AUSTRALIAN GOVERNMENT SOLICITOR

# Litigation Notes

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## State Workers' Compensation Laws and the Commonwealth

**The High Court has decided that the Commonwealth is not subject to state workers' compensation laws.**

*Telstra Corporation Limited v Worthing and Anor; Attorney-General of the Commonwealth v Telstra Corporation Limited & Anor*

High Court of Australia, 24 March 1999
161 ALR 489

### BACKGROUND TO THE LITIGATION

These appeals arose out of an application for workers' compensation made by an employee of Telstra (formerly Telecom) in respect of alleged injuries to his back sustained in 1986, 1988 and 1993. The employee made the application under the *Workers Compensation Act 1987* (NSW) ('the NSW Act') rather than under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ('the Commonwealth Act') which contains a workers' compensation scheme for employees of the Commonwealth and of certain corporations, including Telstra.

Telstra argued before the NSW Compensation Court that the Compensation Court did not have jurisdiction to determine the application for workers' compensation because the NSW Act and its predecessor (the *Workers' Compensation Act 1926* (NSW)) did not apply to Telstra (or formerly to Telecom).

The Compensation Court and, on appeal, the NSW Court of Appeal found that the NSW Act validly applied to give jurisdiction to the Compensation Court to determine the application for workers' compensation. The result of the Court of Appeal decision (if it had stood) would have been that, in respect of its employees, the Commonwealth would have been potentially subject to the workers' compensation schemes of each of the states and territories as well as its own scheme, including possible application to the Commonwealth of the provisions of the state and territory schemes in relation to licensing and insurance of employers. A Commonwealth employee could have chosen whether to make his or her claim for workers' compensation under the Commonwealth Act or under an otherwise applicable state or territory workers' compensation statute.

The Commonwealth Attorney-General had intervened in the hearing before the Court of Appeal to support Telstra's argument that the NSW Act did not validly apply to give jurisdiction to the Compensation Court. Both Telstra and the Attorney-General appealed to the High Court from the decision of the Court of Appeal.

### THE HIGH COURT'S DECISION

The appeals were heard on 9 December 1998 and the High Court gave judgment allowing the appeals on 24 March 1999. A Full Court of 7 justices of the High Court unanimously held that the Compensation Court did not have jurisdiction to determine the workers' compensation application.

In relation to the 1986 and 1988 injuries (which were sustained when the employer was Telecom) the High Court held that the NSW Act did not as a matter of

construction apply to the Commonwealth, that Telecom, by force of Commonwealth law, was not subject to any liability to which the Commonwealth was not subjected (*Telecommunications Act 1975* (Cth), s.21(3)) and that there was therefore no liability which passed to Telstra in relation to the 1986 and 1988 injuries.

In relation to the 1993 injury (when Telstra was the employer and the NSW Act would otherwise have applied to it), the High Court held that the NSW Act was inconsistent with the Commonwealth Act to the extent that it provided for the determination of a workers' compensation application made by an employee to whom the Commonwealth Act applied. The NSW Act and the Commonwealth Act provide different regimes of workers' compensation entitlements, and application of the NSW Act to the employee's claim would 'qualify, impair and, in some respects, negate the application of federal law, with the consequence that, to the extent of the inconsistency thereby made out, the State law was invalid' (161 ALR at 498). (Section 109 of the Constitution provides that '[w]hen a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.')

### IMPLICATIONS OF THE DECISION

The effect of the decision is that an employee to whom the Commonwealth Act applies cannot pursue a workers' compensation claim under the NSW Act. The reasoning of the High Court in relation to inconsistency between the NSW Act and the Commonwealth Act would apply equally to the workers' compensation schemes of the other states, the Northern Territory and the Australian Capital Territory.

