HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY AND HAYNE JJ

ROBERT PETER AUSTIN & ANOR — PLAINTIFFS

AND

THE COMMONWEALTH OF AUSTRALIA — DEFENDANT

Austin v The Commonwealth of Australia
[2003] HCA 3
5 February 2003
M10/2001

ORDER

Answer questions in Stated Case as follows:

Question 1

On their true construction, do the Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Act 1997 (Cth) and the Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997 (Cth):

(a) make the First Plaintiff liable to pay superannuation contributions surcharge in respect of surchargeable contributions reported for the financial years ending 30 June 1999 and 30 June 2000?

(b) make the Second Plaintiff liable to pay superannuation contributions surcharge in respect of surchargeable contributions reported for the financial years ending 30 June 1997, 30 June 1998, 30 June 1999 and 30 June 2000?

Answer

(a) Yes.

(b) No.

Question 2

If so, are the Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Act 1997 (Cth) and/or the Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997 (Cth) invalid in their application to the First Plaintiff and/or the Second Plaintiff:

(a) on the ground that they so discriminate against the States of the Commonwealth, or so place a particular disability or burden upon the operations and activities of the States, as to be beyond the legislative power of the Commonwealth;

(b) on the ground that the first-named Act imposes a liability to pay superannuation contributions surcharge:

(i) by reference to criteria which are so incapable of ascertainment or lacking in general application;
(ii) as a result of administrative decision based upon individual preference which is not sufficiently related to any test laid down by legislation; or
(iii) which is so arbitrary and capricious,

so that they are not laws with respect to taxation or otherwise are beyond the legislative power of the Commonwealth;

(c) on the ground that the first-named Act deals with more than one subject of taxation contrary to section 55 of the Commonwealth Constitution;

(d) on the ground that the first-named Act imposes a tax on property belonging to a State contrary to section 114 of the Commonwealth Constitution; or

(e) otherwise?

Answer

(a) Yes. The legislation referred to is invalid in its application to the first plaintiff on the ground that it places a particular disability or burden upon the operations or activities of the State of New South Wales so as to be beyond the legislative power of the Commonwealth.

Question 3

Save for those otherwise dealt with by order, who should pay the costs of the Stated Case and of the hearing of the Stated Case before the Full High Court?

Answer

The defendant should pay the costs of the plaintiffs.

Representation:

G A A Nettle QC and M K Moshinsky for the plaintiffs (instructed by Allens Arthur Robinson)

D M J Bennett QC, Solicitor-General of the Commonwealth of Australia and M Sloss with G A Hill for the defendant (instructed by Australian Government Solicitor)

Interveners:

R J Meadows QC, Solicitor-General for the State of Western Australia with J C Pritchard intervening on behalf of the Attorney-General for the State of Western Australia (instructed by the Crown Solicitor for the State of Western Australia)

B M Selway QC, Solicitor-General for the State of South Australia with R L Goldsmith and B D Allgrove intervening on behalf of the Attorney-General for the State of South Australia (instructed by the Crown Solicitor for the State of South Australia)

J W Shaw QC with M J Leeming intervening on behalf of the Attorney-General for the State of New South Wales (instructed by the Crown Solicitor for the State of New South Wales)

M A Dreyfus QC with K L Emerton intervening on behalf of the Attorney-General for the State of Victoria (instructed by the Victorian Government Solicitor)

CATCHWORDS

Austin & Anor v Commonwealth

Constitutional law - Legislative power of Commonwealth - Implied limitation - Interference with governmental functions of States - Superannuation - Taxation - Statute - Validity - Whether liability of State judicial officers to pay Commonwealth superannuation contributions surcharge valid.

Constitutional Law - Taxation - Commonwealth legislation imposing superannuation contributions surcharge - Whether criteria for liability so incapable of ascertainment or lacking in general application as to deny legislation quality of law with respect to taxation.

Constitutional Law - Taxation - Section 55 of the Constitution - Whether legislation deals with more than one subject of taxation.

Constitutional Law - Legislative power of Commonwealth - Federal law requires State Government Actuary to supply information and perform calculations for the purpose of imposition of federal tax upon State employees and officeholders - Whether obligation amounts to conscription of State officers and institutions - Whether impermissible federal intrusion upon the employment authority of the State - Whether, if impermissible, provisions severable from law imposing federal tax.

Superannuation - Taxation - Superannuation contributions surcharge - Legislation - Construction - Whether State judge liable to pay - Whether State judge a member of a constitutionally protected fund - Whether State judge has a surchargeable contribution - Whether State judge a defined benefit member - Whether State judge has an accrued benefit.

Court and Judges - Statutes - Interpretation - Whether Master of Victorian Supreme Court a judge of that Court.

Words and phrases: "discrimination", "discriminate between", "subject of taxation", "surcharge", "surchargeable contributions", "constitutionally protected superannuation fund", "defined benefit member".

Commonwealth Constitution, ss 51(ii), 55, 114
Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Act 1997 (Cth)
Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997 (Cth)
Judges' Pensions Act 1953 (NSW)
Constitution Act 1975 (Vic) s 75(2)
Supreme Court Act 1986 (Vic)

1 GLEESON CJ. The plaintiffs, who are serving State judicial officers, have commenced proceedings to test their liability to pay a Federal tax, described as a superannuation contributions surcharge. The first plaintiff is a judge of the Supreme Court of New South Wales. The second plaintiff is a Master of the Supreme Court of Victoria. The tax is the subject of the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Act* 1997 (Cth) and the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act* 1997 (Cth) ("the Acts"). The plaintiffs are not members of any superannuation fund as that expression is ordinarily understood; and no contributions are made to any such fund for their benefit. By State legislation, they are conditionally entitled to pension and related benefits, which are paid out of Consolidated Revenue. However, the Acts construct a notional scheme by reference to which they are taxed as if such contributions were made. This is part of a wider legislative scheme imposing a tax that was described in argument, by the Commonwealth, as a tax on the value (ie quantum) of the annual increase in the liability of an employer with respect to superannuation benefits payable to an employee.

2 Two questions have been reserved for the consideration of a Full Court. Question (1) asks whether the Acts, on their true construction, make each plaintiff liable to pay the tax for certain years. That question raises a number of issues as to the meaning and effect of the legislation. Question (2), which only arises if question (1) is answered affirmatively in respect of at least one of the plaintiffs, asks whether the Acts are invalid in respect of their application to that plaintiff. A number of possible grounds of alleged invalidity are set out in the question.

3 The facts, the legislation in issue, and the wider legislative scheme of which it is a part, appear from the reasons for judgment of Gaudron, Gummow and Hayne JJ ("the joint judgment"). I agree with the answers to question (1) proposed in the joint judgment, and with the reasons given. I also agree with what is said in the joint judgment concerning the grounds of potential invalidity raised by pars (b), (c), (d) and (e) of question (2).

4 Because of the answer proposed in relation to question (1)(b) it is unnecessary to make further reference to the second plaintiff when discussing the operation of the Acts.

5 Paragraph (a) of question (2) asks whether the Acts are invalid in their application to the first plaintiff:

> "on the ground that they so discriminate against the States of the Commonwealth, or so place a particular disability or burden upon the operations and activities of the States, as to be beyond the legislative power of the Commonwealth."

6 The question raises an issue of federalism. It concerns the relationship between the constituent political entities of the federal union, and limitations on the legislative power of the Parliament of the Commonwealth that flow from that relationship. The laws in question are laws with respect to taxation, within the meaning of s 51(ii) of the Constitution. It is not suggested that they discriminate between States or parts of States. They do not infringe s 114 by imposing a tax on property belonging to a State. No other express limitation on the legislative power of Parliament is invoked. What is relied upon is an implied limitation on power, the nature of which is reflected in the language of (a), said to result from the federal nature of the Constitution as a matter of necessary implication.

7 In the course of argument, reference was made to various aspects of the legal effect of the tax as it operates in relation to judicial pensions. The primary matters to which the plaintiffs drew attention were the nature of judicial pension entitlements, and the differences between such entitlements and those of members of ordinary superannuation funds; the fact that (subject to a qualification arising from State legislation enacted following, and in consequence of, the Acts) such pensions cannot be commuted in whole or in part; the fact that the pensions are non-contributory and unfunded; the fictional nature of the notional contributions upon which the tax is based; the circumstance that the notional contributions are calculated by reference to actuarial assumptions that may have no relationship to the personal situation of a particular taxpayer; and the principal difference between the operation of the Acts and that of the wider legislative scheme in relation to the superannuation contributions surcharge, which is that the tax presently in question is imposed directly upon "members" of the notional "funds", rather than upon a superannuation provider.

8 Some actuarial calculations were included in the case stated. Bearing in mind that the projected figures are expressed in dollars of the time to which they relate, and are based on assumptions as to inflation, they show that, at the time when the first plaintiff will have served 10 years and attained an age of not less than 60 (in his case, 62), his accumulated superannuation surcharge debt will be $310,885. If he retires, at that time, he will commence to receive a pension which in the first year will amount to $179,957, on which he will be liable to income tax at the marginal rate. If he remains in office until the age of compulsory retirement, 72, his accumulated superannuation surcharge debt will be $550,780, and he will be entitled to a gross annual pension of $267,433. Allowing for income tax on the pension, it will take approximately four years before his net pension receipts equal his surcharge liability; a liability he will have to discharge at the time he commences to receive the pension. And, depending upon when he dies, whether he is survived by a widow, and when she dies, total pension receipts could amount to a smaller sum than the total surcharge liability.

9 These matters are of relevance only to the extent to which they bear upon the ground of invalidity asserted in (a). Whether the tax might operate in a harsh and unreasonable manner in its incidence upon the first plaintiff is beside the point[1]. Unreasonableness is not a ground of invalidity of a tax.

10 Some reference was made in argument to an explanation given to Parliament by the responsible Minister concerning the reason for the introduction of a superannuation contributions surcharge; a reason that does not appear to have anything to do with judicial pension arrangements. That also is a matter of no legal consequence. The considerations advanced for or against a taxation measure in the course of political debate do not give rise to a justiciable issue. I would assume that the principal object of the superannuation contributions surcharge is the same as the principal object of most taxes: to raise revenue for government. Taxation involves an exercise of power, by which the burden of compulsory contribution to the revenue is distributed, often unequally, amongst taxpayers. The pattern of distribution is determined by the political process. Subject to one overriding qualification, it is for Parliament to decide what form of distribution is expedient. The qualification is that, although Parliament has power to make laws with respect to taxation, its power is not unlimited. It is for this Court to decide whether, in a given case, the limits have been exceeded. That is the context in which it becomes necessary to consider the legal nature and effect of the tax.

11 It is contended that the tax is discriminatory. Since what is involved is a Federal tax upon a member of the Supreme Court of New South Wales, bearing the character of a tax on the value of the annual increase in the liability of the State for pension benefits payable to judges, the contention raises a potential constitutional issue. It will be necessary to examine more closely what the concept of discrimination involves, and to consider the place of discrimination in the wider principle invoked by the first plaintiff. That the Acts treat the first plaintiff, and other State judges, differently from the manner in which other "high-income earners" generally are treated for the purpose of taxing the value of the annual increases in the liability of their superannuation providers, and differently again from the manner in which Federal judges are treated, is not in dispute. There is a question whether the differences involve relevant and impermissible discrimination. Federal judges in respect of whom the surcharge applies have their pensions, when they ultimately become payable, reduced, at the time of each pension payment, by a certain amount. No personal liability is incurred; no accumulated debt is payable by the judge; and there is no possibility that surcharge liability could exceed benefits. As to other high income earners, in their case the tax is imposed on the superannuation provider, no doubt in the

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1 *Deputy Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678 at 684.

expectation that it will be passed on to the member in the form of reduced benefits. Paradoxically, the explanation for the difference in treatment of taxpayers in the position of the first plaintiff is what is described in the titles of the Acts as a constitutional protection. The Commonwealth, acknowledging the differences in the manner in which State judges, and some other State office holders, are treated, as compared with members of superannuation funds generally, asserts that "(t)he differences in application are dictated by constitutional limitations and by the design of the superannuation schemes".

12 As to the design of superannuation schemes, the New South Wales Parliament, after the enactment of the Acts, altered the design of that State's judicial pension scheme in one significant respect. Before the alteration, and at the time the Acts came into force, the principal characteristics of the scheme were as follows. The primary benefits were periodical pension payments commencing upon retirement and ceasing on death. The payments were fixed by reference to judicial salaries at the time of payment. The schemes were unfunded and non-contributory. Entitlements could not be commuted, either in whole or in part. Qualification for pension entitlement required a minimum of 10 years service, and the attainment of the age of 60. After satisfaction of those requirements, continuation in judicial office brought no increase in benefits. On the contrary, it necessarily resulted in a decrease of the period during which a pension would be payable. The scheme also involved other entitlements, including a right in certain circumstances to a modest lump sum payment, disability benefits, and benefits for a surviving spouse and eligible children. However, the most significant component in the value of a judge's entitlements was the periodical pension payable between retirement and death. The change made in response to the Acts was that judges became entitled, on retirement, to commute their entitlements to the extent necessary to provide them with an amount equal to their superannuation contributions surcharge debt, with, of course, a corresponding reduction in pension payments.

13 As is explained in the joint judgment, under the Acts, the first plaintiff will have the option, while in office, of paying the amount of his annual surcharge, or leaving the debt to accumulate, with compound interest, until his retirement, when benefits first become payable. This will give a judge in the position of the first plaintiff an added reason to leave office upon becoming entitled to a pension rather than to serve out his or her full term. The Commonwealth points out that the design of the judges' pension scheme already provided a reason for leaving office sooner rather than later, if pension benefits were a major factor in such a decision. Judges' pension schemes, State or Federal, are not designed to reward long service, except to the extent that there is a minimum qualifying period. Remaining in office after that period diminishes pension benefits. This was already an aspect of the New South Wales scheme. It is difficult to measure the practical significance of this aspect of the Acts, and it probably varies in individual cases.

14 The feature of the Acts which is of greatest significance to a judge in the position of the first plaintiff is the incurring and accumulation of a liability to pay a substantial capital sum, on retirement, in discharge of an accrued superannuation contributions surcharge debt, at a time when payment of the pension is commencing. The relationship between the debt, and the amount of the pension payments, has been referred to above. The difference between the position of State judges, and that of Federal judges, who face a reduction in the amount of their periodical pension payments, or that of other high income earners, who incur no personal liability, and who may be entitled to lump sum benefits, or who may be able to commute their entitlements in whole or in part, is obvious. To ameliorate that difference, the New South Wales Parliament altered the pension scheme. The first plaintiff submits that this is evidence of the interference with State governmental functions constituted by the Federal tax; the imposition of the tax forced the State to make a significant amendment to its pension arrangements for judges. The Commonwealth submits that the fact that the tax imposed no substantial burden on the State is demonstrated by the State's ability to mitigate the problem by appropriate legislation.

15 The constitutional limitations said to have dictated the differences in application between the surcharge as it applies to State judges, and the surcharge as it applies to others entitled to superannuation benefits, are those found in s 114 of the Constitution.

16 Section 114 prohibits a State from imposing any tax on property of any kind belonging to the Commonwealth, and it also prohibits the Commonwealth from imposing any tax on property of any kind belonging to a State. The latter prohibition is the constitutional protection referred to in the title to the Acts, and is said to have dictated the differential treatment of certain people, including State judges. Although, in the course of argument, there were references to the possibility that there were other means by which the Parliament could have imposed a tax in respect of annual increases in the value of a State's liability to pay pension benefits to judges, without the need to resort to the fiscal regime involved in the Acts, with the implication that the assertion that the regime was dictated by s 114 was at least an exaggeration, there was no explanation of exactly why s 114 had the effect claimed for it. It is not self-evident that, subject to the argument in ground (a), the State of New South Wales could not be taxed as a superannuation provider in the case of unfunded pension schemes. The Commonwealth submitted that the legislation "makes the member him or herself liable to pay the tax, because the superannuation provider of the scheme is 'the State' for the purposes of s 114 of the Constitution". However, s 114 only prohibits a tax on property. The Commonwealth validly imposed pay-roll tax[2],

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2 *Victoria v The Commonwealth* (1971) 122 CLR 353.

and fringe benefits tax[3], on the States. The New South Wales judges' pension scheme is unfunded. The submissions of South Australia, which was one of a number of States intervening in support of the plaintiffs to challenge the validity of the legislation, outlined a history of inter-governmental negotiations in the course of which the implications of the decision in *South Australia v The Commonwealth*[4] were considered. The facts of that case show that the South Australian government conducts a funded superannuation scheme for the payment of superannuation benefits to statutory officers and public sector employees. It was held that a tax on the net capital gain derived on the disposal of an asset of the fund was a tax on property within s 114. It is far from clear what that has to do with the arrangements relating to pensions for New South Wales judges. However, reg 177 of the Income Tax Regulations 1936 lists the *Judges' Pension Act* 1953 (NSW) among constitutionally protected funds, the income of which is, by s 271A of the *Income Tax Assessment Act* 1936 (Cth), exempt from tax. It is one thing to say that some apprehension as to the possible effect of s 114 at least partly explains the Acts. It is another thing to say that the differential treatment of the first plaintiff and others was "dictated" by s 114. And, even if that were the case, the circumstance that the Commonwealth is constitutionally prohibited from taxing the State of New South Wales as a superannuation provider, is, at first sight, a curious justification for discrimination, if such differential treatment is properly regarded as discrimination. Whether it is properly so regarded is a question which needs to be considered in the light of the wider constitutional principle upon which the first plaintiff's argument depends.

17 The federal system involves the co-existence of national and state or provincial governments, with an established division of governmental powers; legislative, executive and judicial. As in the United States, the national government was given limited, specified powers. An approach to constitutional interpretation which stressed a reservation of State powers flourished for a time after federation, but was reversed by the *Engineers' Case* in 1920[5]. Even so, as in the United States, the federal nature of the Commonwealth has been held to limit the capacity of the Federal Parliament to legislate in a manner inconsistent

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3 *State Chamber of Commerce and Industry v The Commonwealth (The Second Fringe Benefits Tax Case)* (1987) 163 CLR 329.

4 (1992) 174 CLR 235.

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

with the constitutional role of the States.[6] In both countries, the taxation power has provided a battleground upon which contests as to the nature and extent of that limitation have been fought. Here, as in the United States, a concept of immunity of governments and government instrumentalities from taxation has waxed and waned. In both countries, significance has been attached to a characterisation of a tax as either discriminatory or non-discriminatory. In *New York v United States*[7], Rutledge J said that he took the limitation against discrimination "to mean that state functions may not be singled out for taxation when others performing them are not taxed or for special burdens when they are". In the same case, but with reference to a different power, Frankfurter J said that "discrimination" was "not a code of specifics but a continuous process of application"[8]. Non-discriminatory taxes were described by Stone CJ as taxes "laid on a like subject matter, without regard to the personality of the taxpayer, whether a State, a corporation or a private individual"[9]. That was said in the course of acknowledging that there may be non-discriminatory taxes which, when laid on a State, would impair its constitutional status.[10]

18 The *Engineers' Case* marked a turning point in Australian constitutional interpretation. The decision involved a rejection of some previously understood implications, including what was described in the leading judgment as "the doctrine of mutual non-interference".[11] However, when, in 1930, Dixon J expressed his understanding of the rule established by that case, he added an important qualification. He said[12]:

> "This rule I understand to be that, unless, and save in so far as, the contrary appears from some other provision of the Constitution or from the nature or the subject matter of the power or from the terms in which it

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6 For recent United States examples of the issues generated by such a principle, see *New York v United States* 505 US 144 (1992); *Printz v United States* 521 US 898 (1997).

7 326 US 572 (1946) at 584-585.

8 326 US 572 (1946) at 583.

9 326 US 572 (1946) at 587.

10 326 US 572 (1946) at 587.

11 (1920) 28 CLR 129 at 145.

12 *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 390. See also *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657 at 681-682; *Essendon Corporation v Criterion Theatres Ltd* (1947) 74 CLR 1 at 23.

> is conferred, every grant of legislative power to the Commonwealth should be interpreted as authorizing the Parliament to make laws affecting the operations of the States and their agencies, at any rate if the State is not acting in the exercise of the Crown's prerogative and if the Parliament confines itself to laws which do not discriminate against the States or their agencies."

19 The qualification was developed and applied in *Melbourne Corporation v The Commonwealth*[13]. One of the most striking differences between that case, decided in 1947, and the *Engineers' Case*, is the approach to United States authority. In the joint judgment of Knox CJ, Isaacs, Rich and Starke JJ in the *Engineers' Case* there was an emphatic and, it might be thought, extravagant rejection of the possibility of guidance from that source[14]. Yet in *Melbourne Corporation* all the judgments paid careful attention to United States authority. Both nations have what Latham CJ described as "a constitution establishing not only a federal Government with specified and limited powers, but also State Governments which, in respect of such powers as they possess under the Constitution, are not subordinate to the federal Parliament or Government"[15]. Such a constitution necessarily gives rise to a problem as to whether, and to what extent, a federal law, which on its face is a law with respect to a subject of federal legislative power, may burden or affect a State government.

20 In *Melbourne Corporation* the Court held invalid a law of the Parliament, enacted pursuant to its power to make laws with respect to banking, which prohibited banks, without the consent of the Federal Treasurer, from conducting banking business for a State or a State agency. The reasons of the Justices were expressed in various ways. Latham CJ examined the meaning of the concept of discrimination, and concluded that it meant "singling out another government and specifically legislating about it"[16]. Presumably the reference to government included a government agency. Laws of that kind may be held to be invalid; as may laws which "unduly interfere" with State functions of government, although he had reservations about the vagueness of the content of such a test[17]. Dixon J elaborated upon what he had earlier said as to the qualification to the rule established by the *Engineers' Case*. He said[18]:

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13 (1947) 74 CLR 31.

14 (1920) 28 CLR 129 at 147.

15 (1947) 74 CLR 31 at 50.

16 (1947) 74 CLR 31 at 61.

17 (1947) 74 CLR 31 at 60-62.

18 (1947) 74 CLR 31 at 78-79.

"This Court has adopted a rule of construction with reference to the application to the States of the specific powers conferred by the Constitution upon the Parliament of the Commonwealth. It is a prima-facie rule of construction and its operation may be displaced by sufficient indications of a contrary intention whether found in the nature or subject matter of the power, in the manner in which it is expressed, in the context or elsewhere in the Constitution.

The prima-facie rule is that a power to legislate with respect to a given subject enables the Parliament to make laws which, upon that subject, affect the operations of the States and their agencies. That, as I have pointed out more than once, is the effect of the *Engineers' Case* stripped of embellishment and reduced to the form of a legal proposition. It is subject, however, to certain reservations and this also I have repeatedly said. Two reservations, that relating to the prerogative and that relating to the taxation power, do not enter into the determination of this case and nothing need be said about them. It is, however, upon the third that, in my opinion, this case turns. The reservation relates to the use of federal legislative power to make, not a general law which governs all alike who come within the area of its operation whether they are subjects of the Crown or the agents of the Crown in right of a State, but a 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. In support of such a use of power the *Engineers' Case* has nothing to say. Legislation of that nature discloses an immediate object of controlling the State in the course which otherwise the Executive Government of the State might adopt, if that Government were left free to exercise its authority. The control may be attempted in connection with a matter falling within the enumerated subjects of federal legislative power. But it does not follow that the connection with the matter brings a law aimed at controlling in some particular the State's exercise of its executive power within the true ambit of the Commonwealth legislative power. Such a law wears two aspects. In one aspect the matter with respect to which it is enacted is the restriction of State action, the prescribing of the course which the Executive Government of the State must take or the limiting of the courses available to it. As the operation of such a law is to place a particular burden or disability upon the State in that aspect it may correctly be described as a law for the restriction of State action in the field chosen. That is a direct operation of the law.

In the other aspect, the law is connected with a subject of Commonwealth power. Conceivably that connection may be made so insubstantial, tenuous or distant by the character of the control or restriction the law seeks to impose upon State action that it ought not to be regarded as enacted with respect to the specified matter falling within the

> Commonwealth power. If so, the law fails simply because it cannot be described as made with respect to the requisite subject matter. But, if in its second aspect the law operates directly upon a matter forming an actual part of a subject enumerated among the federal legislative powers, its validity could hardly be denied on the simple ground of irrelevance to a head of power. Speaking generally, once it appears that a federal law has an actual and immediate operation within a field assigned to the Commonwealth as a subject of legislative power, that is enough. It will be held to fall within the power unless some further reason appears for excluding it. That it discloses another purpose and that the purpose lies outside the area of federal power are considerations which will not in such a case suffice to invalidate the law."

21 Dixon J discussed the special problem of a federal tax falling on State operations and, in particular, a tax which is discriminatory in the sense that a State is singled out for taxation or for a special burden of taxation in respect of acts or things when others are not taxed or not so burdened in respect of the same act or things. After noting that this may not exhaust the range of potential problems involved in the taxation power, he went on:[19]

> "What is important is the firm adherence to the principle that the federal power of taxation will not support a law which places a special burden on the States. They cannot be singled out and taxed as States in respect of some exercise of their functions. Such a tax is aimed at the States and is an attempt to use federal power to burden or, may be, to control State action. The objection to the use of federal power to single out States and place upon them special burdens or disabilities does not spring from the nature of the power of taxation. The character of the power lends point to the objection but it does not give rise to it. The federal system itself is the foundation of the restraint upon the use of the power to control the States."

22 Non-discriminatory federal taxes which applied to the States in their capacity as employers were held valid in *Victoria v The Commonwealth*[20] (pay-roll tax) and *State Chamber of Commerce and Industry v The Commonwealth*[21] (fringe benefits tax). In the first of those cases, Windeyer J added to the lexicography by defining discrimination as "an adverse distinction with regard to something or somebody"[22]. The pay-roll tax was not discriminatory, and, to use

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19 (1947) 74 CLR 31 at 81.

20 (1971) 122 CLR 353.

21 (1987) 163 CLR 329.

22 (1971) 122 CLR 353 at 404.

the words of Menzies J, did not "operate to interfere with a State carrying out its constitutional functions of government"[23]. That being so, there was no occasion for the Justices to state more precisely what might constitute impermissible interference. A majority of the Court accepted the principles stated by Dixon J in *Melbourne Corporation* but found it unnecessary further to refine or elaborate them. Gibbs J said that the source of the implication is "what is required to preserve and protect the position of the States as independent members of the federation"[24]. In the second case, the argument that the fringe benefits tax was invalid was advanced under rubrics corresponding to those that appear in ground (a) in the present case[25]. First, it was said the legislation singled the States out for special treatment. It required them to pay tax in respect of benefits paid to people such as Ministers, parliamentarians and judges, who were not employees. In that respect the obligation was peculiar to States and had no counterpart in relation to non-government employers. This argument was answered by reference to the nature of the tax. It was not a tax on benefits paid to people who were in a master-servant relationship. It was a tax on benefits paid in addition to salary or wages, whether or not there was a strict relationship of employment. In order words, a decision as to whether the tax was discriminatory involved an examination of the wider scheme of which it was part, and an exercise in characterisation. Secondly, it was said that the legislation interfered with, impaired or curtailed the States or the exercise of their functions of government. This argument was answered by the observation that the imposition of a general income tax on the salaries or wages of State officials or employees is valid, and familiar, and the fringe benefits tax was no different in its effect on the States[26].

