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WHAT IS STATE INSURANCE? COMMENTARY ON DAVID BENNETT QC'S PAPER

It is often stated that a good judge understands that the most important person to satisfy in litigation is the losing party. If that party is not satisfied of the fairness of the proceeding he or she will leave with a sense of grievance. Having appeared before Justice Bradley Selway for a losing party in *Victorian WorkCover Authority v Andrews*[1] ('*State Insurance Case*'), I can attest that he was a most wonderfully receptive, responsive and impartial judge, and, having known him in one capacity or another for over 10 years, I was delighted to appear before him. I had hoped to do so on many more occasions.

As far as the *State Insurance Case* is concerned, might I set the scene somewhat in terms of the constitutional issue. As the Commonwealth Solicitor-General has indicated, the *State Insurance Case* involved both an administrative law issue and a constitutional law issue. The administrative law issue, the alleged breach of natural justice, was listed for hearing on 25 November 2004. Peter Hanks QC, who appeared for the Victorian Workcover Authority, and I were convinced that there was also a constitutional law issue lurking under the surface of the proceeding. Peter Hanks appeared before Justice Selway on the due date and indicated that there was a need to issue a s 78B notice and that it was likely that at least the Victorian Attorney-General would intervene. Justice Selway, exhibiting the combination of rigour and no-nonsense practical approach of which David Bennett QC has written, insisted that the administrative law issue be dealt with on the due date, s 78B notices be issued and the constitutional law issue be adjourned until 28 January 2005. As another indication of his Honour's ability for case management, he also ordered that the principal submissions of all the parties and intervenors on the constitutional issue be filed before Christmas.

On 28 January we assembled before his Honour. I was acting for the Victorian Attorney-General who had, as anticipated, intervened. At that stage no other Attorney intervened.

As David Bennett has mentioned,[2] the case concerned s 51 (xiv) of the *Constitution*, the power of the Commonwealth Parliament to make laws with respect to 'insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned'. It is the first case to raise the meaning and scope of

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1 *Victorian WorkCover Authority v Andrews* [2005] FCA 94 ('*State Insurance Case*').

2 D. Bennett, 'The Constitutional Decisions of Justice Selway' (2007) 28 *Adelaide Law Review* 79-93.

this power directly although it was not in contest that the principles developed by the High Court in relation to State banking, particularly in the case of *Bourke v State Bank of NSW*, [3] would apply to State insurance. It was also not in contest that the Victorian WorkCover Authority is an emanation of the State.

State insurance can be defined in a manner comparable to the definition of 'State banking' given by the High Court in *Bourke* as the 'business of [insurance] conducted by an [insurer] owned or controlled by a State'.[4]

Our case was a simple one. The relevant State legislation, the *Accident Compensation (WorkCover Insurance) Act 1993* (Vic), imposed an obligation on employers to obtain and keep in force a WorkCover insurance policy with the Victorian WorkCover Authority in respect of the employer's liability under the *Accident Compensation Act 1985* (Vic) to pay no-fault compensation, and in respect of the employer's liability at common law and otherwise. This is compulsory insurance and the obligation to insure is an obligation to take out insurance with the State insurer. The employment had to be connected with the State of Victoria.

Under the relevant Commonwealth legislation, the *Safety, Rehabilitation and Compensation Act 1988* (Cth), a corporation could become licensed if it was declared by the Minister to be an eligible corporation; for example, because, like Optus, it was in competition with a former Commonwealth authority, namely, Telstra.

Upon being declared an eligible corporation, a corporation could apply to the Safety, Rehabilitation and Compensation Commission for a licence to be, in effect, a self-insurer under the Commonwealth scheme and to manage claims and pay compensation in accordance with the Commonwealth Act on a par with Comcare, the Commonwealth compensation scheme.[5]

Most significantly, as David Bennett has indicated, the effect of a licence, which authorises a corporation to accept liability under the Commonwealth Act, is to create an immunity from all laws of a State relating to workers' compensation. Amongst the excluded State laws is the provision in the Victorian Act requiring an employer to insure with the State.[6]

Thus, the effect of the impugned provisions of the Commonwealth's *Safety, Rehabilitation and Compensation Act 1988* (Cth) is to dissolve an obligation which would otherwise exist under State law for employers in Victoria to insure with the Victorian WorkCover Authority in respect of their no-fault liabilities under the

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3 (1990) 170 CLR 276 ('*Bourke*').
4 Ibid 284.
5 *Safety, Rehabilitation and Compensation Act 1988* (Cth), Part VIII.
6 *Accident Compensation (WorkCover Insurance) Act 1993* (Vic), s 7(1)(a).

