
The Baxter saga: The role of competition law in government procurement

Erica Brooke Taylor*

This article considers the epic battle between the Australian Competition and Consumer Commission and Baxter Healthcare Pty Ltd and its impact on the entitlement of the Crown to immunity from the application of the Trade Practices Act 1974 (Cth). The ramifications of the Baxter litigation on the practices of private enterprises when contracting with the Crown and its emanations in the government procurement market is also examined.

INTRODUCTION

The battle between the Australian Competition and Consumer Commission (ACCC) and Baxter Healthcare Pty Ltd (Baxter) (the Baxter litigation) has not only been a crusade by the ACCC of epic proportions, but has stirred up a number of issues regarding the entitlement of the Crown, its emanations and private entities dealing with it, to immunity from the application of statute, and in particular, Australian competition laws. It has also raised questions regarding non-government entities dealing with the Crown in the government procurement market and the role of the ACCC in this regard.

Many a commentary¹ has been written about the original proceedings and subsequent appeals instituted by the ACCC in this matter, and why not? The decisions of the courts at each stage of proceedings have given rise to great debate and discussion about the status of the Crown, and those dealing with it, before the law.

The purpose of this article is to analyse these questions in the context of modern competition law and the existence of a government procurement market, and how this market can be regulated such that the *Trade Practices Act 1974 (Cth)* (TPA) will have the intended effect of enhancing the welfare of Australians.

FACTS

Baxter had entered into long-term contracts with State purchasing authorities (SPAs)² in New South Wales, the Australian Capital Territory, Western Australia, South Australia and Queensland for the supply of various sterile fluids³ and peritoneal dialysis (PD) products.⁴ These products were considered by the courts to constitute two separate classes of fluids.

Baxter had been the only manufacturer of sterile fluids in Australia, and had competed with other companies in the domestic market for the supply of PD products.⁵

In the conduct of its negotiations with SPAs for the supply of sterile fluid products, Baxter had elected to bundle those products with PD products. Baxter gave the SPAs the option of agreeing to a

* Solicitor and Notary Public.

¹ For an excellent analysis of the decisions of the courts in the Baxter litigation, readers may wish to refer to the following: Cust K, "Case note: To Bundle or Not to Bundle" (2005) 13 TPLJ 226; Ramsey F, "Case note: Crown Immunity – Has its Time Passed?" (2007) 15 TPLJ 47; Duns J, "The High Court Rules on Derivative Crown Immunity" (2008) 16 TPLJ 51.

² Each SPA is part of the executive arm of government of the corresponding State or Territory.

³ Which include large volume parenteral (LVP) fluids used for re-hydration; the administration of drugs, resuscitation, and fluid and electrolyte replacement; irrigation solutions (IR), used for a variety of purposes including washing wounds during surgery; and parenteral nutrition (PN) fluids used for the provision of nutrients to patients.

⁴ PD is a form of treatment for chronic renal failure. The term PD fluids refers to both fluids and apparatus used to perform peritoneal dialysis treatment.

⁵ In the relevant time, Baxter sold approximately 90% of PD products in Australia, with other market participants holding a small market share.

sole supply agreement for the bundled products, or agreeing to take only the sterile fluid products at a higher item-by-item cost (alternate offer strategy).⁶ At all times it was the SPAs, and not Baxter, who dictated the terms upon which an agreement for the supply of sterile fluids and/or PD products would be concluded.⁷

Proceedings were brought by the ACCC in 2005 against Baxter and the SPAs alleging breaches of ss 46-47 of the TPA.

HISTORY OF THE BAXTER LITIGATION

Each stage of the Baxter litigation can be summarised as follows:

- *ACCC v Baxter v Healthcare Pty Ltd*⁸ (judgment at first instance): Allsop J found that Baxter, by its conduct in dealing with the SPAs, contravened ss 46-47 of the TPA. The ACCC had conceded that the SPAs were not carrying on business, thus rendering their conduct exempt from scrutiny under Pt IV of that Act.⁹ For reasons of derivative Crown immunity, his Honour found that Baxter was shielded from the application of the TPA, and its alleged anti-competitive conduct escaped the scrutiny of the court.
- Full Federal Court:¹⁰ relying on High Court authority, the Full Court agreed with the findings of Allsop J at first instance that the TPA did not apply to Baxter's conduct for reasons of derivative Crown immunity. The ACCC applied for, and was subsequently granted, special leave to appeal to the High Court.
- High Court:¹¹ the court considered the contemporary validity of the doctrine of derivative Crown immunity, and in doing so concluded that authorities relied upon by the Full Federal Court were incongruous with the state of the law since the commencement of the Hilmer Reforms¹² in 1993. The finding of Baxter's entitlement to derivative Crown immunity was overturned on this basis. The matter was remitted to the Full Federal Court to decide Baxter's liability under ss 46-47 of the TPA.
- Full Federal Court:¹³ Baxter's conduct was scrutinised by the court, which considered: (1) whether Baxter had a substantial degree of market power, and took advantage of that power by way of its alternate offer strategy for an anti-competitive purpose; and (2) whether that strategy constituted exclusive dealing for reasons of the conduct having the purpose or likely effect of substantially lessening competition.¹⁴ The court found that Baxter's conduct had contravened both ss 46-47 of the TPA.

