The Doctrine of Implied Intergovernmental Immunities: A Recrudescence?

Thomas Dixon*

The essential and distinctive feature of "a truly federal government" is the preservation of the separate existence and corporate life of each of the component States concurrently with that of the national government. Accepting that a number of polities are contemplated as coexisting within a federation does not, however, address the fundamental question of how legislative and executive powers are to be allocated among the constituent constitutional units inter se, nor the extent to which the various polities are immune from interference occasioned by their constitutional counterparts. These "federal" questions are fundamental as they ultimately define the prism through which one views the Constitution. Shifts in the lens have resulted in significant ramifications for intergovernmental relations. This article traces the development of the Melbourne Corporation doctrine in Australia, and undertakes a comparative analysis with the development of the cognate jurisprudence in the United States. Analysis is undertaken of the major Australian industrial relations decisions, such as the Amalgamated Society of Engineers v Adelaide Steamship Co Ltd, Re Australian Education Union; Ex parte Victoria, Queensland Electricity Commission v Commonwealth, and United Firefighters Union of Australia v Country Fire Authority, in this context.

> But one of the first and most leading principles on which the commonwealth and the laws are consecrated, is left the temporary possessors and life-renters in it, unmindful of what they have received from their ancestors, or of what is due to their posterity, should act as if they were the entire masters; that they should not think it amongst their rights to cut off the entail, or commit waste on the inheritance, by destroying at their pleasure the whole original fabric of their society; hazarding to leave to those who come after them, a ruin instead of an habitation – and teaching these successors as little to respect their contrivances, as they had themselves respected the institutions of their forefathers. By this unprincipled facility of changing the state as often, and as much, and in as many ways as there are floating fancies or fashions, the whole chain and continuity of the commonwealth would be broken.[1]

INTRODUCTION

The essential and distinctive feature of "a truly federal government" is the preservation of the separate existence and corporate life of each of the component States concurrently with that of the national government.[2]

Accepting that a number of polities are contemplated as coexisting within a federation does not, however, address the fundamental question of how legislative and executive powers are to be allocated among the constituent constitutional units *inter se*, nor the extent to which the various polities are immune from interference occasioned by their constitutional counterparts.

These "federal" questions are fundamental as they ultimately define the prism through which one views the *Constitution*. Shifts in the lens have resulted in significant ramifications for intergovernmental relations; they stand as *peripeteia* in the constitutional struggle that has been waged between the States and the federal government since Federation.

* BSc (Hons), LLB (UWA), BEcons, LLM (Columbia).

[1] Edmund Burke, *Reflections on the Revolution in France* (OUP, 1999) 95; on the concept of Burkean minimalism in the judicial process see Cass R Sunstein, "Burkean Minimalism" (2006) 105 *Michigan Law Review* 353, 356; Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921) 141.

[2] See *Williams v Commonwealth* (2012) 248 CLR 156, [1] (French CJ); [2012] HCA 23, citing Andrew Inglis Clark.

The Constitutional Debates

At 2pm on the second day of the first session of the 1897 Federal Convention held in Adelaide, Edmund Barton rose to move a motion to establish the framework for the coming debates and to recognise the overarching desirability to create a federal government that would be subject to a number of "principal conditions".

The first condition identified in Barton's motion was that "the powers, privileges, and territories of the several existing colonies shall remain intact, except in respect of such surrenders as may be agreed upon to secure uniformity of law and administration in matters of common concern".[3]

The language of Barton's motion was redolent of the allocation of powers contemplated by the draft constitution compiled years earlier aboard the *Lucinda*. The 1891 draft contained the forerunner to what is now s 107 of the *Constitution*.[4] The predecessor to s 107 echoed Diceyan conceptions of co-ordinate federalism in which the various integers of the federation remain sovereign within their own spheres of competency. Based on the *Tenth Amendment to the US Constitution* and Art 3 of the *Swiss model*,[5] the draft clause provided that all powers not exclusively vested in the Commonwealth Parliament were "reserved to" and would "remain vested in" the parliaments of the States. The provision was referred to as the "reservations clause" until the 1898 Melbourne-session recension saw the clause take on its final form.[6] Section 107 would feature prominently in early High Court jurisprudence, and in the establishment of the doctrine of implied intergovernmental immunities.[7]

Against this background, it came as little surprise that the view ventured by Alfred Deakin in the course of the 1897 Convention debates was that it was "more probable that the States will over-awe the Federal Government" rather than the other way around as, given the Commonwealth's "limited scope", it would "be a completely feeble power when opposed to the great States growing up in this continent".[8]

Consistent with these early views, the *Constitution* ultimately born of the debates was one which expressly preserved and continued the otherwise plenary powers of the colonies into the Original States,[9] established a Supreme Court to be called the High Court with the power of judicial review to stand as a check against the rampant arrogation of power by the federal government, and provided for a powerful Senate to act as a balance against the threat of domination by the large States.[10]

Certain grants of power were necessarily exclusive to the new national government,[11] and others were designed to be concurrent with the plenary legislative powers of the Original States.[12] In areas which squarely fell within the domain of national concern, such as defence, currency, external affairs

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[3] Tuesday 23 March 1897 in *Official Report of the National Australasian Convention Debates, Adelaide, March 22 to May 5 1897* (CE Bristow, Government Printer, 1897) 88; Ronald Norris, *The Emergent Commonwealth: Australian Federation, Expectations and Fulfilment 1889–1910* (MUP, 1975) 4.

[4] *Convention Debates*, Sydney, 1891, 849; Andrew Inglis Clark's Draft Constitution of 1891 provided that the legislative powers of the Colonial Parliaments would remain vested except for the powers "transferred or delegated" to the new Federal Government: Nicholas Aroney, *The Constitution of a Federal Commonwealth – The Making and Meaning of the Australian Constitution* (CUP, 2009) 256.

[5] The *Tenth Amendment to the US Constitution* provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people".

[6] Aroney, n 4, 257–258.

[7] Adam Sharpe, "State Immunity from Commonwealth Legislation: Assessing its Development and the Roles of Sections 106 and 107 of the *Commonwealth Constitution*" (2012) 36(2) *University of Western Australia Law Review* 252, 254; *Spence v Queensland* (2019) 93 ALJR 643, [6], [46]–[48] (Kiefel CJ, Bell, Gageler and Keane JJ); [2019] HCA 15.

[8] 30 March 1897 (Adelaide session).

[9] For example, *R v Barger* (1908) 6 CLR 41, 67 (Griffith CJ, Barton and O'Connor JJ), relying upon s 107 of the *Constitution*.

[10] See *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 363 (Dixon J).

[11] For example, Defence (s 51(vi)), Fisheries in Australian waters beyond territorial limits (s 51(x)), Currency (s 51(xii)), Immigration and emigration (s 51(xxvii)), and External Affairs (s 51(xxix)).

[12] John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 933–937.

and immigration, the Framers wished to create a "popular and central government for the whole of Australia".[13] However, we find important signposts in the allocation of the enumerated legislative powers where the Framers attempted to establish barriers against encroachment into areas of traditional State governance such as internal trade and commerce, taxation, banking, insurance, railway acquisition and construction, and conciliation and arbitration.[14]

Thus the daedal hands of the Framers guided the creation of an instar offspring of co-ordinate but limited competency – nourished at birth by the parsimonious allocation of powers designed to weaken the imago States only to the extent necessary to breathe life into the embryonic national polity.[15] The United States (US) Constitution, which served as an "incomparable model" for its Australian progeny,[16] was ratified by the people of the 13 original States on terms designed to secure their liberties.[17] So too would the Australian facsimile be sold to the people of the colonies as a bulwark against aggrandisement and usurpation at the expense of the enfeebled States.[18] Ontogeny recapitulated phylogeny.

Or so it was thought.

FEDERATION TO *ENGINEERS*

Following Federation, the three original members of the High Court adopted a method of interpretation informed by their experience as leading proponents in the Convention debates and as framers of the *Constitution*.[19]

The argument ran that the Preamble and covering clauses of the *Commonwealth of Australia Constitution Act 1900* (Imp) evidenced a compact predicated on the agreement of the people of the Australian colonies whereby the Original States were to be constituent elements of a federal Commonwealth.[20] Whereas the *Constitution* identified only a finite number of legislative powers in s 51 as conferred on the Commonwealth, ss 106 and 107 preserved and continued the otherwise plenary powers of the colonies into the Original States.

Applying this "federal compact" approach to constitutional interpretation, Griffith CJ thus stated (in *Peterswald v Bartley*, a case in which the validity of a State Act imposing a license fee on brewers was challenged):

> In construing a Constitution like this it is necessary to have regard to its general provisions as well as to particular sections, and to ascertain from its whole purview whether the power to deal with such matters was intended to be withdrawn from the States, and conferred upon the Commonwealth. The Constitution contains no provisions for enabling the Commonwealth Parliament to interfere with the private or internal

[13] *Convention Debates*, Melbourne, 24 January 1898, 202 (Alfred Deakin).

[14] See, eg, subs 51(i), (ii), (xiii), (xiv), (xxxiii), (xxxiv), and (xxxv) respectively. Each placitum contains words of limitation upon the federal head of power by reference to the States.

[15] Quick and Garran, n 12, 333: "The primary and fundamental meaning of a federation … is its capacity and intention to link together a number of co-equal societies or States … It implies that the union has created a new State, without destroying the old States; that the duality is in the essence of the State itself that there is a divided sovereignty, and a double citizenship."

[16] Owen Dixon, "The Law and the Constitution" in *Jesting Pilate – and Other Papers and Addresses* (Sweet & Maxwell Ltd, 1965) 44.

[17] One such term being the promise of a Bill of Rights: Akhil Reed Amar, *America's Constitution, A Biography* (Random House, 2005) 316–317; Alexander Hamilton, *The Federalist*, No 84, "Concerning Several Miscellaneous Objections" in Alexander Hamilton, John Jay and James Madison, *The Federalist* (George W Carey and James McClellan (eds), Liberty Fund, 2001) 442–451.

