

The Optus decision – the beginning of the end?

By Simon Morrison

On 1 and 2 August 2006, the critical Optus case (*Attorney-General for the State of Victoria v Andrews & Ors*) was heard in the High Court in Canberra.

Taking a narrow view, the case is simply about whether or not Optus should have been granted a licence to self-insure under the Comcare scheme, involving a decision about the legislation that applies and whether or not Optus meets those requirements.

Taking a broader view, however, the consequences are rather more distressing. Should the state of Victoria fail to convince the High Court that Optus should not have been granted its licence, the flow-on effects could be disastrous and indeed spell the beginning of the end for state-based workers' compensation schemes.

PRODUCTIVITY COMMISSION AND SELF-INSURANCE APPLICATIONS

A good place to start is the key findings of the Productivity Commission (PC) from its inquiry into national workers' compensation and occupational health and safety frameworks. In relation to workers' compensation, the Commission made the following recommendations to the Commonwealth government:

The Productivity Commission recommends that the Australian Government develop an alternative national workers' compensation scheme to operate in parallel with existing state and territory schemes by taking the following steps:

Step 1

To immediately encourage self-insurance applications from employers who meet the current competition test to self-insure under the Comcare scheme, subject to meeting its prudential, claims management, occupational health and safety and other requirements;

Step 2

To commence, at the same time, the development of an alternative national self-insurance scheme for corporate employers who wish to join such a scheme and who meet prudential, claims management and other requirements;

Step 3

In the longer term, consider the establishment of an alternative national premium-paying insurance scheme for corporate employers who so wish, including small to medium enterprises, which would be competitively underwritten by private insurers and incorporate the national self-insurance scheme established under Step 2.¹

SELF-INSURANCE APPLICATIONS UNDER s100 SRC

Section 100 of the *Safety Rehabilitation and Compensation Act 1988* (SRC Act) gives the Minister for Employment and Workplace Relations the power to declare certain

corporations as 'eligible' to apply for a workers' compensation self-insurance licence. The three bases upon which the Minister could so declare are that the corporation:

- (a) 'is, but is about to cease to be, a Commonwealth authority; or
- (b) was previously a Commonwealth authority or;
- (c) is carrying on business in competition with a Commonwealth authority or with another corporation that was previously a Commonwealth authority.'

The following corporations hold existing licences under s100:

1. ADI limited
2. Australian Air Express Pty Limited
3. Australian Postal Corporation (Australia Post)
4. CSL Limited
5. Pacific National (ACT) Limited
6. Reserve Bank of Australia (RBA)
7. Telstra Corporation Limited
8. Vision Stream Pty Limited
9. Optus Administration Pty Limited

However, of significant relevance to the self-insurance applications are those flowing from non-Commonwealth corporations seeking declarations that they compete with Commonwealth authorities or with other corporations that were previously Commonwealth authorities.

There are certain criteria that the Minister may give consideration to in determining whether the licence should be granted:

1. In relation to competition, considering:
 - (a) the market in which the applicant and the authority/previous authority operates, including the composition of the market and market share;
 - (b) where competition exists, whether this is a substantial part of the applicant's business; and
 - (c) the substitutability between the goods, services and other provided/produced by the applicant and those of the Commonwealth authority.
2. Secondly, in relation to the issues of public policy, the Minister may consider:
 - (1) whether the number of people employed by the corporation is 500 or more;
 - (2) the likely impact on the corporation's employees of the granting of the licence;
 - (3) the likely impact on the corporation of the granting of the licence;
 - (4) the likely impact on the integrity of the Commonwealth scheme for workers' compensation under the SRC Act;
 - (5) whether the corporation is operating in a minimum of at least two state or territory jurisdictions; and

(6) the likely impact on operations of the state and territory government workers' compensation schemes.²

As we know, Optus was in fact granted its licence, which commenced on 30 June 2005. Two of the public policy principles that appear to be causing concern are the likely impact on the operations of the state and territory government workers' compensation schemes and compensation under the SRC Act.

First, the potential damage that could be caused to state and territory schemes if the Optus decision goes against the state of Victoria cannot be underestimated. We know that the PC is pushing hard for more licences to be granted.

Once a Commonwealth authority ceases to be so, it is free to 'jump ship' to the self-insurance haven of the Comcare scheme. This departure from the state-based workers' compensation scheme of some of the largest premium-paying companies (for example, the Commonwealth Bank, Telstra) can only result in those state scheme operators that are left being forced to impose hikes in premium levels to fill the void.

In an effort to avoid lifting premium levels, one option for states will be to consider cutting benefits in those areas covered by other schemes (including common law).

Secondly, the Comcare scheme was developed initially for a restricted employer base that does not experience the wide risk areas experienced in broader state-based schemes. While it claims to have a good low premium rate, its service delivery and dispute rates are not exciting by comparison with better schemes in the country, and those are likely to suffer further with broader classes of entrants into the scheme.

ARGUMENTS IN THE OPTUS CASE

The state of Victoria's appeal to the High Court in relation to the granting of the Optus licence centres around the restrictions on Commonwealth legislative power contained in s51(XIV) of the Constitution – namely, powers in relation to state insurance.

In simple terms, Victoria argues that the provision in the SRC Act that enables the granting of a licence to a self-insurer, which was previously a premium-payer in a state-based workers' compensation scheme, goes beyond the Commonwealth's legitimate use of its powers.

His Honour Justice Kirby outlined the theory behind the arguments from Optus as follows:

'The theory behind it is the so-called level playing field theory and economic efficiency. We were a Commonwealth authority – we are not now, but we are in competition with Commonwealth authorities – therefore, we should not have the irksome necessity to conform to all the state laws in Australia. We should just stay within the federal regulations. To do that we need the approval of the commission, the licence and that ensures a level playing field for federal or federal-type authorities. That is the theory, I suppose.'

In simple terms, the Commonwealth/Optus argued that although the SRC legislation is legislation with respect to

insurance, it is not legislation with respect to state insurance. Therefore, self-insurance licences do not breach the restrictions referred to in the Constitution.

Now that the *Work Choices* decision has been handed down by the High Court, it seems likely that the Optus decision will follow suit.

CONCLUSION

Should the decision favour Optus and the Commonwealth, the first of the PC's recommendations – namely, to encourage more applications under s100 – will get a lot of momentum.

The Commonwealth government might then pay closer attention to the remaining recommendations of the PC.

Given that the model favoured by the PC for a national premium-paying scheme would appear to be based on the Comcare Scheme, we may be in for a very difficult time in future when it comes to workers' compensation in this country. ■

Notes: 1 <http://www.pc.gov.au/inquiry/workerscomp/finalreport/workerscomp.pdf> 2 An Australian government Comcare site – eligibility for coverage for non-Commonwealth corporations.

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