LIMITING COMMONWEALTH POWERS AND THE MEANING OF "OTHER THAN STATE INSURANCE": *ATTORNEY-GENERAL (VIC) v ANDREWS*

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Paper presented to the Gilbert + Tobin Centre of Public Law 2008 Constitutional Law Conference, 8 February 2008

Attorney-General (Vic) v Andrews[1] concerned Commonwealth legislation which purported to enable Optus Administration Pty Ltd (**Optus**) to become subject to the Commonwealth workers' compensation scheme instead of the Victorian regime. The legislation in question was primarily supported by section 51(xx) of the Constitution, applying as it did to the activities of constitutional corporations. But the argument against the validity of the legislation, advanced by the Victorian WorkCover Authority and the Victorian Attorney-General intervening, relied on the insurance power in section 51(xiv) of the Constitution.

That head of power contains an unusual limitation. It empowers the Commonwealth Parliament to make laws with respect to

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

In short, it was contended that the Commonwealth law was a law with respect to State insurance, or at least that it was not a law with respect to insurance "other than State insurance". In other words, by extending impermissibly to State insurance, the law contravened the restriction in section 51(xiv).

On the face of it, the argument seemed strong. After all, section 108A(7)(a) of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) (**the Commonwealth Act**) provided that, if a corporation in the position of Optus became authorised to accept liability to pay compensation under that Act, then no State or Territory law "relating to workers compensation" applied to Optus in respect of injuries suffered by its employees thereafter. It appears at first blush that this provision is a law with respect to State workers' compensation laws, which themselves of course regularly make

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1 (2007) 233 ALR 389; [2007] HCA 9.

provision for insurance to meet the liabilities they create and, in the case of Victoria, required such insurance to be taken out with a statutory body established for the purpose. As such it looks like a law with respect to insurance, and maybe even State insurance.

The majority came to the opposite result, employing an approach which it is suggested below involved a novel and undesirable method of characterization.

Part VIII of the *Safety, Rehabilitation and Compensation Act* 1988

Part VIII of the Commonwealth Act was entitled "Licences to enable Commonwealth authorities and certain corporations to accept liability for, and/or manage, claims". Under section 100, if the Minister was satisfied that it was desirable for the Commonwealth Act to apply to employees of a corporation that, among other things, was carrying on business in competition with a Commonwealth authority or with another corporation that was previously a Commonwealth authority, then the Minister could, by notice in writing, declare the corporation to be eligible to be granted a licence under Part VIII.

Such an "eligible corporation" could apply to the Safety, Rehabilitation and Compensation Commission (**the Commission**) for a licence under section 102. In considering an application, the Commission was required to determine, among other things, the degree to which, and the circumstances in which, the licensee may accept liability for compensation.[2]

Specifically, section 108(1) provided:

> *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.*

Following the making of an application under the above provisions, the Commission on 1 November 2004 granted Optus a licence under section 104(1) of the Commonwealth Act. Optus thereupon became a "licensed corporation" or "licensee"

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[2] Section 103(2)(a).

for the purposes of Part VIII of that Act. The licence made provision as set out in section 108(1) above.

In summary, this meant that, as a corporation in competition with a former Commonwealth authority, namely Telstra Corporation Ltd (**Telstra**), Optus was licensed and authorised under Part VIII to accept liability for compensation claims under the Commonwealth Act in respect of injury, loss or damage suffered by, or in respect of the death of, its employees, and to manage those claims. The language of "authorisation" is somewhat misleading, in so far as it suggests an ability rather than an obligation to accept liability. The legislative meaning was made clear by section 108A(1) which stated:

> *If:*
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> *(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*
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> *(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.*

Accordingly, the corporation did not need formally to accept liability; the statute had that operation itself. In relation to injuries, loss, damage or death occurring to which the licence applied, Optus rather than Comcare became liable to pay compensation or other amounts under the Commonwealth Act in respect of that event.

