

## Intergovernmental Immunities - Austin v Commonwealth [2003] HCA 3

### *Background*

In any federal system of government, the constitution must regulate the legal relationships that exist between the central repository of governmental power and the regional or provincial levels of government which co-exist with it. In Australia, the regulation of intergovernmental power was first discussed in *D'Emden v. Pedder*<sup>1</sup> where it was established that the Commonwealth was impliedly immune from any associated state legislation – the reciprocal position being established in *Federated Amalgamated Government Railway and Tramway Service Association v NSW Railway Traffic Employees Association*.<sup>2</sup> This rationale was subsequently rejected in the *Amalgamated Society of Engineers v Adelaide Steamship*<sup>3</sup> case and the constitutional interpretation of intergovernmental immunities was redefined by the High Court in the *Melbourne Corporation v Commonwealth*<sup>4</sup> decision.

The scope of immunity after the *Melbourne Corporation v Commonwealth*<sup>5</sup> decision was poignantly termed the Melbourne Corporation doctrine and it consisted of two distinct limbs<sup>6</sup> – framed by Mason J in *Queensland Electricity Commission v Commonwealth*.<sup>7</sup> The first limb consisted of a prohibition against State discrimination such that the Commonwealth could not place special burdens or disabilities on the States, while the second limb was a prohibition against the creation or application of laws that '[i]mpose restrictions which prevent [the States] from performing functions or impede them from doing so.'<sup>8</sup> While the first limb of the Melbourne Corporation doctrine was applied by the High Court in the *QEC Case*, the second limb of the test was not definitively applied until *Western Australia v Commonwealth*<sup>9</sup> where the High Court rejected Western Australia's argument as to the validity of the *Native Title Act 1993 (Cth)* ruling that '[t]he Act does not purport to affect the machinery of government of the State'. Additionally, in *Re Australian Education Union and Australian Nursing Federation; Ex parte Victoria*<sup>10</sup> the High Court again considered the second limb of the Melbourne Corporation doctrine – applying it against the Commonwealth Industrial Relations Commission in upholding the Victoria's contention that the States should have the power to determine '[t]he terms and conditions on which its employees shall be engaged'.<sup>11</sup>

*Austin v Commonwealth*<sup>12</sup> was the first modern case since the *AEU Case* to consider the Melbourne Corporation doctrine. The plaintiffs in the case were State judicial officers who contested their liability to a 'superannuation contributions surcharge' as directed under

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<sup>1</sup> *D'Emden v Pedder* (1904) 1 CLR 91.

<sup>2</sup> *Federated Amalgamated Government Railway and Tramway Service Association v NSW Railway Traffic Employees Association (the Railway Servants case)* (1906) 4 CLR 488.

<sup>3</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd (the Engineers case)* (1920) 28 CLR 129.

<sup>4</sup> *Melbourne Corporation v Commonwealth (the State Banking case)* (1947) 74 CLR 31.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Queensland Electricity Commission v Commonwealth (the QEC case)* (1985) 159 CLR 192 at 217.

<sup>7</sup> *Ibid* at 192.

<sup>8</sup> *Melbourne Corporation v Commonwealth (the State Banking case)* (1947) 74 CLR 31 at 65-66.

<sup>9</sup> *Western Australia v Commonwealth (the Native Title Act case)* (1995) 183 CLR 373.

<sup>10</sup> *Re Australian Education Union and Australia Nursing Federation; Ex parte Victoria (AEU case)* (1995) 184 CLR 188.

<sup>11</sup> *Ibid* at 223.

<sup>12</sup> *Austin v Commonwealth* [2003] HCA 3; 215 CLR 185.

Commonwealth Statute.<sup>13</sup> The two plaintiffs were not members of any specific superannuation fund and the stated purpose of the impugned Acts was to impose a surcharge on State judges in order to balance the liability owed by them in a similar fashion to other high-income earners. Liability for Judges appointed before the 7<sup>th</sup> December 1997 was exempted from the surcharge<sup>14</sup> and for Judges appointed after this date, the liability was based upon notional contributions made to a notional fund. The plaintiffs noted that liability would increase significantly for judicial officers appointed to the bench after the 7<sup>th</sup> December 1997, and would continue to increase while the judicial officer remained in service.<sup>15</sup> Accordingly, the plaintiffs contended that the imposition of this superannuation surcharge operated significantly different from any surcharge imposed on members of private superannuation schemes and as such – it was contrary to the Melbourne Corporation doctrine.

In response, the Commonwealth submitted that the treatment of State judicial officers did not amount to any discrimination or contravention of the Melbourne Corporation doctrine. The argument presented by the Commonwealth was that the different treatment of State judicial officers as opposed to members of private superannuation schemes was valid within the confinements of the Constitution, and was imposed in order to bring judicial pensions schemes in-line with their private counterparts. This argument was strongly contested by the plaintiffs who submitted that the imposition of the new superannuation surcharge was unconstitutional as it did not ensure that the States ‘continued their existence as independent entities’<sup>16</sup> and directly conflicted with s55 and s114 of the Constitution.