Accident Compensation Act 1985 (Vic) to compensate employees for injury and loss, their liabilities at common law, and otherwise.

It was our submission before Justice Selway that the Commonwealth laws were beyond power because those laws were laws 'with respect to' 'State insurance'. We argued that they thus infringed the restriction in s 51 (xiv).

Back to 28 January 2005. It was apparent immediately upon the opening of the case that Justice Selway was engaged by the issues and spoke from a position of considerable appreciation of late colonial history. He interrogated all of us in a gentle, serious, yet excited manner about the purpose of the exception in the insurance power for the protection of State insurance. He indicated that he considered that the restriction in s 51 (xiv), as an exception from legislative power rather than the grant of a legislative power, should be construed narrowly in accordance with a general principle of constitutional interpretation that prohibitions under the *Constitution* are to receive a strict construction.

Ultimately, his Honour concluded that the restriction in s 51 (xiv), construed narrowly, would not extend to the scheme of compulsory insurance with the State provided for under the Victorian legislation. Justice Selway held that such schemes would not fall within the meaning of 'State insurance', and thus held that the provisions of the Commonwealth Act were not beyond the legislative power of the Commonwealth Parliament.

People have spoken of Justice Selway's capacity to produce high-quality work with great speed. In this case he handed down judgment in an area of great complexity with little authoritative guidance within three weeks. Having lost, the Victorian Attorney-General decided to appeal and became the appellant in the proceeding, having been only an intervenor below. The appeal was confined to the constitutional issue alone. The matter was appealed to the Full Court of the Federal Court, but before that appeal was heard the Attorney-General had the cause removed to the High Court, under s 40 of the *Judiciary Act 1903* (Cth), as of right. The Attorneys-General of New South Wales, Western Australia and South Australia also intervened in the proceeding in the High Court. On 1 and 2 August 2006, Justice Selway's judgment came under the scrutiny of the High Court.

The Commonwealth relied upon and developed the principles which Justice Selway had enunciated in his judgment. The Commonwealth contended that the impugned provisions of the Commonwealth Act did not affect 'State insurance' properly understood. The Commonwealth's principal argument involved two steps.

First, it argued that the meaning of 'State insurance' in s 51 (xiv) at the time of its drafting between 1897 and 1900 did not include compulsory forms of insurance. More specifically, the Commonwealth argued first, that as a matter of history:

> the insurance known and in existence at the time of drafting of s 51(xiv) did not contain or form part of an arrangement in which there was a requirement for the insurance to be compulsory; and,
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> the development of a requirement for insurance to be compulsory was a novel development well subsequent to the drafting of s 51 (xiv) and was not part of the 'mischief' to which the exception in s 51 (xiv) was directed. [7]

The second step in the Commonwealth's argument involved looking to the judgment of Justice Mason in *Attorney-General (Vic); ex rel Black v Commonwealth*[8] to support the proposition that the restriction in s 51 (xiv), being a prohibition, should be construed strictly so as to have as its fixed meaning, the narrow meaning it bore in 1897.

We pointed out that it was necessary for the Commonwealth to establish both steps in the argument for the Court to find that the impugned Commonwealth law did not infringe the restriction. By contrast, it was only necessary for us to demonstrate either that in 1897-1900 the understanding of insurance extended to compulsory schemes of insurance, and schemes in which the State had a significant or exclusive role, or that, whether or not compulsory schemes of insurance with the State were known at the time of federation, the expression 'State insurance' should now be regarded as extending to such schemes, compulsory insurance now being commonplace, including not only workers' compensation insurance but also motor vehicle insurance and professional indemnity insurance. In some instances the obligation is to insure with the State.

