HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION APPELLANT

AND

BAXTER HEALTHCARE PTY LIMITED & ORS RESPONDENTS

Australian Competition and Consumer Commission v Baxter Healthcare Pty Limited
[2007] HCA 38
29 August 2007
S56/2007

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 24 August 2006.*

3. *Remit the matter to the Full Court of the Federal Court of Australia for further consideration in accordance with the reasons of this Court.*

4. *Respondents to pay the appellant's costs of the appeal to this Court. The costs of the proceedings to date otherwise to be in the discretion of the Full Court of the Federal Court of Australia.*

On appeal from the Federal Court of Australia

Representation

L G Foster SC with A I Tonking and J S Gleeson for the appellant (instructed by Australian Government Solicitor)

D M Yates SC with I S Wylie for the first respondent (instructed by Blake Dawson Waldron)

R J Meadows QC, Solicitor-General for the State of Western Australia with J C Pritchard for the second respondent (instructed by State Solicitor's Office (WA))

C J Kourakis QC, Solicitor-General for the State of South Australia with G F Cox and S A McDonald for the third respondent (instructed by Crown Solicitor's Office (SA))

M G Sexton SC, Solicitor-General for the State of New South Wales with S J Gageler SC and N L Sharp for the fourth respondent (instructed by Crown Solicitor for New South Wales)

CATCHWORDS

Australian Competition and Consumer Commission v Baxter Healthcare Pty Limited

Statutes – Interpretation – *Trade Practices Act* 1974 (Cth) ("the Act") – First respondent negotiated with and formed contracts with State and Territory governments for the supply of medical products in circumstances where State and Territory governments were not carrying on a business – Trial judge found that, but for the application of derivative Crown immunity, the first respondent had contravened ss 46 and 47 of the Act in relation to pre-contractual conduct – Whether the provisions of ss 46 and 47 applied to the conduct of the first respondent – Nature and extent of available relief.

Statutes – Operation and effect of statutes – Crown immunity – Derivative immunity – *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107 – Whether the presumption of Crown immunity creates a presumption against legislation having an incidence in legal effect upon the Crown – Whether the presumption of Crown immunity creates a presumption against legislation affecting Crown "freedoms" or governmental, commercial or political "interests" – Whether the Commonwealth, States and Territories are manifestations of the Crown – Whether Crown immunities apply as such to the Commonwealth, States and Territories – Whether different notions of governmental immunity are suggested or required by the Australian Constitution.

Constitutional law (Cth) – Crown immunity – Whether Crown immunity is applicable without modification to the Commonwealth, States and Territories provided for in the Constitution.

Words and phrases – "bind", "derivative Crown immunity", "incidence in legal effect".

Constitution, ss 1, 61, 71, 73, 74, 75, 78, 79, 114.
Trade Practices Act 1974 (Cth), ss 2, 2A, 2B, 4L, 6, 46, 47, 51, 87, 87A.

1 GLEESON CJ, GUMMOW, HAYNE, HEYDON AND CRENNAN JJ. The issues in this appeal are whether, upon the true construction of the *Trade Practices Act* 1974 (Cth) ("the Act"), ss 46 and 47 of the Act apply to conduct of a trading corporation in, or in connection with, negotiations for, entry into, or performance of, a contract with a State or Territory government where the government's conduct is not in the course of carrying on a business, and, if so, what remedies are available in a case of contravention. Sections 46 and 47 bind the Crown in right of a State or Territory so far as the Crown carries on a business, either directly or by a government authority (s 2B). Yet it is argued that when a corporation, in the course of carrying on its business, negotiates for, enters into, or performs a contract with a State or Territory government which is not itself carrying on a business, ss 46 and 47 do not apply to the corporation. That is said to be a form of derivative immunity, recognised and applied by this Court in 1979 in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*[1]. This argument was accepted by Allsop J at first instance in the Federal Court of Australia[2], and by the Full Court of the Federal Court[3] (Mansfield, Dowsett and Gyles JJ) on appeal. The appellant appeals against the decision of the Full Court. The Act has changed in significant respects since 1979. All parties accept that, ultimately, the question is one of construction of the Act. That is the way in which the case was conducted and decided at first instance, and in the Full Court, and it is the basis upon which the case was argued in this Court.

2 The Act contains certain provisions concerning its application to what the Act describes as the Crown in right of the Commonwealth, the Crown in right of a State, and the Crown in right of a Territory. As is often the case, the terms in which Parliament expressed its legislative intention reflected legal doctrine expounded in earlier judicial decisions, including decisions of this Court. There was no argument that the legislation, or a relevant part of it, is constitutionally invalid, or that the Constitution, for reasons outside the provisions of the Act, dictates an outcome in favour of one side or the other. Such an argument would have required notification under s 78B of the *Judiciary Act* 1903 (Cth), in order to give interested Attorneys-General the opportunity to appear and make

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1 (1979) 145 CLR 107.

2 *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2005) ATPR ¶42-066.

3 *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2006) 153 FCR 574.

submissions. The issue being one of statutory construction, the Court must give meaning and effect to the language of the Act.

3 Allsop J found that, but for the derivative immunity enjoyed by the first respondent, the conduct of the first respondent would have contravened s 46 in one respect and s 47 in a number of respects. He concluded, however, that the Act did not apply to, or operate in respect of, the conduct complained of and dismissed the application brought under the Act by the appellant. There was an appeal to the Full Court against the dismissal of the application. The appeal covered both the derivative immunity conclusion and Allsop J's refusal to find further contraventions. There was also a notice of contention by which the first respondent challenged the findings that its conduct fell within the terms of the prohibitions in ss 46 and 47. The Full Court did not find it necessary to deal with the notice of contention. Hence, if the appeal to this Court is allowed, it will be necessary to remit the matter to the Full Court to resolve that issue and to permit determination of the remainder of the appellant's appeal to that Court.

The conduct of the first respondent

4 The first respondent, Baxter Healthcare Pty Limited ("Baxter"), is the Australian operating subsidiary of Baxter International Inc, a global medical products and services company incorporated in the United States of America. Baxter and its parent company specialise in critical therapies for life-threatening conditions.

5 Baxter manufactures the majority of the products it supplies within Australia at a plant in Toongabbie, New South Wales. It manufactures and supplies several different types of sterile fluid commonly used in hospitals. These relevantly include: (1) large volume parenteral ("LVP") fluids, used for re-hydration, the administration of drugs, resuscitation, and fluid and electrolyte replacement; (2) irrigating solutions ("IS"), used for a number of purposes, including the washing or cleaning of wounds in surgery; and (3) parenteral nutrition ("PN") fluids, used for the provision of nutrition to patients. Baxter also manufactures peritoneal dialysis ("PD") products. PD is a form of treatment for chronic renal failure. Most PD treatments are self-administered by patients at home. The expression "PD products" refers to both PD fluids and apparatus used to perform PD, such as automated PD machines and lines for fluid connection.

6 In the judgments of the primary judge and the Full Court of the Federal Court, the term "sterile fluids" was defined to exclude PD fluids, although it was acknowledged that PD fluids are required to be sterile. This usage provides a

convenient shorthand for contrasting LVP fluids, IS and PN fluids, as a class, with PD fluids and PD products generally.

7 Between 1998 and 2001 Baxter had the only manufacturing plant for LVP and PN fluids in Australia. Most LVP and PN fluids are bulky, water-based items. In general, transportation costs are relatively high, giving domestic producers a significant competitive advantage. Since early 1997, Baxter has supplied almost 100 per cent of LVP fluids at the wholesale level. Baxter was also the wholesale supplier of about 95 per cent of IS acquired in Australia between 1998 and 2001 inclusive.

8 PD became available to home-based patients in the early 1980s. Until 1990, Baxter was the only supplier of PD fluids in Australia. In 1990, Gambro Pty Ltd ("Gambro") commenced supplying PD products in Australia. Another supplier, Fresenius Medical Care ("Fresenius"), sought to enter the PD market in Australia in about 1995. Between 1998 and 2001 inclusive, Baxter sold about 90 per cent of PD products in Australia, with Gambro and Fresenius each enjoying a small market share. As PD products are more valuable for their size and weight than sterile fluids, the competitive advantage enjoyed by domestic manufacturers over importers is less significant.

9 Between 1998 and 2001, Baxter entered into five long-term contracts for the supply of sterile fluids and PD products to public hospitals. The contracts were entered into with the relevant purchasing authorities of the second to fourth respondents (the States of Western Australia, South Australia, and New South Wales, respectively), the State of Queensland, and the Australian Capital Territory. The purchasing authorities have been described generically in the proceedings as State Purchasing Authorities ("SPAs"). Each SPA is part of the executive arm of government of its corresponding State or Territory.

10 Each of the contracts was entered into after a process involving formal requests for tenders by the SPAs and a period of negotiation. (In the Australian Capital Territory there was no tender, but the SPA agreed with Baxter to adopt the terms on which Baxter had contracted to supply to New South Wales.) Each tender invitation included sterile fluids and PD fluids and products, and each permitted alternative tenders. Each tender also specifically allowed for the submission of bundled offers, that is, offers of several items together at a discount rate. Baxter's response to each tender invitation followed a consistent pattern. It made an offer to supply the tender items, on an item-by-item basis, at particular prices, and an offer to supply the same items, for substantially lower prices, on a sole supply basis.

11 The contracts with New South Wales, South Australia and Western Australia provided for the supply of the entire requirements of each State for certain sterile fluids and the supply of 90 per cent of the requirements of each State for PD fluids, for periods of five years or just under five years. The Australian Capital Territory contract was in similar terms, but the supply was for a period of just over four years. The contract with Queensland provided for Baxter to supply the State's entire requirements for certain sterile fluids (excluding PN fluids) and 92.5 per cent of its requirements for PD fluids, for a period of three years. None of the contracts is currently on foot.

12 There was background evidence as to previous contracts for the supply to State and Territory authorities of sterile fluids and PD products. In the 1980s there were four manufacturers of intravenous ("IV") solutions in Australia, but by 1993, Baxter was the only Australian manufacturer. In the mid-1980s there were exclusive supply agreements with certain SPAs for some IV products. From 1990, when Commonwealth/State funding arrangements changed, significant quantities of PD products were sold directly to the States.

13 The Full Court summarised Allsop J's findings about this part of the evidence as follows:

> "Baxter had previously made bids to Queensland for tenders to supply IV, IS and PD solutions, including bids which were on the basis of item-by-item prices and bids which were at significantly lower prices for guaranteed sole supply for all items covered by the tender, both in 1987 (when the States had limited purchases of PD products), and in 1990 and 1993. It made bids on similar bases to South Australia and to Western Australia in 1991, and to New South Wales in 1992 and 1993. In March 1992, a consortium including Abbott [Australasia Pty Ltd, a competitor with Baxter in the supply of LVP fluids between 1985 and 1992] and Gambro and another company expressed concern to New South Wales about the way the tender processes were constructed. Their concern was that those processes were constructed to favour the supplier with the broadest range of product, and which encouraged bundling and 'a sole supplier situation'.
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> [Allsop J] observed:
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> 'To this point this [the construction of the tender process] had not been dictated by Baxter but decided by the States. That remained the position up to and during the relevant period.'

In fact, New South Wales, in the period after the consortium's concern, made it clear that it wanted a long term contract and one in which there was an exclusive supply arrangement covering sterile fluids and PD products, and that Baxter was one of its potential suppliers, but in the longer term not the only one.

Baxter secured exclusive supply contracts with Queensland in 1990 (for three years) and again in 1993, excluding PN fluids at the insistence of Queensland (for three years), and in 1997 (again for three years); with South Australia in 1991 (for two years) and in 1995 (for three years); with Western Australia in 1991 (for two years, extended by one year) and again in 1995 (for five years); and with New South Wales in 1993 (for five years). His Honour found that each of those contracts was negotiated by the relevant SPAs which had a capacity to choose, to a degree, the terms on which they would deal with Baxter and for the costs savings the contracts produced as well as the range of products supplied."

14 The Full Court then set out the history of the negotiation of the contracts:

"The Request for Tenders for the 1998 NSW contract was released on 8 October 1997. It referred to LVP, PD and PN fluids and products and to IS. At the time, as his Honour found, Baxter was, of course, aware of B. Braun [Melsungen AG and its subsidiary, B. Braun Australia Pty Ltd] as a major worldwide sterile fluid producer and believed it was a competitive threat to Baxter winning the New South Wales tender, although it anticipated winning the sterile fluids contract. Apart from B Braun, tenders for the New South Wales contract were also received from Fresenius and Gambro, although not for the full range of products. Baxter understood also that, if its item-by-item prices were taken seriously, the financial pressure on New South Wales to take Baxter's PD fluids and products was very strong unless an importer such as B. Braun was to take the bulk of the sterile fluids market. New South Wales then further negotiated with Baxter, as a result of which Baxter made further concessions or revised offers. Ultimately, one of its revised offers was accepted. The evidence was that the acceptance of that offer was heavily influenced by the desire to avoid additional cost to the public health system in New South Wales.

On 30 April 1998, the existing contract between South Australia and Baxter was due to expire. There were direct negotiations with Baxter during 1998 for a new contract, during which Baxter made two bundled offers. They were not taken up. The existing contract therefore continued

to roll over until the 2001 SA contract. South Australia invited tenders for pharmaceutical products including LVP, PD and PN fluids and IS. Tenders were invited for two year contracts, with one or two year optional extensions. Tenders were received from Baxter, Gambro and Fresenius. On 5 December 2000, South Australia requested a revised offer for a five year term (called Offer 1A), for sole and exclusive supply of sterile fluids, but excluding PD fluids and products. Baxter responded on 11 December 2000 with its Offer 1A. It offered no discount on the item-by-item prices in its Offer 1, although clearly the invitation to make Offer 1A was to seek a volume discount in exchange for sole and exclusive supply of sterile fluids. Baxter's Offer 1A indicated that it was not prepared to give a discount for exclusivity for sterile fluids if no exclusivity for PD fluids was given. Baxter's initial bundled offer for sterile fluids and PD fluids was cheaper than its item-by-item offer for sterile fluids alone, and that remained the position after Offer 1A. After further negotiation, however, its Offer 1 was accepted but allowing for 10 per cent of PD products to be purchased from other suppliers.

The 1999 ACT contract was, as the Australian Capital Territory understood it, based on the 1998 NSW contract, although the relevant officer in the Australian Capital Territory did not think the arrangement precluded the Australian Capital Territory from dealing with other suppliers. In fact in May 2001, Fresenius contracted with the Australian Capital Territory to supply dialysis products so that Baxter was no longer the exclusive supplier of PD fluids and products to Canberra Hospital. Baxter then claimed to be entitled to a higher price, but the Australian Capital Territory has continued to adhere to the prices in the 1998 NSW contract. At the time of the judgment, there was an ongoing dispute about that.

The 2001 QLD contract followed a tender request of 3 May 2000 for IV fluids and dialysis fluids, excluding PN fluids. Baxter, Fresenius and Gambro tendered. Both the Baxter and Gambro tenders included bundled bids. The unbundled bid of Baxter was that which was assessed, and Baxter was recommended. The impugned bundling, as his Honour found, had no effect on the awarding of the tender to Baxter. However, obviously for price reasons, its bundled bid was then accepted. His Honour also accepted the evidence that Queensland perceived its position as one embodying 'real bargaining power, deployed in its own interests'.