[18] *Commonwealth Constitution*, ss 106, 107 together provide that the constitution of each State shall, subject to the *Commonwealth Constitution*, continue to operate, and that every power of a State Parliament shall continue unless exclusively vested in the Commonwealth or withdrawn from the State.

[19] Griffith CJ, Barton and O'Connor JJ.

[20] *Commonwealth of Australia Constitution Act 1900* (Imp), Preamble, ss 3, 6; *Federated Amalgamated Government Railway & Tramway Service Association v NSW Railway Traffic Employees' Association* (1906) 4 CLR 488, 534 (Griffith CJ, Barton and O'Connor JJ) ("The Constitution Act is not only an Act of the Imperial legislature, but it embodies a compact entered into between the six Australian Colonies which formed the Commonwealth."); Nicholas Aroney, "The Ghost in the Machine: Exorcising Engineers" (Paper presented at the Fourteenth Conference of the Sir Samuel Griffith Society, 2002).

> affairs of the States, or to restrict the power of the State to regulate the carrying on of any businesses or trades within their boundaries.[21]

In *D'Emden v Pedder* (*D'Emden*),[22] a Commonwealth officer who was required by Commonwealth legislation to give an unstamped receipt for his pay, became liable to pay duty under a Tasmanian statute. The Court, in its first year, held that the Tasmanian Act impermissibly "interfered with" or "exercised control" over the Commonwealth officer. The Court based its decision upon the seminal US authority of *McCulloch v Maryland* (*McCulloch*), which had held that a US State could not tax the national bank (as "the power to tax involves the power to destroy").[23] Chief Justice Marshall laid down a broad principle of immunity for federal agencies from State taxation and, by implication, State regulation.[24] The supremacy of the federal government was central to his reasoning.[25]

The doctrine of Commonwealth immunity was later confirmed in *Deakin v Webb*,[26] a case which involved a challenge by Alfred Deakin, Australia's second Prime Minister, to a State Act which purported to tax his salary as a Commonwealth Minister. The High Court followed its decision in *D'Emden* and, notably, placed no reliance on s 109 of the *Constitution* to support its judgment.

In 1906, a significant development in High Court jurisprudence occurred.[27] In *Federated Amalgamated Government Railway & Tramway Service Association v NSW Railway Traffic Employees' Association* (*Railway Servants' Case*), the High Court developed what would later be characterised as heresy – the doctrine of reciprocal immunities.[28]

On the question of whether the *Commonwealth Conciliation and Arbitration Act 1904* (Cth) could deal with industrial disputes defined to include "disputes in relation to employment upon State railways", the original members of the Court found that the doctrine of Commonwealth legal supremacy identified in *D'Emden* had reciprocal operation. The consequence was that a federal law purporting to regulate the terms and conditions of employment of State railway servants was invalid.[29]

An unusual aspect of the expansion of the doctrine of Commonwealth immunity in *D'Emden* to one of reciprocal immunity in the *Railway Servants' Case* was that it broke ranks with *McCulloch* – the *fons et origo* of the doctrine of immunities. Mutual supremacy is a contradiction in terms.[30] However, the Court once again followed the lead of US constitutional jurisprudence by applying the ratio in *Collector v Day*

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[21] *Peterswald v Bartley* (1904) 1 CLR 497, 507 (Griffith CJ); dissent from this view began to emerge when Isaac Isaacs and Henry Bournes Higgins were appointed to the Court (*Attorney-General for NSW v Brewery Employes Union of NSW* (1908) 6 CLR 469 (*Union Label Case*)) and again with the appointments of Frank Gavan Duffy (following the death of O'Connor J), Charles Power and George Rich (see, eg, *Farey v Burvett* (1916) 21 CLR 433). Griffith CJ retired in 1919 and was replaced as Chief Justice by Adrian Knox. Barton J died in 1920 and was replaced by Hayden Starke.

[22] *D'Emden v Pedder* (1904) 1 CLR 91.

[23] *McCulloch v Maryland*, 17 US (4 Wheat) 316, 431 (Marshall CJ) (1819).

[24] *McCulloch v Maryland*, 17 US (4 Wheat) 316, 435–437 (1819). In *D'Emden v Pedder*, it was thought necessary to rely upon the broad doctrine of immunity as an implication derived from the federal structure as found in *McCulloch* rather than just s 109 alone as there was no inconsistency between the State and federal Acts: see *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 689 (Evatt J); compare *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 156 (Knox CJ, Isaacs, Rich and Starke JJ).

[25] *McCulloch v Maryland*, 17 US (4 Wheat) 316, 426–436 (1819); *US Constitution*, Art VI provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." Section 109 is the cognate provision in the *Commonwealth Constitution*.

[26] *Deakin v Webb* (1904) 1 CLR 585; and confirmed again in *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1132–1133 (Griffiths CJ, Barton and O'Connor JJ) despite the decision of the Judicial Committee of the Privy Council in *Webb v Outtrim* [1907] AC 81, which disapproved of *Deakin v Webb*.

[27] *Victoria v Commonwealth* (1971) 122 CLR 353, 395–396 (Windeyer J).

[28] *Federated Amalgamated Government Railway & Tramway Service Association v NSW Railway Traffic Employees' Association* (1906) 4 CLR 488.

[29] *Federated Amalgamated Government Railway & Tramway Service Association v NSW Railway Traffic Employees' Association* (1906) 4 CLR 488, 537–539 (Griffiths CJ, Barton and O'Connor JJ).

[30] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 149.

(*Collector*) which held that States were immune from federal taxation as they were "as sovereign and independent as the general government".[31] As will be seen, *Collector* was later overturned.

These early cases disclose the origins of what came to be known as the dual "heresies"[32] of the doctrine of reserved powers[33] and the doctrine of implied intergovernmental immunities.[34] It is also notable that the language used by the Court in those early days paid full deference to the States as "sovereign" entities in their own right,[35] a characterisation which would later be rejected.[36]

The doctrines of reserved powers and of implied intergovernmental immunities arose by way of implications based on the prevailing view as to the proper place of the States within the federal structure. However, as will be seen, a different conclusion is reached if the inquiry begins from the starting point of the constitutional text itself.[37]

THE *ENGINEERS' CASE*

Two decades after Federation the "heresies" were "exploded" in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (*Engineers' Case*) when a union sought a federal award covering State government instrumentalities.[38] With the three original members of the High Court now gone, the compactual theory, reliant as it was on implications derived from the basic structure, was swept aside.[39]

The *Constitution* was now to be interpreted as a statute of the Imperial Parliament according to the "settled rules of construction".[40] As a result, once a power had been identified as conferred on the Commonwealth Parliament, no implication prohibiting the exercise of that power arose because of notions of reserved State powers or State immunities.

Perhaps the somewhat ironic result of the explosion of pre-*Engineers* heresies is that the methodology the Griffith Court employed had fairly solid doctrinal support. Marshall CJ in *McCulloch* – a case that sits squarely on the Mount Rushmore of canonical legal precedent – did not adopt a clause-bound textualist approach to interpreting the US Constitution when it came to the issue of whether Congress acted within power in creating a national bank, and whether a State in turn had the power to tax it.[41] The creation of a bank was not among the enumerated powers in Art I, but Marshall CJ rejected the notion

[31] *Collector v Day*, 78 US (11 Wall) 113, 126 (Nelson J) (1871).

[32] *Victoria v Commonwealth* (1971) 122 CLR 353, 396 (Windeyer J).

[33] See also *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 where the Court found sections of the *Australian Industries Preservation Act 1906* (Cth) (which purported to regulate anti-competitive activities of corporations) was not supported by the corporations power as they represented "an invasion of the field of domestic trade, a matter which is reserved to the States" as s 51(xx) of the *Constitution* was to be read consistently with s 51(i) which contained a contained "definite and distinct" limitation on Commonwealth regulation of intrastate trade and commerce: 350, 353–354 (Griffith CJ).

[34] Sir Robert Garran described it as "the reciprocal doctrine of non-interference": Robert Garran, "The Development of the Australian Constitution" (1924) 40 *Law Quarterly Review* 202, 215; both the States and the Commonwealth and their respective instrumentalities were immune from any law passed by the other wherever such laws would in some way "fetter, control, or interfere with, the free exercise of the legislative or executive power": *D'Emden v Pedder* (1904) 1 CLR 91, 111 (Griffith CJ).

[35] *D'Emden v Pedder* (1904) 1 CLR 91, 109 (Griffith CJ, Barton and O'Connor JJ).

[36] *The Commonwealth v New South Wales* (1923) 32 CLR 200, 210 (Isaacs, Rich and Starke JJ) (the High Court held it had jurisdiction to entertain an action for a tort brought by the Commonwealth against a State without its consent: "The appellation 'sovereign State' as applied to the construction of the Commonwealth Constitution is entirely out of place, and worse than unmeaning."), 218 (Higgins J); *New South Wales v Commonwealth (No 1)* (1932) 46 CLR 155 (*Garnishee Case*), 183 (Starke J), 221 (Evatt J), 221 (McTiernan J).

[37] *New South Wales v Commonwealth* (2006) 229 CLR 1 (*Work Choices Case*), 120 [191] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); 156 IR 1; [2006] HCA 52.

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

[39] And in doing so, the Court overruled the *Railway Servants' Case* as "Mutual supremacy is a contradiction of terms.": *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 157 (Knox CJ, Isaacs, Rich and Starke JJ).

[40] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 145ff (Knox CJ, Isaacs, Rich and Starke JJ) (referring to "a vague, individual conception of the spirit of the compact"); 161–162, 165 (Higgins J).

