# HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ

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ATTORNEY-GENERAL FOR THE STATE OF VICTORIA APPELLANT

AND

KEVIN JAMES ANDREWS, MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS & ORS RESPONDENTS

*Attorney-General (Vic) v Andrews* [2007] HCA 9
*21 March 2007*
M83/2005

**ORDER**

*1. Appeal dismissed.*

*2. Appellant to pay the costs of the first, second and third respondents.*

**Representation**

P M Tate SC, Solicitor-General for the State of Victoria with M K Moshinsky for the appellant (instructed by Victorian Government Solicitor)

D I Star for the first and second respondents (instructed by Australian Government Solicitor and Phillips Fox)

Submitting appearance for the third respondent

P J Hanks QC with R J Orr for the fourth respondent (instructed by Corrs Chambers Westgarth)

**Interveners:**

D M J Bennett QC, Solicitor-General of the Commonwealth with D I Star intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

R J Meadows QC, Solicitor-General for the State of Western Australia and R M Mitchell intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor's Office (Western Australia))

M G Sexton SC, Solicitor-General for the State of New South Wales and M J Leeming intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for New South Wales)

C J Kourakis QC, Solicitor-General for the State of South Australia with S A McDonald and J-A Lake intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor's Office (South Australia))

## CATCHWORDS

### Attorney-General (Vic) v Andrews

Constitutional law (Cth) – Inconsistency of laws – The third respondent, Optus Administration Pty Ltd, was granted a licence under Pt VIII of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth), which subjected it to the scheme of liability contained in that Act – Whether the *Accident Compensation Act* 1985 (Vic) and the *Accident Compensation (WorkCover Insurance) Act* 1993 (Vic) were invalid to the extent that they altered, impaired or detracted from the operation of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth).

Constitutional law (Cth) – Legislative power – Insurance – Meaning of "other than State insurance" – Whether ss 104(1), 108(1), 108A(7)(a) of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) were invalid as laws with respect to "State insurance" within the meaning of s 51(xiv) of the Constitution – Whether the scheme established by the *Accident Compensation Act* 1985 (Vic) and the *Accident Compensation (WorkCover Insurance) Act* 1993 (Vic) constituted "State insurance".

Constitutional law (Cth) – Legislative power – Insurance – Meaning of "other than State insurance" – Whether the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) was invalid for indirectly circumventing the exclusion of "State insurance" in s 51(xiv) of the Constitution.

Statutes – Interpretation – Interaction between the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) and the *Accident Compensation Act* 1985 (Vic) and the *Accident Compensation (WorkCover Insurance) Act* 1993 (Vic) – Whether the operation of s 44(1) of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) is such as to remove liabilities or obligations to which s 82 of the *Accident Compensation Act* 1985 (Vic) and s 7(1)(a) of the *Accident Compensation (WorkCover Insurance) Act* 1993 (Vic) would otherwise attach.

Words and phrases – "alter, impair or detract", "at common law or otherwise", "other than State insurance".

Constitution, ss 51(xiii), 51(xiv), 109.
*Safety, Rehabilitation and Compensation Act* 1988 (Cth), ss 44, 45, 104(1), 108(1), 108A(7); Pts II, VIII.
*Accident Compensation Act* 1985 (Vic), ss 5(1), 82(1), 134AB; Pt IV, Div 8A.
*Accident Compensation (WorkCover Insurance) Act* 1993 (Vic), ss 5, 7(1).

1 GLEESON CJ. The issue in this appeal is whether ss 104(1), 108(1) and 108A(7) of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) ("the Commonwealth Act") are invalid. They are said to be invalid because they infringe what has been described as the proviso, concerning State insurance, in s 51(xiv) of the Constitution.

2 The impugned provisions, and the wider statutory context in which they are contained, appear from the reasons of Gummow, Hayne, Heydon and Crennan JJ. Those reasons also explain the intersection between those provisions and Victorian legislation which provides for workers compensation, deals with common law entitlements of injured workers, provides for compulsory insurance in respect of employers' liabilities, and gives the Victorian WorkCover Authority, in effect, a monopoly in respect of that insurance business. The Commonwealth provisions, if valid, enable the third respondent ("Optus") to operate, not under the Victorian compensation scheme, but under the Commonwealth compensation scheme. Optus is a competitor of Telstra Corporation Ltd ("Telstra"), a corporation that was previously a Commonwealth authority, and is within the class of potential eligible corporations described by s 100 of the Commonwealth Act. Because Optus is a competitor of Telstra, and because Telstra is covered by the Commonwealth Act, Optus applied to be made an eligible corporation, and to be licensed under the Commonwealth Act, arguing that, in the interests of a "level playing field", it should be subject to the same workers compensation scheme as Telstra. The Attorney-General for the State of Victoria, and the Victorian WorkCover Authority, argue that, insofar as the Commonwealth Act purports to permit that, it is invalid. They maintain that Optus must remain subject to the Victorian scheme, and must insure with the Victorian WorkCover Authority. More specifically, they argue that the impugned provisions are beyond Commonwealth legislative power to the extent that they purport to authorise the grant to Optus of a licence under the Commonwealth Act, authorise Optus to accept liability for workers compensation, and remove Optus from "the scheme of State insurance" established by the Victorian legislation. The reference to a "scheme of State insurance" is legally tendentious, but it is apt to express the practical interests that are at stake.

3 The impugned provisions are contained in Pt VIII of the Commonwealth Act, which deals with "Licences to enable Commonwealth authorities and certain corporations to accept liability for, and/or manage, claims". Section 104(1) empowers the second respondent, the Safety, Rehabilitation and Compensation Commission, to grant a licence to a Commonwealth authority or an eligible corporation. If a licence is granted to an eligible corporation, the Commonwealth Act applies in relation to employees of the corporation in a way similar to the way in which it applies to employees of the Commonwealth, but such application is subject to the acceptance by the corporation of liability under the Commonwealth Act for payments in respect of injury or death of employees, and the acceptance by the corporation of the function of managing claims under the Commonwealth Act (s 98A). Section 108(1) provides that a licence may provide

that a licensee is authorised to accept liability to pay compensation or other amounts under the Act in respect of injury or death of employees. Section 108A(1) provides that if a licensee is so authorised, the licensee is liable to pay compensation under the Act in respect of injury or death. Section 108A(7) provides that, after a licence comes into force, no law of a State relating to workers compensation applies to the licensee in respect of injury or death the subject of the liability accepted by the licensee under the Commonwealth Act. Liability under State law before the licence came into force is unaffected.

4 Sections 104(1) and 108(1) do not deal with the subject of insurance, other than in the colloquial sense that a licensed corporation is sometimes referred to as a self-insurer. It is left to the corporation to decide for itself what, if any, insurance cover it arranges in respect of its liabilities for death or injury of workers. Subject to the argument in this appeal, the power to enact those provisions is conferred by s 51(xx) of the Constitution (the corporations power) and, in their application to Optus, perhaps also by s 51(v) (dealing with postal, telegraphic, telephonic, and other like services). It may be that, subject to the same qualification, in respect of part of its operation (the part that would concern a State law relating to compulsory insurance) s 108A(7) is also supported by s 51(xiv) (the insurance power).

5 Section 51 of the Constitution empowers the Parliament to make laws with respect to:

> "(xiv) insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned".

6 The expression "State insurance" means the business of insurance conducted by an insurer owned or controlled by a State, that is to say, a business of State government insurance[1]. (It is unnecessary to decide the extent of the concept of control in this context. It is accepted that the Victorian WorkCover Authority's business constitutes State insurance.) As a matter of history, State governments, through government insurance offices of various kinds, have conducted insurance business. It is, however, important to distinguish between a State legislative scheme which makes insurance of a certain kind compulsory, and a State owned or controlled business of insurance. In New South Wales, for example, for most of the twentieth century workers compensation insurance was compulsory, but the insurers were mainly private insurers subject to statutory oversight and regulation. The same is true of Victoria. The Court was told, in the course of argument, that Victoria established a State insurance office in 1914, when compulsory insurance for workers compensation liability was introduced,

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**1** *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 52, 65, 70, 78, 86, 97; *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 284.

but that office was only one of many insurers, and its principal function was to regulate authorised insurers. The Government Insurance Office of New South Wales insured some State government authorities, but most workers compensation insurance policies were written by non-government insurance companies. Paragraph (xiv) of s 51 shows that, at the time of the framing of the Constitution, it was contemplated that States might wish to set up State insurance offices. It does not show, and there is nothing in the historical material to suggest, that it was proposed, or was regarded as necessary, to confer on those offices a monopoly in respect of any particular kind of insurance business.

7 At the time of Federation, none of the Australian colonies carried on any kind of insurance business. New Zealand, which was considered as a possible State, carried on a government life assurance business. During the Convention Debates, Mr O'Connor said[2]:

> "It was suggested that colonies might undertake State insurance, as was done in New Zealand, and it was held that State insurance should not come under the general [Commonwealth] laws."

8 Mr Higgins said[3]:

> "My idea is this: That the Federal Parliament should be allowed to deal with all insurance matters, with only one limitation. I would refrain from dealing with State insurance in the colony establishing it, but if that colony extends its operations to other colonies, I do not see why it should not be treated like an ordinary company."

9 That explains the reference to "State insurance extending beyond the limits of the State concerned". State insurance does not mean the market for insurance in a State, or a State's regulatory scheme concerning insurance. If it meant those things, it may not be capable of extending beyond the limits of the State concerned. State insurance means a State owned or controlled business which undertakes insurance of a certain kind. To use the words of Mr Higgins, it is something that is capable of being treated like an ordinary company if it extends its business activities beyond the limits of the State concerned. The business of the Victorian WorkCover Authority is State insurance. The market for insurance in Victoria is not State insurance within the meaning of par (xiv), although in a different context it could have that meaning; neither is the legislative regime governing some particular form of insurance in Victoria.

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**2** *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 17 April 1897 at 779.

**3** *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 17 April 1897 at 781.

Furthermore, although workers compensation insurance became compulsory in Victoria in 1914, the State owned insurance business was, for most of the twentieth century, a very small participant in the Victorian market for workers compensation insurance. No single insurer enjoyed a monopoly in that market, and no such monopoly was necessary to sustain viability.

10 Compulsory insurance is one thing; a State monopoly of a certain kind of insurance business is another. If a State, by setting up an insurance business and legislating to require residents of the State both to effect insurance of a certain kind and to effect such insurance with the State's insurance office, could effectively withdraw that kind of insurance from Commonwealth control on the basis that the monopoly was part of the relevant "State insurance", then it is difficult to see what scope would be left, in the case of that kind of insurance, for Commonwealth legislative power. Although accepting that State insurance means a business of insurance owned or controlled by a State, the appellant and the fourth respondent, in their arguments, drifted towards the idea that the expression covered the market for insurance of a certain kind, or the legal regime governing such a market, with the consequence that any derogation from the State insurer's monopoly of workers compensation insurance would infringe the protection conferred by the words of qualification in par (xiv).

11 Section 51(xiv) does not confer on the States an exclusive power to make laws with respect to State insurance. So much was established by the decision of this Court in *Bourke v State Bank of New South Wales*[4] in relation to the cognate provisions of s 51(xiii) concerning State banking. The central issue in the appeal concerns the nature and extent of the protection of State insurance conferred by the qualification to par (xiv), but it does not go so far as to give the States exclusive power to enact any law that can be described as a law with respect to State insurance.

12 The decision in *Bourke* also establishes that the restriction imposed by the proviso in par (xiv) applies to Commonwealth legislative power generally, provided the Commonwealth law in question is, or is also, a law with respect to insurance[5]. The qualification at the end of the preceding sentence accords with the second part of what was said by Dixon CJ in *Attorney-General (Cth) v Schmidt*[6]. The application of both parts of what Dixon CJ said was important to the reasoning in *Bourke*. In its bearing on the present case, it means that a law supported by the corporations power is subject to the restriction imposed by the proviso to par (xiv), if it is also a law with respect to insurance.

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**4** (1990) 170 CLR 276 at 288.

**5** (1990) 170 CLR 276 at 289.

**6** (1961) 105 CLR 361 at 371-372.

13 Much of the argument on the appeal was devoted to a consideration of what further light *Bourke* throws on the present problem. That case concerned par (xiii) of s 51, which provides that the Parliament may make laws with respect to:

> "banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money".

14 As has been noted, it was held that "State banking" does not mean banking in a State; it means a State owned or controlled business of banking. A number of the paragraphs of s 51 confer on the Commonwealth Parliament power to enact laws that could affect such a business. Three obvious examples are pars (xii) (currency, coinage, and legal tender), (xvi) (bills of exchange and promissory notes) and (xvii) (bankruptcy and insolvency). A Commonwealth law enacted under any of those heads of power could affect, at least incidentally, a business of banking, including a business conducted by a State bank. The Commonwealth legislation in question in *Bourke* was ss 52 and 52A of the *Trade Practices Act* 1974 (Cth). Those sections prohibited misleading or deceptive, and unconscionable, conduct by corporations in trade or commerce. "Corporation" was defined to include a financial corporation, and "financial corporation" was defined to include a bank. The State Bank of New South Wales carried on State banking. The issue in the case, as identified in the Court's reasons for judgment, was whether the legislative power of the Commonwealth extended to regulate a State banking transaction taking place wholly within the limits of the State concerned[7]. Sections 52 and 52A of the *Trade Practices Act* were enacted in reliance on the corporations power. The Court held that, in their application to the conduct of the State Bank in its banking business, they were also laws with respect to banking[8]. Therefore the proviso to par (xiii) applied and protected the State Bank from Commonwealth regulation of its banking transactions[9].

15 There was debate about the meaning of some of what was said by the Court in explaining its reasons[10]. It is important to observe the way in which the Court formulated the issue it was deciding. It was a question of Commonwealth

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**7** (1990) 170 CLR 276 at 284.