CROWN IMMUNITY AND AUSTRALIAN COMPETITION LAW

The Act provides, inter alia, that Pt IV binds the Crown in right of the Commonwealth, States and Territories (the Crown) so far as it "carries on a business, either directly or by an authority, of the Commonwealth, a State or Territory".¹⁵

⁶Note, in the context of negotiations with the South Australian SPA, Baxter refused to provide a volume discount to the SPA unless it agreed to Baxter being the sole supplier of PD fluids to that SPA.

⁷See *ACCC v Baxter v Healthcare Pty Ltd* [2005] ATPR 42-066 at [39] (Allsop J).

⁸*ACCC v Baxter v Healthcare Pty Ltd* [2005] ATPR 42-066 (Allsop J).

⁹See s 2B of the *Trade Practices Act 1974* (Cth).

¹⁰*ACCC v Baxter v Healthcare Pty Ltd* (2006) 153 FCR 574.

¹¹*ACCC v Baxter v Healthcare Pty Ltd* (2007) 232 CLR 1.

¹²See Independent Committee of Enquiry into National Competition Policy, *National Competition Policy Report* (1993) (the Hilmer Report) and *Competition Policy Reform Act 1995* (Cth).

¹³*ACCC v Baxter v Healthcare Pty Ltd* (2008) 170 FCR 16.

¹⁴*ACCC v Baxter v Healthcare Pty Ltd* (2008) 170 FCR 16 at [241] (Mansfield J).

¹⁵Sections 2A and 2B of the TPA. An authority of the Commonwealth, a State or Territory, but not the Crown, is liable to pecuniary penalty or to be prosecuted for an offence under those sections under which it is bound by the TPA.

The logical application of this section, in circumstances where the Crown, either directly or by one of its authorities, carries on a business, is that it will be subject to the same sanctions and penalties as private citizens under the law.

The converse of this is where the Crown is not carrying on a business, it will be immune from the application of the TPA. Up until the High Court's decision in the Baxter litigation, the law in Australia was that those engaging in transactions with the Crown in circumstances where it was not carrying on business, may themselves be immune if a legitimate entitlement to derivative Crown immunity could be established.

The antiquity of Crown immunity and the evolution of its derivative forms, together with the increasingly blurred line between the Crown carrying out the normal functions of government as distinct from carrying on business, meant that the immunity, in both forms, was at odds with the legislatively entrenched objectives of the TPA.

COMMON LAW

The High Court's decision in *Baxter* opened up a reconsideration of Crown immunity and its consequences in a modern context. To understand the court's decision and consider the contemporary relevance of its application, one must first understand the history of, and reason for, Crown immunity.

The history of Crown immunity

The history of Crown immunity in England and its development in Australia can be summarised in three distinct phases:¹⁶

- *Phase One*: occurred between the 16th and mid-20th centuries. Immunity from the application of general statutory provisions was generally limited to those provisions which would otherwise derogate from any prerogative, estate, right, title or interest of the Crown,¹⁷ unless the intention was to provide "for the public good" and the like.¹⁸ In Australia, the law was the same and Crown immunity applied except where the Crown was either named or was, by necessary implication, to be bound by statute.¹⁹
- *Phase Two*: it was during this phase, following the Privy Council's decision in *Province of Bombay v Municipal Corporation of Bombay*,²⁰ that the doctrine was held not to be of universal application, but rather was subject to exceptions.²¹ The only circumstance in which the doctrine could be displaced was if, by necessary implication, it was intended that the Crown be bound by the provisions of the statute. Any such intention had to be "manifest from the very terms of the statute"²² or proven that the beneficent purpose of the statute would be wholly frustrated unless the Crown were bound²³ (the Bombay test). The Privy Council's decision was accepted by the High Court as establishing the law in Australia²⁴ and in this way the doctrine of Crown immunity

¹⁶ See Wright R, "The Future of Derivative Crown Immunity – with a Competition Law Perspective" (2007) 14 CCLJ 240 at 242-254 for a detailed analysis of each of the three phases.

¹⁷ *Magdalen College Case* (1615) 77 ER 1235 at 1247.

¹⁸ *Bropho v Western Australia* (1990) 171 CLR 1 at 14.

¹⁹ See *Sydney Harbour Trust Commissioners v Ryan* (1911) 13 CLR 358; *Minister for Works (WA) v Gulson* (1944) 69 CLR 338.

²⁰ *Province of Bombay v Municipal Corporation of Bombay* [1947] AC 58.

²¹ See comments of Windeyer J in *Downs v Williams* (1971) 126 CLR 61 at 87 regarding acceptance of this finding as determinative of the law in Australia.

²² *ACCC v Baxter v Healthcare Pty Ltd* (2007) 232 CLR 1 at 64, citing *Bradken Consolidated Ltd v Broken Hill Pty Co Ltd* (1979) 145 CLR 107 at 116.

²³ *ACCC v Baxter v Healthcare Pty Ltd* (2007) 232 CLR 1 at 64.

²⁴ *Wynyard Investments Pty Ltd v Commissioner of Railways (NSW)* (1955) 93 CLR 376 at 389.