The 2001 WA contract followed a tender request of 26 May 2000. Tenders were received from Baxter, Gambro and Fresenius. The cost or

'price' of not taking a Baxter sole supply arrangement for all products, including PD products, was described by the primary judge as 'huge, unless sterile fluids could be sourced elsewhere'. Its bundled sole supply offer was accepted, after negotiation to allow 10 per cent of PD products to be acquired from other sources.

The learned primary judge also noted that the later agreement made jointly by New South Wales and Victoria and Baxter in 2003, after extensive negotiation, did not give Baxter any guaranteed exclusive supply agreement, although Baxter has provided more favourable pricing based upon volume discounts for total usage of sterile fluids and a minimum of 80 per cent of the PD fluids acquired. That agreement does not contain the 'cherry pick' item-by-item prices."

The Act

15 Section 2 of the Act declares that the object of the Act, relevantly, is to enhance the welfare of Australians through the promotion of competition and fair trading. It was inserted in 1995, but it is plain from the detailed language of the key provisions that the object of the Act was the same before 1995, and would have been the same after 1995 even if s 2 had not been inserted.

16 Sections 2A and 2B deal with the application of the Act to the Commonwealth, the States and the Territories. Section 2A, which was originally inserted in 1977, provides that the Act binds the Crown in right of the Commonwealth in so far as the Crown in right of the Commonwealth carries on a business, either directly or by an authority of the Commonwealth. However, the Crown in right of the Commonwealth is not liable to prosecution or to a pecuniary penalty (s 2A(3)). Section 2B, which was inserted in 1995, makes corresponding provision as to the Crown in right of a State or the Crown in right of a Territory in relation to certain parts of the Act, including those that are presently relevant. Section 2C, also inserted in 1995, provides that certain specified forms of government activity, or exercises of government powers, do not amount to carrying on a business for the purposes of ss 2A and 2B. That list is not exhaustive (s 2C(2)). In the present case, it was conceded by the appellant that the acquisition of the products in question by the SPAs was not in the course of carrying on a business.

17 Section 4L, inserted in 1977, provides that if the making of a contract contravenes the Act by reason of the inclusion of a particular provision in the contract, then, subject to any order made under s 87 or s 87A, nothing in the Act affects the validity or enforceability of the contract otherwise than in relation to

that provision in so far as the provision is severable. That section was recently construed by this Court in *SST Consulting Services Pty Ltd v Rieson*[4] to mean, not that a contract is enforceable only if the common law rules about severance permit severance, but that s 4L requires rather than permits the severance of offending provisions and that the phrase "in so far as" marks the limit of invalidity of the offending provision. In that connection, it was pointed out that the Act contains its own detailed scheme dealing with the consequences of contravention.

18 As appears from the pleadings in *Bradken*, the relevant events occurred in early 1978. At that time, ss 2, 2B and 2C were not in the Act. Section 4L was there, but it was not referred to in argument or in the reasons for judgment. The changes to the Act made in 1995 were part of a national programme of competition policy reform adopted by the Commonwealth, State and Territory legislatures. The Commonwealth Parliament enacted the *Competition Policy Reform Act* 1995 (Cth), which amended the Act in a number of ways, including the insertion of s 2 and s 2B, the New South Wales Parliament enacted the *Competition Policy Reform (New South Wales) Act* 1995 (NSW), and other States and Territories enacted similar legislation.

19 Part IV of the Act includes ss 46 and 47. Section 46 deals with misuse of market power. So far as presently material, it provides that a corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of eliminating or substantially damaging a competitor in that or any other market or for the purpose of deterring or preventing a person from engaging in competitive conduct in that or any other market. Section 47 provides that a corporation shall not, in trade or commerce, engage in the practice of exclusive dealing, and then defines that concept. Exclusive dealing includes supplying goods on the condition that the customer will not, or will not except to a limited extent, acquire goods, or goods of a particular kind, from a competitor of the corporation. It also includes refusing to supply goods to a person for the reason that the person has not agreed not to acquire goods from a competitor of the supplier. The prohibition on exclusive dealing only applies where the engaging by the corporation in the conduct described has the purpose or effect of substantially lessening competition in a market (s 47(10)). Furthermore, the prohibition does not operate while there is a notification of exclusive dealing under s 93 in force (s 47(10A)). Section 46, in its terms, operates independently of any contract. Taking advantage of market power for the purpose of

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4 (2006) 225 CLR 516 at 533 [52]-[53].

eliminating or damaging a competitor, or of deterring or preventing competitive conduct, may, or may not, manifest itself in the provisions of a contract made by the corporation but, if a contravention occurs, it is the purposeful conduct of the contravening corporation that attracts the operation of the Act. A contravention of s 47 may or may not involve making or giving effect to a contract. A supply on certain terms may involve a contract. A refusal to supply will not. An offer to supply on certain terms may not. In any such case an anti-competitive purpose or effect is a necessary element of a contravention. As will appear, in the present case the conduct found by Allsop J to have fallen within s 46 and s 47 was not making or giving effect to a contract. It occurred, and was complete, before any contract was entered into.

20 Although ss 46 and 47 apply only to conduct by corporations (a term defined in s 4 in such a way as to invoke the legislative power conferred by s 51(xx) and s 122 of the Constitution), s 6 of the Act gives Pt IV (and other provisions) an extended application designed to invoke other areas of Commonwealth legislative power. There was no argument in the present case as to the extent to which it may be necessary to rely on s 6 in order to give effect to s 2B in cases where it otherwise applies. Since no party contended that s 2B covered the present case, its operation where the relevant agency of an executive government is not a corporation as defined did not arise for consideration.

21 Part IV also includes s 51(1), which requires that, in deciding whether there has been a contravention of the Act, it is necessary to disregard anything done in a State or Territory if the thing is specified in, and specifically authorised by, an Act of the Parliament of the State or an enactment or Ordinance of the Territory, or by regulation. A form of s 51(1) was in force in 1978, but the emphatic double reference to specificity was introduced in 1995, as part of the competition policy reform legislation. In 1978, the exception related to an act or thing specifically authorised or approved. Now it relates to an act or thing that is specified in, and specifically authorised by, State or Territory legislation or delegated legislation.

22 Part VI of the Act deals with enforcement and remedies. It provides, among other things, for pecuniary penalties (s 76) and injunctions (s 80). If the court is satisfied that a person has engaged, or is proposing to engage, in a contravention of Pt IV, the court may grant an injunction in such terms as the court determines to be appropriate. Section 87, which qualifies s 4L, gives the court power to make other orders, as it thinks appropriate, against a person engaging in or involved in a contravention for the purpose of compensating a person who has suffered loss or damage by contravening conduct. The section also gives the court power to declare contracts void in certain circumstances or to

vary contractual provisions or covenants that would be otherwise unenforceable. Section 87A, which also qualifies s 4L, empowers the court to prohibit payment or transfer of moneys or other property in certain circumstances.

23 In *SST Consulting Services Pty Ltd v Rieson*[5], the majority said:

> "The Act does much more than proscribe ... certain forms of conduct. It contains detailed provisions, in Pt VI, dealing with the enforcement of the Act and providing remedies for past or proposed contraventions of the Act ...
>
> [There is] a framework of legislation that makes elaborate provision not only for the creation of norms of conduct but also for the consequences that are to follow from the contravention of those norms."

24 Section 87, in an earlier form, but not s 87A, was in the Act in 1978, but its provisions have become much more extensive since then.

The application to the Federal Court

25 The appellant's proceedings were originally brought against the first respondent only. The States of Western Australia, South Australia and New South Wales applied to be joined as parties on the basis that the relief claimed against the first respondent affected the States' contractual rights. At the time the proceedings were commenced, the impugned contracts, or at least some of them, were still on foot.

26 The application before Allsop J was an Amended Application said to be made under ss 46, 47, 76, 80 and 83 of the Act and s 21 of the *Federal Court of Australia Act* 1976 (Cth) (which empowers the making of declarations). It was alleged that the conduct of the first respondent, in negotiating and entering into certain agreements of the kind described earlier in these reasons, contravened s 46 of the Act. There were eight separate claims for declarations of contraventions by the first respondent of s 46, the differences between them largely relating to questions of market definition. It was further alleged that the first respondent, by its conduct in negotiating, entering into and supplying pursuant to each of the agreements, contravened s 47. There were 12 separate claims for declarations of such contraventions, again the differences being related

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5 (2006) 225 CLR 516 at 526-527 [29]-[30] (references omitted).

to matters of market definition. The anti-competitive purpose alleged was that of substantially preventing, hindering, or lessening competition in an identified market. A pecuniary penalty against the first respondent was sought in respect of each instance of contravening conduct. Injunctions were sought against the first respondent. The claims for injunctive relief were as follows:

> "21. An injunction restraining the First Respondent, by itself its servants or agents, for a period of five (5) years, or for such lesser period as the First Respondent continues to have a substantial degree of power in any of the LVP Fluids Market, PN Fluids Market or the Irrigating Solutions Market from:
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> a) making any offer to enter into;
>
> b) entering into; or
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> c) giving effect to
>
> any contract, agreement, arrangement or understanding with a State or Territory, containing provisions to the effect that:
>
> a) require the State or Territory to purchase PD products, as part of a bundle together with one or more of the following products, LVP fluids, PN fluids and Irrigating Solutions; and/or
>
> b) require the State or Territory to purchase one or more of the following products PD products, LVP fluids, PN fluids and Irrigating Solutions, exclusively from the [First] Respondent; and/or
>
> c) require the State or Territory to purchase one or more of the following products, PD products, LVP fluids, PN fluids and Irrigating Solutions, exclusively from the [First] Respondent, in order to obtain a special price or discount in respect of those products when compared with the price at which the [First] Respondent is prepared to supply those products in the absence of the requirement.
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> 22. In the alternative to the injunction set out in paragraph 21, an injunction restraining the First Respondent, by itself its servants or agents, for a period of five (5) years, or for such lesser period as the First Respondent continues to have a substantial degree of power in the Sterile Fluids Market; from:

a) making any offer to enter into;

b) entering into; or

c) giving effect to

any contract, agreement, arrangement or understanding with a State or Territory, containing provisions to the effect that:

a) require the State or Territory to purchase PD products, as part of a bundle together with one or more of the following products, LVP fluids, PN fluids and Irrigating Solutions; and/or

b) require the State or Territory to purchase one or more of the following products PD products, LVP fluids, PN fluids and Irrigating Solutions, exclusively from the [First] Respondent; and/or

c) require the State or Territory to purchase one or more of the following products, PD products, LVP fluids, PN fluids and Irrigating Solutions, exclusively from the [First] Respondent, in order to obtain a special price or discount in respect of those products when compared with the price at which the [First] Respondent is prepared to supply those products in the absence of the requirement.

22A. Where an order has been made in terms of paragraph 21 or 22 ('the paragraph 21 or 22 order'), having the effect of restraining the First Respondent from, inter alia, giving effect to one or more of the following agreements:–

a) 2001 SA Supply agreement between Baxter and the State of South Australia for the period 1 April 2001 to 30 March 2006;

b) 2001 WA Supply agreement between Baxter and the State of Western Australia for the period 1 March 2001 to 28 February 2006; and

c) 2001 Queensland Supply agreement between Baxter and the State of Queensland for the period 1 June 2001 to 31 May 2004,

or, if the term of any State Agreement has then expired or been terminated and the First Respondent is supplying (or continuing to supply) the relevant State Purchasing Authority pursuant to:

d) the expired agreement; or

e) another agreement to which the paragraph 21 or 22 order applies ('Substitute Agreement'),

[a] further order requiring the First Respondent to supply each of LVP fluids, PN fluids (except in the case of Queensland), Irrigating Solutions and PD products:

1) on terms as to price and payment no less favourable to the State Purchasing Authority than the terms as to price and payment specified in the relevant State Agreement or Substitute Agreement or any continuation or extension thereof including any volume discount, but without any condition restricting the relevant State Purchasing Authority from acquiring any proportion of its requirements for those goods from a person other than the First Respondent;

2) alternatively to sub-paragraph 1), on such terms as to price and payment as the Court considers to be appropriate in all the circumstances,

and otherwise in accordance with the terms of the relevant State Agreement or Substitute Agreement, for the remainder of the term of the relevant State Agreement or Substitute Agreement or any continuation or extension thereof."

27 No injunctive relief having been granted, the occasion to consider in detail how orders in that form would have affected any vested legal rights of the second, third and fourth respondents under the impugned contracts or otherwise did not arise.

The findings of the primary judge on contravention

28 Although Allsop J accepted that ss 46 and 47 of the Act did not apply, or did not relevantly apply, to the conduct of the first respondent because such conduct related to dealings with State or Territory governments which were not themselves carrying on a business, he went on to deal with the arguments of the

parties on the assumption that the first respondent's primary contention (of derivative immunity) was wrong.

29 On that basis, Allsop J concluded that there was one contravention of s 46. There were, he decided, two relevant markets: an Australia-wide sterile fluids market, and an Australia-wide PD fluids market. He found that the first respondent had a substantial degree of market power in the sterile fluids market. Save in one instance, however, he was not satisfied that the first respondent had taken advantage of its market power or that it had been shown to have a purpose proscribed by s 46(1)(a) or s 46(1)(c). The single instance concerned the first respondent's conduct in relation to what was referred to as Offer 1A in South Australia. In relation to the rest of the first respondent's conduct, Allsop J said:

> "When one examines the history of the market, from the 1980s through to the exit of Abbott and the tendering processes, with the exception of Offer 1A to SA in 2000, one does not see any of the relevant offers being made over the opposition of the SPAs or the exclusive contracts somehow forcibly extracted from them. The relevant offers were not made in circumstances in which it can be seen that advantage was being extracted from the position of power by obtaining something from the SPAs which was resisted. Other than SA in Offer 1A, no SPA asked for a volume discount for sterile fluids on an exclusive basis, detached from PD."

30 The facts in relation to Offer 1A may be summarised as follows. (While this summary is adequate for the purposes of the present appeal, it is not intended to foreclose any issue that would arise if the case were remitted to the Full Court.) In July 2000, the Department of Human Services of South Australia issued a public request for tenders in relation to various pharmaceutical products, including LVP, PD and PN fluids and IS. The Department was advised by the Strategic Procurement Unit. Tenders were received from the first respondent, and from Gambro and Fresenius. Fresenius tendered for PD products, as did Gambro. Gambro made offers on a bundled and unbundled basis in relation to haemodialysis and haemofiltration products. The first respondent tendered for all products. Its Offer 1 was an item-by-item bid to supply all items for two years (with options for extensions). Its Offer 2 was a combined bid for all items on an exclusive basis for five years with volume discounts. The Department requested a revised offer (to be called Offer 1A), being for a five-year term for the products in the tender but excluding those renal products the subject of a supplementary tender. The request was for an offer for a sole and exclusive supply of sterile fluids, not including PD fluids. A volume discount was sought in exchange for sole and exclusive supply of sterile fluids. This was the first time any SPA had asked for a tender on an exclusive and long-term basis which excluded PD fluids.