[41] Akhil Reed Amar, *America's Unwritten Constitution* (Basic Books, 2013) 24.

that a constitution should "contain an accurate detail of all the subdivisions of which its great powers will admit", for to do so "would partake of the prolixity of a legal code".[42] Rather, Marshall CJ employed an holistic analysis based on "a fair construction of the whole instrument" with all attendant implications and incidents that arise from the nature of the document under review.[43]

The US methodology understandably proved highly persuasive to the High Court in its formative years, because similar issues arose where the components of the federal structures found themselves in direct conflict. Such methodology was rejected for the literalist approach adopted in the *Engineers' Case*.[44]

The Development of the Immunities Doctrine in the United States

It is important to appreciate that the development of the doctrine of immunities in the United States often foreshadowed a change in direction in Australian High Court jurisprudence. Sir Owen Dixon described a "striking parallel" between the development of the immunities doctrine in the United States and Australia.[45]

As we have seen, the doctrine of federal government immunity from *McCulloch* spawned *D'Emden* and the cases following. The broad principle from *McCulloch* was that the States had no power, by taxation or otherwise, to retard, impede, burden or control the laws enacted by Congress or their execution.[46] There was no reciprocal doctrine laid down in *McCulloch* because, it was reasoned, the States were adequately protected through their representation in Congress.[47]

In *Weston v Charleston* (*Weston*),[48] Marshall CJ extended the *McCulloch* doctrine beyond instrumentalities to non-discriminatory laws of general application. In *Weston*, a city tax was invalidated in its application to privately-held US bonds. A further extension of the doctrine occurred in *Dobbins v Erie County* (*Dobbins*)[49] in which the captain of a federal revenue cutter was assessed for county taxes. The county tax was held invalid as it interfered with the constitutional means employed by the federal government to execute its constitutional powers.

A major development occurred when the US Supreme Court struck down a federal income tax of general application levied on the income of a State judge in *Collector*.[50] *Collector* purported to apply *Dobbins*, but the Court reasoned that *both* the States and the federal government were each supreme in their own spheres of competency.[51] Thus the doctrine of reciprocal immunity was born. Significantly, *Dobbins* and

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[42] *McCulloch v Maryland*, 17 US (4 Wheat) 316, 407 (1819).

[43] *McCulloch v Maryland*, 17 US (4 Wheat) 316, 406 (1819).

[44] The doctrines taken from *McCulloch v Maryland* underpinned such pre-*Engineers* cases as *D'Emden v Pedder* (1904) 1 CLR 91; *Deakin v Webb* (1904) 1 CLR 585 and *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 but the seminal US authority was referred to only once in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 itself (in the judgment of Higgins J at 136).

[45] Owen Dixon, "Marshall and the Australian Constitution" in *Jesting Pilate – and Other Papers and Addresses* (Sweet & Maxwell Ltd, 1965) 172.

[46] *McCulloch v Maryland*, 17 US (4 Wheat) 316, 436 (1819): "The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared."

[47] *McCulloch v Maryland*, 17 US (4 Wheat) 316, 435 (1819): "The people of all the States, and the States themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the States, they tax their constituents, and these taxes must be uniform. But when a State taxes the operations of the Government of the United States, it acts upon institutions created not by their own constituents, but by people over whom they claim no control."

[48] *Weston v Charleston*, 27 US (2 Pet) 449 (1829).

[49] *Dobbins v Erie County*, 41 US (16 Pet) 435 (1842).

[50] *Collector v Day*, 78 US (11 Wall) 113 (1871).

[51] *Collector v Day*, 78 US (11 Wall) 113, 124 (Nelson J) (1871): "The general government and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. The former in its appropriate sphere is supreme, but the states within the limits of their powers not granted, or,

Collector remained good law until they were overruled in 1939 in the midst of the greatest centralisation of power the republic had ever witnessed: the New Deal.[52]

A year before *Melbourne Corp v Commonwealth* (*Melbourne Corporation*) was decided in 1947, the US Supreme Court held that the State of New York, in the sale of mineral waters owned and operated by the State, was not immune from a general tax imposed on mineral waters by federal legislation.[53] In *New York v United States* the Court recognised that, while one government in a federation could not destroy its counterparts, the extension of government into private sector trading activities had made it impractical to uphold a general rule of immunity in the broad terms of the *McCulloch* doctrine.

Chief Justice Stone in his concurring opinion in *New York v United States* held that "a federal tax discriminating against a State would be an unconstitutional exertion of power over a coexisting sovereignty within the same framework of government", and that non-discriminatory tax "may nevertheless so affect the State … as to interfere unduly with the State's performance of its sovereign functions of government".[54] That is, there remained some activities which were necessarily governmental in character which attracted the immunity. The decision in *New York v United States* was extensively referred to in the various judgments in *Melbourne Corporation*.

FROM *ENGINEERS' CASE* TO THE *MELBOURNE CORPORATION CASE*

Following the *Engineers' Case*, the issue of State and Commonwealth economic relations was brought into sharp relief with the advent of the Great Depression. The financial independence of the States was tested early on in the life of the *Constitution*.[55]

The federal government had not taken up the invitation in s 94 of the *Constitution* (which contemplated the Commonwealth making a monthly payment to the States of "all surplus revenue" of the Commonwealth). However, the Commonwealth for some years did make per capita payments from the Commonwealth budget to the States in accordance with the *Surplus Revenue Act 1910* (Cth) until it was finally repealed in 1927. It was repealed at a time when the States were attempting to negotiate a funding agreement with the Commonwealth.[56]

A new federal *States Grants Act* in 1927 now made the per capita payments "subject to the terms of any agreement made between the Commonwealth and all the States".[57] In 1928, s 105A of the *Constitution* was inserted to give effect to such an agreement. A new financial agreement in which the Commonwealth took over State public debts and created a Federal Loan Council was signed on 12 December 1928.

In 1932, the Lang Government in New South Wales failed to make interest payments on public debts due under the financial agreement with the Commonwealth. The Commonwealth passed enforcement legislation, the validity of which was upheld by the High Court.[58] Starke J noted that:

> It has been strenuously asserted that these Acts are an interference with the sovereign rights of the States and with the judicial power of the Commonwealth vested in its Courts. But, as has been pointed out more than once in this Court, the States are not sovereign powers. By the Constitution a restriction is placed upon their supposed sovereign rights by the grant to the Federal power of the right and power to legislate

in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the states."

[52] In *Graves v New York*, 306 US 466 (1939).

[53] *New York v United States*, 326 US 572 (1946).

[54] *New York v United States*, 326 US 572, 586–587 (1946) (Stone CJ; Reed, Murphy and Burton JJ concurring).

[55] Owen Dixon, "Aspects of Australian Federalism" in *Jesting Pilate – and Other Papers and Addresses* (Sweet & Maxwell Ltd, 1965) 118–119.

[56] Sir Robert Menzies, *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation* (Cassell & Company Ltd, 1967) 96.

[57] *States Grants Act 1927* (Cth) s 6.

[58] *New South Wales v Commonwealth (No 1)* (1932) 46 CLR 155 (*Garnishee Case*).

> with respect to various matters. Again, one of the privileges or rights of a sovereign power is its immunity from action without its own consent. Yet by the Constitution this right or privilege was surrendered.[59]

By the start of World War II, the Federal Loan Council had become the instrument through which resources were concentrated to support the war effort. Following the war, the States undertook massive public works initiatives well beyond the capacity of the banks to underwrite. The Commonwealth thus took on de facto control of the States' works programs.[60]

At the same time, the seemingly temporary constitutional power permitting the Commonwealth to make grants-in-aid to the States led to a system of uniform taxation.[61] The High Court gave a very broad reading to s 96, permitting the Commonwealth to attach terms and conditions to the grants of moneys.[62] That is, the Commonwealth could insist on the States falling into line with federal policy objectives notwithstanding that there was no constitutional head of power which permitted the Commonwealth to legislate in respect of the subject matters covered by the attached conditions.[63]

The war years increased the competition for the finite funds available to satisfy the demands of the various governments within the federation. The Commonwealth passed a series of Acts whose central aim was to take over the field of income taxation and to create uniformity in a country where State taxation rates had always been disparate. The Commonwealth did this by taxing an amount surplus to its requirement, and then using s 96 of the *Constitution* to grant the surplus to the States, who then in turn agreed to cease taxing in their own right.

The legislation was challenged on the basis that it all but deprived the States of any real choice in the matter. The High Court dismissed the challenges to the legislation in the *Uniform Tax Cases*.[64] In *South Australia v Commonwealth* (*First Uniform Tax Case*), Latham CJ noted that, just as the Commonwealth may properly induce a State to exercise its powers by offering a tied grant,[65] so too could the Commonwealth use s 96 to induce a State by the same means to abstain from exercising its powers. Rich J upheld the federal legislation on the basis that the very existence of the Federation was under threat: "If the Commonwealth is to wage war effectively, it must command the sinews of war."[66]

The Commonwealth thereafter continued its march towards economic ascendency within the federation, and the States towards a confirmation of their subaltern, mendicant status.[67] In *Ha v New South Wales*,[68] the High Court invalidated State franchise taxes on alcohol, tobacco and fuel as being contrary to s 90 of the *Constitution*. The States lost 16% of the revenue they had previously been able to raise.[69] The State franchise taxes were replaced by Commonwealth taxes and the revenue collected was then paid to the States.[70]

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[59] *New South Wales v Commonwealth (No 1)* (1932) 46 CLR 155 (*Garnishee Case*), 184–185.

[60] Menzies, n 56, 104–105.

[61] *Constitution*, s 96 commences "During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides…"; Menzies, n 56, 74.

[62] *Victoria v Commonwealth* (1926) 38 CLR 399, a case which approved a co-operative plan for the construction and maintenance of roads and highways.

[63] Similarly, "Congress may attach conditions on the receipt of federal funds": *South Dakota v Dole*, 483 US 203, 206 (1987).

[64] *South Australia v Commonwealth* (1942) 65 CLR 373; *Victoria v Commonwealth* (1957) 99 CLR 575 (*Second Uniform Tax Case*).

[65] As was established in *Victoria v Commonwealth* (1926) 38 CLR 399.

[66] *South Australia v Commonwealth* (1942) 65 CLR 373, 437.

