Public Competition Assessment

28 November 2013

Baxter International Inc. – proposed acquisition of Gambro AB

Introduction

1. On 4 September 2013, the Australian Competition and Consumer Commission (ACCC) announced its decision not to oppose the proposed acquisition of Gambro AB (Gambro) by Baxter International Inc. (Baxter) (the proposed acquisition), subject to a court enforceable undertaking (the undertaking) pursuant to section 87B of the Competition and Consumer Act 2010 (the Act).

2. The ACCC decided that, with the undertaking, the proposed acquisition would be unlikely to have the effect of substantially lessening competition in any market in contravention of section 50 of the Act.

3. The ACCC made its decision on the basis of the information provided by the parties to the acquisition (the parties) and information arising from its market inquiries. This Public Competition Assessment outlines (subject to confidentiality considerations) the basis on which the ACCC has reached its decision on the proposed acquisition.

Public Competition Assessment

4. To provide an enhanced level of transparency and procedural fairness in its decision making process, the ACCC issues a Public Competition Assessment for all transaction proposals where:
   - a proposed acquisition is opposed;
   - a proposed acquisition is subject to enforceable undertakings;
   - the parties seek such disclosure; and
   - a proposed acquisition is not opposed but raises important issues that the ACCC considers should be made public.

5. This Public Competition Assessment has been issued because Baxter's proposed acquisition of Gambro is subject to a court enforceable undertaking.
6. By issuing Public Competition Assessments, the ACCC aims to provide the public with a better understanding of the ACCC’s analysis of various markets and the associated merger and competition issues.

7. Each Public Competition Assessment is specific to the particular transaction under review by the ACCC. While some transaction proposals may involve the same or related markets, it should not be assumed that the analysis and decision outlined in one Public Competition Assessment will be conclusive of the ACCC’s view in respect of other transaction proposals, as each matter will be considered on its own merits.

8. Public Competition Assessments outline the ACCC’s principal reasons for forming views on a proposed acquisition at the time the decision was made. As such, Public Competition Assessments may not definitively identify and explain all issues that the ACCC considers arise from a proposed acquisition. Further, the ACCC’s decisions generally involve consideration of both non-confidential and confidential information provided by the merger parties and market participants. In order to maintain the confidentiality of particular information, Public Competition Assessments do not contain any confidential information or its sources.

The parties

The acquirer: Baxter


10. In Australia, Baxter’s operations include the supply of dialysis products and technologies used in Continuous Renal Replacement Therapy (CRRT), Haemodialysis (HD) and Peritoneal Dialysis (PD). Baxter supplies its own Aquarius brand of CRRT monitors, but these are manufactured on its behalf by Nikkiso Co. Ltd (Nikkiso). Conversely, Baxter is the distributor of Nikkiso manufactured and branded HD monitors.

11. Baxter’s Australian operations comprise a fluid manufacturing plant in Toongabbie, Western Sydney, distribution, and warehousing depots in New South Wales, Queensland, Victoria, South Australia, Western Australia and Tasmania. Baxter manufactures fluids for intravenous administration and dialysis fluids.

The target: Gambro

12. Gambro, based in Lund, Sweden, is a global provider of dialysis products and technologies used in HD and CRRT. Its portfolio of HD and CRRT devices includes monitors, dialysers, bloodlines, cyclers and dialysis fluids.

13. Gambro distributes these products (which it manufactures overseas) in Australia through offices located in Sydney, Melbourne, Brisbane and Perth. Gambro does not have any Australian manufacturing facilities.
Industry Background

Renal Replacement Therapy

14. Renal Replacement Therapy (RRT) performs the key functions of healthy kidneys where a patient suffers kidney deterioration or failure. Kidney failure can be the result of:
   - Chronic Kidney Disease (CKD) - which usually occurs gradually over time and results in permanent kidney failure; or
   - Acute Kidney Injury (AKI) - a rapid loss of kidney function occurring suddenly and is potentially reversible.

15. In either form of failure, the filtering of the blood by the kidneys is either slowed or stopped, causing waste products and other toxic substances to build up in the blood. All forms of RRT, whether for AKI or CKD patients, pursue the same objective which is to remove waste substances from the blood and to correct fluid abnormalities associated with renal failure.