23 The concept of discrimination was also developed in the judgments of Brennan J and Deane J in *Queensland Electricity Commission v The Commonwealth*[27]. In that case a Commonwealth law, enacted pursuant to the conciliation and arbitration power, singled out, for the imposition of special and disadvantageous treatment, an agency of the Queensland government. It was held invalid on the basis of the *Melbourne Corporation* principle. Brennan J[28] said that if a law discriminates against a State in that it imposes some special burden or disability, there may be no real, as distinct from formal, discrimination

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23 (1971) 122 CLR 353 at 392.

24 (1971) 122 CLR 353 at 423.

25 (1987) 163 CLR 329 at 355-356.

26 (1987) 163 CLR 329 at 356.

27 (1985) 159 CLR 192.

28 (1985) 159 CLR 192 at 240.

if the law is calculated to provide for particular circumstances affecting the State. Some forms of discrimination may be justified by circumstances. Special circumstances may require special treatment and, in such cases, it is for the legislation to decide what special treatment is appropriate. Deane J[29] referred to circumstances where a head of power authorises the singling out of a particular object or situation for special legislative treatment and a State or State agency is affected by reason of its particular involvement in an activity or situation. He gave as an example the involvement of a State or State agency in a particular industrial dispute where the power to legislate with respect to conciliation and arbitration for the purposes of that dispute might be seen to authorise special treatment of the State or State agency.

24 Discrimination is an aspect of a wider principle; and what constitutes relevant and impermissible discrimination is determined by that wider principle. In *Queensland Electricity Commission*[30], Mason J, in the course of explaining why the implied limitation on Commonwealth powers applies in relation to State agencies as well as States, said that the foundation for the implication is "the constitutional conception of the Commonwealth and the States as constituent entities of the federal compact having a continuing existence reflected in a central government and separately organized State governments". Federal legislation that would be inconsistent with that conception includes, but is not limited to, legislation aimed at the destruction of the States or State agencies, or of one or more of their governmental attributes or capacity. Dawson J expressed the general proposition that arises by implication from the federal structure of the Constitution as being that "the Commonwealth Parliament cannot impair the capacity of the States ... to function effectually as independent units"[31]. He regarded discrimination, and the placing of a special burden on the States by a law of general application, as two examples of potential contravention of that limitation on power. A law which singles out a State or State agency may have as its object to restrict, burden or control State activity[32]. Or a law of general application may so interfere with or impede State activity as to impose an impermissible burden on the exercise of its functions. It is not possible to state exhaustively every form of exercise of Commonwealth legislative power that might be contrary to the general proposition stated above. Just as the concept of discrimination needs to be understood in the light of the general principle, so also does the concept of burden. The adverse financial impact on the States of the pay-roll tax, or the fringe benefits tax, both of which were held valid, far

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29 (1985) 159 CLR 192 at 251.

30 (1985) 159 CLR 192 at 218.

31 (1985) 159 CLR 192 at 260.

32 (1985) 159 CLR 192 at 207 per Gibbs CJ.

exceeded the financial consequences of the laws held invalid in *Melbourne Corporation* or *Queensland Electricity Commission*. It was the disabling effect on State authority that was the essence of the invalidity in those cases. It is the impairment of constitutional status, and interference with capacity to function as a government, rather than the imposition of a financial burden, that is at the heart of the matter, although there may be cases where the imposition of a financial burden has a broader significance.

25 Putting discrimination aside, an illustration of a Commonwealth law of general application which operated to impair the capacity of the States to function as governments, was the federal law, enacted pursuant to the conciliation and arbitration power, empowering the Industrial Relations Commission to make awards in relation to terms and conditions of employment, considered in *Re Australian Education Union; Ex parte Victoria*[33]. The law was held invalid in its application to the States and their agencies in relation to certain, although not all, aspects of the terms and conditions of employment of public servants, including redundancy. It was also held that it did not empower the Commission to make awards in relation to the terms and conditions of employment of such persons as Ministers, ministerial assistants and advisers, heads of department, senior office holders, parliamentary officers and judges. Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ said[34]:

> "In our view, ... critical to a State's capacity to function as a government is its ability, not only to determine the number and identity of those whom it wishes to engage at the higher levels of government, but also to determine the terms and conditions on which those persons shall be engaged. Hence, Ministers, ministerial assistants and advisers, heads of departments and high level statutory office holders, parliamentary officers and judges would clearly fall within this group. The implied limitation would protect the States from the exercise by the Commission of power to fix minimum wages and working conditions in respect of such persons and possibly others as well. And, in any event, Ministers and judges are not employees of a State."

26 To a substantial extent, these principles were expressed in summary form by Starke J in his statement of the grounds of his decision in *Melbourne Corporation*[35]:

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33 (1995) 184 CLR 188.

34 (1995) 184 CLR 188 at 233.

35 (1947) 74 CLR 31 at 75.

> "It is a practical question, whether legislation ... on the part of [the] Commonwealth ... destroys, curtails or interferes with the operations of [a State], depending upon the character and operation of the legislation ... No doubt the nature and extent of the activity affected must be considered and also whether the interference is or is not discriminatory but in the end the question must be whether the legislation ... curtails or interferes in a substantial manner with the exercise of constitutional power by [the State]. The 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."

27 Legislating to deprive States and State agencies of the capacity to bank with any bank other than the Commonwealth Bank might or might not have been to their financial disadvantage. That was not the point. The point was that it substantially impaired their capacity to decide where to place their funds and, in that respect, it impaired their capacity to act as governments. As was pointed out in the opinion of the Supreme Court of the United States in *Printz v United States*[36], in a case where it is claimed that the incidental application to the States of a federal law of general application excessively interferes with the function of state governments, it may be material to measure the burden imposed. But where the argument is that a federal law compromises the structural framework of the federal system, in such a way that the principle of federalism is offended, then the outcome of that argument cannot depend upon a comparative assessment of the governmental interests that are advanced or affected.

28 It is plain, and was accepted in the *Australian Education Union Case*, that quite apart from the consideration that they are not employees, the conciliation and arbitration power does not extend to enable the Parliament directly or indirectly to dictate to the States the terms and conditions of engagement of judges. An attempt to do so would be an impermissible interference with the capacity of States to function as governments. For the same reason, 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. Judges, like other citizens, are subject to general, non-discriminatory taxation, and the mere fact that the incidence of taxation has a bearing upon the amount and form of remuneration they receive does not mean that federal taxation of State judges is an interference with State governmental functions. It is otherwise when, as here, a federal law with respect to taxation treats State judges differently from the general run of high income earners and federal judges, and to their practical disadvantage. That differential treatment is

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36 521 US 898 (1997) at 931-932.

constitutionally impermissible, not because of any financial burden it imposes upon the States, but because of its interference with arrangements made by States for the remuneration of their judges. The practical manifestation of that interference is in its capacity to affect recruitment and retention of judges to perform an essential constitutional function of the State. Evidence of that capacity is to be found in the legislative response which the State of New South Wales was, in effect, forced to make. The Parliament could never have compelled the State of New South Wales to alter the design of its judicial pension scheme. Indeed, at the time of the Acts, the State judicial pension scheme was not materially different from the federal judicial pension scheme. But the State scheme was substantially altered as a result of the practical necessity that followed from the subjection of State judges to a discriminatory federal tax.

29 The validity of the Acts is to be determined as at the time of their enactment. They were not rendered valid by subsequent State legislative action. However, the Commonwealth argues that any burden on the State of New South Wales, in consequence of the fiscal imposition on its judges, could be, and was, ameliorated by legislation of the kind that was subsequently enacted by the State. For the reasons already given, it is not a question of any financial burden on the States. Judges are relatively few in number, and the arrangements made for their remuneration are not of major significance in any government budget. The issue is one of interference; of impairment of the constitutional integrity of a State government. Such interference is not denied by pointing out that a State could and did make a substantial alteration to the design of its judicial pension scheme; on the contrary, the need to make such alteration demonstrates the interference.

30 The wider fiscal regime, of which the Acts form part, imposes what the Commonwealth has characterised as a tax on increases in the amount of the liability of superannuation providers to pay superannuation benefits. In its operation in relation to most high income earners, it is imposed on the superannuation providers. The sole justification advanced for its imposition directly on State judges is that s 114 of the Constitution is said to prevent the imposition of such a tax on States in their capacity as providers of superannuation benefits to judges. As noted above, that proposition has not been demonstrated to be correct. However, let it be assumed in favour of the Commonwealth's argument that it is correct. It means that the explanation for creating the fiction of contributions to a notional fund, and imposing directly upon State judges the liability that, in the ordinary incidence of the tax, would be imposed upon the State, is that to impose the tax upon the State would be unconstitutional. The assumed constitutional prohibition upon taxing the States in the same way as other superannuation providers is said to justify taxing State judges differently from other recipients of superannuation benefits. Section 114 is a particular instance, covered by express prohibition, of federal taxation inconsistent with the federal nature of the Constitution. What would otherwise be covered by the implied prohibition recognised in *Melbourne Corporation* and

other cases cannot be justified on the ground that it is an indirect means of achieving that which is prohibited by s 114.

31 Brief reference was made in argument to some relatively recent North American decisions dealing with an argument that certain legislation affecting judges violated constitutional imperatives of judicial independence. Because no argument about judicial independence was raised in this case, those decisions were rightly regarded by the parties as being of only marginal relevance. However, if only to make it clear that they were about a different issue, they should be mentioned.

32 *The Queen v Beauregard*[37] concerned legislation enacted by the Federal Parliament in Canada altering the pension arrangements that applied to federally appointed judges. In Canada, judges of superior Provincial courts, as well as federal judges, are appointed by the federal government, and their remuneration is fixed by the Federal Parliament. There was no limitation on the Federal Parliament's law-making capacity, based on federalism, of the kind invoked in the present case. However, it was argued that it was inconsistent with judicial independence that federal judicial pensions, which had previously been non-contributory, should, in relation to judges appointed after a certain date, be made contributory. That argument was rejected by the Supreme Court of Canada. No similar argument is involved in the present case; rather, the issue here is one of federalism. It is unnecessary to examine the detail of the legal arguments based on the claimed interference with judicial independence. It may be noted, however, that Dickson CJ said[38]:

> "The power of Parliament to fix salaries and pensions of superior court judges is not unlimited. If there were any hint that a federal law dealing with these matters was enacted for an improper or colourable purpose, or if there was discriminatory treatment of judges *vis-a-vis* other citizens, then serious issues relating to judicial independence would arise and the law might well be held to be *ultra vires* s 100 of the *Constitution Act, 1867*."

33 Issues of judicial independence, and the arrangements for fixing and altering judicial remuneration that might be established consistently with such independence, were again examined by the Supreme Court of Canada in *Re Provincial Court Judges*[39]. Once again, that was not a case that raised issues of federalism of the kind with which we are presently concerned; and it is not

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37 [1986] 2 SCR 56.

38 [1986] 2 SCR 56 at 77.

39 [1997] 3 SCR 3.

argued that the federal legislation under challenge in the present case threatens the independence of State judges.

34 The Supreme Court of the United States, in *United States v Hatter*[40] also considered the application of federal laws to federal judges. The laws were claimed to violate the United States Constitution's prohibition against diminishing the remuneration of federal judges during their term of office. No such issue is involved in the present case. Our Constitution, in s 72, contains a similar prohibition, but it has nothing to do with the effect of federal laws on State judges. In *Hatter*, some of the laws under challenge were held valid, and some were held invalid. The valid laws imposed non-discriminatory taxes upon judges and other citizens. The invalid laws were discriminatory, singling out federal judges for unfavourable treatment. The Court held that the Constitution did not forbid Congress to enact a law imposing a non-discriminatory tax on judges. The invalid taxes were discriminatory. It is of interest to note the attempted justification advanced for the discrimination, and rejected by the Court. The supposed justification was that the singling out of judges for disadvantageous treatment was "necessary to offset advantages related to constitutionally protected features of the judicial office"[41]. It was pointed out by Breyer J that, if such a justification were accepted, it would authorise the legislature to "equalize away"[42] the very protection given by the Constitution. To the extent that *Hatter* has similarities to the present case, they appear to me to be to the disadvantage of the Commonwealth's argument.

35 The challenge to the validity of the Acts on the ground stated in par (a) of Question 2 has been made out.

36 I would answer the questions in the case stated as follows:

1. (a) Yes

   (b) No

2. (a) Yes.

3. The defendant should pay the costs of the plaintiffs.

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40 532 US 557 (2001).

41 532 US 557 (2001) at 576.

42 532 US 557 (2001) at 576.

GAUDRON, GUMMOW AND HAYNE JJ.

The case stated

37 The occasion for this litigation is provided by the impact of federal revenue laws upon the "non-contributory" and "unfunded" pension arrangements provided by State laws for the plaintiffs as State judicial officers. Constitutional issues respecting the impact of revenue legislation upon such judicial pension schemes have been considered in recent times by the Supreme Court of Canada[43] and the Supreme Court of the United States[44]. In the present litigation, the Attorneys-General for New South Wales, Victoria, South Australia and Western Australia intervened to support the submissions by the plaintiffs and, in certain respects, to supplement those submissions.

38 Before the Full Court is a case stated under s 18 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") asking certain questions. The first is whether on the true construction of two laws of the Commonwealth the plaintiffs are liable to pay "superannuation contributions surcharge" in respect of "surchargeable contributions" reported for several financial years. The two laws are the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Act* 1997 (Cth) ("the Protected Funds Imposition Act") and the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act* 1997 (Cth) ("the Protected Funds Assessment Act"). These statutes commenced on 7 December 1997. The Protected Funds Assessment Act has been amended several times, in particular by Sched 2 to the *Superannuation Contributions and Termination Payments Taxes Legislation Amendment Act* 1999 (Cth) ("the 1999 Amendment Act").

39 The second question assumes an affirmative answer to the first. It asks whether on one or more identified grounds the legislation is invalid in its application to the plaintiffs. One objection to validity, shortly put, is that the Protected Funds Imposition Act imposes a liability upon the plaintiffs by reference to criteria which are so incapable of ascertainment or lacking in general application as to deny to both statutes the description of "laws … with respect to … Taxation", within the meaning of s 51(ii) of the Constitution. In seeking an affirmative answer to that question, the plaintiffs pray in aid passages in the joint

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43 *R v Beauregard* [1986] 2 SCR 56.

44 *United States v Hatter* 532 US 557 (2001).

judgments in *MacCormick v Federal Commissioner of Taxation*[45] and *Deputy Commissioner of Taxation v Truhold Benefit Pty Ltd*[46]. A further objection to validity is that the Protected Funds Imposition Act deals with more than one subject of taxation, contrary to s 55 of the Constitution. Here the plaintiffs rely particularly upon *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation*[47].

40 Other objections to validity are formulated in various ways but, in essence, invite attention to fundamental constitutional considerations, invoking that implied limitation upon the legislative powers of the Commonwealth which is associated with *Melbourne Corporation v The Commonwealth*[48] and recently was further expounded in the *Native Title Act Case*[49], *Re Australian Education Union; Ex parte Victoria*[50] and the *Industrial Relations Act Case*[51]. In submissions, no direct reliance was placed upon the specific but limited prohibition imposed upon the federal taxation power by s 114 of the Constitution[52], but some reference will be necessary to decisions construing s 114.

41 It should be emphasised that, contrary to what at times in the argument appeared to be some colour given by the Commonwealth to its submissions, the issues identified above are not to be approached with some broad view which takes as dispositive in this Court the economic results sought to be obtained by

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45 (1984) 158 CLR 622 at 640-641.

46 (1985) 158 CLR 678 at 684.

47 (1992) 173 CLR 450 at 469.

48 (1947) 74 CLR 31.

49 *Western Australia v The Commonwealth* (1995) 183 CLR 373.

50 (1995) 184 CLR 188.

51 *Victoria v The Commonwealth* (1996) 187 CLR 416 at 497-503.

52 Section 114 states:

> "A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State."

the legislation in question[53]. It is the character in constitutional law of what was done, as it bears upon the plaintiffs and the States of whose courts they are members, which is in issue. What resort to arguments of *economic* equivalence does reveal is that the impugned legislation is *legally* different from other, generally applicable legislation providing for the taxation of other pension and superannuation entitlements. That is, the impugned legislation subjects the plaintiffs, as State judicial officers, to special and legally different taxation arrangements from those generally applicable to persons eligible for, or in receipt of, pensions or superannuation.

42 For the reasons that follow, the first question (about construction) should be answered differently in relation to each plaintiff – "Yes" in the case of the first plaintiff, "No" in the case of the second plaintiff. The second question (about validity) should be answered "Yes". The legislation is invalid. It exceeds that limitation on the legislative powers of the Commonwealth which flows from the very nature of the federal structure established by the Constitution.

43 The judgment is divided as follows:

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53 cf *Europa Oil (NZ) Ltd v Inland Revenue Commissioner* [1976] 1 WLR 464 at 471-472; [1976] 1 All ER 503 at 508-509; [1976] 1 NZLR 546 at 552-553.

The plaintiffs' pension entitlements

44 The first plaintiff was appointed after and the second plaintiff before the commencement of the legislation on 7 December 1997. The first plaintiff is a judge of the Supreme Court of New South Wales and was appointed to that office on 31 August 1998 at the age of 52 years. He must retire from office no later than 15 June 2018 when he attains the age of 72 years. Section 25 of the *Supreme Court Act* 1970 (NSW) ("the NSW Supreme Court Act") provides that the Supreme Court is composed of the judges thereof. The second plaintiff was appointed to the office of Master of the Supreme Court of Victoria on 20 July 1993 when aged 42 years. She must retire from office no later than when she attains the age of 70 years in 2021. Section 75(2) of the *Constitution Act* 1975 (Vic) ("the Victorian Constitution") states that the Supreme Court of the State of Victoria consists of the judges and the Masters of that Court.

45 It is accepted by the Commonwealth that the courts of the States are an essential branch of State governments. It should be added that the State courts, as contemplated by s 71 of the Constitution, exercise in substantial measure the judicial power of the Commonwealth. They do so pursuant to the investment of federal jurisdiction by laws such as s 39(2) and s 68(2) of the Judiciary Act, supported by s 77(iii) of the Constitution.

46 The pension provisions in relation to the offices held by the plaintiffs are made respectively by the *Judges' Pensions Act* 1953 (NSW) ("the NSW Pensions Act") and Pt 7 of the *Supreme Court Act* 1986 (Vic) ("the Victorian Supreme Court Act"). There are considerable differences in matter of detail, but the statutes share significant characteristics. No provision is made for contributions by the plaintiffs. Pensions are payable to the plaintiffs[54] upon satisfaction of statutory criteria and out of the Consolidated Fund of the State of New South

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54 See the NSW Pensions Act, s 10; Victorian Supreme Court Act, s 104A(11).

Wales, established by the *Constitution Act* 1902 (NSW)[55], and the Consolidated Revenue established by the Victorian Constitution[56].

47 In *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth*[57], Dawson J pointed out that one of the purposes served by the establishment in Australia of Consolidated Funds modelled upon the Consolidated Fund first established in the United Kingdom by statute in 1787 is a blending of all public moneys received so that they become available for appropriation by the legislature. Consistently with that system, provision for payment of the pensions in question is not made by the setting aside for investment of specific moneys or assets; in particular, legislation of neither State provides for the establishment of a fund whereby property is set aside for investment, with capitalisation of the yield from investment; nor is provision made for the funding of pensions by or with the assistance of contributions by prospective pensioners or others.

48 The result is that neither legislative scheme answers the general description of a superannuation fund given by Windeyer J in *Scott v Commissioner of Taxation of the Commonwealth (No 2)*[58]. His Honour referred to the setting aside of money or other property for investment with the yield therefrom to be capitalised, and the fund thus created being subjected to appropriate trusts for the provision to participants of monetary benefits upon their reaching a prescribed age.

Federal superannuation legislation

49 In order to appreciate the issues respecting construction and validity of the Protected Funds Imposition Act and the Protected Funds Assessment Act, it is necessary first to consider in a little detail the impact upon superannuation arrangements of federal revenue law. In this field, a range of policy considerations are presented. One concerns the deductions, if any, to be allowed to those making contributions to superannuation arrangements; another the tax, if any, to be imposed upon the yields from the investment of those contributions; and a third, the tax treatment of the payments made to those having the benefit of the superannuation provisions. The responses by the Parliament, particularly

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55 Part 5 (ss 39-46).

56 Part V, Div 1 (ss 89-93).

57 (1993) 176 CLR 555 at 591.

58 (1966) 40 ALJR 265 at 278.

over the past 20 years, have produced a complex and shifting legislative pattern formed by a number of federal statutes of which those immediately in dispute are but two.

50 The general position as it previously obtained has been described by one commentator as follows[59]:

> "Prior to 1983, if an employer contributed money to an approved employee superannuation fund, the contribution was tax deductible, the income of the fund was tax free and only 5% of any lump sum paid to an employee on retirement was included in assessable income, to be taxed at the employee's marginal rates. Pensions were treated separately. Because they were regular receipts and displayed some of the common indicia of income on ordinary concepts, they were taxed in full. This merely encouraged most superannuation benefits to be paid out as lump sums. Eventually governmental advisors and commentators sought to value this tax expenditure. Estimates were in the order of billions of dollars per annum in foregone revenue."

To that it may be added, as the submissions for South Australia emphasised:

> "In general terms these arrangements did not apply to public sector superannuation. Such schemes were usually unfunded, defined benefits pension schemes which were taxed as ordinary income upon receipt by the beneficiary."

51 The terms of the New South Wales and Victorian laws providing pensions to judicial officeholders, particularly the absence of contributions and of any segregated fund, have rendered inapplicable certain concessional taxation treatment provided for many years by the *Income Tax Assessment Act* 1936 (Cth) ("the ITAA"). That concessional treatment includes provision now made by subdivs AA and AB[60] of Div 3 of Pt III of the ITAA. Division 3 deals generally with deductions. Subdivision AA is headed "Contribution to Superannuation Funds for Benefit of Employees" and s 82AAC provides allowable deductions for contributions to a fund which is an "eligible superannuation fund". Subdivision AB is headed "Contributions to Superannuation Funds by Eligible Persons". Section 82AAT provides an allowable deduction for certain contributions to a "complying superannuation fund". The terms "eligible superannuation fund" and "complying superannuation fund" have the meaning

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59 Waincymer, *Australian Income Tax – Principles and Policy*, (1991) at 119.

60 Sections 82AAA-82AAR and ss 82AAS-82AAT respectively.

given by Pt IX (ss 267-315F). Part IX is headed "TAXATION OF SUPERANNUATION BUSINESS AND RELATED BUSINESS". Part IX was added to the ITAA in 1989[61].

52 Pursuant to Pt IX, liability for taxes was imposed upon certain income, receipts and net capital gains by superannuation funds. One significant change made by Pt IX was to add to the assessable income of funds the deductible contributions made by employers; this attracted full tax in respect of those contributions earlier in what might be called the investment cycle.

The SASFIT litigation and s 114

53 The South Australian Superannuation Fund Investment Trust ("the SASFIT") was incorporated by s 6 of the *Superannuation Act* 1988 (SA) which made provision for the payment of superannuation benefits to South Australian statutory officers and public sector employees; the statutory scheme established the South Australian Superannuation Fund into which the contributions of contributors were paid either directly or indirectly. In *South Australia v The Commonwealth*[62], it was accepted that, for the purposes of s 114 of the Constitution, SASFIT was relevantly the State of South Australia and that the assets of the Fund were property "belonging to" the State. The Commissioner of Taxation claimed that the Fund was a superannuation fund to which Pt IX applied and that, as a consequence, SASFIT was liable to pay tax on the taxable income of the Fund. It was held that SASFIT was not exempt from paying income tax on interest derived by the Fund; the exemption was limited to income tax on net capital gains.

54 Section 267, the first provision in Pt IX, contained various definitions for the purposes of that Part. SASFIT had accepted that it was a "complying superannuation fund" within the definition in that provision. In the joint judgment of Mason CJ, Deane, Toohey and Gaudron JJ in *South Australia v The Commonwealth*, their Honours, after referring to that definition, continued[63]:

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61 By the *Taxation Laws Amendment Act (No 2)* 1989 (Cth) and amended by the *Taxation Laws Amendment (Superannuation) Act* 1989 (Cth) which commenced immediately after the former Act; see s 2(1) of the *Taxation Laws Amendment (Superannuation) Act*.

62 (1992) 174 CLR 235.

63 (1992) 174 CLR 235 at 246.

"The trustee of a complying superannuation fund is liable to pay tax on the taxable income of the fund of the year of income (s 278(1)). A complying superannuation fund is an 'eligible superannuation fund' as defined by s 267(1) and is therefore an 'eligible entity' as defined by that sub-section. The taxable income of an eligible entity shall be calculated as if the trustee were a taxpayer and a resident (s 272). A reference in Pt IX to a fund includes a reference to a fund established by (a) a law of a State or (b) a public authority constituted by or under a law of a State (s 270).

The provisions of Pt IX were drafted with an eye to the possibility that the provisions of the Part might infringe the prohibition in s 114 of the Constitution by imposing a tax on property of a State. Section 271 deals with that situation. Sub-section (1) provides:

'It is the intention of the Parliament that if, but for this section, this Part would have the effect that a law imposing taxation would impose tax on property of any kind belonging to a State within the meaning of section 114 of the Constitution, this Part shall not have that effect.'"

Section 271(2), as the legislation stood at the time of the High Court litigation, read:

"For the purposes of this Part, a fund is a constitutionally protected fund in relation to a year of income if subsection (1) applies to the fund in relation to any tax in relation to the year of income."

55 Thereafter[64], s 271(2) was omitted, a definition of "constitutionally protected fund" as meaning a fund declared by the regulations to be a constitutionally protected fund was inserted in s 267, and s 271A was added. This provided:

"Despite any other provision of this Part, income derived by a constitutionally protected fund is exempt from tax."

Section 266 of the ITAA conferred a regulation-making power to prescribe all matters which by the statute were required or permitted to be prescribed. The purpose of the declaration by regulations that a fund was a constitutionally protected fund was to enliven s 271A and the exemption from tax of income derived by those funds.

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64 Sections 100-102 of the *Taxation Laws Amendment Act (No 2)* 1994 (Cth).

56 At the time of the commencement of the Protected Funds Assessment Act and the Protected Funds Imposition Act, reg 177 of the Income Tax Regulations 1936[65] declared certain funds (principally identified by Sched 14) to be a "constitutionally protected fund" for the definition of that term in s 267 of the ITAA. Schedule 14 listed 31 statutes enacted by the six States. Included in the list were the NSW Pensions Act, the Victorian Constitution and the Victorian Supreme Court Act. The NSW Pensions Act was the only statute of that State listed.

The superannuation guarantee legislation

57 In the meantime, there had come into force legislation implementing three significant policies adopted by the Commonwealth. They were concerned with the making of stipulated contributions by employers, the prudential management of superannuation funds, and the imposition of the "surcharge". The first policy was implemented by the *Superannuation Guarantee Charge Act* 1992 (Cth), the *Superannuation Guarantee (Administration) Act* 1992 (Cth) ("the Guarantee Act") and the *Superannuation Guarantee (Consequential Amendments) Act* 1992 (Cth). Section 12(9) of the Guarantee Act expands the ordinary meaning of the term "employee" and, in particular, it classifies a person holding office under a law of a State as an employee of that State. Section 16 obliges employers to pay the "superannuation guarantee charge" imposed on that employer's "superannuation guarantee shortfall".