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# State Mining Laws and the Commonwealth

**This case concerns the application of the Mining Act 1978 (WA) to land at Lancelin in Western Australia that has been declared as a defence practice area under the Defence Force Regulations (Cth).**

*Commonwealth v Western Australia*

High Court of Australia, 11 February 1999
160 ALR 638

### BACKGROUND TO THE LITIGATION

The third and fourth defendants were mining companies who applied under the Mining Act for exploration licences over land within the defence practice area. The defence practice area includes freehold land held by the Commonwealth, land held by the Commonwealth under a special lease from Western Australia and State Crown land not vested in the Commonwealth. The freehold land and the special lease are subject to a reservation to Western Australia of the minerals in the land.

The Commonwealth applied to the High Court for declarations that:

- Mining Wardens appointed under the Mining Act do not have jurisdiction to consider applications for mining tenements over land within the defence practice area;
- the Mining Act is invalid to the extent that it purports to apply to the land within the defence practice area; and
- the Mining Act does not bind the Commonwealth.

At the hearing before the High Court on 26 and 27 May 1998, a number of issues were argued including:

- the extent of any constitutional immunity of the Commonwealth from the application of State mining laws (including further consideration of the High Court's decision in *Re Residential*

*Tenancies Tribunal of New South Wales; Ex parte Defence Housing Authority* (1997) 190 CLR 410) (the Henderson case – discussed in *Legal Briefing* No. 36);

- the extent of any inconsistency between the Mining Act and Commonwealth laws such as the Defence Force Regulations and Lands Acquisition legislation; and
- if an inconsistency arose, whether the applicable Commonwealth laws were invalid on the basis that their operation gave rise to an acquisition of property for which (according to the submissions of Western Australia) just terms had not been provided as required by s.51(xxxi) of the Constitution.

## THE HIGH COURT'S DECISION

The High Court based its decision on the construction of the Mining Act. Apart from the question of inconsistency, most of the justices did not find it necessary to deal with the constitutional issues. The Court held that:

- the Mining Act does not, as a matter of construction, apply to freehold or leasehold land vested in the Commonwealth and therefore does not apply to land of this kind within the defence practice area;
- neither the *Commonwealth Places (Application of Laws) Act 1970* (Cth) nor s.64 of the *Judiciary Act 1903* (Cth) applies the Mining Act to that land;
- accordingly, questions of inconsistency or immunity or acquisition of property do not arise in relation to the application of the Mining Act to the freehold and leasehold land vested in the Commonwealth.

These conclusions as to the application of the Mining Act were not affected by the reservations of minerals to the State. However, it might be that those reservations confer rights on the State in relation to mining activities undertaken by it or on its behalf (as opposed to authorisation by the State *under the Mining Act* of mining activities to be undertaken by others).

The parties agreed that the Mining Act applied, as a matter of construction, to land within the defence practice area that was not owned or leased by the Commonwealth (ie to the State Crown land). It was therefore necessary for the Court to consider the question of inconsistency in relation to this land.

The Court held (by majority) that, in relation to the land within the defence practice area that was not vested in the Commonwealth, there is no 'covering the field' inconsistency between the Defence Force Regulations and the Mining Act such as would preclude the application of the Mining Act at all. They contemplated that 'operational inconsistency' could arise in some circumstances – for example, if a person were authorised under the Mining Act to enter the land for exploration purposes at a time when a defence practice operation had been authorised. However, in that event it would be necessary to consider whether the Defence Force Regulations were themselves invalid as effecting an acquisition on other than just terms. But as this situation had not yet arisen, a majority of the Court did not deal with the acquisition issue conclusively. As the Lands Acquisition legislation did not apply to this land, no question of inconsistency arose in relation to it.

## IMPLICATIONS OF THE DECISION

The application of mining laws of other states to Commonwealth land will depend in the first instance on whether those laws are to be interpreted as applying to Commonwealth land. If they are, then it would be necessary to consider the other issues that were argued in this case but not decided by the High Court.

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# Liability of Co-defendants to Damages Contributions

**This case considers the question of whether a defendant found liable in damages to the plaintiff can claim contribution from a co-defendant under section 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW) where that co-defendant has had a consent judgment entered in its favour against the plaintiff.**

*James Hardie and Co Pty Limited v Seltsam Pty Limited*

High Court of Australia, 21 December 1998
(1998) 159 ALR 268

Section 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW), in essence, provides that where damage is suffered by any person as a result of a tort, any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor 'who is, or would if sued have been, liable' in respect of the same damage. The High Court's majority judgment carries warnings for defendants whose rights to contribution are governed by s.5(1)(c) or equivalent provisions. Also, the dissenting judgment of Kirby J. contains instructive comment on the literal and 'purposive' canons of statutory interpretation.

