

# AUSTRALIAN BUSINESS LAW REVIEW

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## ARTICLES

### **Business Competitors, Standing and Judicial Review** – *Matthew Groves*

The doctrine of standing requires that those seeking to commence or maintain judicial review show a sufficient or special interest in the decision sought to be challenged. This requirement presents little difficulty to individuals, who usually have little difficulty in articulating how a decision will impact their rights or interests. Standing rules allow for degrees of affectation, recognising that most decisions affect more than one person, which means someone other than the person most affected by a decision may have standing to challenge it. The degrees of affectation recognised in standing rules does not apply easily to business interests, particularly when the party claiming standing is a business competitor to another business that is also affected by a decision. This article examines the special position of business competitors in standing rules. It argues that Australian courts have not yet fashioned a coherent approach to the standing of business competitors. The article examines recent English cases which have recognised the standing of public interest groups seeking to challenge many government decisions with a commercial element. .... 315

### **Corporate Criminal Liability in Transnational Bribery: Is Double Jeopardy a Game Changer?** – *Qingxiu Bu*

The emergence of multijurisdictional anti-bribery actions presents a substantial challenge to multinational corporations (MNCs). Multiple sovereigns have the jurisdiction to pursue criminal enforcement action against the same entity for the same underlying bribery. The existing legal framework is not sufficient for addressing this global challenge. The difference between theories of double jeopardy and judicial practices across sovereigns complicates multinationals' strategic designs of their compliance programs. Arguably, a global settlement regime would not only help make efficient use of precious judicial resources, but also incentivise MNCs to self-disclose in furtherance of their co-operation. .... 340

### **Competitive Neutrality in Australia: Time for a Reset?** – *Rhonda L Smith and Deborah Healey*

Australia's long-established competitive neutrality policy, an aspect of competition policy, focuses on ensuring that government businesses have no advantages over private competitors merely because of their ownership. Implementation has, however, been somewhat imperfect and a comprehensive review in 2015 recommended revitalisation and amendment. This has not been achieved. The OECD issued a formal Recommendation on Competitive Neutrality in May 2021 following much research and discussion. It took a broader approach to the issue than Australia, applying competitive neutrality principles to distorting conduct in relation to all businesses, not just to government businesses. In

addition, the Independent Pricing and Review Tribunal in New South Wales is currently undertaking a detailed review of competitive neutrality policy in the State, as was recommended in 2015. In these circumstances, it is timely to reconsider the utility of the current Australian approach and how Australian policy might be amended to comply with the OECD Recommendation. This article shows that solid groundwork on competitive neutrality has been laid in Australia but that the system needs fine tuning going forward in terms both of its utility and its capacity to comply with the OECD Recommendation. .... 360

**A New Regulatory Regime to Address Digital Harm** – *Nicholas Felstead and Cordelia Egerton-Warburton*

It is without question that services provided by digital platforms have an important and entrenched role in the modern economy. Digital platform markets are fast-moving and dynamic, which creates real enforcement challenges for regulators. The Australian Competition and Consumer Commission’s latest interim report in its Digital Platform Services Inquiry represents a significant step in developing fit-for-purpose digital regulation. The interim report builds on considerable community and stakeholder consultation, drawing attention to the real competition and consumer protection issues raised by digital platform services. These issues include the proliferation of dark patterns, inadequate dispute resolution mechanisms, and anti-competitive exclusionary practices. The interim report makes recommendations to strengthen Australia’s competition and consumer protection laws, through economy-wide and digital platform-specific measures. In this brief article, we consider the proposals for a prohibition against unfair trading practices, and the introduction of service-specific codes of conduct. .... 374