

**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v BAXTER
HEALTHCARE PTY LIMITED & ORS (S56/2007)**

Court appealed from: Full Court of the Federal Court of Australia

Dates of judgment: 24 August 2006

Date of grant of special leave: 9 February 2007

This case concerns the anti-competitive effects of "exclusionary bundling". This is the practice of supplying customers with a bundle of products cheaper than they would otherwise be supplied individually. This is done on the condition that the customer will not, except to a limited extent, acquire similar products from a competitor.

The Australian Competition and Consumer Commission ("ACCC") alleged that Baxter Healthcare Pty Limited ("Baxter") contravened sections 46 and 47 of the *Trade Practices Act 1974* (Cth) ("TPA") in various ways. This was in the sale and supply of sterile fluids and peritoneal dialysis products to the health authorities of New South Wales, Queensland, South Australia, Western Australia and the Australian Capital Territory. It sought declaratory and injunctive relief, monetary penalties under section 76 of the TPA and findings of fact for the purposes of section 83 of the TPA. The relevant events covered the periods from 1998 to 2001.

On 16 May 2005 Justice Allsop held that the provisions of the TPA did not apply to the questioned conduct. This was due to the principles of Crown immunity or derivative Crown immunity. If not for this, his Honour held that Baxter would have contravened section 46 of the TPA by entering into an agreement with South Australia known as the "Offer 1A contravention". He found however that Baxter had not otherwise contravened section 46 of the TPA in respect of its dealings with NSW, Queensland, South Australia, Western Australia or the ACT generally ("the section 46 conclusions generally"). Again working on the assumption that he was wrong on the Crown immunity issue, his Honour held that Baxter would have contravened section 47 of the TPA by its conduct known as the "section 47 Contraventions". It had not however contravened section 47 in respect of what the ACCC called the wider competitive process in the market.

The ACCC appealed against the decision on both the Crown immunity issue and the section 46 conclusions generally (other than the conclusion of the Offer 1A contravention). It also appealed against the decision concerning the section 47 contraventions. This was to the extent that they were not based on exclusive dealing having the purpose or effect of substantially impeding or hindering "the wider competitive process in the market". Baxter also filed a notice of contention, alleging that Justice Allsop erred in both fact and law with respect to the section 46 conclusions generally, along with the section 47 contraventions.

On 24 August 2006 the Full Federal Court (Mansfield, Dowsett and Gyles JJ) unanimously dismissed the ACCC's appeal. Their Honours held that Justice Allsop's conclusion on the threshold Crown immunity issue was correct. The

correctness of his other findings was therefore moot. In reaching this conclusion, the Full Court expressed its doubts about the leading case in this field, *Bradken Consolidated Ltd v Broken Hill Co Ltd* (1979) CLR 107 ("*Bradken*"). It nevertheless held that *Bradken* was binding authority. Their Honours noted however that the effect of that Crown immunity was to have a substantial area of commerce in which restrictive practices could be carried on by all those dealing with a government. This was potentially to the disadvantage of the public purchasing authority, other suppliers and to the consumers.

The grounds of appeal include:

- The Full Court erred in holding that, by reason of the operation of the principles of Government or Crown immunity, the TPA (in particular sections 46 and 47 of the TPA) did not apply to nor operate upon the conduct of Baxter alleged to contravene sections 46 and 47 of the TPA, including:
 - a) conduct in and in connection with negotiations which took place prior to the entry into the impugned contracts;
 - b) conduct constituted by the entry into the impugned contracts; and
 - c) conduct constituted by performing and otherwise giving effect to the impugned contracts;

with the consequence that no relief could be granted to the ACCC.