“came to assume its universal and somewhat rigid mid-twentieth century form in Australia”.²⁵ The High Court would later demonstrate some of the unsatisfactory results in the application of the Bombay test.²⁶

- *Phase Three*: in the context of Australian law, this phase commenced in 1990 with the High Court’s decision in *Bropho v Western Australia*.²⁷ Rather than follow a strict application of the Bombay test, the court preferred a non-technical test of whether an intention for the Crown to be bound by a statute can be discerned from all the relevant circumstances.²⁸ The rigidity of the doctrine was relaxed, and from 1990 it took on a universal, and flexible application which considered legislative intent together with the subject matter of the particular statute, its purpose and policy²⁹ (the Bropho test). The presumption created by the test applied no matter what effect a statute had on the Crown. The impairment of the Crown’s commercial interests had to be more than merely adjectival.³⁰

Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd

While the Bropho test relaxed the threshold of finding an intention to bind the Crown by necessary implication, it did not assist in a determination of the liability of non-government parties in their contractual dealings with the Crown. Thus, the question of the extent of the liability of the parties in those circumstances remained unclear.

The High Court attempted to answer this question in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*,³¹ a case which concerned the issue of derivative Crown immunity in the context of Australian competition laws.

Bradken concerned a claim for injunctive relief by manufacturers of rolling railway stock. The Queensland Commissioner for Railways, a corporation and Queensland government authority and the second respondent, was a purchaser of rolling stock. It had agreed to acquire rolling stock, not through a competitive tender process, but in circumstances which were alleged to have contravened ss 45 and 47 of the TPA. The first and fifth respondents (who were competitors of the applicant) had agreed to finance the building of a railway by the Commissioner for Railways on which the stock was to be used.

The court found that the Commissioner for Railways, an instrumentality or agent of the Crown in right of the State of Queensland, was not bound by the TPA. At the time this case was decided, the TPA did not bind the Crown in the right of the States or Territories. The court denied relief sought against the first and fifth respondents on that basis. Thus derivative Crown immunity was bestowed on the first and fifth respondents, thereby absolving them of any liability under ss 45 and 47, leaving the merits of those claims undecided.

²⁵ Wright, n 16 at 246.

²⁶ See *Downs v Williams* (1971) 126 CLR 61, in particular the dissenting judgment of Windeyer J. See also *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172. In this case, all of the judgments accepted either the Bombay test or the statement of principle in *Commonwealth v Rhind* (1966) 119 CLR 584 at 598, that where the Crown is not expressly mentioned, the implication is found, if at all, by a consideration of the subject matter and terms of the particular statute. However, the judgments were split on the application of those principles. Barwick CJ found that the nature and subject matter of the relevant statute, background policy and drafting operated to bind the Crown. The majority preferred a strict application of the Bombay test. Note this decision was handed down six months after *Bradken Consolidated Ltd v Broken Hill Pty Co Ltd* (1979) 145 CLR 107.

²⁷ *Bropho v Western Australia* (1990) 171 CLR 1.

²⁸ *Bropho v Western Australia* (1990) 171 CLR 1 at 28 (Brennan J); see also the joint judgment of Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ at 23-24.

²⁹ Wright, n 16 at 253. See also *Commonwealth v Rhind* (1966) 119 CLR 584 at 598.

³⁰ *ACCC v Baxter v Healthcare Pty Ltd* [2005] ATPR 42-066 at [662].

³¹ *Bradken Consolidated Ltd v Broken Hill Pty Co Ltd* (1979) 145 CLR 107.

STATUTORY CONCEPTS

Crown in right of the Commonwealth, a State or Territory

The phrase “Crown in right of” on its own would ordinarily require a consideration of whether an activity being carried on by a government is done by the Crown in right of the Commonwealth, a State or Territory. However, in the context of ss 2A and 2B of the TPA (which expressly call out both the Crown and its authorities), any distinction between what is and what is not an act of the Crown is irrelevant.³² The intent to bind the Crown and its authorities is manifest from the terms of the statute, but subject to one major qualification as further discussed below.

Carry on business

The general displacement of immunity established by ss 2A and 2B is qualified by the words “so far as [the Crown or its authorities] carries on business”. Sections 2A and 2B will only act to waive Crown immunity insofar as the Crown, either directly or by way of an authority, is carrying on business. The legislative intent of these sections is to apply the relevant provisions of the TPA to businesses in public ownership, rather than make those provisions generally applicable to the Crown.³³

The TPA itself gives very little assistance in interpreting the phrase “carries on business”. While s 2C states what activities *do not* constitute carrying on a business, this list is not exhaustive. At its widest, the phrase would encompass *any* commercial activity of the government. At its narrowest, the phrase would exclude government business carried out for the ordinary function of government, commercial in nature or otherwise.³⁴

This section appears to entrench an intention that private enterprise dealing with States or Territories in relation to the *actual conduct of a business* will be afforded the same protection and subject to the same sanctions as they are in their dealings with other private enterprises.³⁵

The following is a reproduction of a useful summary of what activities were considered to amount to carrying on business³⁶ immediately prior to the High Court’s decision in *NT Power Generation Pty Ltd v Power & Water Authority*.³⁷

- The word “business” takes its meaning from its context. Sections 2A and 2B of the TPA embody a norm of equal protection for the citizen, but only in respect of executive activities engaged in as part of, or in the course of, carrying on a business and not other dealings with the executive. The ambit of these activities must be examined to see whether the impugned conduct occurred in the course of the said business.³⁸
- The *regular* and *systematic* conduct of any activity is a necessary, though not sufficient, indicator of carrying on a business.³⁹

³² Miller R, *Millers Annotated Trade Practices Act – Australian Competition and Consumer Law* (30th ed, Thomson Reuters, 2009) at [1.2.A7]. The immunity of the Crown in right of a State or Territory was limited in the same manner as it is for the Commonwealth with the insertion of s 2B of the TPA. This section was the result of the recommendations of the Hilmer Report, n 12 and subsequent legislative reforms.

