a legal right amounts to a divestment of that right must depend on the nature of the right and the nature and extent of interference with it. *ACCC v NSW Ports Operations Hold Co Pty Ltd* [2021] FCA 720 at [356] per Jagot J. See [20.115].