58 The effect of the legislation is to require employers to pay stipulated contributions to a "complying superannuation fund", an expression adopted from Pt IX of the ITAA[66]; in the absence of those payments, the employer is liable to the superannuation guarantee charge of approximately twice the amount otherwise to be contributed. The charge is a debt due to the Commonwealth[67]. Approximately half of the charge is to be passed on to the complying superannuation fund for the benefit of the employee. The case stated is silent as to whether New South Wales or Victoria have had any superannuation guarantee shortfalls in respect of the plaintiffs.

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65 Inserted by SR No 191 of 1997, effective from 4 July 1997.

66 See s 7 of the Guarantee Act.

67 Guarantee Act, s 50.

The SIS Act

59 The second development involved the introduction of new prudential arrangements for superannuation funds. The policy given effect by the *Superannuation Industry (Supervision) Act* 1993 (Cth) ("the SIS Act") was identified in sub-ss (1) and (2) of s 3. These stated:

> "(1) The object of this Act is to make provision for the prudent management of certain superannuation funds, approved deposit funds and pooled superannuation trusts and for their supervision by the Insurance and Superannuation Commissioner.
>
> (2) The basis for supervision is that those funds and trusts are subject to regulation under the Commonwealth's powers with respect to corporations or pensions (for example, because the trustee is a corporation). In return, the supervised funds and trusts may become eligible for concessional taxation treatment."

The scheme of the SIS Act was considered in *Attorney-General (Cth) v Breckler*[68]. A "regulated superannuation fund" was a fund in respect of which there had been an election that the SIS Act apply to it. If this fund was a resident superannuation fund and if there was compliance with the SIS Act and the regulations thereunder, the fund would obtain the status of a "complying superannuation fund" within the meaning of s 45 of the SIS Act. In respect of such a compliant fund, s 278 of the ITAA produced the beneficial result that the trustee would be liable to pay tax on the taxable income of the fund as provided in Pt IX of the ITAA and not otherwise.

60 The only complying superannuation funds within the meaning of s 45 of the SIS Act that are unfunded are public sector superannuation schemes[69]. In the past a number of Australian public companies entered into agreements, which are still on foot, with officers or employees to pay them upon or after retirement an annuity or, more recently, a lump sum, in circumstances where the payments are made out of the resources of the company in question and no fund is set aside for the purposes of making the payments. The taxation treatment of moneys paid under these agreements will vary according to the terms and conditions on which

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68 (1999) 197 CLR 83 at 100-103. See also O'Connell, "Superannuation and Tax – Some Equity Issues", (2000) 28 *Federal Law Review* 477 at 480-483.

69 Case Stated, par 108B.

they are paid; there is no "complying superannuation fund" within the meaning of s 45 of the SIS Act[70].

61 Difficulties were encountered in applying the new prudential regime to State superannuation funds; in particular, as was emphasised in the submissions for South Australia, the prudential requirements relating to the maintenance of minimum assets could not be complied with in respect of those funds which were unfunded. Neither scheme established by the NSW Pensions Act or by s 104A of the Victorian Supreme Court Act, being the schemes affecting the plaintiffs, was a regulated superannuation fund for the purposes of the SIS Act; nor were the requirements of the definition in s 45(1) of "complying superannuation fund" met. However, s 45(6) of the SIS Act provided:

> "Despite subsection(1), if, at all times during a year of income when a fund was in existence, the fund was, or was part of, an exempt public sector superannuation scheme, the fund is a complying superannuation fund in relation to the year of income for the purposes of Part IX of the [ITAA]."

The effect of the definition in s 10(1) of "exempt public sector superannuation scheme" was to identify its content as that specified in regulations. The effect of reg 1.04(4A) of the Superannuation Industry (Supervision) Regulations 1994 ("the SIS Regulations") has been that, at all material times, what were identified therein as "Schemes established by or operated under … [the NSW Pensions Act and the Victorian Supreme Court Act]" were exempt public sector superannuation schemes.

The surcharge legislation

62 It is with the implementation by the Commonwealth of its third policy that this litigation is more immediately concerned. In introducing the Budget, the Commonwealth Treasurer on 20 August 1996 announced a range of measures which, it was said, were designed to make superannuation arrangements fairer, more flexible and better suited to the needs of the modern workforce. In particular, it was announced that tax deductible contributions made to superannuation funds by or on behalf of "high income earners" were to be subject to a surcharge of up to 15 per cent "payable by the funds". Further, it was said that, with respect to service *before* the Budget announcement, the new measure would not affect "benefits paid under an unfunded or Constitutionally protected scheme". The apparent incongruity in singling out for the same impost, dubbed a

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70 Case Stated, par 108A.

"surcharge", those "high income earners" who had had the benefit of concessional deductions for contributions and those in the public sector who had non-contributory arrangements was not addressed in the announcement.

63 Subsequently, in the Second Reading Speech for the bills for what became the *Superannuation Contributions Tax Imposition Act* 1997 (Cth) ("the Surcharge Imposition Act") and the *Superannuation Contributions Tax (Assessment and Collection) Act* 1997 (Cth) ("the Surcharge Assessment Act"), the responsible Minister said[71]:

> "The superannuation system has been inequitably biased in favour of high income earners. Those high income earners have been benefiting from the concessional taxation treatment of superannuation to a much greater extent than low income earners. The introduction of the superannuation contributions surcharge for high income earners is this government's response to ensure that the superannuation system is more equitable for all Australians, while also ensuring that superannuation remains an attractive savings option."

64 The term "surcharge" has been used to describe a penalty imposed for late returns to revenue authorities and a sum not passed on an audit and required to be refunded by the person responsible. The Minister appears to have had in mind some other meaning to identify a new subject of taxation without using that word. At all events, counsel for the plaintiffs emphasised that persons in their position had not participated in this announced mischief; the non-funded pensions schemes for judicial officers had attracted no tax deductible contributions.

65 The oddly drawn s 34 of the Surcharge Assessment Act stated that the statute did not apply in any circumstance where its application would "or might" result in a constitutional contravention. Section 10 imposed liability to pay the surcharge not upon members but upon the superannuation provider, if that entity was the "holder" of the contributions. The arrangements in the private sector referred to at [60] for non-contributory unfunded benefits to which the SIS Act does not apply will not be "unfunded defined benefits superannuation schemes" (within the meaning of s 43 of the Surcharge Assessment Act) which attract the surcharge[72]. The Surcharge Assessment Act has been amended on various

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71 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 13 February 1997 at 887.

72 Case Stated, par 108A.

occasions. Section 7(4) now provides[73] that the surcharge is not payable under the Surcharge Assessment Act if, under the Protected Funds Assessment Act, it is payable on the contributions in question.

66 Section 4 of the Surcharge Imposition Act imposed by force of that provision the surcharges identified by the Surcharge Assessment Act. Section 9 stated that the Surcharge Imposition Act did not impose a tax on property of any kind belonging to a State, within the meaning of s 114 of the Constitution. Further, s 8, to the extent necessary, read down s 4 so as to save it from imposing in relation to a State or an authority or officer of a State a surcharge the imposition of which would exceed the legislative power of the Commonwealth. No such provision is found in the Protected Funds Imposition Act; as will appear, that legislation is drawn so as to avoid any operation of s 114 by imposing liability for the impost not upon the States but the plaintiffs themselves.

67 It is convenient now to return to the particular legislation with which this litigation is concerned, the Protected Funds Assessment Act and the Protected Funds Imposition Act.

The protected funds legislation

68 In the Second Reading Speech on the bill for the Protected Funds Assessment Act, the responsible Minister said[74] that the bill would ensure that the superannuation contributions surcharge announced by the Treasurer on 20 August 1996 would apply "to members of constitutionally protected superannuation funds". The Minister continued[75]:

> "This bill complements the surcharge legislation already passed by the parliament. The existing superannuation contribution[s] surcharge legislation imposes surcharge on superannuation providers. The legislation cannot apply to certain state superannuation funds because they are protected from revenue measures under the constitution.

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73 As a result of the amendment made by Sched 4 to the *Superannuation Contributions and Termination Payments Taxes Legislation Amendment Act* 1997 (Cth).

74 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 2 October 1997 at 9123.

75 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 2 October 1997 at 9123-9124.

> This bill strengthens the equity of the surcharge measure by ensuring that the surcharge will apply to all high income earners. …
>
> The collection mechanism under the bill is similar to that which applies to members of unfunded defined benefits superannuation funds under the [Surcharge Assessment Act]. The only difference is that the liability to pay the surcharge will rest with the member rather than the superannuation fund. The surcharge liability for a member for a year will be accumulated in a surcharge debt account, maintained by the Commissioner of Taxation, for the member and will be payable by the member when the member's superannuation benefit becomes payable. The member will have the option of paying off the debt as it arises once an amount of surcharge has been assessed."

69 The emphasis upon strengthening the equity of the surcharge measure is indicative of a reluctance to admit of exceptions or qualifications to a particular revenue-raising policy. But the Constitution itself may require the allowance of exceptions. In that respect, attention was paid by the legislature to what was seen as the requirements of s 114. The plaintiffs submit that, as a result, the protected funds legislation implemented a different scheme from that in the Surcharge Imposition Act and the Surcharge Assessment Act. In particular, they point to the imposition of a surcharge not upon the superannuation provider, as with the general legislation, but upon members and to the apparent reason for this in a view taken as to the operation of s 114 of the Constitution. Whether that view, apparent from the Second Reading Speech, was soundly based may be open to question but should be acknowledged to the extent that it helps disclose the legislative purpose of the impugned statutes. However, what is at the heart of the present litigation is whether, in framing the laws in this form, there was a failure to have sufficient regard to another constitutional imperative, that expressed in the *Melbourne Corporation* doctrine.

70 The plaintiffs further contend that, as it applies to them (even if not to all persons taxed by this legislation), the essence of the legislative scheme is a fiction. The State is treated as having made actuarially determined contributions into a superannuation fund on behalf of the plaintiffs and those "contributions" are treated as if held in the fund on trust for them; in respect of that non-existent state of affairs, the legislation purports to impose a tax as if those notional contributions existed and were held for or otherwise available to the plaintiffs.

71 The plaintiffs do not contend that the statutes in question operate solely by resort to the fictions they identify. Rather, they submit, with particular support from New South Wales, that tax is imposed by two distinct criteria of liability which are to be seen from s 9 of the Protected Funds Assessment Act. The first is identified as the settlement of funds in what might be described as ordinary

superannuation funds which are "constitutionally protected superannuation funds", where the tax is on actual contributions; the second, which applies to the plaintiffs, is the derivation of income at a rate determined by the "notional surchargeable contributions factor". It will be necessary to return to these submissions when considering the further ground of alleged invalidity, that based in the operation of s 55 of the Constitution.

Federal unfunded schemes

72 Reference also should be made to the position respecting benefits payable to members of unfunded non-contributory Commonwealth superannuation schemes. There is no challenge made to the scheme adopted here[76]. It differs to that in the legislation of which the plaintiffs complain. In particular, with respect to members of this Court and of the other courts created by the Commonwealth Parliament, the legislation provides for the reduction in benefits paid under the *Judges' Pensions Act* 1968 (Cth). The changes to that statute do not apply in respect of a Ch III Justice or judge appointed before the commencement of the changes to the latter statute[77]. This accurately reflects an understanding, common to Art III of the United States Constitution, that the "remuneration", which s 72(iii) of the Constitution states shall not be diminished during continuance in office, includes non-contributory pension plan entitlements which are accruing under the federal judicial pensions statute[78].

The liabilities of the plaintiffs

73 Both the Protected Funds Imposition Act and the Protected Funds Assessment Act came into force on 7 December 1997. Section 7 of the latter Act states:

> "This Act does not apply to a person who is a member [of a constitutionally protected superannuation fund] because he or she is a judge of a court of a State at the commencement of this Act."

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76 By the *Superannuation Contributions Tax (Application to the Commonwealth) Act* 1997 (Cth), the *Superannuation Contributions Tax (Application to the Commonwealth – Reduction of Benefits) Act* 1997 (Cth) and the *Superannuation Legislation Amendment (Superannuation Contributions Tax) Act* 1997 (Cth).

77 *Superannuation Legislation Amendment (Superannuation Contributions Tax) Act* 1997 (Cth), Sched 5, Item 21.

78 *United States v Hatter* 532 US 557 at 574, 583 (2001).

The expression "constitutionally protected superannuation fund" is given by s 38 of the Protected Funds Assessment Act "the same meaning" as has the expression "constitutionally protected fund" in Pt IX of the ITAA. It will be recalled that the definition in Pt IX operates by reference to reg 177 (including Sched 14) of the Income Tax Regulations. This yoking of reg 177, through the medium of Pt IX, to a pivotal provision of the Protected Funds Assessment Act is a significant matter for present and later purposes.

74 The Commissioner of Taxation has the general administration of the Protected Funds Assessment Act. The Commissioner contends and the plaintiffs dispute that the first plaintiff is liable to pay superannuation contribution surcharge for the financial years 1998-1999 and 1999-2000 and that the second plaintiff is liable as well for the financial years 1996-1997 and 1997-1998. The alleged liability arises by virtue of accruing pension entitlements under the NSW Pensions Act and the Victorian Supreme Court Act.

The position of the second plaintiff

75 As has been indicated at [44], the first plaintiff was appointed a judge of the New South Wales Supreme Court after 7 December 1997, but the second plaintiff was appointed a Master of the Supreme Court of Victoria before that date. The application to her of the Protected Funds Assessment Act depends upon the view that, although a Master, she was not, within the meaning of s 7 of that statute, "a judge of a court of a State" at its commencement.

76 Section 75(2) of the Victorian Constitution states:

> "The [Supreme] Court consists of the Judges of the Court and the Masters of the Court."

On the other hand, s 25 of the NSW Supreme Court Act reads:

> "The [Supreme] Court shall be composed of a Chief Justice, a President of the Court of Appeal and such other Judges of Appeal and Judges as the Governor may from time to time appoint."

77 Upon the proper construction of s 7 of the Protected Funds Assessment Act, the second plaintiff was "a judge of a court of a State" at the relevant time and the legislation under which she has been assessed has no application to her. Provisions with respect to pensions for Supreme Court Masters are made by the Victorian Supreme Court Act; those for judges of the Supreme Court by Pt III of the Victorian Constitution. Section 7 of the Protected Funds Assessment Act is so drawn as to exclude certain persons to whom the statute otherwise would apply because they are members of a "constitutionally protected fund".

Schedule 14, to which reference has been made, lists both the Victorian Supreme Court Act and the Victorian Constitution. The only "fund" established by the former statute is to be seen in the pension entitlement provisions for Masters. The inclusion in the Schedule of the Victorian Supreme Court Act can serve no other purpose. This supports the construction of the phrase "a judge of a court of a State" to include the second plaintiff.

78 To that may be added the specification, in s 75(2) of the Victorian Constitution, of the Supreme Court as a court consisting both of judges and Masters. Reference to the significance of s 75(2) was made in *Harris v Caladine*[79] by several members of the Court. Mason CJ and Deane J said[80]:

> "[T]he ways in which a court may be organized or structured for the purpose of exercising its jurisdiction, powers and functions admit of considerable variation. As Windeyer J noted in *Kotsis* [*v Kotsis*], '[a]ccording to the tradition of the common law, a superior court of record is a court sitting in banc for the administration of justice'[81]. However, as his Honour went on to point out:
>
> > 'In the course of time it became settled that, for some purposes, the jurisdiction of a superior court of common law could be exercised by a single judge. For the due administration of justice courts had officers who in some cases were, and are, empowered to perform specified functions on behalf of the courts to which they belonged.'"

Their Honours went on to describe s 75(2) of the Victorian Constitution as marking[82]:

> "a further stage in the process of evolutionary development in the constitution of courts for purposes connected with the exercise of their jurisdiction. Although they are developments which have taken place since 1900, they serve to confirm what we have already said, namely, that a court may be organized or structured in a wide variety of ways for the purpose of exercising its jurisdiction."

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79 (1991) 172 CLR 84.

80 (1991) 172 CLR 84 at 91. See also per Dawson J at 117-118.

81 (1970) 122 CLR 69 at 91.

82 (1991) 172 CLR 84 at 91.

79 The conclusion that, in respect of the Supreme Court of Victoria, the term "judge" in s 7 of the Protected Funds Assessment Act includes both Masters and judges is not determinative of the position of officeholders in other State courts. The answer in each case will turn upon the relevant State legislation and the contents of Sched 14 to the Income Tax Regulations.

80 However, with respect to the second plaintiff, question 1(b) of the case stated should be answered "No" and question 2 does not arise. The second plaintiff may be dismissed from further consideration in these reasons; they will bear upon the position of the first plaintiff.

81 It is convenient to return to consideration of the provisions under which the first plaintiff has been assessed.

The position of the first plaintiff

82 Section 5 of the Protected Funds Assessment Act states:

> "The object of this Act is to provide for the assessment and collection of the superannuation contributions surcharge payable on surchargeable contributions for high-income members of constitutionally protected superannuation funds."

83 Section 4 of the Protected Funds Imposition Act imposes the superannuation contributions surcharge that is payable for each financial year on the surchargeable contributions of a member as computed under the Protected Funds Assessment Act. The rate of the surcharge is fixed by s 5 of the Protected Funds Imposition Act.

84 The surcharge is payable on the member's surchargeable contributions for the financial year that began on 1 July 1996 or a later financial year (Protected Funds Assessment Act, s 8(1)). However, no surcharge is payable for a financial year unless the member's adjusted taxable income for the financial year is greater than the surcharge threshold for the financial year (s 8(2)). The adjusted taxable income of the first plaintiff for the financial years in question was in each case greater than the surcharge threshold for that financial year.

85 The effect of definitions in s 38 of the Protected Funds Assessment Act is that a scheme for the payment of superannuation, retirement or death benefits established by or under a law of a State is a "public sector superannuation scheme"; a "defined benefits superannuation scheme" includes a public sector superannuation scheme which is, within the meaning of the SIS Act, an "exempt public sector superannuation scheme". As already indicated, at [61], the effect of reg 1.04(4A) of the SIS Regulations is that schemes established by or operated

under the NSW Pensions Act are exempt public sector superannuation schemes. This definitional chain leads to the result that the State statutory scheme for the provision of benefits to the first plaintiff is a "defined benefits superannuation scheme".

86 This is significant for the operation of s 9 of the Protected Funds Assessment Act. This sets out to explain what are the surchargeable contributions of a member for a financial year. A definition of "surchargeable contributions" is provided by s 9. As indicated at [71], it falls into two halves. The first deals, in broad terms, with "contributed amounts" paid by the trustee of a constitutionally protected superannuation fund (s 9(2), (3)). The second deals (s 9(4)-(7)) with defined benefits superannuation schemes where there are no actual contributions and the statutory fictions of which the first plaintiff complains are employed. In both categories, the surcharge for each financial year is payable not by the superannuation provider, but by the member (s 11).

87 In the latter category, that in which the first plaintiff finds himself, the "surchargeable contributions" are identified in s 9(4) as:

> "the amounts that constitute the actuarial value of the benefits that accrued to, and the value of the administration expenses and risk benefits provided in respect of, the member for the financial year".

A component in the formula set out in s 9(5) for the identification of that "actuarial value" is identified as the "notional surchargeable contributions factor". That is specified in s 9(5) as meaning the factor applying to the member for the financial year worked out by an eligible actuary in accordance with "the method set out in Superannuation Contributions Ruling SCR 97/1". That ruling ("SCR 97/1") was issued by the Commissioner of Taxation on 13 August 1997 to provide actuaries with a standard to follow when providing certificates which deal with the "notional surchargeable contributions factor" as defined in s 43 of the Surcharge Assessment Act. The effect of s 12 of the Protected Funds Assessment Act is to require New South Wales as a "superannuation provider" of the benefits of the first plaintiff to engage an actuary to make the calculations of "surchargeable contributions" required under s 9. Section 12(2) requires each "superannuation provider" to report to the Commissioner of Taxation surchargeable contributions which have been computed in the required way.

88 The first plaintiff emphasises that the actuary is obliged to undertake the calculation by reference to the amount of contributions which would have actually to be made to a fund, if one existed, in order to produce the pension benefits that it is supposed the judicial officer might receive upon retirement; further, for the purposes of that supposition, the actuary is required to assume that the judicial officer will qualify for a pension at an actuarially determined

average age for judicial retirement, will have a spouse and dependants of number and circumstances corresponding to an actuarially determined mean, and will survive retirement for a period corresponding to an actuarially determined age of death for retired judicial officers. Thus the calculations incorporate assumptions for groups of people on matters such as matrimonial status, age of retirement and mortality, with the result that in many cases the pension benefits actually received will be significantly less than that assumed in the calculation of the notional surcharge contributions factor for s 9(5) of the Protected Funds Assessment Act.

89 Further, and it would appear inevitably, the "surchargeable contributions" calculated in this fashion are high proportions of the salary of the judicial officers. The first plaintiff has been assessed to surcharge for the years 1998-1999 and 1999-2000 on surchargeable contributions fixed at more than 61 per cent of his annual remuneration. If he were to pay the contributions surcharge which had been assessed, he would be doing so in respect of potential benefits under the State legislation which might never be received. In the event, there may be failure to comply with one or other of the statutory preconditions for receipt of those benefits under the State laws. There is a dispute between the parties as to whether, if events so transpired, the amounts paid to the Commonwealth would be refundable under the provisions of the *Taxation Administration Act* 1953 (Cth).

90 Section 15 of the Protected Funds Assessment Act makes provision for deferment of liability to pay the surcharge and for interest to accrue on the deferred amount in the "surcharge debt account" to be kept by the Commissioner for each member of a constitutionally protected superannuation fund. Interest is charged annually on the balance and added to the amount by which the surcharge debt account is in debit. The result is that that debit, which includes interest on interest, will continue to grow whilst the judicial officer remains in service after reaching that age at which, under the relevant State law, there has fully accrued the right to retire with a pension; this increase in the debit will continue even though the worth of the pension is diminishing because it would be payable for a shorter period of time.

91 Tables accompanying the case stated provide examples where the amount payable by a judicial officer upon retirement to discharge the debit in the surcharge debt account can exceed the amount which would be payable under the State scheme in the first year of retirement. For example, if the first plaintiff lived and served until the statutory retirement age for those in his office, his surcharge and interest liability would be in the order of $550,000. That sum would be more than double the gross annual pension (before income tax) to which, as now estimated, he would be entitled at that time.

Construction issues

92 It is convenient to turn to the questions of construction which, if resolved by acceptance of the first plaintiff's submissions, would deny the application to him of the provisions respecting the surcharge. Section 3 of the Protected Funds Imposition Act gives to those expressions used therein which are defined in the Protected Funds Assessment Act the same meaning as in that statute.

93 The first point turns upon the definition in s 38 of the Protected Funds Assessment Act of "constitutionally protected superannuation fund". It is there said that this "has the same meaning" as another term, namely "constitutionally protected fund", "has in Pt IX of the [ITAA]". Liability for the surcharge is imposed by s 11 upon those who are "members" of a constitutionally protected superannuation fund. The first plaintiff denies that, upon the proper construction of the legislation, he is a member of such a fund.

94 The reference to Pt IX of the ITAA directs the reader to s 271A of that statute. That has the purpose of limiting the reach of the revenue law by exempting from tax income derived from a "constitutionally protected fund". The definition of that term in s 267(1) identifies "a fund" declared by reg 177 of the Income Tax Regulations (which incorporates by reference Sched 14) to be a constitutionally protected fund. The range of State legislation listed in Sched 14 establishes schemes which provide a variety of benefits, including pensions and lump sum payments; some of the schemes are funded wholly or in part by contributions made by or on behalf of members, others are not; there are funds the assets of which belong to the State and others where benefits are paid directly from the State consolidated revenue fund. In addition to the NSW Pensions Act, Sched 14 identifies a number of non-contributory schemes with payments to be made out of the Consolidated Revenue[83]. Also included are contributory arrangements under a range of public sector legislation[84]. Hence, some schemes will fall into the first half of the definition of surchargeable contributions in s 9 of the Protected Funds Assessment Act and others, of which the NSW Pensions Act is one, will fall into the second as defined benefits superannuation schemes.

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83 This includes the *Attorney-General and Solicitor-General Act* 1972 (Vic), the *Coal Mines (Pensions) Act* 1958 (Vic), the *Mint Act* 1958 (Vic) and the *Public Prosecutions Act* 1994 (Vic).

84 This includes the *Government Employees Superannuation Act* 1987 (WA), the *Parliamentary Superannuation Act* 1974 (SA), the *Police Superannuation Act* 1990 (SA), the *Southern State Superannuation Act* 1994 (SA), the *Superannuation Act* 1988 (SA), the *Judges' Contributory Pensions Act* 1968 (Tas) and the *Solicitor-General Act* 1983 (Tas).

95 The statutes listed for South Australia display perhaps the greatest diversity. There are several species of public sector "constitutionally protected" superannuation schemes. They include: (i) those where employee contributions are paid into a fund which is the property of the State; entitlements are paid from the Consolidated Account which is reimbursed from the fund; (ii) schemes in which both employer and employee contributions are paid into such a fund; (iii) schemes where employer and employee contributions are paid into a fund vested in a trustee and entitlements are paid from that fund; and (iv) schemes where there are no contributions by employees or officers, no fund, and entitlements are paid from the Consolidated Account. Thus, in South Australia, in some cases entitlements in respect of contributory schemes (as well as non-contributory schemes) will be received by payments from the Consolidated Account.

96 In the case of such legislative arrangements for contributory schemes, it is easy to speak of a fund which derives income, so that the exemption conferred by s 271A of the ITAA applies. That does not so readily appear where the State legislation both establishes non-contributory schemes and provides for payments secured upon the Consolidated Revenue. Those non-contributory schemes identified in Sched 14 are not limited to those respecting judicial officers, the law officers and vice-regal representatives. However, they are so limited in the case in New South Wales and Victoria, save for the schemes established by the *Coal Mines (Pensions) Act* 1958 (Vic) and the *Mint Act* 1958 (Vic). But the pensioners under these latter two statutes represented a closed class (of about 91 persons in all) when the protected funds legislation began its operation; the result is that, despite the terms of Sched 14, the legislation has no impact upon them. This incongruity is a consequence of the direct translation of the whole of Sched 14 from its earlier purpose to that of the later legislation.

97 It is against that background that reg 177 falls for consideration. The text is as follows:

> "For the definition of 'constitutionally protected fund' in section 267 of the [ITAA], each of the following funds is declared to be a constitutionally protected fund:
>
> (a) a fund of the kind to which, in the absence of section 271A of the [ITAA], Part IX of the [ITAA] would apply, established by:
>
> (i) a State Act specified in Schedule 14; or

(ii) a specified provision of a State Act specified in Schedule 14;

(b) the fund known as the Police Occupational Superannuation Scheme, established in South Australia under Trust Deed."

98 Paragraph (a) of the regulation is to be understood as presenting two criteria, the first of which is broader than the second, and both of which are to be satisfied. The first criterion is the identification of a fund established by State legislation specified in Sched 14. The second requires identification, from among that list, of a fund of a kind to which, in the absence of the exemption conferred by s 271A, Pt IX of the ITAA would apply. The result is that, for more abundant caution, there have been included in Sched 14 some statutes which make arrangements not involving the establishment of funds deriving income. Nevertheless, in such cases, there is no "constitutionally protected fund" because there is no fund of a kind to which, in the absence of s 271A, Pt IX would apply. In this way, the legislative purpose of conferring an exemption from what otherwise would be the scope of Pt IX is satisfied.