[67] Allan Fenna, "Commonwealth Fiscal Power and Australian Federalism" (2008) 31(2) *University of New South Wales Law Journal* 508, 521.

[68] *Ha v New South Wales* (1997) 189 CLR 465.

[69] James Stellios, *Zines' the High Court and the Constitution* (Federation Press, 6th ed, 2015) 492; *Melbourne Corp v Commonwealth* (1947) 74 CLR 31, 103.

[70] Within years, the Intergovernmental Agreement on the Reform of Commonwealth – State Financial Relations 1999 spawned the Goods and Services Tax in July 2000.

Thus, what began after the *Engineers' Case* as a new version of co-operative federalism,[71] soon saw the Commonwealth come to acquire exclusive power over the field of income taxation. Sir Robert Menzies observed that:

> The whole matter is a very good illustration of how something which was not anticipated in the Constitution when it was first enacted can come into existence by judicial interpretation and the inexorable demands of new circumstances.[72]

While Dixon J described the Australian federal system as a "dual" one, in reality the structure is far more complex. There exist manifold examples whereby the various polities within the Australian federation have utilised various intergovernmental arrangements and co-operative institutions in order to realise their respective policy objectives.[73] This is known as "layer-cake federalism" which emphasises the concurrent and competitive nature of the integers within the federation (to be contrasted with strictly "co-ordinate" federalism involving independent governments operating within their own spheres of influence).[74]

THE *MELBOURNE CORPORATION CASE*

During WWII, the Commonwealth Bank was given power to oversee private banks and control the supply of money and credit. The *Banking Act 1945* (Cth) made this permanent. Section 48 provided that banks could not conduct banking business for a State or authority of a State, including a local government authority, without consent of the treasurer.

The City of Melbourne challenged the *Banking Act 1945* as beyond legislative power and, alternatively, that it was a law directed at an essential State government function involving a form of "discrimination" impermissible under the *Constitution*.

Of the majority judgments, Rich, Starke and Dixon JJ invalidated s 48 based on implications drawn from the federal nature of the *Constitution*.

Rich J held that "[s]uch action on the part of the Commonwealth may be invalid in two classes of case, one, where the Commonwealth singles out the States or agencies to which they have delegated some of the normal and essential functions of government, and imposes on them restrictions which prevent them from performing those functions or impede them in doing so; another, where, although the States or their essential agencies are not singled out, they are subjected to some provision of general application, which, in its application to them, would so prevent or impede them".[75] Rich J held that s 48 was invalid as "while power in a State and in its essential agencies to carry on the business of banking cannot be impaired, the power freely to use the facilities provided by banks, under modern conditions, must be regarded as essential to the efficient working of the business of government, and that power also cannot be impaired".[76]

Starke J rejected the notion that discrimination by the Commonwealth against a State alone could provide a decisive test for determining government power.[77] His Honour stated that "in the end the question must be whether the legislation or the executive action curtails or interferes in a substantial manner with

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[71] See, eg, *Hodel v Virginia Surface Mining and Reclamation Association*, 452 US 264 (1981).

[72] Menzies, n 56, 88–89.

[73] Allan J Myers, "The Grants Power Key to Commonwealth – State Financial Relations" (1970) 7 *Melbourne University Law Review* 549, 550; *R v Duncan; Ex parte Australian Iron & Steel* (1983) 158 CLR 535; 5 IR 15; compare *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; [1999] HCA 27.

[74] Leslie Zines, "Changing Attitudes to Federalism and Its Purpose" in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 96.

[75] *Melbourne Corp v Commonwealth* (1947) 74 CLR 31, 66 (Rich J).

[76] *Melbourne Corp v Commonwealth* (1947) 74 CLR 31, 67 (Rich J). Rich J had suggested that a "general income tax Act which purported to include within its scope the general revenues of the States derived from State taxation" would be invalid (66). However, based on the outcome of the *State Chamber of Commerce & Industry v Commonwealth* (1987) 163 CLR 329, a progressive tax on all receipts including those of a State would not be discriminatory.

[77] *Melbourne Corp v Commonwealth* (1947) 74 CLR 31, 74–75 (Starke J).

the exercise of constitutional power by the other".[78] Immunity, according to Starke J, depended upon "practical considerations".[79]

Starke J found s 48 invalid as "[t]he management and control by the States and by local governing authorities of their revenues and funds is a constitutional power of vital importance to them. Their operations depend upon the control of those revenues and funds. And to curtail or interfere with the management of them interferes with their constitutional power".[80]

Dixon J stated that the Framers conceived of a form of federalism involving "a central government and a number of State governments separately organized" in which "power itself" formed no part of the conception of a government but where the distribution and interrelation of legislative power is effected chiefly through the operation of ss 51, 52, 107, 108 and 109 of the *Constitution*.[81]

His Honour framed the immunity in terms of a federal law "which discriminates against States, or a law which places a particular disability or burden upon an operation or activity of a State, and more especially upon the execution of its constitutional powers".[82] But his Honour here was not speaking of "a general law which governs all alike who come within the area of its operation".[83] This is made clear when his Honour later stated that "the efficacy of the system logically demands that … it should not be understood as authorizing the Commonwealth to make a law aimed at the restriction or control of a State in the exercise of its executive authority".[84]

It followed that Dixon J held s 48 invalid on the basis that it was an "attempt to isolate the State from the general system, deny it the choice of the machinery the system provides and so place it under a particular disability".[85] Once discrimination was identified, it was immaterial whether the right to exercise such a choice was "of great or of small importance to the States".[86]

However, if the constitutional head of power contemplates the making of federal laws required to be directed to a State, then the "discrimination" based immunity does not apply. Dixon J referred to, by way of example, s 51(xxxi) being "the acquisition of property on just terms from any State", as well as the control of railways and the defence power as "conspicuous" examples of where this exception might arise.

The ratio of *Melbourne Corporation* is, as can be appreciated from the reasoning extracted above, not easy to distil into a single constitutional principle.[87] More difficult still is to identify any single doctrinal foundation for the various expressions of principle enunciated.

For Dixon J, discrimination was determinative of the issue. The extent of the burden on the State's powers was not thereafter material to the issue of validity. Starke and Rich JJ, however, decided the case based on a more general proposition that a federal law would be invalid where it impaired or curtailed the exercise of a vital or essential constitutional power. These differences in the doctrinal underpinnings took on great significance decades later.

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[78] *Melbourne Corp v Commonwealth* (1947) 74 CLR 31, 75 (Starke J).

[79] *Melbourne Corp v Commonwealth* (1947) 74 CLR 31, 72 (Starke J); *Austin v Commonwealth* (2003) 215 CLR 185, 265 [168] (Gaudron, Gummow and Hayne JJ); [2003] HCA 3; *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272, [31] (French CJ), [76] (Gummow, Heydon, Kiefel and Bell JJ); [2009] HCA 33.

[80] *Melbourne Corp v Commonwealth* (1947) 74 CLR 31, 75 (Starke J). Starke J, however, was at odds with Rich J to the extent that he rejected the distinction between essential government functions and other trading functions.

[81] *Melbourne Corp v Commonwealth* (1947) 74 CLR 31, 82 (Dixon J); *Spence v Queensland* (2019) 93 ALJR 643, [6] (Kiefel CJ, Bell, Gageler and Keane JJ); [2019] HCA 15.

[82] *Melbourne Corp v Commonwealth* (1947) 74 CLR 31, 79 (Dixon J).

[83] *Melbourne Corp v Commonwealth* (1947) 74 CLR 31, 79 (Dixon J); compare *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 227; 58 IR 431.

[84] *Melbourne Corp v Commonwealth* (1947) 74 CLR 31, 83 (Dixon J).

[85] *Melbourne Corp v Commonwealth* (1947) 74 CLR 31, 84 (Dixon J).

[86] *Melbourne Corp v Commonwealth* (1947) 74 CLR 31, 84 (Dixon J).

[87] Stellios, n 69, 492.

POST *MELBOURNE CORPORATION*: TO *QEC*

The basis of the decision in the *Melbourne Corporation* case has been accepted as one which turned on the discriminatory nature of the law being contrary to the implications derived from the federal system.[88] However, the precise limits of the prohibition had still not been formulated decades after *Melbourne Corporation* had been decided.[89]

In *Victoria v Commonwealth* (*Payroll Tax Case*),[90] the impugned Commonwealth tax was a law of general application that did not single out the States. The law was held to be valid as it did not "operate to interfere with a State carrying out its constitutional functions of government".[91]

In the *Commonwealth v Tasmania* (*Tasmanian Dam Case*),[92] Tasmania argued that the *World Heritage (Western Tasmania Wilderness) Regulations 1983* (Cth) infringed the implied immunity as the Tasmanian Hydro-Electric Commission was prevented from building a dam upon land (being 11% of the State) that the Commonwealth had declared to be of national significance. Brennan J thought that the argument would have substance if it applied to "the building that housed the principal organs of the State".[93] However, the Commonwealth Act was upheld, as the "functioning – as distinct from the powers" of the organs of the State government were not relevantly diminished.[94]

Mason J, applying his formulation of the immunity from *Koowarta v Bjelke-Petersen*,[95] rejected a submission that "the prohibition strikes down a Commonwealth law which inhibits, impairs or curtails any governmental function of a State in a material way". His Honour identified that "what it does is to prohibit impairment of the capacity of the State to function as a government, rather than to prohibit interference with or impairment of any function which a State government undertakes".[96] To fall foul of the prohibition, Mason J ventured that "it must emerge that there is a substantial interference with the State's capacity to govern, an interference which will threaten or endanger the continued functioning of the State as an essential constituent element in the federal system".[97]

A high hurdle was evidently set for establishing invalidity based on the implication designed to protect the structural integrity of the State components within the federal framework.