## BACKGROUND TO THE LITIGATION

The proceedings arose out of a claim for damages in the NSW Dust Diseases Tribunal for diseases attributed to the inhalation of asbestos dust and fibre. The plaintiff sued as concurrent tortfeasors three defendants, James Hardie and Co Pty Limited ('James Hardie'), Seltsam Pty Limited ('Seltsam') and the Electricity Commission of NSW ('Elcom') alleging that the first two had manufactured and supplied products containing asbestos to which he was exposed in the course of his employment with the third. During the trial, James Hardie and Seltsam filed cross claims against each other seeking indemnity or contribution under s. 5(1)(c) in the event that either was found to be liable to the plaintiff. Later on the same day as those cross claims had been filed, settlements were reached with James Hardie and Elcom under which judgments were to be entered against each that required certain damages to be paid to the plaintiff. Shortly afterwards, the plaintiff settled his claim against Seltsam on the basis that Seltsam would have judgment against him.

Both James Hardie and Elcom had the right to be heard when draft orders giving effect to all these settlements were submitted to the Tribunal for entry. At this point, James Hardie's counsel told the Tribunal that James Hardie did not want to be seen as consenting to a judgment against the plaintiff in favour of Seltsam. Counsel said that this judgment was not one in relation to which James Hardie had any standing, and asserted that entry of such a judgment would not impede James Hardie's claim for contribution. The Tribunal proceeded to enter all the judgments, including that in favour of Seltsam.

At a later date, Seltsam moved to strike out James Hardie's contribution claim against it on the ground that the judgment in favour of it against the plaintiff put an end to James Hardie's right to contribution. Seltsam submitted that, upon entry of the judgment, it ceased to be a tortfeasor within s. 5(1)(c) 'who is, or would if sued have been, liable' in respect of the relevant damage. The argument drew on the decision in *George Wimpey and Co Ltd v British Overseas Airways Corporation* [1955] AC 169. That decision considered the then identically worded English counterpart of s. 5(1)(c) (ie. s. 6(1)(c) of the *Law Reform (Married Women and Tortfeasors) Act 1935* (UK). The House of Lords held that the word 'liable' in the phrase 'who is, or would if sued have been, liable' meant 'liable by judgment'. It is to be noted that Barwick CJ in *Brambles Constructions Pty Ltd v Helmers* (1966) 114 CLR 213 at 219, declined to endorse this view, regarding the question as still open. However, notwithstanding this, the House of Lords' view was shortly later adopted by a majority of the NSW Court of Appeal in *Castellan v Electric Power Transmission Pty Ltd* (1967) 69 SR (NSW) 159.

The Tribunal (differently constituted than before) acceded to Seltsam's argument, relying on

*Castellan's case,* and struck out James Hardie's claim. An appeal against this decision to the NSW Court of Appeal was dismissed. James Hardie then obtained leave to appeal to the High Court.

### THE HIGH COURT'S DECISION

The High Court appeal was dismissed by a majority. Before the High Court, James Hardie argued that Seltsam had not been sued to final judgment, so that it was still a person who 'would if sued have been, liable' within the meaning of s. 5(1)(c). There had not been a full trial on the merits. Gaudron and Gummow JJ rejected this argument, as did Callinan J in a separate judgment. The fact that a consent judgment had been entered prior to any trial on the merits did not stop the judgment from being a final order, to the effect that Seltsam was not liable.

On the other hand, Kirby J (with whom McHugh J concurred) disagreed, saying that the ascertainment of liability could not be by private arrangement between only some of the parties 'by which, unilaterally, they deprive others of rights which for good purpose, Parliament has conferred on them'.