16. Baxter and Gambro overlapped in the supply of CRRT and HD. CRRT and HD are both forms of RRT, with CRRT being used to treat patients suffering from AKI and HD being used to treat patients with CKD.

Tender processes

17. RRT products are not purchased directly by patients. Customers of RRT products comprise state government organisations, public hospitals and private clinics. For HD and PD, tenders are generally structured on a price per treatment (PPT) basis where suppliers (such as Baxter and Gambro) will loan the relevant machine to the customer (normally for periods of 5-7 years), with the customer paying a price for each treatment (which includes consumables and takes into account the capital cost of the machine). For CRRT, the ACCC identified that it was common for customers to purchase CRRT machines outright and then contract for the supply of components separately.

Other industry participants

Nikkiso

18. Nikkiso is headquartered in Tokyo, Japan. Its medical division engages in the manufacture and sale of HD and CRRT products. Baxter currently distributes the Nikkiso HD machine fleet within Australia. Nikkiso also manufactures the Aquarius CRRT machine for Baxter, which Baxter supplies globally including in Australia.

Fresenius

19. Fresenius SE & Co. KGaA (Fresenius) is a vertically integrated, publicly listed German company. Fresenius is the world’s largest provider of products and services for individuals undergoing dialysis due to CKD. Fresenius has been active in Australia since 1996 when it set up headquarters for the South East Asian region in Sydney and began offering HD and PD products. Fresenius does not currently supply CRRT products in Australia.
TekMed

20. TekMed Pty Ltd (TekMed) distributes a CRRT monitor in Australia and New Zealand which is imported from the Swiss manufacturer, Infomed SA.

Nipro

21. The Nipro Group (Nipro) is headquartered in Osaka, Japan and mainly engages in the manufacture, development and sale of dialysis related products. Baxter distributes some of Nipro's dialysis products in Australia. Nipro also sells its own dialysers and other HD products in Australia through the Regional Medical Group and Sutherland Medical Pty Ltd.

NxStage Medical

22. Headquartered in Massachusetts, NxStage Medical Inc.'s (NxStage) primary product, the NxStage System One is a smaller, portable form of a traditional HD machine, designed to be used in a variety of settings, including patient homes, as well as more traditional care settings such as hospitals and dialysis clinics. NxStage’s System One has been distributed in Australia and New Zealand through the Regional Health Care Group since 2011.

Regional Health Care Group

23. Regional Health Care Group is a privately owned Australian group in the healthcare, research and development sector. Relevantly, it sources and distributes renal treatment products (including HD treatment products) across Australia to hospitals and patients' homes.

B Braun

24. B. Braun Melsungen AG (B Braun) is a multinational health organisation based in Germany. B Braun’s renal division Avitium AG offers a full line of kidney dialysis offerings. The division focuses on treatment systems for AKI, HD as well as therapeutic aphaeresis. At the time of the review, B Braun was in the process of commencing the supply of HD products in Australia. It does not supply CRRT products in Australia.

The proposed transaction

25. Baxter proposed to acquire Gambro for a total consideration of 26.5 billion Swedish Kronor (approximately $A 4.0 billion at exchange rates at the time). On 20 February 2013, Baxter made a submission to the ACCC seeking clearance of the proposed acquisition in Australia.

International liaison

26. Throughout the course of the review, the ACCC liaised closely with the European Commission (EC) and the New Zealand Competition Commission (NZCC). All three authorities shared information and documents according to confidentiality waivers provided by the merger parties.
## Review timeline