We sought first to establish that, as at 1897-1900, compulsory forms of insurance were in existence in Germany and other parts of Europe. We obtained a 1910 report by the Commonwealth Statistician, who had conducted a comprehensive survey of European social insurance schemes, which included insurance for workers' compensation.[9] The survey revealed that by 1897 many countries in Europe had enacted compulsory schemes for the insurance of workers against sickness, accident, invalidity and old age. Such schemes were referred to as 'social insurance' (whether voluntary or compulsory), an expression which was 'ordinarily employed ... to denote insurance of workmen, as a distinctive class, against sickness, accident, death, old age, or other adversity'.[10] The Commonwealth Statistician wrote:

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7 Commonwealth submissions at [17.2], [17.3]. Transcript of Proceedings, *A-G (Vic) v Kevin James Andrews, Minister for Employment and Workplace Relations* (High Court of Australia, David Bennett QC, 2 August 2006, ll 6125).

8 (1981) 146 CLR 559 (*'Defence of Government Schools (DOGS) Case'*).

9 Parliament of the Commonwealth of Australia, *Social Insurance: Report by the Commonwealth Statistician*, *GH Knibbs* (1910).

10 Ibid 11.

> To meet the demand for social insurance a number of systems have been devised. Insurance or relief funds have been created, either on a compulsory or voluntary basis, by the central government, by national or local bodies, by groups of working men, by industrial establishments, and by employers and employés operating conjointly …These various schemes of insurance … are all designed for the benefit of wage-workers and persons earning small salaries, and their purpose usually is [inter alia] (1) to compensate to some extent for the loss of wages or salary occasioned through accident, sickness, or other disability. [11]

Social insurance laws had been introduced by Bismarck in Germany in 1883 and expanded in 1884.[12] Compulsion was seen as necessary for social insurance to be effective. As the Statistician said:

> The fundamental principles of the German system are *compulsory insurance* on the one hand, and *far-reaching freedom of action* on the other. As a result of experience with voluntary insurance, *compulsion was deemed to be indispensable*, inasmuch as under the voluntary system only the better-paid and more thrifty classes of workmen were reached. [13]

The distinctive role of the State was recognised:

> According to the German law each insurance organization, whatever form it may have adopted, must be under the supervision of the State, and in Germany it appears to be an open question whether all such organizations will not in due course be *transformed into institutions wholly organised by the State.* [14]

Other countries in Europe followed Germany's lead. By 1897, compulsory social insurance had also been introduced in Austria to bring it on a par with Germany, so that 'as in Germany, all accidents [will be] indemnified without need to prove negligence'.[15] Compulsory social insurance had also been introduced in Hungary, Finland, Norway, France and Belgium.[16] Holland established a 'State Bank' to deal with 'grants, refusals, changes and cessation of compensations.'[17] Other 'insurance banks' provided this form of insurance, as did joint stock companies formed for this purpose. In Norway, the Statistician wrote: [18]

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11 Ibid.

12 *Act for Insurance against Sickness* (1883); *Act for Insurance against Industrial Accidents* (1884).

13 Knibbs, above n 9, 22 (original emphasis).

14 Ibid (original emphasis).

15 Knibbs, above n 9, 36-7.

16 See Knibbs, above n 9, 41, 52-3, and 62-4.

17 Ibid 59, 61. (Under a 1901 Act).

18 Ibid 63.

> [T]he working of the system of insurance against accidents is intrusted to a State insurance institution, extending over the whole kingdom, which institution is authorized to effect also certain voluntary insurances. The costs of administration are borne by the State Treasury.

By an Act of 1868, a State insurance institution was established in France.[19] Moreover, it was acknowledged by other historians that:

> State insurance was long an economic and social theory before it became a fact, and the general principles to which the theory appealed for its sanction were used in Austria, France, and England with frank acknowledgement that Germany had originated the idea out of which it all grew. [In Germany, there was] Dr Schaeffle [who] is called the father of compulsory state insurance. He conceived the plan in the year 1867 or prior thereto. [20]

We also found evidence that the subject of compulsory insurance for no-fault workers' compensation schemes had 'first attracted the attention of legislative agents in the United States in 1893'.[21] International Congresses specifically directed to considering social insurance were held in Paris (1889), Berne (1891), Milan (1894), Brussels (1897), Paris (1900), Dusseldorf (1902), Vienna (1905) and Rome (1908).[22]

At about the same time there were legislative developments in England in 1880 and 1897 in relation to employers' liability for injuries and loss suffered by employees. While those Acts did not introduce compulsory insurance, the Parliamentary debates manifested an awareness of the European schemes of legislation within the United Kingdom, and an appreciation of the need for insurance of the newly extended liabilities.