**8** (1990) 170 CLR 276 at 290.

**9** (1990) 170 CLR 276 at 288-289, 290-291.

**10** The paragraph at the foot of page 288 and to the top of page 289 was subjected to particular scrutiny.

power to regulate a State banking transaction, that is, a banking transaction carried out by a State bank. It has already been noted that there are various powers conferred by s 51, the exercise of which could affect State banks, or State banking transactions. Sections 52 and 52A of the *Trade Practices Act*, in their application to the banking business of a State bank, were held to be laws with respect to banking, and that regulation of State banking was held to infringe the protection conferred by the proviso to par (xiii).

16 *Bourke* did not decide that a State may confer on a State bank a monopoly on banking business within the State, free from Commonwealth interference. It declared a limit to the capacity of the Commonwealth to regulate banking transactions entered into by a State bank.

17 In the present case, the impugned provisions do not seek to regulate insurance transactions entered into by the Victorian WorkCover Authority. They do not prohibit the conduct of State insurance, and they have not been shown substantially to impair the capacity of Victoria to conduct State insurance. They do not invade the area of protection given by the proviso to par (xiv).

18 By creating a Commonwealth scheme which applies to Commonwealth authorities and certain eligible corporations (being corporations that fall within a confined class) and their employees, the Commonwealth detracts from the comprehensiveness of the Victorian legislative scheme concerning compensation of workers, and insurance against compensation liability. In that respect, the Victorian WorkCover Authority has never enjoyed a monopoly. However, the Victorian scheme is not "State insurance"; nor is the Victorian workers compensation insurance market. The circumstance that it is the current policy of the Victorian Parliament that there be a single insurer of employers who are subject to the Victorian scheme of liability (a relatively new policy), and compulsory insurance of such liability, does not alter the case. Some of the argument for the appellant appeared to treat "State insurance" as meaning the state of affairs in Victoria concerning insurance. The proper meaning of that expression is, relevantly, the insurance business of the Victorian WorkCover Authority. The Constitution does not preclude the Commonwealth Parliament from enacting any laws which might incidentally affect that business. As in the case of State banking, there are various powers conferred by s 51 the exercise of which could affect that business. The impugned laws do not regulate the Authority's insurance transactions, and they do not prohibit Victoria from conducting, or substantially impair its capacity to conduct, insurance business.

19 No question arises in this case as to the extent of the power of the Commonwealth to legislate, in a manner that binds a State insurance office, with respect to matters such as accounting standards, financial viability, or internal organisation. Furthermore, the question of the practical application of what might be called the proviso to the proviso, that is to say, the qualification

concerning a State insurance office which has activities extending beyond State boundaries, does not arise.

20 The decision of Selway J was correct. The appeal should be dismissed with costs.

21 GUMMOW, HAYNE, HEYDON AND CRENNAN JJ. On 7 July 2004, the first respondent ("the Minister") made a declaration that the third respondent ("Optus") was eligible to be granted a licence under Pt VIII of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) ("the Commonwealth Compensation Act"). On 1 November 2004 that licence was granted to Optus by the second respondent[11] ("the Commission"). The licence came into operation on 30 June 2005.

22 The fourth respondent, the Victorian WorkCover Authority ("the VWA"), is established as a body corporate by s 18 of the *Accident Compensation Act* 1985 (Vic) ("the Victorian Compensation Act"). Among its objectives and functions stated in ss 19 and 20 are the administration of that statute and the *Accident Compensation (WorkCover Insurance) Act* 1993 (Vic) ("the Victorian Insurance Act") (s 19(b)), the payment of compensation to persons entitled under the Victorian Compensation Act (s 20(b)) and the provision of insurance for the purposes of that statute and of the Victorian Insurance Act (s 20(f)). The VWA has power conferred by s 252 of the Victorian Compensation Act to institute prosecutions for offences against both statutes. It is not in dispute that the VWA answers the description of the "State" in the relevant provisions of the Constitution[12].

23 The purpose of the Victorian Insurance Act, as stated in s 1, is:

> "to provide for compulsory WorkCover insurance for employers under WorkCover insurance policies and the payment of premiums for WorkCover insurance policies".

24 Optus held such insurance under the Victorian Insurance Act and, for the year ended 30 June 2004, paid premiums totalling $1,377,412 for that insurance. Optus had over 9,000 employees across Australia, 60 per cent of whom were based in New South Wales and a further 20 per cent in Victoria. Optus expected that the pre-tax financial benefits to it of being licensed under Pt VIII of the Commonwealth Compensation Act compared to its obligations to pay premiums under the Victorian legislation to be $186,000 per month.

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**11** The members of the Safety, Rehabilitation and Compensation Commission, established by s 89A of the Commonwealth Compensation Act.

**12** cf *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51.

The dispute

25 Does the grant to Optus of the licence under Pt VIII of the Commonwealth Compensation Act produce the result that Optus no longer is subject to the compulsion imposed by the law of Victoria to insure with the VWA? The VWA, by action instituted in the Federal Court of Australia, sought declaratory relief that certain provisions of the Commonwealth Compensation Act upon which Optus relied for that result were invalid.

26 Section 51(xiv) of the Constitution provides that the Parliament shall, subject to the Constitution, 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". In short form, the contention of the VWA and of the Attorney-General for Victoria, who intervened in the Federal Court in support of the VWA, was that the federal laws in question fell outside the legislative power of the Commonwealth by reason of the words "other than State insurance" in s 51(xiv).

27 The text of par (xiv) may be compared with that of par (xiii):

> "banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money".

This provision, particularly the phrase "other than State banking", was construed in *Bourke v State Bank of New South Wales*[13], and it will be necessary to refer further to *Bourke* later in these reasons.

28 The application to the Federal Court was heard by Selway J who dismissed it[14]. His Honour's conclusion respecting the construction of s 51(xiv) appears from the following passage[15]:

> "It is clear from the mischief to which the proviso was directed, that what was envisaged was the continuing capacity of the State insurance business to operate in a commercial marketplace. The use of the words 'State

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**13** (1990) 170 CLR 276.

**14** *Victorian WorkCover Authority v Andrews* [2005] FCA 94.

**15** [2005] FCA 94 at [70].

insurance business' to describe the meaning of 'State insurance' needs to be understood in that context[16]. There is no basis for treating the words 'State insurance' as extending to State laws requiring persons to insure with a State insurer or to State laws conferring an economic monopoly on a State insurer. In my view such State laws are not themselves 'State insurance'."

29 An appeal to the Full Court of the Federal Court was instituted by the Attorney-General for Victoria. Upon application then made by the Attorney-General to this Court under s 40 of the *Judiciary Act* 1903 (Cth), the whole of that cause was removed into this Court.

30 The cause removed was then set down for argument before the Full Court of this Court. In that argument the appellant, the Attorney-General for Victoria, was supported by the VWA, and by the intervening Attorneys-General for New South Wales, South Australia and Western Australia. The Attorney-General of the Commonwealth intervened in support of the Minister and the Commission and the Attorney-General's submissions were adopted by them. Optus submitted to any order save as to costs.

31 In this Court, as in the Federal Court, much of the argument turned upon the construction and application of the phrase "other than State insurance" in s 51(xiv) of the Constitution. Much attention was given to the development in the last quarter of the nineteenth century of compulsory workers compensation insurance systems, particularly in Imperial Germany, and to what had been said on the subject in the Convention Debates. However, as the oral argument for the appellant proceeded, it became apparent that there were associated, and in some respects anterior, issues respecting the application of s 109 of the Constitution to the State legislation in question.

32 For the reasons that follow, which differ in their focus somewhat from that in the reasons of Selway J, the appeal should be dismissed. To understand the reasons for that outcome in this Court, it is necessary to begin with further consideration of the federal and State legislative schemes and particular provisions of the legislation.

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**16** See *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 at 116 [66] and *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 51-52, 86; *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 193-194, cf at 331.

The Commonwealth Compensation Act

33 It is necessary to begin with the position of Comcare in the federal compensation scheme. Comcare is established as a body corporate by ss 68 and 74 of the Commonwealth Compensation Act. Comcare is required to determine the amount of premiums (s 97) from which, as "Comcare-retained funds" (s 90C(5)), it discharges liabilities in relation to compensation incurred by Comcare under the Act (s 90C(1)).

34 Part II of the statute (ss 14-33) is headed "Compensation". Subject to the other provisions of that Part, Comcare is rendered by s 14 liable to pay compensation in accordance with the statute "in respect of an injury suffered by an employee if the injury results in death, incapacity for work, or impairment". In particular, s 24 provides for compensation for injuries resulting in a permanent impairment, s 25 for interim payment of compensation for such injuries and s 27 for compensation for non-economic loss for such injuries. The term "employee" is defined in s 5(1) in such a fashion as to include those employed by the Commonwealth or by a Commonwealth authority or by "a licensed corporation". The reference to licensed corporations is to the provisions of Pt VIII (ss 98A-108G). Part VIII is headed "Licences to enable Commonwealth authorities and certain corporations to accept liability for, and/or manage, claims".

35 Part IV (ss 42-52A) is headed "Liabilities arising apart from this Act". Section 44(1) states:

> "Subject to section 45, an action or other proceeding for damages does not lie against the Commonwealth, a Commonwealth authority, a licensed corporation or an employee in respect of:
>
> (a) an injury sustained by an employee in the course of his or her employment, being an injury in respect of which the Commonwealth, Commonwealth authority or licensed corporation would, but for this subsection, be liable (whether vicariously or otherwise) for damages; or
>
> (b) the loss of, or damage to, property used by an employee resulting from such an injury;
>
> whether that injury, loss or damage occurred before or after the commencement of this section."

36 Section 45(1) confers a right of election and provides:

"Where:

(a) compensation is payable under section 24, 25 or 27 in respect of an injury to an employee; and

(b) the Commonwealth, a Commonwealth authority, a licensed corporation or another employee would, but for subsection 44(1), be liable for damages for any non-economic loss suffered by the employee as a result of the injury;

the employee may, at any time before an amount of compensation is paid to the employee under section 24, 25 or 27 in respect of that injury, elect in writing to institute an action or proceeding against the Commonwealth, the Commonwealth authority, the licensed corporation or other employee for damages for that non-economic loss."

In an action or proceeding for damages for non-economic loss which is instituted as a result of such an election under s 45(1), the court shall not award the employee damages for any non-economic loss in an amount exceeding $110,000 (s 45(4)).

The Commonwealth licensing provisions

37 Further reference should now be made to Pt VIII of the Commonwealth Compensation Act which empowers the Commission to grant certain licences to Commonwealth authorities or eligible corporations. The funds derived by Comcare from premiums and which are applied by Comcare to meet its obligations are not provided by licensees; they become "self-insurers" and the capacity of eligible corporations to act as such is taken into account in issuing their licences under Pt VIII. Of course, a particular licensee may wish nevertheless to carry insurance under arrangements it concludes with third parties. At the heart of the case presented by Optus in this litigation is the complaint that the compulsory insurance system applying in Victoria denies it that liberty; for their part, the appellant and the VWA deny the validity of the federal legislation whence Optus derives that liberty of action.

38 The term "eligible corporation" means a corporation declared by the Minister by notice in writing to be eligible for the grant of a licence under Pt VIII (ss 99, 100). The Minister is empowered to make such a declaration if satisfied that it would be desirable for the Commonwealth Compensation Act to apply to employees of a corporation that has one of the following characteristics: first, the corporation is, but is about to cease to be, a Commonwealth authority (s 100(a));

secondly, the corporation was previously a Commonwealth authority (s 100(b)); or, thirdly, the corporation "is carrying on business in competition with a Commonwealth authority or with another corporation that was previously a Commonwealth authority" (s 100(c)).

39 Optus satisfied the Minister that, as a competitor of Telstra, it answered the third criterion, that in par (c) of s 100. The history of Telstra and its origins as a Commonwealth authority were explained in *Telstra Corporation Ltd v Worthing*[17].

40 In his reasons for judgment, Selway J[18] explained that Optus had put its successful submission to the Minister on the basis that Optus was in competition with Telstra, that Telstra was covered by the Commonwealth Compensation Act and that it was desirable in the interests of achieving a "level playing field" that Optus be subject to the same workers compensation scheme as Telstra. Upon application to the Commission under s 102, s 104 then empowered it to grant a licence to Optus.

41 In respect of "eligible applicants", being Commonwealth authorities and "eligible corporations" declared to be such by the Minister under s 100 (s 99), the Commission is obliged by s 103(2) to determine certain matters respecting the scope of the licence. These include determination in accordance with Div 3 of Pt VIII (ss 108-108A) of the scope of the licence so far as concerns "the degree to which, and the circumstances in which, the licensee may accept liability for compensation" (s 103(2)(a)). A licensee may be a Commonwealth authority or an "eligible corporation" (s 99).

42 Section 4(10A) has a particular effect for the purposes of the application of the Commonwealth Compensation Act to an employee employed by a licensed corporation, or a dependant of such a person. This is that references to Comcare in provisions of the statute, including ss 14, 24, 25 and 27 (dealing with the payment of compensation and compensation for permanent impairments), are to be read as references to that licensed corporation. Hence s 14 imposes upon Optus the liability to pay compensation under the scheme described earlier in these reasons. Further, it should be noted that the treatment of "common law" liabilities by ss 44 and 45 applies, in the terms of those sections themselves, directly to Optus as "a licensed corporation".

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**17** (1999) 197 CLR 61 at 71 [8]-[9].

**18** [2005] FCA 94 at [9].

The relief sought by the appellant

43 In this Court, the appellant reformulated the terms of the declaratory relief he seeks. In addition to a declaration of the invalidity of the licence granted to Optus under Pt VIII of the Commonwealth Compensation Act on 1 November 2004, the appellant seeks a declaration that:

> "ss 104(1), 108(1) and 108A(7)(a) of the [Commonwealth Compensation Act], to the extent that those provisions:
>
> (i) authorise [the Commission] to grant an eligible corporation a licence under Part VIII of the [Commonwealth Compensation Act];
>
> (ii) 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
>
> (iii) 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],
>
> are outside the legislative power of the Commonwealth and are invalid".

44 Section 104(1) is the provision empowering the Commission to grant the licence sought by an eligible applicant. Section 108(1) is included in Div 3 of Pt VIII and states:

> "A licence may provide that the licensee is authorised to accept liability to pay compensation and other amounts under this Act in respect of particular injury, loss or damage suffered by, or in respect of the death of, some or all of its employees under this Act."