99 The legislative purpose in the Protected Funds Assessment Act is quite different. The objective here is to create, or at least to identify, by the notion of a member of a constitutionally protected superannuation fund, a class of taxpayers and a "subject of taxation" within the meaning of s 55 of the Constitution. References already made to the provisions in the second half of s 9 dealing with the "notional surchargeable contributions factor" indicate that the legislature had in mind the imposition of taxation partly by reference to notional or fictional constructs.

100 In that setting, the construction of the definition of "constitutionally protected superannuation fund" in s 38 of the Protected Funds Assessment Act turns in large degree upon the statement that it "has the same meaning" as does the phrase just considered in Pt IX of the ITAA. Taken at one level, the phrase cannot have the same meaning in the ITAA as it has in the Protected Funds Assessment Act. That which is identified or indicated by the first use is the existence of an exemption to a certain species of revenue liability; that which is identified or indicated by the second use is the incurring of another species of revenue liability.

101 However, the phrase "the same meaning" is to be taken as used at the semantic level appropriate to the respective subject-matters of the two statutes[85].

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85 cf *Maunsell v Olins* [1975] AC 373 at 391; *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 398, 400-401.

To read the definition as excluding non-contributory arrangements under a range of particular State laws would not conform to the scheme of the Protected Funds Assessment Act[86]. The definition is not to be given the same literal application as it has in Pt IX of the ITAA if to do so would cause to miscarry the hypothesis upon which it is adopted by the other statute[87].

102 Further, in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*, Mason and Wilson JJ remarked[88]:

> "The fact that the Act is a taxing statute does not make it immune to the general principles governing the interpretation of statutes. The courts are as much concerned in the interpretation of revenue statutes as in the case of other statutes to ascertain the legislative intention from the terms of the instrument viewed as a whole."

103 The definition in s 267(1) of the ITAA identifies "a fund" declared by the regulations to be a constitutionally protected fund; the only such regulation is reg 177. That regulation itself has difficulties of construction to which reference has been made and to these the requirement of the "same meaning" in s 38 of the Protected Funds Assessment Act is to be accommodated. Whether or not, given s 114 of the Constitution, Pt IX of the ITAA would apply in the absence of the exemption conferred in s 271A thereof for that purpose is not significant. What is significant for the purposes of the definition in the Protected Funds Assessment Act is the treatment as "funds" of the arrangements established by the State legislation listed in Sched 14. This includes the New South Wales legislation upon which the first plaintiff relies for his pension entitlements. The first construction point fails.

104 Next, the first plaintiff submits that, even if he is a "member" for the purposes of the definition because he is a member of a constitutionally protected superannuation fund, nevertheless ss 8(1) and 9(4) of the Protected Funds Assessment Act do not apply. This is said to be because, contrary to the requirement in the definition of "surchargeable contributions" in s 9(4), he is not "a member of a defined benefits superannuation scheme". The reason given is that the first plaintiff is not a "defined benefit member" of a "public sector

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86 cf *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 321-322.

87 cf the treatment by Mason J of s 79 of the Judiciary Act in *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 95.

88 (1981) 147 CLR 297 at 323.

superannuation scheme". The expression "defined benefit member" is defined in s 38 of the Protected Funds Assessment Act as meaning:

> "a member entitled, on retirement or termination of his or her employment, to be paid a benefit defined, *wholly or in part, by reference to* either or both of the following:
>
> (a) the amount of:
>
> (i) the member's salary at a particular date, being the date of the termination of the member's employment or of the member's retirement or an earlier date; or
>
> (ii) the member's salary averaged over a period before retirement;
>
> (b) a stated amount." (emphasis added)

105 The first plaintiff holds a statutory office and, in the common law sense of the term, is not an employee. However, the term "employee" and cognate expressions may take further colour from particular statutory contexts[89]. At the time of the commencement of the Protected Funds Assessment Act, the list of statutes in Sched 14 brought within the scope of the statute a range of officeholders who would not be treated as employees of any State. The reference in the definition of "defined benefit member" to "employment" is to be read accordingly.

106 The third construction point fixes upon the requirement in the definition of "defined benefit member" that there be an entitlement on retirement or termination of employment to be paid a benefit which "wholly or in part" is defined "by reference to" the salary of the member at the date of the termination or retirement. It is said that the pension that would be payable to the first plaintiff under the NSW Pensions Act is referable to the salary from time to time of current officeholders; it is not frozen by reference to the particular officeholder's remuneration at the date of retirement or termination.

107 The first plaintiff is entitled under s 29 of the NSW Supreme Court Act to be paid remuneration in accordance with the *Statutory and Other Offices Remuneration Act* 1975 (NSW). The effect of s 21(1) and Sched 1 of that statute is to forbid the reduction of this remuneration. Remuneration at the time of retirement or termination of service of the first plaintiff will form a basal

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89 *Holly v Director of Public Works* (1988) 14 NSWLR 140 at 150-151.

component of what thereafter becomes the pension sums paid from time to time. Pensions are calculated as percentages of the "notional judicial salary" from time to time of the retired or deceased judge. Section 2(2) of the NSW Pensions Act identifies this by reference to the salary payable from time to time to the holder of a judicial office of equivalent status to that held at the death or retirement of the judge in question. In that way, the first plaintiff is entitled after retirement or termination to be paid a benefit "in part" defined "by reference" to a salary at the date of termination or retirement. In that way the definition of "defined benefit member" is satisfied. Further, the provisions in ss 13-15 of the NSW Pensions Act with respect to lump sum benefits provide for the calculation of lump sums immediately by reference to final salary and years of service.

108 The satisfaction in this way of the criteria in par (a) of the definition of "defined benefit member" makes it unnecessary to consider the submissions with reference to par (b), the specification of "a stated amount".

109 Finally, the first plaintiff fixes upon the specification in the definition of "surchargeable contributions" in s 9(4) of the Protected Funds Assessment Act of "amounts that constitute the actuarial value of the benefits that accrued to ... the member for the financial year". It is submitted that no "benefit" can be said to "accrue" to him in respect of any financial year before his retirement or termination of service. However, the content of the expression in question in s 9(4) is found in succeeding provisions of that section. The phrase "the benefits that accrued to … the member for the financial year" has no independent operation. Rather, there is in s 9(4) a composite expression "actuarial value of the benefits that accrued to, and the value of the administration expenses and risk benefits provided in respect of, the member for the financial year". The content of that composite expression is detailed in s 9(5) in such a fashion as to bring into operation the method stipulated in SCR 97/1. It may be, as the first plaintiff contends, that the application of this method involves notional or fictional elements. But this circumstance does not make good the construction point respecting s 9(4).

110 For these reasons, in the case of the first plaintiff, question 1(a) of the case stated should be answered "Yes". It then becomes necessary to answer question 2 which poses the various contentions respecting invalidity.

Constitutional implications

111 The plaintiffs rely in several ways upon principles derived from *Melbourne Corporation v The Commonwealth*[90], in particular, to restrain what

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90 (1947) 74 CLR 31.

otherwise would be the reach of the power of the Parliament to make laws under s 51(ii) of the Constitution with respect to:

> "Taxation; but so as not to discriminate between States or parts of States".

112 The relevant fundamental constitutional conception represents what, after the rejection in the *Engineers' Case*[91] of the earlier doctrine, remained as an implication necessarily to be derived from the federal structure established by the Constitution and consistent with its express terms.

113 In *Australian Capital Television Pty Ltd v The Commonwealth*[92], in a passage later adopted by Brennan CJ in *McGinty v Western Australia*[93], Mason CJ said:

> "[W]here the implication is structural rather than textual it is no doubt correct to say that the term sought to be implied must be logically or practically necessary for the preservation of the integrity of that [constitutional] structure".

Thereafter, in *Kruger v The Commonwealth*[94], Dawson J said that:

> "[t]he limitation upon the powers of the Commonwealth Parliament which prevent it from discriminating against the States is derived from … considerations … articulated by Dixon J in *Melbourne Corporation v The Commonwealth*[95] when he said:
>
> > 'The foundation of the Constitution is the conception of a central government and a number of State governments separately organised. The Constitution predicates their continued existence as independent entities.'"

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

92 (1992) 177 CLR 106 at 135.

93 (1996) 186 CLR 140 at 168-169; see also at 188, 230-232, 291.

94 (1997) 190 CLR 1 at 64. See also his Honour's observations in *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 260.

95 (1947) 74 CLR 31 at 82.

114 Sir Owen Dixon, shortly after *Melbourne Corporation*, said that in a dual political system, such as a federal system, one did not "expect to find either government legislating for the other"[96]. Nevertheless, the Constitution contemplates federal laws directed in terms to the States. By a law with respect to trade and commerce the Parliament may forbid, as to railways, certain preferences or discrimination by any State (s 102). The Parliament may prescribe the number of judges of a State court to exercise federal jurisdiction (s 79), having conscripted State courts for the investing of federal jurisdiction (s 77(iii)). The Parliament may annul certain State inspection laws (s 112), consent to the raising of any naval or military force (s 114), and oblige States to make provision for the detention in their prisons of those accused or convicted of Commonwealth offences (s 120). Most significantly, it may, on terms, grant financial assistance to any State (s 96) and, on just terms, acquire State property (s 51(xxxi)). In a sense, these laws "single out" the States but would not necessarily do so in the manner or to the degree with which the *Melbourne Corporation* doctrine is concerned.

115 Because the limitation on power is derived from the federal structure, it is difficult, if not impossible, to articulate it except in negative terms which are cast at a high level of abstraction – that the Commonwealth's legislative powers do not extend to making a law which denies one of the fundamental premises of the Constitution, namely, that there will continue to be State governments separately organised. In the cases which have considered this implication, including *Melbourne Corporation*, it is sought to give the proposition more precise content by referring to "discrimination".

Melbourne Corporation and discrimination

116 It is important for an evaluation of the first plaintiff's submissions to examine what is involved in the notion of "discrimination" said to be drawn from *Melbourne Corporation* and succeeding decisions respecting intergovernmental immunities. The notion of "immunity" here is concerned with freedom from legislative affectation[97]. In *Re State Public Services Federation; Ex parte*

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96 *In re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 529.

97 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560.

Attorney-General (WA)[98], Toohey J identified a debate underlying *Queensland Electricity Commission v The Commonwealth*[99]:

> "as to whether discrimination against a State is but an illustration of a law impairing the capacity of a State to govern or whether it has a standing of its own".

117 It is necessary also to distinguish the specific reference in s 51(ii) to discrimination. A law with respect to taxation, in general, does not discriminate in the sense spoken of in s 51(ii) if its operation is general throughout the Commonwealth even though, by reason of circumstances existing in one or more of the States, it may not operate uniformly[100]. It is for that reason that if, as appears to be the case, the *Judges' Contributory Pensions Act* 1968 (Tas) establishes a contributory scheme in contrast to the New South Wales and Victorian legislation which makes provision for the plaintiffs, that circumstance does not render the Protected Funds Imposition Act or Protected Funds Assessment Act laws which in their application to judicial officers discriminate between States.

118 The phrase in s 51(ii) is "discriminate between". Likewise, in other provisions of the Constitution where "discrimination" is used expressly, notably ss 102 and 117, and in judicial interpretation of the Constitution, notably that of s 92, the primary sense is of "discrimination between"[101]. The essence of the notion of discrimination is said to lie in the unequal treatment of equals or the equal treatment of those who are not equals[102], where the differential treatment

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98 (1993) 178 CLR 249 at 296.

99 (1985) 159 CLR 192.

100 *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735 at 764; affd *W R Moran Pty Ltd v Deputy Federal Commissioner of Taxation (NSW)* (1940) 63 CLR 338 at 349; [1940] AC 838 at 857; *Conroy v Carter* (1968) 118 CLR 90 at 101.

101 *I W v City of Perth* (1997) 191 CLR 1 at 36-37.

102 *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 240; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 480; *Cameron v The Queen* (2002) 76 ALJR 382 at 385 [15]; 187 ALR 65 at 68.

and unequal outcome is not the product of a distinction which is appropriate and adapted to the attainment of a proper objective[103].

119 The submission in the present litigation respecting *Melbourne Corporation* is that, at least in their application to the first plaintiff, the laws in question are beyond the taxation power because they discriminate against New South Wales by singling it out to place upon it special burdens or disabilities, the attainment of a constitutionally improper objective. But, even if that be so, where is the first step, the unequal treatment of equals or equal treatment of the unequal?

120 In *Melbourne Corporation* itself, in speaking of laws said to "discriminate" against the States, Latham CJ said[104]:

> "I have some difficulty in understanding how 'discrimination' in a precise sense can be shown in a law applying only to one person or class of persons in respect of a particular subject matter. Discrimination appears to me to involve differences in the treatment of two or more persons or subjects. Legislation with respect only to one or more persons or with respect only to one or more subjects is not, I suggest with respect, properly described as discriminating against other persons or other subjects simply because it leaves them alone. … In *New York v United States*[105] and the other cases to which I have referred in which it has been held that a law may be invalid on the ground of 'discrimination,' the word 'discrimination' is, I think, really used in the sense explained by *Douglas* J in *New York v United States*[106] – that is, singling out another government and specifically legislating about it."

121 To similar effect is the more recent statement by Professor Tribe, with reference to the apparent paradox in the United States decisions treating "discrimination" as the trigger for principles of intergovernmental immunity. He said[107]:

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103 *Street v Queensland Bar Association* (1989) 168 CLR 461 at 510-511; 548, 571-573, 582; *Cameron v The Queen* (2002) 76 ALJR 382 at 385 [15]; 187 ALR 65 at 68.

104 (1947) 74 CLR 31 at 60-61.

105 326 US 572 (1946).

106 326 US 572 (1946).

107 Tribe, *American Constitutional Law*, 3rd ed (2000), vol 1 at 1233.

> "[T]he very concept of an *immunity* (as reflected in the intergovernmental immunity doctrine) is more than a claim to *equal treatment*; indeed, it is a claim to *special* treatment beyond that to which otherwise similarly situated parties are entitled." (original emphasis)

122 In the joint judgment of six members of the Court in *Australian Education Union*, after discussing the judgment of Dixon J in *Melbourne Corporation*, their Honours continued[108]:

> "Although the comments of Dixon J were couched principally in terms of discrimination against States and the imposition of a particular disability or burden upon an operation or activity of a State or the execution of its constitutional powers, his Honour clearly had in mind, as did Latham CJ, Rich and Starke JJ, that the legislative powers of the Commonwealth cannot be exercised to destroy or curtail the existence of the States or their continuing to function as such[109]. Whether this means that there are two implied limitations, two elements or branches of one limitation, or simply one limitation is a question which does not need to be decided in this case."

123 At some stages in the argument in the present case it was suggested to be sufficient to render the legislation invalid in its application to the first plaintiff and other State judicial officers that the legislation treated them differently to beneficiaries under the unfunded private sector schemes to which reference is made at [60] and [65], and differently to Ch III judges, by imposing the taxation liability upon them rather than the provider of the benefits. This differential treatment was said, without more, to attract the *Melbourne Corporation* doctrine; the like was treated as the unalike and thereby the States were burdened in a "special way". That would appear to give "discrimination" a standing on its own which in this field of discourse it does not have.

124 There is, in our view, but one limitation, though the apparent expression of it varies with the form of the legislation under consideration. The question presented by the doctrine in any given case requires assessment of the impact of particular laws by such criteria as "special burden" and "curtailment" of "capacity" of the States "to function as governments". These criteria are to be

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108 (1995) 184 CLR 188 at 227.

109 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 56, 60 per Latham CJ, 66 per Rich J, 74 per Starke J, 82 per Dixon J; see also *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 337-338 per Dixon J.

applied by consideration not only of the form but also "the substance and actual operation" of the federal law[110]. Further, this inquiry inevitably turns upon matters of evaluation and degree and of "constitutional facts" which are not readily established by objective methods in curial proceedings. The cautionary remarks by Frankfurter J in *New York v United States*[111] respecting the judgment of issues of legislative validity by such criteria and methods of reasoning remain in point.

The scope of the doctrine

125 In *Queensland Electricity*[112], in a passage with which we respectfully agree, Dawson J referred to these difficulties as inherent in any attempt to formalise the *Melbourne Corporation* doctrine and added:

> "These difficulties explain why there has been a preference to speak in terms of those aspects of legislation which may evidence breach of the doctrine rather than to generalize in terms of the doctrine itself. Discrimination against the States or their agencies may point to breach as may a special burden placed upon the States by a law of general application."

The reasoning in the foundation decisions, and that in the contemporary United States cases, bears out the view later taken by Dawson J in this passage.

126 In *Essendon Corporation v Criterion Theatres Ltd*[113], decided six weeks before the argument in *Melbourne Corporation*, Dixon J had said[114]:

> "It is, perhaps, desirable to add that this case cannot be considered as one in which the Commonwealth comes in to avail itself of privileges, facilities or a course of business established by or under State law to

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110 *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 240; *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 249-250; *Industrial Relations Act Case* (1996) 187 CLR 416 at 500.

111 326 US 572 at 581 (1946). See also the discussion by Brennan J in *The Second Fringe Benefits Tax Case* (1987) 163 CLR 329 at 359-360.

112 (1985) 159 CLR 192 at 260.

113 (1947) 74 CLR 1.

114 (1947) 74 CLR 1 at 24.

> which a charge or even a tax is incident. In the *Panhandle Oil Co's Case*[115] the United States as a purchaser suffered the increase in price which resulted from the sales tax on the vendor, and *Holmes* J in reference to this said of the Federal Government, 'It avails itself of the machinery furnished by the State and I do not see why it should not contribute in the same proportion that every other purchaser contributes for the privileges that it uses. It has no better or other right to use them than any one else. The cost of maintaining the State that makes the business possible is just as necessary an element in the cost of production as labor or coal'[116]."

127 Section 48 of the *Banking Act* 1945 (Cth) ("the Banking Act"), the provision held invalid in *Melbourne Corporation*, was addressed to banks but impacted upon the States. It stated:

> "Except with the consent in writing of the Treasurer, a bank shall not conduct any banking business for a State or for any authority of a State, including a local governing authority."

128 Dixon J repeated the proposition that the States must accept the general legal system as it is established when they availed themselves "of any part of the established organization of the Australian community"[117]. However, s 48 attempted "to isolate the State from the general system" by denying it "the choice of the machinery the system provides"[118]. Williams J spoke of the deprivation by s 48 of "the use of banking facilities available to the general public"[119]. Both judges, in this context, spoke of discrimination against the States[120]. But they did so in response to the Commonwealth submission that the States, as well as private individuals, must accept the consequences that attend federal control of the banking system[121]. The course taken by Dixon J perhaps anticipated and responded to the apparent paradox later detected by Professor Tribe and noted at

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115 [*Panhandle Oil Co v Mississippi ex rel Knox*] 277 US 218 (1928).

116 277 US 218 at 224 (1928).

117 (1947) 74 CLR 31 at 84.

118 (1947) 74 CLR 31 at 84.

119 (1947) 74 CLR 31 at 100.

120 (1947) 74 CLR 31 at 84, 99-100 respectively.

121 (1947) 74 CLR 31 at 40-41.

[121]. It also reflected his Honour's position that, whilst generally expressed principles applied, as the first part of his judgment indicated[122], nevertheless[123]:

> "[t]he actual decision in the present case can be no wider than the constituent factors contained in s 48 require, however widely the principles which lead to it may be stated."

129 On the other hand, Rich J[124] and Starke J[125] both stressed the use by the States of banking facilities as essential to the efficient discharge by the States of their constitutional functions rather than the general milieu in which the States must operate.

130 Thereafter, in *Bank of NSW v The Commonwealth* ("the *Banking Case*")[126], Dixon J distinguished between (a) a federal law of general application which the States must take as they find it as part of the system enjoyed by the whole community, if they wish to avail themselves of the services or facilities regulated or determined by that federal law[127]; (b) a law which discriminates against the States and in that way singles them out in order to curtail their freedom in the execution of their constitutional powers; and (c) laws which, without discriminating against the States and singling them out, nevertheless operate against them in such a way as to be beyond federal power. The *Banking Case* fell in category (a); *Melbourne Corporation* in category (b); and, with respect to category (c), Dixon J referred to the discussion in *New York v United States*[128].

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122 (1947) 74 CLR 31 at 78-83.

123 (1947) 74 CLR 31 at 83.

124 (1947) 74 CLR 31 at 67.

125 (1947) 74 CLR 31 at 75.

126 (1948) 76 CLR 1 at 337-338.

127 Later, in *The Commonwealth v Cigamatic Pty Ltd (In Liquidation)* (1962) 108 CLR 372 at 378, Dixon CJ made the corresponding point respecting the choice by the executive arm of the Commonwealth to enter into sale of goods transactions, a field where the States had enacted laws of general application.

128 326 US 572 (1946).

131 In *Melbourne Corporation* itself, Dixon J[129] had referred to *New York v United States* as a decision "the various opinions in which will repay study". Reference to it was made also in the judgments of Latham CJ[130], Rich J[131] and Starke J[132]. In his extrajudicial writing, Sir Owen Dixon stressed the importance of the timely development of federalism doctrine in the United States at this period[133]. Accordingly, it is appropriate to look more closely at that decision and other American cases of the period in which *Melbourne Corporation* was decided, particularly those in which federal taxation laws were in question. What is said in those cases may well not represent the current state of authority in the United States[134], but an examination of them supports the tripartite analysis in the *Banking Case*; that is their significance for present purposes.

The United States decisions

132 In *Helvering v Gerhardt*[135], the Supreme Court held that the salaries of employees of the Port of New York Authority, a corporation created by compact between the States of New York and New Jersey, were not immune to the imposition of taxation by a federal law of general application. The Court referred to *McCulloch v Maryland*[136], saying that the State law there held invalid "was aimed specifically at national banks and thus operated to discriminate against the

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129 (1947) 74 CLR 31 at 81.

130 (1947) 74 CLR 31 at 47, 58-61.

131 (1947) 74 CLR 31 at 67.

132 (1947) 74 CLR 31 at 71-72.

133 Dixon, "Marshall and the Australian Constitution", (1955) 29 *Australian Law Journal* 420 at 423-424; Dixon, "Mr Justice Frankfurter: A Tribute from Australia", (1957) 67 *Yale Law Journal* 179 at 183-184. See also Sawer, *Australian Federal Politics and Law 1929-1949*, (1963) at 210-212; Johnston, *The Effect of Judicial Review on Federal-State Relations in Australia, Canada, and the United States*, (1969) at 73-79.

134 See, for example, as to the "anti-discrimination rule", Tribe, *American Constitutional Law*, 3rd ed (2000), vol 1 at 914-916, 1233-1237.

135 304 US 405 (1938). The Opinion of the Court was delivered by Stone J.

136 4 Wheat 316 (1819) [17 US 159].

exercise by the Congress of a national power"[137]. The Court continued by saying that such discrimination later had been "recognized to be in itself a sufficient ground for holding invalid any form of state taxation adversely affecting the use or enjoyment of federal instrumentalities", and, further, that federal instrumentalities had been held immune even from "non-discriminatory state taxation"[138].

133 The Court in *Helvering* went on to refer to the application after 1870 of the governmental immunity doctrine in favour of the States. In particular, in *Collector v Day*[139], the salary of the respondent, a judge of a Massachusetts State court whose salary was fixed by law and payable out of the treasury of that State, had been held by the Supreme Court to be immune from federal income tax. In *Helvering*, the Supreme Court pointed out that the implied limitation upon federal power necessarily proceeded upon a broader basis than that which had founded the implied restriction upon State power. Referring to *Collector v Day*, the Court in *Helvering* said[140]:

> "In recognizing that implication for the first time, the Court was concerned with the continued existence of the states as governmental entities, and their preservation from destruction by the national taxing power. The immunity which it implied was sustained only because it was one deemed necessary to protect the states from destruction by the federal taxation of those governmental functions which they were exercising when the Constitution was adopted and which were essential to their continued existence."

Their Honours continued[141]:

> "We need not stop to inquire how far, as indicated in *McCulloch v Maryland*…, the immunity of federal instrumentalities from state taxation rests on a different basis from that of state instrumentalities; or whether or to what degree it is more extensive. As to those questions, other considerations may be controlling which are not pertinent here. It is

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137 304 US 405 at 413 (1938).

138 304 US 405 at 413 (1938).

139 11 Wall 113 (1870) [78 US 113].

140 304 US 405 at 414 (1938).

141 304 US 405 at 415 (1938).

> enough for present purposes that the state immunity from the national taxing power, when recognized in *Collector v Day*…, was narrowly limited to a state judicial officer engaged in the performance of a function which pertained to state governments at the time the Constitution was adopted, without which no state 'could long preserve its existence.'"

Then, in *Graves v New York; Ex rel O'Keefe*[142], *Collector v Day* was overruled in so far as it recognised an implied constitutional immunity from federal income taxation of the salaries of officers or employees of a State government or its instrumentalities. In his concurring reasons, Frankfurter J referred[143] to the earlier inclination of this Court to follow the United States doctrines regarding intergovernmental immunity, and to change that had taken place with the *Engineers' Case*[144].

134 Frankfurter J referred also to *West v Commissioner of Taxation (NSW)*[145]. There, Dixon J had distilled from the *Engineers' Case* a principle[146]:

> "that whenever the Constitution confers a power to make laws in respect of a specific subject matter, prima facie it is to be understood as enabling the Parliament to make laws affecting the operations of the States and their agencies".

But this was subject to a reservation that the *Engineers' Case*[147]:

> "does not appear to deal with or affect the question whether the Parliament is authorized to enact legislation discriminating against the States or their agencies".

135 It was against that background that *New York v United States* was decided in 1946. The Supreme Court determined that the State of New York, in selling

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142 306 US 466 at 486 (1939).

143 306 US 466 at 490-491 (1939).

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

145 (1937) 56 CLR 657.

146 (1937) 56 CLR 657 at 682.

147 (1937) 56 CLR 657 at 682. See also the remarks of Evatt J at 698-699, 701-702.

mineral waters taken from Saratoga Springs, owned and operated by that State, was not immune from federal sales tax imposed on such waters. The Supreme Court was concerned to explain the circumstances in which a "non-discriminatory tax" of general application, such as the federal sales tax laid on a particular subject-matter without regard to the personality of a taxpayer, might nevertheless be an unconstitutional exertion of federal power on the States. The concurring judgment of four members of the Court, delivered by Stone CJ, said[148]:

> "The tax reaches the State because of the Congressional purpose to lay the tax on the subject matter chosen, regardless of who pays it. To say that the tax fails because the State happens to be the taxpayer is only to say that the State, to some extent undefined, is constitutionally immune from federal taxation. Only when and because the subject of taxation is State property or a State activity must we consider whether such a non-discriminatory tax unduly interferes with the performance of the State's functions of government. If it does, then the fact that the tax is non-discriminatory does not save it. If we are to treat as invalid, because discriminatory, a tax on 'State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations,' it is plain that the invalidity is due wholly to the fact that it is a State which is being taxed so as unduly to infringe, in some manner, the performance of its functions as a government which the Constitution recognizes as sovereign."

Earlier in his judgment, Stone CJ had observed[149] that a federal tax which was non-discriminatory as to its subject-matter, might nevertheless affect a State "as to interfere unduly with the State's performance of its sovereign functions of government".

The judgments in *Melbourne Corporation*

136 In *Melbourne Corporation*, Starke J[150] cited *Graves v New York* and *Helvering* and set out with approval the passage from *New York v United States* referred to immediately above. He went on[151] to pose the "practical question",

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148 326 US 572 at 588 (1946).

149 326 US 572 at 587 (1946).

150 (1947) 74 CLR 31 at 74-75.