The first time that Commonwealth legislation was held to be invalid based on the doctrine of implied immunities since *Melbourne Corporation* occurred in the course of a major industrial dispute in the Queensland electricity industry.[98] In *Queensland Electricity Commission v Commonwealth* (*QEC*),[99] the Court was dealing with a dispute which had extended beyond the State, and where the Australian Council of Trade Unions had imposed blockades affecting air, sea, road and rail links into Queensland.[100]

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[88] See, eg, *Victoria v Commonwealth* (1971) 122 CLR 353, 392 (Menzies J), 402 (Windeyer J), 406 (Walsh J), 422 (Gibbs J); *Austin v Commonwealth* (2003) 215 CLR 185, 258 [145] (Gaudron, Gummow and Hayne JJ); [2003] HCA 3.

[89] *Re Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297, 313; 4 IR 188.

[90] *Victoria v Commonwealth* (1971) 122 CLR 353.

[91] *Victoria v Commonwealth* (1971) 122 CLR 353, 392 (Menzies J); see also *State Chamber of Commerce & Industry v Commonwealth* (1987) 163 CLR 329.

[92] *Commonwealth v Tasmania* (1983) 158 CLR 1.

[93] *Commonwealth v Tasmania* (1983) 158 CLR 1, 214.

[94] See *Commonwealth v Tasmania* (1983) 158 CLR 1, 214 (Brennan J); see also 139–140 (Mason J), 254, 280–281 (Deane J).

[95] *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 226 (Mason J).

[96] *Commonwealth v Tasmania* (1983) 158 CLR 1, 139 (Mason J).

[97] *Commonwealth v Tasmania* (1983) 158 CLR 1, 139 (Mason J).

[98] In *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at least two justices found that the provisions of a Commonwealth Act which prohibited the broadcasting of political matters prior to a State election impermissibly burdened the State Government as the electoral system was a fundamental part of the machinery of state: 162–164 (Brennan CJ), 241–244 (McHugh J).

[99] *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192; 11 IR 376.

[100] Chris Tappere, "Queensland Electricity Commission and Ors v Commonwealth of Australia" (1986) 16 *Federal Law Review* 305, 307.

In an effort to quell the dispute, the Commonwealth enacted the *Conciliation and Arbitration (Electricity Industry) Act 1985* (Cth) which singled out Queensland and imposed certain procedural requirements upon it designed to fast track the transition to a federal award for the State industry.

The Court in *QEC* held the Commonwealth Act to be invalid based on the doctrine of implied intergovernmental immunities.

Mason J identified a two-factor test emerging from the *Melbourne Corporation* case involving:

(1) the prohibition against discrimination which involves the placing on the States of special burdens or disabilities; and
(2) the prohibition against laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments.[101]

The first limb of the test (discrimination) is derived from Dixon J's judgment in *Melbourne Corporation*. The second limb of the test (impairment) is based on the judgments of Rich and Starke JJ.[102] The satisfaction of either of the two elements was sufficient to establish invalidity.

By contrast, Dawson J identified, as a "general proposition", the immunity in terms that "the Commonwealth Parliament cannot impair the capacity of the States to exercise for themselves their constitutional functions".[103] His Honour found the Commonwealth Act invalid as it "reduced the range of choices available to the State" and so reduced its capacity to make its own decisions in the exercise of its governmental functions. Dawson J made it clear that this result might obtain as a result of a law of general application, although recognised that if singled out, a State's constitutional integrity would thereby be "impaired in a manner which the federal structure does not permit, regardless of the extent of the impairment".[104]

In both *Melbourne Corporation* and *QEC*, the federal laws were invalidated based on the first limb (discrimination), namely Dixon J's formulation. However, it should also be noted that, in each case, the burdens imposed by the federal Acts did not threaten the continued existence of the States.

In the case of *Melbourne Corporation*, the choice of banking with its preferred banker was removed from the City of Melbourne. Other than the removal of choice, there was nothing in the Commonwealth law that impacted on the ability of the State to carry out its banking functions.

In *QEC*, although the State of Queensland was subject to considerable industrial action at the time, the Commonwealth legislation was designed to facilitate the settlement of the dispute by the making of a federal award. It did so by imposing what might be described as certain procedural burdens on the State, namely to ensure that the industrial dispute could be dealt with expeditiously by a Full Bench of the federal Commission. However, there was nothing in the Commonwealth Act which could have been said to have posed an existential threat to the continued functioning of the State itself.

The two-limb formulation of the immunities doctrine favoured by Mason J in *QEC* was subsequently approved by a joint judgment of six in *Re Australian Education Union; Ex parte Victoria* (*Re AEU*) in 1995,[105] and of five justices in *Victoria v Commonwealth* (*Industrial Relations Act Case*) a year later.[106]

In *Western Australia v Commonwealth* (*Native Title Act Case*),[107] Western Australia challenged Commonwealth native title legislation on the basis of the impairment of the State's ability to control and regulate its land use. It was submitted by the State that Mason J's formulation in *QEC* "may not

[101] *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 217 (Mason J); 11 IR 376.

[102] *Melbourne Corp v Commonwealth* (1947) 74 CLR 31, 66 (Rich J), 74 (Starke J).

[103] *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 260 (Dawson J); 11 IR 376.

[104] *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 262 (Dawson J); 11 IR 376.

[105] *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 231 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); 58 IR 431.

[106] *Victoria v Commonwealth* (1996) 187 CLR 416, 498 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); 66 IR 392.

[107] *Western Australia v Commonwealth* (1995) 183 CLR 373.

comprehend the principle in its full width" whereas Dawson J's formulation suggested a principle "conferring on State functions a wider immunity from interference by Commonwealth power".[108]

As was the case in the *Tasmanian Dam Case*, the joint judgment in the *Native Title Act Case* rejected the plaintiff's claim of invalidity argument as the Commonwealth Act did not "purport to affect the machinery of government of the State".[109] The constitution of the three branches of government was said to remain unimpaired.

Re AEU

The first time Commonwealth legislation was invalidated based on the impairment limb was in *Re AEU*.[110]

A number of federal awards were challenged which would have bound State public servants and government instrumentalities. The States contended that the implied limitation protected the integrity or autonomy of a State against federal award prescription that conditioned employment qualifications, eligibility and termination procedures.

The federal log of claims served included a demand that no employee could be terminated (by way of voluntary redundancy or otherwise) except with the consent of the union. This was held to be an impairment of the State's capacity to function as a government because it undermined the right of a State to determine "the number and identity of the persons whom it wishes to employ, the term of appointment of such persons and, as well, the number and identity of the persons whom it wishes to dismiss, with or without notice, from its employment on redundancy grounds".[111]

The High Court went on to find that another critical aspect of the State's capacity to function as a government was its ability to determine the terms and conditions upon which persons at "higher levels of government" (eg ministers, ministerial assistants, heads of department, parliamentary officers and judges) were engaged.[112]

The Court did not attempt to reconcile its decision in *Re AEU* with its decision in *State Chamber of Commerce & Industry v Commonwealth* (*Second Fringe Benefits Tax Case*).[113] Recall that the majority in that case decided that, like income tax on salaries, a fringe benefits tax applied to the benefits given to those who occupied the essential organs of government, would not be invalid.[114]

UFU v CFA

The issue of the implied immunity identified in *Re AEU* arose in *United Firefighters Union of Australia v Country Fire Authority* (*UFU v CFA*).[115]

The Country Fire Authority (CFA) and the United Firefighters Union (UFU) made an enterprise agreement in 2010 and had it approved under the *Fair Work Act 2009* (Cth). A clause within the agreement required the CFA to employ an additional 342 firefighters over a six-year period. The CFA did not comply with the recruitment requirements under the agreement and the UFU prosecuted it for breach.

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[108] *Western Australia v Commonwealth* (1995) 183 CLR 373, 477.

[109] *Western Australia v Commonwealth* (1995) 183 CLR 373, 481 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

[110] *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188; 58 IR 431.

[111] *Re Australian Education Union; Ex parte Victoria; Ex parte Victoria* (1995) 184 CLR 188, 232; 58 IR 431.

[112] *Western Australia v Commonwealth* (1995) 183 CLR 373, 233.

[113] *State Chamber of Commerce & Industry v Commonwealth* (1987) 163 CLR 329.

[114] Contrast the dissent of Brennan J in this respect: *State Chamber of Commerce & Industry v Commonwealth* (1987) 163 CLR 329, 362.

[115] *United Firefighters Union of Australia v Country Fire Authority* (2015) 228 FCR 497; 247 IR 167; [2015] FCAFC 1 (Perram, Robertson and Griffiths JJ).

The CFA defended the proceedings, contending that the relevant clause in the enterprise agreement was invalid on the basis of the *Melbourne Corporation* principle.[116] Specifically, it was said to place a direct burden on the State's ability to determine the number of employees it engaged.

The UFU had submitted that the reasoning in *Re AEU* did not apply because, unlike the federal awards which were imposed upon the industry participants in *Re AEU*, the industrial instrument in this case was the product of agreement. It followed, on this submission, that there was no relevant "burden" on the State as the State had consented to the arrangements.[117]

Murphy J, at first instance, rejected that submission and held that the relevant clauses in the agreement offended the *Melbourne Corporation* principle.[118]

The Full Court of the Federal Court allowed the appeal on this point. The Full Court determined that the relevant question was whether the impugned provisions "imposed some special disability or burden on the exercise of the powers and fulfilment of the functions of the State of Victoria or the CFA, which curtailed the State's capacity to function as a government".[119]

The Court held that the impugned provisions did not offend the implied limitation "in circumstances where the CFA voluntarily agreed to make the enterprise agreement".[120] The Court, however, went on to say that the answer might have been different if, for example, the Union had taken protective industrial action to the point where the MFB was left "with no choice but to accede to the demands of the UFU"[121] as based on those facts it could not then be said that the agreement was involuntary.[122]

New York v United States

The issue of whether a State can, through its consent, lose its ability to rely upon the doctrine of immunities was dealt with in *New York v United States*.[123]

In the 1980s, Congress passed legislation to deal with the problem of radioactive waste, described by O'Connor J as "a crisis of national proportions". Following negotiations by the State Governors, various concessions were made by all sides in an effort to arrive at an acceptable compromise. The States with disposal sites for radioactive waste agreed to continue accepting waste for a period of time while other States developed their own waste programs.