The application of the provisions for payment of compensation and other amounts under the Commonwealth Act was clearly expressed to operate to the exclusion of State and Territory laws on the subject. In particular, section 108A(7) provided:

> *(7) 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.*

The Commonwealth Act did not require a licensed corporation to take out insurance in respect of the liabilities it accepted under its licence.[3] A licensed corporation became a "self-insurer", its capacity to meet its liabilities having been required to be taken into account in issuing the licence.[4]

The consequences of accepting liability under a licence were, for present purposes, principally that the licensed corporation became liable to pay compensation under various provisions of the Commonwealth Act or, in some instances, damages. Liability for damages was confined to the circumstances specifically provided for in the Act by the combined effect of sections 44 and 45, which relevantly stated:

> ***44 Action for damages not to lie against Commonwealth etc. in certain cases***
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> *(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;*
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> *whether that injury, loss or damage occurred before or after the commencement of this section.*

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3 Only Commonwealth authorities which were not licensed under Part VIII were required to pay insurance premiums: see section 97D.

4 The term "self-insurer" and related expressions are not used in the legislation. The term is merely convenient shorthand to describe the lack of an obligation to insure. Of course, a licensed corporation might well choose to take out insurance of its own accord: see the joint judgment of Gummow, Hayne, Heydon and Crennan JJ at [83].

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> ***45 Actions for damages—election by employees***
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> *(1) Where:*
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> *(a) compensation is payable under section 24, 25 or 27 in respect of an injury to an employee; and*
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> *(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.*

Section 45(2) made it clear that an election by an employee under subsection (1) meant that compensation under sections 24, 25 and 27 was not payable in respect of the injury. Subsection (4) provided that in any action or proceeding instituted as a result of an election, the court could not award damages of an amount exceeding $110,000 for any non-economic loss suffered by the employee.

Those challenging the legislation sought a declaration that sections 104(1), 108(1) and 108A(7)(a) were invalid to the extent that they removed the obligation of a licensed corporation to insure under the Victorian workers' compensation regime and its obligations to pay compensation and damages at common law under that regime.[5]

Section 51(xiv) of the Constitution

The question raised by the challenge to these provisions was whether they were laws "with respect to … insurance, other than State insurance". The Court had not previously considered that power. However, the parallel head of power in section 51(xiii), which empowers the Parliament to make laws with respect to "banking, other than State banking", was analysed in the unanimous judgment of the Court in *Bourke*

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[5] There was no challenge to section 108A(1), which imposed the licensed corporation's liability to pay compensation or other amounts under the Commonwealth Act. The joint judgment indicated (at [53]) that the relief sought did not go far enough in this respect, but it does not appear that this made any difference to the result.

v State Bank of New South Wales[6]. Certain matters had been established in that case and it was accepted on all sides in *Andrews* that the same principles applied by parity of reasoning when one moved from banking to insurance. The Court did not take any different approach. Translating *Bourke* to the field of insurance, then, *Andrews* stands for the following propositions:

- First, there is no exclusive State power preventing the Commonwealth Parliament from making laws with respect to "State insurance".[7]

- Secondly, however, there is a restriction on Commonwealth legislative power, namely that any law that can be characterized as a law with respect to insurance must, in order to be valid, be a law with respect to insurance other than State insurance. This means that any interference with State insurance must be so incidental as not to affect the character of the law as one with respect to insurance other than State insurance.[8]

- Thirdly, and mirroring the first two propositions, if a law is not one with respect to insurance, then it is not subject to a restriction that it must not touch or concern State insurance (i.e. in a more than incidental way).[9]

- Fourthly, the fact that a law might be characterized as a law with respect to another head of power, such as trading or financial corporations, does not

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6 (1990) 170 CLR 276.

7 *Bourke v State Bank of New South Wales* (1990) 170 CLR 276, the Court at 288.