151 (1947) 74 CLR 31 at 75.

which arose whether or not the alleged interference was discriminatory, and in the end was whether the legislation or executive action in question "curtails or interferes in a substantial manner" with the exercise of constitutional power. Rich J spoke to similar effect, saying[152]:

> "Such 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."

Latham CJ referred at length to *New York v United States*, the reasoning in which he said corresponded to that in the *Engineers' Case*[153]. Latham CJ concluded that the American decisions supported what he understood to be the position in Australia, namely[154]:

> "Laws 'discriminate' against the States if they single out the States for taxation or some other form of control and they will also be invalid if they 'unduly interfere' with the performance of what are clearly State functions of government."

137 Dixon J[155] referred to the use in the United States of the interstate commerce power and the postal power. He compared this to the doctrine accepted in Australia that it is enough for validity that a federal law has an actual and immediate operation within a field assigned to the Commonwealth, notwithstanding that the law has a purpose of achieving some result lying within the undefined area of power reserved to the States. However, he continued[156]:

> "It is altogether another thing to apply the same doctrine to a use of federal power for a purpose of restricting or burdening the State in the

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152 (1947) 74 CLR 31 at 66.

153 (1947) 74 CLR 31 at 58.

154 (1947) 74 CLR 31 at 60.

155 (1947) 74 CLR 31 at 79-80.

156 (1947) 74 CLR 31 at 80.

> exercise of its constitutional powers. The one involves no more than a distinction between the subject of a power and the policy which causes its exercise. The other brings into question the independence from federal control of the State in the discharge of its functions."

Dixon J then said that[157]:

> "to attempt to burden the exercise of State functions by means of the power to tax needs no ingenuity, and that, no doubt, is why that power occupies such a conspicuous place in the long history both in the United States and here of the question how far federal power may be used to interfere with the States in the exercise of their powers".

138 After referring to the demise in the United States, as in Australia, of the intergovernmental immunity doctrine, Dixon J observed[158] that the Supreme Court had encountered some difficulty in formulating a test "by which the validity of a federal tax falling upon operations of the States may be determined". Dixon J considered *New York v United States* and said[159]:

> "What is important is the firm adherence to the principle that the federal power of taxation will not support a law which places a special burden upon the States. They cannot be singled out and taxed as States in respect of some exercise of their functions. Such a tax is aimed at the States and is an attempt to use federal power to burden or, may be, to control State action. The objection to the use of federal power to single out States and place upon them special burdens or disabilities does not spring from the nature of the power of taxation. The character of the power lends point to the objection but it does not give rise to it. The federal system itself is the foundation of the restraint upon the use of the power to control the States. The same constitutional objection applies to other powers, if under them the States are made the objects of special burdens or disabilities."

139 It follows from the reasoning in these judgments in *Melbourne Corporation* that invalidity does not necessarily attend any federal law which requires a State in the performance of its functions to bear a burden or to suffer a disability to which others are not subject. That was the conclusion reached by

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157 (1947) 74 CLR 31 at 80.

158 (1947) 74 CLR 31 at 80-81.

159 (1947) 74 CLR 31 at 81.

Brennan J in *Queensland Electricity*[160] after consideration of what had been said, not only by Sir Owen Dixon in *Melbourne Corporation* and in *Victoria v The Commonwealth*[161], but by Williams J in the latter case[162] and by Barwick CJ and Gibbs J in the *Pay-roll Tax Case*[163].

Taxation

140 Special considerations arise where it is the reach of the federal legislative power with respect to taxation that is in question. The statement by Marshall CJ in *McCulloch v Maryland*[164] that "the power to tax involves the power to destroy" was uttered in connection with a tax directed against the use by the United States of the Bank of the United States as one of its instruments of government. Later, speaking of the uses to which this statement had been put, Frankfurter J dubbed it a "seductive *cliché*"[165], uttered "at a time when social complexities did not so clearly reveal as now the practical limitations of a rhetorical absolute"[166].

141 So it is that, following the *Pay-roll Tax Case* and *The Second Fringe Benefits Tax Case*[167], it cannot be said that the imposition upon the States of a tax of general application necessarily imposes some special burden or disability upon them so that the law may be described as one aimed at the restriction or control of the States. In the *Pay-roll Tax Case*, the point was explained as follows by Gibbs J[168]:

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160 (1985) 159 CLR 192 at 233.

161 (1957) 99 CLR 575 at 609.

162 (1957) 99 CLR 575 at 638.

163 *Victoria v The Commonwealth* (1971) 122 CLR 353 at 375, 426 respectively.

164 4 Wheat 316 at 431 (1819) [17 US 159 at 210]. Daniel Webster had submitted in argument that "[a]n unlimited power to tax involves, necessarily, a power to destroy; because there is a limit beyond which no institution and no property can bear taxation": 4 Wheat 316 at 327 (1819) [17 US 159 at 164].

165 *Graves v New York; Ex rel O'Keefe* 306 US 466 at 489 (1939).

166 *New York v United States* 326 US 572 at 576 (1946).

167 *State Chamber of Commerce and Industry v The Commonwealth* (1987) 163 CLR 329.

168 (1971) 122 CLR 353 at 425.

> "Although in some cases it may be possible to show that the nature of a tax on a particular activity, such as the employment of servants, renders the continuance of that activity practically impossible, it has not been shown that the tax in the present case prevents the States from employing civil servants or operates as a substantial impediment to their employment. The tax has now been imposed upon and paid by the States for nearly thirty years, and it has not been shown to have prevented the States from discharging their functions or to have impeded them in so doing. They may have less money available for public purposes because they have to pay the tax, but that could be said in every case in which a tax is imposed on the States, and in itself it cannot amount to an impediment against State activity sufficient to invalidate the tax."

142 It might have been thought that the constitutional text itself, particularly in s 114, dealt exhaustively with that measure of immunity conferred with respect to federal taxation. Indeed, in some respects, s 114 would protect the States against imposts in circumstances which attract the operation of the *Melbourne Corporation* doctrine[169]. Nevertheless, the emphasis by Dixon J in *Melbourne Corporation*[170] respecting the lack of ingenuity needed to burden the exercise of State functions by use of the taxation power has led to a general acceptance that, while the States enjoy no general immunity from the exercise of that power, federal laws which do not fall within the prohibition in s 114 nevertheless may fall foul of the *Melbourne Corporation* doctrine.

Queensland Electricity

143 To fix separately upon laws addressed to one or more of the States and upon laws of so-called "general application", and to present the inquiry as differing in nature dependent upon the form taken by laws enacted under the one head of power, tends to favour form over substance. The substance is provided by considerations which arise from the constitutional text and structure pertaining to the continued existence and operation of the States. Further, to treat as the decisive criterion of validity the form of an impugned law with respect to taxation is to distract attention from the generality of the terms in which in s 51(ii) the power is expressed (save for the specific reference to discrimination). It is to attend insufficiently to what in this realm of discourse is the essential

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169 *SGH Ltd v Commissioner of Taxation* (2002) 76 ALJR 780 at 789-791 [45]-[55]; 188 ALR 241 at 253-256.

170 (1947) 74 CLR 31 at 80.

question in all cases. This is whether the law restricts or burdens one or more of the States in the exercise of their constitutional powers. The form taken by a particular law may, as Dawson J explained in the passage from *Queensland Electricity* set out at [125], assist more readily in answering that question, but in all cases the question must be addressed.

144 In *Queensland Electricity*[171], Mason J may have taken a contrary view. His Honour said that the principle applied in *Melbourne Corporation* was then well settled and that it consists of two elements:

> "(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: *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation*[172]. The second element of the prohibition is necessarily less precise than the first; it protects the States against laws which, complying with the first element because they have a general application, may nevertheless produce the effect which it is the object of the principle to prevent."

However, that is to be read with an earlier passage in that judgment. Mason J, with reference to what had been said by Dixon J in the *Banking Case*[173] concerning laws of general application, there said[174]:

> "Plainly, his Honour was speaking of a law which, though referable to a head of legislative power, is, by reason of its impact on the States and their functions, inconsistent with the fundamental constitutional conception which underlies the prohibition against discrimination."

145 That "fundamental constitutional conception" has proved insusceptible of precise formulation. Nevertheless, an understanding of it is essential lest propositions such as those expressed by Mason J in *Queensland Electricity* take on, by further judicial exegesis, a life of their own which is removed from the constitutional fundamentals which must sustain them.

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171 (1985) 159 CLR 192 at 217.

172 (1982) 152 CLR 25 at 93.

173 (1948) 76 CLR 1 at 338.

174 (1982) 159 CLR 192 at 216.

The later decisions

146 Some guidance as to the content of the limited State immunity is provided by the later decisions in this Court. In *The Tasmanian Dam Case*[175], Mason J and Brennan J pointed out that the concern was with the capacity of a State to function as a government rather than interference with or impairment of any function which a State government may happen to undertake. Later, in the *Native Title Act Case*[176], it was said in the joint judgment of six members of the Court that the relevant question for the application of the *Melbourne Corporation* doctrine was not whether Commonwealth law effectively restricted State powers or made their exercise more complex or subjected them to delaying procedures. Their Honours continued[177]:

> "The relevant question is whether the Commonwealth law affects what Dixon J called the 'existence and nature' of the State body politic. As the *Melbourne Corporation Case* illustrates, this conception relates to the machinery of government and to the capacity of its respective organs to exercise such powers as are conferred upon them by the general law which includes the Constitution and the laws of the Commonwealth[178]. A Commonwealth law cannot deprive the State of the personnel, property, goods and services which the State requires to exercise its powers and cannot impede or burden the State in the acquisition of what it so requires."

Later in that judgment[179], their Honours distinguished between a federal law which impaired capacity to exercise constitutional functions and one which merely affected "the ease with which those functions are exercised".

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175 *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 140, 213-215. See also the observations of Mason J in *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 216-217.

176 (1995) 183 CLR 373 at 480.

177 (1995) 183 CLR 373 at 480.

178 Constitution, Covering Clause V.

179 (1995) 183 CLR 373 at 481.

147 In *Melbourne Corporation*[180], Dixon J spoke of the "restriction or control of the State … in respect of the working of the judiciary", and Williams J of laws seeking to direct the States as to the manner of exercise of judicial governmental functions. Later, in *Australian Education Union*[181], the joint judgment identified the State courts as an essential branch of the government of the State.

148 In the present case, the question thus becomes whether the two laws with respect to taxation, the Protected Funds Imposition Act and the Protected Funds Assessment Act, restrict or control the States, in particular New South Wales and Victoria, in respect of the working of the judicial branch of the State government.

149 Unlike the situation in the *Pay-roll Tax Case* and *The Second Fringe Benefits Tax Case*, these laws do not impose a taxation liability upon the States themselves. It is the plaintiffs who are taxed. In *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation*[182], Mason CJ, Deane, Toohey and Gaudron JJ distinguished, for the application of the *Melbourne Corporation* doctrine, a federal taxation law which, whilst it imposed tax upon a State officer, did not "affect any interest or purpose of the State". In that case this was because the Registrar was taxed in his capacity as trustee for private citizens.

150 Similar considerations, where the tax is imposed not upon the State itself but upon officers or employees thereof, were considered in the United States in the period when *Melbourne Corporation* was decided. In *Helvering*[183], the Supreme Court spoke of a State function which was important enough to demand immunity from a tax upon the State itself but which did not extend to a tax which might well be substantially entirely absorbed by private persons; there, the burden on the State was "so speculative and uncertain" as not to warrant restriction upon the federal taxing power.

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180 (1947) 74 CLR 31 at 80, 99-100 respectively. See, as to the State courts in the United States, *Gregory v Ashcroft* 501 US 452 (1991).

181 (1995) 184 CLR 188 at 229.

182 (1993) 178 CLR 145 at 172-173.

183 304 US 405 at 419-420 (1938). See also *Wilmette Park District v Campbell* 338 US 411 at 420 (1949); *United States v City of Detroit* 355 US 466 at 469 (1958); *South Carolina v Baker* 485 US 505 at 523, 532 (1988); *Davis v Michigan Department of Treasury* 489 US 803 at 811-812 (1989); *Barker v Kansas* 503 US 594 at 597-598, 605-606 (1992); *Jefferson County v Acker* 527 US 423 at 436-439, 454 (1999).

151 However, as Dixon CJ pointed out in the *Second Uniform Tax Case*[184], *Melbourne Corporation* itself was an instance where a restriction was imposed not on the State or its servants but on others, yet the federal law impermissibly interfered with the governmental functions of a State. Section 48 of the Banking Act imposed a prohibition upon banks but was effectual to deny to the States the use of the banks and that was the object of the law[185].

152 The joint judgment of six members of the Court in *Australian Education Union*[186] is of central importance for the present case, in particular for two propositions. They are that (a) it is "critical to a State's capacity to function as a government" that it retain ability to determine "the terms and conditions" on which it engages employees and officers "at the higher levels of government", and (b) "Ministers, ministerial assistants and advisers, heads of departments and high level statutory office holders, parliamentary officers and judges would clearly fall within this group". One result, with which *Australian Education Union* was immediately concerned, would protect the States to some degree from the exercise by the Commonwealth Industrial Relations Commission of power under federal law to fix minimum wages and working conditions in respect of persons to whom the federal law otherwise would extend. Another result is to support the foundation for the case made by the first plaintiff.

Conclusion respecting *Melbourne Corporation* doctrine

153 The Protected Funds Imposition Act and the Protected Funds Assessment Act are invalid in their application to the first plaintiff.

154 The NSW Pensions Act is the only law of that State listed in Sched 14 to the Income Tax Regulations. With respect to that State, the issue for decision here fixes upon that statute as an exercise by the legislature of its functions respecting the judicial branch of its government. It may be added that the States, with the exception of Tasmania, have non-contributory judicial pension schemes under legislation listed in Sched 14.

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184 *The State of Victoria v The Commonwealth* (1957) 99 CLR 575 at 610.

185 (1947) 74 CLR 31 at 62, 66-67, 75, 84, 100-101.

186 (1995) 184 CLR 188 at 233. See also the *Industrial Relations Act Case* (1996) 187 CLR 416 at 498.

155 As a general proposition, it is for the State of New South Wales, as for the other States, to determine the terms and conditions upon which it appoints and remunerates the judges of its courts. The concept of remuneration includes provision of retirement and like benefits to judges, spouses and other dependants. There is, as the Supreme Court of Canada pointed out in *R v Beauregard*[187], "a close relationship between salaries and pensions", both being "remunerative benefits". The State of New South Wales chose to discharge its responsibilities for the establishment and maintenance of its judicial branch by providing the unfunded and non-contributory scheme in the NSW Pensions Act.

156 In *R v Beauregard*, the Supreme Court of Canada, speaking of the Parliament of Canada which has responsibilities in respect of both federal and Provincial superior court judges, said[188]:

> "In fulfilling its constitutional obligation to establish salaries and pensions for superior court judges, it is reasonable that Parliament would ask: what is an appropriate total benefit package and what components should constitute the package? Salary and pension must be two of the components and Parliament must consider the relationship between them."

157 Other methods for the provision of such remuneration might have been chosen by the New South Wales legislature. *Beauregard* found valid a choice by the Parliament of Canada to change the basis of superior court judges' pensions from non-contributory to contributory. New South Wales might have chosen a funded scheme which would generate State property on which the Commonwealth was forbidden by s 114 of the Constitution to impose any tax. Rather than pursue that or some other course, the legislature made provision for a non-contributory scheme with payment of benefits out of the Consolidated Fund of the State. The method so selected by the State legislature affected the terms and conditions for the engagement by the executive branch of judges and the organisation and working of the third branch of government of the State.

158 In respect of that State legislative choice, the federal laws in contention impose no fiscal burden directly upon the State. It is the first plaintiff, not the State, who is the taxpayer. Does the absence of that immediate fiscal burden upon the State compel the conclusion that there has been but a "speculative and uncertain"[189] impairment by the federal law of the exercise by the State of its

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187 [1986] 2 SCR 56 at 83.

188 [1986] 2 SCR 56 at 83-84.

189 cf *Helvering v Gerhardt* 304 US 405 at 420 (1938).

freedom to discharge as it decides its constitutional functions respecting the remuneration of the judicial branch? Does the federal law merely affect the ease of the working of the judicial branch?[190]

159 The provision of secure judicial remuneration at significant levels serves to advantage and protect the interest of the body politic in several ways. Secure judicial remuneration at significant levels assists, as the United States Supreme Court has emphasised[191], to encourage persons learned in the law, in the words of Chancellor Kent written in 1826[192], "to quit the lucrative pursuits of private business, for the duties of that important station".

160 It also, as the Victorian Attorney-General indicated when introducing legislation[193] to provide some relief against the effects of the surcharge legislation, assists the attraction to office of persons without independent wealth and those who have practised in less well paid areas[194]. Further, the Supreme Court of the United States has stressed[195] that such provision helps "to secure an independence of mind and spirit necessary if judges are 'to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty'[196]". The Supreme Court went on[197] to refer to the statement by Chief Justice John Marshall that an ignorant or dependent judiciary would be the "greatest scourge … ever inflicted".

161 Views may vary from time to time as to the relevant importance of these considerations and the measures to give effect to them. But in the constitutional framework in this country these are matters, respecting State judges, for determination by State legislatures. That constitutional framework also

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190 cf *Native Title Act Case* (1995) 183 CLR 373 at 481.

191 *United States v Hatter* 532 US 557 at 568 (2001).

192 *Commentaries on American Law*, (1826), vol 1, Lecture XIV at 276.

193 *Judicial and Other Pensions Legislation (Amendment) Act* 2001 (Vic).

194 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 May 2001 at 1021.

195 *United States v Hatter* 532 US 557 at 568 (2001).

196 Wilson, *Constitutional Government in the United States*, (1911) at 143.

197 *United States v Hatter* 532 US 557 at 569 (2001).

constrains those legislatures, in particular, by requiring them to take as they find federal laws of "general application" as part of the system enjoyed by the whole community[198]. Hence the statement by Frankfurter J in *O'Malley v Woodrough*[199]:

> "To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering."

162 However, that is not the present case. Section 5 of the Protected Funds Assessment Act speaks of "high-income members of constitutionally protected superannuation funds". They are taxed in a fashion which differs from that required by the Surcharge Imposition Act and the Surcharge Assessment Act. A law taxing them is not in the sense of the authorities a law of "general application" which, with reference to the classification by Dixon J, falls into category (a) identified at [130]. Those persons whose surchargeable contributions in respect of a "defined benefit superannuation scheme" are worked out by reference to the notional surchargeable contributions factor and other elements specified in the second half of s 9, are a particular group of State employees and officers. Their selection for attention by the federal legislature as "high-income members" of the non-contributory unfunded schemes in question suggests that, for the purposes of the *Melbourne Corporation* doctrine, they are those employees and officers "at the higher levels of government" spoken of in *Australian Education Union*[200]. At all events, there is no doubt that the first plaintiff is such an individual.

163 The Commonwealth suggests that the treatment in special legislation of constitutionally protected funds, both funded and unfunded, as appear respectively in the first and second half of the definition in s 9 of the Protected Funds Assessment Act, was dictated by the operation of the Constitution itself. It is said that to treat members of constitutionally protected superannuation funds differently to members of non-constitutionally protected superannuation funds by reference to a relevant distinction, the operation of s 114 of the Constitution, is not an impermissible discrimination. It further is submitted that, to the extent that a member of a constitutionally protected fund does not receive from the State

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198 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 337.

199 307 US 277 at 282 (1939).

200 (1995) 184 CLR 188 at 233.

concerned a lump sum from which the surcharge may be deducted, this is but a consequence of the way in which the benefits of members are designed under State law.

164 These submissions are not determinative of the application of the *Melbourne Corporation* doctrine. It may be conceded, as indicated earlier at [123]-[124], that, though differential treatment may be indicative of infringement of the limitation upon legislative power with which the doctrine is concerned, it is not, of itself, sufficient to imperil validity. What is more important for present purposes is that it is no answer to a case of alleged invalidity to assert that the federal law in question takes its form from a perceived need to escape the peril of invalidity presented by another constitutional restraint upon federal legislative power.

165 In its application to the first plaintiff, question 2(a) of the case stated asks whether either or both the Protected Funds Imposition Act and the Protected Funds Assessment Act are invalid on the ground that they so discriminate against New South Wales or so impose a particular disability or burden upon the operations and activity of that State as to be beyond the legislative power of the Commonwealth. That issue may be narrowed by asking whether that result comes about by a sufficiently significant impairment of the exercise by the State of its freedom to select the manner and method for discharge of its constitutional functions respecting the remuneration of the judges of the courts of the State. That requires consideration of the significance for the government of the State of its legislative choice for the making of provision for judicial remuneration. Having regard to what is said earlier in these reasons, particularly with reference to decisions of the Supreme Court of the United States and the Supreme Court of Canada, jurisdictions which share a common constitutional tradition with this country, that significance is to be taken as considerable.

166 In *The Second Fringe Benefits Tax Case*[201], in a passage which is no less significant for its presence in a dissenting judgment, given the later statement in *Australian Education Union*[202] referred to at [152], Brennan J observed:

> "The essential organs of government – the Governor, the Parliament, the Ministry and the Supreme Court – are the organs on which the 'existence and nature' of the body politic depends. (I mention only the Supreme Court, for that is the court of general jurisdiction in which,

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201 (1987) 163 CLR 329 at 362-363.

202 (1995) 184 CLR 188 at 233.

> subject to the jurisdiction of this Court, the laws of the State are finally interpreted and the constitutional and administrative law of the State is applied.) The existence and nature of the body politic depends on the attendance to their duties of the officers of the essential organs of government and their capacity to exercise their functions. The emoluments which a State provides to the officers of the essential organs of government ensure or facilitate the performance by those organs of their respective functions".

167 The circumstances that judicial pensions do not require contributions but are fixed as a proportion of the remuneration of a serving judge and are to be paid at the full rate only upon a substantial period of service as well as attainment of a minimum age, indicates the importance attached by legislatures to such schemes in the remuneration of the judicial branch.

168 There then is posed the "practical question" identified by Starke J in *Melbourne Corporation*[203]. This, in the end, is whether, looking to the substance and operation of the federal laws, there has been, in a significant manner, a curtailment or interference with the exercise of State constitutional power.

169 The first plaintiff has been assessed to surcharge on surchargeable contributions fixed at more than 61 per cent of his annual remuneration. If the first plaintiff were to meet such imposts as they are imposed year by year during the tenure of his office, he would be chancing fortune to the degree indicated earlier in these reasons. More immediately to the point, to a significant degree, the interest of the State in providing an adequate level of remuneration would have been denied. Further, the provisions for accumulation of indebtedness supply a disincentive to the first plaintiff to meet the public interest of the State in retaining his judicial services for the maximum possible term. This is because the "notional surchargeable contributions factor" is zero for each year after the earliest retirement date, but upon the surcharge debt interest will continue to accrue until retirement and receipt of the pension. If the first plaintiff does serve the public interest in this way by remaining in office until final retirement age, then the interest of the State in providing remuneration at what it regards as an appropriate level is again undermined, here by the imposition of a very large lump sum debt.

170 The Commonwealth, in its submissions, urges against speculation upon what it says are the indirect effects of its laws upon the government of the State. However, one tendency of the federal laws readily apparent from their legal

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203 (1947) 74 CLR 31 at 75.

operation is to induce the State to vary the method of its judicial remuneration. The liberty of action of the State in these matters, that being an element of the working of its governmental structure, thereby is impaired. No doubt there is no direct legal obligation imposed by the federal laws requiring such action by the State. But those laws are effectual to do so, as was the Banking Act.

171 The Commonwealth referred to the well-known judgment of Kitto J in *Fairfax v Federal Commissioner of Taxation*[204]. His Honour pointed out, with reference to *Melbourne Corporation*, that the taxation power is susceptible to employment to achieve an end other than the immediate recovery of revenue and that such an end might otherwise lie outside the area of federal power. That may readily be conceded. *Breckler*[205], to which reference has been made at [59], is a recent illustration of such a use of the taxation power. However, the passage in the judgment of Dixon J in *Melbourne Corporation* to which Kitto J referred in the critical portion of his judgment in *Fairfax*, did not stand alone. Dixon J went on immediately thereafter to say that it was[206]:

> "altogether another thing to apply the same doctrine to a use of federal power for a purpose of restricting or burdening the State in the exercise of its constitutional powers".

172 Earlier in these reasons at [141], there is set out a passage from the judgment of Gibbs J in the *Pay-roll Tax Case*[207]. His Honour referred to the absence over many years of indications that the States had been impeded by the pay-roll tax in the discharge of their functions. The present case stands differently. It discloses a state of affairs well beyond the speculative and the uncertain[208]. In New South Wales there is now the *Judges' Pensions Amendment Act* 1998 (NSW) ("the 1998 Act"). As the long title to that statute discloses, it was enacted to amend the NSW Pensions Act so as to provide for the commutation of pensions under that statute for a particular purpose. That purpose was the payment of the superannuation contributions surcharge.

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204 (1965) 114 CLR 1 at 11-13.

205 (1999) 197 CLR 83.

206 (1947) 74 CLR 31 at 80.

207 (1971) 122 CLR 353 at 425.

208 cf *Helvering v Gerhardt* 304 US 405 at 420 (1938).

173 In the Second Reading Speech in the Legislative Council on the bill for the 1998 Act, the Attorney-General said[209]:

> "The bill will enable a retired judge or other person entitled to be paid a pension to elect to have part of the pension commuted for the purpose of payment of the superannuation contributions surcharge. A spouse or eligible child, who is entitled to a reversionary pension under the Act, may also make an election in respect of a liability of a judge who has died in office or a retired judge who died before the original time for making an election ended.
>
> The bill provides that an election may relate to the whole or part of any such liability and must be made not later than two months after the liability arises, or within such further period as the Minister may allow. The bill also provides that a pension may be commuted only to the extent necessary to meet the liability for the superannuation contributions surcharge. … If a lump sum is paid, the bill provides for the pension and any reversionary pensions payable to a spouse or eligible child under the Act to be reduced."

The Attorney-General concluded[210]:

> "The amendments proposed are essential to provide judges and other persons entitled to a pension or reversionary pension under the Act with a mechanism to pay the superannuation contributions surcharge from the benefit they are entitled to receive."

The occasion for the provision of that mechanism thus was supplied solely by the operation of the federal legislation; the provision of the mechanism was a response which changed what had been the legislative scheme respecting the terms and conditions for the remuneration of State judges, in particular as indicated in the NSW Pensions Act. The Court was referred to legislation in other States responding in a similar fashion to the same stimulus, in particular the *Judicial and Other Pensions Legislation (Amendment) Act* 2001 (Vic).

174 The conclusion reached is that, in its application to the first plaintiff, the Protected Funds Imposition Act and the Protected Funds Assessment Act are

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209 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 2 June 1998 at 5507.

210 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 2 June 1998 at 5507.

invalid on the ground of the particular disability or burden placed upon the operations and activities of New South Wales. The reasoning for that conclusion would apply also to the application of the legislation to the judges of other State courts as members of unfunded non-contributory pension schemes resembling that provided by the NSW Pensions Act. Nothing said in these reasons indicates any conclusion respecting the position of other members of constitutionally protected superannuation funds to which the federal legislation applies.

Other immunity issues

175 It is unnecessary to decide the case upon the other submissions in which in varying formulations reliance was placed upon what was said to flow from *Melbourne Corporation* and later decisions of this Court.