As remarked above, such a licensee may be a Commonwealth authority or it may be an "eligible corporation". Section 104(1) and s 108(1) speak generally to the position of both species of licensees.

45 Particular attention in argument was given to two sub-sections of s 108A dealing with the consequences of the authorisation of a licensee to accept liability. Section 108A(1) also speaks generally of "licensees", and locates in

licensees, rather than Comcare, liability "to pay compensation and other amounts under this Act". The sub-section provides:

> "If:
>
> (a) a licensee is authorised to accept liability to pay compensation and other amounts under this Act in respect of particular injury, loss or damage suffered by, or in respect of the death of, some or all of its employees; and
>
> (b) such injury, loss, damage or death occurs;
>
> then:
>
> (c) the licensee is liable to pay compensation and other amounts under this Act in respect of that injury, loss, damage or death; and
>
> (d) Comcare is not liable to pay compensation or other amounts under this Act in respect of that injury, loss, damage or death."

46 However, s 108A(7) speaks specifically to those licensees which are corporations and which have a particular authorisation under Div 3 to accept a certain head of liability. The sub-section does not apply to those licensees which are Commonwealth authorities. The sub-section also has a particular temporal operation.

47 Section 108A(7) states:

> "*If* a licensee who is a corporation is authorised to accept liability to pay compensation and other amounts under this Act in respect of a particular injury, loss or damage *suffered* by, or in respect of the death of, some or all of its employees *after* the licence comes into force *then*:
>
> (a) *no law* of a State or Territory relating to workers compensation *applies* to a licensee in respect of *such* injury, loss, damage or death; and
>
> (b) any liability or obligation of the corporation under a law of a State or Territory in respect of *such* injury, loss or damage suffered, or death occurring, *before* the licence came into force is unaffected." (emphasis added)

48 The declaration of invalidity sought by the appellant, with the support of the VWA, fixes upon par (a) of s 108A(7). However, no declaratory relief is sought in respect of s 108A(1).

49 Yet, if sub-ss (1) and (7) of s 108A are read sequentially and with respect to Optus as a licensed corporation, it will be apparent that they operate together. Section 108A(1) both relieves Comcare of liability it otherwise might have in respect of injuries, losses, damage and death suffered by employees of Optus, and obliges Optus to make the payments required by the Commonwealth Compensation Act. These also include the amounts that may be payable under the election provisions of s 45, but otherwise and by operation of s 44 do not include amounts in respect of "common law" actions.

50 Provisions of a State law which required Optus to meet liabilities under a State compensation scheme, or which preserved or modified common law liabilities of Optus otherwise than as provided by ss 44 and 45, would, if s 108A(1) otherwise be valid, alter, impair or detract from the essential legislative scheme of that federal law. The State law provisions, to the extent of what thus would be inconsistency within the meaning of s 109 of the Constitution, would be invalid[19].

51 Section 108A(7) is directed to those licensees which are corporations (rather than Commonwealth authorities) which are authorised to accept the liability to pay compensation in respect of the injury, loss, damage and death of employees, as already spelled out in the same form of words appearing as par (a) of s 108A(1). Those licensees retain, unaffected by the grant of the licence under the federal statute, such liability in respect of that injury, loss, damage and death occurring before the licence came into force as they carried under a law of a State or Territory relating to workers compensation. That is the effect of par (b) of s 108A(7).

52 In respect of such injury, loss, damage or death occurring after the licence comes into force, no State or Territory law with respect to workers compensation applies to the licensee. That is the effect of par (a) of s 108A(7).

53 In this way, for licensed corporations such as Optus, s 108A(7) gives a particular and temporal operation for the more generally expressed provisions made for all licensees by s 108A(1). The declaratory relief sought by the

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**19** *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76 [27].

appellant thus, if its case otherwise be made good, appears to focus too narrowly upon par (a) of s 108A(7).

Commonwealth authorities

54 As noted above, s 108A(7) of the Commonwealth Compensation Act does not apply to those licensees which are Commonwealth authorities. The legislative assumption on the part of the Parliament appears to have been that State (and Territory) laws relating to workers compensation most likely, on the proper construction of those laws, would not have sought to bind those bodies answering the description of "Commonwealth authority"[20]. A further legislative

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**20** The term "Commonwealth authority" is the subject of a lengthy definition in s 4(1) of the Commonwealth Compensation Act. This reads:

> "***Commonwealth authority*** means:
>
> (a) a body corporate that is incorporated for a public purpose by a law of the Commonwealth, other than a body declared by the Minister, by notice in writing, to be a body corporate to which this Act does not apply;
>
> (b) a body corporate that is incorporated for a public purpose by a law of a Territory (other than an ACT enactment or a law of the Northern Territory) and is declared by the Minister, by notice in writing, to be a body corporate to which this Act applies;
>
> (c) a body corporate:
>
> (i) that is incorporated under a law of the Commonwealth or a law in force in a State or Territory;
>
> (ii) in which:
>
> (A) the Commonwealth has a controlling or substantial interest; or
>
> (B) a Territory (other than the Australian Capital Territory or the Northern Territory) or a body corporate referred to in paragraph (a) or (b) has a controlling interest; and

(Footnote continues on next page)

assumption may have been that, to the extent that a State law purported to do so, it would be invalid to the extent of inconsistency, pursuant to s 109 of the Constitution, with the federal law providing for the Commonwealth authority in question. Of course, s 109 does not operate where, on its proper construction, the federal statute assumes the operation of the common law as modified by State statute law[21]; in that situation, the federal law operates within the setting of other laws so that it is supplementary to, or cumulative upon, the State law in question[22]. It will be necessary to refer again to these matters later in these reasons.

55 The position of Commonwealth authorities apart, and from the viewpoint of Optus, the interrelation of sub-ss (1) and (7) of s 108A is significant for the operation of s 109 of the Constitution upon the Victorian legislation.

The Victorian legislation

56 Section 5(1) of the Victorian Compensation Act contains a definition of "worker" which applies in particular to those working under a contract of service. Part IV (ss 80-138B) is headed "PAYMENT OF COMPENSATION". Section 82(1) states:

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(iii) that is declared by the Minister, by notice in writing, to be a body corporate to which this Act applies; or

(d) a body corporate:

(i) in which a body corporate declared under paragraph (c) has a controlling interest; and

(ii) that is declared by the Minister, by notice in writing, to be a body corporate to which this Act applies; or

(e) if a declaration is in force under section 4A, the Australian Capital Territory."

**21** cf *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 432-433, 449, 462; *Commonwealth v Western Australia* (1999) 196 CLR 392 at 416-417 [59], 441 [145].

**22** *Dobinson v Crabb* (1990) 170 CLR 218 at 231; *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76 [27]; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 401 [208]-[209], 449 [375].

> "If there is caused to a worker an injury arising out of or in the course of any employment, the worker shall be entitled to compensation in accordance with this Act."

This statutory entitlement to compensation is not conferred other than in respect of employment connected with the State of Victoria (s 80(1)). What amounts to sufficient connection is detailed in the remaining sub-sections of s 80.

57 Division 8A of Pt IV (ss 134AA-134AG) deals with actions for damages in respect of injuries arising on or after 20 October 1999. In particular, a worker who is, or the dependants of a worker who are or may be, entitled to compensation in respect of an injury arising out of or in the course of, or due to the nature of, employment on or after 20 October 1999, have restrictions or "caps" placed upon those common law actions by s 134AB, in respect of the recovery of damages for both pecuniary and non-pecuniary loss.

58 With reference to the federal and State legislation, Selway J observed[23]:

> "There are significant restrictions under both schemes upon the entitlement of employees to sue for common law damages. Nevertheless, under the Victorian scheme damages for economic loss are 'capped' for serious injury at $1,006,760 and $438,000 for non economic loss. In contrast the maximum payable under the [Commonwealth Compensation Act] is $110,000 for non economic loss. Of course, there may be other benefits to employees in being subject to the Commonwealth scheme, rather than the Victorian scheme."

59 The Victorian Insurance Act is, by s 5 of that statute, to be "read and construed as one" with the Victorian Compensation Act. The central provision for the accomplishment of the purpose of the Victorian Insurance Act requiring compulsory WorkCover insurance is s 7(1) of that statute. This is a penal provision. It states:

> "An employer who in any financial year employs a worker within the meaning of section 5(1) of the [Victorian Compensation Act] –
>
> (a) must obtain and keep in force a WorkCover insurance policy with [the VWA] in respect of all of the employer's liability under the [Victorian Compensation Act] and at common law or otherwise in

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**23** [2005] FCA 94 at [9].

respect of all injuries arising out of or in the course of or due to the nature of all employment with that employer on or after 4 pm on 30 June 1993; and

(b) must not at any one time keep in force more than one such policy.

Penalty: 100 penalty units."

60 It may be assumed for present purposes that Optus is an employer which employs workers within the meaning of s 5(1) of the Victorian Compensation Act. The term "WorkCover insurance policy" is defined in s 3(1) of the Victorian Insurance Act as meaning an insurance policy issued in accordance with that statute. A WorkCover insurance policy must contain only such provisions as are prescribed by the Victorian Insurance Act and any other provisions approved by the VWA (s 9). One such prescribed provision is that the VWA as well as the employer is directly liable to pay the compensation under the Victorian Compensation Act and "at common law or otherwise" for which the employer is liable (s 9(2)(a)).

61 Under risk of penalty, a person other than the VWA must not issue or renew a WorkCover insurance policy or a purported WorkCover insurance policy (s 10(1)). Thus, not only does the Victorian legislation compel the taking out of insurance; it also requires the selection of the VWA as insurer and thus denies any choice between insurers.

62 The obligation of compulsory WorkCover insurance imposed by s 7(1) of the Victorian Insurance Act arises in respect of the liability of the employer under the Victorian Compensation Act and, secondly, in respect of the employer's liability "at common law or otherwise". What then are the liabilities of Optus under this legislation in so far as it validly applies to Optus?

The position of Optus under the Victorian legislation

63 As indicated earlier in these reasons, the central provisions respecting liability under the Victorian Compensation Act are those to satisfy the entitlement to compensation given to workers by s 82 and the "capping" of common law claims by s 134AB. Optus, as a licensed corporation, is subjected by the Commonwealth Compensation Act to the liability in s 14 to pay compensation under the federal scheme. Further, the "common law" liabilities of Optus are removed by s 44 of that statute, subject to the election provision of s 45. The operation of the compensation system thus applying to Optus by virtue of the federal law would be, in the sense of the authorities referred to earlier in these reasons, qualified and impaired by s 82 and by the "capping" provisions of

the Victorian Compensation Act. To that extent, those provisions are rendered invalid by s 109 of the Constitution.

64 If attention then be redirected to s 7 of the Victorian Insurance Act, it is apparent there is no liability imposed upon Optus under s 82 of the Victorian Compensation Act in respect of which there may be attached the compulsory insurance requirement by s 7(1)(a) of the Victorian Insurance Act.

65 Section 7(1)(a) also imposes an obligation to insure compulsorily in respect of liability of the employer "at common law or otherwise". What is the meaning of those terms and what is the range of their operation?

66 If a State law such as s 7(1)(a) of the Victorian Insurance Act is to be so construed as to impose an obligation by reference to a liability under the common law, that State law is not, in the absence of a contrary indication, to be construed as addressed to liabilities as they exist after the operation upon the common law of ss 44 and 45 of the federal statute. No such contrary indication appears. Further, s 7 is a penal provision. The Court should not strain to discern such an indication.

67 A better reading of the expression "the employer's liability ... at common law" in s 7(1)(a) would include the common law liability as modified by the "capping" provisions of the Victorian Compensation Act. But, if so, nothing then turns upon the point. This is because those "capping" provisions in their application to Optus are rendered invalid by s 109 of the Constitution.

68 The words "or otherwise" in s 7(1)(a) of the Victorian Insurance Act are apt to include obligations of strict liability arising from State statute, particularly laws imposing safety requirements in the workplace such as those considered in the well-known authorities of *O'Connor v S P Bray Ltd*[24] and *Sovar v Henry Lane Pty Ltd*[25]. No such State legislation has been said in argument to have any relevant application to Optus.

69 The form of words in s 44(1) of the federal statute includes any "other proceeding for damages" and so is apt to remove both the "common law" liability and liability arising "otherwise" within the sense of s 7(1)(a) of the Victorian

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**24** (1937) 56 CLR 464.

**25** (1967) 116 CLR 397.

Insurance Act[26]. It is true that s 44 does not apply where the election is made under s 45 of the Commonwealth Compensation Act but what is then permitted is the limited form of action spelled out in s 45.

70 As remarked earlier in these reasons, in some instances federal law may assume the continued operation of State law and the common law of Australia as modified by State law[27]. However, here the common law upon a particular topic, including the responsibilities of Optus to its employees and its liability to an action or other proceeding for damages, has been removed by s 44 of the federal law, subject to the election regime established by s 45. The federal law cannot be said to assume the continued operation of the common law, so as to preserve it for the attachment of obligations imposed by State law.

71 The result thus is reached that there is no obligation of Optus to which s 7(1)(a) of the Victorian Insurance Act attaches the requirement of compulsory WorkCover insurance in respect of an injury, loss or damage suffered by, or in respect of the death of, an employee of Optus after the licence under the Commonwealth Compensation Act came into force. That is not to say that s 7(1)(a) is invalid. But that section must be read having regard to the federal law's impact upon the common law and upon the Victorian Compensation Act, especially upon s 82 and the "capping" provisions of s 134AB. When it is observed that a corporation licensed under the Commonwealth Compensation Act is liable to pay compensation and other amounts under the federal Act in respect of injury, loss or damage suffered by, or in respect to the death of, its employees which occurs after the licence comes into effect, but is not otherwise liable at common law or under the Victorian Compensation Act, the premise for the engagement of s 7(1)(a) of the Victorian Insurance Act is to that extent not satisfied.