³³ Wright, n 16 at 257. See Australian Government, House of Representatives, *Hansard*, “Competition Policy Reform Bill 1995”, Second Reading Speech (30 June 1995) p 2793.

³⁴ Sneddon N, “*JS McMillan Pty Ltd v Commonwealth* (1997) 147 ALR 419: The Trade Practices Legislation and Government Immunity” (1998) 26 FLR 401 at 404.

³⁵ Sneddon, n 34 at 403, citing the High Court in *ASIC; Ex parte Australian Transport Officers Federation* (1990) 171 CLR 216 at 226, where the court said it was appropriate to talk of the “business of the government”.

³⁶ Mantziaris C, “Comments: When Government ‘Carries on a Business’/Derivative Crown Immunity: *NT Power Generation Pty Ltd v Power & Water Authority* (2004) 210 ALR 312; [2004] HCA 48” (2005) 16 PLR 5 at 7-8.

³⁷ *NT Power Generation Pty Ltd v Power & Water Authority* (2004) 219 CLR 90.

³⁸ *JS McMillan Pty Ltd v Commonwealth* (1997) 77 FCR 337 at 356.

³⁹ *JS McMillan Pty Ltd v Commonwealth* (1997) 77 FCR 337 at 354.

- The provision of services for remuneration, regardless of the commercial adequacy of such, might constitute carrying on a business.⁴⁰
- Activity which can be characterised as more “regulatory” or “administrative” rather than “commercial” will generally not amount to carrying on a business, even when conducted on a fee-recovery basis.⁴¹
- The less “commercial” the character and objectives of an organisation, the greater the degree of system and regularity required for the organisation to be characterised as a business.⁴²

In *NT Power*, the court adopted a broad view of the activities which may fall within the realm of carrying on business, thereby extending the scope of the TPA to capture a broad range of government activity.

Activities that may constitute carrying on a business were considered in the context of an alleged misuse of market power by the Power and Water Authority (PAWA), a statutory corporation of the Northern Territory government, and its wholly owned subsidiary company (Gasco). PAWA was established under statute and the relevant minister had formal power to direct the corporation.⁴³ PAWA was a vertically integrated electricity enterprise,⁴⁴ and had denied NT Power Generation Pty Limited (NT Power Co) access to its infrastructure as to do so would give NT Power Co the ability to compete with it in the market for electricity supply to retail consumers.

The court made a clear distinction between the terms “market” (as that term is defined in s 4E of the TPA) and “business”, and found that nothing in the TPA limited the meaning of “business” by reference to criteria for market definition. Thus, the question of what activities may amount to carrying on business is not to be approached with reference to competition in a market.⁴⁵ PAWA’s conduct in denying access to its infrastructure was found not to have been engaged in for reasons of capacity or technical difficulty, but to preserve its revenue position in relation to electricity sales, and was designed to secure its position as part of its retail electricity supply business.⁴⁶

PAWA was found to have engaged in the relevant conduct to advance its retail electricity supply business, insofar as it carried on this particular business, and was thus caught within the net of s 2B. However, the court found that the business the subject of the relevant conduct need not necessarily be the actual business engaged in by PAWA.

In addition to its consideration of what activities might constitute carrying on a business, in *NT Power* the High Court also established further principles relevant to the determination of the application of derivative Crown immunity. These principles required evidence that the application of the statute to the relevant person would adversely affect a legal prerogative, or a statutory, proprietary, contractual or other legal or equitable right or interest held by the Executive. The affectation of an economic interest only would not be sufficient, nor would an interest in an understanding or arrangement. The immunity could, however, be claimed in circumstances where the Crown could

⁴⁰ *JS McMillan Pty Ltd v Commonwealth* (1997) 77 FCR 337 at 355.

⁴¹ *Village Building Company Ltd v Canberra International Airport Pty Ltd (No 2)* (2004) 134 FCR 422 at [94]; *East's Van Villages Pty Ltd v Minister Administering the National Parks and Wildlife Act* [2001] ATPR 46-211 at [134]-[139]; *Saitta Pty Ltd v Commonwealth* (2001) 162 FLR 35.

⁴² *Fasold v Roberts* (1997) 70 FCR 489 at 525; *GEC Marconi Systems v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 at 313.

⁴³ Section 16 of the *Power and Water Authority Act 1987* (NT).

⁴⁴ *NT Power Generation Pty Ltd v Power & Water Authority* (2004) 219 CLR 90 at [2]. PAWA generated electricity or purchased electricity generated by others; it transported that electricity from generation sites to distribution points via transmission equipment; it then transported it from distribution points to the customers via distribution equipment, and charged the customers.

⁴⁵ *NT Power Generation Pty Ltd v Power & Water Authority* (2004) 219 CLR 90 at [67]-[70].