176 The first of these has been identified at [123]. The position of the first plaintiff may be compared with and contrasted to that of an officer or employee of a private sector corporation with an agreement for an unfunded annuity or lump sum on retirement where the SIS Act, the Surcharge Assessment Act and the Surcharge Imposition Act do not apply. The taxation treatment of moneys so paid will attract no special taxation regime such as that to which the first plaintiff is subjected. In making provision for its officers and employees, the States must take the federal taxation system as it finds it. But does the legislation here in question isolate the States from that general system and, *for that reason alone*, so place them under a particular disability, discriminatory in this special sense, sufficient to attract the operation of the *Melbourne Corporation* doctrine? However, as was indicated at [139], invalidity does not *necessarily* attend a federal law which requires a State to bear a burden or suffer a disability to which others are not subject. It is unnecessary to determine whether any different outcome would follow if the appropriate comparator was taken not from the private sector but by looking to the position of the federal judges described at [72].

177 Secondly, Western Australia and South Australia emphasised the requirements of the Protected Funds Assessment Act and Regulations thereunder ("SR 371 of 1997")[211] for the performance by an "eligible actuary" of certain functions in the calculation of the "notional surchargeable contributions factor" for s 9(5) thereof; where the "superannuation (unfunded defined benefits) provider" is a State, that actuary necessarily will be an officer or employee of the

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211 Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Regulations 1997.

State or one engaged by the State for the purpose. That was said to be an interference of the kind considered in *Australian Education Union*[212].

178 Further, South Australia emphasised that the actuarial calculations served only the purposes of federal law. Reference was made to narrowly divided decisions of the United States Supreme Court[213] supporting an implication in the United States Constitution which would restrain the unilateral imposition by a federal law upon State officials of functions under that federal law. A contrast was drawn with the express provisions of Art 258 of the Indian Constitution for the making of such laws by the Union Parliament[214].

179 In Australia, there are a number of express provisions imposing various federal duties and functions upon State officers and institutions, including Governors (ss 7, 12, 15), Parliaments (ss 9, 15) and courts (s 77(iii)). Section 120, to which reference has been made at [114], obliges the States to receive and hold federal prisoners.

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212 (1995) 184 CLR 188 at 232-233.

213 *New York v United States* 505 US 144 (1992); *Printz v United States* 521 US 898 (1997); *Reno v Condon* 528 US 141 (2000); Tribe, *American Constitutional Law*, 3rd ed (2000), vol 1 at 878-894.

214 Article 258 states:

> "(1) Notwithstanding anything in this Constitution, the President may, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends.
>
> (2) A law made by Parliament which applies in any State may, notwithstanding that it relates to a matter with respect to which the Legislature of the State has no power to make laws, confer powers and impose duties, or authorise the conferring of powers and the imposition of duties, upon the State or officers and authorities thereof.
>
> (3) Where by virtue of this article powers and duties have been conferred or imposed upon a State or officers or authorities thereof, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of any extra costs of administration incurred by the State in connection with the exercise of those powers and duties."

180 The exercise of Commonwealth legislative power validly may burden the States in similar fashion. The upholding in the *First Uniform Tax Case*[215] of the validity of the conscription of State public servants by the *Income Tax (War-Time Arrangements) Act* 1942 (Cth) provides a striking illustration of the use of the defence power. On the other hand, it was decided in *The Commonwealth v New South Wales*[216] that the power in s 51(xxxi) did not support a law requiring registration under State law of land compulsorily acquired by the Commonwealth without compliance by it with the conditions imposed by State law. That reasoning is consistent with that of Dixon J in the *Banking Case*[217], to which reference is made at [130].

181 In the end, the complaint here is that consistently with, and perhaps in development of, the reasoning in *Australian Education Union*, it is critical to the constitutional integrity of the States that they alone have the capacity to give directions to their officials and determine what duties they perform. That is a large proposition and best left for another day.

Arbitrary exactions?

182 It may well be said of the federal laws respecting superannuation enacted over the last 20 years that collectively and individually they fall well short of the Benthamite ideal referred to in *Byrnes v The Queen*[218]. This advocates the drafting of laws which mark out the line of the citizen's conduct by visible directions rather than turn the citizen loose "into the wilds of perpetual conjecture". Further, the plaintiffs gave colour to their submissions by emphasising what they saw as the harsh or unreasonable incidence of the tax imposed upon them by reference both to its subject-matter and its objects. But, as the plaintiffs recognised, with reference to *Truhold*[219], such matters do not go to validity.

183 However, in *MacCormick*[220], one of the characteristics which were said by the majority to bring the impost there in question within the description of a tax

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215 *South Australia v The Commonwealth* (1942) 65 CLR 373.

216 (1923) 33 CLR 1 at 28, 54.

217 (1948) 76 CLR 1 at 337.

218 (1999) 199 CLR 1 at 13 [11].

219 (1985) 158 CLR 678 at 684.

220 (1984) 158 CLR 622 at 639.

for the purposes of s 51(ii) of the Constitution was that it was "not arbitrary". In apparent elaboration, their Honours continued[221]:

> "Liability is imposed by reference to criteria which are sufficiently general in their application and which mark out the objects and subject-matter of the tax: see *Federal Commissioner of Taxation v Hipsleys Ltd*[222]."

Further explanation of this passage was given in the joint judgment in *Truhold*[223]. The notion of "arbitrary" imposts was said there to be:

> "a reference to the fact that liability can only be imposed by reference to ascertainable criteria with a sufficiently general application and that the tax cannot lawfully be imposed as a result of some administrative decision based upon individual preference unrelated to any test laid down by the legislation".

However, in *Truhold*, the Court went on to reject a submission that the formulation by the Commissioner of an opinion respecting the criteria of liability rendered the imposition an arbitrary one. So much already followed from what had been said in *Giris Pty Ltd v Federal Commissioner of Taxation*[224].

184 The notions involved here are linked with the impermissibility of an "incontestable tax"[225]. In that regard, s 20 of the Protected Funds Assessment Act deals with objections against assessment and picks up the general provisions of Pt IVC (ss 14ZL-14ZZS) of the *Taxation Administration Act* 1953 (Cth). Division 5 thereof (ss 14ZZN-14ZZS) leads to the Federal Court.

185 The plaintiffs complain that different actuaries, all applying SCR 97/1 and SR 371 of 1997, can reasonably differ in working out the amount of their surchargeable contributions under s 9 of the Protected Funds Assessment Act. That is because the "eligible actuary" identified in s 9(5) will be making assumptions and judgments on such variables as mortality rates, retirement age,

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221 (1984) 158 CLR 622 at 639.

222 (1926) 38 CLR 219 at 236.

223 (1985) 158 CLR 678 at 684.

224 (1969) 119 CLR 365 at 372-373, 379, 380-381, 383-385.

225 *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 638-641.

marital status, age differences between spouses and the like. However, the various actuarial assumptions selected by SCR 97/1 supply "the method" mandated by s 9(5).

186 The submissions by the plaintiffs are foreclosed by what was said by Kitto J in *Giris*[226]:

> "There is no need to cite authority for the general proposition that the operation of a law with respect to taxation may validly be made to depend upon the formation of an administrative opinion or satisfaction upon a question, eg, as to the existence of a fact or circumstance, or as to the quality (eg, the reasonableness) of a person's conduct, or even as to the likelihood of a consequence of the operation of the law in an individual case, as in s 265 [of the ITAA] where the question is whether the exaction of an amount of tax will entail hardship."

In such situations there has been no "abdication" of legislative authority[227]. This objection to validity fails.

Section 55 of the Constitution

187 The first paragraph of s 55 states:

> "Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect."

It was this provision which, in *Australian Tape Manufacturers Association Ltd v The Commonwealth*[228], brought down the blank tape levy imposed by the *Copyright Amendment Act* 1989 (Cth).

188 It is the stricture imposed by the first limb of the second paragraph of s 55 which is invoked by the plaintiffs here. The second paragraph states:

> "Laws imposing taxation, except laws imposing duties of customs or of excise, *shall deal with one subject of taxation only*; but laws

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226 (1969) 119 CLR 365 at 379.

227 cf Sawer, "The Separation of Powers in Australian Federalism", (1961) 35 *Australian Law Journal* 177 at 186-187.

228 (1993) 176 CLR 480.

> imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only." (emphasis added)

It was with the requirement of the second limb that laws imposing duties of excise deal with duties of excise only that the Court was concerned in *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation*[229]. That decision was relied upon in particular to support the attack in this case but the decision was concerned with the second, not the first, limb.

189 As indicated at [83], s 4 of the Protected Funds Imposition Act imposes that tax identified as the superannuation contributions surcharge and s 5 prescribes the rates. However, in accordance with what was said in *The Second Fringe Benefits Tax Case*[230] to be long-standing Parliamentary practice, it is the Protected Funds Assessment Act, not the other statute, which specifies those who are liable to pay the tax and defines the circumstances in which liability to pay it arises. For this reason, s 3 of the Protected Funds Imposition Act states that expressions used in that statute which are defined by the Protected Funds Assessment Act have the same meanings. In considering the present matter, reference should be made to the 1999 Amendment Act. Schedule 2 thereof amended, with effect from 7 December 1997[231], s 9 of the Protected Funds Assessment Act to take the form considered throughout this judgment.

190 In *The Second Fringe Benefits Tax Case*, reference was made in the joint judgment[232] to statements by Isaacs J in *Harding v Federal Commissioner of Taxation*[233] and by Dixon J in *Resch v Federal Commissioner of Taxation*[234] for several propositions. They are:

(i) in construing the expression "subject of taxation" in s 55 it is not to be supposed that there exists some recognised classification of taxes according to subject-matter;

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229 (1992) 173 CLR 450.

230 (1987) 163 CLR 329 at 344.

231 Section 2(3) of the 1999 Amendment Act so provided.

232 (1987) 163 CLR 329 at 343-344.

233 (1917) 23 CLR 119 at 135.

234 (1942) 66 CLR 198 at 223.

(ii) s 55 is not directed to categories concerned with economic consequences or operation upon the creation, transfer and devolution of legal rights;

(iii) rather, s 55 is concerned with political relations and contemplates "broad distinctions between possible subjects of taxation based on common understanding and general conceptions, rather than on any analytical or logical classification"[235];

(iv) it is for the legislature to choose its own subjects of taxation unfettered by existing nomenclature or by categories adopted for other purposes; and

(v) the test is whether, looking at the subject of taxation selected by the Parliament, it can fairly be regarded as a unit rather than a collection of matters necessarily distinct and separate.

191 It was with these matters in mind, that it was said in the joint judgment in *The Second Fringe Benefits Tax Case*[236]:

> "Although the Court is bound to insist on compliance with the requirements of s 55 so that the section achieves its purpose of enabling the Senate to confine its consideration in each case to a taxing statute dealing with a single subject of taxation, in applying the test stated above, the Court will naturally give weight to the Parliament's understanding that its Tax Act deals with one subject of taxation only. This is because the application of the test involves what is in substance a question of fact or value judgment. The Court should not resolve such a question against the Parliament's understanding with the consequence that the statute is constitutionally invalid, unless the answer is clear: see *National Trustees, Executors & Agency Co of Australasia Ltd v Federal Commissioner of Taxation*[237]; *Harding*[238]; *Resch*[239]."

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235 *Resch v Federal Commissioner of Taxation* (1942) 66 CLR 198 at 223.

236 (1987) 163 CLR 329 at 344.

237 (1916) 22 CLR 367 at 378-379.

238 (1917) 23 CLR 119 at 134-136.

239 (1942) 66 CLR 198 at 211.

192 The conclusion the Court reached with respect to the legislation at stake in *The Second Fringe Benefits Tax Case* is instructive. The Court rejected the submission that the principal subject of the tax imposed was fringe benefits provided by private employers to employees so that in imposing a liability in respect of benefits otherwise provided the statute dealt with more than one subject of taxation. After considering the framework of the legislation, Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ concluded[240]:

> "Clearly enough the legislation has been framed on the footing that there is but a single subject of taxation, formulated according to a broad conception of what constitutes fringe benefits. That conception embraces benefits, not being salary or wages, referable to the employment relationship, whether provided by the employer or not and whether received by the employee or not. So understood the legislation presented for the consideration of each House of the Parliament a 'unity of subject matter' rather than distinct and separate subjects of taxation."

193 The Attorney-General for New South Wales, in submissions supporting the plaintiffs on these issues, pointed out that s 4 of the Protected Funds Imposition Act was expressed to impose the "superannuation contributions surcharge" upon "a member's surchargeable contributions", terms for the meaning of which it was necessary to turn to the Protected Funds Assessment Act, and in particular to the detailed treatment of "surchargeable contributions" in s 9.

194 It was emphasised that the definition has two halves. In relation to contributory funded schemes, the surchargeable contributions are identified in terms reflecting amounts paid for or by a member to or otherwise credited or attributed to an account for the member by a superannuation provider. The other half of the definition deals with unfunded non-contributory arrangements identified as defined benefits superannuation schemes. Here there are no "contributed amounts", no fund into which contributions might be made and rather than rights of due administration of a fund there is a statutory entitlement, in the case of the first plaintiff, to the benefits provided by the NSW Pensions Act out of Consolidated Revenue.

195 The submissions proceeded by saying that the Parliament has sought to unite these two different arrangements by employment of the "statutory fiction" of the "notional surchargeable contributions factor" and that there has been an attempt to impose tax upon two distinct activities. The first is the settlement of

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240 (1987) 163 CLR 329 at 349.

funds by contributions in what might be called ordinary superannuation funds. The second is a tax on the derivation of income by persons who are entitled under certain non-contributory schemes, the rate of tax being determined by the "notional surchargeable contributions factor". Something plainly not a contribution to a superannuation fund, namely a percentage of deemed remuneration, is classified as a surchargeable contribution.

196 In *Resch*, Dixon J had said that the practice, among other bodies, of colonial legislatures might serve as a guide in the determination of whether a provision of a given kind was to be regarded as falling within a particular subject-matter[241]. With that in mind, New South Wales referred to the distinct treatment in colonial taxing legislation of income on the one hand and gifts and settlements on the other. What, however, perhaps is of more significance for present purposes is the wide scope, given by the Court in *Harding*[242], with reference to the long history in imperial and colonial legislation, to "income" as a subject of taxation.

197 The incidence and rate of the surcharge is conditioned by the quantum of the adjusted taxable income of the member for any financial year in question. If the relevant condition as to quantum be satisfied, then the surcharge applies at a particular percentage of the surchargeable contributions for the member. In working out those surchargeable contributions, s 9 of the Protected Funds Assessment Act applies with the sharp distinctions to which the first plaintiff and his supporters point.

198 However, the operation of these provisions is premised upon the taxpayer answering the description of a "member". That is defined in s 38 of the statute to identify members of "a constitutionally protected superannuation fund". This, as indicated earlier in these reasons, directs the reader to the State legislation listed in Sched 14. That legislation embraces a range of schemes in the public sector. The object of the Protected Funds Assessment Act, as indicated in s 5 thereof, was to collect an impost imposed upon those members of "constitutionally protected superannuation funds" who were "high-income members". The statutory notion of "contributions" reflected the range of the schemes provided for in the State legislation. In the case of non-contributory schemes, it was found in the benefit measured by contributed amounts. In the case of other schemes, being defined benefits superannuation schemes, it was found in a notional benefit

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241 (1942) 66 CLR 198 at 223.

242 (1917) 23 CLR 119.

identified in part by the actuarial computations to which reference has been made.

199 The legislation has been framed on the footing that there is but a single subject of taxation, formulated by reference to the quantum of adjusted taxable income and the value to be attributed to benefits accruing or deemed to accrue to the member in each financial year. That is sufficient for the first limb of the second paragraph of s 55. Has it been established, against the Commonwealth, that the question, whether there are necessarily distinct and separate subjects of taxation, should receive a clear and negative answer[243]? Those challenging validity on this ground have not made out their case. The distinction upon which they rely to delineate two subjects of taxation is an example of the identification of categories by legal criteria concerned closely with the administration of legal rights; to such considerations, Dixon J said in *Resch*[244], s 55 is not directed.

200 Reliance upon *Mutual Pools* was misplaced. It was the second limb of the second paragraph of s 55 which was considered in *Mutual Pools*. This presents issues of greater specificity. The decision in *Mutual Pools* turned upon whether a tax imposed in relation to something other than goods might ever constitute a duty of excise. The duty in question was imposed upon something which formed part of the realty, namely a constructed swimming pool. It was pointed out in the joint judgment[245] that, upon it being accepted that a tax on land or something forming part of it could not be an excise, the outcome was obvious.

201 The argument for invalidity by reason of non-compliance with s 55 of the Constitution should not be accepted.

Conclusions

202 Question 1(a) should be answered "Yes", and question 1(b) should be answered "No".

203 Question 2 should be answered by stating that the legislation referred to is invalid in its application to the first plaintiff on the ground that it places a particular disability or burden upon the operations or activities of the State of

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243 *The Second Fringe Benefits Tax Case* (1987) 163 CLR 329 at 344, 350.

244 (1942) 66 CLR 198 at 223.

245 (1992) 173 CLR 450 at 454.

New South Wales so as to be beyond the legislative power of the Commonwealth.

204 Question 3 should be answered that the costs of the plaintiffs, save for those otherwise dealt with by order, should be borne by the Commonwealth.

205 McHUGH J. The first issue in this case stated under s 18 of the *Judiciary Act* 1903 (Cth) is whether the plaintiffs are liable under two federal laws to pay a "superannuation contributions surcharge" in respect of "surchargeable contributions". If they do, a further question arises as to whether those laws validly apply to the plaintiffs.

206 The joint judgment of Gaudron, Gummow and Hayne JJ states the material facts and summarises the relevant legislation. It is unnecessary for me to repeat them. I agree with their Honours that the federal laws, properly construed, apply to the first plaintiff but not the second plaintiff. But, for slightly different reasons, in my opinion those laws cannot *validly* apply to the first plaintiff. That is because he is a judge of the Supreme Court of New South Wales and the federal laws burden the constitutional functions of the State of New South Wales, a burden that the Commonwealth Constitution prohibits.

Federalism

207 A federal system of government involves a distribution of legislative power between a central and regional governments with the result that no government has the same legislative authority as a government in a unitary system of government[246]. The sovereignty of a federated nation "is divided on a territorial basis"[247]. What a legislature can do under a unitary system of government may be denied to either the central or regional governments and, sometimes as s 92 of our Constitution shows, to both the central and regional governments.

208 As Dicey pointed out[248]:

> "The object for which a federal state is formed involves a division of authority between the national government and the separate States. The powers given to the nation form in effect so many limitations upon the authority of the separate States, and as it is not intended that the central

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246 Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (1959) at 171-172 cited in Blackshield and Williams, *Australian Constitutional Law and Theory*, 3rd ed (2002) at 245-246.

247 Gillespie, "New Federalisms", in Brett, Gillespie and Goot (eds), *Developments in Australian Politics*, (1994) at 60 cited in Blackshield and Williams, *Australian Constitutional Law and Theory*, 3rd ed (2002) at 241.

248 *Introduction to the Study of the Law of the Constitution*, 10th ed (1959) at 151 cited in Blackshield and Williams, *Australian Constitutional Law and Theory*, 3rd ed (2002) at 245.

> government should have the opportunity of encroaching upon the rights retained by the States, its sphere of action necessarily becomes the object of rigorous definition."

209 Thus, each legislative authority "is merely a subordinate law-making body, whose laws are of the nature of by-laws, valid whilst within the authority conferred upon it by the constitution, but invalid or unconstitutional if they go beyond the limits of such authority"[249].

210 This distribution of functions and powers is an essential element of federalism. But the system is unlikely to work well – or perhaps at all – unless somebody has the power to define the functions and powers belonging to the central and regional governments respectively. The general terms of the constating document of the federation are never clear enough to avoid disputes concerning the limits of their functions and powers. As a result most federal systems – including Australia – have an ultimate judicial "umpire" whose interpretations of the constating document bind the central and regional governments and define the boundaries of their powers and functions. As the Constitutional Commission pointed out[250]:

> "It would seem that the minimal essential features of a federal system as it has come to be understood in Australia are a high degree of autonomy for the governmental institutions of the Commonwealth and the States, a division of power between these organisations, and a judicial 'umpire'."

211 In Australia, the ultimate judicial umpire is this Court. Its judgments ultimately define the powers and functions of the federal and State governments. So in this case, it is for this Court to decide whether expressly or by necessary implication, the Constitution prohibits the Parliament of the Commonwealth from imposing the superannuation contributions surcharge on State judicial officers. The Parliament accepts or assumes that it could not require the States to pay the surcharge in respect of State judicial pensions. And in my opinion, it cannot impose the surcharge by requiring State judges rather than the States to pay it.

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249 Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (1959) at 150 cited in Blackshield and Williams, *Australian Constitutional Law and Theory*, 3rd ed (2002) at 245.

250 Australia, Constitutional Commission, *Final Report of the Constitutional Commission*, (1988) vol 1 at 53 [2.16] cited in Blackshield and Williams, *Australian Constitutional Law and Theory*, 3rd ed (2002) at 248.

212 Most commentators agree that the decision of this Court in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ("the *Engineers' Case*")[251] dramatically extended the powers of the federal Parliament. First, the *Engineers' Case* held[252] that the "one clear line of judicial inquiry as to the meaning of the Constitution must be to read it naturally in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it". Second, the *Engineers' Case* rejected the doctrine of the immunity of governmental instrumentalities that had prevailed up to that time. Under that doctrine, the federal and State governments were seen as sovereign within their respective spheres of power and entitled to carry out their operations without legislative or executive interference from each other. Given that premise, the immunity was seen as arising from a necessary implication of the Constitution that prohibited the State and the federal governments from controlling the activities of each other. The genesis of the rule was a *dictum* of Marshall CJ, delivering the opinion of the United States Supreme Court, in *McCulloch v Maryland*[253]. There, the Chief Justice said 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". Marshall CJ saw the rule as a necessity in a federal system. Nineteenth century United States cases held that the prohibition was reciprocal. One year after the setting up of this Court in 1903, it applied the prohibition in favour of the Commonwealth in *Deakin v Webb*[254] and in favour of the States in *The Federated Amalgamated Government Railway and Tramway Service Association v The New South Wales Railway Traffic Employés Association*[255]. However, the *Engineers' Case* rejected the doctrine of immunity of instrumentalities and held that, with limited exceptions, every grant of power to the federal Parliament authorised laws affecting the operations of the States and their agencies. The exceptions concerned the taxation power and powers affecting the prerogatives of the Crown. Thus, the emphasis on the text of the Constitution and the rejection of the principles of implied prohibition and immunity of instrumentalities enlarged the power of the federal government to deal with matters affecting the States as well as enlarging its power generally.

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251 (1920) 28 CLR 129.

252 (1920) 28 CLR 129 at 152 per Knox CJ, Isaacs, Rich and Starke JJ.

253 4 Wheat 316 at 436 (1819) [17 US 159 at 213].

254 (1904) 1 CLR 585.

255 (1906) 4 CLR 488.

213 Despite this change, it soon became apparent that the *Engineers' Case* did not preclude the drawing of constitutional implications concerning the power of the States and the Commonwealth to bind each other. Isaacs J was the principal author of the judgment in the *Engineers' Case*. Yet not long after the decision in that case, his Honour pointed out – although in a dissenting judgment – in *Pirrie v McFarlane*[256] that a fundamental principle of federalism was that, "where by the one Constitution separate and exclusive governmental powers have been allotted to two distinct organisms, neither is intended, in the absence of distinct provision to the contrary, to destroy or weaken the *capacity* or *functions* expressly conferred on the other". Five years later, in *Australian Railways Union v Victorian Railways Commissioners*[257], Dixon J declared:

> "[U]nless, and save in so far as, the contrary appears from some other provisions of the Constitution or from the nature or the subject matter of the power or from the terms in which it is conferred, every grant of legislative power to the Commonwealth should be interpreted as authorizing the Parliament to make laws affecting the operations of the States and their agencies, at any rate if the State is not acting in the exercise of the Crown's prerogative *and if the Parliament confines itself to laws which do not discriminate against the States or their agencies*." (emphasis added)

214 In *Melbourne Corporation v The Commonwealth*[258], this Court held that the Commonwealth's power with respect to banking did not authorise a discriminatory law prohibiting a bank from conducting any banking business for a State or for any authority of the State unless the Treasurer of the Commonwealth had consented in writing to the conduct of the business. Although the law was directed to the private banks, the Court unanimously held that it burdened the functions of the States in a constitutionally impermissible way. In a much cited passage, Dixon J said[259]:

> "The prima-facie rule is that a power to legislate with respect to a given subject enables the Parliament to make laws which, upon that subject, affect the operations of the States and their agencies. That, as I have pointed out more than once, is the effect of the *Engineers' Case* stripped of embellishment and reduced to the form of a legal proposition. It is subject, however, to certain reservations and this also I have

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256 (1925) 36 CLR 170 at 191. (original emphasis)

257 (1930) 44 CLR 319 at 390.

258 (1947) 74 CLR 31.

259 (1947) 74 CLR 31 at 78-79.

> repeatedly said. Two reservations, that relating to the prerogative and that relating to the taxation power, do not enter into the determination of this case and nothing need be said about them. It is, however, upon the third that, in my opinion, this case turns. The reservation relates to the use of federal legislative power to make, not a general law which governs all alike who come within the area of its operation whether they are subjects of the Crown or the agents of the Crown in right of a State, but a 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."

215 However, this celebrated passage does not represent the *ratio decidendi* of the case. Latham CJ and Williams J saw the case as turning on the proper characterisation of the section which they thought was not a law "with respect to" banking. Latham CJ said[260] that "the invalidity of a federal law which seeks to control a State governmental function is brought about by the fact that it is in substance a law with respect to a subject as to which the Commonwealth Parliament has no power to make laws". Starke J said[261] "in the end the question must be whether the legislation or the executive action curtails or interferes in a substantial manner with the exercise of constitutional power by the other". Rich J said[262] that a federal law:

> "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."

216 The issue of the Parliament's power to bind the States in respect of their functions arose again in *Victoria v The Commonwealth* ("the *Payroll Tax Case*")[263]. Barwick CJ, with whose judgment Owen J agreed, saw the issue as turning on the characterisation of the federal law. In his view[264] when a law is

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260 (1947) 74 CLR 31 at 62.

261 (1947) 74 CLR 31 at 75.

262 (1947) 74 CLR 31 at 66.

263 (1971) 122 CLR 353.

264 (1971) 122 CLR 353 at 373.

invalid because it interferes with the powers or functions of a State, it is because of "lack of an appropriate subject matter". Windeyer J rejected the characterisation approach. He said[265] that the validity of such laws were to be decided by implications arising from the existence of the States as part of the Commonwealth. Those implications "relate to the use of a power not to the inherent nature of the subject matter of the law". His Honour said that a law, although made with respect to a designated subject matter, was not valid "if it be directed to the States to prevent their carrying out their functions as parts of the Commonwealth". Gibbs J[266]adopted the view of Sir Owen Dixon, that "a Commonwealth law is bad if it discriminates against States, in the sense that it imposes some special burden or disability upon them, so that it may be described as a law aimed at their restriction or control". However, his Honour went on to say that he was not disposed to agree that "a law which is not discriminatory in this sense is necessarily valid if made within one of the enumerated powers of the Commonwealth". He said that "[a] general law that would prevent a State from continuing to exist and function as such would in my opinion be invalid".

217 In *The Commonwealth v Tasmania* ("the *Tasmanian Dam Case*")[267], Mason J accepted the formulation of the principles expounded by Dixon J in *Melbourne Corporation*. His Honour said[268]:

> "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."

