

Health Alert

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Misuse of market power causes a bundle of trouble for Baxter

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- *Private Hospitals Regulation 1996 (NSW)*
- *Retirement Villages Amendment Bill 2008 (NSW)*



Misuse of market power causes a bundle of trouble for Baxter

Following nearly six years of constant and embattled litigation, the Full Federal Court has declared that Baxter Healthcare Pty Limited has breached the misuse of market power and exclusive dealing provisions of the *Trade Practices Act 1974 (Cth)*.

The ACCC originally commenced Federal Court proceedings in 2002 in relation to the tender process for contracts entered into by Baxter Healthcare Pty Limited (Baxter) and State purchasing authorities (in NSW, SA, WA, QLD and ACT) (the States). In response to calls for tender by the States, Baxter offered to supply sterile fluid products (SF products) and peritoneal dialysis products (PD products) at prohibitively high item-by-item prices as one of its bases for tender. In the alternative, Baxter offered to provide both SF Products and PD Products at 'bundled' and heavily discounted prices provided the States agreed to an exclusive contract with Baxter. This offer was subsequently agreed to by the States.

Both PD products and SF products are essential items within the health care sector and the exclusive supply to the States of these products represented a very significant proportion of the market.

At the time the contracts were made, Baxter was effectively the sole manufacturer and supplier of SF products in Australia and was also the main manufacturer and supplier of PD products with minimal international competition. The 'bundling' of both SF products and PD products allowed Baxter to offer PD products (for which there was minimal competition) at prices which were so low they could not be matched. The acceptance of the bundled contract by the

States meant that competitors supplying PD products were likely to be eliminated from the market.

The ACCC alleged that Baxter's conduct amounted to exclusive dealing (s47) and misuse of market power (s46) under the *Trade Practices Act*.

Initially, the Federal Court found in favour of the ACCC, but held there was no breach of the *Trade Practices Act* because the doctrine of 'derivative' Crown immunity applied to Baxter. Effectively, this doctrine confers immunity on parties contracting with government bodies in situations where immunity is required to preserve the Crown's interests.

The Full Federal Court upheld this decision and it was only until the matter came before the High Court that it was overturned. The High Court held that there was no general immunity available to Baxter and its conduct with the States was subject to the provisions of the *Trade Practices Act*. The matter was remitted back to the Full Federal Court who, last month, found that Baxter's conduct constituted a breach of ss46 and 47 of the *Trade Practices Act*. Baxter had misused its market power by offering PD products at bundled prices which were drastically cheaper than competitors with the intention of eliminating these competitors from the market. Additionally, the exclusive arrangements with the States to supply SF products and PD products had the 'purpose, effect or likely effect' of substantially lessening competition in the market.

As the High Court has narrowed the application of Crown derivative immunity, organisations contracting with government departments should give careful attention to the competition implications of tendering for government contracts, particularly on



an exclusive basis, offering discounted rates. Further, the Full Federal Court noted that Baxter's contraventions of the *Trade Practices Act* could have been averted had the States restructured their tender processes to prevent anti-competitive conduct. In practical terms, the States will need to consider in each case how to ensure compliance with the *Trade Practices Act*. For example, the States may seek declarations or warranties from tendering organisations that tender offers do not breach the *Trade Practices Act*. Alternatively, the States may be put to the expense of assessing the elements of each potential tender arrangement to avoid any breaches of the *Trade Practices Act*.

The decision has significant implications for entities contracting with State governments and serves as a reminder and warning that breaching the *Trade Practices Act* puts an organisation at risk of pursuit by the ACCC and the imposition of substantial penalties.

Land tax exemption for non-profit associations

The recent amendment to the *Land Tax Management Act 1956* (NSW) will benefit clubs, societies and associations that are not carried on for profit (non-profit

associations). Starting from the 2009 calendar year, non-profit associations may claim an exemption in relation to the land value of the strata lot that they own and operate from. For example, to obtain the exemption, where a building has strata lots:

- > each strata lot is considered as a separate premises,
- > each strata lot must be used for the purpose of the non-profit association, and
- > each strata lot must be used for non-profit activities.



Legislation update

Public Health Act 1991 (NSW) (Act)

The Public Health (Tobacco) Bill 2008 (Bill) proposes to amend the Act by omitting and replacing Part 6 of the Act relating to the sale, advertising and packaging of tobacco

products and non-tobacco smoking products, with a separate new Act. The Bill has passed the Legislative Assembly but is still to be debated and passed in the Legislative Council (NSW Parliament finished sitting on 25 September 2008 and resumes on 21 October 2008).

Private Hospitals Regulation 1996 (NSW) (Regulation)

Clause 16 of the Regulation titled 'Definition of pecuniary interest', was recently amended by Schedule 3.36 of the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW). The amendment to Clause 16 of the Regulation resulted in the inclusion of a definition for 'de facto partner of a practitioner'.

Retirement Villages Amendment Bill 2008 (NSW) (Bill)

The purpose of the Bill is to amend the *Retirement Villages Act 1999* (NSW). The Bill was introduced into the Legislative Council on 23 September 2008 and there have been no further developments on the Bill since Parliament adjourned on 25 September 2008. Parliament resumes on 21 October 2008. We will monitor the progress of this Bill and keep you informed of any developments.

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