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Crown immunity protects private sector

*In a significant decision, the Full Federal Court has recently ruled that derivative Crown immunity is available to shield entities in the private sector who contravene the **Trade Practices Act 1974 (Cth) (TPA)** when dealing with Government procurement agencies.*

Key message

*If the High Court refuses special leave, private sector entities may be immune from the **Trade Practices Act** when dealing with the executive arm of Government.*

Background

State Procurement Agencies (SPAs), forming part of the executive arm of government, issued State-wide tenders for the supply of certain 'sterile fluids' to public hospitals.

Between 1998 and 2001, Baxter Healthcare Pty Ltd (Baxter) successfully tendered for and entered into five long-term contracts with each of the SPAs.

ACCC's arguments

The ACCC contended that effectively Baxter had a monopoly on the supply in Australia of sterile fluids. The impugned conduct of Baxter, was alleged to be, its entry into long term 'bundled' contracts which tied its monopolistic supply of sterile fluid products to the supply of peritoneal dialysis (PD) products, thereby eliminating the effectiveness of any competition from rival PD suppliers who could not, and in most cases did not want, to compete with Baxter in the supply of sterile fluids.

Section 46 of the TPA was said to have been contravened by Baxter taking advantage of its alleged substantial power in the sterile fluids market for the purpose of harming competitors or preventing competitive conduct in the PD products market.

Section 47 of the TPA was said to have been contravened by Baxter having supplied sterile fluids and PD products at a particular price on condition that the SPA would not acquire sterile fluids and PD products from a competitor of Baxter.

Federal Court at first instance

Justice Allsop's findings were that:

- » Baxter did have a substantial degree of market power in the Australian sterile fluids market
- » the conduct of Baxter in responding to South Australia's invitation to tender for the supply of sterile fluid and PD products had contravened s46 of the TPA
- » in all other respects, Baxter's impugned conduct did not breach s46 because it had not taken advantage of its market power
- » Baxter had contravened s47(2) of the TPA by bundling its products to block competitive bids for PD products, which had the proscribed purpose of substantially lessening competition.

However, Justice Allsop dismissed the ACCC's application on the basis that Crown immunity doctrine shielded Baxter from the operation of the TPA with the result that there was no contravention.

Crown immunity

The principle of Crown immunity provides, in general terms, that no statute binds the Crown unless the Crown is expressly named or there is a necessary implication that it was intended to be bound. Section 2B of the TPA provides that Part IV of the TPA applies to the Crown in each of the states and territories so far as the Crown carries on a business, either directly or by an authority of the state or territory.

However, the ACCC conceded that each of the SPAs was not relevantly carrying on business for the purposes of section 2B. Accordingly, Justice Allsop held that the TPA did not apply to the SPAs.

The ACCC argued that the doctrine of Crown immunity should not be extended so as to shield Baxter from the operation of the TPA.

Justice Allsop decided that:

- i) the principle of Crown immunity shielded Baxter's conduct from the application of the TPA in relation to the commercial negotiations leading up to the formation of the impugned contracts
- ii) Crown immunity is not limited to the protection of the Crown, and may extend to the other contracting party. The basis for this 'derivative immunity' is that if the legislation were to apply, it may interfere with the legitimate right of the Crown by preventing it from entering into an otherwise valid contract. The immunity applies where the Crown itself is immune, and the application of the statute would impair an existing legal position of the Crown. However, the immunity does not extend to circumstances where only the commercial or financial interests of the Crown are affected
- iii) to subject Baxter to the operations of the TPA would deny the Crown the benefits of a contract it had bargained for and accepted, thereby affecting its contractual and legal rights and interests.

Accordingly, Justice Allsop held that Baxter enjoyed derivative immunity.

The Full Federal Court

The Full Court concurred with the findings of Justice Allsop and affirmed that:

- i) the SPAs were not carrying on a business and were entitled to Crown immunity

- ii) Baxter enjoyed derivative immunity from the operation of the TPA.

Special leave application

The ACCC has sought special leave to appeal to the High Court following the decision of the Full Federal Court.

The ACCC will no doubt assert that the decision questions the effectiveness of the TPA in combating anti-competitive conduct in connection with State and Territory government procurement. It remains an open question whether the concept of 'derivative immunity' has extended the doctrine of Crown immunity too far, and whether the ambit and scope of the doctrine needs to be constrained to ensure that companies negotiating and contracting with State and Territory governments are subject to the TPA.

If the High Court grants special leave, it will provide the Court with an opportunity to make a final determination as to the precise ambit of the Crown immunity doctrine

In the event that special leave is refused, the legal position in Australia will be that the doctrine of Crown immunity may be extended to protect private sector entities from contravention of the TPA when dealing with government procurement agencies.

Conclusion

A critical feature of the case appears to have been the concession on the part of the ACCC that the SPAs were not carrying on a business.

The Full Court maintains that the ultimate reform of the doctrine of Crown immunity is a constitutional and politically sensitive issue, which is a matter for legislative amendment rather than judicial confinement.