218 His Honour held that the principle arose from an implied prohibition in the Constitution. He specifically rejected the view of Barwick CJ in the *Payroll Tax Case*[269] that the invalidity of federal laws that interfered with State functions or discriminated against the State was the result of the characterisation of the relevant Commonwealth power.

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265 (1971) 122 CLR 353 at 403.

266 (1971) 122 CLR 353 at 424.

267 (1983) 158 CLR 1.

268 (1983) 158 CLR 1 at 128.

269 (1971) 122 CLR 353 at 372-373.

219 The view expounded by Mason J in the *Tasmanian Dam Case* prevailed in *Queensland Electricity Commission v The Commonwealth*[270]. Mason J said[271]:

> "This review of the authorities shows that the principle is now well established and that it consists of two elements: (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".

220 Gibbs CJ[272], Wilson J[273], Deane J[274] and Dawson J[275] also took the view that the principle had two elements – discrimination and preventing or impeding essential functions.

221 In *Australian Capital Television Pty Ltd v The Commonwealth*[276] Dawson J again accepted that the principle had two elements – discrimination in the sense of subjecting the States to a special burden or disability not imposed on persons generally and undue interference with the capacity of the States to perform their constitutional functions.

222 In *Victoria v The Commonwealth* ("the *Industrial Relations Act Case*")[277], five members of this Court again recognised[278] that the *Melbourne Corporation* principle had two elements.

223 Given this long line of judicial exposition of the principle, I am unable to agree with that part of the reasons of the joint judgment[279] that the *Melbourne*

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270 (1985) 159 CLR 192.

271 (1985) 159 CLR 192 at 217.

272 (1985) 159 CLR 192 at 206-207.

273 (1985) 159 CLR 192 at 222.

274 (1985) 159 CLR 192 at 247-248.

275 (1985) 159 CLR 192 at 260-262.

276 (1992) 177 CLR 106 at 199, 202.

277 (1996) 187 CLR 416.

278 (1996) 187 CLR 416 at 500, 541-542 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

Corporation principle involves only "one limitation, though the apparent expression of it varies with the form of the legislation under consideration". With respect, since *Queensland Electricity Commission* it has been settled doctrine that there are two rules arising from the necessary constitutional implication. It is true that the joint judgment of six members of this Court, including myself, in *Re Australian Education Union; Ex parte Victoria*[280] said that it was unnecessary in that case to decide whether "there are two implied limitations, two elements or branches of one limitation, or simply one limitation". But that statement provides no basis for rejecting the statement of Mason J in *Queensland Electricity Commission*[281] that "the principle is now well established and that it consists of two elements". Nor does it provide any basis for rejecting the statement of Gibbs CJ in the same case[282] 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".

224 Perhaps 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 criteria as 'special burden' and 'curtailment' of 'capacity' of the States 'to function as governments'".[283] 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. If there are no differences, no advantage is to be gained by jettisoning the formulation of Mason J in *Queensland Electricity Commission*.

225 As the present case is concerned with legislation imposing burdens on State judicial officers, the federal legislation is not directed at the States themselves. But that fact does not prevent the application of the *Melbourne Corporation* principle. In *Melbourne Corporation* itself, the legislation was directed at the private banks. But it was invalid because it restricted the banking choices open to State governments and their authorities. It prevented them – because it prevented the private banks – from entering into relationships concerning the use and placement of State government funds and borrowings.

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279 Reasons of Gaudron, Gummow and Hayne JJ at [124].

280 (1995) 184 CLR 188 at 227 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

281 (1985) 159 CLR 192 at 217.

282 (1985) 159 CLR 192 at 206.

283 Reasons of Gaudron, Gummow and Hayne JJ at [124].

226 In *Queensland Electricity Commission*, after referring to the principle of *Melbourne Corporation*, Mason J said[284]:

> "The object of the implied prohibition is to protect the State in the exercise of its functions from the operation of discriminatory laws whether the functions are discharged by the executive government or by an authority brought into existence by the State to carry out public functions even if the authority acts independently and is not subject to government direction and even if its assets and income are not property of the State."

227 Similarly in *Re Australian Education Union*, this Court held certain awards in relation to the terms and conditions of employment of certain public servants invalid. This Court held that the federal arbitration power did not authorise the Commission to make awards concerning the terms and conditions of employment of high level office holders and senior public servants. The Court said[285]:

> "In our view ... critical to a State's capacity to function as a government is its ability, not only to determine the number and identity of those whom it wishes to engage at the higher levels of government, but also to determine the terms and conditions on which those persons shall be engaged. Hence, Ministers, ministerial assistants and advisers, heads of departments and high level statutory office holders, parliamentary officers and judges would clearly fall within this group. The implied limitation would protect the States from the exercise by the Commission of power to fix minimum wages and working conditions in respect of such persons and possibly others as well".

228 The federal legislation in the present case is concerned with a superannuation contributions surcharge – taxation – and not directly with the terms and conditions of employment of State judicial officers. But that is a difference without relevant constitutional meaning. Nothing in the Constitution or in the principle of *Melbourne Corporation* prevents the federal Parliament from subjecting State judicial officers to general taxation, provided that it does not discriminate against them as State judicial officers. But the matter is constitutionally different when federal legislation taxes State judicial officers in a way that differs from other income earners. Such a law will be invalid unless the discrimination is such that it has no practical impact on the relationship between the State and the judicial officer. The matter may be one of degree. Drawing the line between a law that treats State judicial officers differently from other income

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284 (1985) 159 CLR 192 at 218.

285 (1995) 184 CLR 188 at 233 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

earners and is valid and a law that disadvantages them in a real sense and is invalid may not always be easy. But it must be drawn if the States are to be free from federal laws that impose special burdens or disabilities on their constitutional arrangements relating to the administration of justice.

229 Here the federal law discriminates against State judicial officers in a way that interferes in a significant respect with the States' relationships with their judges. It interferes with the financial arrangements that govern the terms of their offices, not as an incidence of a general tax applicable to all but as a special measure designed to single them out and place a financial burden on them that no one else in the community incurs. The Commonwealth does not dispute that the relevant federal legislation treats the first plaintiff and other State judicial officers differently from the way federal laws concerned with the superannuation contributions surcharge deal with other "high income earners". Private "high income earners" do not have the surcharge imposed on them. In their case, the surcharge is imposed on their superannuation provider. The federal legislation assumes – no doubt with good reason – that the surcharge will be passed on to the high income earner in his or her capacity as a member of the superannuation scheme in the form of reduced benefits. But in so far as the federal legislation deals with these private "high income earners", it does not impose any surcharge on them personally. It does not make them liable to pay a debt of hundreds of thousands of dollars, as these federal laws make State judicial officers liable to pay.

230 Similarly, federal judges – as "high income earners" – are treated differently by the federal legislation from State judicial officers. Federal judges incur no personal liability. When they leave office they do not have the burden of an accumulated debt arising from the imposition of the surcharge. Federal judges who are subjected to the surcharge merely have their pensions reduced at the time of each payment by a specified amount. Their position is very different from State judicial officers who are subjected to the surcharge.

231 The evidence in this case shows, for example, that, when the first plaintiff turns 62 and can retire with a judicial pension, he will have an accumulated superannuation contributions surcharge debt of over $300,000. He will receive a pension on retirement at 62 of about $180,000. The pension will be taxed at the marginal rate. If, instead of retiring at 62, he remains in office until he is required to retire at 72, he will have accumulated a superannuation contributions surcharge debt to the Commonwealth of over $550,000. At age 72, the actuarial evidence indicates that he will have a pension of about $267,000. After paying income tax on his annual pension, four years will pass before his pension receipts match his surcharge debt. If he should die within that four-year period or earlier and is survived by a widow, the pension receipts will be even smaller but the debt owed by the first plaintiff's estate will remain the same.

232 Thus, if the first plaintiff were to serve beyond the age of 62, when he can retire with a judicial pension, it will result in him incurring a debt of an additional $240,000 if he should remain until he is 72. Hence, the federal legislation operates to provide a strong incentive for the first plaintiff and other State judicial officers to retire as soon as they are entitled to a pension. It is true that, independently of the federal legislation, the value of a judge's pension decreases with each day the judge stays in office after becoming eligible to retire with a pension. In that respect, the pension scheme, by entitling a judge to retire after turning 60 and serving for 10 years, has an inherent incentive for retirement on entitlement to the pension. But the legislation in issue in this case provides an additional and greater incentive for the judge to retire early. Thus, the legislation operates so as to hamper the capacity of State governments to retain the services of their judicial officers. More than that, it must also hamper the ability of the States to get suitable persons to take appointments to State judicial offices. Any person approached for appointment to State judicial office knows that under this legislation he or she will incur a significant and increasing financial debt to the Commonwealth upon taking office.

233 So serious was the likely effect on the relationship between State judicial officers and the State of New South Wales that the State felt compelled to enact the *Judges' Pensions Amendment Act* 1998 (NSW). That Act amended the *Judges' Pensions Act* 1953 (NSW) to provide for the commutation of pensions to enable the payment of the superannuation contributions surcharge. As the New South Wales Attorney-General pointed out in his Second Reading Speech in the Legislative Council[286], the amendments were "essential to provide judges and other persons entitled to a pension or reversionary pension under the Act with a mechanism to pay the superannuation contributions surcharge from the benefit they are entitled to receive". Thus, the result of the present federal legislation concerning superannuation contributions surcharges is that the State of New South Wales and other States have been forced for practical reasons to a enact legislation to pay a lump sum to their judges who retire so that they can if they wish commute part of their benefits to pay the surcharge debt. Thus, the practical effect of the federal legislation is to require the States to pay a sum of money to a retiring State judge to be paid to the Commonwealth, a payment that the Commonwealth accepts or assumes it could not directly require the States to pay.

234 The federal legislation in question in this case violates the principles enshrined in *Melbourne Corporation*. It is invalid in so far as it applies to the first plaintiff. I agree with the answers to the questions proposed by Gaudron, Gummow and Hayne JJ.

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286 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 2 June 1998 at 5507.

235 KIRBY J. This Court has before it questions reserved on a case stated[287]. As explained in the reasons of Gaudron, Gummow and Hayne JJ ("the joint reasons"), the questions for decision present two issues[288]. The first is a construction issue concerned with whether, pursuant to federal legislation, the two plaintiffs are liable to pay a superannuation contributions surcharge ("the surcharge"). The second issue involves the alternative attack that the plaintiffs have mounted on the legislation, suggesting that, if it applies to them or either of them, it exceeds the constitutional powers of the Federal Parliament.

Background facts, history and context

236 *The facts and legislation*: The facts are set out in the stated case. Most of them necessary for my opinion are explained in the joint reasons.

237 The first plaintiff (Justice Robert Austin) was appointed a judge of the Supreme Court of New South Wales on 31 August 1998. The second plaintiff (Master Kathryn Kings) was appointed the Listing Master of the Supreme Court of Victoria on 23 March 1993. On 20 July 1993 she was appointed a Master of that Court. Each of the plaintiffs has been supported in this Court by submissions of the Attorney-General for his or her State and by Attorneys-General of other States, intervening. The Commonwealth has disputed the plaintiffs' arguments. It submits that the legislation is valid and applicable to each of them.

238 Because the joint reasons set out a description of the federal legislation (both that impugned and other laws relevant to the issues)[289], it is unnecessary for me to repeat that detail. The unpleasant complexity of federal superannuation law has already been the subject of attention in this Court[290]. I shall adopt the description of the legislation, federal and State, used by my colleagues.

239 *Historical setting*: The sources of the plaintiffs' arguments do not lie only in the text of the Constitution and the detail of the impugned legislation. They lie deep in constitutional history and in issues of basic principle. So far as history is concerned, the plaintiffs submitted that their arguments could be understood only if this Court recalled the long struggle for the integrity of the judicial institution to which the Australian judiciary is heir.

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287 The case was stated by Hayne J pursuant to the *Judiciary Act* 1903 (Cth), s 18.

288 See the joint reasons at [38]-[39].

289 Joint reasons at [49]-[69].

290 *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83.

240 In the time of the Norman Kings of England, the judicial power (at least in non-ecclesiastical matters) reposed in the hands of the King personally and his immediate entourage (the *Curia Regis*)[291]. Royal participation in the judicial function diminished over ensuing centuries in favour of professional judges. However, those judges were, at first, dependant for their offices and remuneration upon the King's pleasure. The abuse of that power by the Stuart Kings contributed to the revolution of 1688 and *The Act of Settlement* of 1700[292]. By that law, confirmed by George I in 1714[293], it was enacted that the judges of the Kingdom should hold office during good behaviour and that their salaries should be "ascertained and established" by law[294]. In 1760, by an Act relating to the "Commissions and Salaries of Judges"[295], another cause weakening the position of judges was removed. It was provided that Royal appointees, including judges, would no longer vacate their offices, and lose their salaries, upon the demise of the Crown[296].

241 These constitutional advances, won in England, were not initially observed in England's colonies. One of the complaints made by the American colonists in the *Declaration of Independence* was that the King had "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries"[297]. It was this defect in government that led, among other things, to the "Compensation Clause" in the United States Constitution[298], guaranteeing federal judges a "Compensation, which shall not be diminished during their Continuance in Office".

242 *Australian judicial pensions*: The first provisions for judicial pensions in the Australian colonies were introduced by the New South Wales and Victorian

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291 *Re Provincial Court Judges* [1997] 3 SCR 3 at 176 [305]; see also Lederman, "The Independence of the Judiciary", (1956) 34 *Canadian Bar Review* 769.

292 12 and 13 Will 3 c 2.

293 1 Geo 1 c 4.

294 s 3. See *Re Provincial Court Judges* [1997] 3 SCR 3 at 177 [306].

295 1 Geo 3 c 23.

296 cf *Re Provincial Court Judges* [1997] 3 SCR 3 at 177 [306].

297 §11. See *United States v Hatter* 532 US 557 at 568 (2001).

298 Art III s 1.

Constitution Acts[299]. Such provisions were confirmed, and formalised, by later colonial[300] and State[301] statutes. In respect of federal judges, provision for pensions was made in the first draft of the Judiciary Bill[302]. However, that provision was deleted when the *Judiciary Act* 1903 (Cth) was passed. In 1918, a special measure was enacted for the entitlements of Griffith CJ, who had enjoyed pension rights as Chief Justice of Queensland which he lost upon his federal appointment[303]. A general provision for pensions for federal judges was not enacted until 1926[304].

243 Judicial pensions were introduced over time in the Australian colonies[305]. In Queensland and South Australia the pension provisions so introduced were abolished but later restored[306]. The common feature of most of the Australian judicial pension statutes was that they provided a "non-contributory" pension (that is, one to which the judge did not directly contribute financially) paid to the

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299 *New South Wales Constitution Act* 1853, s 59 (17 Vict No 41); *Victoria Constitution Act* 1855, Sched 1 cl 49 (18 & 19 Vict c 55).

300 *Judges' Pensions Act of 1859* (NSW) (23 Vict No 2) and *Supreme Court and Circuit Courts Act, 1900* (NSW).

301 eg *Judges Retirement Act* 1918 (NSW) and *Supreme Court (Judges Retirement) Act* 1936 (Vic). The present source of the judicial pension for judges and Masters of the Supreme Court of New South Wales is the *Judges' Pensions Act* 1953 (NSW). The present source of the judicial pension for Masters of the Supreme Court of Victoria is the *Supreme Court Act* 1986 (Vic), Pt 7. See the joint reasons at [46].

302 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 18 March 1902 at 10976.

303 *Chief Justice's Pension Act* 1918 (Cth).

304 *Judiciary Act* 1926 (Cth). This was later amended by the *Judges' Pensions Act* 1948 (Cth). The present source of judicial pensions for federal judges is the *Judges' Pensions Act* 1968 (Cth).

305 Queensland: *Supreme Court Constitution Amendment Act of 1861* (Q), s 8 (25 Vict No 13); Tasmania: *Supreme Court Judges' Retiring Allowances Act* 1880 (Tas) (44 Vict No 28); Western Australia: *Judges' Pensions Act* 1896 (WA) (60 Vict No 24).

306 Queensland: *Judges' Retirement Act* 1921 (Q) (12 Geo 5 No 14). Pensions were reintroduced by the *Judges' Pensions Act of 1957* (Q) (6 Eliz 2 No 38). South Australia: *An Act to repeal an Act No 186 of 1880* 1886 (SA) (49 & 50 Vict No 381). Pensions were reintroduced by the *Supreme Court Act Amendment Act* 1944 (SA).

judge upon qualifying retirement or, upon death, to the judge's legal personal representative or specified family members. Only in two States was provision made for contributions by a judge to such pension entitlements. In South Australia, when pensions were restored after an interval of fifty-eight years, they were at first contributory[307]. The present non-contributory scheme in that State only commenced in 1971[308]. The *Judges' Contributory Pensions Act* 1968 (Tas) provides, as its short title suggests, for judicial contributions to the benefits payable under that Act. All other judicial pension schemes in Australia, federal and State, are non-contributory and "unfunded" (that is, paid out of consolidated revenue rather than from a specific fund established for the purpose).

244 *Australian taxation*: South Australia was the first Australian jurisdiction to introduce income tax, in 1884[309]. Like taxes were introduced in New South Wales and Victoria in 1895[310]. The other colonies and States introduced that form of taxation at the same time or soon after[311]. The Federal Parliament first enacted taxes upon incomes in 1915[312].

245 Despite objections of the Privy Council[313], this Court initially embraced a view of the Constitution forbidding the imposition of taxation by one polity of the Commonwealth upon an instrumentality or officer of another, where such taxation would "fetter, control, *or interfere* with, the free exercise of the legislative or executive power" of the other[314]. This principle was held to be reciprocal[315]. It therefore prohibited the interference of federal law with State

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307 *Supreme Court Act Amendment Act* 1944 (SA).

308 *Judges' Pensions Act* 1971 (SA).

309 *Taxation Act* 1884 (SA) (47 & 48 Vict No 323).

310 *Land and Income Tax Assessment Act of 1895* (NSW) (59 Vict No 15) and *Income Tax Act* 1895 (NSW) (59 Vict No 17); *Income Tax Act* 1895 (Vic) (58 Vict No 1374).

311 *Income Tax Act* 1894 (Tas) (58 Vict No 16); *Income Tax Act of 1902* (Q) (2 Edw VII No 10); *Land Tax and Income Tax Act* 1907 (WA) (7 Edw 7 No 16).

312 *Income Tax Act* 1915 (Cth).

313 *Webb v Outrim* [1907] AC 81.

314 See *D'Emden v Pedder* (1904) 1 CLR 91 at 111. (emphasis added) Affirmed in *Deakin v Webb* (1904) 1 CLR 585.

315 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1132-1133.

governmental instrumentalities and officeholders[316]. However, the doctrine of intergovernmental immunities, which was the foundation for these rulings, was overthrown in 1920 by the decision of this Court in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ("the *Engineers' Case*")[317].

246 At least after the *Engineers' Case*, there was no question that a State judge in Australia was obliged, like any other citizen, to pay taxes imposed by legislation enacted by the Federal Parliament under its constitutional power to make laws with respect to taxation[318]. Nor was it suggested that federal judges were wholly immune from such laws. This was so although, in the case of federal judges, a relevant express provision is made in s 72 of the Constitution:

> "The Justices of the High Court and of the other courts created by the Parliament:
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> …
>
> (iii) shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office."

247 The provision of s 72 is similar to the "Compensation Clause" in the United States Constitution. In that country it was originally held that the power of the Congress to "lay and collect Taxes"[319] did not extend to imposing federal taxation on State judges[320]. Similarly, it was held that, under the "Compensation Clause", federal judges were immune from liability to pay federal taxes[321].

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316 *The Federated Amalgamated Government Railway and Tramway Service Association v The New South Wales Railway Traffic Employés Association* (1906) 4 CLR 488.

317 (1920) 28 CLR 129. See the reasons of McHugh J at [212] and the remarks of Chief Justice Sir Garfield Barwick on his retirement (1981) 148 CLR v at ix-x; cf *SGH Ltd v Commissioner of Taxation* (2002) 76 ALJR 780 at 790 [50], 797 [85]; 188 ALR 241 at 255, 264.

318 Constitution, s 51(ii).

319 United States Constitution, Art I s 8.

320 *Collector v Day* 78 US 113 (1870); cf *Pollock v Farmers' Loan and Trust Company* 157 US 429 (1895).

321 *Evans v Gore* 253 US 245 (1920). See also *Miles v Graham* 268 US 501 at 509 (1925). During the Civil War an attempt by federal law to impose income tax on the Justices of the Supreme Court led to a communication to the Government by

(Footnote continues on next page)

However, in 1939, each of these immunities was overruled by the Supreme Court. That Court held that judges in the United States were liable to pay non-discriminatory federal taxes imposed by reference to their salaries[322]. A little earlier, a similar decision had been reached in respect of the judges of Canada[323].

248 *Exempting current officeholders from the new tax*: A final contextual consideration must be mentioned before I turn to the plaintiffs' legal challenges. The last time an Australian judge contested the applicability of taxes to his judicial income, as a matter of general principle, was in 1907. Sir Pope Cooper, Chief Justice of Queensland, disputed the application of State income tax law to judicial salaries[324]. This Court dismissed the challenge. One reason for the absence of judicial proceedings questioning the applicability to judges of Australian taxation laws may have been the care which Australian governments and parliaments have normally observed to respect the principle that judges should only be rendered liable to taxation laws of general application and to respect the convention otherwise protecting the remuneration of serving judges from effective diminution.

249 There is no express equivalent in the Australian Constitution, similar to s 72(iii), protecting the remuneration of State judges. There are relevant State laws to restrain the reduction of the salaries and allowances payable to judges of State Supreme Courts[325]. However, such laws are obviously addressed only to State reductions. They could not prevent the operation of a valid federal law having that effect. It may be argued that there is a convention, and possibly an implication in Ch III of the Constitution, protecting the remuneration of appointed State judges. Whatever might be said as to the existence, or scope, of any such protection (a matter that might consume much time to clarify) in this case a decision was made by the Federal Parliament to draw no distinctions between Australia's judges already in office who were entitled to a judicial pension. Relevantly, by s 7 of the *Superannuation Contributions Tax (Members*

Taney CJ on behalf of the Court and to a subsequent refund to the Justices of the tax paid by them "under protest". See Miller, *Lectures on the Constitution of the United States*, (1893) at 247-248 cited in *Cooper v Commissioner of Income Tax for the State of Queensland* (1907) 4 CLR 1304 at 1316 per Griffith CJ.

322 *O'Malley v Woodrough* 307 US 277 (1939); cf *United States v Hatter* 532 US 577 (2001).

323 *Judges v Attorney-General of Saskatchewan* [1937] 2 DLR 209 (PC).

324 *Cooper v Commissioner of Income Tax for the State of Queensland* (1907) 4 CLR 1304.

325 eg *Constitution Act* 1975 (Vic), s 82(6B).

of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997 (Cth) ("the Protected Funds Assessment Act"), it is provided that the Act "does not apply to a person who is a member because he or she is a judge of a court of a State at the commencement of this Act".

Application of interpretative principles

250 No issue is raised in these proceedings concerning the taxation obligations of federal judges. This case is concerned only with the application of the impugned laws with respect to the two plaintiffs who are State judicial officers. The outcome thus depends upon the construction of the laws in question and, should either or both of the plaintiffs fall within their operation, whether such laws are constitutionally valid.

251 In the performance of the function of statutory construction a court must conform to applicable statutory and common law rules devised to facilitate that task and to ensure that it is carried out in a consistent manner. One such rule is the "plain meaning" principle. Another is that commonly described as the "purposive" principle[326]. In the case of federal legislation, the latter principle is supported by provisions of the *Acts Interpretation Act* 1901 (Cth)[327]. It is also supported by the common law as elaborated by this Court[328]. In earlier times it used to be said that legislation imposing taxation was subject to a strict construction, in favour of the taxpayer. However, in more recent times, this Court has departed from the narrow and literal interpretation of words appearing in legislation, including that imposing taxation, in favour of an interpretation that seeks to achieve the apparent purposes or objects of the enactment as expressed in its terms[329].

252 There is another principle of interpretation important for this case. It affects my approach both to the suggested ambiguities of the federal legislation (relevant to the applicability issue) and to the meaning and operation of the Constitution (relevant to the validity issue). In the task of construction it is permissible to have regard to any applicable principles of international human

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326 cf *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423-424 per McHugh JA.

327 s 15AA.

328 See eg *Bropho v Western Australia* (1990) 171 CLR 1 at 16-17; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[70].

329 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 307 per Gibbs CJ, 310 and 313 per Stephen J, 323 per Mason and Wilson JJ; cf joint reasons in this case at [102]. See also *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1 at 7-9; [1958] AC 450 at 465-466.

rights law that throw light upon the point in controversy. To do this is not to introduce into the interpretation, by the backdoor, provisions in international human rights treaties to which Australia is a party but which have not been incorporated as part of this country's domestic law[330]. That would be an impermissible course. Instead, it involves a different, and permissible course. Faced with a choice between competing concepts of the common law or ambiguous Australian statutes, a decision-maker may take into account, as relevant, the consideration that one interpretation will conform to the international law of human rights and another will not[331].

253 The international law of human rights represents a large and growing body of jurisprudence, developed by courts and expert bodies throughout the world, based upon the texts of international instruments that have come into force. It provides a legal resource of great utility from which this country is not disconnected. It is at least as useful in considering questions of basic legal principle concerning the content of Australian law to have regard to this source as it is to examine the non-binding expositions of the law appearing in English cases of centuries ago, often dealing with problems in a context quite different from that of the contemporary world[332].

254 Australia is a party to the International Covenant on Civil and Political Rights ("the ICCPR")[333]. It is also a signatory to the First Optional Protocol to the ICCPR. That Protocol renders the law of Australia (including as expounded by this Court) accountable to the treaty body established under the ICCPR for dealing with communications alleging derogations from that Covenant's requirements.

255 The ICCPR provides that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law"[334]. These tripartite characteristics of courts and tribunals are fundamental rights belonging not to the judges or other members of such bodies, as such, but

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330 cf *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 288.

331 cf *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42. See also *Dietrich v The Queen* (1992) 177 CLR 292 at 305-306, 360-361, 373; *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128 at 151-152 [69].

332 cf *Commonwealth v Yarmirr* (2001) 208 CLR 1 at 132-133 [297]-[298].

333 Done at New York on 19 December 1966, ATS 1980 No 23.

334 Art 14.1; cf *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128 at 151-152 [69].

to all persons in society. The entitlement to a manifestly competent, independent and impartial decision-maker in a court or tribunal established by law, is the clear requirement of international human rights law[335]. The more general proposition of judicial independence is also supported by Australian domestic law[336]. It may be implied in the Australian Constitution, including in the case of State courts[337].

256 So far as the interpretation of the Constitution by reference to developments of international law, it is to be noted that the approach that I have mentioned, often favoured by judges of other Commonwealth countries[338], has recently gathered some support in the Supreme Court of the United States. In ruling that the carrying into effect of a sentence of death upon a prisoner who was severely mentally handicapped would constitute "cruel and unusual punishment", contrary to that country's Constitution, Stevens J, for the majority of the Court, called in aid opinions concerning the requirements of international human rights law[339].

257 For reasons that I have expressed in other decisions[340], it is my view that this Court may also interpret the Australian Constitution so as to ensure that the development of constitutional doctrine, relating to matters of fundamental

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335 *Karttunen v Finland, United Nations Human Rights Committee*, 23 October 1992 extracted in Martin et al, *International Human Rights Law and Practice*, (1997), vol 1 at 527.