The first respondent, in Offer 1A, offered no discount from the item-by-item prices. Furthermore, Offers 1 and 1A (when PD fluids were added) would both cost $5,914,291, whereas the bundled Offer 2 would cost $4,501,053. The first respondent's bundled offer (Offer 2) for IV fluids and PD fluids was cheaper than its item-by-item offer for IV fluids alone. The Department protested, and raised concerns that the first respondent's conduct might be in breach of s 46 of the Act. Offer 1A was not accepted. Subsequently a different offer from the first respondent was accepted.

31 Allsop J found that the conduct of the first respondent in relation to Offer 1A was a taking advantage by the first respondent of its substantial degree of power in the sterile fluids market for the purpose of preventing competition in the PD market. He said:

> "The purpose of the bid and its structure was to foreclose the likelihood or restrict the possibility of a competitor's bid having any realistic prospect of success. The stubbornness of [the first respondent's] attitude to the request for Offer 1A in SA in 2001 reflects the reality of the purpose of the structure of the bids. To give a genuine discount for volume would be to make Fresenius' and Gambro's PD bids ones that had realistic prospects of success. It was that that was to be prevented, thereby protecting the PD revenue stream."

32 The conduct which would have contravened s 46 but for the derivative immunity was conduct that was unilateral. South Australia was not a party to it. Indeed, South Australia protested that it was unlawful (although South Australia now supports the stand taken by the first respondent). Offer 1A was not accepted, and did not find ultimate expression in a contract between the first respondent and the State.

33 As to s 47, there was no dispute that, subject to the question of immunity, the first respondent's conduct fell within s 47(2) of the Act, "because of the bundling of its tenders". The question was whether s 47(10) was enlivened, and that depended upon whether the conduct had the purpose of substantially lessening competition. Allsop J regarded the tender system used by the States as the critical aspect of the process. He held that it was the first respondent's purpose to ensure so far as possible that the process of tendering would not bring about realistically competitive bids for PD products. He said:

> "Each of the SPAs and the State governments which put in place a tender process intended that the operation of that process would produce real competition for the products the subject of the tender process. The

> purpose of Baxter was ... to structure the bids made by it in a way to prevent rival bidders for PD products from being able to put forward bids that were realistically competitive, by the existence of credible alternative high item-by-item pricing. The purpose was to ensure, as far as possible, that the competitive process of the tender process would not bring about realistically competitive bids for PD products by tying or bundling PD products to sterile fluids, and by providing a credible alternative which would make a choice of any likely rival PD product financially damaging to the State.
>
> Is that a purpose of 'lessening competition'? In my view it is. The competitive process here was the tender system used by the States. Suppliers in the relevant field were asked to bid on an hypothesis that each would be competing in a process that would be conducted in such a way as would enable each, subject to price and quality considerations, to have a realistic prospect of success ... Here ... one may conclude that the rivals' bids are not competitive by reason of the realistic consequences that will occur to the buyer if the condition imposed by one rival on its offer to supply is not complied with. In those circumstances, it is the perceived consequences of not accepting the offer of bundled supply, that is, of not accepting the offer amounting to exclusive dealing within s 47(2), which hinders the effective operation of the tender process in relation to PD products. That plainly was the purpose of the bundled bids. That purpose, in my view, is one directed to hindering the competitive process of the tender bids and so hindering competition."

34 Here again, the finding of the primary judge related only to pre-contract conduct. There was no similar finding in relation to entering into the contracts, or to the supply of goods under them. Allsop J did not consider that the contracts themselves had any substantial effect on competition.

Events in the Full Court

35 In the Full Court, both the appellant and the first respondent challenged these conclusions: the appellant on the ground that there were other contraventions of ss 46 and 47 in addition to those found by Allsop J; the first respondent on the ground that (apart from the question of immunity) there was no contravening conduct. The Full Court did not deal with those issues. Consequently, the specific focus of the argument in this Court concerning the decisions of Allsop J, and the Full Court, concerned those aspects of the first respondent's conduct that Allsop J found would have contravened the Act but for the derivative immunity. That conduct was all pre-contract and, in the sense

earlier explained, unilateral. Nevertheless, it is to be remembered that the appellant's claims of contravention covered the making and performance of the now-expired contracts.

The legal position of the second, third and fourth respondents

36 Sections 46 and 47 of the Act did not apply to the conduct of the second, third and fourth respondents, or any other State or Territory government involved in procuring sterile fluids or PD products from the first respondent.

37 That is because it was conceded that the procurement did not take place in the course of carrying on a business by what the Act describes as the Crown in right of a State or Territory. The appellant's application did not allege any contravention of the Act by any State or Territory or seek any order or relief against any State or Territory. Indeed, the application in its original form did not join any State or Territory as a party. The injunctive relief sought was expressed so as to preserve the contractual rights of the States.

38 The reasons why ss 46 and 47 did not apply to any conduct of the second, third and fourth respondents may be stated briefly. It was held by this Court in *Bradken*[6] that the Act, as it stood in 1978, did not bind the Crown in right of a State. The principle applied in *Bradken* was expressed by Gibbs ACJ as follows[7]:

> "It is an established rule of construction that no statute binds the Crown unless the Crown is expressly named therein or unless there is a necessary implication that it was intended to be bound; there will be such a necessary implication if it is manifest from the very terms of the statute that it was the intention of the legislature that the Crown should be bound."

39 That principle of construction was reconsidered, and modified, by this Court in 1990 in *Bropho v Western Australia*[8]. After pointing out that, in this context, "the Crown" signifies not only the Sovereign but also the executive

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6 (1979) 145 CLR 107.

7 (1979) 145 CLR 107 at 116 (references omitted).

8 (1990) 171 CLR 1.

government, its employees and agents, Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ said[9]:

> "For so long as 'the Crown' encompassed little more than the Sovereign, his or her direct representatives and the basic organs of government, there may well have been convincing reasons for an assumption that a legislative intent that general statutory provisions should bind the Crown and those who represent it would be either stated in express terms or made 'manifest from the very terms of the statute'. The basis of an assumption to that effect lay in a mixture of considerations: regard for the dignity and majesty of the Crown; concern to ensure that any proposed statutory derogation from the authority of the Crown was made plain in the legislative provisions submitted for the royal assent; and, the general proposition that, since laws are made by rulers for subjects, a general description of those bound by a statute is not to be read as including the Crown ...
>
> Whatever force such considerations may continue to have in relation to legislative provisions which would deprive the Crown 'of any part of [the] ancient prerogative, or of those rights which are ... essential to [the] regal capacity' ... they would seem to have little relevance, at least in this country, to the question whether a legislative provision worded in general terms should be read down so that it is inapplicable to the activities of any of the employees of the myriad of governmental commercial and industrial instrumentalities covered by the shield of the Crown."

40 Their Honours emphasised that what was involved was a general principle of statutory construction, not some prerogative power of the Crown to override a statute, or dispense with compliance[10]. This is of some present importance, because some of the arguments for the respondents about derivative immunity had about them a flavour of assertion of executive prerogative.

41 The Court in *Bropho* concluded that the inflexible rule as formulated, for example, in *Bradken*, should give way to a more flexible approach to construction that took account of the nature of the statutory provisions in question and the activities of government to which they might apply. Making the

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9 (1990) 171 CLR 1 at 18-19.

10 (1990) 171 CLR 1 at 15.

Commonwealth or a State liable to prosecution might be one thing. Subjecting the employees of a governmental corporation to general requirements enacted for the public benefit might be another. The joint reasons said[11]:

> "Implicit in that is acceptance of the propositions that, notwithstanding the absence of express words, an Act may, when construed in context, disclose a legislative intent that one of its provisions will bind the Crown while others do not and that a disclosed legislative intent to bind the Crown may be qualified in that it may, for example, not apply directly to the Sovereign herself or to a Crown instrumentality itself as distinct from employees or agents. Always, the ultimate questions must be whether the presumption against the Crown being bound has, in all the circumstances, been rebutted, and, if it has, *the extent to which* it was the legislative intent that the particular Act should bind the Crown and/or those covered by the prima facie immunity of the Crown." (emphasis added)

42 Brennan J agreed with the joint judgment, saying[12]:

> "[T]he presumption cannot be put any higher than this: that the Crown is not bound by statute unless a contrary intention can be discerned from all the relevant circumstances. As the Court must determine whether the legislature intended (or would have intended had the question been addressed) that the statute should affect the activities of the Executive Government, the circumstances which properly relate to that question must be considered. Those circumstances include the terms of the statute, its subject matter, the nature of the mischief to be redressed, the general purpose and effect of the statute, and the nature of the activities of the Executive Government which would be affected if the Crown is bound."

43 At the time of *Bradken*, the Act contained s 2A. The express provision that the Act bound the Crown in right of the Commonwealth in so far as it was carrying on a business was treated by some members of the Court as a strong indication that it did not bind the Crown in right of a State[13]. When, in 1995, s 2B was added, providing that certain provisions of the Act bound the Crown in right of a State or Territory when carrying on a business, the conclusion reached

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11 (1990) 171 CLR 1 at 23-24.

12 (1990) 171 CLR 1 at 28.

13 (1979) 145 CLR 107 at 116, 136.

in *Bradken* was reversed in so far as the Crown was carrying on a business, but reinforced in so far as the Crown was not carrying on a business[14].

44 Although the conduct in the present case found to fall within the terms of ss 46 and 47 was unilateral conduct of the first respondent, the terms of the Act cover (although they are not limited to) conduct that includes making or giving effect to contracts. Indeed, some of the contraventions alleged but not found against the first respondent were of that kind. There is nothing unusual about a circumstance in which making or giving effect to a contract involves an offence by one party to the contract but not by the other. The consequences of such illegality for the rights of the respective parties will not necessarily be the same[15]. Furthermore, there is nothing unusual about the Act applying to one party to a transaction, or proposed transaction, but not to the other. Leaving aside the extended application given by s 6, ss 46 and 47 according to their terms apply to conduct by corporations, not sole traders or partnerships. In a transaction between a corporation and an individual, the provisions may apply to the corporation but not to the individual. Differential application of legislation to parties to a contract is commonplace, although working out the legal consequences may be complex.

45 In *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd*[16], Mason J said:

> "The principle that a contract the making of which is expressly or impliedly prohibited by statute is illegal and void is one of long standing but it has always been recognized that the principle is necessarily subject to any contrary intention manifested by the statute. It is perhaps more accurate to say that the question whether a contract prohibited by statute is void is, like the associated question whether the statute prohibits the contract, a question of statutory construction and that the principle to

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14 See *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 348-349 [22].

15 Treitel, *The Law of Contract*, 11th ed (2003) at 480-490; *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd* [1988] QB 216 at 273; *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454 at 463-464.

16 (1978) 139 CLR 410 at 423.

which I have referred does no more than enunciate the ordinary rule which will be applied when the statute itself is silent upon the question."

46 That passage was cited by Kerr LJ in *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd*[17], where his Lordship said that when a statute contains a unilateral prohibition on entry into a contract, it does not follow that the contract is void[18]. Whether or not the statute has this effect depends upon the mischief which the statute is designed to prevent, its language, scope and purpose, the consequences for the innocent party, and any other relevant considerations. Ultimately, the question is one of statutory construction. As was pointed out in *SST Consulting Services Pty Ltd v Rieson*[19], the Act is far from being silent upon the question of the consequences of illegality, but, rather, contains elaborate provisions. That is not to say that the express provisions of the Act answer all questions that may arise, but they answer many of them, and set the context in which others are to be resolved.

47 It should also be remembered that, as Gibbs J said in *McGraw-Hinds (Aust) Pty Ltd v Smith*[20], the fact that an offence is one that may not be committed by the Crown is no reason for concluding that it may not be committed against the Crown. That was a case in which a Queensland statute, which did not bind the Crown, prohibited conduct involving an assertion of a right to payment for a directory entry. Such an assertion was made to the Queensland Government Tourist Bureau. The conduct in making the assertion was held to be covered by the prohibition. On its true construction, the Crown was intended to be protected by the prohibition, which therefore applied to conduct in relation to government agencies although it did not apply to conduct by government agencies.

48 Section 2 of the Act states the object as enhancing the welfare of Australians through the promotion of competition and fair trading. Identifying the operation of the Act as a benefit or a burden for government agencies, even in a particular instance, may not be straightforward. Plainly, in the case of procurement of supplies through the tender process, the anti-competitive practice of collusive tendering often would harm directly the interests of the procuring

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17 [1988] QB 216 at 270.

18 [1988] QB 216 at 273.

19 (2006) 225 CLR 516 at 527 [30].

20 (1979) 144 CLR 633 at 643-644.

agency. That would be a form of conduct in relation to the Crown in right of a State, but it seems improbable in the extreme, at least since 1995, that the Act was not intended to apply to such conduct. It would appear to fall squarely within the authority of *McGraw-Hinds (Aust) Pty Ltd v Smith*. What, then, of the conduct found by Allsop J to have fallen within the scope of s 46 – that is, the conduct in relation to Offer 1A? Assuming Allsop J otherwise to have been correct, the direct harm caused by such conduct was to the first respondent's competitors in the market for PD products, but it is difficult to understand why anti-competitive behaviour in relation to that market would not have affected, at least indirectly, the interests of the procuring agency. It was not conduct which South Australia encouraged. It was conduct about which South Australia complained, at least then, although it does not do so now. Similarly, as to s 47, Allsop J found that the purpose of the conduct of the first respondent was to defeat the States' desire for a competitive tender process. Moving away from the particular facts of the present case, promotion of competition and fair trading is at least as likely to be for the benefit of government purchasing authorities as it is to be a potential invasion of government interests. To describe the conclusion for which the appellant contends as one that adversely affects State interests is at least an over-simplification. It may be added that, if State Parliaments see State interests to be threatened by competition law, they have the power of exemption given by s 51(1) of the Act, provided, of course, they are willing to accept the political responsibility of exercising that power with the necessary specificity.

49 There was no pleading, and no finding by Allsop J, as to whether any of the SPAs were corporations or as to any fact relevant to s 6 of the Act. In any event, once it was accepted that they were not in any relevant respect carrying on a business, the plain inference from s 2B is that ss 46 and 47 did not apply to the SPAs. It is necessary now to consider what, if anything, flows from that as to the application of ss 46 and 47 to the conduct of the first respondent in relation to its dealings or proposed dealings with them, and, in particular, to the conduct found by Allsop J to fall within the terms of those provisions. In the case of the conduct found to fall within s 47, it was entirely pre-contractual. In the case of the conduct found to fall within s 46, it did not result in any contract. However, the appellant also argues that the conduct of making and performing contracts involved, or could involve, contraventions of ss 46 and 47 by the first respondent, and that possibility means that there is a wider question to be considered.