8 *Bourke v State Bank of New South Wales* (1990) 170 CLR 276, the Court at 288-289. The Court went on to express the test by a different formulation, as follows: "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" (citing *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31, Dixon J at 79). The Commonwealth contended in *Andrews* that this sentence expressed a broader test and was to that extent incorrect. The joint judgment held that, read in context, the Court was not further attenuating the sufficiency of the necessary connection with State banking for the restriction in section 51(xiii) to apply: at [90]; see also Kirby J at [145]-[150].

9 *Bourke v State Bank of New South Wales* (1990) 170 CLR 276, the Court at 289.

> avoid the restriction on legislative power. So long as the law is one with respect to insurance as well, the restriction applies.[10]

Bourke stands for a further proposition, namely that "State banking" means the business of banking conducted by a bank owned or controlled by a State.[11] Most members of the Court in *Andrews* did not need to define "State insurance", but those that did reach that point in the argument adopted a corresponding meaning.[12]

In *Bourke* itself, section 52 of the *Trade Practices Act* 1974 (Cth), in its operation to the banking activities of the State Bank of New South Wales not extending beyond New South Wales, was held invalid. It was a law with respect to banking essentially because the statutory definition of the critical term "corporation" in section 52 expressly included a bank. The provision touched or concerned State banking in a more than incidental way by affecting the way State banks did business and was therefore a law with respect to banking but not a law with respect to banking other than State banking.

Laws with respect to insurance?

In order to get to the argument based on section 51(xiv), therefore, those challenging the legislation in *Andrews* needed to establish that the impugned provisions were laws with respect to insurance.

Kirby J recorded it as a matter of agreement between the parties that the provisions were properly characterized as laws with respect to insurance.[13] However, as was

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10 *Bourke v State Bank of New South Wales* (1990) 170 CLR 276, the Court at 285-286. This conclusion relies on the reasoning of Dixon CJ in *Attorney-General (Cth) v Schmidt* (1961) 100 CLR 361 at 372 in relation to the acquisitions power in section 51(xxxi), namely that "when you have … an express power, subject to a safeguard, restriction or qualification, to legislate on a particular subject … 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 … and so authorized the same kind of legislation but without the safeguard, restriction or qualification".

11 *Bourke v State Bank of New South Wales* (1990) 170 CLR 276, the Court at 284.

12 See Gleeson CJ at [9], Kirby J at [111], Callinan J at [167], [178]; Gummow, Hayne, Heydon and Crennan JJ expressly left open the meaning of "State insurance": see at [84].

13 See at [111]; the transcript bears this out: see [2006] HCA Trans 377 at T139.6131.

pointed in oral argument[14], the Court is not constrained by what the parties agree, at least not in constitutional cases; and as it transpired the joint judgment of Gummow, Hayne, Heydon and Crennan JJ was at odds with that agreed position of the parties.

Judgment of Gleeson CJ

It is first convenient to refer to the judgment of Gleeson CJ, who also formed part of the majority but did not need to decide the insurance point. The Chief Justice was prepared to accept, at least for the sake of argument, that the challenged laws were laws with respect to insurance, but his Honour upheld the laws on the basis that, although they detracted from the comprehensiveness of the Victorian legislative scheme for compensation of workers and insurance against liability for that compensation, the *regime* for that insurance was not "State insurance".[15] Rather, "State insurance" meant a state-owned or controlled *business* which undertakes insurance, in this case the insurance business of the Victorian WorkCover Authority.[16] The challenged laws did not regulate that authority's insurance transactions or prohibit the State of Victoria from conducting insurance business or substantially impair its capacity to do so.[17] As such, even assuming the impugned laws were laws with respect to insurance, they were laws with respect to insurance other than State insurance and therefore within power.

Summary of the joint judgment

Gummow, Hayne, Heydon and Crennan JJ held that the laws in question were not laws with respect to insurance at all, let alone State insurance. Although not articulated exactly in this way in the judgment, the reasoning to that conclusion appears to have involved the following steps.

- First, the provisions of the Commonwealth Act imposing liability on licensed corporations and excluding other kinds of liability were not laws with respect to insurance; they were valid laws under the corporations power which

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14 See [2006] HCA Trans 377 at T130.5745.