Amy Southwell | Solicitor

Structural divestiture secured ACCC's clearance of Toll's acquisition of Patrick

The final version of Toll's section 87B undertakings, which were accepted by the ACCC, shed light on how to obtain an informal clearance of an acquisition which involves horizontal and vertical integration with key infrastructure.

Key message

In proposed acquisitions which involve horizontal and vertical integration linked to key infrastructure, the ACCC is more likely to accept section 87B undertakings which require a clear structural divestiture of assets and interests (rather than mere behavioural undertakings) to address relevant competitive concerns.

On 11 March 2006, the ACCC discontinued its proceedings to prevent the proposed acquisition by Toll Holdings Limited (Toll) of Patrick Corporation Limited (Patrick), after it accepted Toll's fifth version of court-enforceable s87B undertakings.

Section 50 of the TPA prohibits acquisitions that would have the effect, or likely effect, of substantially lessening competition in a market. If the ACCC believes that a merger will breach s50, it can apply to the Federal Court to seek remedies such as an injunction to prevent the merger. Where there is a risk of raising s50 concerns, parties can apply to the ACCC for an informal clearance or authorisation of the merger. The parties can submit undertakings to alleviate any competition concerns raised by the ACCC's market inquiries into the merger.

The ACCC's Public Competition Assessment released on 5 May 2006 outlines how Toll's subsequent structural undertakings (in conjunction with its behaviour undertakings) satisfied the ACCC that the proposed acquisition of Patrick would not have the effect or likely have the effect of substantially lessening competition in the transport and logistics industry.

Background

Toll and Patrick are providers of transport and logistic services, which includes freight forwarding and line-haul services by road, rail, sea and air, and integrated logistics and distribution services. Patrick is also a

provider of port stevedoring operations. Both providers are part of a 50-50 joint venture in Pacific National, one of Australia's largest providers of interstate rail container line-haul services.

In August 2005, Toll launched a hostile offer to take over Patrick. Given that this would result in Toll's 100% control of Pacific National, the ACCC was concerned the effect of the proposed acquisition would be to substantially lessen competition across several markets in the transport and logistics industry.

Market definition

Toll argued the acquisition would create logistical efficiencies in Australia. However, as Toll was vertically integrated and a 100% control of Pacific International would mean Toll could control the east-west rail freight and freight forwarding market, there would be flow-on effects of Toll discriminating against rival transport and logistic providers across the road, rail, sea and airline networks. It could also increase barriers to entry and expansion across the markets.

Accordingly, the ACCC had to define each market and examine how the proposed acquisition would affect competition in each.

Federal Court action

The ACCC and Toll were engaged in months of deliberations whereby Toll provided 4 versions of undertakings pledging not to discriminate and favour its own businesses over other

players in the market. These undertakings did not alleviate ACCC's competition concerns because Toll remained in control of significant assets and infrastructure across several markets in the industry. The ACCC requested that the acquisition not proceed, but Toll refused to comply.

On 9 February 2006, the ACCC commenced proceedings in the Federal Court to seek an injunction to prevent Toll from acquiring Patrick and any of Patrick's businesses, assets or affairs. It also sought a declaration that the proposed acquisition would contravene s50.

Undertakings

It was not until the Federal Court action that Toll offered a 5th version of its proposed undertakings which provided, for the first time, a structural divestment undertaking. The main undertakings included:

- » divestment of 50% of shares in Pacific National to an ACCC approved entity
- » divestment of interests in Patrick's Bass Strait shipping and freight forwarding operations, Patrick or Toll's vehicle transport operations and the Minto siding terminal
- » relinquishing east-west train paths and trains to assist a new or existing operator to obtain access to certain terminals and tracks
- » commitments that Pacific National will not favour Toll's downstream interests in its future business activities
- » commitments that Patrick would not favour Toll or Patrick's land-side logistic operations.

Of major importance was Toll's undertaking to divest 50% of Pacific National. The structural and behavioural undertakings satisfied the ACCC that Toll would:

- » not gain an additional ability to influence the activities of Pacific National to anti-competitively discriminate against

competitors in favour of its own operations and interests

- » facilitate the further entry of operators or expansions into the rail and shipping line-haul and freight-forwarding markets and automotive distribution services market
- » prevent the removal of vigorous competitors in the shipping, automotive distribution services, and pre-delivery and inspection services market.

The structural undertakings, though complex and inter-related, addressed the concerns the ACCC had of enforcing and monitoring the behaviour of a player which, without the undertakings, would otherwise control a substantial proportion of assets and infrastructures in a market. It was further satisfied that Toll's 50% capped ownership of Pacific National and the court-enforceability of the undertakings ensures that adequate pressure can be applied by Pacific National shareholders, competitors, customers and suppliers to ensure compliance with the undertakings.

Accordingly, the ACCC discontinued its proceedings against Toll.

Significance

This acquisition highlights that, in complex cases involving vertical and horizontal integration with key infrastructure and flow-on effects to competition in inter-related markets, the mere provision of behavioural undertakings are unlikely to alleviate the ACCC's competition concerns. In these circumstances, the ACCC will look to asset divestments and structural undertakings in order to satisfy itself that the acquisition would not substantially lessen competition.

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