The legal position of the first respondent

50 The starting point for this enquiry is the decision in *Bradken*. The headnote in the authorised report of that case simply states that it decided that the

Act did not bind the Crown in right of a State. Section 2B later reversed that position so far as the Crown in right of a State (or Territory) carries on a business, but it is still the position otherwise. What matters for this appeal is the consequence. That question arose in *Bradken* against a somewhat confusing procedural background. During the course of argument in the present case, reference was made to the court record in *Bradken*. The case involved a claim for injunctive relief by manufacturers of rolling stock. The applicants were competitors of the first, third, fourth and fifth respondents. The second respondent, the Queensland Commissioner for Railways, a corporation, was a Queensland government authority which was a purchaser of rolling stock. In early 1978, the second respondent agreed to acquire rolling stock from the other respondents, not by the usual process of competitive tender, but in circumstances that allegedly contravened s 45 or s 47 of the Act. It was part of the agreement that the first and fifth respondents would provide finance to the second respondent for the construction of the railway on which the rolling stock was to be used. This was the result of negotiations that had extended over many years, since before the commencement of the Act. The merits of the claim that the conduct of the respondents, or any of them, fell within s 45 or s 47 are presently irrelevant and, indeed, were never decided. After the applicants commenced proceedings against all respondents, the case was removed into this Court to decide a defence raised by the second respondent. The defence was that the Act did not apply to him because he was not a trading corporation and was an instrumentality or agent of the Crown in right of the State of Queensland which was not bound by the Act. Another presently irrelevant defence also was raised. This Court, by majority, upheld the defence that the Commissioner was an instrumentality or agent of the Crown in right of the State of Queensland and was not bound by the Act. Furthermore, the Court held that the defence raised was a bar to the granting of the relief sought in the applicants' points of claim pars 34(1) and 34(2). Those paragraphs sought injunctions restraining the first, second and fifth respondents from giving effect to the contract arrangement or understanding complained of. It was also held to be a bar to the granting of the relief sought in pars 34(3) and 34(4), which sought general restraints against exclusive dealing, "in so far as that relief is sought upon the basis of the allegations presently made in the points of claim."[21] The matter was remitted to the Federal Court. As appears from the report of the argument[22], the primary stance of counsel for the applicants when the case reached this Court was to

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21 (1979) 145 CLR 107 at 141.

22 (1979) 145 CLR 107 at 110-111.

concede that no relief could be obtained against the Commissioner, but to seek to discontinue and proceed only against the other respondents. In that connection, he indicated that he would wish to amend, and base a claim for relief on pre-contract conduct. Gibbs ACJ said[23]:

> "The applicants indicated that they wished to amend their points of claim in the Federal Court, to raise a new case that the respondent companies had, contrary to the *Trade Practices Act*, engaged in conduct (pre-contractual conduct it was called) in which the Commissioner played no part. Nothing that I have said is intended to indicate that the Commissioner would be a necessary party to the proceedings if that were the only case presented against the respondent companies – that question is not before us and I express no views upon it."

51 Thus, the decision in *Bradken* left unresolved any issue as to alleged contraventions of the Act in the pre-contractual conduct of the respondents, other than the Commissioner. What the Court decided, however, was that the relief sought in the existing points of claim, under s 80 of the Act, was barred by the defence that the Crown in right of the State of Queensland was not bound by the Act. That relief was an injunction restraining the relevant respondents, including the Commissioner, from giving effect to the provisions of the contract, arrangement or understanding contrary to s 45 or s 47 of the Act. Central to those provisions were the financing arrangements for the railway. The Court decided that ss 45, 47 and 80 did not empower a court to make orders restraining the parties from giving effect to those contracts.

52 The reasons given in *Bradken* for the conclusion that ss 45 and 47 of the Act did not apply to the conduct of the Queensland Commissioner for Railways must now be regarded, in the light of this Court's decision in *Bropho*, as too widely expressed. The appellant submits, correctly, that the same is true of the reasons given for the conclusion that ss 45, 47 and 80 did not empower a court to grant the relief sought in the points of claim, in their existing form. It is also important to note what was left undecided by *Bradken*. *Bradken* did not decide that the Act had no application to any conduct of the respondents other than the Commissioner in relation to their dealings with the Commissioner. It did not decide that a corporation dealing with the Crown in right of a State is unaffected by the Act. It did not decide, for example, that corporations are free to engage in collusive tendering when bidding for government contracts, even though it noted

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23 (1979) 145 CLR 107 at 113.

with approval the United Kingdom decision, concerning a different legislative scheme, in *In re Telephone Apparatus Manufacturers' Application*[24].

53 Having concluded that ss 45 and 47 of the Act did not apply to the Queensland Commissioner for Railways, as an emanation of the Crown in right of the State of Queensland, Gibbs ACJ went on[25]:

> "It of course follows that the applicants cannot obtain the relief which they seek against the Commissioner, but can they obtain *the relief sought* against the respondent companies? I have already pointed out that such relief, if granted, would invalidate transactions to which the Commissioner is a party. The first two claims are for injunctions to restrain the respondent companies concerned from giving effect to the provisions of contracts, arrangements or understandings to which the Commissioner was a party. An injunction restraining one of the parties to a contract from completing it affects not only the party against whom it is made; it equally affects the other party to the contract. The third and fourth claims are for injunctions restraining certain of the respondent companies from engaging in the practice of exclusive dealing, which, according to the points of claim, consists in providing, or agreeing to provide, finance and/or financial assistance to the Commissioner on certain conditions. Those injunctions, if granted, will affect the Commissioner as much as the respondent companies. In other words, if the remedies sought are granted against the respondent companies, the Commissioner will be prejudiced by the operation of the *Trade Practices Act* just as much as if its provisions had been directly enforced against him." (emphasis added)

54 The Acting Chief Justice then referred to a corollary of the proposition that the Act did not bind the Crown. He quoted Romer LJ who said, in *Clark v Downes*[26]: "The Acts not binding the Crown, it is the duty of the courts so to construe the Acts that the Crown and its property are in no way prejudicially affected by the Acts." After referring to other authorities Gibbs ACJ dealt with the corollary thus[27]: "It is not necessary to explore the limits of this principle."

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24 [1963] 1 WLR 463; [1963] 2 All ER 302; (1963) LR 3 RP 462.

25 (1979) 145 CLR 107 at 123.

26 (1931) 145 LT 20 at 22.

27 (1979) 145 CLR 107 at 124.

One reason it was unnecessary to explore the limits of the principle was that the case was to be remitted to the Federal Court to enable the applicants to re-frame their case against the respondents other than the Commissioner.

55 Stephen J, having held that the Act did not bind the Crown, said[28]: "Once this be concluded it follows that the Act will not only not apply directly to the Commissioner but will also not apply so as to prejudice its interests when in contractual relationship with parties to whom the Act clearly applies or when otherwise interested in transactions affecting those parties (*In re Telephone Apparatus Manufacturers' Application*[29])." This, it is to be observed, treated the respondents other than the Commissioner as parties "to whom the Act clearly [applied]".

56 Mason and Jacobs JJ said of the corollary that "the absence of [a legislative] intention to bind the Crown in right of Queensland will not only exonerate it from the direct application of the statutory provisions but will also exonerate from the application of those provisions the contracts arrangements or understandings made by that Crown and the other parties thereto as well."[30]

57 The other member of the Court, Murphy J, dissented. Both Stephen J and Murphy J said that the Court had not had the benefit of full argument on all issues[31]. However that may be, the Court, beyond making it plain (by remitting the issue of pre-contractual conduct to the Federal Court) that it was not finding that the Act did not apply to the other respondents, and that it was unnecessary to explore the limits of the principle involved, left unresolved a number of questions of present relevance.

58 Two things are clear. First, the proposition applied in *Bradken* was regarded as a corollary of the principle about Crown immunity. Secondly, both the proposition about Crown immunity and its corollary are principles of statutory construction. The Court's statement in *Bradken* of the principle about Crown immunity no longer accurately represents the law. It has been overtaken by the decision in *Bropho*. Despite the statement in the joint judgment that the

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28 (1979) 145 CLR 107 at 129.

29 [1963] 1 WLR 463; [1963] 2 All ER 302; (1963) LR 3 RP 462.

30 (1979) 145 CLR 107 at 138.

31 (1979) 145 CLR 107 at 128, 141.

effect of its reasoning was not to overturn the settled construction of particular existing legislation, the fact that that reasoning was enunciated alone requires reconsideration of its statement of the corollary. Furthermore, in the application of the principle, it being one of statutory construction, it is necessary to consider changes to the Act since *Bradken*. It should also be noted that *Bradken* contained no discussion of a related and wider question of statutory construction: how does the Act operate in the (not uncommon) case of a contract between a corporation and a party who is not bound by the Act?

59 To begin with, for the purposes of this case it is necessary to be more precise about the proposition of construction that is the corollary of the principle that is now to be found in *Bropho*. In *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)*[32], Kitto J said (references omitted):

> "The cases in which a statutory provision not binding on the Crown must be denied an incidence upon a subject of the Crown because that incidence would be in legal effect upon the Crown fall into a few broad classes. There is first the class of cases where a provision, if applied to a particular individual or corporation, would adversely affect the exercise of an authority which he or it possesses as a servant or agent of the Crown to perform some function so that in law it is performed by the Crown itself. Next there is the class of cases in which a provision, if applied to a particular individual or corporation, would adversely affect some proprietary right or interest of the Crown, legal equitable or statutory. And finally there is an anomalous class of cases where a provision creating a liability by reference to the ownership or occupation of property would, in its application in respect of certain kinds of property, impose a burden upon the performance of functions which, though not performed by servants or agents of the Crown, are looked upon by the law as performed for the Crown."

60 We are concerned with the second of these classes, bearing in mind that what is involved is the "incidence ... in legal effect" upon the Crown. General references to unspecified forms of prejudice to interests of the Crown in a context such as this are unhelpful. There were references in the argument for the respondents to the "right" of States to enter into contracts, where what was in contemplation would be described more accurately as a freedom. There is also a risk of confusing governmental, commercial, or even political interests with

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32 (1955) 93 CLR 376 at 393-394.

legal, equitable or statutory rights and interests. From one point of view, it may be in the interests of a government for it, and anyone who deals with it, to have complete freedom to contract, but in reality no one has such freedom. There are many laws, some of which apply to governments and some of which do not, that constrain freedom of contract. Some of those laws that do not apply to governments have an indirect effect upon governments, in their application to people dealing with governments. Some of those laws operate for the protection of governments. A law to promote competition and fair trading may, in some of its aspects, operate in that way. For reasons already given, whether and to what extent it is to the advantage of executive governments, Commonwealth or State, for corporations dealing with them to be unfettered by laws which promote competition, is a question to which there is no simple answer. Because of its power to make laws with respect to trading corporations, it is a question on which the language of the federal Parliament's legislation is decisive, subject to s 51(1).

61 In *Wynyard Investments*[33], Kitto J said:

> "The object in view is to ascertain whether the Crown has such an interest in that which would be interfered with if the provision in question were held to bind the corporation that the interference would be, for a legal reason, an interference with some right, interest, power, authority, privilege, immunity or purpose belonging or appertaining to the Crown."

62 The need for concentration on legal consequences in this context has been stressed in recent times by this Court in *NT Power Generation Pty Ltd v Power and Water Authority*[34]. The principle of construction to be applied is that, since the Act does not bind the Crown in right of a State or Territory when it is not carrying on a business, then, save to the extent to which a contrary intention appears, the Act will not be read so as to divest the Crown of proprietary, contractual or other *legal* rights or interests. Consistently with *Bropho*, such a contrary intention may appear from the language of the Act, and its objects and subject matter as emerging from that language.

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33 (1955) 93 CLR 376 at 396.

34 (2004) 219 CLR 90 at 152 [170].

The construction of the Act

63 For the reasons already given, and particularly because of the terms of s 2B, ss 46 and 47 of the Act, even when the Crown is acting through a corporation as defined, or in any extended application of the Act under s 6, do not apply to conduct of the Crown in right of a State or Territory so far as the Crown does not carry on a business. Sections 46 and 47 did not apply to any conduct of the second, third and fourth respondents in this case.

64 At the same time, it 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 interests. As a result of changes to the Act since *Bradken*, State and Territory governments no longer enjoy any general immunity from the Act. Acting under s 51(1), State and Territory Parliaments may legislate to protect governmental interests, but the legislative emphasis on the specificity with which they must do that (increased since *Bradken*) draws attention to the importance attached to the pursuit of the object declared in s 2.

65 One example is sufficient to demonstrate the unacceptable consequences of a general proposition that s 47 of the Act did not apply to the first respondent in its dealings with the SPAs. Section 47(3) covers refusals to deal. Suppose the first respondent, over the protests of a SPA, had refused to supply sterile fluids unless the SPA agreed not to acquire PD products from anyone else. It is difficult to take seriously a suggestion that the Act was not intended to cover such conduct.

66 The real question is the *extent* to which the reach of ss 46 and 47 of the Act, and the provisions relating to remedies, in their potential application to the conduct of the first respondent, is modified by the operation of the principle of construction discussed above.

67 The argument for the respondents, accepted by Allsop J and the Full Court, was expressed by Allsop J as follows:

> "The respondents submitted that all [the] relief [claimed] impermissibly applied the Act to the Crown by denying it the right, power and capacity that it had and has to enter a contract of such kind as it wishes. This was said to be an interference directly with its rights and not a mere adjectival interference with its commercial interests."

68 Underlying this argument is the idea that the Act operated so as not to enact any law that would circumscribe the freedom of the Crown in right of a State or Territory to make any kind of contract it wished, and, furthermore, that the Act preserved the Crown's freedom in that respect, by providing that corporations dealing or negotiating with the Crown should be free to propose and make any kind of contract, unfettered by any constraint under the Act. These ideas cannot be supported by reference to any established principle of statutory construction, and they are impossible to reconcile with the purpose and subject matter of the Act. 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 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.

69 Allsop J accepted the following proposition:

> "If a State or Territory has a contract with a non-government party, the Act is to be construed as not applying to that contract such that the State or Territory and non-government party [are] not bound by the terms of the Act in relation to the entry into and performance of that contract."

70 If the expression "is to be construed" suggests some inflexible rule of construction, the proposition is inconsistent with *Bropho*. Even if the expression is understood only as a prima facie approach to construction, it is too wide. In order to protect legal rights of the Crown, it is not necessary to deny that entering into or performing a contract could involve a contravention of s 46 or s 47 by a non-government party. As was pointed out earlier, many statutes, and the Act in particular, may produce the consequence that making or performing a contract is illegal for one party but not for the other. When that occurs, the result is not necessarily general unenforceability of the contract. In the case of the Act, that is reinforced by s 4L as explained in *SST Consulting Services Pty Ltd v Rieson*[35].

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35 (2006) 225 CLR 516.

The outcome is determined by the application of the detailed legislative scheme concerning remedies. It is not dictated by a general conclusion that, in order to preserve the Crown's immunity, it is necessary also to extend a general immunity to any non-government party negotiating or contracting with the Crown.

71 Finally, Allsop J dealt with the problem that, on his findings, the only conduct of the first respondent that otherwise fell within s 46 or s 47 was pre-contract conduct and, in the case of s 46, was conduct that never led to a contract. He said:

> "This leaves the issue of whether the principle [of derivative immunity] only prevents the application or operation of the Act to the entry into or giving effect to the impugned contracts once formed, as crystallised legal rights, or whether it extends to prevent the application or operation of the Act to the commercial negotiations leading up to the formation of the impugned contracts. If the former, then Baxter will have contravened s 46 of the Act by making Offer 1A in SA and s 47 of the Act by negotiating, and making the offers it made leading up to the formation of, the impugned agreements. Not only will this have the consequences that declarations to that effect will be made and that Baxter will be liable to the imposition of penalties, but also, Baxter can be restrained from the repetition of such conduct in the future. This would thereby prevent or foreclose the State or the ACT from making a contract with Baxter by preventing its negotiation, notwithstanding that if such a contract were to be formed the Act would not extend to either Baxter or the State or the ACT as to its formation and performance."

