



## HIGH COURT OF AUSTRALIA

Public Information Officer

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AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v BAXTER  
HEALTHCARE PTY LTD, THE STATE OF WESTERN AUSTRALIA, THE STATE OF  
SOUTH AUSTRALIA AND THE STATE OF NEW SOUTH WALES

A corporation does not derive immunity from civil proceedings for contraventions of the *Trade Practices Act* (TPA) through conducting business with governments, the High Court of Australia held today.

Baxter Healthcare is the Australian arm of a global medical products company. It manufactures various sterile fluids for hospitals and fluids and apparatus for home-based kidney dialysis patients. Baxter has the only Australian manufacturing plant for certain types of sterile fluids, at Toongabbie in Sydney. Between 1998 and 2001, Baxter entered into long-term contracts to supply sterile fluids and dialysis products to public hospitals in four States and the ACT. Baxter offered to supply products either priced on an item-by-item basis or heavily discounted by bundling together on a sole-supplier basis. The resulting contracts provided for the total supply of certain sterile fluids and at least 90 per cent of dialysis fluids for up to five years. None of the contracts is still on foot.

In 2000, the South Australian Department of Human Services sought tenders for various products and Baxter and two other companies responded. Baxter's Offer 1 was an item-by-item bid for two years, with optional extensions. Offer 2 was a combined bid on an exclusive basis for five years with volume discounts. The Department requested a revised offer for a five-year term for all products, except renal products, with a volume discount. Baxter's Offer 1A did not include this discount. Both Offer 1A and Offer 1 cost \$5,914,291. The bundled Offer 2 cost \$4,501,053, which included renal products but was cheaper than Offer 1A. The Department protested and raised concerns about Baxter's conduct possibly breaching section 46 of the TPA. Offer 1A was not accepted and a different offer from Baxter was later accepted.

Section 46 is concerned with misuse of market power and section 47 with exclusive dealing. Section 46 prohibits corporations taking advantage of market power to eliminate or damage a competitor or to deter or prevent competitive conduct. Exclusive dealing in section 47 includes corporations' supplying goods on condition that the customer will not acquire certain goods from a competitor or refusing to supply goods because the customer has not agreed not to acquire goods from a competitor, if the conduct has the purpose or effect of substantially lessening competition.

In the Federal Court of Australia, the ACCC sought declarations that Baxter had committed 20 contraventions of sections 46 and 47, plus monetary penalties and injunctions. Justice James Allsop found that Baxter's conduct would have contravened section 46 in one respect in relation to Offer 1A in SA and section 47 in a number of respects. The conduct was not in making or giving effect to a contract but occurred before any contract was entered into. However Justice Allsop held that the Act did not apply to this conduct due to the Crown immunity Baxter derived from doing business with the States and dismissed the ACCC's application. The Full Court dismissed an appeal, but did not decide Baxter's argument that Justice Allsop was wrong to conclude that, but for immunity, there would have been breaches of sections 46 and 47. The ACCC appealed to the High Court.

The High Court, by a 6-1 majority, allowed the appeal. It held that Baxter, in dealing with a government, did not enjoy a general immunity not available to the government if the government itself had carried on a business. Such a conclusion would go beyond what is necessary to protect the legal rights of governments. The Court rejected an argument that the TPA does not prevent the Crown in right of a State or Territory from making any contract it wishes and that the TPA preserves the Crown's freedom by providing that corporations dealing with the Crown should be free to make any contract unfettered by any constraints. The Court held that this argument was not supported by established principles of statutory construction and could not be reconciled with the purpose and subject matter of the TPA. It held that in its dealings with the States and Territories, Baxter was bound by sections 46 and 47. Conduct found to have fallen within the prohibitions of sections 46 and 47 should now be subject to remedies, including pecuniary penalties, sought by the ACCC. The Court remitted the case to the Full Court of the Federal Court for further consideration of remaining issues, including whether Baxter's conduct contravened sections 46 and 47.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*