27. The following table outlines the timeline of key events in this matter.

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
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<tbody>
<tr>
<td>4 March 2013</td>
<td>ACCC commenced review under the Merger Review Process Guidelines.</td>
</tr>
<tr>
<td>22 March 2013</td>
<td>Closing date for submissions from interested parties.</td>
</tr>
<tr>
<td>22 March 2013</td>
<td>ACCC requested further information from the merger parties. ACCC timeline suspended. Former proposed decision date of 26 April 2013 delayed to allow provision of requested information.</td>
</tr>
<tr>
<td>8 April 2013</td>
<td>ACCC received further information from the merger parties. ACCC timeline recommenced.</td>
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<tr>
<td>18 April 2013</td>
<td>ACCC timeline suspended and former proposed decision date of 26 April 2013 delayed to allow the merger parties to provide additional information.</td>
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<tr>
<td>26 April 2013</td>
<td>ACCC received further information from the merger parties. ACCC timeline recommenced.</td>
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<tr>
<td>3 May 2013</td>
<td>ACCC timeline suspended until after the parties have had further discussions with overseas regulators.</td>
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<tr>
<td>5 July 2013</td>
<td>ACCC commenced market inquiries in relation to draft s87B divestiture undertaking offered by Baxter. ACCC timeline recommenced.</td>
</tr>
<tr>
<td>11 July 2013</td>
<td>Closing date for submissions from interested parties.</td>
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<tr>
<td>24 July 2013</td>
<td>Before deciding whether to accept Baxter's proposed undertaking, the ACCC wanted to be certain of the identity of the purchaser of the global divestiture business approved by the European Commission (EC) in accordance with the EC's decision on the proposed acquisition and related Commitments which took effect on 22 July 2013. The ACCC delayed its decision on whether to accept the proposed undertaking pending the EC's expected decision of an approved purchaser. ACCC timeline suspended.</td>
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<tr>
<td>3 September 2013</td>
<td>EC approved purchaser of the global divestiture business. ACCC timeline recommenced.</td>
</tr>
<tr>
<td>4 September 2013</td>
<td>ACCC announced it would not oppose the proposed acquisition, subject to section 87B undertaking accepted by ACCC.</td>
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Market inquiries

28. The ACCC conducted market inquiries with a range of industry participants, including competitors in the supply of RRT treatment products and customers of these products (including hospitals, dialysis clinics and state health authorities).

Competition test

29. Section 50 of the Act prohibits mergers or acquisitions that would have the effect or be likely to have the effect of substantially lessening competition in a market. In assessing a proposed acquisition pursuant to section 50 of the Act, the ACCC considers the effects of the acquisition by comparing the likely future competitive environment post-acquisition if the acquisition proceeds (the “with” position) to the likely future competitive environment if the acquisition does not proceed (the “without” position) to determine whether the proposed acquisition is likely to substantially lessen competition in any relevant market.

30. In the absence of the proposed acquisition, the ACCC considered that the likely future competitive environment would be the status quo, that is, both Baxter and Gambro would continue to operate as independent, viable and effective competitors in the relevant markets.

Areas of concern

31. Baxter and Gambro overlapped in the supply of both CRRT and HD products. The ACCC’s investigation focussed on whether the merged firm would be able to:

- unilaterally increase prices or decrease service in the supply of:
  - CRRT treatment products; or
  - HD treatment products; or
- reduce research and development in RRT on a global level.

32. Due to Baxter’s strong market position in the supply of PD, the ACCC also considered whether the merged firm would have the ability and incentive to foreclose actual and potential rivals, or raise barriers to entry in the relevant markets, through a bundling or tying strategy.

Market definition

Continuous Renal Replacement Therapy

33. CRRT is used to treat patients suffering from AKI. Treatment occurs in an intensive care hospital setting and is administered constantly for up to a week. An alternative form of treatment to CRRT for AKI is sustained/slow extended daily dialysis (SLEDD). However, the ACCC’s market inquiries indicated that customers do not substitute between CRRT and SLEDD based on changes in prices and service. Rather, decisions on the treatment are based on clinical preferences and the condition of the patient. Accordingly, for the purpose of
assessing the likely competition effects of the proposed acquisition, there is no substitute for customers purchasing CRRT treatment products.

34. Baxter submitted that it is not appropriate to treat the individual components of CRRT as separate markets. However, the ACCC considered, based on information provided by market inquiries and data provided by the parties, that in CRRT the appropriate product markets were likely to be narrower than submitted by the parties. In particular, the ACCC considered that there appeared to be distinct product markets for some of the components and monitors utilised in CRRT treatment.

35. The ACCC identified that it was common for customers to purchase CRRT monitors outright and then contract for the supply of components (e.g. catheters, concentrates) separately. While some customers contracted with one supplier for all CRRT treatment products, other customers utilised different suppliers for components that did not need to be technically compatible with the respective monitors. In particular, the ACCC’s market inquiries indicated that there may be separate product markets for the supply of CRRT concentrates and tubing/catheters.

36. The ACCC did not consider that it was necessary to reach a definitive view on the appropriate product market definitions. As explored further below, regardless of the market definition adopted, the ACCC considered that, in the absence of a remedy, the proposed acquisition would be likely to raise significant competition concerns in relation to the broader market for the supply of CRRT treatment products as well as in distinct product markets.