72 The premise that the Act would not apply to the first respondent in relation to the formation or performance of the contract is unwarranted. Even if it were correct, it would not follow that pre-contract conduct, or conduct that never resulted in a contract, would be beyond the reach of the Act. Allsop J dealt with that question by reference to the States' and Territories' freedom of contract, which he described as an aspect of the prerogative, or at least of the relevant polity's "legal situation". He referred to the initiation by governments of a tender process and said:

> "Does, then, the Act operate to make it unlawful for non-government parties to respond to such tenders or invitations or to participate in negotiation if a specified norm of conduct is contravened? If the answer to that were yes, it would follow (at least insofar as the response was such as to be within the contemplation of the request or

> invitation) that the legal rights, interests or prerogatives of the polity in question were qualified or impaired. Thus, the answer must be, no."

73 This reasoning, also, seems to seek to apply some inflexible rule, but even as an expression of an approach to construction it goes beyond the established principle. The concept of responding to an invitation to tender is pregnant with uncertainty. Obviously the learned judge regarded Offer 1A as a response. This then was qualified by references to conduct "within the contemplation of the request or invitation". What is meant by that is unclear. The reaction of South Australia to Offer 1A hardly suggests that the conduct of the first respondent was within its contemplation. Even if it had been, the purpose of the Act is to promote competition, which is a process which operates for the public benefit, not to satisfy the expectations of parties. Whether it was open to the first respondent to argue, as it did, successfully, that the conduct of the SPAs was of factual relevance in considering whether its conduct had the necessary anti-competitive purpose or effect can be left to one side for present purposes. As a matter of construction of the Act, however, it is wrong to conclude that it operates to preserve unfettered the contractual capacities of the Crown, to the extent of withholding the application of the Act from conduct by non-government parties in response to an invitation to tender. To return to an example given earlier, suppose a response to an invitation to tender is a refusal to supply except on certain exclusive terms, and that refusal is made with the purpose of lessening competition. It is unsatisfactory to make the application of the Act depend on whether this is a response that was within the contemplation of the procuring authority. It is also at odds with the restrictions imposed by s 51(1) on the capacity of a Parliament to exempt anti-competitive behaviour from the Act. It seems to give the public officials of States and Territories a wider power to give dispensations from the operation of Commonwealth law than State or Territory legislatures.

74 The construction urged by the respondents imposes a very extensive qualification upon the Act's object of promoting competition and fair trading in the public interest, in the name of the protecting of the capacities of the Crown, a qualification strikingly at odds with the way the Act deals with governments when they themselves carry on a business. As the Full Court (which felt bound by *Bradken* to uphold the decision of the primary judge) rightly said:

> "The amount involved in the combined purchases of goods and services by the executive governments of the States and State instrumentalities is massive and, as this case illustrates, in many fields would dominate demand. It is one thing to exempt the executive government from legislative prohibition as to conduct, particularly where the dominant

position of the executive government in many markets would complicate procurement. It is another to have a substantial area of commerce in which restrictive practices can be carried on by all those dealing with a government, perhaps to the disadvantage of the public purchasing authority, but also to the detriment of other suppliers and consumers."

75 The Act has changed materially since *Bradken*, as has the law governing the relevant principles of construction. Even *Bradken* itself did not decide issues as to pre-contract conduct. It is necessary for this Court to approach the construction of the Act, as it stands at present, in the light of the current context of competition law.

Conclusion

76 It should be concluded that, in its dealings with the SPAs, the first respondent was bound by ss 46 and 47. As to those aspects of that conduct found by Allsop J to have fallen within the prohibitions in ss 46 and 47, there is no sufficient reason to deny the availability of the remedies, including pecuniary penalties, sought by the appellant. The proposition that the Act does not bind SPAs does not require, as a corollary, that it does not bind corporations dealing with SPAs.

77 It follows that the matter must be remitted to the Full Court for determination of those parts of the appellant's notice of appeal which have not been dealt with, and of the notice of contention. It is not desirable to say anything about the question whether, if the Full Court concludes, contrary to Allsop J, that the conduct of the first respondent in making and giving effect to the impugned contracts fell within the prohibitions in s 46 or s 47, those contracts were enforceable. Whether, and to what extent, the question would arise at all, having regard to the expiry of the contracts, is another matter. The nature and form of any injunctive or declaratory relief that might be appropriate would be a matter for consideration. These issues were either not fully argued in the present appeal or not argued at all.

78 The appeal should be allowed. The orders of the Full Court of the Federal Court of Australia made on 24 August 2006 should be set aside. The matter should be remitted to the Full Court for further consideration consistently with the reasons of this Court. The respondents should pay the appellant's costs of the appeal. The costs of the proceedings to date should otherwise be in the discretion of the Full Court.

79 KIRBY J. This appeal was propounded as an opportunity for this Court to reconsider, and re-express, its holding in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*[36]. In *Bass v Permanent Trustee Co Ltd*[37], I suggested that *Bradken* might be in need of reconsideration.

80 In the Federal Court of Australia, the judges who decided these proceedings, both at trial[38] and on appeal to the Full Court[39], held that they were bound by the reasoning of this Court in *Bradken* to dismiss the claim brought by the appellant, the Australian Competition and Consumer Commission ("the Commission"), against the first respondent, Baxter Healthcare Pty Limited ("Baxter"). They held that this was necessary because Baxter was relevantly protected from liability for any alleged contraventions of ss 46 and 47 of the *Trade Practices Act* 1974 (Cth) ("the Act") by a "derivative immunity"[40]. That "derivative immunity", relevantly, arose (so it was held) because, to decide otherwise, would be to extend the application of the Act in a way that would undermine the legal immunity enjoyed under the general law (and referred to in the Act) by "the Crown in right of [the relevant] States … and of the Australian Capital Territory"[41].

81 Sections 46 and 47 of the Act, which Baxter was alleged to have contravened, relate to the misuse of market power by defined corporations having a substantial degree of power in the market. By s 2B of the Act, the Federal Parliament provided, relevantly, that Pt IV of the Act (in which ss 46 and 47 appear) bound "the Crown in right of each of the States, of the Northern Territory and of the Australian Capital Territory, so far as the Crown carries on a business, either directly or by an authority of the State or Territory".

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36 (1979) 145 CLR 107.

37 (1999) 198 CLR 334 at 373 [95]. See Steinwall, "Revisiting State Crown immunity under the Trade Practices Act 1974: The High Court's decision in Bass v Permanent Trustee Company Limited", (1999) 27 *Australian Business Law Review* 319.

38 *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2005) ATPR ¶42-066 (Allsop J).

39 *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2006) 153 FCR 574.

40 (2005) ATPR ¶42-066 at 43,066-43,067 [692]-[700]; (2006) 153 FCR 574 at 599 [105]-[106].

41 The language of the Act, s 2B(1).

82 In approaching the issues now presented, I share misgivings expressed in *Bradken* by Murphy J[42]. His Honour "[found] the resolution of [that] case extremely difficult because of the way it was presented by the applicants". The Commission made concessions, and conducted its case against Baxter, on the footing that the relevant State and Territory governmental interests were to be treated as those of a manifestation of the Crown "in right of" the State or Territory concerned. For reasons ultimately derived from the constitutional character of the polities established by, or envisaged in, the Australian Constitution, this approach is erroneous.

83 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.

84 For a number of years, this Court, with substantial unanimity, has been drawing attention to this serious weakness of approach as it has manifested itself in many cases, large and small[43]. The present is a case where the supervening text is the Constitution itself. The erroneous approach is just as clear (but has more serious consequences) where the text is the Constitution as where it comprises an intervening statutory provision or some humbler subordinate law or rule. For some time, in circumstances analogous to the present case, I[44], and others[45], have been calling this error to notice. So far, in this country, the admonitions have fallen on deaf ears. Yet they cannot be ignored, because they concern a characteristic of the constitutional arrangements of the Commonwealth.

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42 (1979) 145 CLR 107 at 139-141.

43 The cases are collected in *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 80 ALJR 1509 at 1528 [84], fn 64; 229 ALR 1 at 22-23. See also *General Motors Acceptance Corporation Australia v Southbank Traders Pty Ltd* (2007) 227 CLR 305 at 317 [35].

44 See eg *Bass* (1999) 198 CLR 334 at 374-375 [99]; *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 82-86 [138]-[153].

45 *Byrne v Ireland* [1972] IR 241 at 272-275 per Walsh J (with the concurrence of Ó Dálaigh CJ at 261). See also at 302-303 per Budd J (with the concurrence of Ó Dálaigh CJ at 261 and O'Keeffe P at 261); *The Commonwealth v Mewett* (1997) 191 CLR 471 at 542-545 per Gummow and Kirby JJ.

Understanding the approach of the parties

85 *How the issue arises*: As appears from the reasons of Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ ("the joint reasons")[46], the parties to this appeal did not rely on, or argue, an implied constitutional immunity or rule to confer protection from the operation of a federal law, such as the Act, on a State or Territory of the Commonwealth as such (or, by derivation, to render a corporation such as Baxter dealing by contract with such a polity equally immune)[47]. Had any party raised such an argument, either in this Court or in the Federal Court, it would have to have complied with procedural requirements for notice of a constitutional question to the nation's law officers[48]. The argument of the appeal, and of the proceedings below, would have taken a different course.

86 Instead, the arguments of the parties were addressed, almost exclusively, to questions of "Crown immunity" that were said to arise from the language of the Act. This took the appeal into a consideration of the "established rule of construction that no statute binds *the Crown* unless *the Crown* is expressly named therein or unless there is a necessary implication that it was intended to be bound"[49]. The arguments for the derivative immunity claimed by Baxter appear also to rely on legal notions traced ultimately to the prerogatives of the Crown[50]. Absent very clear legislation to which the Crown itself has given its royal assent, those prerogatives traditionally limit the amenability of the Crown, in its various manifestations, to answerability at law to an action prosecuted before one of the Crown's own courts.

87 These premises make it clear that the assumption of treating the States and Territories of the Commonwealth as "manifestations of the Crown" was crucial for the arguments of Baxter, and of the States supporting it. This was so whether

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46 Joint reasons at [2].

47 cf *British American Tobacco* (2003) 217 CLR 30 at 80-81 [134]-[137].

48 *Judiciary Act* 1903 (Cth), s 78B.

49 *Bradken* (1979) 145 CLR 107 at 116 per Gibbs ACJ (emphasis added).

50 Joint reasons at [40]. The same use of the language of Crown immunity and reference to old and new English cases in relation to that concept are apparent in other legal writing. See eg Wright, "The future of derivative crown immunity – with a competition law perspective", (2007) 14 *Competition & Consumer Law Journal* 240. The article traces the principles back to the seventeenth century at least, eg *Magdalen College Case* (1615) 11 Co Rep 66b at 72a [77 ER 1235 at 1243]; *Attorney-General v Allgood* (1743) Parker 1 at 3-5 [145 ER 696 at 696-697] and *Sydney Harbour Trust Commissioners v Ryan* (1911) 13 CLR 358 at 365-366.

those arguments were founded on the foregoing rule of statutory construction at common law, or on expanded notions of the Crown's modern prerogatives. At the heart of the arguments, as finally expressed, was the assumption that a State or Territory of the Commonwealth is, as such, a manifestation of the Crown and, for that reason, entitled to a relevant immunity from the operation of insufficiently specific provisions of a federal law, such as the Act. This is why, throughout the joint reasons, there are repeated references to the affected States and the Australian Capital Territory as manifestations of the Crown "in right" of the polity concerned.

88 In Australia, however blind we were to this perception in earlier times, the assumption inherent in the foregoing submission can now be seen as inconsistent with the text, purpose and character of the Australian Constitution and of its constituent polities. If that conclusion is correct, it knocks away (or at least undermines) the importation into the present discourse of notions of *Crown* immunity or *Crown* prerogatives *as such*. To attract any immunity or prerogative, so as to afford a foundation for the type of immunity claimed by Baxter, a different (perhaps analogous) legal theory of immunity would need to be propounded. Necessarily, any such new immunity would have to be expressed in different, non-Crown terms. It would have to be explained in language compatible with the text, structure and character of the Australian Constitution[51]. No party to the proceedings before this Court (or in the Federal Court) ventured upon such an endeavour.

89 *Excusing the parties*: I do not criticise the parties too much for failing to approach the problem now presented in the way that I consider to be constitutionally mandated:

- This Court, in *Bradken*, and later in *Bropho v Western Australia*[52], expressed the governing rule in terms of the immunities of the Crown[53]. This Court has persisted with the assumption in cases of this kind that the political units of the Commonwealth of Australia are, for present purposes, to be characterised as manifestations of different aspects of the Crown[54];

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51 cf *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-567; *Roberts v Bass* (2002) 212 CLR 1 at 54-58 [143]-[158].

52 (1990) 171 CLR 1.

53 See especially at (1990) 171 CLR 1 at 23-25.

54 See eg joint reasons at [39]-[42] where *Bropho* is cited.

- None of the polities concerned (including the States that, along with Baxter, are the respondents to this appeal), even as an alternative or fall-back to a preferred persistence with notions of Crown immunity, endeavoured to re-express a type of governmental immunity of a different character, more apt to the text, purpose and character of the Australian Constitution. Because, primarily, it is the States (and now the self-governing Territories) of the Commonwealth that have an interest to uphold a governmental immunity of some kind, the omission on their part to propound a new and different immunity, founded on new, different and indigenous legal sources, leaves the polities concerned with all their legal eggs in the basket of Crown immunity. If, for reasons of Australian constitutional law, that source of the immunity is inapplicable, neither the polities concerned, nor Baxter seeking derivative immunity based on Crown immunity, offered any other argument;

- So far as *Bradken* was concerned, even Murphy J (who dissented[55]) accepted, and applied, the language of Crown immunity used by the majority in that appeal. He considered whether the Commissioner for Railways of Queensland was a manifestation "of the Crown in right of a State"[56]. For Murphy J, the question of significance was whether the Crown's immunity under the Act extended to the Crown in right of a State or was confined to "the Crown in right of the Commonwealth"[57]. He did not pause to consider the antecedent question concerning the fundamental equivalence (or description) of the Commonwealth and State concerned with the Crown, so as to attract *for that reason* all of the traditional immunities of the Crown against being bound by insufficiently specific legislation to which the Crown had given its royal assent;

- Although in *Bradken* Stephen J remarked that the doctrine of Crown immunity evinced "artificiality"[58] and indicated that it seemed inappropriate to modern circumstances where the Crown had often been replaced by independent and even republican polities so that "it may be that the doctrine is no longer capable of providing any reasoned basis upon which to determine the precise operation, in a federal setting, of the common law rule"[59], he too ultimately fell back on the traditional

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55 (1979) 145 CLR 107 at 141.

56 (1979) 145 CLR 107 at 139.

57 (1979) 145 CLR 107 at 140.

58 (1979) 145 CLR 107 at 128.