Within the colonial legislatures of Australia, there was direct recognition to be found in the parliamentary debates of the developments in England as well as the systems of social insurance in Germany and other parts of Europe. Of all of this the framers of the *Constitution* must have been aware.

On the basis of this history, we argued that it could not be inferred that in 1900 the meaning of the word 'insurance' in the expression 'State insurance' in s 51 (xiv) did not include compulsory systems of insurance in which the State or the government played a principal regulatory role or was the insurer, nor could it be accepted that a requirement for insurance to be compulsory was a novel development well subsequent to the drafting of s 51 (xiv).

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19 Ibid 64 (The Caisse Nationale d'assurance en cas d'accidents).

20 James H. Boyd, *Workmen's Compensation and Industrial Insurance* (1913), 36-8.

21 Ibid 17.

22 Knibbs, above n 9, 20.

Our alternative submission was that, in any event, the restriction in s 51 (xiv) ought not to be fixed in meaning to that which it had in 1897. We submitted that this was contrary to orthodox principles of constitutional interpretation and was not otherwise supported by principle. It was our submission that there is no such generally accepted or universally applicable principle of construction with respect to constitutional prohibitions to the effect that they ought to be construed narrowly. We argued that, insofar as there is any support for the principle to be found in the *DOGS Case*, it is of limited and uncertain application, and was not applicable here. The *DOGS Case* concerned the prohibition in s 116 of the *Constitution* on the Commonwealth Parliament against passing a law establishing a religion.

We accepted that Justice Mason had remarked in the *DOGS Case* that 'a constitutional prohibition must be applied in accordance with the meaning which it had in 1900'.[23] On the other hand, Chief Justice Barwick had said: 'I can find no reason why the words of the *Constitution* should not be given their full effect, whether they be expressed in a facultative or prohibition provision.'[24] Justice Gibbs held that 'it remains necessary to determine the meaning of the words… themselves'.[25] Justice Aickin agreed with both Gibbs and Mason JJ. Justice Stephen interpreted the words of the prohibition according to their common usage. Justice Wilson supported Justice Mason. Justice Murphy dissented.

We pointed out that the observations of Mason and Wilson JJ were later rejected by the whole Court in the context of another prohibition, s 114 (the prohibition on the Commonwealth taxing the property of the States), in *Deputy Commissioner of Taxation v State Bank of NSW*,[26] where it was suggested that the principle might have some application in limited circumstances. The principle was further rejected in *SGH Ltd v Commissioner of Taxation*,[27] again in the context of s 114.

During the hearing, we also took the Court to the liberal construction given to the word 'religion' in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)*[28] (in which scientology was recognised as a religion) where there was no suggestion that in s 116 'religion' ought to be given a fixed meaning to reflect that which it bore in 1900. To all of this Justice Gummow responded by saying that he believed the authors of the restrictive principle had later regretted their approach.[29]

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23 *DOGS Case*, 614-15.
24 Ibid 577.
25 Ibid 603.
26 (1992) 174 CLR 219.
27 (2002) 210 CLR 51.
28 (1983) 154 CLR 120.
29 Transcript of Proceedings, *A-G (Vic) v Kevin James Andrews, Minister for Employment and Workplace Relations* (High Court of Australia, Gummow J, 1 August 2006, ll 3253-4).

The High Court has reserved its decision. We will await with interest to see how the High Court determines the matter.[30]

What can be said about the proceeding is that the High Court has had the benefit of a judgment of the highest quality written by a judge who understood his responsibility to the administration of justice.

[30] Since this paper was presented, the High Court delivered its judgment on 21 March 2007. By majority it dismissed the appeal: *Attorney-General (Vic) v Andrews* (2007) 233 ALR 389; (2007) 81 ALJR 729; [2007] HCA 9.