### *The Justices Decisions*

In the *Austin v Commonwealth*<sup>17</sup> there were four judgements delivered. Gaudron, Gummow and Hayne JJ provided a joint judgement while Chief Justice Gleeson and McHugh J each provided individual judgements. Justice Kirby dissented and Justice Callinan did not sit as His Honour was liable to pay the surcharge. The plaintiffs framed their argument on both limbs the Melbourne Corporation doctrine and the majority found that the Commonwealth provisions infringed the core principles outlined in this doctrine and were therefore invalid. A key underlying consideration of the majority’s decision was the acceptance of the plaintiff’s contention that preservation of State integrity and autonomy was of utmost importance. The primary point of conflict between the decisions was the varying rationale and enthusiasm for the two-limbed Melbourne Corporation doctrine in determining the validity of the superannuation surcharge and its constitutional operation.

The Court, through the joint judgement of Gaudron, Gummow and Hayne JJ, rejected the plaintiff’s contention that a two-limb Melbourne Corporation doctrine provided that the surcharge was invalid. The joint decision abandoned the concept of a ‘discrimination limb’ that had previously persisted unabated since the Melbourne Corporation doctrine was introduced, instead contending that the doctrine is ‘but one limitation, though the apparent

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<sup>13</sup> *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997* (Cth); *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Act 1997* (Cth).

<sup>14</sup> *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997* (Cth), s 7.

<sup>15</sup> *Ibid* 12 at [90].

<sup>16</sup> *Kruger v The Commonwealth* [1997] HCA 27; (1997) 190 CLR 1 at 64.

<sup>17</sup> *Ibid* 12.

expression of it varies with the form of the legislation under consideration'.<sup>18</sup> In their view, the two-limb approach was no longer valid because it 'tends to favour form over substance',<sup>19</sup> in that it is fixated separately on laws which impose a special burden or disability in respect to the first limb, and on laws of general application in respect to the second limb. In the joint view, the Melbourne Corporation doctrine was predominately focused on the Commonwealths intrusion on a States capacity to function as opposed to any associated notion of a laws general operation.

The joint judgement commented on the importance of judicial retainment in ensuring that judicial officers were secured and provided sufficient incentive to remain for the full length of their available term.<sup>20</sup> The joint judgement agreed that any additional burden placed on the judicial branch by the Commonwealth, would have adversely affected the State's ability to recruit and retain adequately competent judicial officers which may have impaired State judicial standards. They found that such an impairment placed the States independent constitutional function at odds with the Melbourne Corporation doctrine and they 'posed the practical question' identified by Starke J in *Melbourne Corporation v Commonwealth*<sup>21</sup> such that they looked '[t]o substance and operation of the federal laws and whether there has been, in a significant manner, a curtailment or interference with the exercise of State constitutional power.'<sup>22</sup> Consequently, the joint judgment concluded that the imposition of such a law would directly affect independent State constitutional function and ruled in favour of the plaintiffs.<sup>23</sup>

Justice McHugh rejected the reasoning of the joint judgement and actively defended the two-limbed Melbourne Corporation doctrine. His Honour believed that the two-limbed doctrine had been widely applied and had a '[l]ong line of judicial exposition supporting the principle'.<sup>24</sup> His Honour cited references from Mason J in the *QEC Case*<sup>25</sup> where it was stated that 'the principle is now well established and that it consists of two elements',<sup>26</sup> and from Gibbs CJ in the same case such that 'it is clear, however, that there are two distinct rules, each based on the same principle, but dealing separately with general and discriminatory laws'.<sup>27</sup> In His Honours application of the Melbourne Corporation doctrine, he found that the Commonwealth's isolation of State judges placed an unfair burden on the 'States relationships with their judges ... as a special measure designed to single them out and place a financial burden on them that no one else in the community incurs.'<sup>28</sup> His Honour contrasted this directly to Federal Judges and the lack of liability that they incurred<sup>29</sup> indicating that under the first limb of the Melbourne Corporation doctrine the superannuation scheme discriminated directly against State judicial officers by singling them out. As suggested in his reasoning, the first limb of the doctrine closely parallels the second limb – upholding State autonomy and independence – and it was His Honours view that State

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<sup>18</sup> *Austin v Commonwealth* [2003] HCA 3; 215 CLR 185 at 124 (357)

<sup>19</sup> *Ibid* at [124] (357)

<sup>20</sup> *Ibid* at [159] (368)

<sup>21</sup> *Melbourne Corporation v Commonwealth (the State Banking case)* (1947) 74 CLR 31.

