

Expanding the Comcare System to Private Sector Employers

The “Comcare” system established under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) is primarily concerned with providing compensation for injured workers in the Commonwealth public sector.

Since 1992, however, it has been possible for certain private sector employers to apply for a licence to operate under Comcare on a self-insured basis, rather than under one or more State or Territory workers compensation schemes: see Creighton & Stewart, para [19.74].

Under what is now Part VIII of the 1988 Act, a corporation can make such an application if it obtains a declaration of eligibility from the Minister for Workplace Relations. To get this it must either be (or about to be) a former Commonwealth authority, or carry on business in competition with a current or former Commonwealth authority (s 100).

It was not until 2004 that the first such licence was granted to Optus (as a competitor of Telstra). Further licences have now been obtained by businesses such as Linfox, John Holland and the National Australia Bank.

In an important ruling, the High Court has rejected a challenge to the validity of these licensing provisions. Coincidentally, its decision was handed down just a week after changes took effect to federal occupational health and safety (OHS) legislation. These changes are likely to make the option of seeking Comcare coverage appear more attractive to businesses.

The High Court decision

The decision to grant a Comcare licence to Optus was challenged by the State of Victoria, on the basis that the licensing provisions themselves were beyond Commonwealth power. The challenge was supported by New South Wales, South Australia and Western Australia.

Section 51(14) of the Constitution makes it clear that the Commonwealth cannot legislate on the subject of “State insurance”. To the extent that Part VIII of the 1988 Act overrode the obligation imposed on Optus to insure against work-related injury under State workers compensation legislation, it was said to stray into that forbidden territory.

In *Attorney-General (Vic) v Andrews* [2007] HCA 9 (21/3/07), however, the High Court has ruled by a 5:2 majority (with Kirby and Callinan JJ again in dissent) that the relevant provisions of the 1988 Act should not be regarded as a law about State insurance. Accordingly the provisions are valid and the Optus licence stands.

The majority made it clear that the licensing provisions can be regarded as a valid exercise of the corporations power in s 51(20) of the Constitution,

just as the Work Choices legislation had been upheld by the same judges in *NSW v Commonwealth* (2006) 81 ALJR 34.

Hence the Commonwealth could, if it wished, extend the Comcare option in the future to any trading, financial or foreign corporation, regardless of whether it is, or competes with, a former Commonwealth authority.

The OHS changes

On 14 March 2007, just a week before the High Court decision, the *OHS and SRC Legislation Amendment Act 2006* (Cth) took effect.

This has renamed the *Occupational Health and Safety (Commonwealth Employment) Act 1991* as the *Occupational Health and Safety Act 1991*. The change in title reflects the fact that the Act now applies not only to Commonwealth authorities, but to any corporations that have been granted a licence to operate under Comcare.

By virtue of s 4 of the 1991 Act, such employers are no longer to be subject to State or Territory OHS laws, at least as they apply to employment relationships. Unfortunately, it is unclear exactly which laws may apply where, for example, workers employed by an outside contractor come onto a site operated by a licensed employer.

It remains to be seen whether the federal government moves to clarify the effect of s 4 in this regard, perhaps through new regulations.

The 1991 Act has also been amended by the *Occupational Health and Safety (Commonwealth Employment) Amendment Act 2006*, which came into force on 15 March 2007. The main thrust of the changes is to reduce the role played by trade unions in the regulatory scheme established by the 1991 Act and give employers greater flexibility in developing OHS management arrangements.

Taken together, the various amendments have the effect that private sector employers with Comcare licences will now (at least in relation to their own employees) be subject to an OHS regime that is less burdensome in certain respects than the State regimes to which they were formerly subject.

Making the switch?

Given these developments, a number of employers are now in the process of considering (a) whether they are eligible to apply for a Comcare licence, and (b) if they are, whether they have anything to gain by doing so.

In terms of eligibility, some of the recent decisions to grant licences under Part VIII of the 1988 Act suggest that the federal government is taking a liberal view of the “competition” criterion.

Aside from banks or other financial institutions, who are plainly in competition with the Commonwealth Bank (or the Reserve Bank), there may be a significant number of businesses that can qualify by competing with current or former Commonwealth authorities in areas such as transport, communications, employment services, and so on.

The question then becomes whether it is worth making the switch. The obvious attraction is to deal only with a single workers compensation system, rather than up to eight systems in the case of truly national businesses.

There may also be cost savings. It was noted in the High Court proceedings that Optus expected to save \$186,000 per month in Victoria alone from moving to Comcare.

Finally, some businesses may see advantages in becoming subject to an OHS regime that may impose lower standards of compliance and carry a lower risk of prosecution, especially when compared to the New South Wales system, for instance.

Broadening eligibility for Comcare?

For the present, the Howard Government is denying any intention to expand eligibility to seek a Comcare licence. However if the Coalition is returned at the 2007 election, there will undoubtedly be pressure from business groups to do that.

Conversely, an ALP government is likely to come under pressure from the States to close up the Comcare “loophole”. Either way, it seems unlikely we have seen the last of developments in this area.