⁴⁶ *NT Power Generation Pty Ltd v Power & Water Authority* (2004) 219 CLR 90 at [72].

show that an legal or equitable interest in a contract to which it is not a party would be affected by the application of the relevant statute to the parties to that contract.⁴⁷

DERIVATIVE CROWN IMMUNITY

As noted above, in *Baxter*, the ACCC conceded, without argument, that the SPAs were not carrying on business for the purposes of the application of s 2B of the TPA. It therefore followed from the application of the Bropho test that Baxter was entitled to the benefit of derivative Crown immunity.

Notwithstanding this concession, the extent of the operation of derivative Crown immunity in respect of Baxter's conduct in dealing with the SPAs remained a relevant consideration for the courts at all stages of proceedings.

Crown immunity will apply where the government does not carry on business, even if it is a party to, or a participant in, an anti-competitive agreement or conduct with a non-government party.⁴⁸ As a result of derivative Crown immunity, the non-government party would also be shielded by the Crown. If this were not the case, a finding of liability against that non-government party would operate to impair the Crown's proprietary, contractual or legal rights.⁴⁹ Until the High Court's decision in *Baxter*, the law left considerable scope for the operation of derivative Crown immunity.

In *Baxter*, Allsop J, at first instance, stated that the doctrine of Crown immunity was "not so much an immunity of the Crown as an application of a principle of the construction of a statute".⁵⁰ If the statute is construed so as not to bind the Crown, it will not extend to non-government parties dealing with the Crown in circumstances where the result would be an interference with the Crown's proprietary, contractual, and legal rights and interests. As a result, Baxter was shielded from any purported liability under the TPA. This decision was later upheld by the Full Federal Court relying on High Court authority.

It was the appropriateness of these findings which the High Court considered in a modern commercial context. A consideration of the facts and relevant law in this context resulted in a majority of the High Court concluding that the authorities relied upon by the lower courts in the Baxter litigation were archaic and no longer represented the modern state of the law, in particular following the Hilmer Reforms in 1993 and the introduction of s 2B in 1995.⁵¹

The majority of the High Court demonstrated the incongruity of derivative Crown immunity with the modern emanation of the Act in the following passage:

[I]t would be wrong to conclude that ss 46 and 47 had no application to any conduct of the first respondent in relation to its dealings with the second, third and fourth respondents. The first respondent was a trading corporation. A conclusion that, in carrying on dealings with a government in the course of its own business, it enjoyed a general immunity not available to the government when the government was carrying on business itself would be remarkable. Such a conclusion would be impossible to reconcile with the object of the Act as now declared in s 2. Furthermore, such a conclusion would go far beyond what is necessary to protect the legal rights of governments, or to prevent a divesting of proprietary, contractual and other legal rights and interest.

...

It is one thing to read the Act so as not to divest the Crown of legal rights. It is another thing altogether to read the Act as giving an executive government (as distinct from a Parliament acting under s 51(1)), including all its servants and agents, a freedom not enjoyed when the government itself is carrying on

⁴⁷ *NT Power Generation Pty Ltd v Power & Water Authority* (2004) 219 CLR 90 at [167]-[189].

⁴⁸ *Bass v Permanent Trustee Company Ltd* (1999) 198 CLR 334 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, with Kirby J agreeing).

⁴⁹ See *Wynyard Investments Pty Ltd v Commissioner of Railways (NSW)* (1955) 93 CLR 376; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334; *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90.

⁵⁰ *ACCC v Baxter v Healthcare Pty Ltd* [2005] ATPR 42-066 at [681].

⁵¹ *ACCC v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at [75].

business, from any impact of laws enacted for the promotion of competition and fair trading in the public interest. And it is even more unlikely that that freedom extends to all persons dealing with that executive government.⁵²

The TPA contains its own scheme, in the enactment of s 4L, to determine relief in circumstances where the application of the TPA to the parties to anti-competitive agreement is one-sided.⁵³

BAXTER'S LIABILITY UNDER THE TPA

Following the findings of the High Court, the matter was remitted to the Full Federal Court to consider the merits of the ACCC's claim that Baxter acted contrary to the TPA in its dealings with the SPAs and, in particular, in effecting its alternate offer strategy. The Full Federal Court found:

- on the s 46 issue – Baxter took advantage of its substantial degree of market power in the sterile fluids market by engaging in the alternate offer strategy, in particular the pricing of sterile fluids in item-by-item bids. The conduct was engaged in with the sole or substantial purpose of lessening competition in the PD fluids market, a proscribed purpose under s 46(1)(c).⁵⁴
- on the s 47 issue – by its conduct, the purpose and effect, or likely effect of which was to substantially lessen competition in the market for the supply of PD fluids, Baxter had engaged in exclusive dealing in contravention of s 47(1) and (2).⁵⁵

Contravention of section 46

The ACCC alleged that Baxter was in breach of s 46 in a number of different ways to accommodate the identification of the market or markets in which it was said that Baxter had engaged in conduct with the proscribed purpose and effect required by the s 46(1)(a) and (c).⁵⁶

