Workers' compensation fall-out: The High Court decision

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*The High Court's March 2007 decision in **Attorney-General (Victoria) v Andrews** has paved the way for many corporate employers to obtain national workers' compensation coverage under Commonwealth legislation. As with the historic November 2006 **WorkChoices** case, the decision in **Andrews** reflects an expansive interpretation of the Commonwealth's legislative reach and provides further evidence of an emerging constitutional transformation of Australian federalism. This article outlines the background to the court's decision, discusses the reasoning in both the majority and minority judgments and concludes that the decision has major implications for the future of workers' compensation policy in Australia.*

Introduction

In a landmark decision in *Attorney-General (Victoria) v Andrews* handed down in March 2007, the High Court in a five to two decision dismissed an appeal by the Victorian Attorney-General against a Federal Court ruling in favour of the Commonwealth to grant a national self-insurance licence to Optus Administration Pty Ltd (Optus) under the Safety Rehabilitation and Compensation Act 1988 (Cth) (the SRC Act).[1] The decision is particularly significant because it opens the way for multi-state employers to migrate out of the state and territory workers' compensation schemes and operate under the SRC Act.

Background

In the Federal Court in *Victorian WorkCover Authority v Andrews*[2] Selway J noted that the Commonwealth Safety, Rehabilitation and Compensation Commission (Comcare) may issue self-insurance licences to Commonwealth authority employers to allow them to operate under the SRC Act. If an employer is not a Commonwealth authority the employer may make an application to the Federal Minister for Employment and Workplace Relations to satisfy s 100 of the SRC Act that the employer is a corporation that 'is carrying on business in competition with a Commonwealth authority or with another corporation that was previously a Commonwealth authority'. Comcare must also consider a range of other criteria primarily concerning financial and prudential issues. On 7 July 2004 the Minister declared that Optus was eligible to be granted a licence under Pt VIII of the SRC Act. Optus was granted a licence by Comcare on 1 November 2004 which came into

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1 (2007) 233 ALR 389.

2 [2005] FCA 94 (unreported, 17 February 2005, BC200500321).

operation on 1 December 2004. Optus commenced operations under the licence in July 2005. In the meantime the Victorian WorkCover Authority (WorkCover) commenced proceedings in the Federal Court against the then Federal Minister for Employment and Workplace Relations (the Honourable Kevin Andrews) to challenge the Minister's determination to grant a licence to Optus. The challenge in the Federal Court for declaratory relief was on two grounds. First, WorkCover argued the Minister had failed to afford WorkCover natural justice in relation to the application because no notice of the Optus application had been given to WorkCover and, second, that Comcare was acting unconstitutionally in granting the licence to Optus by contravening the 'insurance' power in s 51(xiv) of the Commonwealth Constitution which provides:

> The Parliament shall, subject to this Constitution, have power to makes laws for the peace, order and good government of the Commonwealth with respect to insurance, *other than State insurance; also State insurance extending beyond the limits of the State concerned*.[3]

The first part of the argument was dismissed on the grounds that the SRC Act did not require Comcare to seek submissions from WorkCover or other state or territory authorities and, accordingly, natural justice had not been denied. As to the second, and more significant constitutional issue, Selway J held that the qualification in relation to 'state insurance' would also be applicable to other powers under s 51 such as the corporations power or the trade and commerce power.[4] Selway J proceeded on the basis that the relevant activities of WorkCover were characterised as 'state insurance'. He also held that s 51(xiv) did not allow the Commonwealth to legislate to directly affect the internal operations of a state insurer nor to affect the terms upon which a state insurer could offer insurance.[5]

WorkCover argued that the relevant qualifications or limits to the insurance power operated when laws of the Commonwealth 'touch and concern' state insurance in a way that is not merely 'insubstantial, tenuous or distant' and consequently is not a law 'with respect to . . . insurance other than state insurance'.[6] After a review of the authorities on this point Selway J concluded that the SRC Act did not touch and concern state insurance powers. He found that the SRC Act was a law with respect to insurance, but held that a law which simply affected the market place for insurance, even if it did have significant consequences for state insurance, did not touch and concern state insurance. Similarly, even if the SRC Act interfered with the policies and purposes of the Accident Compensation Act 1985 (Vic), this did not mean that it was unconstitutional.[7] Overall Selway J held that the SRC Act only incidentally affected state insurance and therefore was not contrary to s 51(xiv). As a consequence, the application for declaratory relief by WorkCover to the Federal Court was dismissed. During the proceedings the Victorian Attorney-General was joined as an intervener and, together with a

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3 Ibid, at [35] (emphasis added).
4 Ibid, at [53].
5 Ibid, at [70].
6 Ibid, at [58].
7 (2007) 233 ALR 389 at [62]–[63].

number of other state attorneys-general, the matter was taken on appeal to the High Court by those parties.