15 See at [18].

16 See at [9].

17 See at [17]-[18].

provided for the liability of licensed corporations for injuries suffered by their employees.[18]

- Secondly, those valid Commonwealth laws engaged section 109 of the Constitution in relation to the inconsistent liabilities provided for under Victorian workers' compensation legislation, with the result that there remained no liability on the part of Optus under the Victorian legislation to which the obligation to insure under that legislation could attach.[19]

- Thirdly, although there was a connection between the obligation to insure under Victorian law and the Victorian system for the provision of workers' compensation, that link never appeared where, as in the case of Optus, section 109 operated to negate the relevant operation of the workers' compensation system. It was section 109 rather than the Commonwealth laws which restricted or altered the obligation of Optus to take out insurance.[20]

It is implicit in this reasoning that, although section 108A(7)(a) of the Commonwealth Act purported to exclude State laws relating to workers' compensation (and therefore, it might be thought, purported necessarily also to exclude State laws governing insurance in relation to workers' compensation), that provision applied only to State laws left intact after the operation of section 109 of the Constitution. So, if valid Commonwealth laws governing liability rendered State laws concerning workers' compensation insurance obligations inoperative under section 109, section 108A(7)(a) had no work to do in relation to those insurance obligations, which were nullified by operation of section 109 instead. Accordingly, section 108A(7)(a) was not a law with respect to insurance.

The Victorian legislation and the joint judgment in more detail

It can be seen that this reasoning involves an examination of the Victorian legislation. The *Accident Compensation Act* 1985 (Vic) provided for a regime of workers'

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18 See at [87]-[88].

19 See at [63]-[71], [86], [88].

20 See at [88].

compensation and made related provision in respect of common law claims (including providing a cap as to damages). The statute also established the Victorian WorkCover Authority (**the Authority**) responsible for administering the State regime. Optus was formerly liable to pay compensation under this legislation in respect of injuries to its employees where the requisite connection with Victoria existed, and its common law liability in that respect was also affected by the same legislation.[21]

The *Accident Compensation (WorkCover Insurance) Act* 1993 (Vic) provided for compulsory insurance to be paid by employers to the Authority. In particular, section 7(1)(a) imposed an obligation to insure with the Authority in respect of three heads of liability, as follows:

> *(1) An employer who in any financial year employs a worker within the meaning of section 5(1) of the Accident Compensation Act 1985-*
>
> *(a) must obtain and keep in force a WorkCover insurance policy with the Authority in respect of all of the employer's liability under the Accident Compensation Act 1985 and at common law or otherwise 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 p.m. on 30 June 1993; and*

The joint judgment addressed each aspect of this provision in turn and applied section 109 in relation to it, as follows.

- The first liability needing to be insured against was "liability under the *Accident Compensation Act*". The joint judgment held that, in the case of a licensed corporation under Part VIII of the Commonwealth Act, this liability would qualify and impair the operation of Part VIII.[22] Accordingly, by operation of section 109 there was no State liability to pay compensation and therefore no obligation to insure under that head.

- Secondly, an employer was required by section 7(1)(a) to insure in respect of liability "at common law". The joint judgment held that this language was not

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21 No doubt Optus was likewise formerly liable under other State and Territory workers' compensation laws where the necessary territorial nexus was satisfied.

22 See at [63]-[64].

directed to liabilities affected by the Commonwealth statute; it referred only to the common law as modified by the *Accident Compensation Act*, and in particular by the cap on damages, not to the common law as modified by the Commonwealth Act. As such, the provisions of the Commonwealth Act imposing liability on licensed corporations to pay damages only under the common law as modified by the Commonwealth Act were inconsistent with the liability for which the State Act provided at common law and so liability of that latter kind was also removed.[23] Again, there was no obligation left against which to insure.