Haemodialysis

37. HD is used to treat patients suffering from CKD. Treatment occurs in a patient’s home or, more commonly, in a clinic or hospital environment. HD generally occurs three times per week for 8 hours a time and treatment may continue for a number of years while the patient awaits a kidney transplant. An alternative treatment option for CKD is PD. PD can generally only be administered for two to three years, due to the breakdown of the peritoneum lining, before a patient must transfer to HD. The ACCC’s market inquiries indicated that there was no substitution between HD and PD based on price or service with the decision on treatment based on clinical preference and the patient’s condition.

38. As with CRRT, Baxter submitted that it is not appropriate to treat the individual components of HD as separate markets. The ACCC’s market inquiries identified that, unlike CRRT, in HD customers generally obtained supply of products under PPT arrangements where all the necessary components for the treatment were bundled and provided as a single price and the monitor’s cost was in effect amortised over the term of the multi-year supply arrangement.

39. While the ACCC’s market inquiries indicated that in some instances customers obtained supply for some components separately, this was not commonplace and the ACCC considered that an HD supplier needed to offer the complete range of HD treatment products on a PPT basis in order to compete effectively.

40. The ACCC also considered whether there was a separate market for Home HD. Home HD is where the patient self-administers HD treatment within their own home, rather than travelling to a clinic or hospital. Based on the information
before it, the ACCC did not consider that there was a separate market for Home HD given the fact that, in most cases, a standard HD monitor required minimal customisation in order to be suitable for use by a patient in their home. Further, the ACCC’s market inquiries indicated that customers did not generally differentiate Home HD in contracting or tendering arrangements.

41. The ACCC concluded that a broad HD treatment product market was appropriate. However, the ACCC considered that even if it were to adopt narrow component or Home HD markets, this would not have altered the outcome of the competition analysis below.

Peritoneal dialysis

42. Although Gambro had no presence in the supply of PD, the ACCC considered that the supply of PD was relevant to its consideration of whether the proposed acquisition would raise conglomerate merger concerns.

43. PD is used to clean the blood without removing it from the body. Dialysate, made up mostly of salts, water and glucose is injected into the peritoneal space in the abdomen through a two way catheter. The membrane that lines the abdomen (the peritoneum) acts as a natural filter, allowing waste and fluid to pass from the blood into the dialysate, which is then pumped out of the abdomen.

44. Although PD and HD are both used to treat patients suffering from CKD, the ACCC’s investigation did not find evidence of substitution between the two based on price or service. For the same reasons as HD, the ACCC concluded that the relevant market is likely to be the broad PD treatment market comprising all the necessary components.

Geographic dimension – CRRT, HD and PD

45. The ACCC concluded that the appropriate geographic scope of the relevant markets was national.

46. Almost all of the key equipment and components in HD, CRRT and PD treatment distributed in Australia are manufactured overseas. While these products are all imported, the ACCC did not consider that it represented a global market. The ACCC’s inquiries identified that pricing is not based on any global benchmarks, the nature of supply arrangements between customers and suppliers is fundamentally different between jurisdictions, and that regulatory approval is a barrier to entry into the Australian market.

47. The ACCC’s market inquiries identified that suppliers generally distributed products nationwide. The ACCC’s market inquiries indicated that all major suppliers competed for contracts or supply arrangements on a nationwide basis and the ACCC did not identify any evidence to suggest pricing differed markedly between states.

RRT Innovation Market

48. Both Baxter and Gambro overlapped in global RRT research and development. The ACCC, although recognising that research in RRT is intricately linked to future competition in the separate HD, CRRT and PD markets, also considered whether there was a standalone innovation market. The ACCC’s market inquiries
identified that, at a global level, research may be undertaken on a broad technology which has the potential to result in innovations across numerous and future product markets.

49. As a consequence, the ACCC considered that it was appropriate to consider the impact of the proposed acquisition on the global market for RRT innovation.

Conclusion – relevant markets

50. The ACCC’s assessment of the proposed acquisition was conducted in relation to the following markets:

- the national market for supply of CRRT treatment products as either a:
  - broad system based market for CRRT treatment products; or
  - individual CRRT component markets (e.g. catheters, fluids);
- the national market for supply of HD treatment products;
- the national market for supply of PD treatment products; and
- the global market for RRT innovation.

