

### **CASE NOTE: *ATTORNEY-GENERAL (VIC) v ANDREWS* [2007] HCA 9**

#### **INTRODUCTION**

On 21 March 2007 the full court of the High Court delivered its decision in the case of *Attorney-General (Vic) v Andrews* [2007] HCA 9. The decision was not unanimous, with the majority comprising of Chief Justice Gleeson and Justices Gummow, Hayne, Heydon and Crennan in a joint judgement. Justices Kirby and Callinan dissented in separate judgements.

#### **FACTS**

The Victorian workers compensation scheme is comprised of two pieces of legislation. The *Accident Compensation Act 1985* (Vic) ("the Victorian Compensation Act") sets up the Victorian WorkCover Authority (VWA) which administers the *Accident Compensation (WorkCover Insurance) Act 1993* (Vic) ("the WorkCover Insurance Act"). The intention of the WorkCover Insurance Act, set out in Section 1, is "to provide for compulsory WorkCover insurance for employers under WorkCover insurance policies and the payment of premiums for WorkCover insurance policies". Thus, these Acts seek to set up a compulsory worker compensation insurance scheme in Victoria.

In 2004, Optus sought to opt-out of the Victorian scheme and into the Commonwealth workers compensation scheme, set up by the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ("the Commonwealth Act"). Optus applied to become an eligible company and to be granted a self-insurance under the Part VIII the Commonwealth Act. After a decision by then Minister for Employment and Workplace Relations, Kevin Andrews, this licence was granted to Optus on 1 November 2004 and came into operation on 30 June 2005.

Optus estimates that this will save \$186,000 per month in premiums and put them 'on a level' with their competitor Telstra, covered by the Commonwealth Act by virtue of its status as a former Commonwealth Authority.

#### **THE APPLICANT'S CLAIM**

The applicant sought a declaration that the license granted to Optus was invalid. Furthermore, it was claimed that ss 104(1), 108(1) and 108A(7) of the Commonwealth Act were outside of Parliament's legislative power and invalid to the extent those provisions:

- Authorise the Commission to grant an eligible corporation a licence under Part VIII of the Commonwealth Compensation Act;
- Authorise the eligible corporation to accept liability to pay compensation in respect of injury, loss or damage suffered by or in respect of the death of its employees under the Commonwealth Compensation Act; and,
- Remove the obligation of a licensed corporation to obtain and keep in force a policy of insurance with the VWA in accordance with the Victorian Insurance Act and relieve such a corporation of its liabilities as an employer to pay compensation under the Victorian Compensation Act and to pay damages at common law as preserved and regulated by the Victorian Compensation Act.

Section 104(1) is the provision empowering the Commission to grant the licence sought by an eligible applicant. Sections 108(1) and 108A(7) deal with licensee ability to accept liability to pay compensation under the Commonwealth Act.

The applicants argued that ss 104(1), 108(1) and 108A(7) the Commonwealth Act were invalid because of s 51(xiv) of the Constitution. Section s51(xiv) of the Constitution provides that the Parliament shall have power to make laws respect to "insurance, *other than State insurance*".

## **FINDINGS**

### ***Majority***

#### *1 Joint Judgement: Justices Gummow, Hayne, Heydon and Crennan.*

The joint judgement finds that the applicant's claims should not be accepted.

The joint judgement relies on *New South Wales v Commonwealth* (2006) 81 ALJR 34 to find that the licensing provisions in the Commonwealth Act are laws with respect to a trading corporation formed within the limits of the Commonwealth (s 51(xx)).

They hold that the licensing provisions in the Commonwealth Act oblige a licensee, such as Optus, to pay workers compensation according to the Commonwealth Act. Thus, after the license comes into force, by virtue of section 109 of the Constitution of the Victorian Compensation Act and the WorkCover Insurance Act are over ridden by the Commonwealth Act. Thus, there is no obligation on Optus to have compulsory WorkCover Insurance.

The justices accept that the corporations power - and other constitutional powers - is subject to a limitation "other than State insurance" in 51(xiv), thus extending the decision in *Bourke* (1990) 170 CLR 276 regarding the reference to "State banking" regarding s51(xiii). However, they find that the licensing provisions leave Optus at liberty to decide whether to take out insurance, and, if so, on what terms, or to remain a "self-insurer". Thus the licensing provisions in the Commonwealth Act "do not touch and concern insurance any more than in an incidental manner. Still less do the licensing provisions touch and concern "state insurance as must be made good if the appeal is to succeed" [at para 83] and are not subject to the limitation in s51(xiv).

#### *2. Gleeson CJ*

In a separate judgment, Gleeson CJ also finds that the appeal should be dismissed.

Gleeson CJ relies on *Bourke* and agrees that laws supported by the corporations power are subject to the restriction imposed in section 51(xiv). However, Gleeson CJ emphasises that section 51(xiv) and the decision in *Bourke* does not confer on the States an exclusive power or monopoly to make laws with respect to State insurance.

In contrast to the joint decision, Gleeson CJ holds that the impugned provisions of the Commonwealth Act do not seek to regulate the "State Insurance". He states the proper meaning of "State insurance" is "insurance business." The provisions in the Commonwealth Act do not seek to regulate the insurance transactions entered into by the VWA, nor do they prohibit the conduct of State insurance or impair the capacity of Victoria to conduct State insurance. Thus the provisions of the Commonwealth Act do not invade the area of protection given by the proviso to s51(xiv). The Constitution does not preclude the Commonwealth Parliament from enacting any laws which might incidentally affect that business.

## ***Dissenting Judgments***

### **1. Kirby J**

Kirby J is concerned about the expansion of federal power, especially in this case where s 51(xiv) contains an express limitation. He holds that the Commonwealth Act *does* touch or concern "State insurance". The interference is not so incidental as not to affect the character of the federal law as one with respect to insurance other than State insurance. Put another way, the connection with State insurance cannot be said to be "so insubstantial, tenuous or distant" that the federal law cannot be regarded as one with respect to State insurance

Holds that the licence granted to Optus is invalid and that sections 104(1), 108(1) and 108A(7)(a) of the Commonwealth Act are invalid to the extent they remove the obligation of a licensed corporation to obtain and keep in force a policy of insurance with the VWA and relieve a licensed corporation of its liabilities to pay workers compensation and to pay damages at common law.

### **2. Callinan J**

Callinan J largely agrees with the reasons and provision of Kirby. He finds that the provisions of the Commonwealth Act are "largely and substantially" laws with respect to insurance, and in particular, laws with respect to "State insurance".

## **SUMMARY**

The majority of the High Court find that the proviso in s 51(xiv) of the Constitution does not invalidate ss 104(1), 108(1) and 108A(7) of the Commonwealth Act as these sections are not laws relating to State insurance. This allows Optus, as an eligible corporation with a self-insurance licence, to opt out of Victorian workers compensation scheme and into the federal Comcare scheme.

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