The ACCC contended the existence of power in either a combined national wholesale sterile fluids market, or three separate national wholesale markets (for LVP fluids, PN fluids and IS fluids respectively). It argued that Baxter had exercised its power in those markets, a national PD products market, or in separate State-based geographic PD products. The Full Court agreed with the finding of Allsop J at first instance that the relevant market to assess the degree of Baxter's market power was in a national wholesale sterile fluids market.⁵⁷

The facts in support of these arguments were that: (1) Baxter had been the dominant supplier of sterile fluids for a considerable period of time; (2) the inelasticity of the price of sterile fluids, given their essential character; (3) the existence of significant barriers to entry in local production and import competition; and (4) Baxter was likely to be successful in sterile fluid tenders notwithstanding any countervailing power of the SPAs.⁵⁸

⁵² *ACCC v Baxter v Healthcare Pty Ltd* (2007) 232 CLR 1 at [64], [68]. Callinan J dissented, stating at [145] that: "It is not to be supposed that the promotion of competition, either within a State or the whole Commonwealth, is a higher end than the provision by a State of medical services and medication for the people of that State." It is respectfully submitted that this is a rather narrow view to take of the matter, given the importance of the opportunity for the High Court to consider the contemporary relevance of derivative Crown immunity in the context of legislation enacted to promote competition and the welfare of Australian consumers.

⁵³ Section 4L was inserted into the TPA in 1977 by the *Trade Practices Revision Act 1986* (Cth). In *SST Consulting Services Pty Ltd v Rieson* (2006) 225 CLR 516 at [24], the High Court construed that section to require, as opposed to permit, the severance of offending provisions of a contract insofar as the offending provision is severable.

⁵⁴ *ACCC v Baxter v Healthcare Pty Ltd* (2008) 170 FCR 16 at [163]-[189].

⁵⁵ *ACCC v Baxter v Healthcare Pty Ltd* (2008) 170 FCR 16 at [190]-[253].

⁵⁶ *ACCC v Baxter v Healthcare Pty Ltd* (2008) 170 FCR 16 at [23].

⁵⁷ *ACCC v Baxter v Healthcare Pty Ltd* (2008) 170 FCR 16 at [114].

⁵⁸ Watts K and Gordon T, "Baxter Litigation Finally Concludes" (2008) 24(4) *Australia & New Zealand Trade Practices Law Bulletin*.

The Full Court, contrary to the findings of Allsop J at first instance,⁵⁹ found that Baxter had taken advantage of its substantial degree of market power by engaging in the alternate offer strategy, in particular by its pricing of sterile fluids in its item-by-item bids.⁶⁰

On the issue of whether Baxter had a proscribed purpose as required by s 46, the Full Court was split. Baxter had submitted that its purpose in engaging in the alternative offer strategy was to “win as much of the available business as possible”.⁶¹ Only a contravention of s 46(c) was found. Baxter’s conduct was found to be for the purposes of deterring or preventing persons from competing in the relevant market, or any other market.⁶²

Baxter’s conduct was viewed in two ways:

- as a deliberate strategy to take advantage of its power in the sterile fluids market to bolster its power in the national market for PD products, that is, anti-competitive conduct; or
- a strategy to prevent its rival competitors from submitting commercially viable bids in competition with Baxter – or normal commercial conduct.

The concurring judgment of Gyles and Mansfield JJ indicated that Baxter’s conduct was for a proscribed purpose for reasons of Baxter’s knowledge of its dominance in both the relevant PD products and sterile fluids markets, and the likely effect of its alternative offer strategy (that is, winning tenders).⁶³

On the issue of whether Baxter’s conduct was for an anti-competitive purpose, only a contravention of s 46(c) was found. Baxter’s conduct was found to have the purpose of deterring or preventing a person from competing in the relevant market, or any other market.⁶⁴

While the ACCC’s successful prosecution of a s 46 contravention is to be applauded, it must be remembered that *Baxter* must be distinguished on its facts from other authorities on s 46, given Baxter’s prima facie market power resulting from its position as sole manufacturer and supplier of sterile fluids.

Contravention of section 47

The ACCC alleged that by the same conduct, and as a result of having supplied sterile fluids and PD products to some SPAs at a particular price and on condition (by virtue of the alternate offer strategy), Baxter had acted in contravention of s 47.⁶⁵ The court considered it appropriate to analyse the alleged contravention of s 47 in the context of the tender process, and not at a higher level of competition, as submitted by Baxter.⁶⁶ Thus, the temporal reference of Baxter’s conduct was limited to the relevant tender process, and not the impact of its long-term conduct in the relevant market.

The lessening of competition which resulted from the alternate offer strategy occurred in the national PD products market, a market in which Baxter and the targeted competitors (but for the impugned conduct) supplied or were likely to supply goods.⁶⁷ Baxter’s conduct in its item-by-item pricing of sterile fluids products effectively foreclosed its competitors from being able to participate in the relevant tender process.

⁵⁹ See *ACCC v Baxter v Healthcare Pty Ltd* (2008) 170 FCR 16 at [115]-[155]. The court found that evidence that Baxter’s item-by-item prices were monopolist prices was not required.

⁶⁰ See, eg *ACCC v Baxter v Healthcare Pty Ltd* (2008) 170 FCR 16 at [153] (Mansfield J), [294] (Dowsett J), [380] (Gyles J).

⁶¹ *ACCC v Baxter v Healthcare Pty Ltd* (2008) 170 FCR 16 at [120].