72 It is to be noted, however, that s 7(1)(a) of the Victorian Insurance Act specifies the liabilities with which it deals not only by reference to their nature but also by reference to time. Thus, s 7(1)(a) identifies the relevant liability of an employer as liability "in respect of all injuries arising out of or in the course of or due to the nature of all employment with that employer on or after 4 pm on

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**26** In this second aspect of s 44(1), questions of inconsistency with State law giving rise to actions for breach of statutory duty might then arise under s 109 but no point of that nature arises in this case.

**27** See *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 395-396 [185], 401 [209], 449 [375].

30 June 1993". It follows from s 108A(7)(b) of the Commonwealth Compensation Act that a corporation licensed under that Act would remain subject to liabilities of the kind identified in s 7(1)(a) if the relevant death, injury, loss or damage occurred before the licence came into effect.

73 Whether that was, or may be, the case with respect to Optus was not explored in this Court or at first instance. Nor was there any exploration of how the Victorian Insurance Act would operate in respect of an employer whose only liability to be insured concerned injuries or death occurring before the employer was granted a licence under the Commonwealth Compensation Act. For present purposes, it suffices to observe that in respect of injuries or death occurring *after* the grant of a licence under the Commonwealth Compensation Act there is nothing to attach to Optus the requirement of compliance with s 7(1)(a).

74 The application to Optus of the licensing provisions of Pt VIII of the Commonwealth Compensation Act has the consequence that Optus is at liberty to be a "self-insurer" in respect of its liabilities under that statute for injuries or death suffered by its employees after the grant of the licence. The use of the term "self-insurer" is apt to mislead when used in this context. The constitutional support for the operation of the legislation relating to Optus is not to be found in the insurance power (s 51(xiv)). The contrary was not asserted, at least by VWA. Rather, it was accepted in argument that relevant sources of power respecting Optus might be found in the posts and telegraphs power (s 51(v)) or the corporations power (s 51(xx)).

The issues respecting validity

75 *Bourke*[28] established that the corporations power (and other heads of power in s 51) is subjected to the limitation or exception found in the words "other than State banking"; the upshot is that a law which on its face is supported by s 51(xx) nevertheless is beyond power if it answers the description "State banking". The Commonwealth accepts that this outcome applies to the insurance power, though it disputes some of the statements made in *Bourke*.

76 The question in the present appeal then becomes whether the provisions of the Commonwealth Compensation Act which render invalid, by the operation of s 109 of the Constitution, provisions of the Victorian Compensation Act and which transmogrify the common law are denied any such valid operation by the expression "other than State insurance" in s 51(xiv).

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**28** (1990) 170 CLR 276.

77 The appellant submits that s 51(xiv) of the Constitution does not permit the valid operation of the Commonwealth Compensation Act to "remove" by "indirect" means the liabilities of Optus in relation to which the State law imposes the compulsory obligation to obtain and keep in force a WorkCover insurance policy. The impugned provisions were said to have "the effect of dissolving or removing the obligation imposed by [s 7(1)(a) of the] State law to hold insurance with a State insurer". The presence of the State law and the effect which, if valid, the federal law would have upon it were said to render invalid the federal law so as to deny it that effect. Accordingly, in so far as the federal law "annihilated" the application of s 82 of the Victorian Compensation Act to Optus, it was restricting and altering the obligation of Optus to take out State insurance and so was invalid.

Conclusions

78 These submissions should not be accepted. It is necessary in that regard first to return to *Bourke*. That case decided two further points of present importance. First, the Court rejected any suggestion that the protection by s 51(xiii) of "State banking" amounts to what is "an exclusive State power preventing Commonwealth law from touching or affecting State banking in any way"; this suggestion was said to have "strong overtones of the discredited reserved powers doctrine"[29].

79 Secondly, *Bourke* decided that the phrase in s 51(xiii) "other than State banking" requires that a law of the Parliament which can be characterised as a law with respect to banking (whether or not it can also be characterised as a law with respect to any other subject-matter of legislative power) nevertheless "does not touch or concern State banking, except to the extent that any interference with State banking is so incidental as not to affect the character of the law as one with respect to banking other than State banking"[30].

80 In the above formulation of principle respecting s 51(xiii), the Court relied expressly upon the well-known statement by Kitto J in *Fairfax v Federal Commissioner of Taxation*[31], namely:

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**29** (1990) 170 CLR 276 at 288.

**30** (1990) 170 CLR 276 at 286, 288-289.

**31** (1965) 114 CLR 1 at 7.

> "Under [s 51 of the Constitution] the question is always one of subject matter, to be determined by reference solely to the operation which the enactment has if it be valid, that is to say by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes; it is a question as to the true nature and character of the legislation: is it in its real substance a law upon, 'with respect to', one or more of the enumerated subjects, or is there no more in it in relation to any of those subjects than an interference so incidental as not in truth to affect its character?"

That case also is authority for affirming the rejection of reserved powers notions which had influenced the majority decision in *R v Barger*[32].

81 What then is the nature of the rights, duties, powers and privileges which, with respect to Optus, the licensing provisions of Pt VIII of the Commonwealth Compensation Act change, regulate or abolish? Does the answer indicate that the substance of those provisions is a law with respect to insurance of any description?

82 The licensing provisions oblige a licensee such as Optus to make the payments stipulated by the Commonwealth Compensation Act in respect of injury, loss, damage and death suffered by its employees; and no State law with respect to workers compensation applies to such occurrences after the licence comes into force. These licensing provisions are laws supported in their application to Optus at least as laws with respect to a trading corporation formed within the limits of the Commonwealth (s 51(xx))[33]. It is unnecessary to decide whether they are also supported by s 51(v).

83 Undoubtedly, as Fullagar J put it in *Insurance Commissioner v Associated Dominions Assurance Society Pty Ltd*[34], "the whole relation of insurer and insured" is within the scope of the federal legislative power. However, 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". They do not touch and concern insurance in any more than an incidental fashion. Still less do

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**32** (1908) 6 CLR 41.

**33** See *New South Wales v Commonwealth* (2006) 81 ALJR 34 at 86-87 [177]; 231 ALR 1 at 54.

**34** (1953) 89 CLR 78 at 87.

the licensing provisions touch and concern "State insurance" as must be made good if the appeal is to succeed.

84 The federal licensing provisions have full legal effect and operation regardless of what, at any given time, amounts to "State insurance". Hence, it is unnecessary to determine whether Selway J was correct in holding that a mandatory requirement of State law that employers be insured, in relation to a particular species of liability, with a designated insurer which is a "State insurer" does not answer the description "State insurance" in s 51(xiv) of the Constitution[35].

85 It is here that a further point must be made concerning *Bourke*. No State law was involved in that case beyond the *State Bank Act* 1981 (NSW), which established the respondent as a body corporate with banking as its principal business. The issue decided by this Court was that ss 52 and 52A of the *Trade Practices Act* 1974 (Cth) were invalid to the extent that they purported to apply to a State bank in the conduct of its banking business not extending beyond the limits of the State concerned[36].

86 As was pointed out by Gleeson CJ and Heydon J in *APLA Ltd v Legal Services Commissioner (NSW)*[37]:

> "Inconsistency between a State law and a federal law does not spring from the political motives of the respective law-making authorities. Section 109 is concerned with inconsistency of laws, not inconsistency of political opinion."

In the present case, s 109 of the Constitution is engaged in the manner described earlier in these reasons. The result of the operation of s 109 upon the Victorian Compensation Act is that there remains no obligation on the part of Optus to which there can attach the requirement of compulsory WorkCover insurance.

87 While the authorities confirm an understanding that the term "inconsistency" in s 109 of the Constitution may bring about the invalidity of a State law which does not necessarily have the same subject-matter as the federal

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**35** [2005] FCA 94 at [70]-[72].

**36** See (1990) 170 CLR 276 at 292.

**37** (2005) 224 CLR 322 at 355 [45].

law in question[38], that does not assist the appellant's case. The provisions of the Victorian Compensation Act which are rendered invalid to the extent of inconsistency with the federal licensing provisions share the character of laws with respect to workers compensation. The federal provisions also have the character of laws with respect to trading corporations and this sustains their validity with respect to Optus. Neither federal nor State laws to which s 109 applies bear any character of laws with respect to insurance, let alone "State insurance".

88 It is true, as the appellant stressed, that the obligation of compulsory insurance under the Victorian law is connected with the legislative system in Victoria for the provision of workers compensation. But the link never appears where, as in the case of Optus, s 109 has operated to negate any relevant operation of the State workers compensation system. Contrary to the submission by the appellant, that outcome does not mean that it is the federal laws which restrict or alter the obligation of Optus to take out State insurance and so must be invalid to that extent. It is s 109 which so operates upon State law as to lead to the result that Optus has no obligation of compulsory WorkCover insurance. The federal laws retain after the operation of the mechanism of s 109 a character which supports their validity under the corporations power without those laws touching or concerning State insurance. To adapt what was said in *Bourke*[39]:

> "[I]f a law is not one with respect to [insurance], it is not subject to a restriction that it must not touch or concern State [insurance]."

89 The Commonwealth disputed, as broadening rather than merely restating that restriction, the following passage in *Bourke*[40]:

> "Put another way, the connexion with State banking must be 'so insubstantial, tenuous or distant' that the law cannot be regarded as one with respect to State banking: *Melbourne Corporation* [*v The Commonwealth*][41]."

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**38** *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 78 [32].

**39** (1990) 170 CLR 276 at 289.

**40** (1990) 170 CLR 276 at 289.

**41** (1947) 74 CLR 31 at 79.

90 That passage should be read in its context, preceded as it is by the citation of the later passage in *Fairfax*[42], which has been set out earlier in these reasons. If that be done, it may be understood that the Court in *Bourke* was not further attenuating the sufficiency of necessary connection with State banking for the restriction in s 51(xiii) to apply. A law does not touch and concern State banking or State insurance merely because State legislation is so drawn that the invalidation of one State law by the operation of s 109 produces a consequence that in some circumstances a State law of banking or insurance lacks subject-matter for its operation.

Orders

91 The appeal removed into this Court should be dismissed, with the costs of the first, second and third respondents to be paid by the appellant.

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**42** (1965) 114 CLR 1 at 7.

92 KIRBY J. The most important function entrusted to this Court is to maintain the Constitution and specifically the federal arrangements that it secures[43].

93 The grants of legislative power provided by the Constitution to the Federal Parliament are large and broad. They are to be interpreted with the amplitude appropriate to a national instrument of government and to the functional needs, envisaged by the constitutional language and presented by changing times[44]. Nevertheless, the federal component of our Constitution is one of its central elements. By dividing governmental power, federalism reinforces representative democracy and tends to protect liberty, to encourage experimentation and reform and to promote local decisions on issues of local importance[45]. The federal idea is especially important where, exceptionally, the Constitution has carved out from what is otherwise a legislative subject matter granted to the Federal Parliament, a sphere of lawmaking that is denied to that Parliament and thus left with the lawmakers of the States.

The proceedings and the controversy

94 These proceedings were heard and dismissed in the Federal Court of Australia by the primary judge (Selway J)[46]. In addition to lodging an appeal to the Full Court of the Federal Court, the Attorney-General for the State of Victoria ("the State") applied for the removal of the cause into this Court. That application succeeded. The proceedings were returned before a Full Court of this Court.

95 The Full Court effectively heard the proceedings as a challenge to the validity of the provisions of federal law. That law authorised the effective removal of a private corporation employing workers in the State of Victoria from the operation of a Victorian statute. The impugned federal law purported to excuse the corporation from having to conform to Victorian legislation otherwise

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**43** *New South Wales v Commonwealth* (2006) 81 ALJR 34 at 167-168 [611]-[613]; 231 ALR 1 at 164; cf *Victoria v The Commonwealth and Connor* (1975) 134 CLR 81 at 118 per Barwick CJ; Saunders, "Legislative, Executive, and Judicial Institutions: A Synthesis", in Le Roy and Saunders (eds), *Legislative, executive, and judicial governance in federal countries*, (2006) 344 at 368.

**44** *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367; *Herald and Weekly Times Ltd v The Commonwealth* (1966) 115 CLR 418 at 434.

**45** *New South Wales v Commonwealth* (2006) 81 ALJR 34 at 133-134 [446]; 231 ALR 1 at 118.

**46** *Victorian WorkCover Authority v Andrews* [2005] FCA 94.

applicable to it in respect of the provision of workers' compensation benefits to its employees and their dependants. It exempted the corporation from securing compulsory State insurance to cover that risk, as generally applicable to employers in the State.

96 The Attorney-General of the Commonwealth intervened in this Court to support the validity of the federal law under which the corporation concerned, Optus Administration Pty Ltd ("Optus"), secured the purported exemption from the State workers' compensation and insurance obligations. The Commonwealth nominated, as the constitutional foundations for the federal law, the lawmaking powers provided to the Federal Parliament under s 51(xx) (trading corporations), s 51(v) (postal, telegraphic, telephonic and other like services), and s 51(xiv) of the Constitution. In this Court, a majority concludes that the corporations power is sufficient to uphold, as valid, the relevant federal law[47].

97 The corporations power is one of many powers provided by s 51 of the Constitution. It is expressed to be "subject to this Constitution". So is s 51(xiv). Hitherto, par (xiv) has been a little-noticed provision. It is expressed in unusual terms. By it, there is granted to the Federal Parliament the power to make laws with respect to:

> "insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned".

98 The State (supported by Victorian WorkCover Authority ("VWA"), the fourth respondent, and by the States of New South Wales, South Australia and Western Australia intervening) argues that the legislative powers to make federal laws with respect to trading corporations must be read harmoniously with the exclusion expressed in s 51(xiv) of the Constitution that prevents the Federal Parliament from making laws with respect to "State insurance". That, say the State and VWA, is what in substance the Victorian laws governing compulsory workers' compensation and obligatory insurance constitute. To the extent, therefore, that the Federal Parliament purports to exempt a private trading corporation, such as Optus, from its obligations under such Victorian laws, it has intruded into legislative territory expressly marked out by s 51(xiv) as forbidden to federal lawmaking.

99 In support of these arguments, the State and VWA rely on the conclusions and reasoning of this Court in *Bourke v State Bank of New South Wales*[48].