- Finally, section 7(1)(a) required an employer to insure against the employer's liability "otherwise" in respect of injuries arising out of or in the course of employment. Again, the joint judgment concluded that any such other liability was removed because section 44 of the Commonwealth Act held that an action or other proceeding for damages did not lie in respect of such injuries.[24]

In the end, therefore, there was no liability of a licensed corporation, or at least of Optus, to which section 7(1)(a) of the *Accident Compensation (WorkCover Insurance) Act* attached the requirement to insure. Once that result was reached, then applying familiar tests of characterization the only rights, duties, powers and privileges which Part VIII changed, regulated or abolished with respect to Optus were laws with respect to workers' compensation. The laws concerning insurance were left untouched because, after the operation of section 109 had removed the underlying liability, the insurance requirement was simply inapplicable. As such, the challenged provisions of Part VIII were not laws with respect to insurance at all, still less did they touch or concern State insurance – regardless of what that expression embraces.[25]

It can be seen that the premise for this approach is that the laws which, by virtue of section 109, deprived the State obligation to insure of any content were not themselves laws with respect to insurance. On the Court's approach, they were laws with respect to workers' compensation and, more relevantly, trading and financial

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23 See at [65]-[67], [70].

24 See at [68]-[70].

25 See at [81]-[87].

corporations. Not being laws with respect to insurance, they were not subject to any requirement arising from section 51(xiv) that they affect State insurance only incidentally. Here lies the paradox. Laws which, by virtue of section 109 of the Constitution, rendered inoperative State laws obliging an employer to take out specified insurance, were not laws with respect to insurance.

In effect, then, the Commonwealth Act created a new regime of workers' compensation liability in the case of licensed corporations that displaced the liabilities for which State law provided that an employer must insure. Even so, what then of section 108A(7)(a), which expressly displaced State laws "relating to workers compensation"? Given that such laws routinely provide for insurance obligations, was not that provision, at least, a law with respect to insurance? The joint judgment did not distinguish in this respect between section 108A(7)(a) and the substantive provisions governing liability under the Commonwealth Act; but as indicated above it appears that, once it was held that the insurance obligation under the State legislation had no liability to which to attach after section 109 had done its work, section 108A(7)(a) likewise had no application to the insurance obligations or related provisions and so was not itself a law with respect to insurance.

Judgment of Kirby J

Kirby J, with whom Callinan J substantially agreed in dissent, identified as the basic flaw in this reasoning the majority's willingness to separate the insurance and compensation provisions of the State and federal Acts.[26] His Honour criticized the joint judgment for ignoring the legal and practical interconnection between the substantive compensation provisions and the provisions for insurance or self-insurance that underpinned both the federal and State compensation schemes.[27]

So, if one treats the compensation and insurance provisions of a workers' compensation regime as closely interconnected, then one would more readily characterize a law ousting all those provisions as a law "with respect to" insurance.

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26 See at [154].

27 See at [155]. Since the Commonwealth Act did not relevantly contain insurance provisions, the "basic flaw" identified by Kirby J must be found in examining the State position, even though it is the Commonwealth Act that is being characterized.

The words "with respect to" are, after all, words of wide import and it is hard to see the connection between compensation on the one hand, and insurance in respect of that compensation on the other, as tenuous.

Kirby J held that the Commonwealth Act conferred on Optus an immunity from an obligation to insure with the Authority as State insurer as it would otherwise have been obliged to do.[28] This meant that the challenged provisions were laws with respect to insurance and indeed State insurance.[29]

Approach to characterization

As indicated, the joint judgment held that the insurance provisions of the State law were excluded, not by the Commonwealth licensing provisions or section 108A(7)(a), but by section 109 of the Constitution. As such, those Commonwealth laws were not laws with respect to insurance. This might be regarded as a highly technical, even artificial, approach to characterization. But aside from the differences of impression of the kind which characterization always involves, I suggest that the majority's reasoning is problematic for a more fundamental reason.