The High Court majority decisions

The High Court dismissed the appeal by the Attorney-General of Victoria from the decision of Selway J in the Federal Court. Gleeson CJ, in the majority, gave separate reasons. He said that the expression *state insurance* meant the business of insurance conducted by an insurer owned or controlled by a state; that is, state insurance.[8] He noted that at the time of federation none of the colonies carried on any kind of insurance business, that the evidence from the Convention Debates showed that it was anticipated the states would establish insurance operations within state borders, and that these operations should be protected, but that the protection would be lost when those operations extended beyond the limits of the states.[9] On this basis Gleeson CJ noted that the business of the Victorian WorkCover Authority is state insurance. However, Gleeson CJ, like Selway J in the Federal Court, held that the *market* for insurance within a state is not state insurance. The Chief Justice held that, although states could create systems of compulsory insurance, as with workers' compensation, this did not mean that it could withdraw that form of insurance from Commonwealth control.[10]

Gleeson CJ also considered the decision in *Bourke v State Bank of New South Wales*.[11] *Bourke* dealt with similar provisions of the Commonwealth Constitution relating to state banking under s 51(xiii). Gleeson CJ held that *Bourke* was authority for the proposition that the restrictions imposed by s 51(xiv) applied to Commonwealth legislative power generally, provided the Commonwealth law in question was a law in respect of insurance. This meant that a law supported, for example, by the corporations power was subject to the limitations under s 51(xiv) of the insurance power.[12] In *Bourke* it had been held that ss 52 and 52A of the Trade Practices Act 1974 (Cth) were made in reliance on the corporations power and were also laws relating to banking and therefore were affected by the limitations under s 51(xiii). In arriving at this conclusion Gleeson CJ said that *Bourke* did not decide that a state could confer on a bank a monopoly in banking business within the state, free from Commonwealth interference, but that the decision declared a limit on the capacity of the Commonwealth to regulate banking transactions entered into by a state bank.[13] He held that the granting of licences by Comcare did not amount to an attempt to regulate insurance transactions entered into by WorkCover and did not prohibit the conduct of state insurance or substantially impair it. He also noted that the Commonwealth scheme may detract from the comprehensiveness of the Victorian scheme, but that *the scheme* of workers' compensation was not state insurance, nor was the workers' compensation market in Victorian state insurance. Consequently, Gleeson CJ held that no

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8 Ibid, at [6].
9 Ibid, at [7]–[8].
10 Ibid, at [10].
11 (1990) 170 CLR 276; 93 ALR 460.
12 (2007) 233 ALR 389 at [12].
13 Ibid, at [15]–[16].

question of state insurance arose in this case, and nor did the question of the qualifications concerning state insurance under s 51(xiv).

Justices Gummow, Hayne, Heydon and Crennan provided joint reasons to dismiss the appeal. The joint reasons differ in focus from the decision of Gleeson CJ, and include an excursive survey of the provisions of the SRC Act and the Accident Compensation Act 1985 (Vic). In particular, the joint reasons noted that s 108A(7) of the SRC Act provides inter alia that no law of a state or territory relating to workers' compensation applies in respect of a corporation which is licensed under the SRC Act, and that any law which impaired the operation of s 108A would be invalid pursuant to s 109 of the Commonwealth Constitution.[14] Somewhat surprisingly, the joint reasons noted that although these matters were not explored in argument before the High Court or the Federal Court, considerable emphasis was placed on the potential for Optus to be liable at common law for damages under the Accident Compensation Act 1985 (Vic) but also noted that ss 44 and 45 of the SRC Act appeared to remove such liability.

The joint reasons accepted, as Gleeson CJ had, that *Bourke* established that the corporations power was subject to other heads of power in s 51. Relating the outcome in *Bourke* to its discussion of the Accident Compensation Act 1985 (Vic) the joint reasons framed the issue on appeal in terms of whether the provisions of the Accident Compensation Act 1985 (Vic) which 'transmogrify the common law', are a valid operation of state insurance laws and thus affect the operation of the SRC Act.[15] This approach to the appeal differs from the approach by Gleeson CJ.