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**47** Reasons of Gummow, Hayne, Heydon and Crennan JJ ("joint reasons") at [74], [82].

**48** (1990) 170 CLR 276.

Although not a decision concerned with s 51(xiv), that case concerned s 51(xiii) – the power with respect to banking – which, by analogy, excludes State banking but includes State banking "extending beyond the limits of the State concerned".

100 Save for the matters argued by the State and VWA, in deciding these proceedings, this Court can assume the sufficiency of the corporations (and perhaps the postal) power otherwise to support the exempting licence granted to Optus by federal authorities under federal law, to permit the effective transfer of that corporation to federal regulation. The Court is not here concerned with the validity of federal laws with respect to workers' compensation and connected benefits; insurance and self-insurance so far as they relate to actual federal employers and employees; or the employees of privatised federal corporations or of trading corporations like Telstra Corporation Ltd[49] which amount to a type of continuation of a federal agency formerly operating pursuant to federal legislation[50]. Such bodies present other and different issues from those raised in these proceedings. Those issues can be put to one side.

101 It was not contested that Optus is, and at all times has been, a trading corporation. It is not a manifestation of the Commonwealth or, relevantly, of federal law. It is a private corporation in competition with Telstra but operating in an open marketplace containing other private competitors. Until the events occurred which gave rise to these proceedings, Optus maintained a compulsory insurance policy with VWA pursuant to the relevant Victorian State law. Pursuant to that policy, in the year ended 30 June 2004, Optus paid VWA premiums amounting to $1,377,412. Those sums were paid into an account maintained by VWA, along with all other premiums so paid, at the Victorian Treasury. They therefore constituted part of the pool from which the integrated scheme of State workers' compensation benefits and compulsory insurance obligations was maintained in respect of the entitlements of workers in the State of Victoria and their dependants.

102 If Optus, a private corporation, could so easily be shifted from State legal regulation to federal, the consequence in practical terms for VWA and for the viability of the integrated State compensation and insurance legislation, would obviously be significant. Thus, it is reasonable to ask whether any corporation within the Commonwealth could, by analogy, be rendered subject to federal workers' compensation and insurance provisions displacing State compensation and insurance obligations. Would this shift strike at the viability of the State legislation on workers' compensation with its integrated component of universal

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**49** See *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61.

**50** *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 70-72 [6]-[11].

insurance inferentially necessary to support the payment of statutory compensation benefits?

103 These were the features of the present proceedings that brought Victoria, the intervening States and VWA to this Court to challenge the validity of the federal laws purporting to authorise Optus's shift to federal workers' compensation regulation for its employees and their dependants and consequential exemption from the State law with its integrated workers' competition and insurance obligations.

104 The resonances of these proceedings with the recent decision of this Court in the *Work Choices*[51] case are obvious. There are differences; but some parallels. This appeal and its outcome demonstrate the constitutionally disruptive journey that began with the decision in *Work Choices*. Once again, we have proof of the judicial indifference to established authority of this Court. Such indifference seriously disturbs the federal balance which the Constitution was designed to achieve.

105 Undeniably, Chapter III courts play a vital role in upholding the federal compact. I see little point in repeated declarations about the vital need to protect the integrity of Chapter III courts and federal jurisdiction under the Constitution[52] if, whenever an appeal is made to this Court to fulfil that role, the party making that appeal is rebuffed and seemingly never-ending accretions to federal legislative power are upheld and enhanced.

The facts, legislation and common ground

106 *The facts*: The background facts of these proceedings are described in the joint reasons. Set out there is an account of the course of the proceedings in the Federal Court and the decision of Selway J, who dismissed VWA's challenge to the extension to Optus of the federal compensation legislation, the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) ("the federal Act")[53].

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**51** *New South Wales v Commonwealth* (2006) 81 ALJR 34; 231 ALR 1.

**52** See eg *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 267-268, 274-276; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 12-16; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 102-103, 116-117, 134; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 569 [94], 574-575 [110]-[111].

**53** Joint reasons at [21]-[30].

107 There were attractions for Optus (and distinct disadvantages for its employees) in moving from State regulation of workers' compensation entitlements of employees in Victoria to regulation under the federal Act. Importantly, as the primary judge found, entitlements to sue for "common law" damages, in addition to statutory workers' compensation benefits, are significantly larger under the Victorian scheme[54]. The "cap" on the amount payable for non-economic loss under the federal Act was, at the relevant time, $110,000. By comparison, the maximum amount payable for non-economic loss under the *Accident Compensation Act* 1985 (Vic) ("the State Compensation Act") was $438,000. As well, there are severe election requirements under the federal Act, as a pre-condition to the pursuit of a claim for "common law" damages. These introduce traps and burdens for insured employees seeking compensation for civil wrongs by their employer.

108 Inferentially for these and other reasons, on 10 June 2004, the federal Minister for Employment and Workplace Relations ("the Minister"), the first respondent, was presented with an application by Optus requesting a declaration under s 100 of the federal Act that Optus was entitled to the grant of a licence under Pt VIII of that Act. On 7 July 2004, the Minister declared that Optus was so eligible. In consequence, on 1 November 2004, the Safety, Rehabilitation and Compensation Commission established under the federal Act ("the Commission"), the second respondent, authorised its chairman to sign a licence under ss 103 and 104 of the federal Act, granting Optus authorisation to accept liability and to manage claims under the federal Act commencing from 1 December 2004. This authorisation was twice varied, effectively such that the licence to Optus came into operation on 30 June 2005. It is that licence, with the purported effect it had to exempt Optus from the operation in Victoria of the State Compensation Act and the integrated provisions of the *Accident Compensation (WorkCover Insurance) Act* 1993 (Vic) ("the State Insurance Act"), that occasioned these proceedings.

109 To the extent that the federal Act purported to give authority to the Minister and the Commission to authorise the application of the federal law to Optus, the State and VWA challenge the validity of ss 104(1), 108(1) and 108A(7)(a) of the federal Act. They assert that, constitutionally speaking, such laws are laws with respect to State insurance. They submit that, even if otherwise the federal Act and steps taken under it would be sustained in the case of Optus (eg under s 51(xx) on the basis that Optus was a trading corporation and the law was one with respect to such a corporation), the express exclusion of federal lawmaking power with respect to "State insurance" modified the otherwise substantial grant of lawmaking power to the Federal Parliament. It qualified the ambit of the corporations power in this respect and excluded the

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**54** *Victorian WorkCover Authority v Andrews* [2005] FCA 94 at [9].

availability of that head of power (and any other), once it was concluded that the character of the federal law in its operation in this respect, was that of a law with respect to State insurance.

110 *The legislation*: The joint reasons contain relevant provisions of, or reference to, the federal Act, the State Compensation Act and the State Insurance Act[55]. There is no necessity for me to repeat any of this statutory material. I incorporate it by reference.

111 *The common ground*: Having regard to the arguments of the parties, certain matters represent common ground between them in these proceedings:

(1) The impugned provisions of the federal Act, as defined in the submissions of the State and VWA (common in this respect), namely ss 104(1), 108(1) and 108A(7)(a) so far as they purported to apply to Optus, are properly characterised as laws with respect to "insurance";

(2) VWA is the "State" within the meaning of that phrase for the purpose of the Constitution, including as that word is used in s 51(xiv);

(3) The business of VWA includes "State insurance" for the purpose of s 51(xiv) of the Constitution;

(4) The exclusion in s 51(xiv) of the Constitution of federal lawmaking power in respect of "State insurance" is to be treated in the same way as the like exclusion in relation to "State banking" contained in s 51(xiii) of the Constitution;

(5) The exclusion in relation to "State insurance" in s 51(xiv) imposes a restriction upon federal legislative power generally, and not only a restriction in respect of federal laws that could be characterised as laws with respect to insurance; and

(6) When the Federal Parliament enacts a law that may be characterised as a law with respect to insurance, to be a valid law of the Commonwealth, that law must not touch or concern State insurance, except to the extent that any interference with State insurance is so incidental as not to affect the character of the law as one with respect to insurance other than State insurance.

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**55** Joint reasons at [33]-[42], [44]-[47], [56]-[57], [59]-[62].

112 The propositions contained in pars (5) and (6) above draw their validity from the reasoning of this Court in *Bourke*[56]. As will appear, it is that reasoning that lies at the heart of the challenge by the State and VWA to the validity of the purported steps taken to transfer Optus to the federal workers' compensation régime with its associated provisions for compulsory insurance and self-insurance to sustain that scheme. Both as a practical matter, and as a consequence of legal analysis of the federal and State workers' compensation legislation, the State and VWA argued that the intent and purported effect of the federal Act was to shift Optus wholly out of the State workers' compensation scheme into the federal one and, although it is a private corporation, to clothe it with a federal character in a way destructive of the application to it of the relevant State laws, notably the State law with respect to State insurance whose operation is protected from federal interference by the exception specifically expressed in s 51(xiv) of the Constitution.

113 For the State and VWA, the interference complained of was not an "incidental" or a peripheral or insubstantial consequence of the operation of the federal Act in this respect, such as might pass muster despite the exclusion from federal lawmaking of "State insurance" in s 51(xiv)[57]. On the contrary, the federal law touched or concerned State insurance in a way that was substantial, immediate and essential, striking at the heart of the operation and effectiveness of such State law and thus attracting the exemption from federal legislative power contained in s 51(xiv).

114 That this was so, the State and VWA asserted, was inherent in the operation of ss 108(1) and 108A of the federal Act in the case of a private corporation, such as Optus, employing employees in the State of Victoria. But any doubt about this conclusion was dispelled, according to their arguments, by the terms of s 108A(7) of the federal Act. Although that provision appears in the joint reasons[58], because it makes plain an essential purpose of the federal Act, it is worth repeating the critical provisions:

> "If a licensee who is a corporation is authorised to accept liability to pay compensation and other amounts under this Act in respect of a particular injury, loss or damage suffered by, or in respect of the death of, some or all of its employees after the licence comes into force then:

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**56** (1990) 170 CLR 276.

**57** *Bourke* (1990) 170 CLR 276 at 288-289.

**58** Joint reasons at [47].

(a) no law of a State or Territory relating to workers compensation applies to a licensee in respect of such injury, loss, damage or death".

115 The reference in s 108A(7)(a) of the federal Act is to a State (or Territory) law relating to workers' compensation. No express reference is made in the paragraph to such a law relating to insurance. However, according to the State and VWA this omission is immaterial. The State law relating to workers' compensation, by its terms and necessary operation, was inextricably linked to the State law on insurance and to the activities of VWA, a provider of State insurance established under State law. Hence the attraction of the constitutional exclusion in s 51(xiv).

The issues

116 The following issues arise for decision by this Court within the arguments addressed by the parties:

(1) *The requirements of Bourke*: This Court has not previously elaborated the meaning of the exception "State insurance" in the federal head of power provided by s 51(xiv) of the Constitution. However, in *Bourke* it explained the exception of "State banking" in s 51(xiii) which is agreed to be analogous. So the issue arises as to the requirements established by *Bourke* for the ambit of s 51(xiv) that must be applied in judging the validity of the federal Act challenged in this case, as it concerns or affects the State insurance conducted by VWA pursuant to the provisions of the State Compensation Act and the State Insurance Act as they relate to Optus;

(2) *The suggested modification of Bourke*: No party to these proceedings challenged the correctness of this Court's unanimous holding in *Bourke*. However, the Commonwealth contested one passage in the reasoning of the Court in that case where it explained that, to be permissible as a federal law which nonetheless touched and concerned State banking (and hence insurance), the connection with, or effect on, that activity must be "'so insubstantial, tenuous or distant' that the law cannot be regarded as one with respect to State banking"[59]. This test is expressed in a passage in the Court's reasons prefaced by the words "Put another way". The Attorney-General of the Commonwealth submitted that the alternative expression, supported by the Court by reference to the *Melbourne*

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**59** *Bourke* (1990) 170 CLR 276 at 289.

*Corporation* case[60], was erroneous. It was over-broad and was in any case subject to the following sentence explaining that the tests propounded are those appropriate to "the familiar process of characterization". Applying that familiar process, the Commonwealth urged that the impugned provisions could not be characterised as laws with respect to "State insurance". They did not infringe the exclusion expressed in s 51(xiv) of the Constitution. They were thus laws made under other relevantly unqualified paragraphs of s 51 (notably par (xx)). Accordingly, they were constitutionally valid and took primacy over the inconsistent State laws by force of s 109 of the Constitution. The second issue, therefore, concerns the correctness of the second expression of the applicable test for the validity of a federal law in such circumstances, as stated in *Bourke*; and

(3) *The application of Bourke*: Depending on the answers to the foregoing issues, the issue remains whether, applying this Court's authority in *Bourke* to the analogous problem presented by s 51(xiv) of the Constitution, the challenged provisions of the federal Act impermissibly intruded in this case upon the forbidden territory marked out in s 51(xiv) and were thus invalid as an attempt by the Federal Parliament to make laws on a subject of State insurance expressly excluded from the grant of legislative power to the Federal Parliament and so beyond that Parliament's powers.

The requirements of the decision in *Bourke*

117 *Implied reserved powers*: The starting point of analysis is a need to rid the judicial mind of irrelevant phobias concerning the "discredited reserved powers doctrine"[61]. That doctrine is mentioned in the joint reasons[62] as it was in *Work Choices*[63]. It harks back to the notion, embraced in the earliest days of the Commonwealth and of this Court, that the federal character of the Constitution, and the limited grants of legislative powers to the Federal Parliament, impliedly reserved certain powers to the States so that the grants of lawmaking powers to

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**60** *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79. See *Bourke* (1990) 170 CLR 276 at 289.

**61** *Bourke* (1990) 170 CLR 276 at 288.

**62** Joint reasons at [78].

**63** *New South Wales v Commonwealth* (2006) 81 ALJR 34 at 68-69 [82], 71-72 [94], 89 [190], 140-141 [470]; 231 ALR 1 at 29-30, 33, 57, 127.

the Federal Parliament, as in s 51 of the Constitution, were to be read, by implication, as subject to such (State) "reserved powers"[64].

