

Online updates for Duns, Davison and Beaton-Wells, *Competition Law: Cases & Materials* (2nd ed).

Chapter 1: Introduction

Case Update – Baxter Healthcare

[1.6C] In *Australian Competition Consumer Commission v Baxter Healthcare Pty Ltd* [2007] HCA 38, the High Court narrowed the scope of derivative Crown immunity and in doing so rejected the approach taken in *Bradken* (extracted at [1.6C]). ‘Derivative Crown immunity’, discussed in *Bradken*, refers to the immunity from liability under the Act that third parties derive as a result of dealing with the Crown (ie where the Crown itself has immunity). This derivative immunity is allowed in order to prevent the immunity of the Crown itself being undermined. In *Baxter Healthcare* the lower courts had held that Baxter Healthcare Pty Ltd was protected under this doctrine. However the High Court held that the immunity did not apply in this case. The decision is of particular significance in determining whether the Act applies to parties who have commercial dealings with Commonwealth, State or Territory Governments.

The joint judgment (Gleeson CJ, Gummow, Hayne, Heydon and Crennon JJ) rejected a broad reading of derivative Crown immunity. Kirby J delivered a separate concurring judgment, in which his Honour adopted different reasoning from the majority. Callinan J dissented, holding that *Bradken* applied and required that Baxter be given immunity in this case.

The High Court’s decision makes it more likely than previously thought that parties dealing with the Crown will be bound by the Act, even though the Crown is not carrying on business and so not within the Act itself.