On Kirby J's view, the consent judgment in its favour, did not place Seltsam in the position of being a person who was not liable to the plaintiff. To sustain Seltsam's continuing amenability to James Hardie's contribution claim, Kirby J contended that the words in s. 5(1)(c) 'would if sued have been, liable' should not be confined to a situation where, at the time the contribution claim is made, the 'target' tortfeasor has not been sued by the plaintiff, but should cover any alleged liability for the relevant damage (whether the subject of suit or not at the time of claiming contribution) which exists at any time prior to a determination on the merits that that liability never existed. Kirby J supported this argument by giving what he saw as a 'purposive' construction to s. 5(1)(c), looking to the mischief the section was directed against.

### IMPLICATIONS OF THE DECISION

The High Court's decision will serve to draw further attention to the flaws in s. 5(1)(c). Amendments have been made to corresponding provisions in Victoria, South Australia and Tasmania, some involving the insertion of the words 'at any time' before the words 'if sued'. It would appear that in the case of claims governed by s. 5(1)(c), or identically worded provisions in other jurisdictions, defendants claiming contribution against other defendants would do well, to the extent possible, to oppose entry of consent judgments between the plaintiff and other defendants pending a final determination on the merits, and, in any settlement negotiations to which they are party, require that the plaintiff refrain from any step which might prejudice the defendant such as exceeding to judgment in favour of another defendant.

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# The Trade Practices Act and the States

**The High Court has decided that Part IVA (Unconscionable Conduct) and Part V (Consumer Protection) of the Trade Practices Act 1974 (Cth) do not apply to the States.**

*Bass v Permanent Trustee Co Limited & Ors*
*Conca v Permanent Trustee Co Limited & Ors*
*Woodlands v Permanent Trustee Co Limited & Ors*

High Court of Australia, 24 March 1999
161 ALR 399

These appeals arose out of the NSW HomeFund low cost housing loan scheme. The appellants took out loans under the scheme. They claim that the respondents (the State of NSW and others, such as co-operative housing societies, who participated in the scheme) breached provisions in Parts IVA and V of the *Trade Practices Act 1974* and in the *Fair Trading Act 1987* (NSW) in the course of effecting

transactions under the scheme. They commenced proceedings in the Federal Court seeking damages from the respondents.

The Full Federal Court considered a number of preliminary questions. The Full Court decided that the State of NSW is not bound by the relevant provisions of the Trade Practices Act, and that the other respondents were not bound by the Trade Practices Act to the extent that they were acting at the direction or request of the State.

## THE HIGH COURT'S DECISION

The appellants appealed to the High Court from the Full Federal Court's decision. The appeals were heard on 2–3 September 1998 and judgment was given on 24 March 1999. All 7 justices of the High Court held that the proceedings under the Trade Practices Act against the State of NSW could not be maintained (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ in a joint judgment; Kirby J agreeing in this respect in a separate judgment). This was because the relevant provisions of the Trade Practices Act were not to be construed as applying to a state.

The High Court also rejected arguments that the relevant provisions of the Trade Practices Act were applied to the State of NSW by s.64 of the *Judiciary Act 1903* (Cth) or s.5(2) of the *Crown Proceedings Act 1988* (NSW) (provisions which seek to ensure that, in litigation to which the State is a party, the rights of the parties are as nearly as possible the same as in a suit between subject and subject).

Other provisions of the Trade Practices Act (for example, Part IV, Restrictive Trade Practices) apply to the states when carrying on a business because they are expressly made to apply.

The 6 justices who gave the joint judgment also held that it was inappropriate for the Full Court of the Federal Court to have answered the other questions that were before it (Kirby J disagreed). They gave general guidance on the question of when it is appropriate for preliminary questions to be answered by a court where the facts of the case have not been fully found or agreed (at least where the court is exercising the judicial power of the Commonwealth). The High Court therefore did not consider an issue of general significance to the Commonwealth which was considered by the Full Federal Court – that is, the question of the extent to which laws which do not apply to the Commonwealth or a state also do not apply to persons who contract with or act as agents for the Commonwealth or a state.

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