59 (1979) 145 CLR 107 at 128-129.

explanation. Thus, his Honour concluded that "since the Act is devoid either of express reference binding the Crown in right of the States or of necessary implication to that effect, it should, I think, be interpreted as not binding the Commissioner for Railways of the State of Queensland"[60];

- Repeated expressions of concern by me about this matter have not, so far, produced any new approach nor even an attempt at one[61]. In the manner that elsewhere has become so familiar, the Australian legal culture prefers to stick with a common law rule and to ignore any discordancy of that rule with the supervening adoption of a disharmonious written law, in this case nothing less than the Australian Constitution; and

- Finally, the Act itself appears to assume, for some relevant purposes, that the States and Territories of the Commonwealth are manifestations of the Crown. Thus, s 2A of the Act contains several provisions that assume that the Commonwealth, States and Territories are respectively, in their several identities, manifestations of the Crown "in right of" such polities. This phraseology appears in no fewer than eight of the provisions of ss 2A, 2B and 2C of the Act. Thus, even if the better view of the law of Australia were that the Commonwealth, States and Territories are not manifestations of the Crown in those several "rights", but distinct constitutional entities so described, the express statutory assumption manifested, relevantly, in s 2B(1) of the Act might arguably justify treating as harmless any misdescription of a State or Territory as the Crown. It might justify reading the provision in the Act concerning "the Crown in right of" a given State as nothing more than a reference to the constitutional State itself.

90 Is this the way the present appeal should be approached? In particular, is it the way that the appeal should be approached given the unwillingness of the parties to proffer, even as an alternative or fall-back, some other and different proposition to sustain a relevant Australian governmental immunity otherwise than on the footing of Crown immunities or Crown prerogatives?

The Crown and the Australian polities

91 *The constitutional text*: As I attempted to make clear during argument of the appeal[62], there is a fundamental difficulty involved in an analysis of the issues

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60 (1979) 145 CLR 107 at 129.

61 See eg *Bass* (1999) 198 CLR 334 at 373 [95]; *British American Tobacco* (2003) 217 CLR 30 at 82-85 [138]-[147].

62 [2007] HCATrans 202 at 11, 31-85, 285, 765, 1145, 1290 and 1325.

in this appeal in treating the Australian Commonwealth, States and Territories as manifestations of the Crown for the purpose of attracting to them, unrevised and unadjusted to local circumstances, all of the immunities, privileges and prerogatives of the Crown, as traditionally enjoyed in ancient times and as expressed in previous common law doctrine. Such an approach is, in my view, incompatible with the text, structure and character of the Australian Constitution.

92 The Australian constitutional text makes it clear that certain new constitutional entities are thereby created. They are "the Commonwealth" which is thereby "established"[63]; the "States" (being the former named "colonies" of the Crown such as are admitted into or established by the Commonwealth as States[64]) and the Territories of the Commonwealth[65].

93 It is plain from the constitutional text, purpose and history that the new polities are not merely a continuation of pre-existing colonies under a different appellation. This would be an impossible notion in the case of the Commonwealth and the Territories of the Commonwealth, which had no earlier existence, as such. But it is equally impossible in the case of the States for, after federation, they existed as new governmental entities deriving their legal character and status from the Constitution itself, not from the pre-federation colonies which were thereby terminated.

94 Under the Constitution, the polities created were related to each other as integral parts of a new Commonwealth, a distinct and "indissoluble" federal entity[66]. Moreover, they constituted a new nation in the community of nations. This new nation was brought into existence by the will of the *people* in the several colonies named and those of any other identified Australasian colonies that might thereafter be admitted into the Commonwealth[67].

95 Although in colonial times in Australia, it was understandable that the colonial governments should have been treated for legal purposes as "manifestations of the Crown", with governmental "powers and functions …

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63 *Commonwealth of Australia Constitution Act* 1900 (Imp) (63 & 64 Vict c 12), s 4. See also s 3.

64 *Commonwealth of Australia Constitution Act* 1900 (Imp), s 6. See also Constitution, Chs V and VI.

65 Constitution, ss 122, 125.

66 *Commonwealth of Australia Constitution Act* 1900 (Imp), Preamble, par 1.

67 As happened in the case of Western Australia before proclamation of the Constitution.

vested in the Governor of a Colony" representing the Crown, or in "the Governor of a Colony with the advice of his Executive Council, or in any authority of a Colony"[68], once the Commonwealth was established the new political entities then created were not properly so described or characterised. They derived their existence from the Constitution itself. They were thus constitutional entities and not a manifestation of anything else.

96 In effect, the Commonwealth, the States and the Territories therefore stand apart from the pre-existing governments in Australia, although they relate to each other. They are not, as such, manifestations of the Crown. It is a misdescription to so designate them or to equate them as such.

97 In the early years of Australian federation, as the notion of the indivisibility of the Crown throughout the British Empire persisted for some time, it was understandable that the Commonwealth, States and Territories should continue to be described as manifestations of the Crown. However, in terms of the constitutional text and basic legal principle, this description was erroneous. Persisting with it into the twenty-first century is unacceptable. It is past time that it should be replaced with a new governmental characterisation of the Australian governmental polities – one appropriate to the Constitution and the independent nation and component polities that the Constitution brought into existence.

98 *Specific textual references*: The fact that the Commonwealth and the Territories, at least, are plainly not subsumed in the Crown may be demonstrated by the distinction drawn in the Constitution between those polities, as such, and the various specific ways in which the Crown and the Queen are involved in Australia's post-federation constitutional arrangements.

99 Thus, the Queen is part of the Federal Parliament created by the Constitution as the Parliament of the Commonwealth[69]. The executive power of the Commonwealth is vested in the Queen[70]. Yet neither the Parliament nor the Executive of the Commonwealth *is* the Commonwealth itself. The constitutional polity is distinct and separate from the constituent parts that the Queen and the Crown play in its affairs.

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68 Constitution, s 70.

69 Constitution, s 1.

70 Constitution, s 61.

100 This is even more clear in the case of the Judicature created by Ch III[71]. In *The Commonwealth v Mewett*[72], Gummow J and I endorsed the observation of Murphy J in *Johnstone v The Commonwealth*[73]:

> "In Australia, the federal courts are not the Sovereign's courts in the sense used in the United Kingdom. Under the Commonwealth Constitution, the legislative power of the Commonwealth is expressed to be vested in the Queen, the Senate and the House of Representatives (s 1); and the executive power is vested in the Queen (s 61). However, the judicial power is not vested in the Queen, but in 'a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction' (s 71)."

101 In these circumstances, as Gummow J and I went on to explain in *Mewett*[74], the acceptance in Australia of the principle in *Marbury v Madison*[75] as "axiomatic"[76]:

> "placed a fundamental limitation upon any general acceptance in the exercise of federal jurisdiction of the maxim that the Sovereign could do no wrong. To the contrary, it was for the judicial branch of government to determine controversies as to whether the legislative or executive branches had exceeded their constitutional mandates. The authority given by s 75(iii) in respect of matters in which the Commonwealth is a party was supplemented by s 75(v) which provides for writs of mandamus and prohibition, and for injunctions, against officers of the Commonwealth."

102 Thus, the specificities and juxtapositions in the Australian Constitution concerning the part played in its governmental institutions by the Queen and the Crown, and particularly the provisions made (necessary to a federation) for the integrated Judicature, rendered it inapposite to import into our constitutional institutions, without significant adjustment, notions of governmental immunities and prerogatives that earlier existed in the United Kingdom. It is a basic legal

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71 Constitution, ss 71, 73, 74, 75, 78, 79.

72 (1997) 191 CLR 471 at 546.

73 (1979) 143 CLR 398 at 406.

74 (1997) 191 CLR 471 at 547.

75 5 US 137 (1803).

76 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 262.

mistake to consider that common law Crown immunities and prerogatives can be picked up holus-bolus and transferred to our antipodean constitutional setting without serious reconsideration, and adjustment, appropriate to the Australian constitutional text.

103 *The democratic element*: A particular consideration reinforces this conclusion. It is one to which reference has been made, and the point reserved, in more recent decisions of this Court[77]. It provides a reason of basic constitutional principle for abandoning descriptions of the Commonwealth, the States and the Territories of Australia as manifestations of the Crown or of the Crown in a particular "right".

104 The point was made earlier in the Supreme Court of Ireland in *Byrne v Ireland*[78] by Walsh J and his colleagues. Writing in *Byrne* of the Constitution of the Irish Free State 1922, in respect of a time before the republican constitution and when Ireland was still a constitutional monarchy under the Crown, Walsh J indicated the error of treating the new Irish polity as a manifestation of the Crown, entitled for that reason to all of the immunities and prerogative limitations that the Crown in the United Kingdom had previously enjoyed in Ireland under the common law and by reason of its royal prerogatives.

105 By reference to history, Walsh J explained that such immunities and prerogatives had traditionally derived from "the fact that the basis of the Crown prerogatives in English law was that the King was the personification of the state"[79]. With the establishment of a new and distinct State in Ireland, under a written constitution securing its authority ultimately from the *people* of Ireland whose will gave it birth, it was a basic error of legal principle to treat as applicable to the new State all of the pre-existing *Crown* immunities and prerogatives.

106 Views similar to those of Walsh J were expressed in *Byrne* by Budd J[80]. A contrary opinion was expressed by FitzGerald J[81]. The trial judge

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77 *Mewett* (1997) 191 CLR 471 at 542-545; *Bass* (1999) 198 CLR 334 at 374-375 [99]; *British American Tobacco* (2003) 217 CLR 30 at 84-85 [145]-[147]; *New South Wales v Ibbett* (2006) 81 ALJR 427 at 430 [6] and fn 6; 231 ALR 485 at 488.

78 [1972] IR 241 at 272-273.

79 [1972] IR 241 at 272.

80 [1972] IR 241 at 302-303.

81 [1972] IR 241 at 310-311.

(Murnaghan J[82]) had found the arguments for a new legal perception of the character of the new constitutional State "unconvincing"[83] and difficult to take seriously. However, the perception of Walsh J and his colleagues in the majority has long since prevailed in Ireland[84]. In my opinion it is manifestly correct.

107 The same conclusion is applicable to the Australian Constitution, and essentially for the same reasons. Our Constitution, like that of Ireland after 1922, was a new, written instrument of government, approved at referendums by a vote of the Australian people then entitled to vote. Its ultimate foundation lies in its grant, and continued acceptance, by the Australian people. They alone may approve formal changes to the text[85].

108 The point of this discourse is not a merely formal one. It is a basic mistake of constitutional doctrine in Australia to treat the Commonwealth, the States and the Territories as manifestations of the Crown. It follows that it is an equal mistake to derive uncritically the applicable law of the governmental immunities of those polities from notions of the English common law or the royal prerogatives. This is because the new polities take their character from their creation and acceptance by the Australian people. Without argument, analysis and modification, it should not be assumed that this change in the source, origin, and character of the Australian constituent polities did not affect the ambit and content of such immunities. It was thus an error to import into the new constitutional arrangements for Australia, without modification, all of the law on Crown immunities and Crown prerogatives apt to a different country, in different times, reflecting different constitutional purposes and values.

109 *A relevant stream of authority*: In addition to the cases in this Court where the possible need to reconsider governmental immunity in Australia apart from notions of Crown immunity has been raised, there is a stream of authority

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82 Reproduced at [1972] IR 241 at 245-257.

83 [1972] IR 241 at 254.

84 See eg *Webb v Ireland* [1988] IR 353 at 382 per Finlay CJ (Henchy and Griffin JJ concurring), 387 per Walsh J, 397-398 per McCarthy J. See also *In re Irish Employers Mutual Insurance Association Ltd* [1955] IR 176, which foreshadowed the decision in *Byrne*, and see generally Forde, *Constitutional Law*, 2nd ed (2004) at 20-29.

85 Constitution, s 128. See *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351 at 441-442; *Breavington v Godleman* (1988) 169 CLR 41 at 123; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 485-486; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 138; *McGinty v Western Australia* (1996) 186 CLR 140 at 230.

that lends support to that notion. In *Bank of NSW v The Commonwealth* ("the *Banking Case*")[86], Dixon J specifically addressed the character of the Australian polities, viewed from the Australian constitutional perspective. He said[87]:

> "The Constitution sweeps aside the difficulties which might be thought to arise in a federation from the traditional distinction between, on the one hand the position of the Sovereign as the representative of the State in a monarchy, and the other hand the State as a legal person in other forms of government … and goes directly to the conceptions of ordinary life. From beginning to end [the Constitution] treats the Commonwealth and the States as organizations or institutions of government possessing distinct individualities. Formally they may not be juristic persons, but they are conceived as politically organized bodies having mutual legal relations and amenable to the jurisdiction of courts upon which the responsibility of enforcing the Constitution rests."

110 Dixon J's comments in that case were noted with approval in this Court in *Crouch v Commissioner for Railways (Q)*[88], both by Gibbs CJ[89] and in the joint reasons of Mason, Wilson, Brennan, Deane and Dawson JJ[90]. The latter reasons, in particular, endorsed Dixon J's idea that reconsideration of the identity of governmental polities with the Sovereign (the Crown or the Queen) was made essential by a federal system of constitutional government.

111 Later still, in *Deputy Commissioner of Taxation v State Bank (NSW)*[91], the entire Court[92] drew attention, in the context of s 114 of the Constitution, to the explicit immunity from federal taxation there provided to property of any kind belonging to a State, so described. The Court said that, although Dixon J's comments in the *Banking Case* had been made in the context of elucidating s 75(iii) and (iv) of the Constitution, they applied with equal force to s 114. This conclusion was then deployed to reject the argument of the State Bank that it was "the Crown 'in right of' the State" and so entitled to the constitutional immunity

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86 (1948) 76 CLR 1.

87 (1948) 76 CLR 1 at 363.

88 (1985) 159 CLR 22.

89 (1985) 159 CLR 22 at 28-29.

90 (1985) 159 CLR 22 at 39.

91 (1992) 174 CLR 219 at 229.

92 Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

as such. That notion was held to be incompatible with "the constitutional conception of 'a State'"[93]. So far as the State Bank's alternative submission that it was entitled to "the privileges and immunities of the Crown"[94] was concerned, this proposition too was rejected[95], by reference to "the meaning and operation of an unalterable constitutional provision which the intention of the legislature cannot affect"[96].

112 Given the centrality of that constitutional notion, recognised in the foregoing cases, it seems scarcely persuasive, or legally coherent, to apply it to cases arising under provisions of the Constitution that explicitly describe the Australian governmental polities but to ignore it in other cases of legislation made under (and subject to) the constitutional grant of legislative powers.

113 This area of the law in Australia has been characterised as complex[97]. Doubtless this is so because it is dealing with bedrock notions of the "politically organized bodies" created in, or envisaged by, the Australian Constitution. It is further complicated by the historical evolution of the Commonwealth and its constituent parts and indeed of the Crown itself, originally in the British Empire and later in the Commonwealth of Nations and the world more generally.

114 Because of the terms in which Ch III of the Constitution is expressed, the States and the Commonwealth, and also the Territories, are commonly parties to proceedings in this and other courts, by their own constitutional names. So indeed they are in these proceedings. They were not named, and did not appear as, the Crown or the Queen. It would have been erroneous for them to do so. The States and Territories might not be "juristic persons" or corporations in the normal sense of those notions. But they are constitutionally created governmental organisations or institutions "possessing distinct individualities". And those "individualities" are derived from the Constitution, not from historically pre-existing notions of the Crown or its manifestations.