**Competition Assessment**

Supply of CRRT treatment products

51. The ACCC considered that, in relation to the supply of CRRT treatment products, in the absence of a suitable divestiture remedy the proposed acquisition would remove Baxter’s major competitor and result in a near-monopoly in Australia irrespective of the precise market definition. The only other supplier of CRRT products in Australia is TekMed which does not have a complete product offering and has a much smaller market share.

52. The ACCC did not issue a Statement of Issues during its investigation, due to the fact that:

- the ACCC’s initial market inquiries provided strong evidence on which the ACCC was able to form a view as to the likely competitive effects of the proposed acquisition; and
- following initial market inquiries and receipt of a proposed undertaking from Baxter that was in a suitable format for consultation, the ACCC proceeded to initiate market consultation on the suitability of the remedy proposed by Baxter.

**Closeness of competition and availability of substitutes**

53. The ACCC’s investigation identified that Baxter and Gambro were each other’s closest competitors in the supply of CRRT treatment products in Australia. Notwithstanding a recent temporary withdrawal of Baxter’s Aquarius machine, the ACCC’s market inquiries indicated that most customers of CRRT treatment
products considered that Baxter and Gambro were the only two viable options for the supply of these products.

54. The ACCC also considered the impact of TekMed, an alternative supplier of CRRT monitors and some ancillaries. The ACCC’s market inquiries identified that TekMed had a small market presence, a slightly differentiated CRRT monitor, and did not currently offer CRRT fluids. Therefore, the ACCC considered that the merged firm’s pricing and service would not be sufficiently constrained by TekMed in the foreseeable future.

Barriers to entry or expansion

55. The ACCC’s investigation identified that barriers to entry for the supply of CRRT treatment products are very high. Information provided through the ACCC’s market inquiries revealed that the barriers would be significant for any new entrant, whether this was an overseas supplier establishing supply operations in Australia, a supplier already present in other RRT markets in Australia, or an Australian distributor seeking to import CRRT treatment products.

56. Industry feedback identified that reputation or brand recognition amongst customers was a significant impediment to successful entry. Market participants indicated that there was general industry reluctance to adopt new products that had not demonstrated clinical acceptance in Australia. Furthermore, the ACCC identified that there appeared to be significant sunk costs, for example in the form of free trials and promotions, in establishing the necessary reputation to compete effectively in Australia.

57. Further, the ACCC’s market inquiries indicated that there appeared to be significant switching costs involved in hospitals changing to a new supplier of CRRT products, especially if it would involve using multiple suppliers’ CRRT monitors in the same dialysis location. Hospitals may be reluctant to acquire a CRRT monitor from a new supplier as it would increase the cost and complexity of procurement and require training of staff to use a different CRRT monitor to those of the merger parties.

58. In addition, the ACCC considered that other barriers appeared to exist due to the significant timeframes and costs associated with obtaining regulatory approval for new CRRT treatment products to be supplied in Australia. Further, new entrants would need to establish the necessary distribution, support/service and training infrastructure to compete effectively against the merged firm. The ACCC’s market inquiries indicated there would be significant sunk costs in establishing these functions.

59. For these reasons, the ACCC concluded that the threat of new entry or expansion would be unlikely to constrain the merged firm in the foreseeable future.

Countervailing Power

60. The ACCC did not consider that customers of CRRT treatment products were able to exercise countervailing power to constrain the merged firm. Although the ACCC recognised that customers were often very large public health authorities which purchased significant volumes, these authorities were involved in such a broad range of purchases that it would be impractical for them to sponsor new
entry. Additionally, as discussed above, the ACCC’s investigation identified that there were very high barriers to entry and market inquiries indicated that it is impractical for a customer to bypass, or threaten to bypass the merger parties by producing or importing their own products. Market inquiries did not identify that customers of CRRT considered they had any countervailing power.

61. The ACCC’s market inquiries indicated that the margins derived from the sale of CRRT fluids in Australia are likely to be considerably higher than those in Europe. The ACCC considered that it was reasonable to assume that, if customers had countervailing power, they would have exercised it previously in an attempt to reduce the cost of CRRT fluids. However, to date customers had not attempted to bypass Baxter and Gambro by importing their own CRRT fluids or sponsoring new entry.