The well-established approach to characterization of Commonwealth laws requires the ascertainment of the substantive or direct legal and practical operation of a law by determining the rights, duties, obligations, powers and privileges which the law changes, regulates or abolishes.[30] The approach is not controversial; indeed, the joint judgment cited it.[31] There may well be constitutional facts necessary to the Court's determination of validity,[32] but whether that is the case or not, the determination of

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28 See at [159].

29 At [163].

30 *Fairfax v Federal Commissioner of Taxation* (1985) 114 CLR 1, Kitto J at 7; *South Australia v The Commonwealth (First Uniform Tax Case)* (1942) 65 CLR 373, Latham CJ at 424; *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1, Mason J at 152; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, McHugh J at 368-369; *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ at 492; *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397, the Court at 413; *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1, Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ at 103-104.

31 See at [80].

32 Section 92 is one clear example; the incidental power in section 51(xxxix) is another: *Jumbunna Coal Mine NL v Victorian Coal Miner's Association* (1908) 6 CLR 309. See

the legal and practical operation of the law according to ordinary principles of characterization generally proceeds, not according to the underlying facts to which the law might apply in the specific case at hand, but according to the terms and operation of the law itself.[33] As Kitto J explained in *Herald & Weekly Times Ltd v The Commonwealth*[34]:

> *Undoubtedly it is right to scrutinize minutely the effect of a challenged law in all the variety of cases to which it applies according to its terms; but when that has been done the broader inquiry remains: what, then, is the law really doing by the operation which the scrutiny reveals that it has? For it is the answer to that question that shows whether the law is really one "with respect to" the relevant subject matter of power.*

The inquiry as to the law's "operation" is therefore general rather than specific. For instance, a law purporting to prohibit gatherings of three of more persons without a permit issued by the Australian Federal Police would not be valid as a law with respect to trading or financial corporations, or aliens, merely because it would apply by its terms to meetings of corporate boards of directors or gatherings of aliens. The connection between the law and the subject matter would need to emerge from the terms and operation of the law, rather than by reference only to some of the circumstances to which it might apply.[35]

This is so even if the circumstances to which particular regard is sought to be had are those facts which brought the controversy before the Court. The characterization question does not receive a different answer depending on the circumstances of the particular plaintiff. So, in the example above, it would make no difference if the

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generally *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280, Dixon CJ at 292; *Thomas v Mowbray* (2007) 237 ALR 194, Heydon J at [613]ff; Kenny, "Constitutional Fact Ascertainment", (1990) 1 Public LR 134; Selway, "The Use of History and Other Facts in the Reasoning of the High Court of Australia", (2001) 20 U Tas LR 129.

33 The task is different for powers which are "purposive" in nature, most especially the defence power, because the purpose of the Parliament in making a law in reliance on such powers can only be determined by reference to the facts and circumstances which led to the power being exercised: *Stenhouse v Coleman* (1944) 69 CLR 457, Dixon J at 471; *Thomas v Mowbray* (2007) 237 ALR 194, Gummow and Crennan JJ at [135], Hayne J at [425].

34 (1966) 115 CLR 418 at 436.

35 *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468, Barwick CJ at 498-499, Menzies J at 502-503, Windeyer J at 512-513, Walsh J at 516.

Court were being asked to characterize the law in its application to a meeting of directors or a gathering of aliens.

Again, the nature of the relief sought in the particular case may determine what characterization question the Court asks, but should make no difference to the answer to that question.[36] The relief itself might appropriately be confined once the question is answered, but that does not mean that the context-specific underlying facts should affect the characterization of the law, or that the Commonwealth legislation ought to be characterized by reference to its interaction with a particular State law.

There are sound reasons for this approach. In determining whether a law is within power, the Court may rule on the validity of the law with effect beyond the parties, unconfined by the specific facts that brought the issue before the Court. The Court's well-established power to declare a law invalid assumes such an operation for the declaration,[37] although there will of course be occasions when a declaration or finding as to validity is expressed in narrower terms according to the issue that needs to be decided. But, being a question larger than the immediate controversy between the parties, the validity of a law "cannot be made to depend on the course of private litigation"[38]. Otherwise the question might be determined by fortuitous or even arbitrary circumstances.