The joint reasons assert that *Bourke* did not provide the states with an exclusive power to prevent Commonwealth laws from touching or affecting state banking laws. At the heart of this issue, so far as the joint judgment is concerned, was the need to characterise the true nature of the laws.[16] Accordingly, it was necessary to consider the nature and substance of the relevant provisions of the SRC Act to determine whether they were laws with respect to state insurance. Because Optus (and any other corporate employer) can choose whether or not to seek insurance or national self-insurance, the joint reasons held that the licensing provisions were only incidentally concerned with *insurance*. Referring back to its comments in relation to s 109 of the Commonwealth Constitution, Justices Gummow, Hayne, Heydon and Crennan observed that there was no obligation on Optus to comply with anything under the Accident Compensation Act 1985 (Vic) because they regarded any provisions in conflict with the SRC Act to be invalid. On this point the joint reasons go a further step because it asserts that the laws in question should not be charactised as insurance laws, let alone state insurance. Rather the judgment appears to have been characterised by the Act as validly made under the corporations power, without touching or concerning state insurance.[17] In effect this declares the state laws invalid in relation to their operation upon a Comcare licenced employer. This latter point of distinction

14 Ibid, at [50].
15 Ibid, at [75].
16 Ibid, at [79]–[80].
17 Ibid, at [86]–[90].

did not appear in the judgments of Gleeson CJ.

Apart from the matters outlined by Selway J in his judgment, the joint reasons identified an additional feature of the case which has significance for future Commonwealth policy. The majority finding that state and territory compensation laws can be invalidated by federal laws, founded on the corporations power, corresponds with the views of the majority as expressed in the recent *WorkChoices* case.[18]

The minority decisions

The resonances with the *WorkChoices* case were discussed by Kirby J in his minority judgment. Kirby J pointed out that the federalist idea is especially important where the Constitution has granted legislative power to the Federal Parliament, subject to particular matters being left to the states, including banking and insurance powers. Unlike the majority decisions, Kirby J highlighted one major effect of the withdrawal of Optus from the Victorian compensation scheme, that is, the large premium source lost to that scheme.[19] In contrast to the majority, he also noted the difference in scheme benefits between the Accident Compensation Act 1985 (Vic) and the SRC Act, observing that workers under the Accident Compensation Act 1985 (Vic) had superior rights in relation to common law damages.

Kirby J, like Gleeson CJ, also traced the history of insurance in the Australian colonies, noting the Convention Debates as well as a 1910 report by the Commonwealth statistician (the Knibbs report) which outlined the evolution of social insurance schemes relating to insurance for 'sickness accident, death, old age, or other adversity'. In doing so he further noted that there was 'no sharp bifurcation between state laws with respect to workers' compensation and state laws with respect to compulsory insurance to fund the compensation so provided'.[20]

Kirby J acknowledged that *Bourke* was an important element of the appeal, and traced the discussion of the quarantining of state banking laws to the early decision of the *Melbourne Corporation*[21] citing Dixon J (as he then was) as asserting that no federal laws should *affect the operations* of a state bank, giving rise to the test that the impugned law would be invalid if it *touched or concerned* the restricted subject matter (banking).[22] He then observed that the reasoning in the *Melbourne Corporation* case was accepted in *Bourke*. In a later case, *Attorney-General (Cth) v Schmidt*,[23] Dixon CJ explained that a narrow view of constitutional safeguards, restrictions or qualifications was inconsistent with the appropriate principles of construction.

From this point Kirby J moved to 'the familiar process of characterisation' of the Commonwealth laws and in doing so acknowledged that this process left much room for differences of opinion.[24] He then proceeded to argue that

18 (2006) 231 ALR 1; 81 ALJR 34.
19 (2007) 233 ALR 389 at [101]–[102].
20 Ibid, at [130].
21 (1947) 74 CLR 31.
22 Ibid, at 78.
23 (1961) 105 CLR 361 at 371–2.
24 (2007) 233 ALR 389 at [152].

the flaw in the majority reasoning was to separate the insurance and the workers' compensation provisions so as to characterise the laws in question as valid under the corporations power. Kirby J said this separation ignored the 'essential legal and practical inter-connection between the substantive compensation provisions and the provisions for insurance' highlighted in the Knibbs report[25] and found that the separation of the rights to workers' compensation from insurance obligations was an unreal distinction and, therefore, held that the licensing provisions were laws in respect of insurance.[26]