118 The provenance of this doctrine may be traced to early decisions of the Supreme Court of the United States concerning analogous provisions of that country's Constitution[65]. After an early tussle between this Court and the Privy Council, which had rejected the doctrine in early Canadian cases, the doctrine was eventually overthrown by this Court's decision in the *Engineers'* case[66]. Nevertheless, that decision could not (nor did it purport to) erase the federal features that permeate the Australian Constitution and lie in its bedrock.

119 The *Engineers'* case was concerned with a doctrine of reserved State powers that depended upon an implication said to be found in the Constitution, although not expressed there in terms. Some such implications, protective of the essential governmental functions of the States, continue to be upheld by this Court[67]. It is not, therefore, true to suggest that the Federal Parliament can do anything it wishes under its own grants of power without consideration of the consequences for the States. However, that is not an issue presented by these proceedings. No one in this case, certainly not the State or VWA or any of the States intervening, sought to revive the implied doctrine of reserved State powers. Their concerns lay elsewhere.

120 Here, the limitation invoked by the State and VWA was not an *implied* but an *express* one. It was the one specifically included in the grant to the Federal Parliament of what was otherwise an ample federal lawmaking power with respect to insurance. By express provision of that paragraph of the Constitution, no federal law might be enacted that might be characterised as a law with respect to "State insurance". This Court is therefore dealing here with an express constitutional limitation, not an implied one. The *Engineers'* decision says

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**64** *D'Emden v Pedder* (1904) 1 CLR 91 at 111; *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087.

**65** *McCulloch v State of Maryland* 17 US 316 (1819); *The Collector v Day* 78 US 113 at 124 (1871). For later decisions see *Helvering v Gerhardt* 304 US 405 (1938). The doctrine was finally explicitly overruled in the United States in *Graves v New York ex rel O'Keefe* 306 US 466 (1939).

**66** *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

**67** *Melbourne Corporation* (1947) 74 CLR 31; *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188; *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416; *Austin v Commonwealth* (2003) 215 CLR 185.

nothing in relation to such express limitations. Given the constitutional text, there is no justification for judge-made doctrine, whether in *Engineers* or anywhere else, to excuse this Court from its duty to uphold the exclusion of federal laws on "State insurance". By explicit command of the Constitution, that exclusion must be observed.

121 *Express State insurance exclusion*: What is the reason for the grant of the powers in s 51(xiv) in the terms provided? Clearly, the business of insurance was well known in Australia at the time of federation. In fact, private insurance companies had operated in the Australian colonies for some time. They had assumed an important place as public financial institutions[68]. At first, they were largely unregulated. However, after the failure of a number of significant life assurance companies in the United Kingdom during the 1860s, the Imperial Parliament enacted the *Life Assurance Companies Act* 1870 (UK)[69]. That legislation had the objective of regulating the insurance industry in ways that were quickly copied in the Australian colonies, including Victoria[70].

122 Further regulation of insurance followed before, and after, federation. Also by that time, governments in the Australasian colonies began to show an interest in the conduct of insurance business themselves where that was considered necessary or useful to sustain social and legislative policies[71]. Thus, the establishment by the government of the New Zealand colony of its own insurance office[72] attracted favourable attention during the Australasian Convention Debates[73]. At the time of federation it was anticipated that the Australian States might follow the New Zealand example[74]. Specifically, at the

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**68** Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 20 May 1873 at 78 (Mr Langton).

**69** 33 & 34 Vict c 61; see also the 1872 amending Act: *Life Assurance Companies Act* 1872 (UK) (35 & 36 Vict c 41).

**70** *The Life Assurance Companies Act* 1873 (Vic) (37 Vict No 474).

**71** cf reasons of Callinan J at [173]-[174].

**72** *Government Annuities Act* 1869 (NZ) (32 & 33 Vict No 60). See also *New Zealand Government Insurance and Annuities Act* 1870 (NZ) (33 & 34 Vict No 86).

**73** *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 17 April 1897 at 779-780.

**74** *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 17 April 1897 at 779-780. See also Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 27 August 1913 at 977-985.

time of federation, the concept of State insurance of employers' workers' compensation liabilities, to reinforce and protect the effectiveness of such liabilities, fell within the subject to which the language of s 51(xiv) was directed.

123 In 1910, the Commonwealth Statistician, Mr G H Knibbs, delivered a report to the Federal Parliament on *Social Insurance* ("the Knibbs Report")[75]. His report described the "remarkable development in the application of the principles of insurance" in Europe, notably with respect to social insurance extending to insurance against "sickness, accident, death, old age, or other adversity"[76]. The report recounted developments in the law of Prussia, and of the later German and Austrian Empires, in the latter part of the nineteenth century. By those developments social insurance, applicable to workers (originally miners in Prussia), was made feasible by the enactment of laws "making compulsory the creation of such funds" as would render such compensation a practical possibility[77].

124 It was out of such developments, which Mr Knibbs traced to the Prussian law of 10 April 1854, that the later legislative innovations of Imperial Germany, under the chancellorship of Prince Otto von Bismarck, saw the enactment of the world's first compulsory workers' compensation laws[78]. These developments were well known to the framers of the Australian Constitution. They reflected the developments in Europe, later copied in New Zealand, which were expected to spread to the Australian States in accordance with the text of the Constitution. The meaning, ambit and purpose of s 51(xiv) needs to be considered against this historical background[79].

125 *Integrated benefits and social insurance*: The foregoing historical excursus does not suggest that s 51(xiv) should be given a meaning today according to the original intent of those who framed, and adopted, the paragraph. But it does indicate the functional purpose for which the paragraph was provided: a function in any case clear enough from the paragraph's terms.

126 The Knibbs Report explained specifically[80]:

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**75** Parliament of the Commonwealth of Australia, *Social Insurance: Report by the Commonwealth Statistician, G H Knibbs*, (1910).

**76** Knibbs Report at 11 [1].

**77** Knibbs Report at 12 [3].

**78** Knibbs Report at 16-17 [1].

**79** See also reasons of Callinan J at [173]-[174].

**80** Knibbs Report at 14 [6].

> "As matters then stood [before the enactment of workers' compensation laws], the workman could recover damages by action at law only, with costly investigations ensuing each case of accident and with tedious legal procedure and its consequent delays and uncertainties. The desire for more certain and immediate compensation in cases of accident grew apace. It is at this point that the agency of insurance has been invoked. By this agency it is sought to compel employers either to insure their employés in a State or private insurance institution, or themselves to maintain insurance funds, and to thus secure the position of the workmen by establishing in advance the amount and nature of the compensation to be granted, and by ensuring its immediate payment. From a merely legal question, therefore, the liability for accidents to workmen has, by a natural process of evolution, passed into a social question, viz, that of workmen's insurance."

127 Describing the state of the law as he found it in Germany in the first decade of the twentieth century, Mr Knibbs insisted that compulsory insurance was a principle that was fundamental to the German system of workmen's compensation[81]. He added, presciently so far as later developments in Australia were to unfold[82]:

> "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 course of time be *transformed into institutions wholly organized by the State*."

Contemporaneous texts in the United States of America made similar points[83].

128 As anticipated at the time of Australian federation, and later in the Knibbs Report, State Parliaments quickly moved to enact integrated workers' compensation and compulsory insurance legislation. Thus, the Parliament of Victoria did so by enacting the *Workers' Compensation Act* 1914 (Vic)[84]. That

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**81** Knibbs Report at 22 [3].

**82** Knibbs Report at 22 [3] (emphasis in original).

**83** eg Boyd, *Workmen's Compensation and Industrial Insurance*, (1913), vol 1, §§11, 14, 117, 122.

**84** 4 Geo V No 2496.

Act established a State Accident Insurance Office for Victoria[85]. All employers in the State, subject to State regulation, were thereupon required to insure their workers' compensation liabilities either with the Insurance Commissioner[86] or with a (private) insurer approved by the Commissioner by reference to solvency and integrity criteria.

129 Activities of this kind were thus clearly within the contemplation of the anticipated features of "State insurance" as excluded from the ambit of federal legislative power with respect to insurance in the terms of s 51(xiv) of the Constitution. It was so at the time of federation[87]. It has remained so ever since. It is envisaged in the language of the constitutional grant of power. Moreover, as the history demonstrates, it was expressly contemplated and quickly put into force by the creation of State Insurance Commissions and Offices throughout Australia. These are the type of bodies, now including, in Victoria, VWA, that fell within the description of "State insurance" as used in the Constitution.

130 The history and practice of State insurance since federation denies any sharp bifurcation between State laws with respect to workers' compensation and State laws with respect to compulsory insurance to fund the compensation so provided. Typically, the two laws were, from the start, fully integrated. Often, they were contained in the one statute[88]. Their provision in companion legislation is immaterial to the necessary and intended inter-relationship[89].

131 *Evolution of the applicable test*: The meaning of the exclusion of "State insurance" in s 51(xiv) of the Constitution can only be understood by analogy with the treatment of the like exclusion of "State banking" expressed in s 51(xiii). The latter question, but not the former, has come before this Court in two cases.

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**85** By s 32. This was one of the first State Accident Insurance Offices established in Australia. Others quickly followed.

**86** Appointed pursuant to s 32(2) to manage and control the State Accident Insurance Office of Victoria.

**87** See reasons of Callinan J at [173]-[174].

**88** Provisions relating to insurance could be found, for example, in the *Workers' Compensation Act* 1914 (Vic), s 32 and the *Workers' Compensation Act* 1926 (NSW), ss 18-30. See also Mills, *Workers Compensation (New South Wales)*, (1969) at 398-435.

**89** Which is also demonstrated by the short title to the State Insurance Act, namely *Accident Compensation (WorkCover Insurance) Act* 1993 (Vic).

132 The first was the *Melbourne Corporation* case[90]. The matter in issue in that case was the validity of s 48 of the *Banking Act* 1945 (Cth). That section purported to forbid a bank, except with the consent in writing of the Federal Treasurer, to conduct any banking business for a State or for any authority of a State, including a local government authority. The validity of the prohibition was challenged by the Melbourne City Council. This Court, by majority, held that the section was not a valid exercise of the power to make laws with reference to "banking", conferred on the Federal Parliament by s 51(xiii) of the Constitution. In the course of reasoning, two views were propounded as to the ambit of the exception for State banking.

133 In his reasons, as part of the majority in *Melbourne Corporation*, Latham CJ explained the exception as preventing the Federal Parliament from enacting laws with respect to the establishment, management and conduct of banks by a State or by an authority established under State law and representing the State, or with respect to the conduct of customers of such banks in their capacity as such customers[91].

134 On the other hand, Dixon J, also a member of the majority, adopted a more stringent view[92]:

> "The purpose of the exception was, I have no doubt, to ensure that State banks should not be affected by any law which the Parliament of the Commonwealth might make about banking and that the exclusive power to regulate them should remain with the States.
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> …
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> The exception of State banking means that a general law of the Commonwealth governing the business of banking cannot affect the operations of a State bank within the State concerned. The express inclusion in the federal legislative power of State banking extending beyond the limits of the State concerned gives added point to the exception. For it shows that State banking was contemplated as a possible function of government which should be excluded from the operation of federal law within the territorial limits of the authority of the government concerned."

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**90** (1947) 74 CLR 31.

**91** (1947) 74 CLR 31 at 52.

**92** (1947) 74 CLR 31 at 78.

135 The controversy concerning the ambit of the legislative power in s 51(xiii) re-emerged in *Bourke*. In the result, it was the approach of Dixon J that was followed by this Court in the unanimous reasons of Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ in that decision.

136 At the outset of its reasons in *Bourke*, the Court postulated the alternative views as to the nature and extent of the restriction imposed by the exception. The first possibility was that the Federal Parliament was prohibited from making laws with respect to State banking, in which case the ordinary tests of characterisation would not be adequate to determine whether a federal law intruded upon the exception[93]. The second possibility was that the federal legislative power did not extend to the enactment of laws with respect to banking (even if those laws were also laws with respect to another subject matter of legislative power) to the extent that those laws "touched or concerned" State banking.

137 It would, theoretically, have been possible to confine the scope of the exclusion of laws concerning State banking in s 51(xiii) of the Constitution to cases where it could be shown that the federal law in question was "aimed at" or "singled out" or "discriminated against" State banking. However, in *Bourke*, this Court rejected that narrower view of the exemption[94]. Similarly, the Court concluded that the ambit of the exclusion could not be decided by adopting a simple criterion of whether the sole or dominant character of the impugned federal law was a law with respect to State banking[95]. Such an approach, the Court held, would not give adequate effect to the explicit exclusion of "State banking" to which full force had to be applied.

138 *The broad principle in Schmidt*: It was at this point in its reasoning in *Bourke*[96] that the Court explained the way in which the question, presented by the exemption of the specified State business, had to be answered. In order to make the application of the propounded test clearer, with respect to the issue presented in these proceedings, I will substitute throughout the quoted passage a reference to par (xiv) for par (xiii) and to "insurance" in the place of "banking". So modified, the test was stated as follows[97]:

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**93** (1990) 170 CLR 276 at 286.

**94** (1990) 170 CLR 276 at 288.

**95** (1990) 170 CLR 276 at 286-288.

**96** (1990) 170 CLR 276 at 289. See also at 285.

**97** (1990) 170 CLR 276 at 288-289.

> "The only satisfactory solution to this problem is to accept that there is no exclusive State power to make laws with respect to State [insurance]. But the words of s 51[(xiv)] still require that, when the Commonwealth enacts a law which can be characterized as a law with respect to [insurance], that law does not touch or concern State [insurance], except to the extent that any interference with State [insurance] is so incidental as not to affect the character of the law as one with respect to [insurance] other than State [insurance]: see *Fairfax v Federal Commissioner of Taxation*[98]. Put another way, the connexion with State [insurance] must be 'so insubstantial, tenuous or distant' that the law cannot be regarded as one with respect to State [insurance]: *Melbourne Corporation*[99]. Of course, these are the tests used in the familiar process of characterization. But they are employed in the context of an embracing Commonwealth power expressed as one to make laws with respect to [insurance] other than State [insurance]. They are not employed in the context of an exclusive State legislative power with respect to State [insurance]. So, if a law is not one with respect to [insurance], it is not subject to a restriction that it must not touch or concern State [insurance]."