This emphasis on ascertaining the operation of the law from the law itself and the whole of its operation[39] applies also when the Court must decide whether a law, having been held to lack the requisite connection with an enumerated head of power, is capable none the less of being read down so as to be within power to a limited

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36 In *Andrews* the relief sought was a declaration of invalidity to the extent that the licence removed Optus from the Victorian scheme of insurance.

37 *Toowoomba Foundry Pty Ltd v The Commonwealth* (1945) 71 CLR 545, Latham CJ at 570: "It is now, I think, too late to contend that a person who is, or in the immediate future probably will be, affected in his person or property by Commonwealth legislation alleged to be unconstitutional has not a cause of action in this Court for a declaration that the legislation is invalid."

38 *Gerhardy v Brown* (1985) 159 CLR 70, Brennan J at 142; see also *Breen v Sneddon* (1961) 106 CLR 406, Dixon CJ at 411-412. The application of this proposition to the *manner* in which constitutional facts are determined is a separate issue: see *Thomas v Mowbray* (2007) 237 ALR 194, Heydon J at [621]ff.

39 Or "all the variety" of cases to which the law applies, to use the expression of Kitto J cited above: *Herald & Weekly Times Ltd v The Commonwealth* (1966) 115 CLR 418 at 436.

extent. The nature of the reading down considered by the Court will be determined by the facts of the case. But the reading down task itself again proceeds by way of reference to the statute. The law must indicate a standard or test which may be applied for the purpose of limiting its operation within valid bounds. Otherwise the Court is "left to guesswork" or "performing a feat which is in essence legislative and not judicial".[40]

Just as facts to which the challenged law might happen to apply in the particular case should not govern its characterization, nor should other laws that might be engaged by those particular facts. The operation of a Commonwealth law with respect to particular State laws is just as much a matter of happenstance as its operation with respect to particular facts. The character of the law ought to be determined without concentrating on either to the exclusion of the wider operation of the law.

It is therefore submitted that to have regard to the State laws which, in the circumstances of *Andrews*, would otherwise have applied to Optus, and to apply section 109 in relation to those laws, was both a departure from accepted principles of characterization, and also a course which risked clouding the issue of legislative power in relation to the impugned Commonwealth provisions.

So, looking at its terms and wider operation, section 108A(7)(a) of the Commonwealth Act spoke to all State laws "relating to workers compensation" from time to time, irrespective of their content. It was calculated in its legal and practical operation to exclude State worker's compensation laws, including insurance laws,

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[40] *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, Evatt and McTiernan JJ at 676; *Pidoto v Victoria* (1943) 68 CLR 87, Latham CJ at 109, 110; *Victorian Chamber of Manufactures v The Commonwealth (Industrial Lighting Regulations)* (1943) 67 CLR 413, Latham CJ at 419; *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416, Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ at 502-503. Equally, section 15A of the *Acts Interpretation Act* 1901 (Cth) "does not enable a law with respect to one matter to be construed as a law with respect to another matter in order to bring it within legislative power. The section does not authorise the judicial conversion of one law into another law": *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468, Menzies J at 503; see also Gibbs J at 526-527; *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416, Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ at 501-503; *R v Hughes* (2000) 202 CLR 535, Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ at 556-557. (Section 15A provides: "Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power".)

however those laws were structured or expressed and indeed irrespective of whether such laws had been enacted or were enacted subsequently.

Likewise, if, as the joint judgment held, the liability provisions of the Commonwealth Act had the effect that a licensee such as Optus was subject to a statutory workers' compensation regime different to that applying in Victoria, including a different insurance regime, then those provisions had the same operation as section 108A(7)(a) sought to have and therefore the same character.