Kirby J then examined whether those laws affected the operations of state insurance in accordance with the priniples established in *Bourke* and argued that the case for invalidation of the federal law was stronger in the case before him than in *Bourke*. First, it impinged on the obligations of Optus under the Accident Compensation Act 1985 (Vic). Second, it affected the rights of third parties, namely, workers covered by that Act. Third, it terminated the rights and obligations of the state insurer and affected its viability. Finally, it set a precedent for other corporate employers to shift to the Commonwealth scheme. Accordingly, he held that the SRC Act *did* touch and concern state insurance and therefore infringed the restrictions under s 51(xiv) of the Commonwealth Constitution. He concluded:

> In these circumstances, it would be remarkable if the principle endorsed by all members of this court in *Bourke* should remain standing but its application to the present case could result in an exactly opposite conclusion. Either *Bourke* should be overruled and its principle restated and narrowed or it should be applied with a result favourable to the state and VWA in the much stronger circumstances of this case.[27]

Callinan J also dissented from the majority ruling as he had done in the *WorkChoices* case. He agreed with Kirby J that the laws should be characterised as laws in relation to state insurance. He also argued that if corporate employers could opt out of the state schemes a loss of control by the state insurers would result. This would, in turn, contravene the constitutional restrictions. Like Kirby J he traced the origins of s 51(xiv) by reference to the Convention Debates. In doing so he observed that the state insurance provisions were designed to provide immunity from Commonwealth control, but that this could be negated if an employer could choose to opt out of the state laws; a choice denied to their workers.[28] Callinan J opined that this, in effect, allowed an employer to contract out of the Constitution.

Comment: Pandora's box opened

Following the majority judgment in the *WorkChoices* case, the decision in *Andrews* is unsurprising. In particular, the reasoning in the minority judgments refers back to the reasoning in *WorkChoices*. The reasoning of Kirby J in *Andrews* concludes:

> The fact that the state fails in this appeal is another illustration of the extent of the current disposition of this court to uphold federal legislative power whenever it is

25 Ibid, at [155].
26 Ibid, at [157].
27 Ibid, at [161].
28 Ibid, at [175]–[176].

> challenged by reference to the constitutional position of the states. The current expansion of federal power is demonstrated once again even where, exceptionally, the Constitution carves out an express exclusion protective of state lawmaking.[29]

A number of important judicial differences have emerged from these cases. In both cases the minority judges expressed deep concern at the undermining of the federal system. Kirby and Callinan JJ view the infringement of state legislative powers as throwing the federation out of balance. In *Andrews* Kirby J highlighted the precedent value of the case and indicated that other corporate employers are likely to follow Optus into the federal arena, a development that could, over time, compromise the financial viability of the state and territory compensation schemes. Optus has been joined by Linfox Transport and Logistics, the National Australia Bank and the John Holland Group in obtaining licences under the SRC Act. Australian Safety and Compensation Council Chair Bill Scales indicated that national employers are 'lining up' to join the Commonwealth scheme.[30]

The effect of the majority decisions is several fold. First, it asserts that workers' compensation schemes are somehow distinct from insurance laws, a troubling proposition when, as Kirby J had noted, the essence of workers' compensation schemes is that they are built around the adoption of universal compulsory insurance. Second, the majority appear to have neutered the constitutional restrictions or immunities provided under s 51(xiv). Third, by characterising the SRC Act as a valid exercise of the corporations powers, the majority failed to consider the practical effects of their decision which, as Kirby J noted, may seriously affect the viability of state schemes. Finally, the majority drew sharp distinctions between state insurance and the market for insurance. Kirby and Callinan JJ also noted the market concept, but went further and assessed the issue more holistically, looking at the entire workers' compensation structure including the benefits and obligations under these schemes and how they were inextricably linked to the insurance process.

From a policy perspective, the impact of the High Court's decision is that it has largely demolished the constitutional foundations that have underpinned the federalist framework governing workers' compensation legislation in Australia for the last 100 years. In doing so, it has paved the way for eligible corporate employers to migrate from state schemes at their own volition — without reference to either the views or interests of state insurers or their own workers. More generally, it has strengthened the capacity of a Commonwealth Government — present or future — to implement a national framework for workers' compensation. Whether a comprehensive national scheme will emerge remains to be seen. The crucial point is that the High Court decision in the *Andrews* case has created a new constitutional reality that, for better or worse, puts this objective well and truly on the national policy agenda.

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29 Ibid, at [164] (footnote excluded).

30 Speech to the Australian Self Insurers Summit, April 2007, Sydney.