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93 (1992) 174 CLR 219 at 229-230.

94 In accordance with *Townsville Hospitals Board v Townsville City Council* (1982) 149 CLR 282 at 288 per Gibbs CJ.

95 (1992) 174 CLR 219 at 230.

96 *Banking Case* (1948) 76 CLR 1 at 359 per Dixon J.

97 *White v South Australia* (2007) 96 SASR 581 at 589 [26] per Doyle CJ. See also Note, "Role of Crown as a nominal defendant in proceedings", (2007) 18 *Public Law Review* 140 at 142.

115 *Questioning the assumptions*: Yet what of the suggestion that, because the Parliament, in the Act, has specifically used the expression "the Crown in right of each of the States … and of the Australian Capital Territory", this Court should treat that formulation as a parliamentary endorsement or ratification of the traditional language (or, at least, as an indication that such language is no more than a harmless formula to be taken as equivalent to a reference to the State or Territory concerned)? Should the reference to a State or Territory as a manifestation of the Crown be treated as a kind of legislative fiction or historical surplusage?

116 There are difficulties in this approach. Any such fiction would not necessarily justify importing to the State or Territory concerned, without adjustment, all of the earlier notions of Crown immunity and royal prerogatives. The English prerogative principle, so far as it limits the answerability of the Crown and its manifestations before the Crown's own courts, without clear and express provisions, could have no direct application in the Australian constitutional context. That is so for the reasons explained by Gummow J and myself in *Mewett*[98].

117 Moreover, if ultimately (as seems to be the case) the reason why the Commonwealth, the States and the Territories cannot be conceived of as manifestations of the Crown derives from the Constitution itself, no fiction, however it is expressed by the Parliament, could override the requirements deriving from the constitutional text. On this footing, the references in ss 2A, 2B and 2C of the Act to the various polities of the Commonwealth as manifestations of the Crown in various "rights" would be disclosed for what they are: an unthinking endorsement of old judicial reasoning that has been erroneously applied to the new context created in Australia by the Constitution.

118 To this extent, I agree with one observation made by Callinan J in this appeal. Although the parties did not argue any question of constitutional invalidity or raise any constitutional questions[99], the Court may not "disregard the constitutional setting and the respective constitutional roles of the appellant and the States, in giving sense and effect to the Act"[100].

119 Whilst I ultimately draw a conclusion different from that derived by Callinan J, I agree with his Honour's approach in this respect. Neither the way that parties frame their arguments nor any procedural rule, enacted or adopted,

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98 See above these reasons at [101].

99 Reasons of Callinan J at [154].

100 Reasons of Callinan J at [154].

can authorise this Court, when it is essential to the resolution of the matter before it, to ignore a requirement derived from the Constitution from which the Court itself secures its authority. At least, it cannot do so where the point has been adequately raised by a party or signalled by the Court during argument.

120 In many questions addressed to the present parties I made plain my challenge to their congenial assumption that the present appeal could be decided on the footing that the States in question were manifestations of the Crown, entitled *as such* to the traditional immunities (and prerogatives) of the Crown. I contested their assumption that the constitutional equivalence of the States and the Crown yielded a principle dictated by that assumption for the supposed derivative immunity of Baxter, stated in terms of the traditional rules governing the subjection of the Crown to general or insufficiently specific legislation affecting itself or its instrumentalities[101].

121 *Alternative approaches*: It follows that, in default of any valid and explicit legislation concerning governmental immunities in Australia, the proper approach to the present appeal involves the derivation of a new and different rule for governmental immunity in this country. As one aspect of such a rule, it might also be necessary to evolve a subordinate principle, protective of any governmental immunity, extending the immunity in particular cases to private individuals and corporations with which government has contractual or other dealings. Such a subordinate rule might be required because, otherwise, by imposing burdens on such individuals or corporations, a legislature could undermine, or destroy, the governmental immunity so established.

122 In deriving such principles for contemporary Australia, the starting point would necessarily be the terms and assumptions of the Constitution itself. Doubtless past learning on governmental immunity, expressed in the language of "Crown immunity", would be relevant. But it would not exclude examination of the development of governmental immunity in other common law jurisdictions which have severed, or modified, their relationship with the Crown and established their constitutional order upon the basis of the will of the people, as Australia has.

123 In the United Kingdom, the doctrine of Crown immunity was formerly applied to the enacted competition law based on the decision in *In re Telephone Apparatus Manufacturers' Application*[102]. However, this position was altered by the *Competition Act* 1998 (UK). By s 73 of that Act, the provisions of the Act

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101 The point was repeatedly raised during argument. See above these reasons at [91], fn 62.

102 [1963] 1 WLR 463 at 482-483 per Upjohn LJ; [1963] 2 All ER 302 at 313 (CA).

bind the Crown, save that it is not criminally liable or liable for a penalty, nor is the Queen liable in her private capacity. Thus, in the land of its origins, the analogous immunity is now governed by statute rather than by the common law of Crown immunities or by the royal prerogative.

124 The application of Crown immunity to the *Combines Investigation Act* 1970 (Can) was upheld in *R v Eldorado Nuclear Ltd*[103]. However, this approach was criticised strenuously by two of the judges, in language relevant to the understanding of modern Australian governmental immunity. Thus, Dickson J observed[104]:

> "Why that presumption [of Crown immunity] should be made is not clear. It seems to conflict with basic notions of equality before the law. The more active government becomes in activities that had once been considered the preserve of private persons, the less easy it is to understand why the Crown need be, or ought to be, in a position different from the subject."

125 Wilson J, who dissented in part from the majority, added[105]:

> "We might ask in this case whether Parliament ever contemplated that the respondents would go about the implementation of their statutory purposes by means of an illegal conspiracy with others, counting on the protection of their Crown immunity and leaving their co-conspirators to the full rigours of the law."

126 In the United States of America, a rule of statutory construction is observed whereby "statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect"[106].

127 A judicially declared "state action" doctrine immunises conduct by private parties dealing with States only if it passes a two-part test laid down in *California Retail Liquor Dealers Assn v Midcal Aluminum Inc*[107]:

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103 [1983] 2 SCR 551.

104 [1983] 2 SCR 551 at 558.

105 [1983] 2 SCR 551 at 592.

106 *United States v United Mine Workers of America* 330 US 258 at 272 (1947).

107 445 US 97 at 105 (1980).

(a) The challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; and

(b) "the policy must be 'actively supervised' by the State itself".

128 The equivalent to the principle of derivative governmental immunity has been explained in the United States by express reference to constitutional concepts. Thus, in *Columbia v Omni Outdoor Advertising Inc*[108], Scalia J observed:

> "[I]n light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators … [but] this immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market."

129 Examinations of such questions have frequently arisen, as a matter of legal principle, in United States courts. Unsurprisingly, the expression of the immunities found by the courts has not simply picked up and applied legal notions borrowed from ideas of the traditional Crown immunities and royal prerogatives in England. An early instance was the opinion of Story J in *United States v Hoar*[109], later cited in this Court in *Roberts v Ahern*[110]. That explanation of American governmental immunity was quoted by Gibbs ACJ in *Bradken* as a possible rationale for a measure of governmental immunity from the requirements of general legislation, which did not depend, as such, on the Crown's traditional immunities or upon prerogatives of the Crown[111]. Thus, Story J said[112]:

> "Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens;

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108 499 US 365 at 374-375 (1991).

109 26 F Cas 329 (1821) (Case No 15,373).

110 (1904) 1 CLR 406 at 418.

111 (1979) 145 CLR 107 at 122.

112 26 F Cas 329 at 330 (1821).

> and in most cases the reasoning applicable to them applies with very different, and often contrary force to the government itself. It appears to me, therefore, to be a safe rule founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act."

130 Whether such a rule, expressed and applied in this way, at a time long before the growth of the modern regulatory state[113], remains apposite as a rule of statutory construction for contemporary Australian legislation affecting government and its agencies is a very large question which was not debated in this appeal. In the approach which the parties took, this was a simple case, although the outcome was contested. I have said enough, I hope, to indicate why I do not share this common assumption as to the applicability in Australia of the rule of statutory construction stated in the uncritical and unadapted terms of *Crown* immunity, which the courts below, and now the majority in this Court, have embraced.

131 In *NT Power Generation Pty Ltd v Power and Water Authority*[114], the majority reasons in this Court expressed a preference for substituting "the Executive Government of the State" or more simply "the Government" for the previous language of "Crown" immunity. Such a change in nomenclature is less important than a basic reconsideration of the content of the immunity. However, the joint reasons in this appeal revert to the old language of "Crown immunity", with all of the consequences that that notion, with its long legal history, necessarily imports. They apply to the Australian polities, undiscerningly, the legal notions derived from the privileges and prerogatives of the Crown. This is a step that, respectfully, I would not willingly take.

Resolving the appeal

132 *Imposition of artificiality*: I have now explained why I cannot concur in the joint reasons. I do not agree to equating the States and Territories of Australia and the Commonwealth itself, as such, with manifestations of the Crown. It follows that I do not agree with the assumption of the parties to this appeal that the Constitution is irrelevant to the resolution of the matter that the parties bring to this Court. I question (as Murphy J did in the facts of *Bradken*[115])

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113 *White v Director of Military Prosecutions* (2007) 235 ALR 455 at 468-469 [48], 505 [189].

114 (2004) 219 CLR 90 at 149-150 [163] per McHugh ACJ, Gummow, Callinan and Heydon JJ.

115 (1979) 145 CLR 107 at 139.

concessions made in the course of the proceedings. Most especially, I question the concession of the Commission that the States involved, and the State Purchasing Authorities (SPAs), acquired the products in question in this appeal otherwise than in the course of carrying on a business[116].

133 As Murphy J said of a concession made in *Bradken*[117]: "I have the gravest doubts that this concession is correct." Nevertheless, it was made. The litigation was conducted on that footing. There is no alternative in this Court but to accept the concession. To do otherwise would risk inflicting a serious procedural injustice on the parties.

134 This conclusion requires me to "consider this case artificially", as Murphy J was also required to do in *Bradken*[118]. I may protest at that necessity. However, there is no way that I can avoid it. One day the error of the current approach of this Court to these questions will be understood. The starting point for the enlightenment will be a reading of the reasons of Walsh J in *Byrne v Ireland*[119].

135 *Construction and constitutionalism*: I accept, as the joint reasons suggest[120], that it is difficult for this Court to address a new foundation for governmental immunities in the Australian constitutional context where the parties fail to do so and persist with past reasoning. However, unless this important topic is forever to pass under the radar, it is ultimately necessary for this Court to raise the subject itself. Otherwise, we become complicit in erroneous or imperfect reasoning. We give no corrective stimulus to questioning the assumptions of the parties and of the courts below.

136 In this appeal, the issue was fully addressed in questions asked of the parties. Many of the constituent governments were before the Court. The defect in past reasoning offends the Constitution itself. It is beyond time that the defect should be recognised and addressed by this Court. No rule of statutory construction can exist in Australia which is disharmonious with the provisions of the Constitution.

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116 Joint reasons at [17].

117 (1979) 145 CLR 107 at 139; cf [2007] HCATrans 202 at 1760.

118 (1979) 145 CLR 107 at 141.

119 [1972] IR 241 at 272-273.

120 At [2].

137 *Upholding the Act's purposes*: Pending the enlightenment, and approaching this appeal within the constraints, assumptions and concessions accepted by the parties, I am brought ultimately to the same conclusions as are stated in the joint reasons. Those conclusions accord more closely with my own approach, in many cases, to questions (uncomplicated by issues of governmental immunity) concerning the ambit and application of the Act, so as to fulfil the large national objects declared in s 2[121]. The conclusions also conform more closely with the course of statutory amendments designed to strengthen the operation of the Act. Specifically, they are more consonant with my view of how any properly expressed rule of governmental immunity in Australia would operate in respect of those corporations which, in the course of their business, engage in dealings with an Australian State or Territory government[122].

138 In this appeal (unlike others in which I have disagreed with earlier majorities) there is in the joint reasons what I regard as appropriate attention to the large national, economic and protective purposes of the Act. As this purposive approach to the application of the Act has been a repeated theme of my minority reasons in earlier cases on the Act[123], I will encourage the new dawn. Now that it has at last emerged, I endorse it and hope that it will survive to future cases involving the Act.

139 By reference to the object of the Act, as inserted in 1995 to reflect inter-governmental agreements in Australia concerning competition policy and its importance for the whole nation[124], I accept the observations of Mr Wright[125]:

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121 Joint reasons at [64].

122 Joint reasons at [60].

123 See *SST Consulting Services Pty Ltd v Rieson* (2006) 225 CLR 516 at 534-536 [57]-[64] citing *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at 35-36 [90]; *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374 at 481-482 [323]; *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at 602-603 [120] and *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1 at 19-20 [56].

124 See eg *Competition Policy Reform Act* 1995 (Cth); Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 June 1995 at 2798.

125 Wright, "The future of derivative crown immunity – with a competition law perspective", (2007) 14 *Competition & Consumer Law Journal* 240 at 278. I would re-express and redefine the supposed "Crown" immunity as "governmental immunity".

> "The parliaments of the Commonwealth, states and territories have determined that promoting competition is in the interests of all Australians because it enhances their welfare. It is difficult, therefore, to conclude that the legislatures intended that non-government parties should be able to reach anti-competitive arrangements with the Crown (when not carrying on a business) or engage in anti-competitive conduct involving the Crown (when not carrying on a business) with impunity or that arrangements of this type should be enforceable. Such an approach could potentially frustrate the achievement of the object of the Act in all markets in which the government (when not carrying on a business) is a significant participant."

140 *Ultimate constitutional limits*: Whilst I understand the dissenting opinion of Callinan J in this appeal, I cannot embrace it. Certainly, there would, in my view, be a point beyond which federal legislation, including the Act, could not apply to activities of the States. This would follow from the text, purpose and character of the Constitution. However, to identify that point it would be necessary for a State to mount an explicit constitutional challenge to the ambit of the federal law, based on an alleged interference with its essential governmental functions[126].

141 In this appeal, the States before the Court disclaimed any such argument[127]. As well, such an argument would face difficulties in a case such as the present given the incontestable constitutional power of the Federal Parliament to make laws governing the trading conduct of Baxter, a constitutional corporation[128]. Moreover, difficulties for a constitutional challenge by the States would appear to arise in any attempt to stretch the *constitutional* immunities of the States themselves to apply derivatively to a private corporation such as Baxter. As these questions were not in issue, or argued, in this appeal, I will say no more about them.

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126 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 50, 60-62, 78-79; *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 260; *Austin v The Commonwealth* (2003) 215 CLR 185 at 213 [19], 245 [111].

127 See [2007] HCATrans 202 at 2835, 3230, 3243.

128 Constitution, s 51(xx), particularly following the interpretation given to that paragraph in *New South Wales v The Commonwealth* ("the *Workchoices Case*") (2006) 81 ALJR 34; 231 ALR 1.