Conclusion – supply of CRRT treatment products

62. The ACCC concluded that, absent an undertaking, the proposed acquisition would result in the amalgamation of the only two major suppliers of CRRT treatment products in Australia and would be likely to result in a substantial lessening of competition in the relevant CRRT market(s).

Supply of HD treatment products

63. The ACCC considered that, in the supply of HD treatment products, the proposed acquisition would be unlikely to substantially lessen competition.

Closeness of competition and availability of substitutes

64. The ACCC’s market inquiries and information provided by the merger parties indicated that Baxter and Gambro were not close competitors in the supply of HD treatment products. Information provided by the merger parties identified that Baxter had a minimal market share. The ACCC’s market inquiries and analysis of industry tender outcomes indicated that competition in HD treatment products in Australia is primarily driven by the two major suppliers, Gambro and Fresenius.

65. The ACCC considered that, post-acquisition, Fresenius would be the main substitute and strongest competitive constraint on the merged firm. The ACCC noted that there also several smaller suppliers present in the supply of HD treatment products in Australia.

Barriers to entry

66. As above with CRRT, the ACCC’s investigation indicated that barriers to entry in the supply of HD treatment products are high. However, the ACCC’s investigation identified more opportunity for entry into the market for the supply of HD treatment products. The ACCC considered that this is likely due to the size of the HD market (revenue, number of customers and patients) being much larger than for CRRT. Recent entrants into HD in Australia included NxStage (through the distributor Regional Health Care Group) and Nipro, and B Braun’s entry was imminent. Therefore, the ACCC considered that the threat of new entry would be likely to place some constraint on the merged firm.
Conclusion – supply of HD treatment products

67. The ACCC concluded that the proposed acquisition was unlikely to result in a substantial lessening of competition in the market for the supply of HD treatment products. The ACCC considered that the proposed acquisition resulted in a minimal increase in market concentration, and Fresenius, with a significant market share, represented a strong alternative supplier to the merged firm.

Conglomerate effects between supply of PD and HD products

68. The ACCC concluded that the proposed acquisition would be unlikely to result in Baxter having an increased ability and incentive to anti-competitively foreclose actual and potential rivals, or raise barriers to entry in the relevant markets, through a bundling or tying strategy. Specifically, the ACCC concluded that the acquisition appeared unlikely to result in the merged firm having a greater ability or incentive to leverage Baxter’s existing strong market position in the supply of PD products into the supply of HD products, and that any such attempted foreclosure would be unlikely to be anti-competitive. The main factors informing this conclusion were:

- the ACCC’s market inquiries identified that in nearly all cases, customers did not source PD and HD products as a bundle and customers considered that they had the ability to disaggregate their purchases of PD and HD products between different suppliers. The merged firm would not be a supplier of any ‘must have’ product which it could bundle or tie with other products to the exclusion of rival suppliers;

- the ACCC’s market inquiries indicated that Fresenius would remain the market leader in supply of HD products post acquisition, and had the ability to offer a comparable bundle as it already supplied both HD and PD products; and

- Baxter already had the ability, without the proposed acquisition, to offer a bundle of HD and PD products.

Global RRT Innovation

69. The ACCC considered that the proposed acquisition was unlikely to result in a substantial lessening of competition in the RRT innovation market (or in any narrower innovation market). The main factors which informed the ACCC’s conclusion were:

- the ACCC’s market inquiries indicated that several major international competitors would continue to be significant contributors to RRT research and development, including RRT manufacturers such as Bellco, Nipro, Asahi and Nikkiso; and

- information provided by the parties indicated that Baxter was a marginal RRT R&D party (both in spend and product development) and relied in both CRRT and HD markets on distributing products developed and manufactured by third parties.
Conclusion – competition assessment

70. For the reasons outlined above, the ACCC concluded that the proposed acquisition, absent a remedy, appeared likely to result in a substantial lessening of competition in the supply of CRRT treatment products. The ACCC concluded that the proposed acquisition was unlikely to result in a substantial lessening of competition in any other relevant market.

71. In order to remedy potential competition concerns in Europe, New Zealand and Australia, Baxter proposed to divest its existing global CRRT operations. Baxter offered the ACCC a court enforceable undertaking, pursuant to section 87B of the Act, to commit to this divestiture in Australia.