<sup>22</sup> *Ibid* at 75

<sup>23</sup> *Ibid* 18 at [174] (372)

<sup>24</sup> *Ibid* 18 at [223] (382)

<sup>25</sup> *Queensland Electricity Commission v Commonwealth (the QEC case)* (1985) 159 CLR 192

<sup>26</sup> *Ibid* at 217

<sup>27</sup> *Ibid* at 206

<sup>28</sup> *Ibid* 18 at [229] (386)

<sup>29</sup> *Ibid* 18 at [229] (386)

constitutional independence was being overtly infringed upon and this was the basis for invalidating the law being imposed by the Commonwealth.

Chief Justice Gleeson did not focus his judgement on the discrimination aspect of the two-limb Melbourne Corporation doctrine rather stating that ‘discrimination is an aspect of a wider principle; and what constitutes relevant and impermissible discrimination is determined by that wider principle’.<sup>30</sup> His Honour reiterated the decision from *Australian Education Union and Australian Nursing Federation; Ex parte Victoria*<sup>31</sup> suggesting that the principles from this case make it clear that ‘the Parliament’s power to make laws with respect to taxation does not extend to enable it to legislate to single out State judges for the imposition of a special fiscal burden.’<sup>32</sup> Equally, His Honour also stated that the practical manifestation of such a interference was ‘[i]n its capacity to affect recruitment and retention of judges to perform an essential constitutional function of the State ... evidenced by the legislative response New South Wales was required to make.’<sup>33</sup> His Honour found that it was the ‘singling out’ – the first limb – and the ‘impairment of the constitutional integrity of a State government’<sup>34</sup> – the second limb – which provided the basis for rejecting the Commonwealths arguments and ruling in favour of the plaintiffs.

Justice Kirby was the only dissenting judgement which supported the joint judgements revision of the Melbourne Corporation doctrine but used the revision to find for the defendants. In His Honour’s view, the two limbs of Melbourne Corporation were ‘essentially manifestations of the one constitutional implication’<sup>35</sup> and the application of such an implication was not ‘[s]ignificant or detrimental enough to effect on the power of a State to determine the terms and conditions affecting the remuneration of its judges’.<sup>36</sup> His Honour distanced his judgement entirely from the first limb of the Melbourne Corporation doctrine focusing instead, on the independence and autonomy of the States by contending that no evidence provided to the Court established the inference that the ‘pattern of judicial service would alter significantly following the introduction of a surcharge’.<sup>37</sup> His Honour implied that the conclusion reached by the majority was based on their partiality towards the judicial branch as opposed to any rational evidentiary basis in respect to the effect on State judicial remuneration. His Honour found that the impugned legislation ‘falls far short of impairing, in a substantial degree, the State’s capacity to function as an independent constitutional entity’<sup>38</sup> which was subsequently evidenced through the State’s ability to adapt the impugned legislation into its own state laws. In conclusion, Kirby J found no reason to differ the application of principles set out in *Payroll Tax Case*<sup>39</sup> or the *Second Fringe Benefits Tax Case*<sup>40</sup> regarding the ‘singling out of the States and their high government officeholders’ – contending in this instance ‘it could not be suggested that judges of the States had been singled out for unfavourable attention’.<sup>41</sup>

<sup>30</sup> *Austin v Commonwealth* [2003] HCA 3; 215 CLR 185 at [24] (331).

<sup>31</sup> *Re Australian Education Union and Australia Nursing Federation; Ex parte Victoria (AEU case)* (1995) 184 CLR 188.

<sup>32</sup> *Ibid* 30 at [28] (333).

<sup>33</sup> *Ibid* 30 at [28] (333).

<sup>34</sup> *Ibid* 30 at [29] (334).

<sup>35</sup> *Ibid* 30 at [281] (281).

<sup>36</sup> *Ibid* 30 at [290] (401).

<sup>37</sup> *Ibid* 30 at [292] (402).

<sup>38</sup> *Ibid* 30 at [299] (406).

<sup>39</sup> *Victoria v Commonwealth (Payroll Tax Case)* (1971) 122 CLR 353.

<sup>40</sup> *State Chamber of Commerce and Industry v Commonwealth (Second Fringe Benefits Tax Case)* (1987) 163 CLR 329.

<sup>41</sup> *Austin v Commonwealth* [2003] HCA 3; 215 CLR 185 at [313] (412).

### *Discrimination now invalid?*

The joint view contended that the Melbourne Corporation doctrine is not easily established by evidence and is more adequately framed as a single principle. They acknowledged that the doctrine requires 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” ... this inquiry inevitably turns upon matters of evaluation and degree of constitutional facts which are not readily established by objective methods in curial proceedings’.<sup>42</sup>

It is in this regard, that the joint judgement seemed to more heavily rely on the second limb of the Melbourne Corporation doctrine and disregard the first limb entirely. This disregard frames any associated State immunity jurisprudence within the confinements of a functional test of State ‘autonomy and independence’ as opposed to any consideration of ‘discriminatory’ or ‘singling out’ of a particular State.