139 The foundation for this reasoning, as the Court immediately acknowledged, was the highly influential analysis of Dixon CJ in *Attorney-General (Cth) v Schmidt*[100]. Writing in that case on the relationship between the requirement for just terms for federal acquisitions of property in s 51(xxxi) and other heads of power as potential sources of such acquisition which could otherwise easily evade the requirement of just terms, Dixon CJ explained why no narrow view could be taken of the safeguard, restriction or qualification on the specified grant of federal power[101]:

> "It is hardly necessary to say that when you have … an express power, subject to a safeguard, restriction or qualification, to legislate on a particular subject or to a particular effect, it is in accordance with the soundest principles of interpretation to treat that as inconsistent with any construction of other powers conferred in the context which would mean that they included the same subject or produced the same effect and so

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**98** (1965) 114 CLR 1 at 7.

**99** (1947) 74 CLR 31 at 79.

**100** (1961) 105 CLR 361 at 372. See also *New South Wales v Commonwealth* (2006) 81 ALJR 34 at 147-148 [504]-[508]; 231 ALR 1 at 137-138.

**101** *Schmidt* (1961) 105 CLR 361 at 371-372 cited in *Bourke* (1990) 170 CLR 276 at 285-286.

> authorized the same kind of legislation but without the safeguard, restriction or qualification."

140 It is this general principle of construction, adopted in *Schmidt*, and applied to the heads of legislative power in s 51 of the Constitution, that explains the unanimous ruling of this Court in *Bourke*. That ruling held that s 52(1) of the *Trade Practices Act* 1974 (Cth), prohibiting a corporation from engaging in misleading or deceptive conduct, did not apply to the defendant in that case, State Bank of New South Wales, a manifestation of "State banking" within the Constitution. True, the federal law in question was one of complete generality. True also, it did not "single out", "target" or "discriminate against" the defendant State Bank or State banking as an activity. Nor was the *Trade Practices Act*, in its generality, an Act, as such, entirely with respect to State banking, any more than the federal Act in question in this case is an Act, as such, entirely with respect to State insurance. However, in *Bourke*, this Court concluded that, in its operation, the *Trade Practices Act* could not be said only to touch or concern the State banking operations of the State body involved in that case in a way that was no more than "incidental" and so that it did not "affect the character of the law as one with respect to banking other than State banking".

141 *The State's case: apply Bourke*: Applying the alternative expression of the test of impermissible effect, this Court concluded in *Bourke* that the connection with State banking of the federal *Trade Practices Act* was not "so insubstantial, tenuous or distant" that the latter could not be regarded as a law "with respect to" State banking. The Court thus held that the *Trade Practices Act* intruded into the forbidden territory. As a federal law, it impermissibly invaded the field of State banking. It was therefore constitutionally invalid.

142 By analogous reasoning, the State and VWA invoked the same result in these proceedings. The reasoning of this Court in *Bourke* has been criticised as erroneous in so far as the Court concluded that the prohibition in the *Trade Practices Act* was relevantly a "law with respect to banking"[102]. However, save for the criticism by the Attorney-General of the Commonwealth of the alternative formulation, to which I will now turn, no party to these proceedings challenged the correctness of the decision in *Bourke* or the expression of the test for validity of the impugned federal law stated in that case. On the face of things, subject to what follows, that decision should therefore be given effect. It is a recent, unanimous and single opinion of the entire Court, similar in this respect to the

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**102** Rose, "Judicial Reasonings and Responsibilities in Constitutional Cases", (1994) 20 *Monash University Law Review* 195 at 199-200.

decision in *Brown v West*[103], invoked by the challenges in *Combet v The Commonwealth*[104]. It represented the fulcrum of my reasoning concerning the intersection of the nominated heads of federal legislative power in the *Work Choices* case[105]. To the full extent that the exclusion of "State insurance" is analogous to the exclusion of "State banking", considered in *Bourke*, the same reasoning should be applied with the same outcome. In every way the unanimous holding in *Bourke* applies even more clearly in this case than it did in *Work Choices*.

The suggested modification of *Bourke*

143 *The Commonwealth's submission*: The Commonwealth challenged the second way in which, in this Court's reasoning in *Bourke*[106], the Court explained the criteria of impermissible connection to the State activity (there of banking) that would justify a conclusion that the impugned federal law had passed beyond its permissible ambit and had intruded into the territory of State activity excluded from federal lawmaking. This is what the Court said:

> "Put another way, the connexion with State banking must be 'so insubstantial, tenuous or distant' that the law cannot be regarded as one with respect to State banking".

144 The Commonwealth was prepared to accept that, "correctly understood", the principles in *Bourke* were to be applied in these proceedings to determine whether the provisions of the federal Act challenged by the State and VWA were valid. However, it was in the "correct understanding" of *Bourke* that the dispute lay. The Attorney-General of the Commonwealth suggested that the adoption of criteria for connection with the accepted State activity as being "so insubstantial, tenuous or distant", imposed on the Federal Parliament too strict a test for invalidity. It cast a disproportionately broad protection upon the State business concerned. It deflected attention from the essential requirement which was to consider whether the federal law might, amongst other things, be characterised as a law with respect to insurance and, if so, whether it touched or concerned State insurance in an impermissible way.

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**103** (1990) 169 CLR 195. The Court's reasons in *Brown's* case involved five Justices (Mason CJ, Brennan, Deane, Dawson and Toohey JJ). The reasons in *Bourke* were those of the entire Court.

**104** (2005) 224 CLR 494.

**105** *New South Wales v Commonwealth* (2006) 81 ALJR 34 at 145-146 [496]-[498]; 231 ALR 1 at 134-135.

**106** (1990) 170 CLR 276 at 289.

145 *Conclusion: Bourke criteria stand*: In my view, the Commonwealth has not made good its criticism of the second passage in *Bourke* with which it cavils. The passage appears in the unanimous reasons of all of the then members of the Court. It is grounded, as the text shows, in the reasons of Dixon J in the *Melbourne Corporation* case[107]. There is no reason to doubt the correctness of the expression of the reasons in *Bourke*, or their application, by analogy, to the similar constitutional issue now in hand.

146 I accept that, ultimately, the task for the Court is one involving "the familiar process of characterization" as the joint reasons acknowledged in *Bourke*[108]. I also accept that verbal explanations of the requirements for characterisation are not themselves part of the Constitution or immutable formulae. They represent judicial attempts to explain a complex process involving ultimately matters of assessment and judgment. Explanations in terms of connections that are "so insubstantial, tenuous or distant" are only marginally preferable to the explanation given by Barwick CJ in *Victoria v The Commonwealth*[109], cited in *Bourke*[110], when the Chief Justice said:

> "[W]hen a law may possibly be regarded as having either of two subjects as its substance, one of which is within Commonwealth power and the other is not, a decision must be made as to that which is *in truth* the subject matter of the law."

147 Characterisation notoriously involves classification and assignment of legislation by reference to considerations that are inherently disputable and upon which informed and reasonable observers can quite often reach different conclusions. Those who think otherwise deceive themselves. Nowadays, they are unlikely to mislead others.

148 However, one reason for endorsing, in this context, the formulation derived from the explanation of Dixon J in *Melbourne Corporation* is that the Court is here dealing with an *express* exclusion from a grant of federal power in terms that are obviously designed to protect a State activity. The general doctrine of the *implied* immunity of instrumentalities has been overthrown. But this is

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**107** (1947) 74 CLR 31 at 79. See also *Austin v Commonwealth* (2003) 215 CLR 185 at 213-215 [20]-[21].

**108** (1990) 170 CLR 276 at 289.

**109** (1971) 122 CLR 353 at 372-373 (emphasis added).

**110** (1990) 170 CLR 276 at 286.

one case where the Constitution has taken the pains, exceptionally, to provide an *express* immunity.

149 Far from being an instance which, as the Commonwealth submission urged, should be strictly construed so as to limit the impairment of the grant of federal lawmaking power[111], the unusual and exceptional character of the exclusion from the operation of federal law of "State banking" and "State insurance" suggests the need to take the express constitutional exception seriously. It was provided for a purpose designed to protect both State banking and State insurance from the operation and interference of federal laws, except (relevantly) where any such operation was "incidental" or "insubstantial, tenuous or distant". Otherwise, such State banking and State insurance was intended, by the terms of the Constitution, to be left to State regulation[112].

150 It is often said that federal systems of government permit healthy experimentation and innovation at the State level. Indeed, in Australia there have been notable instances of this. One such area, which was clearly within contemplation of the founders at the time of federation and has emerged since, has been the field of State insurance underpinning policies of social insurance reflected in the successive provisions of State law. Such innovations were contemplated in the early decades of federation, as indicated in the Knibbs Report, mentioned above. The criteria of impermissible intrusion by federal law, accepted by this Court in *Bourke* and challenged by the Commonwealth in these proceedings, are therefore protective of State innovation. They are apt to the express exclusion from the effects of federal lawmaking in s 51(xiv) that forbids a federal law that may be characterised as one with respect to insurance from touching upon or concerning "State insurance" in any way that is not "so incidental" or "so insubstantial, tenuous or distant"[113]. Even if it were open to me to do so, I would not therefore overrule, or excise, the criteria expressed by the unanimous Court in *Bourke*. I would apply them to this case.

The application of *Bourke* to the present case

151 *The task of characterisation*: The foregoing reasons leave this Court with the task of characterising the impugned provisions of the federal Act and asking whether, relevantly, they are laws with respect to insurance and, if so, whether they touch or concern State insurance, to the degree forbidden by *Bourke*.

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**111** By reference to a supposed principle in *Attorney-General (Vict); Ex rel Black v The Commonwealth* (1981) 146 CLR 559 at 614-615, 635, 652-653.

**112** See also reasons of Callinan J at [175]-[178].

**113** *Bourke* (1990) 170 CLR 276 at 288-289.

152 Both sides to the contest invoked the description by Kitto J in *Fairfax v Federal Commissioner of Taxation*[114] of what is involved in this process. The approach to the operation of the phrase "with respect to" in s 51 may be "settled"[115]. However, the process of characterisation still leaves much room for differences of opinion and outcome, doubtless influenced by unexpressed, and even possibly unperceived, constitutional notions regarding the borderline of federal lawmaking power and, hence, the residual State lawmaking power that remains.

153 The majority of this Court has now concluded that no invalidity has been shown in the operation of the federal Act so far as it affects VWA as a State insurer and Optus as (formerly) an insured of such a State insurance business. With respect, I find the majority reasoning unconvincing. Especially so when that reasoning is compared to the reasoning and outcome endorsed by every member of this Court as it was when *Bourke* was decided.

154 The basic flaw in the majority reasoning, as it seems to me, lies in the willingness to separate the insurance and the workers' compensation provisions of the State and federal Acts and to sever the relationship of insurer and insured from the substantive obligations imposed respectively by the federal Act and by the State Compensation and Insurance Acts[116]. It is only in that way that the majority can arrive at its conclusion that the federal laws "retain after the operation of the mechanism of s 109 [of the Constitution] a character which supports their validity under the corporations power without those laws touching or concerning State insurance"[117].

155 This approach to the intersection of the federal and State laws ignores the essential legal and practical inter-connection between the substantive compensation provisions and the provisions for insurance (or self-insurance) that underpin both the federal and State compensation schemes. As the Prussian lawmakers learned in providing for compensation for miners in that country in 1854, and as Chancellor Bismarck taught in respect of his innovative general workers' compensation laws for Germany in the 1890s (and as Australian laws on the subject have repeatedly demonstrated in the decades since federation), the substantive rights to compensation and to "common law" damages are intimately, practically and directly inter-connected with the mechanisms, by way of

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**114** (1965) 114 CLR 1 at 7. See joint reasons at [80].

**115** *Bourke* (1990) 170 CLR 276 at 287.

**116** Joint reasons at [78]-[90].

**117** Joint reasons at [88].

premiums, for providing the fund out of which such compensation and damages will be paid, namely compulsory insurance.

156 To divorce the substantive rights to workers' compensation from the insurance obligations involves a degree of unreality that ill-becomes this Court. Especially so where, as in the case of Victoria, the State law has provided not only that the relevant form of insurance by employers is compulsory in the State but that it must be effected with VWA, a State instrumentality that carries on "State insurance" business within s 51(xiv) of the Constitution.

157 *Intrusion on the State insurance relationship*: In these circumstances, having regard to the statutory rights and obligations of VWA under the State Insurance and Compensation Acts, the federal Act, by purportedly authorising the transfer of Optus to regulation by federal legislation, specifically intrudes into the relationship between Optus and VWA, in respect of VWA's activities in State insurance within the limits of the State concerned[118].

158 The legal and practical effect of s 108A(7)(a) of the federal Act is to render an eligible private corporation, granted a licence under s 104(1) of that Act (which, pursuant to s 108(1), authorises the licensee to accept liability to pay compensation under the federal Act), immune from the obligation to insure any longer with VWA against the liabilities established by the State Compensation and Insurance Acts. The result is that, from the operative date of the licence under the federal Act, employees employed by that licensee who suffer employment injuries, and their dependants, cease to be entitled to compensation and damages in accordance with the State Compensation Act. The licensee is not then liable to pay compensation or damages in accordance with the State Compensation Act. The licensee is not obliged to obtain and keep in force an insurance policy with VWA in respect of any such liability. The licensee is not obliged to pay insurance premiums under the State Insurance Act to VWA. The statutory indemnity afforded to the licensee, pursuant to the State Compensation and Insurance Acts, purportedly ceases.

159 All of these consequences amount, both in law and in practical effect, to a purported conferral on Optus, as an employer of employees in the State of Victoria, of a statutory immunity from obligations to insure with the State insurer as otherwise the law of that State would require in respect of the Victorian employees of Optus.

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**118** Specific argument was not addressed to any extra-territorial operation of the Victorian legislation in particular cases or the effect that such cases might separately have, if any, on the operation of the federal Act.