Conclusion and orders

142 The Federal Court erred in concluding that *Bradken* governed this case. Reluctantly confining myself to the unreformed doctrine[129], *Bradken* must now be viewed as qualified by later decisions of this Court. For a more satisfactory exposition of the applicable law of governmental (and derived governmental) immunity in Australia, fresh attention needs to be given to the text, purpose and character of the Constitution and of the governmental polities it creates, by the will of the Australian people.

143 It is on these grounds that I agree in the orders proposed in the joint reasons.

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129 cf *Favell v Queensland Newspapers Pty Ltd* (2005) 79 ALJR 1716 at 1723 [26]; 221 ALR 186 at 194-195. See also joint reasons at [1]-[2].

144 CALLINAN J. It is unnecessary to restate the facts. I am however of a different opinion from the majority.

145 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 medications for the people of that State. A supposition either way cannot be decisive of this appeal, but the facts, that in seeing to the health of its residents, a State is undertaking one of its essential constitutional functions, and one incidentally which historically is regarded as charitable[130], that the Commonwealth's role in regard to health is entirely voluntary, and that the State is a democratic constitutional polity, at least suggest that a State should in no way be impeded in acquiring medical supplies and services for its residents. To the extent that its right to do so on its own terms might be affected by federal legislation, the legislation, assuming its constitutional validity, which was not in issue here, should, in case of any doubt, be construed as intending no, or the least intrusion reasonably open on its language.

Health services are State services

146 Nowhere in the Constitution is it suggested that the provision of hospitals and related health services is other than the responsibility of and an essential role of the States. This has always been the position. From the earliest colonial times, administrations interested themselves in health and established public hospitals[131]. I have used the language of "essentiality" as that was the language used by Stephen J in *Murphyores Incorporated Pty Ltd v The Commonwealth*[132].

The role of the Commonwealth

147 Section 51 of the Constitution nowhere suggests that the Commonwealth has any particular role in the provision of hospitals or medical or health services. That the Commonwealth has chosen to do so, indeed has in recent times done so extensively[133], does not diminish the importance and essentiality of the States' role and primary function in this field.

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130 See *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 80 ALJR 1509; 229 ALR 1.

131 For example, the Colonial Hospital at Parramatta, which was commissioned by Governor Macquarie and completed in 1818.

132 (1976) 136 CLR 1 at 9.

133 For example, the scheme considered in *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 80 ALJR 1509; 229 ALR 1.

The appellant's arguments

148 One of the principal submissions of the appellant in this Court is that this Court's preference in *NT Power Generation Pty Ltd v Power and Water Authority*[134] for the dissenting judgment of Kitto J in *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)*[135] to that of the majority (Williams, Webb and Taylor JJ) was determinative of this case in its favour, and that *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*[136], to the extent that it stated, or should currently be regarded as stating the relevant law, did not exclude pre-contractual offers and negotiations from the operation of Pt IV of the *Trade Practices Act* 1974 (Cth) ("the Act"), whatever the position might, or might not be in relation to concluded contracts giving rise to rights and obligations. As a matter of ordinary statutory construction, the former was contravening conduct proscribed by, and not immunized from operation or application by any other provisions of the Act. On any view, the respondent supplier was subject to it.

149 Emphasis was placed by the appellant on a passage from the dissenting judgment of Kitto J in *Wynyard*[137]:

> "The cases in which a statutory provision not binding on the Crown must be denied an incidence upon a subject of the Crown because that incidence would be in legal effect upon the Crown fall into a few broad classes. There is first the class of cases where a provision, if applied to a particular individual or corporation, would adversely affect the exercise of an authority which he or it possesses as a servant or agent of the Crown to perform some function so that in law it is performed by the Crown itself[138]. Next there is the class of cases in which a provision, if applied to a particular individual or corporation, would adversely affect some proprietary right or interest of the Crown, legal equitable or statutory[139].

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134 (2004) 219 CLR 90.

135 (1955) 93 CLR 376.

136 (1979) 145 CLR 107.

137 (1955) 93 CLR 376 at 393-394.

138 See for example *Cooper v Hawkins* [1904] 2 KB 164; *R v McCann* (1868) LR 3 QB 677; *Public Works Commissioners v Pontypridd Masonic Hall Co* [1920] 2 KB 233.

139 See *Wirral Estates Ltd v Shaw* [1932] 2 KB 247.

> And finally there is an anomalous class of cases where a provision creating a liability by reference to the ownership or occupation of property would, in its application in respect of certain kinds of property, impose a burden upon the performance of functions which, though not performed by servants or agents of the Crown, are looked upon by the law as performed for the Crown. These are cases in which the property concerned is used exclusively for 'the purposes of the administration of the government of the country' (to use Lord Westbury's expression in *Greig v University of Edinburgh*[140]); the rationale of the doctrine being that such purposes are 'to be deemed part of the use and service of the Crown' because they are 'public purposes of that kind which, by the constitution of this country, fall within the province of government and are committed to the Sovereign'[141]."

150 The appellant seeks to read that passage as if it were a conclusive exposition of State Crown immunity. The respondents must fail, the appellant submitted, if they were unable to bring the State's relevant conduct within one or other of the categories of immunity stated by his Honour. Even if this proposition were an accurate and complete statement of the law on the topic, for reasons which will appear, the purpose, conduct and rights of the States in question do fall within it.

Disposition of the appeal

151 I participated in the joint judgment in *NT Power*[142]. On further reflection, in *McNamara v Consumer Trader and Tenancy Tribunal*[143] which was directly concerned with a question of statutory construction, I expressed some reservations about the breadth of the language of Kitto J in *Wynyard*, and its application, as a dissenting judgment, to other cases. In particular, I referred[144] to the ambiguities in his Honour's expression "some right, interest, power, authority, privilege, immunity or purpose belonging or appertaining to the Crown"[145].

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140 (1868) LR 1 Sc & Div 348 at 354.

141 *Mersey Docks v Cameron* (1865) 11 HLC 443 at 505, 465 [11 ER 1405 at 1429, 1413].

142 (2004) 219 CLR 90.

143 (2005) 221 CLR 646 at 676-677 [90]-[92].

144 (2005) 221 CLR 646 at 671 [76], 677 [92].

145 (1955) 93 CLR 376 at 396.

152 This case, as with *McNamara*, is not governed by *NT Power*. Neither provides a basis for the universal application of the language of Kitto J in *Wynyard* to cases of Crown, or a like immunity. I refer to a "like immunity" because others have taken issue with the equation of State immunity with Crown immunity[146]. Nothing turns in this case upon the resolution of that issue. Before federation the colonies were largely self-governing polities, and after it, polities recognized and protected by the Constitution and having their own vice-regal appointees. Self-evidently, the States, for the government of them, need to be possessed of rights, powers, purposes, authorities and immunities not always apt for natural and other legal personalities. How such an immunity should be definitively described is not a relevant question for the resolution of this case. So too, it is unnecessary to debate any question whether there is, or is not a division or duality of the Crown in this country, as to which I agree with the pragmatic approach of Gibbs ACJ in *Bradken*[147]:

> "I would not wish to decide whether the wider rule of construction should be adopted in preference to the narrower rule by debating the merits of the doctrine of the indivisibility of the Crown, which seems more remote from practical realities than when the *Engineers' Case*[148] was decided, and which is of little practical assistance in many cases".

153 There can be no doubt, in any event, that a right arising under a contract, that is a chose in action, such as the States acquired here under their contracts with the respondent supplier, is "property" of the States, within the language of Kitto J in *Wynyard*. It is also something acquired, just as the negotiations and contracts were, for a purpose, medical, of the States.

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146 Those who dispute the equation of State immunity with Crown immunities and prerogatives often refer to Blackstone, *Commentaries on the Laws of England*, (1765), Bk 1 at 232. In particular, the following is cited:

> "It signifies, in it's etymology, (from *prae* and *rogo*) something that is required or demanded before, or in preference to, all others. And hence it follows, that it must be in it's nature singular and eccentrical; that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects: for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer. And therefore Finch lays it down as a maxim, that the prerogative is that law in case of the king, which is law in no case of the subject." (footnote omitted)

147 (1979) 145 CLR 107 at 122.

148 (1920) 28 CLR 129.

The *Trade Practices Act* 1974 (Cth)

154 No party in this case raised a constitutional question. It was accepted that if the Crown in right of a State or Territory was carrying on a business, either directly, or by one of its agencies then to that extent it would be amenable to the Act. It was also accepted that in dealing with the respondent supplier, the States were not carrying on a business. None of this means however that the Court may disregard the constitutional setting and the respective constitutional roles of the appellant and the States, in giving sense and effect to the Act. All of the matters to which I have referred, the respective constitutional roles of the Commonwealth and the States, the absence of any express conferral of power in relation to health upon the Commonwealth, and the charitable nature of the States' activities in providing medical services, strongly suggest that if there were ambiguity about the exemption of the States from the relevant operation of the Act here, a construction which gave the States a real and ample exemption is preferable. There are other factors relevant to, and tending in favour of such a construction. The appellant is an executive creature of the Commonwealth, although it has special powers and a degree of independence from the Executive. On the other hand, the State purchasing authorities are the States themselves under different names. In these circumstances it is an unlikely proposition that the Commonwealth Parliament would have wished to, and intended to subject the States to the operation of the Act when the States were doing what they did here. My reference to these matters as aids to construction should not be misunderstood. They are, I would reiterate, aids only. They reinforce, to the extent that any reinforcement might be necessary, the effect of the language of the Act itself.

155 What is decisive, however, is that, on its ordinary construction, s 2B plainly exempts the States from the operation of the Act unless they are carrying on business, which, by common consent here they are not.

156 The appellant is not assisted by s 2 of the Act which declares, relevantly, that its object is to enhance the welfare of Australians by the promotion of competition and fair trading. Although not clearly articulated, there could be detected in the arguments of the appellant a contention that it knew better than the States where their best interests lay: that in a competition between the promotion of competition itself and fair trading on the one hand, and the provision of medical supplies and services and the acquisition of the means of providing them on the other, the former should prevail: that it was really in the States' own enlightened self-interest, to have their procurement activities policed by the appellant, even if the States in consequence ended up paying more for, or suffered some uncertainty in respect of, the acquisition of necessary supplies and services. I would reject such a contention. It is entirely a matter for the States how they might choose to go about performing their functions, and there is no

reason to believe, even if it were relevant, that the States misapprehended where their best interests lay.

157 Nothing turns upon the timing of the amendments made to the Act in 1995. Indeed the States were, in a broad sense, parties to their introduction, as participants in a national programme for the reform of competition policy, themselves enacting similar legislation for intra-State operation. It is hardly likely that they would have done so with a view to hobbling themselves in carrying out any of their essential non-business functions. The fact that the amendments gave exactly the same exemption to the States in respect of their non-business activities as the Commonwealth had previously enjoyed, emphasizes, rather than detracts from the importance of State immunity in the carrying out of ordinary State non-business activities. The making of the amendments in no way weakens the force of *Bradken* as a binding authority in a situation of the kind which is under consideration here.

Derivative immunity

158 The joint judgment draws a distinction between concluded contracts and everything that occurs up to the point of their conclusion. It discusses in some detail the negotiations and the like which took place with the respondent supplier before the States agreed to buy supplies from it. Little could be more important for polities than the prudent and economical expenditure of public money in the acquisition of goods and services by them for the carrying out of their ordinary functions. The price of a lessening of competition, or, of an insult to fair trading generally, may not be too high a price for a State, even South Australia on reflection[149], to pay in acquiring its medical necessities.

159 It is inescapable that any impediment placed in the way of the respondent supplier in dealing with the States is equally an impediment imposed upon the latter. This is so, even if it be accepted that "illegality" may not have the same consequences for all of the parties to a contract, or that ss 80, 87 and 87A of the Act confer very wide powers upon the courts to fashion remedies to suit the particular circumstances of the case and the parties before them. The notion that the Act might have a differential application to the respondent supplier and the States here could offer no comfort to the States. The questionability of suppliers' conduct would inevitably deter the States from dealing with them. There may in some circumstances be some room for differential treatment under the Act, for example, with respect to a refusal to supply. But that is not this case. In such a situation a State itself would probably be able to invoke the Act and have it applied to suppliers. But that would be a matter for a State. In doing it they would in no way be prejudiced: rather the contrary. Indeed, insistence by the

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149 South Australia originally baulked at the supplier's proposed terms of trade.

appellant or the States upon the application of the Act in those circumstances would enhance, rather than prejudice the autonomy of the States in carrying out their functions. I cannot therefore accept, as a matter of reality and practicality, that to intercept and proscribe all, or any offers, invitations to tender, discussions and negotiations up to the point of the conclusion of a contract, would be to leave unimpaired, the immunity that s 2B of the Act says the States should have. To do so would not merely impair State immunity, it would effectively destroy it, and allow s 2B little or no useful operation.

160 In my opinion, *Bradken* remains as authority covering this case, despite the subsequent decision of this Court in *Bropho v Western Australia*[150]. The force of what Gibbs ACJ said in the former is largely unaffected by the latter[151]:

> "It is an established rule of construction that no statute binds the Crown unless the Crown is expressly named therein or unless there is a necessary implication that it was intended to be bound; there will be such a necessary implication if it is manifest from the very terms of the statute that it was the intention of the legislature that the Crown should be bound".

161 In *Bropho* the Court was considering the question whether an Act should be read so as to exclude the Crown from its operation[152]. That is not to the point here. In terms, this Act directly and expressly immunizes the conduct of the States when they are not carrying on business.

162 There is no ambiguity about the reasoning of the Court in *Bradken*, nor about the conclusion reached by it. I am unable to accept that their Honours there would not have been alive to the reality that a construction of the Act which invalidated pre-contractual dealings would necessarily defeat the immunity which the Act gave the States. Nothing said in *Bropho* could justify that. As Gibbs ACJ said in *Bradken*[153]:

> "An injunction restraining one of the parties to a contract from completing it affects not only the party against whom it is made; it equally affects the other party to the contract … [I]f the remedies sought are granted against the respondent companies, the Commissioner [for Railways of

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150 (1990) 171 CLR 1.

151 (1979) 145 CLR 107 at 116.

152 (1990) 171 CLR 1 at 18-19 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

153 (1979) 145 CLR 107 at 123.

> Queensland] will be prejudiced by the operation of the Trade Practices Act just as much as if its provisions had been directly enforced against him."

163 Later, his Honour referred with apparent approval to a statement by Romer LJ in *Clark v Downes*[154] that it was a positive duty of the courts to construe an Act so as to ensure that the Crown and its property are in *no* way prejudicially affected[155].

164 It is no answer here to say that the prejudice to the States flowing from the proscription of pre-contractual negotiations with them by the respondent supplier would, or might be offset, or in some way diminished or rendered irrelevant because competition and fair trading as defined by the Act are more important and loftier objects than the non-business activities of the States. It is the federal Parliament which has chosen to exclude from the operation of the Act, State non-business activities. Whether, which I would doubt, that involves any, or a very extensive qualification upon the objects of the Act is not to the point. Nor is it to the point that the Act seeks to deal differently with the States when they are carrying on business. The exclusion is as obviously deliberate as it is clear.

165 For the reasons that I have given, and the reasons of the primary judge and the Full Court of the Federal Court, I would dismiss the appeal with costs.

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154 (1931) 145 LT 20 at 22.

155 (1979) 145 CLR 107 at 123-124.