Importantly, the joint judgement does not provide a definitive articulation of the confinements of the ‘singular’ limb - rather, it seeks to simply steer away from the general application of discriminatory considerations. Accordingly, it is contended in the joint judgement that this is a more effective measure of establishing State autonomy and independence as the imposition of any burden or disability on a State’s function will trigger the threshold of such a test – inferring that no consideration of discrimination is required. Notably, the joint judgement did not require the States to establish that the Commonwealth superannuation surcharge would actually hinder the State judicial system – as commented on by Kirby J<sup>43</sup> – instead, it was enough that the surcharge directly infringed on the State’s capacity to function as a government and to independently determine the most adequate form of judicial remuneration. The lack of such an evidentiary requirement by the majority somewhat confuses how the Court actually determines whether a particular discriminatory burden does or does not infringe a States autonomy and independent operation. This suggests that the Courts must treat all discriminatory laws with suspicion<sup>44</sup> and only focus on those which actually impede or infringe on a State’s ability to function.

McHugh J refused to capitulate to any reformulation of the Melbourne Corporation doctrine and subsequent rejection of the discriminatory element – in direct conflict with the joint decision. His Honour was of the view that

‘nothing of substance turns on the difference between holding that there are two rules and holding that there is one limitation that must be applied by reference to “such

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<sup>42</sup> Ibid at [279] (398).

<sup>43</sup> Ibid at [292] (402).

<sup>44</sup> Graeme Hill, *Austin v Commonwealth: Discrimination and the Melbourne Corporation Doctrine* (2003) 14 PLR 69 at 17.

criteria as ‘special burden’ and ‘curtailment’ of ‘capacity’ of the States ‘to function as governments’”. If there is a difference in content or application, it may lead to unforeseen problems in an area that is vague and difficult to apply.<sup>45</sup>

Arguably, McHugh J was correct in his contention that any rectification of the Melbourne Corporation doctrine does simply lead to greater confusion. A key aspect of the Mason J two-limb test was a fixation on laws that purposefully ‘singling out’ or ‘discriminate’ against a particular State before a consideration of whether this discrimination infringes a State’s ability to function as an independent and autonomous entity.<sup>46</sup> If the High Court, in determining the characterisation of a States independent standing, rejects – as the joint judgement provided – any discriminatory considerations, then this only seems to increase the level of confusion in defining whether a Commonwealth law has ‘burdened’ or ‘curtailed’ the ‘capacity’ of the States ‘to function as governments’.<sup>47</sup>

The refinement of the Melbourne Corporation doctrine does not seem to provide any additional clarity over the accepted two-limb formulation of the test. In *Commonwealth v Tasmania*,<sup>48</sup> Mason J provided that

‘The only relevant implication that can be gleaned from the Constitution ... is that the Commonwealth cannot, in the exercise of its legislative powers, enact a law which discriminates against or ‘singles out’ a State or imposes some special burden or disability upon a State or inhibits or impairs the continued existence of a State or its capacity to function.’<sup>49</sup>

This was reiterated by McHugh J<sup>50</sup> as a clear and formative characterization of the doctrine that does not treat ‘singling out’ or ‘discrimination’ as an inchoate consideration.

Accordingly, while the joint judgment may have merely been attempting to restrict or limit the language of ‘discrimination’ in order to avoid confusion with other areas of law which often refer to the term – the new ‘single test’ does not seem to definitively redefine this area of law or substantially lessen the level of confusion in its application. This is undoubtedly evidenced by the recent action in *Clark v Commissioner of Taxation*<sup>51</sup> where the Full Federal Court sought to reapply the principles evinced in *Austin* – to a similar fact circumstance – but which, at the time of writing, has subsequently been remitted to the High Court for reconsideration. It is hoped that this case will clarify the position of the Melbourne Corporation doctrine or at the very least, emphasise the importance of the ‘discriminatory’ or ‘singling out’ limb as an important aspect of State immunity jurisprudence.

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<sup>45</sup> *Austin v Commonwealth* [2003] HCA 3; 215 CLR 185 at [224] (383)

<sup>46</sup> *Queensland Electricity Commission v Commonwealth (the QEC case)* (1985) 159 CLR 192 at 217

<sup>47</sup> *Ibid* 45 at [124] (357)

<sup>48</sup> *Commonwealth v Tasmania (‘the Tasmanian Dam case’)* (1983) 158 CLR 1.

<sup>49</sup> *Ibid* at 128.

<sup>50</sup> *Ibid* 45 at [217] (378)

<sup>51</sup> *Clark v Commissioner of Taxation* [2008] FCAFC 51