In 1985, a federal Act sanctioned the settlement reached by the States. If a State failed to develop or secure access to a disposal site through a compact with other States by a certain date, it would be forced to accept legal ownership ("take-title") for all of its radioactive waste.

New York was a willing participant in the compromise reached and "reaped much benefit" from the arrangement. Despite this, New York failed to comply with its obligations by the deadline and challenged the Act.[124]

In a 6:3 decision, the US Supreme Court held that the take-title provision of the Act impermissibly "commandeered" the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.

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[116] Other clauses which prohibited redundancy and the like were challenged on the same ground.

[117] Relying upon *Victoria v Commonwealth* (1996) 187 CLR 416; 66 IR 392. The High Court in that case (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) read down certain provisions of the federal Act that operated "to prevent the States from determining for themselves any of those matters which were held in *Re Australian Education Union* to be beyond the legislative power of the Commonwealth" (503), however held that the agreement-making and certification provisions of the Act were valid in their entirety; compare *New York v United States*, 505 US 144 (1992).

[118] *United Firefighters Union of Australia v Country Fire Authority* (2014) 218 FCR 210, [133]; 240 IR 277; [2014] FCA 17.

[119] *United Firefighters Union of Australia v Country Fire Authority* (2015) 228 FCR 497, [239]; 247 IR 167; [2015] FCAFC 1.

[120] *United Firefighters Union of Australia v Country Fire Authority* (2015) 228 FCR 497, [207]; 247 IR 167; [2015] FCAFC 1.

[121] *United Firefighters Union of Australia v Country Fire Authority* (2015) 228 FCR 497, [210]; 247 IR 167; [2015] FCAFC 1.

[122] Compare *Parks Victoria v Australian Workers' Union* (2013) 65 AILR 101-843; 234 IR 242; [2013] FWCFB 950.

[123] *New York v United States*, 505 US 144 (1992).

[124] *New York v United States*, 505 US 144, 181 (1992).

The majority based its reasoning on the compact reached by the Framers at Philadelphia in 1787. O'Connor J, in her majority opinion, reasoned that the Constitutional Convention opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States.[125]

This focus had important ramifications for accountability within a system of checks and balances. If the federal government legislates and overrides State law, it does so in full view of the public, and federal officials remain accountable. But where the federal government coerces the States to regulate, it is the State officials who will bear the brunt of public opprobrium for bad decisions, while the federal officials remain insulated from electoral ramifications. Accountability is thus diminished where there is federal coercion of the States.[126]

The majority held that State officials cannot therefore consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution.

White J wrote the dissenting opinion.[127] He observed that Congress has acceded to the wishes of the States by permitting local decision-making rather than imposing a solution from Washington, and that New York itself supported the passage of the legislation and enacted State laws specifically to comply with the deadlines agreed upon by the States. This was co-operative federalism in action.

White J was therefore of the opinion that the "State should be estopped from asserting the unconstitutionality of a provision" that seeks merely to ensure that it lives up to its end of the bargain. A State could, accordingly, waive its right to immunity in the formation of an agreement.[128]

New York v United States was not cited in *UFU v CFA*.

Austin and *Clarke*

In *Austin v Commonwealth* (*Austin*),[129] a challenge was made to Commonwealth legislation which taxed the superannuation benefits of State judges.

A majority of the High Court held the legislation to be invalid on the basis that it burdened the operation and activities of the State. The decision fell squarely within the second exception found in *Re AEU* concerning the immunity from prescription of minimum conditions in relation to persons employed at high levels of government.

The federal legislation might also have been characterised as giving rise to a breach of the "discrimination limb" identified in *Melbourne Corporation* itself. However, the joint judgment purported to reject the two-limb characterisation identified by Mason J in *QEC*.[130] The basis upon which the joint judgment rejected the two-limb formulation was that the "discrimination" test had "proved insusceptible of precise formulation".[131]

The "new" test identified in the joint judgment involved an "assessment of the impact of particular laws by such criteria as "special burden" and "curtailment" of "capacity" of the States "to function as governments"".[132] Gaudron, Gummow and Hayne JJ posited the essential question in all cases to be

[125] Thus, the Framers rejected William Paterson's New Jersey Plan in favour of Edmund Randolph and James Madison's Virginia Plan: *New York v United States*, 505 US 144, 164–165 (1992).

[126] *New York v United States*, 505 US 144, 168–169 (1992).

[127] Joined by Blackmun J and Stevens J.

[128] *New York v United States*, 505 US 144, 198–200 (1992); compare also *Brown v The Queen* (1986) 160 CLR 171 and *Singer v United States*, 380 US 24 (1965) on the issue of waiver of constitutional protections.

[129] *Austin v Commonwealth* (2003) 215 CLR 185; [2003] HCA 3.

[130] *Austin v Commonwealth* (2003) 215 CLR 185, [125] (Gaudron, Gummow and Hayne JJ); [2003] HCA 3; see also [24] (Gleeson CJ).

[131] *Austin v Commonwealth* (2003) 215 CLR 185, 258 [145] (Gaudron, Gummow and Hayne JJ); [2003] HCA 3; see also *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548, 610 [134] (Hayne, Bell and Keane JJ); [2013] HCA 34; *Spence v Queensland* (2019) 93 ALJR 643, [413] (Edelman J); [2019] HCA 15.

[132] *Austin v Commonwealth* (2003) 215 CLR 185, 249 [124] (Gaudron, Gummow and Hayne JJ); [2003] HCA 3.

whether the law "restricts or burdens one or more of the States in the exercise of their constitutional powers".[133]

In *Austin*, it was found that the impact on the State's "freedom to select" the manner and method for discharge of its constitutional functions respecting the remuneration of its judges was a "sufficiently significant impairment" for the purposes of *Melbourne Corporation*.[134]

In *Clarke v Federal Commissioner of Taxation* (*Clarke*),[135] the Superannuation Taxation Scheme was challenged in respect of a member of State Parliament. This time, all members of the Court endorsed the approach of the joint judgment in *Austin* and held that there is "but one limitation", namely, the "interference with or impairment of State functions".[136] Once again, there was criticism of the "identification of discrimination as a necessity to attract the *Melbourne Corporation* doctrine".[137] The search for an appropriate comparator for the purposes of establishing discrimination had proven a difficult inquiry and was "apt to confuse".[138]

The Court in *Clarke* held that the law was invalid on the basis that "the State has no real choice but to adopt a method of providing retirement benefits that will enable parliamentarians to meet the tax liability specially imposed on them".[139]

In both *Austin* and *Clarke*, the superannuation tax applied to high income members of certain superannuation funds and so could not be characterised as a law of general application. However, the vice of the Commonwealth law in each case was in its impact upon the capacity of a State to secure the terms of its relationships with its judiciary and legislature as branches of the government of that State. The relevant inquiry into establishing impact turned upon "matters of evaluation and degree".[140]

The consolidation of the two limbs into a single test, at first blush appears to fundamentally alter the nature of the immunity. It will be recalled that in both *Melbourne Corporation* and *QEC*, the burdens were discriminatory, but did not rise to the level of being impairments on the capacity of the States to function as governments. According to Dixon J, the "discrimination" limb did not require any material burden in order for it to be made out. The diminution of this element of the doctrine in the subsequent recensions of the test might be thought to raise the bar for States seeking to impugn intrusive Commonwealth legislation.

At the same time, however, the second limb (impairment) appears to have been reformulated into a more facile test to establish immunity from Commonwealth legislation. Kirby J in *Austin* dissented on the basis that the legislation fell "far short of impairing, in a substantial degree, the State's capacity to function as an independent constitutional entity".[141] That is, his Honour had understood the curtailment element of the doctrine to require something akin to what Mason J had formulated, namely that the federal law "threaten or endanger the continued functioning of the State as an essential constituent element in the federal system".[142]

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[133] *Austin v Commonwealth* (2003) 215 CLR 185, 258 [143]; [2003] HCA 3; see also, 301 [281] (Kirby J).

[134] *Austin v Commonwealth* (2003) 215 CLR 185, [165] (Gaudron, Gummow and Hayne JJ); [2003] HCA 3.

[135] *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272; [2009] HCA 33.

[136] *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272, 306 [65]; [2009] HCA 33; also expressed as the "curtailment or interference with the exercise of State constitutional power": 309 [76].

[137] *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272, 306 [65] (Gummow, Heydon, Kiefel and Bell JJ); [2009] HCA 33.

[138] *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272, 306 [65]; [2009] HCA 33.

[139] *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272, [72] (Gummow, Heydon, Kiefel and Bell JJ), [101] (Hayne J); [2009] HCA 33. French CJ who, while approving of the single characterisation of the immunity, set out a multi-factorial assessment involving six factors to be taken into account, the first of which was whether "the law in question singles out one or more of the States and imposes a special burden or disability on them which is not imposed on persons generally": 299 [34].

[140] *Austin v Commonwealth* (2003) 215 CLR 185, [124] (Gaudron, Gummow and Hayne JJ); [2003] HCA 3; *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272, [65]–[66] (Gummow, Heydon, Kiefel and Bell JJ), [93] (Hayne J); [2009] HCA 33.

[141] *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272, [299] (Kirby J); [2009] HCA 33.

[142] *Commonwealth v Tasmania* (1983) 158 CLR 1, 492 (Mason J).

The curtailment test was now focused, not on the continued existence of the State itself, but on whether there has been significant interference with the exercise of a State constitutional power. That is, it was the doctrinal formulations of Starke J in *Melbourne Corporation* and Dawson J in *QEC* that underpinned the ratios in *Austin* and *Clarke*. In each case, the removal of relevant choice by the federal legislation was found to have impaired the States' ability to attract and retain appropriate people. This proved determinative of the outcomes.