If the characterization task had proceeded this way it would more readily have appeared that the impugned provisions were laws with respect to insurance. Indeed the fact that the Commonwealth liability provisions had the operation under section 109 of removing the workers' compensation liabilities of licensed corporations that were otherwise required to be insured under State or Territory laws, rendering the insurance provisions inoperative, suggests that those Commonwealth provisions were laws with respect to insurance. It was that very result which placed corporations such as Optus on a "level playing field" with current or former Commonwealth authorities such as Telstra, as the Commonwealth Act intended.

It is therefore respectfully suggested that their Honours in the joint judgment in *Andrews* were in error in concentrating on the Victorian legislation for this purpose, and should instead have characterized the impugned Commonwealth laws as laws whose intended effect was to exclude all State workers' compensation laws imposing obligations on licensed corporations from time to time, including laws dealing with insurance requirements in respect of those obligations; as such, they were laws with respect to insurance. After all, the Commonwealth legislation purported to exclude all State and Territory laws relating to workers' compensation, and Optus was most likely subject to such laws in all States and Territories, not just in Victoria.

As was pointed out in argument in *Andrews*[41], Brennan CJ and McHugh J in *Kartinyeri v The Commonwealth*[42] cited with approval the statement made by Dawson J in *Kirmani v Captain Cook Cruises Pty Ltd [No 1]*[43] that

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41 See HCA Trans 355 at T88.3890ff; the reference in the transcript to Gaudron J is incorrect.

> *A law which effects the repeal of another law is not a law with respect to repeal; its subject matter is the subject matter of the law which is repealed.*

Equally, a law which has the direct effect of rendering nugatory State laws with respect to a particular class of insurance, irrespective of the content of that State law, should arguably be characterized as a law with respect to insurance.

Conclusion – "other than State insurance"?

At that point the issue would have become whether the laws were invalid because they failed to reflect the constitutional restriction protecting State insurance. Here the competing arguments are found in the judgments of Gleeson CJ and Kirby J. Perhaps ironically, the judgment of Kirby J relies to a considerable extent on the effect of the Commonwealth Act on the obligation of Optus to insure with the Authority as the State insurer under Victorian law, and the effect on the Authority's rights as State insurer.[44] For the reasons already explained, it is respectfully suggested that this emphasis is misplaced because it depends on the particular circumstances that happen to exist in Victoria where workers' compensation insurance was undertaken through the Authority and so happened to constitute State insurance.

Gleeson CJ also referred at some length to the Victorian regime. But in contrast, his Honour stated that the "circumstance that it is the current policy of the Victorian Parliament that there be a single insurer" (namely, the Authority) "does not alter the case".[45] Rather, since the impugned laws did not seek to regulate insurance transactions entered into by the Authority, prohibit the conduct of insurance business by the State or substantially impair its capacity to conduct such business, the effect of the laws on the insurance business of the Authority was merely incidental – in other words, although a licensed corporation ceased to be liable to meet the obligations for which State law required there to be insurance (in the case of Victoria, State insurance), the insurer continued to conduct its business insuring against those obligations wherever they continued to exist. The fact that Victoria had created a

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42 (1998) 195 CLR 337 at 358.

43 (1985) 159 CLR 351 at 459.

44 See, in particular, at [157]-[160].

45 See at [18].

State monopoly in respect of the insurance in question could not bear on the issue, otherwise it would be open to States to withdraw whole fields of insurance from the legislative power of the Commonwealth, contrary to the grant in section 51(xiv).[46] The same reasoning applied irrespective of whether the insurance obligations for which State law provided in a particular case were "State insurance" or not.

Whether one concludes that the Court answered the particular characterization question in this case rightly or wrongly, the wider issue that the case raises is what role, if any, the underlying facts specific to the context in which the argument of invalidity arose, including the effect of the Commonwealth law in question on State laws that otherwise applied to those facts, should have in characterizing that Commonwealth law. It is to be hoped that the case does not give rise to a more context-specific approach to the characterization of Commonwealth laws generally.

Owen Dixon Chambers West

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46 See at [10].