160 *A stronger case than Bourke*: Now compare the federal legislation that was invalidated in *Bourke*, with that in question here. There can be no doubt that the federal Act in issue in these proceedings involves a much more direct instance of federal intrusion into the excepted State activity (here of insurance), excluded by the constitutional provisions. In *Bourke*, nothing more was involved than the operation of a federal law of general application (the *Trade Practices Act*). That law was nonetheless held to be an impermissible federal burden on the conduct by the State banking institution in respect of its activities of banking. Here, the impact of the federal law, if valid, is much more direct and deliberate:

- It impinges on the previously existing, and otherwise subsisting, obligations of Optus, a private corporation, under the State Compensation Act and thus the State Insurance Act;

- It directly affects the rights and obligations of third parties (employees of Optus and their dependants) under the same Acts;

- It terminates the rights and obligations of the State insurer (VWA) and intrudes directly into its statutory indemnity policy with its insured, Optus;

- It strikes at the viability of the State insurance business of VWA by depriving it of its source of premium income in respect of its insured, Optus;

- It sets a precedent for other similar moves of private employers to the federal régime which contains "caps" and other provisions less beneficial to employees than the State régime provides[119]; and

- It alters the compensation and insurance relationship between Optus and its employees (and their dependants) effectively from one regulated with the State insurer under State law to one in which Optus becomes a self-insurer under federal law with significantly diminished obligations when compared to those applicable under State law.

161 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.

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**119** Above these reasons at [107].

162 *Conclusion: the State succeeds*: Distinct questions might arise as to the validity, under the federal Constitution, of State legislation rendering it compulsory to insure with a State insurer. However, such issues were not directly argued in these proceedings. In the approach that I favour, if they were to be advanced, they would have to be postponed to be dealt with specifically on another day.

163 Within the arguments of the parties in these proceedings, the State and VWA are entitled to the application to their case of the principle expressed in *Bourke*. The federal Act does touch or concern State insurance. The interference with State insurance that it occasions 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. In the outcome, the State and VWA are entitled to succeed[120].

164 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 challenged by reference to the constitutional position of the States. The current expansion of federal power is demonstrated once again[121] even where, exceptionally, the Constitution carves out an express exclusion protective of State lawmaking. As in *Combet*, where the unanimous authority of *Brown* was circumvented, so here the unanimous authority in *Bourke* is neutered. This is another discouraging decision for federalism in Australia[122]. But also for the observance of unchallenged past authority of this Court.

Orders

165 In my opinion, the appeal from the Federal Court of Australia (Selway J) should be allowed. The judgment of that Court should be set aside. In place of that judgment, this Court should:

(1) Declare that ss 104(1), 108(1) and 108A(7)(a) of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth), to the extent that those provisions

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**120** See also reasons of Callinan J at [167], [175]-[179].

**121** *New South Wales v Commonwealth* (2006) 81 ALJR 34 at 168 [615]; 231 ALR 1 at 165.

**122** cf Saunders and Le Roy, "Commonwealth of Australia", in Le Roy and Saunders (eds), *Legislative, executive, and judicial governance in federal countries*, (2006) 38 at 62.

remove the obligation of a licensed corporation, otherwise so liable, to obtain and keep in force a policy of insurance with the fourth respondent in accordance with the *Accident Compensation (WorkCover Insurance) Act* 1993 (Vic) and relieve such a corporation of its liabilities as an employer to pay compensation under the *Accident Compensation Act* 1985 (Vic) and to pay damages at common law as preserved and regulated by the *Accident Compensation Act* 1985 (Vic), are invalid as beyond the legislative powers of the Parliament;

(2) Declare that the licence granted by the second respondent under Pt VIII of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) on 1 November 2004 is invalid and of no force and effect; and

(3) Order, by way of *certiorari*, that the decision of the second respondent to grant the licence be quashed;

166 I would order the first respondent to pay the costs of the appellant and the fourth respondent in this Court. I would also order the costs of the fourth respondent in the Federal Court (where it was the applicant) to be borne by the first respondent.

167 CALLINAN J. There is no doubt, in my opinion, that the laws in question are largely and substantially laws with respect to insurance, and relevantly "State insurance". I therefore agree with the reasons and conclusions of Kirby J, subject to the following matters.

168 Not all of the laws of the Commonwealth in question however, may necessarily be characterizable exclusively as laws with respect to insurance. That this is so appears, for example, from the statutory functions of Comcare, established by and under the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) ("the Act"), and set out in s 69 of it:

> "**Functions**
>
> Subject to this Act, Comcare has the following functions, in addition to its other functions under this Act:
>
> (a) to make determinations accurately and quickly in relation to claims and requests made to Comcare under this Act;
>
> *(b) to minimise the duration and severity of injuries to its employees and employees of exempt authorities by arranging quickly for the rehabilitation of those employees under this Act;*
>
> *(c) to co-operate with other bodies or persons with the aim of reducing the incidence of injury to employees;*
>
> *(d) to conduct and promote research into the rehabilitation of employees and the incidence and prevention of injury to employees;*
>
> *(da) to promote the adoption in Australia and elsewhere of effective strategies and procedures for the rehabilitation of injured workers;*
>
> (e) to publish material relating to any of the functions referred to in paragraphs (a), (c) and (d) and relating to the rehabilitation of employees under this Act;
>
> (ea) in respect of actions for non-economic loss – to take over the conduct of such actions under section 52A on behalf of the Commonwealth, Commonwealth authorities or employees against whom such actions were taken;
>
> ...
>
> *(g) such other functions as are conferred on Comcare by any other Act.*

Note: Functions have also been conferred on Comcare by other Acts, such as the *Asbestos-related Claims (Management of Commonwealth Liabilities) Act 2005* and the *Occupational Health and Safety (Commonwealth Employment) Act 1991*."

(emphasis added)

169 A number of the functions at least arguably relate to the avoidance of injury to, and the rehabilitation of workers, who have sustained injury, workplace safety generally, and industrial relations.

170 Section 44 of the Act should also be set out:

"**Action for damages not to lie against Commonwealth etc in certain cases**

(1) Subject to section 45, an action or other proceeding for damages does not lie against the Commonwealth, a Commonwealth authority, a licensed corporation or an employee in respect of:

(a) an injury sustained by an employee in the course of his or her employment, being an injury in respect of which the Commonwealth, Commonwealth authority or licensed corporation would, but for this subsection, be liable (whether vicariously or otherwise) for damages; or

(b) the loss of, or damage to, property used by an employee resulting from such an injury;

whether that injury, loss or damage occurred before or after the commencement of this section.

(2) Subsection (1) does not apply in relation to an action or proceeding instituted before the commencement of this section.

(3) If:

(a) an employee has suffered an injury in the course of his or her employment; and

(b) that injury results in that employee's death;

subsection (1) does not prevent a dependant of that employee bringing an action against the Commonwealth, a Commonwealth authority, a licensed corporation or another employee in respect of the death of the first-mentioned employee.

(4) Subsection (3) applies whether or not the deceased employee, before his or her death, had made an election under subsection 45(1)."

171 Section 45 of the Act imposes, in some circumstances, restrictions and limitations upon the rights of employees of a licensee under it, to sue and recover damages sustained in the course of, or arising out of employees' employment. Sections 46 and 47 make provision, as a condition precedent to certain actions for damages the giving of notices, and s 48 is concerned with, among other things, the consequences of the acceptance by employees of compensation, the pursuit by them of damages, and the relationship between them. And s 52 provides that compensation cannot be recovered under both the Act and an award. Reference should also be made to s 52A, which confers rights upon licensed corporations, and imposes obligations in respect of certain actions for damages for non-economic loss. The joint reasons also touch upon the inferior position in which injured employees of licensed corporations may be placed, with respect to the quantum of some heads of damages, to the position of employees of others in Victoria[123].

172 It follows that some, at least, of the Act may arguably also be characterizable as laws, with respect to actions in Victoria and damages recoverable there under State law, both written and the common law, purporting to limit not only those employers who obtain a licence under the Act, but also, necessarily involuntarily, those persons otherwise able to make claims and bring actions, the employees. These are certainly not matters readily to be seen as within a head of Commonwealth constitutional power. This matter assumes a further significance in relation to a matter of choice which I discuss later.

173 For reasons which I stated in *New South Wales v Commonwealth*[124], I propose to look to the founders' intent in drafting the Constitution[125]. That the founders clearly did not contemplate an intrusion of the kind which this Act, if valid, would make upon State insurance, is readily discernible from what was said during the Convention Debates. Subject to a matter earlier stated by him, Mr Higgins said this[126]:

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**123** Reasons of Gummow, Hayne, Heydon and Crennan JJ at [58].

**124** (2006) 81 ALJR 34 at 224-226 [812]; 231 ALR 1 at 238-241.

**125** cf reasons of Kirby J at [122].

**126** *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 17 April 1897 at 781.

> "I think my friend is under a misapprehension as to this. I am limiting insurance matters for the Federal Parliament to have control over. I propose to *exclude* certain matters from federal control. The expression then will be to the effect that the Federal Parliament is to have power to make laws for insurance, but it is not to have power to make laws as to *insurance effected within the limits of a colony by that colony*." (emphasis added)

The matter earlier stated by him was this[127]: "The intention is to have the federal law only to apply to *insurance which is general over the colonies*."

174 It is suggested that if the result contended for by Victoria were allowed, each State might then legislate for a monopoly in State insurance and "effectively withdraw that kind of insurance from Commonwealth control"[128]. That was a possibility clearly anticipated, and ultimately accepted with equanimity, by the founders, as appears from the Convention Debates[129]:

> "Mr O'CONNOR: ... Supposing every State adopted a system of State insurance, according to this exception each State would be able to adopt a different method, so long as it kept within its own boundaries, and you might have five different systems of insurance outside the general law.
>
> Mr ISAACS: Is that not States rights?
>
> Mr O'CONNOR: No; because you start with the proposition that general insurance laws must be the same throughout the colonies.
>
> Mr SYMON: The object of this, I understand, is to exercise a federal control over any State undertaking the business of insurance outside its own boundaries. I agree, and most people will too, that if a State enters upon a commercial undertaking it should have no privileges and exemptions from which ordinary individuals are not

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**127** *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 17 April 1897 at 780 (emphasis added).

**128** Reasons of Gleeson CJ at [10].

**129** *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 17 April 1897 at 779-780.

free; but the language used here seems to be open to the criticism of Mr Higgins[130].

Mr WISE: By keeping it in you give special privileges within its boundaries.

Mr SYMON: To that I do not object. If South Australia chooses to establish a system of State insurance, I do not see why she should not within her own limits. It affects her own subjects only, and *we should diminish the rights of self-government if we decided otherwise*; but if South Australia opens agencies in Victoria, then the federal law should be able to say, 'If South Australia chooses to enter into commercial rivalry with those companies outside her own territory, she should be subject to the conditions imposed in other countries.' I think that is the extent to which this provision was intended to go.

Mr O'CONNOR: Hear, hear.

Mr SYMON: It seems to me that these words:

> 'Including State insurance extending beyond the limits of the State concerned'

ought to be, in the sense in which they were inserted – –

Mr HIGGINS: Struck out.

Mr SYMON: No; retained. But I doubt with Mr Higgins whether they exactly and clearly give effect to that sense. ...

Mr HIGGINS: I agree thoroughly in principle with Mr Symon as to his intentions, but I would suggest that what is wanted here is an excluding phrase, and not an including phrase. Insurance covers all kinds of insurance. You want an excepting phrase. 'Insurance' will be the general expression, and then will follow:

> 'Except State insurance confined to the limits of the particular State.'

Mr SYMON: That is the better way." (emphasis added)

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**130** Mr Higgins had expressed some concern about whether "State" meant a particular colony, or whether it meant "the State as distinct from the individual": see *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 17 April 1897 at 779.

175 It is also suggested[131] that because the Act leaves it to Optus (and others) to decide whether to effect insurance, or to self-insure under the Act, the Act, in its operation, is so incidental to "State insurance" as not to affect the power over insurance of the Victorian legislature that it possesses, or, is so insubstantial, tenuous or distant from the relevant Victorian legislation that it cannot be regarded as a law with respect to "State insurance". With respect, I am unable to accept, that because Optus might have a choice between insuring under the Commonwealth or insuring under the State scheme, the Commonwealth legislative scheme does not enter the excluded territory of "State insurance" for the purpose of s 51(xiv), despite that if Optus chose the Commonwealth scheme the State laws would, under the Commonwealth legislation, be completely excluded. What would seem to follow if this is correct is that, when the States appear to enjoy, even by express provision in the Constitution, an immunity from Commonwealth control[132], the Commonwealth may nonetheless intrude and dominate the field, if two conditions are satisfied: that the legislation be concerned with a stated head of general power of the Commonwealth; and, that those who may be affected by, or subject to the Commonwealth legislation are given a choice between the regime for which it provides and the State's regime.

176 There is a further significant aspect to this. The "choice" is the choice of the employer alone. It is one thing to say that anyone should be free to choose his or her insurer, or whether to self-insure. It is an entirely different, and, I am disposed to think, unconstitutional thing to say, that in consequence of that choice, employees not party to the choice, who may have been wronged and injured by their employers, should become disentitled to seek remedies and damages in the ways, of the kinds, and subject to the limitation periods, for which State laws otherwise applicable to them and their employers provide.

177 It is, in my view, an unlikely proposition that whether a State constitutional immunity should be given effect, might depend upon the whim or the interests of someone, neither the State nor the Commonwealth: that, in effect, a person might be permitted to contract out of the Constitution, and more, to do so on behalf of others, its employees, as well.

178 A further consequence of all of this is to preclude a State, engaged as the State was here, by the authority created by it, in the business of insurance, from exercising any real power and control over an area of "State insurance", despite that the Constitution expressly grant those[133]. Power is meaningless if it does not

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**131** Reasons of Gummow, Hayne, Heydon and Crennan JJ at [83].

**132** See, eg, ss 91, 100, 104 and 114 of the Constitution.

**133** s 51(xiv).

include a power of control. As Kirby J puts it[134], the express constitutional exception of "State insurance", as with "State banking"[135], must be taken seriously.

179 I would allow the appeal and join in the consequential orders proposed by Kirby J.

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**134** At [149].

**135** s 51(xiii).