⁶² *ACCC v Baxter v Healthcare Pty Ltd* (2008) 170 FCR 16 at [186]-[187].

⁶³ Watts and Gordon, n 58.

⁶⁴ *ACCC v Baxter v Healthcare Pty Ltd* (2008) 170 FCR 16 at [186]-[187].

⁶⁵ *ACCC v Baxter v Healthcare Pty Ltd* (2008) 170 FCR 16 at [24]. The condition was that the SPAs would not, or would only to a limited extent, acquire sterile fluids and PD products from a competitor of Baxter. The ACCC relied on alternative claims dependent on the markets alleged to demonstrate that Baxter’s conduct had either the purpose, or the effect or likely effect, of substantially preventing, hindering or lessening competition in those markets.

⁶⁶ *ACCC v Baxter v Healthcare Pty Ltd* (2008) 170 FCR 16 at [241]-[253] (Mansfield J), [397] (Gyles J); see the dissenting judgment of Dowsett J at [357]-[362].

⁶⁷ *ACCC v Baxter v Healthcare Pty Ltd* (2008) 170 FCR 16 at [194] referring to s 47(13) of the TPA.

The result of the alternate offer strategy was that, while Baxter's competitors in the national PD products market would be able to compete in future tenders, that strategy had the purpose and effect of substantially lessening competition in that particular tender process.

THE EFFECT OF BAXTER ON GOVERNMENT PROCUREMENT

There are many implications for decision makers, both within government and private enterprise, arising from the Baxter litigation in the context of government procurement. These considerations include:

- the nature and extent of the commercial activity of the Crown and its authorities;
- the considerations to be had by private enterprise when contracting with the Crown and its authorities; and
- whether it is appropriate for the ACCC, an authority of executive government, to scrutinise public procurement contracts.

The nature and extent of the commercial activity of the Crown and its authorities

What exactly constitutes carrying on a business is still not entirely clear. What is clear is that any interpretation of the legislation which takes a narrow view of what it means for the Crown to carry on business is at odds with the objects of s 2 of the TPA, which states:

The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

The intent of s 2 is not to protect or shield small market players from the impact of their larger competitors, but to create a level playing field on which competition can occur. It would be reasonable to conclude that the playing field should be level for private entities doing business amongst themselves and with consumers, and with the Crown and its authorities.

The concession made by the ACCC in the Baxter litigation at the commencement of proceedings that the SPAs were not carrying on business was disappointing. Kirby J was critical of this concession as it resulted in the case against Baxter proceeding on the footing that the SPAs were immune from the application of Pt IV of the TPA, stating that:

The error in the parties' approach illustrates an inclination of the legal mind, when a new legal text intervenes, to go on reasoning as if the text did not exist; to fail to adjust past legal notions to the language of the text; and to apply preceding common law principles without regard to the fundamental impact on them of the intervening provisions of the new written law which enjoys higher legal authority.⁶⁸

This concession was surprising in the circumstances, given the nature of the activity undertaken by the SPAs and the fact that it was the purchasing authorities, and not Baxter, who dictated the terms of the contracts. The ACCC therefore denied the courts the ability to undertake a much needed analysis of the scope of s 2B of the TPA in its coverage of the commercial activities of the Crown.

Some may argue that Callinan J (dissenting) was correct in his analysis of the application of the TPA on the basis that it is for the States and the Territories, and not the Commonwealth, to oversee and administer the provision of public health.⁶⁹ However, in the context of competition law, the application of the TPA must be considered with reference to the nature, commercial or otherwise, of the activities of the Crown and its authorities.

In the context of the procurement playing field, the judicial sentiment appears to be that the question of whether the Crown carries on business should be considered in a modern context. In *Bropho v Western Australia*, the majority stated:

activities of the executive government reach into almost all aspects of commercial, industrial and developmental endeavour ... it is commonplace for governmental, commercial, industrial and

⁶⁸ *ACCC v Baxter v Healthcare Pty Ltd* (2007) 232 CLR 1 at [82]-[83].

⁶⁹ See *ACCC v Baxter v Healthcare Pty Ltd* (2007) 232 CLR 1 at [146]-[147] (Callinan J).

developmental instrumentalities and their servants and agents which are covered by the shield of the Crown either by reason of their character as such or by reason of specific statutory provision to that effect to compete and have commercial dealings on the same basis as private enterprise.⁷⁰

The goal of the Act is to secure equal treatment of non-government and government businesses. As was stated by the High Court in *NT Power*:

A construction of s 2B which prevents the same outcome for government businesses that do so is unconvincing. It would permit a government business to remain immune from legislation so long as it were consistently anti-competitive in denying infrastructure access ... The statutory language does not suggest that this anomaly was contemplated.