FORTESCUE AND *SPENCE*

In *Fortescue Metals Group Ltd v The Commonwealth* (*Fortescue*),[143] the Commonwealth's Minerals Resource Rent Tax was challenged on the basis that it impermissibly imposed a tax calculated at a rate that differed from State to State, and interfered with the States' management of the mineral resources under their control by neutralising the States' ability to effect a reduction in the States' royalty rates and thereby attract mining activity.

The joint judgment referred to the warning in *Austin* concerning Mason J's exposition of "the fundamental constitutional conception which underlies the prohibition against discrimination".[144] The plurality then said "[i]t remains important, however, to recognise how that fundamental constitutional conception has been applied in earlier decisions of this Court". Reference was then made to *Re AEU*, *QEC*, the *Payroll Tax Case*, and *Melbourne Corporation* itself.

The plurality characterised *Austin* and *Clarke* as being cases which fell within *Re AEU*, but also as cases which involved legislation "aimed at" the States.[145] That is, the High Court considered discrimination as a basis of establishing immunity, and found that none existed. It also found that the tax did not impose any special burden or disability on the exercise of powers and fulfilment of functions of the States which curtailed their capacity to function as governments.[146]

In *Spence v Queensland* (*Spence*), the Court was faced with reciprocal challenges to State and federal legislation, each directed at regulating electoral donations.[147]

On 21 May 2018, the Queensland Parliament passed amendments to the *Electoral Act 1992* (Qld) which prohibited property developers making political donations.[148] Within two months of the commencement of the Qld amendments, the Commonwealth inserted s 302CA into the *Commonwealth Electoral Act 1918* (Cth) as an attempt to legalise donations to political parties where the purpose of the donation (ie whether it is for State or federal electoral purposes) was not expressly clarified at the time of making the gift.[149]

The plaintiff sought to impugn Queensland's electoral laws on the basis that they impermissibly intruded upon an exclusive power of the Commonwealth Parliament to regulate federal elections, and thereby offended a "reverse *Melbourne Corporation*" immunity.

The State of Queensland contended that the Commonwealth amendment was invalid as offending the *Melbourne Corporation* principle as applied to the State.

The case was decided in a 4:3 judgment. The majority held that the Commonwealth electoral law was beyond power, and so it was not necessary to determine whether it was invalid by reference to *Melbourne Corporation*.[150]

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[143] *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548; [2013] HCA 34.

[144] *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548, [134] (Hayne, Bell and Keane JJ, with whom French CJ, Crennan J and Kiefel J each agreed); [2013] HCA 34.

[145] *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548, 610 [135]–[137] (Hayne, Bell and Keane JJ); [2013] HCA 34.

[146] *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548, [137] (Hayne, Bell and Keane JJ); [2013] HCA 34.

[147] *Spence v Queensland* (2019) 93 ALJR 643; [2019] HCA 15.

[148] The *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Act 2018* (Qld) amended the *Electoral Act 1992* (Qld) and the *Local Government Electoral Act 2011* (Qld) (Qld amendments). The Qld amendments were in materially the same form as those upheld in *McCloy v New South Wales* (2015) 257 CLR 178; [2015] HCA 34.

[149] "Commonwealth amendment".

[150] *Spence v Queensland* (2019) 93 ALJR 643, [84] (Kiefel CJ, Bell, Gageler and Keane JJ); [2019] HCA 15.

However, the majority had to contend with the second contention, namely whether the State electoral laws breached a "reverse *Melbourne Corporation*" immunity.

THE COMMONWEALTH'S IMMUNITY FROM STATE LAWS

In *Pirrie v McFarlane*,[151] it was held that that members of the Commonwealth Armed Forces were subject to State laws regulating driving licences notwithstanding the Commonwealth officer was driving a car without a licence in the course of his duties.[152]

Knox CJ reasoned that the Commonwealth had the ability to protect itself from State laws if it chose to do so (ie by utilising s 109 of the *Constitution*).[153] Starke J also upheld the State law on the basis that it was "not aimed particularly at the Defence Forces" and because the Commonwealth had ample legislative power to maintain its Forces free from any inconvenient legislation of the States.[154]

In *West v Commissioner of Taxation (NSW)*,[155] the Court held that a State could tax the pension of a retired federal public servant. Once again, the various judgments focused on the ability of the Commonwealth to shield itself and its employees from State taxation if it so wished.

In *Uther v Federal Commissioner of Taxation* (*Uther*),[156] a majority of the Court decided that the State could limit the Commonwealth prerogative right to priority payment in the case of a liquidation. Dixon J dissented in *Uther* on the basis that it was beyond the competence of the State to abrogate the Commonwealth's priority. Dixon J rejected s 107 of the *Constitution* as establishing any foundation for the majority's reasoning, arguing that, at the instant the Colonies became States upon Federation, they had no power to regulate the relations between the Commonwealth and its subjects because "it formed no part of the old colonial power".[157]

In *City of Essendon v Criterion Theatres Ltd*,[158] the issue was whether the Commonwealth was liable to municipal rates in respect of premises which were taken over and occupied by the Commonwealth Defence Forces. Dixon J held that "the State may not levy a tax directly upon the Commonwealth in respect of the execution of its duties or the exercise of its functions".[159] As the Defence Forces were temporary occupants of the properties, the tax was not technically in violation of s 114 of the *Constitution*.

This, however, raises the issue of whether the doctrine of Commonwealth immunity developed by Dixon J could be said to conform with the spirit of the federal *Constitution* which at one level purports to recognise an immunity from taxation in s 114, but upon a strict reading applies the reciprocal immunities to "property" only.[160]

Dixon J, although the sole dissentient in *Uther*, carried the day when the issue of Commonwealth priority in liquidation came before the High Court in *Commonwealth v Cigamatic Pty Ltd (in liq)* (*Cigamatic*).[161] The Court held that a State law could not abrogate a Commonwealth prerogative claim.

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[151] *Pirrie v McFarlane* (1925) 36 CLR 170.

[152] The US Supreme Court had held, on the same facts, that the States had no power to regulate the activities of federal officers in this respect: *Johnson v Maryland*, 254 US 51 (1920).

[153] *Pirrie v McFarlane* (1925) 36 CLR 170, 184.

[154] *Pirrie v McFarlane* (1925) 36 CLR 170, 228–229.

[155] *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657.

[156] *Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508.

[157] *Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 530–531.

[158] *City of Essendon v Criterion Theatres Ltd* (1947) 74 CLR 1.

[159] *City of Essendon v Criterion Theatres Ltd* (1947) 74 CLR 1, 17.

[160] See Jeremy Kirk, "Constitutional Implications (I): Nature, Legitimacy, Classification, Examples" (2000) 24(3) *Melbourne University Law Review* 645.

[161] *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372.

Dixon CJ rejected the notion that *Cigamatic* was merely the reflection of the application of the *Melbourne Corporation* principle in reverse.[162] To Dixon CJ, what was important was the absence of State legislative power and not any implication derived from the federal nature of the *Constitution*.

The *Cigamatic* doctrine of implied Commonwealth immunity from State legislation was revisited in *Re Residential Tenancies Tribunal (NSW) and Henderson; Ex parte Defence Housing Authority* (*Re Residential Tenancies Tribunal*).[163] In that case, the Defence Housing Authority leased property for Defence personnel.[164] The owners of properties leased by the Authority sought to exercise rights to inspect premises pursuant to orders made by the Residential Tenancies Tribunal of New South Wales. The Authority maintained that it was not bound by orders of a State Tribunal on the basis of the *Cigamatic* immunity. A majority of the Court held that the Authority was subject to the orders of the Tribunal. In doing so, the majority purported to apply the doctrine from *Cigamatic*.[165]

Brennan CJ in *Re Residential Tenancies Tribunal* adopted a similar approach to Dixon CJ in confining the *Melbourne Corporation* principle to a constraint upon Commonwealth legislative power.[166] This approach, however, is to be contrasted with the approaches of, for example, Dawson, Toohey and Gaudron JJ. Their Honours employed the language of *Melbourne Corporation* when attempting to assign a foundation to the *Cigamatic* doctrine.[167]

In Dixon J's analysis in *Uther* and later in *Cigamatic*, the federal system "is necessarily a dual system" in which "you do not expect to find either government legislating for the other. But supremacy, where it exists, belongs to the Commonwealth, not the States".[168]

Although couched in the language suggestive of a lack of State power to enact laws that impermissibly burden the Commonwealth, a clear majority of the Court in *Spence* found that there is indeed a "reverse" *Melbourne Corporation* immunity available to the federal government.

The majority in *Spence* ultimately held that the Commonwealth amendment was not a law supported by a relevant head of constitutional power and therefore was wholly invalid. It was characterised as a law purporting to confer immunity from the consequences of State electoral laws which had no relevant connection with federal elections.[169] By contrast, the State's regulation activities were said to fall within "the heartland of State legislative power".[170]

It was submitted by the States that the operation of s 109 of the *Constitution* meant there was no need for the Commonwealth to be protected by an implied immunity from interference by State law. The majority recognised that, in practical terms, there is more scope for a Commonwealth law to interfere with operations of the government of a State than there is for a State law to interfere with operations of the government of the Commonwealth because of s 109.[171] However, without reference to the majority judgments in *Pirrie v McFarlane*, the majority found that "[t]he reciprocal operation of the

[162] *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372, 378.

[163] *Re Residential Tenancies Tribunal (NSW) and Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410.

[164] "the Authority".

[165] However, reformulated in the sense that a distinction was drawn between the "capacities" of the federal executive government and "exercise" of those capacities: *Re Residential Tenancies Tribunal (NSW) and Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410, 438–439 (Dawson, Toohey and Gaudron JJ).

[166] *Re Residential Tenancies Tribunal (NSW) and Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410, 425; Brennan J's approach was criticised in *Spence v Queensland* (2019) 93 ALJR 643, [101] (Kiefel CJ, Bell, Gageler and Keane JJ), [308] (Edelman J); [2019] HCA 15; see also Anne Twomey, "Federal Limitations on the Legislative Power of the States and the Commonwealth to Bind One Another" (2003) 31(3) *Federal Law Review* 507.

