reinstate *Sullivan v Gordon* in NSW, modelled on s100 of the ACT legislation. The Lawyers Alliance intends to make similar submissions in other jurisdictions. It is worth noting that, at present, insurance premiums have been set on the basis of insurers being liable to pay *Sullivan v Gordon* damages. Accordingly, there should be no significant increase in premiums were legislation to restore the rights to be removed by the High Court.

The NSW lawyers Alliance submissions can be found at www.lawyersalliance.com.au ■

Notes: 1 (1977) 139 CLR 161. **2** Actions for loss of consortium and *actio per quod servitium amisit* have being abolished in most jurisdictions. **3** [1982] 2 NSWLR 26. **4** (1999) 47 NSWLR 319. **5** The *Sullivan v Gordon* principle was also adopted in Queensland, the ACT and Western Australia but was not followed in South Australia. **6** [2005] HCA 64. **7** [at paragraph 66]. **8** *Nguyen v Nguyen* (1990) 169 CLR 245. **9** See s59(3) of the *Civil Liability Act* 2003 (QLD), s281D of the *Wrongs Act* 1958 (VIC) and s100 of the *Civil Law (Wrongs) Act* 2002 (ACT).

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Early challenge to federal IR reforms

Victorian WorkCover Authority v Andrews [2005] FCA 97

By Liat Blacher

This case is of interest because it offers a first test of employers' reactions to the new federal IR agenda. With forthcoming changes likely to hinge on corporations' power in the constitution, this case provides insight into the response that can be expected from companies and the courts. The case challenges Optus's choice to enter the ComCare scheme in preference to the Victorian WorkCover Authority (VWA) compensation scheme.

The facts of the case restrict its application because the ComCare option is open only to those corporations that compete with a Commonwealth authority. However, given the growing prevalence of large, national employers, the case is sufficiently important that the VWA is currently seeking leave to appeal to the High Court.[1]

The case concerned two corporations, Optus and Toll, which applied to the federal minister to be determined as eligible corporations under the *Safety, Rehabilitation and Compensation (SRC) Act*.[2] Neither Optus nor Toll gave any notice to the VWA of their intentions to apply.

If deemed eligible, the two corporations would become 'employers' under the *SRC Act* and be liable to pay compensation under that Act as opposed to under the state workers' compensation schemes.[3]

The basis of Optus's application was that it was in competition with Telstra (which is covered by the *SRC Act*) and that it was desirable in the interests of a level playing field that Optus be subject to the same scheme as Telstra. In December 2004, Optus was issued with a self-insurance licence.[4]

The VWA challenged the determination of the minister on two grounds. It first argued that he failed to afford the VWA a fair hearing based upon administrative law principles and, second, that Comcare's powers exceeded the constitutional powers of the federal parliament, in that it impermissibly legislated in relation to *state insurance*.

The Federal Court rejected both arguments. It found that there was no obligation on the minister to take into account the VWA's interests and that, further, federal parliament did not go beyond its constitutional powers by legislating in the manner that it did.

Selway J acknowledged that, generally speaking, the VWA >>

had valid standing to challenge a decision. His Honour noted[5] that the VWA had statutory responsibility for the administration of the *Accident Compensation Act* 1985 (Vic) and the *Accident Compensation (WorkCover Insurance) Act* 1993 (Vic). Its role included the prosecution of those required to be insured under that legislation. Therefore, if the VWA was correct that the minister's declaration was invalid, then the licenses sought would also be invalid. If that were the case, the VWA would have statutory responsibilities to discharge, including the enforcement of the state legislation.

The problem in this case was that the wording of the *SRC Act*, in relation to the minister's capacity to grant a licence, was based only upon the minister's satisfaction that the *SRC Act* applied,[6] as opposed to criteria regarding specific consideration of certain issues.[7]

The VWA then argued, on natural justice grounds, that it had a 'legitimate expectation' that its interests would be considered. In this case, the VWA was unable to show that there was something in the statutory scheme, or in the decision-making process adopted by the minister, that meant that the VWA could legitimately expect a non-prejudiced decision.[8] This expectation would extend to the granting of a licence.

The VWA's second main ground was that the federal parliament went beyond its legislative powers and legislated outside the scope provided by the Constitution.[9] It was submitted that the proviso contained in the Constitution, being 'other than state insurance,' applied in this case.[10]

The VWA argued further that the *SRC Act* interfered with and constrained the state scheme.[11] His Honour rejected this submission on the basis that the argument treated state insurance as denoting or including the policies and purposes intended to be achieved by the Victorian Parliament under the relevant legislative schemes. The scope of the proviso did not extend protection to the general scheme of workers' compensation as reflected in those Acts.[12]

Both strands of the arguments will no doubt receive closer scrutiny in the course of WorkCover's special leave application. At the very least, the case highlights the continuing prominence of workers' compensation within ongoing legal debate. At most, it predicts the likely future course of litigation connected with the coming battle between the states and the commonwealth over industrial relations. ■

Notes: **1** The interest of WorkCover was initially aroused as some of the rights and entitlements of Optus employees could be affected by Optus being licensed under the *SRC Act*. Most notably, the capped amount for non-economic loss payable under the *SRC Act* was $328,000 less than the capped amount for non-economic loss payable under the *Victorian Accident Compensation Act*. **2** At that stage, Optus paid annual premiums to the Victorian fund of approximately $1.4 million. Toll was a self-insurer but paid an annual contribution to the Victorian fund of $250,000. **3** See s108A(7)(a) of the *SRC Act*. **4** At that stage, Toll's application was undetermined. **5** At para 16. **6** See s100 of *SRC Act*. **7** It is worth noting that one consideration for the minister under the scheme is the effect that the granting of a licence may have on the operation of the state workers' compensation scheme, but this consideration is only one of a number of suggested considerations. **8** At para 31 - unlike a circumstance where the decision was based upon factual finding that was adverse to the reputation of the VWA. **9** The insurance power in s51(xiv) provided as follows: 'The Parliament shall...have power to make 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.' **10** Note – it was not in issue that the activities in which the VWA engaged were classified as 'state insurance'. **11** At para 63. **12** Rather, what was protected by the proviso was the decision by the Victorian government about whether and how it would carry on an insurance business, the contractual terms upon which it chose to do so and the business actually conducted by the state. The Commonwealth legislation did not impinge on those decisions. A further argument was made that the insurance consisted of and included indemnities granted by legislation and that the compulsory indemnity arrangements upon Optus and the Toll Companies imposed under the state legislation were insurance. This argument was also rejected.

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