Undertaking

72. The ACCC investigated whether the court enforceable undertaking proposed by Baxter would address the competition concerns identified by the ACCC in the supply of CRRT treatment products.

73. The proposed undertaking in effect required Baxter to comply with commitments made to the EC to divest its global CRRT business (EC commitments) and required Baxter to obtain the ACCC’s approval of the proposed purchaser in Australia. The EC commitments would result in a transfer to an ACCC approved purchaser of the majority of Baxter’s Australian CRRT business, including the transfer of personnel.

74. On 22 July 2013, the EC cleared the proposed acquisition, which included accepting the commitment package offered by Baxter. The EC’s clearance was conditional on the EC subsequently approving the proposed purchaser of the divestiture business and the associated transaction documents. The ACCC held off making its decision on the proposed acquisition and undertaking until the EC had approved the purchaser of the divestiture business. On 2 September 2013 the EC approved Nikkiso as the purchaser of the divestiture business.

75. The global divestiture package comprised CRRT tangible assets, intellectual property assets, transfer of or access to licences, permits and authorisations in relation to CRRT, and contracts and other commitments which related to Baxter’s CRRT supply and distribution agreements with third parties (divestiture business).

76. The ACCC considered that the proposed undertaking, including the divestiture of the divestiture business to Nikkiso and interim ‘hold separate’ arrangements, would remedy the competition concerns raised by the proposed acquisition in the national supply of CRRT treatment products on the basis that:

- it would address the common ownership of the Baxter and Gambro CRRT businesses that would otherwise exist after the proposed acquisition;

- the broad commitment package proposed in Europe was likely to provide the proposed purchaser with the assets, rights and agreements necessary to enable the approved purchaser to compete effectively in the supply of CRRT treatment products in Australia;

- it would bind Baxter in Australia to the EC Commitments; and
• it required Baxter to only divest the divestiture business to a purchaser approved by the ACCC.

Proposed Purchaser - Nikkiso

77. The ACCC considered that Nikkiso would be able to conduct the divestiture business effectively in Australia and that it would maintain the divestiture business as a standalone, long term and independent and effective competitor in the supply of CRRT products in Australia.

78. In its assessment of Nikkiso as the proposed purchaser of the divestiture business, the ACCC gave weight to the fact that Nikkiso was already the manufacturer of the Aquarius CRRT machine which Baxter distributed in Australia. In that regard, the ACCC noted that:

• accepting Nikkiso as the approved purchaser eliminated the need for Baxter to obtain third party consent (from Nikkiso) to transfer the agreement with respect to the supply of the Aquarius CRRT machine to another proposed purchaser; and

• while responses were mixed in the ACCC’s market inquiries, some customers were aware that the Aquarius machine distributed by Baxter is manufactured by Nikkiso. The ACCC considered that this reduced the difficulties associated with gaining clinical acceptance which could be an issue for other potential purchasers that were unknown in Australia.

79. In addition, based on information provided by the parties and Nikkiso, the ACCC considered that Nikkiso had significant experience worldwide in RRT, and had knowledge and expertise in relation to the Aquarius monitors. Further, the ACCC was satisfied that Nikkiso had a commitment and intention to continue to operate and grow the divestiture business in Australia.

80. The ACCC was satisfied that the scope of the divestiture package was sufficient to enable Nikkiso to operate the divestiture business effectively. This package included, in particular, the clinical sales and marketing staff who were responsible for managing relationships with health care providers in Australia in relation to Baxter’s CRRT monitors, and who would be able to provide for a smooth transition for Baxter’s existing CRRT customers.

81. The ACCC also considered that Nikkiso was sufficiently independent of Baxter and that their HD distribution agreement was not likely to result in Nikkiso having a reduced incentive to compete with Baxter in the supply of CRRT monitors.

82. Accordingly, the ACCC was satisfied that Nikkiso was a suitable purchaser of the divestiture business in Australia.

Conclusion – divestiture undertaking

83. The ACCC concluded that the undertaking offered by Baxter, with Nikkiso as the purchaser of the divestiture business, would remedy the competition concerns in CRRT which were raised by the proposed acquisition.
Conclusion

84. On the basis of the above, including taking into account the proposed undertaking, the ACCC formed the view that the proposed acquisition of Gambro by Baxter would not be likely to result in a substantial lessening of competition in any market in contravention of section 50 of the Act.