It is interesting to note the way in which the federal Department of Finance and Deregulation views the role of non-government parties in the context of selling to the federal government. The Australian government is viewed as a large potential market for businesses of all sizes and encourages competition amongst non-government parties to secure a part of this market.⁷¹ While there is no one single market for government business, many different government agencies may operate as separate markets, each generally being responsible for its own business decisions and processes.⁷²

The federal government views value for money to be the core principle which underpins procurement. This principle is said to be achieved by:

- encouraging competition;
- promoting the efficient, effective and ethical use of resources;
- accountability and transparency;
- appropriately competitive and non-discriminatory procurement processes; and
- assessing the costs and benefits of each procurement process.⁷³

Non-government parties are encouraged to promote their products and services as a value for money proposition in the same way as they would when dealing with other private sector consumers.⁷⁴

If a distinction is to be drawn between legislation that purports to modify the nature of the executive power vested in the Crown and that which merely seeks to regulate activities in which the Crown may choose to engage in the exercise of its capacity,⁷⁵ then it is argued that the TPA falls within the latter category. That is, the TPA specifically seeks to regulate the business activity of the Crown as opposed to modifying any executive power vested in the Crown which enables it to engage in business activity.

However, this distinction is not aligned with the current state of the law on Crown immunity in Australia following the High Court's decision in *Bropho*. Rather, the *Bropho* test encourages an analysis of the nature of the activity being engaged in by the Crown and for the purposes of determining whether or not that activity is "commercial" or "traditionally governmental" in nature.

In the context of *Baxter*, one can only hypothesise about the arguments which may have been presented by both the ACCC and the SPAs had the issue of the extent to which the SPAs were carrying on business not been conceded. From the perspective of the ACCC, it may have been argued that the

⁷⁰ *Bropho v Western Australia* (1990) 171 CLR 1 at 19.

⁷¹ See Australian Government – Department of Finance and Deregulation, *Selling to the Australian Government – A Guide for Business* (2009), p vii.

⁷² Department of Finance and Deregulation, n 71, p 2.

⁷³ Department of Finance and Deregulation, n 71, p 6.

⁷⁴ Department of Finance and Deregulation, n 71, p 7.

⁷⁵ See *Re Residential Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 438-439. Compare with the High Court's decision in *Bropho v Western Australia* (1990) 171 CLR 1. Both decisions required the High Court to consider whether the Crown was bound by legislation. See Gray A, "Options for the Doctrine of Crown Immunity in 21st Century Australia" (2009) 16 AJ Admin L 200 at 208, where Dr Gray submits that both decisions need to be reconciled. He further suggests that the test in *Bropho* as applied by the High Court does not reconcile with the court's synopsis of Crown immunity in *Defence Housing*. The interplay of these decisions was not discussed in *Defence Housing* and was not later considered by the High Court in *NT Power*.

SPAs were engaged in the acquisition of goods from a non-government entity in the context of a commercial transaction akin to those transactions which take place between private entities.

On the other hand, the SPAs may have argued that their role was traditionally governmental and therefore fell outside the scope “carrying on business” and was an exercise of government prerogative. It would follow that any application of the TPA to their activities would be a purported modification of that executive power vested in the Crown.

Considerations for private enterprise

When contracting with government, private enterprise needs to be acutely aware of the following factors in the preparation of responses to government tenders:

- the gaps in jurisprudence on the application of Crown immunity and how it is assessed;
- the consequent scope for the Crown and its authorities to engage in commercial activities which may not be found to constitute “carrying on business” for the purposes of ss 2A and 2B of the TPA on an application of the *Bropho* test; and
- the legal and financial ramifications of anti-competitive provisions of a contract being severed by virtue of an application of s 4L.

Private enterprise can no longer take risks when engaging in commercial dealings with government authorities on the basis that it will be protected from the application of the Act on the basis of derivative Crown immunity.

Whilst strategies such as bundling may make financial sense to private enterprise, such strategies may have the result of foreclosing the relevant market or markets for products and/or services to competition from other market players.

What can be learned from the Baxter litigation is that bundling strategies may contravene both ss 46-47 of the Act if those strategies have both the purpose and effect of substantially lessening competition in the market for those products and services and any other market. Indeed, the Full Court of the Federal Court found contraventions of both sections resulting from Baxter’s conduct.

Nonetheless, the dollar may drive corporate strategies that are otherwise risky from a legal perspective. Private enterprise should proceed cautiously in this regard. The High Court in *Baxter* indicated that in the event of a one-sided application of the TPA, s 4L would require any contractual provisions contravening Pt IV to be severed from the contract, to the extent that those provisions can be severed.⁷⁶ The consequences of any such findings could no doubt result in significant damage to the reputation and commercial viability of any business.

The most pragmatic and risk neutral approach for private enterprise would be, in the context of bidding for government services, to behave in the same manner it would when dealing with other private enterprise. That is, to proceed on the assumption that the relevant government authority is subject to the provisions of Pt IV of the TPA and thus any anti-competitive conduct should be avoided, or at the very least to consider the cost benefits of entering into a contract that may deliver competitive benefits in the short term, but which may lose those benefits if provisions are found to be anti-competitive in nature and therefore severed.

Scrutiny of government business by the ACCC

Proceeding on the basis that one day clarity will be given on to what extent the Crown and its authorities are required to carry on business so as to extend the application of the competition provisions of the TPA to the conduct of the Crown, it would be for the ACCC to scrutinise the competitive behaviour of the Crown in assessing its compliance with the TPA.

However, for the ACCC to do so would open up a veritable Pandora’s box of issues regarding the appropriateness of the business of the executive being assessed and appraised by another arm of the same executive.

How Parliament would reconcile the difficulties in such a scenario is an argument for another day.

⁷⁶ *ACCC v Baxter v Healthcare Pty Ltd* (2007) 232 CLR 1 at [70].