[167] *Re Residential Tenancies Tribunal (NSW) and Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410, 443.

[168] *Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 529; see also *City of Essendon v Criterion Theatres Ltd* (1947) 74 CLR 1, 22 (Dixon J).

[169] *Spence v Queensland* (2019) 93 ALJR 643, [82]; [2019] HCA 15.

[170] *Spence v Queensland* (2019) 93 ALJR 643, [80]; [2019] HCA 15.

[171] *Spence v Queensland* (2019) 93 ALJR 643, [103] (Kiefel CJ, Bell, Gageler and Keane JJ); [2019] HCA 15.

structural implication is not displaced merely because s 109 allows a Commonwealth law to be used as a shield".[172]

The majority found that the Qld amendments did not impose a special disability or burden on the Commonwealth as they did not deny to the Commonwealth the capacity to regulate its own elections. The most that could be said of the Qld amendments was that they denied to some participants in the federal electoral processes a source of funds that would otherwise be available.[173]

In language consistent with that employed in *Fortescue*, the majority found that the State laws were "not directed to the Commonwealth" and they did "not impose a special disability or burden on the Commonwealth".[174]

Gordon J thought it "unnecessary to decide whether a reverse *Melbourne Corporation* principle exists, beyond that identified in *Commonwealth v Cigamatic Pty Ltd (In liq)*" as any such doctrine "would not be infringed by prohibition of a limited class of political donations" as the prohibition was not "directed at the Commonwealth" nor did it impose any "special disability or burden on the exercise of powers and fulfilment of functions which curtails the Commonwealth's capacity to function".[175]

Edelman J would have found the Commonwealth amendments valid. However, his Honour, like the majority, found "a symmetrical application of the implication" such that the *Melbourne Corporation* principle also applied in reverse.[176]

After setting out the various formulations of the *Melbourne Corporation* principle, Edelman J stated that they could be "reduced to a consideration of the magnitude of the burden upon the other polity's capacity to function as a government. That assessment is one of 'evaluation and degree'".[177]

Various factors were identified including whether the law was "targeted at the other polity and the more essential the governmental function that it curtails is to that other polity".[178] Edelman J held that the burden of the provisions of the Queensland amendments upon the Commonwealth was not significant, and the interference was not "specifically targeted" at the Commonwealth.[179]

It follows that five justices in *Spence* identified a structural implication derived from the *Constitution* characterised as a "reverse-*Melbourne Corporation* principle", but that it did not avail the plaintiff or the Commonwealth in impugning the Queensland electoral laws.

Conclusion

The *Engineers' Case* "exploded and unambiguously rejected" the doctrines of "reserved powers" and of "implied immunities" which endured in the first two decades following Federation.[180]

The doctrine of implied immunities has undergone a revival since the *Engineers' Case* was decided. Not long after *Engineers*, Dixon J began to make inroads into the literalist approach confirmed in 1920.[181]

[172] *Spence v Queensland* (2019) 93 ALJR 643, [103] (Kiefel CJ, Bell, Gageler and Keane JJ); [2019] HCA 15.

[173] *Spence v Queensland* (2019) 93 ALJR 643, [109]; [2019] HCA 15.

[174] *Spence v Queensland* (2019) 93 ALJR 643, [109] (Kiefel CJ, Bell, Gageler and Keane JJ); [2019] HCA 15.

[175] *Spence v Queensland* (2019) 93 ALJR 643, [266] (Gordon J); [2019] HCA 15; Nettle J did not deal with the issue.

[176] *Spence v Queensland* (2019) 93 ALJR 643, [309] (Edelman J); [2019] HCA 15.

[177] *Spence v Queensland* (2019) 93 ALJR 643, [314] (Edelman J), [2019] HCA 15.

[178] *Spence v Queensland* (2019) 93 ALJR 643, [314] (Edelman J); [2019] HCA 15.

[179] *Spence v Queensland* (2019) 93 ALJR 643, [317] (Edelman J); [2019] HCA 15.

[180] *Strickland v Rocla Concrete Pipes Pty Ltd* (1971) 124 CLR 468, 485.

[181] *Spence v Queensland* (2019) 93 ALJR 643, [276] (Edelman J); [2019] HCA 15.

He did so on the basis that "strict and complete legalism"[182] did not foreclose the use to be made of implications derived from the constitutional text and its structure.[183]

A clear majority of the members of High Court have now confirmed the existence of both a *Melbourne Corporation* implied immunity applicable to laws of the Commonwealth, as well as the reverse doctrine applicable to invalidate laws of the States. No doubt attuned to the fact that the existence of reciprocal immunities might be thought to be recrudescent pre-*Engineers* heresies,[184] the majority stated that "[n]o return to extreme and discredited notions of inter-governmental immunity" was involved in recognising that the Commonwealth and the States reciprocally have the benefit of the structural implication recognised in *Melbourne Corporation*.[185]

What is left, however, is arguably a doctrine of reciprocal immunities with uncertain doctrinal foundations.

In the case of State immunity from Commonwealth interference, the possible doctrinal justifications on the road to the present formulation appear to be manifold. Following *Melbourne Corporation*, focus was centred around Dixon J's formulation with discrimination alone being recognised as a ground for invalidity. Discrimination was applied to invalidate a Commonwealth law in *QEC* and accordingly featured in Mason J's two-limbed characterisation of the principle.

In the years that followed *QEC*, there was a shift away from Dixon J's formulation and towards that of Starke J's in *Melbourne Corporation*. This in turn involved a move away from Mason J's characterisation in *QEC* and instead centred on Dawson J's single limb test in *QEC*, which embraced Starke J's original exposition.[186] McHugh J in *Austin* objected to the abandonment of Mason J's two-limbed formulation in *QEC* on the grounds that it "may lead to unforeseen problems in an area that is vague and difficult to apply".[187]

The reframed doctrine as expounded in *Austin* arguably set the bar at a level beyond that which the legislation in either *Melbourne Corporation* or *QEC* was required to meet. This is because Dixon J in *Melbourne Corporation* rested the principle upon the singling out of States for special burdens which would not necessarily amount to an existential threat to the functions of the State itself. However, the test in respect of impairment in *Austin* was applied such that an abrogation of choice in respect of important State government functions was more readily able to be made out such as to give rise to invalidity.

The *Melbourne Corporation* principle now "requires consideration of whether impugned legislation is directed at States imposing some special disability or burden on the exercise of powers and fulfilment of functions of the States which curtails a capacity to function as governments".[188] The High Court in both *Fortescue* and *Spence* applied this test and gave consideration to whether the law was "aimed at" the States, thus reintroducing discrimination into the calculus.

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[182] Owen Dixon, "Address upon Taking the Oath of Office in Sydney as Chief Justice of the High Court of Australia on 21st April, 1952" in *Jesting Pilate – and Other Papers and Addresses* (Sweet & Maxwell Ltd, 1965) 247; see also Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan, 10th ed, 1959) 175: "Legalism … means Federalism".

[183] *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 85 (Dixon J); *Lamshed v Lake* (1958) 99 CLR 132, 144–145 (Dixon CJ; Williams, Webb, Kitto and Taylor JJ agreeing).

[184] RP Meagher and WMC Gummow, "Sir Owen Dixon's Heresy" (1980) 54 ALJ 25, 29 ("In truth, the *Cigamatic* doctrine, in its various formulations is but a revival in fresh garb of one aspect of the immunity of instrumentalities doctrine, which in both of its operations was discarded in the *Engineers' Case*."); see also Greg Craven, "Heresy as Orthodoxy: Were the Founders Progressivists?" (2003) 31(1) *Federal Law Review* 87; Nicolee Dixon, "Limiting the Doctrine of Intergovernmental Immunity" (1993) 9 *Queensland University of Technology Law Journal* 1.

[185] *Spence v Queensland* (2019) 93 ALJR 643, [107] (Kiefel CJ, Bell, Gageler and Keane JJ); [2019] HCA 15.

[186] Compare *Austin v Commonwealth* (2003) 215 CLR 185, 281–282 [223] (McHugh J); [2003] HCA 3; Sharpe, n 7, 252.

[187] *Austin v Commonwealth* (2003) 215 CLR 185, 281–282 [223]; [2003] HCA 3.

[188] *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548, 609 [130] (Hayne, Bell and Keane JJ); [2013] HCA 34; *Spence v Queensland* (2019) 93 ALJR 643, [108] (Kiefel CJ, Bell, Gageler and Keane JJ), [308] (Edelman J); [2019] HCA 15.

In the case of Commonwealth immunity from State interference, there appears to be no compelling reason for its existence.[189] Encroachment by way of taxation by a State on Commonwealth property is prevented by s 114 of the *Constitution*. Moreover, the Commonwealth is well armed to protect itself from any State interference through the use of s 109 of the *Constitution*. However, following the result in *Spence*, it might legitimately be thought that the prophylactic pathway cleared by s 109 may not always guarantee immunity.[190]

The position arrived at in Australia appears once again to have converged with the development of the reciprocal doctrine in the United States wherein the relevant question asked is not whether the federal government has allowed itself to be subjected to State law by waiving constitutional immunity but, rather, whether the subject matter is one of federal or State concern.[191]

Just as Sir Owen Dixon had written decades earlier in respect of the Framers, the Court does not appear fully capable of escaping the fascination of the American model and the jurisprudence that has developed in respect of it.[192]

[189] Ronald Sackville, "The Doctrine of Immunity of Instrumentalities in the United States and Australia: A Comparative Analysis" (1969) 7 *Melbourne University Law Review* 15, 63; Catherine Penhallurick "Commonwealth Immunity as a Constitutional Implication" (2001) 29(2) *Federal Law Review* 151.

[190] *Spence v Queensland* (2019) 93 ALJR 643, [104] (Kiefel CJ, Bell, Gageler and Keane JJ); [2019] HCA 15.

[191] *Mason v United States*, 260 US 545 (1922).

[192] Dixon, n 16, 44.