336 *Johnson v Johnson* (2000) 201 CLR 488; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

337 *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 363-364 [83]-[84] per Gaudron J; 372-373 [115]-[116] of my own reasons; cf *Roberts v Bass* (2002) 194 ALR 161 at 199-200 [145].

338 eg *Tavita v Minister of Immigration* [1994] 2 NZLR 257 at 266; *R v Oakes* [1986] 1 SCR 103 at 120-121; Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms", (1982) 4 *Supreme Court Law Review* 287.

339 *Atkins v Virginia* 70 USLW 4585 at 4589, fn 21 (2002) per Stevens J, with whom O'Connor, Kennedy, Souter, Ginsburg and Breyer JJ joined. That approach produced a strong dissent from Rehnquist CJ at 4591 and Scalia J at 4598 (with whom Thomas J joined).

340 eg *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 657-659; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417-419 [166]-[167]; cf *Commonwealth v Yarmirr* (2001) 208 CLR 1 at 130-131 [292]-[293].

principle, conforms, so far as the text and other considerations allow, to the principles of the law of universal human rights. In the present case, this includes the right of access to judges who are competent, independent and impartial in the full sense of those words. Many international statements concerning the features essential to the judicial branch of government recognise the importance of providing adequate remuneration for the judiciary and protection of such remuneration against its effective reduction whilst in office[341]. Where there is an ambiguity in the applicable legislation or an uncertainty in the meaning and application of the Constitution, I will prefer the construction that upholds these basic principles and applies them to the problem in hand in preference to a construction that does not. I take such notions to be inherent in the type of judiciary for which the Australian Constitution provides or which it recognises.

Construction arguments

258 *Application to the first plaintiff*: The construction arguments advanced by the first plaintiff are described in the joint reasons[342]. For the reasons there stated, each of the arguments fails. Nothing in the interpretative principles to which I have referred assists the first plaintiff on the applicability issue. The plain meaning and purposive principles stand against his arguments. There is no relevant uncertainty or ambiguity in the legislation. The construction arguments must be rejected in his case. This conclusion requires consideration of the first plaintiff's objections to the constitutional validity of the federal law that, in its terms, applies to him.

259 *Application to the second plaintiff*: The case of the second plaintiff is more difficult. The issue is whether, before the applicable date, 7 December 1997, the second plaintiff was a "judge of a court of a State" for the purposes of the Protected Funds Assessment Act. There is no definition of the word "judge" in that Act. Therefore, the issue becomes, what does that phrase "judge of a court of a State" mean in the context of that Act?

260 Upon one view, the second plaintiff is not a "judge". She is not so designated by title. Within the judiciary and legal profession she would not ordinarily be described as a "judge". In this regard, her position is different from

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341 United Nations, Basic Principles on the Independence of the Judiciary, endorsed by the General Assembly, A/Res/40/32, 29 November 1985, A/Res/40/146, 13 December 1985 at par 11; Draft Principles on the Independence of the Judiciary ("Siracusa Principles"); International Association of Judges, The Universal Charter of the Judge (2000), at Art 13 ("The judge must receive sufficient remuneration to secure true economic independence").

342 Joint reasons at [92]-[110].

that of a Master in the State of South Australia where a Master of the Supreme Court is designated a judge because so commissioned in the District Court of that State[343]. In the case of the second plaintiff, the same position did not obtain when she was appointed to her present office. It did not exist on 7 December 1997. Nor has it existed at any time since.

261 It is not to be supposed that the Federal Parliament was ignorant of the distinction, observed in most Australian States, between judges and Masters. The precise functions performed by Masters in the several States differ. Although this is also true of judicial officers designated as "judges", the differentiation there is less marked. One view of the legislation, in effect exempting serving State "judges" from the new federal surcharge, is that the exemption was an exceptional measure, arguably unnecessary by the Constitution but conformable to an established convention, which the Government proposing the Bill, and the Parliament enacting it, felt should be confined to "judges" strictly so described.

262 The Commonwealth conceded that, in particular cases, a differentiation between judges and Masters might put some Masters in an anomalous position. However, it submitted that the adoption of a functional analysis would introduce other and still more difficult problems caused by any departure from observing the plain meaning of the word used by the Parliament. Thus, judicial registrars of the Federal Court of Australia[344] and of the Family Court of Australia[345] perform functions that are in some ways similar to the functions of judges and Masters. However, they are not exempted by federal law from the application of the surcharge. The Commonwealth argued that it would be surprising if a federal law, using the word "judge", were to be construed as covering officers such as Masters only because of functional similarity of their work to the work of judges. If that were the case, questions could arise as to how "magistrates, registrars or people with the status of a judge" could be so distinguished.

263 There is much force in these submissions. They accord with the common sense and ordinary meaning of the word "Master", as distinct from "judge". Upon one view, that distinction is reinforced by the Victorian Constitution, which states that both judges and Masters are part of the Supreme Court of that State[346]. The joint reasons invoke this provision as support for their conclusion

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343 *Supreme Court Act* 1935 (SA), s 7(4).

344 *Federal Court of Australia Act* 1976 (Cth), ss 18AA-18AM; Federal Court Rules O 78 r 38.

345 *Family Law Act* 1975 (Cth), s 26B; Family Law Rules O 36A.

346 s 75(2).

that "a judge of a court of a state" *includes* Masters in the case of that Court[347]. However, it is equally arguable that the distinction is antagonistic to that conclusion. On this view, it only adds force to the understanding of the word "judge", as ordinarily *excluding* a Master. The phrase in the Protected Funds Assessment Act does not refer to the Supreme Court and its members, but only to "judges".

264 The joint reasons refer to the fact that the *Supreme Court Act* 1986 (Vic) is one of the Acts listed in Sched 14 of the Income Tax Regulations 1936, which establishes the "protected" funds. They reason that, as the Masters' fund is the only "fund" established by that Victorian Act, it must have been intended that Masters would be considered "judges" for the purpose of s 7, or else listing that Act in Sched 14 would have no function[348]. However, this possible anomaly is no different in kind from that produced by also listing the *Coal Mines (Pension) Act* 1958 (Vic) and the *Mint Act* 1958 (Vic), to which the legislation has no operation. The joint reasons suggest that this "incongruity" was created by the direct transfer of the contents of Sched 14 from its position in earlier legislation[349]. If such explanation can be used for those Acts, the question is posed why not for the Victorian *Supreme Court Act*?

265 The task of construing legislation is not a mechanical one. In deriving meaning courts will be guided by the apparent purpose which the chosen language was enacted to perform. In the present case, part of that purpose was to protect the pensions of the specified persons already in judicial office in certain courts and to do so out of respect for the convention long observed in relation to the remuneration of judges of superior courts. It is questionable whether, without express provision, Masters are members of the courts to which that convention applies. In such a finely balanced issue, the second plaintiff's arguments receive some support from the interpretive principle based on international human rights law. Thus, with some hesitation, I have concluded that it would not be stretching the definition of "judge" too far in this instance to include within its ambit appointed Masters of the Supreme Court of Victoria for the purpose of s 7 of the Protected Funds Assessment Act. I will not press the hesitation that I feel in embracing this conclusion to a dissent from the opinion of the other members of this Court on the issue of construction. A larger difference lies between us involving the Constitution.

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347 Joint reasons at [76].

348 Joint reasons at [56], [77].

349 Joint reasons at [96].

266 I agree with the joint reasons[350] that the position of Masters in other Australian Supreme Courts depends upon an analysis of the legislation (and functions) applicable in their cases. My conclusion of the construction issue in favour of the second plaintiff would not necessarily require the same outcome in the case of Masters in other States, appointed under relevantly different legislation.

267 *Conclusions*: The result is therefore that the construction question in respect of the first plaintiff must be answered "yes". In respect of the second plaintiff the answer must be "no". It follows that, in respect of the second plaintiff, the issue of constitutional validity does not arise. However, that issue must be addressed in the case of the first plaintiff.

Unavailing constitutional arguments

268 A number of arguments were advanced, contesting the constitutional validity of the federal laws subjecting the first plaintiff to the surcharge. I can dispose briefly of most of those arguments because I agree with the joint reasons that they should be rejected[351]. Specifically, I agree with what is stated in the joint reasons in respect of the submissions that the legislation constituted an arbitrary exaction, not taxation[352]; involved an abdication of legislative authority[353]; and constituted a breach of s 55 of the Constitution which mandates but one subject matter in laws imposing taxation[354].

269 I also agree with what is said in the joint reasons concerning the alleged invalidity of the suggested conscription of State officers and institutions (including State Government Actuaries) to perform functions in the calculation of the "notional surchargeable contributions factor", as contemplated by the federal legislation[355].

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350 Joint reasons at [79].

351 Joint reasons at [175]-[201].

352 Joint reasons at [182]-[183].

353 Joint reasons at [184]-[186]; cf *Gould v Brown* (1998) 193 CLR 346 at 485-487 [284]-[287]; *Byrnes v The Queen* (1999) 199 CLR 1 at 10-11 [4]; *R v Hughes* (200) 202 CLR 535 at 574-575 [94].

354 Joint reasons at [187]-[201]; cf *Luton v Lessels* (2002) 76 ALJR 635 at 655 [122]; 187 ALR 529 at 558.

355 See joint reasons at [177]-[181] referring to the requirements of the Protected Funds Assessment Act, s 9(5) and Regulations thereunder.

270 The joint reasons do not finally resolve this last-mentioned objection[356]. However, to reach my answers, I must do so. In my view, nothing in the applicable federal law subjects the State Actuary (or a fund manager) to duties that are constitutionally impermissible. It is not uncommon for federal laws, in their operation, to have consequences for State officials. Thus, the constitutional power to vest federal jurisdiction in State courts[357] necessarily has many consequences for State officials, quite apart from State judicial officers. For example, such consequences affect the duties of court reporters, sheriffs' officers, registry staff, administrative personnel of the State Attorney-General's office and so on. If there be federal power (as in this case is propounded by reference to the power to make laws with respect to taxation) incidental duties will commonly be cast on many persons, including State public servants. What is impermissible, under the implication derived from the Constitution, is interference in[358]:

> "the [State] government's right 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".

271 In relation to the "higher levels of government", the Federal Parliament may not interfere with the State's capacity to determine the persons it employs, their terms and conditions of employment and the normal duties they are required to perform[359]. However, these principles have no application to the limited burden imposed on the State as a notional "superannuation provider"[360] to

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356 Joint reasons at [181].

357 Constitution, s 77(iii); cf *Solomons v District Court of New South Wales* (2002) 76 ALJR 1601 at 1625 [132]; 192 ALR 217 at 250. The vesting of federal jurisdiction in State courts is a special case because of the constitutional power to do so without State agreement or authority. However, the point of incidental obligations inherent in obedience to valid federal law remains true in other cases: *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 425, 440-441.

358 *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 232; cf *SGH Ltd v Commissioner of Taxation* (2002) 76 ALJR 780 at 790 [51]; 188 ALR 241 at 255.

359 *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 233.

360 In the case of the first plaintiff, the Attorney-General's Department of New South Wales.

provide information essential to the accurate calculation of a federal tax (if so it proves) applicable to the State judge concerned.

272 A similar objection might be voiced in relation to the duty of State government departments, agencies and officeholders to provide details for present income tax laws of the income paid to State officials, including those, like judges, in the "higher levels of government" of the State. Yet for decades "employers" (including State government "employers") have been obliged by federal law to provide such information[361]. Such duties obviously impose burdens on the State and on its employees and officers. They involve costs to the State. But they are relatively minor and strictly incidental to the operation of valid federal taxation laws. The claim that the imposition of the duty provided in this case is constitutionally impermissible, as an invasion of the employment autonomy of a State as a constituent part of the Commonwealth, is unconvincing. So is the contention that susceptibility to federal judicial review (if such be the case) would be impermissible without express consent of State law in the case of a State officeholder such as the State Government Actuary[362].

273 In *Re Australian Education Union; Ex parte Victoria*[363], this Court emphasised the need to respect the integrity and autonomy of the States in the context of the operation of s 109 of the Constitution[364]. That section presents difficulties for the attempted imposition on federal officers of duties imposed by State law without the express and valid agreement of a law of the Federal Parliament. However, the same problem is not presented by the incidental imposition upon State officers of relatively limited obligations inherent in the carrying into effect of valid federal laws. The extreme argument of autonomy advanced for the first plaintiff would deny the integrated character of the Australian federation[365]. It would forbid the Federal Parliament not only from enacting laws obliging the States to provide information on the remuneration paid to State employees. It would also forbid the imposition of obligations to deduct, and remit, taxation at source. Yet for decades, these have been accepted and sensible features of the Australian taxation system. They are laws of broad

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361 cf *Income Tax Assessment Act* 1936 (Cth), ss 221C, 221EAA (but see s 221DA).

362 cf *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117 at 128.

363 (1995) 184 CLR 188.

364 (1995) 184 CLR 188 at 229-230. See also *R v Hughes* (2000) 202 CLR 535 at 553 [31], 577 [101].

365 *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 560; *R v Hughes* (2000) 202 CLR 535 at 566-568 [67]-[73].

application, affecting employees and high officeholders of the States alike. I am unconvinced that the imposition of such incidental burdens on State officials is constitutionally forbidden[366]. It falls far short of the "conscription" of State officials that (except perhaps in wartime or like emergency under the defence power) would be forbidden to federal law[367].

274 It follows that the objections[368] to the statutory duty to perform actuarial calculations do not avail the first plaintiff. Even if those arguments were made good, they would at most be a reason for severing the offending provisions, leaving the remainder of the legislation in tact. The Commissioner of Taxation would simply have to obtain the necessary raw information from the State[369] and perform the calculation for himself. In all other respects I agree with what is said in the joint reasons concerning the heads of challenge mentioned above. This conclusion confines the point of divergence in my reasons to the last remaining argument about constitutional validity. It involves the claimed infringement of the implied limitation on the legislative powers of the Commonwealth, derived from the character of a State as an organ of government and the federal character of the Constitution[370].

The implied federal limitation

275 *The federalism limitation*: The joint reasons express the opinion that the first plaintiff succeeds upon the remaining constitutional argument. This involves the contention that the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Act* 1997 (Cth) and the Protected Funds Assessment Act are invalid wholly, or at least in respect of their application to the first plaintiff, because they infringe limitations on the legislative power of the Federal Parliament arising from "the very frame of the Constitution" as stated in *Melbourne Corporation v The Commonwealth* ("*Melbourne Corporation*")[371]. That decision represented something of a retreat

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366 cf *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 601 [190]-[191]. See also *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 560, 563, 589; cf *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 27-28, 53-56.

367 cf *Printz v United States* 521 US 898 (1997); *Reno v Condon* 528 US 141 (2000).

368 Chiefly advanced by the Attorneys-General for South Australia and Western Australia, intervening.

369 Protected Funds Assessment Act, s 33(1).

370 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31.

371 (1947) 74 CLR 31 at 83 per Dixon J.

from the high water mark of this Court's approach to the exposition of the scope of federal legislative powers following the *Engineers' Case*[372]. Although, in the end, I have reached a conclusion on this argument different from that stated in the joint reasons, I agree with much of the analysis appearing there.

276 *Ample federal legislative power*: The Commonwealth supported the constitutional validity of its legislation on the basis of the Federal Parliament's constitutional power to make laws with respect to taxation. That power is conferred in very large terms. The only relevant express restriction, stated in the grant, forbids discrimination "between States or parts of States". That restriction is not applicable in this case. The mere fact that, because a federal law has differential consequences for different States, as a result of factual or legal distinctions between them, is not sufficient to infringe the express constitutional limitation[373].

277 The first plaintiff did not contest that employees or officers of a State are normally subject to federal taxation law. He did not argue for a restoration of the strict notion of intergovernmental immunity. It may be accepted that the express limitation stated in s 51(ii) itself, or the restriction expressed in s 114 of the Constitution, do not constitute an exhaustive statement of the restrictions on the federal legislative power with respect to taxation as that power impinges on the States. So far as s 114 is concerned, the relatively narrow approach of this Court to the institutions that may be viewed as the "State" for the purposes of that section[374], suggests that it falls short of expressing the entire zone of immunity of the property and activities of the State envisaged by the Constitution[375].

278 In the light of experience and governmental realities, it is wrong to take at face value the mantra that "the power to tax involves the power to destroy"[376]. Nevertheless, it remains true that the federal power over taxation, as interpreted over many decades, affords a substantial explanation of the growth of the

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372 (1920) 28 CLR 129; cf Hill, "Revisiting Wakim and Hughes: The Distinct Demands of Federalism", (2002) 13 *Public Law Review* 205 at 227 citing Sawer, "Implication and the Constitution", (1948) 4 *Res Judicatae* 15 and 85.

373 See joint reasons at [117]-[118]. An example of this form of difference would be that created by the contributory judicial pension in Tasmania compared to the other States' schemes being non-contributory.

374 *SGH Ltd v Commissioner of Taxation* (2002) 76 ALJR 780; 188 ALR 241.

375 cf joint reasons at [142].

376 Joint reasons at [140] citing *McCulloch v Maryland* 17 US 159 at 210 (1819); cf joint reasons at [133].

legislative and economic powers of the Commonwealth, often at the expense of the States. The mere fact that a taxation measure may have purposes beyond the raising of revenue and that it may impose on the States various burdens and disadvantages is not a reason for holding a law to be beyond the Federal Parliament's power with respect to taxation or contrary to implied federal limitations upon that power[377]. For invalidity, much more is required.

279 In this way I arrive at the implied limitation expressed in *Melbourne Corporation*. Defining the implied federal limitation in precise terms presents a difficulty that has been acknowledged by this Court in many cases[378]. Everyone may accept the existence of some such limitation and the need to discover its operation by reference to matters of substance rather than form[379]. Everyone may agree that a federal law on taxation, or anything else, that threatens the continued existence of the States as separate governmental entities would be constitutionally invalid. Yet, in the nature of things, it is unlikely that a frontal attack upon the existence of the States would arise in the form of federal law. In the world of practicalities, the problems are typically ones of degree, presented at the margins of constitutional power.

280 So far, this Court has identified two features of laws that are impermissible in this respect. The first is a law that "involves the placing on the States of special burdens or disabilities"[380]. Such a discriminatory law is "directed against", "singles out", or is "aimed at" the restriction or control of the States[381]. The second is a generally applicable law that operates to reduce the capacity of the States to function as governments within the federation established by the Constitution. In the latter case, although there is no "discrimination" and although the law is one of general application, it may be invalid if it diminishes, to an impermissible degree, the capacity of the States to function as the Constitution contemplates[382].

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377 Joint reasons at [139].

378 Joint reasons at [145]-[146].

379 cf joint reasons at [124].

380 *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 217; cf *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 507.

381 *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 206, 217; joint reasons at [119].

382 *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 217.

281 In so far as a difference has emerged in this case between the joint reasons and the reasons of McHugh J, I agree with the former that the two aspects of the implied limitation upon federal legislative power, noted in past decisions, are essentially manifestations of the one constitutional implication. Both are referable to the underlying conception concerning the nature of the Australian federation. I share the view that each identified defect is to be determined by reference to the effect of the impugned legislation on the continuing existence of the States, and whether there is an impermissible degree of impairment of the State's constitutional functions. The presence of discrimination against a State may be an indication of an attempted impairment of its functions as the Constitution envisaged them. But any discrimination against States must be measured against that underlying criterion. It affords the touchstone of the implied limitation explained in the Court's decision in *Melbourne Corporation*. It has been described as the "firm ground" upon which the reasoning in that case stands[383].

282 *Impairment of State polities*: This said, it is not *any* impairment that is sufficient to establish invalidity of a federal statute[384]. This Court should resist arguments that represent a disguised attempt to resuscitate the implied immunities doctrine whereby *any* encroachment upon a State, its instrumentalities, officers or employees is considered impermissible for federal legislation[385]. Federalism in Australia, as it has been given shape by statute law and decisions of this Court, has evolved into a high degree of cooperation and of federal leadership in matters lying within the powers of the Commonwealth. That is not to deny that a tension exists between the Federal and State Parliaments, especially in a setting such as the present, where the general power of the Federal Parliament over taxation effectively gives the Commonwealth primary access to large economic resources. However, the mere encroachment of legislation, fiscal or otherwise, upon a State, does not amount to an impermissible impairment sufficient to render the federal legislation invalid. Were it so, a vast amount of federal legislation upheld by this Court, having direct and indirect consequences for the States, their functions and officeholders, would have to be struck down as invalid to the great damage of the integrated features of the Australian Commonwealth.

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383 *Victoria v The Commonwealth* (1971) 122 CLR 353 at 402.

384 cf *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 228-229.

385 *The Federated Amalgamated Government Railway and Tramway Service Association v The New South Wales Railway Traffic Employés Association* (1906) 4 CLR 488.

283 In every case in which the *Melbourne Corporation* implication is invoked the issue for decision is one of degree. There is no exact formula to determine the extent to which legislation must burden a State before it will be found invalid. However, some guidance may be sought from earlier statements of members of this Court. For example, as Windeyer J put it, a federal law will be invalid where the subject State is "sterilized" or "its status and essential capacities" are "impaired in a substantial degree"[386]. The language of "control"[387] and "impact" are unhelpful. It is the capacity of a State to function, rather than the mere ease with which its constitutional functions can be exercised, that is determinative[388]. In order to come to a conclusion on this issue, it is the operation and effect of the federal legislation that must be analysed.

284 The protection of the continuing existence of the States as political entities is not an abstract notion. It is a concept that addresses the sum of the executive, legislative and judicial arms of government that together constitute the State as a polity. It is unnecessary in this case to consider the outer limits of what represents "the State"[389] for the purposes of the constitutional implication. The agency in question in the first plaintiff's case is the Supreme Court of New South Wales. It was not contested that such a court represents an essential branch of the government of the State[390]. It follows that a substantial impairment of the functions of the Supreme Court or the ability of the State to determine its composition would certainly constitute an impermissible encroachment by the Federal Parliament upon an essential component part of the government of a State. Such an impairment would render invalid any such federal legislation.

285 The issue in these proceedings therefore becomes whether such an impermissible encroachment has been demonstrated. The difference between my reasoning and that of the majority involves my analysis of the effect of the surcharge legislation upon the State and its judicial institution. In my opinion,

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386 *Victoria v The Commonwealth* (1971) 122 CLR 353 at 398, citing *Attorney-General for Ontario v Israel Winner* [1954] AC 541 at 578.

387 eg *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 163-164, 241.

388 *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 139-140; *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 481; cf joint reasons at [146].

389 cf *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 218 per Mason J.

390 Joint reasons at [147].

there is no encroachment by the federal law such as attracts the implied constitutional prohibition.

286 *Selection and retention of State judges*: To ensure the integrity of the judicial arm of a State and the autonomy of the State more generally, the State must have power over the selection and retention of the members of its courts, especially the Supreme Court[391]. This assertion can be supported by earlier statements of this Court, holding that the States must have control over the terms and conditions of the employment of its officeholders, especially those in "high" office, of which judicial office is clearly one[392]. Specifically in relation to judges, this power is necessary to ensure the continued recruitment to, and retention within, State courts of competent persons with an "independence of mind and spirit"[393]. This is how the level of remuneration of State judges is functionally relevant to the implied constitutional limitation which the first plaintiff invokes in this Court. Remuneration is not pertinent because it is important to the comfort and lifestyle of the judge and the judge's family. Its governmental importance lies in its function in attracting and retaining as judges officeholders worthy of that name. This means officeholders in the government of the State who exhibit the characteristics essential for the judicial office that the Australian Constitution contemplates for the States – most importantly competence, independence and impartiality. In this sense, the independence of the State judiciary, although not a separate ground of attack on the validity of the impugned federal laws, lies at the heart of the first plaintiff's contentions that the impact of the challenged surcharge on the State judicial institution undermines its essential governmental features.

287 I do not agree with Brennan J's statements in *Re Australian Education Union; Ex parte Victoria*[394], in dissent, so far as they imply that *any* burden on the "emoluments" provided by the State to its judicial officers constitutes an impermissible burden, rendering the legislation invalid. Were this the test, federal taxes upon such State "judges" would be prohibited. This is not the law and has not been so in this country since at least 1920.

288 It could not be disputed that the judicial pension entitlements of the first plaintiff constitute an important part of his "remuneration". Obviously, there is a

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391 Joint reasons at [165]; cf reasons of Gleeson CJ at [28].

392 *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 233; *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 498.

393 Joint reasons at [160] citing *United States v Hatter* 532 US 557 at 568 (2001).

394 (1995) 184 CLR 188 at 233; cf joint reasons at [166].

close relationship between the aggregate benefits of salary, allowances and pension rights[395]. Nor could it be disputed that such pension rights amount to an attractive entitlement of office, playing a part in the recruitment to judicial office, whether from private legal practice, or elsewhere. Such entitlements would also represent an inducement relevant to the retention in office of judges of appropriate skill and experience[396].

289 The majority in this Court has concluded that the imposition of federal taxation in the form of the surcharge upon judges based on the notional contributions for pension entitlements and the mechanisms provided for its collection, infringe the States' control over the terms and conditions of the engagement of judges, impairing the ability of the States to recruit, and retain, appropriate officers in their judiciary and in this way infringe the implied federal limitation invoked by the first plaintiff. I disagree.

290 I contest the proposition that imposition of such a tax has a significant and detrimental effect on the power of a State to determine the terms and conditions affecting the remuneration of its judges. This Court has repeatedly upheld the broad power of the Federal Parliament to make laws with respect to taxation in the most ample terms. A wide power is essential for the effective discharge by the Commonwealth of all of its national responsibilities, as envisaged by the Constitution[397]. Self-evidently, taxation laws of general application have long had important consequences for the States, their instrumentalities, employees and officers, including those holding high positions in the government of the States such as judges. Yet this Court has repeatedly resisted attempts by the States to narrow the federal taxation power, or to secure immunity from federal taxes, by reference to implied limitations on the Commonwealth's law-making capacity to affect the States. It did so most recently in the challenges to the federal payroll tax[398] and to the fringe benefits tax[399]. As a matter of constitutional principle, no different approach should be adopted with respect to the laws here in question.

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395 Joint reasons at [155].

396 Joint reasons at [159].

397 cf *Luton v Lessels* (2002) 76 ALJR 635 at 654 [117]; 187 ALR 529 at 557 citing *United States v Butler* 297 US 1 at 61 (1936).

398 *Victoria v The Commonwealth* (1971) 122 CLR 353.

399 *State Chamber of Commerce and Industry v The Commonwealth (The Second Fringe Benefits Tax Case)* (1987) 163 CLR 329; cf *Queensland v The Commonwealth (The First Fringe Benefits Tax Case)* (1987) 162 CLR 74.

291 Nor does the evidence support the argument of the first plaintiff that "not many Judges should be prepared to continue to serve after the first opportunity for retirement". A review, conducted by the New South Wales Government Actuary's Office on the judges' pension scheme of that State[400], received without objection, noted that "[j]udges who retire at older ages have always received a lower value of benefit since payments will on average be paid for shorter periods". Whilst commenting, fairly, that "[t]he effect of the surcharge is that in future [judges] will also receive lower amounts of pension payments, which is a perverse outcome for longer service", the data produced suggests that, despite financial disincentives, many judges in the past have continued to serve until the statutory retiring age[401]:

> "Seven judges, who had completed 10 years service, retired within 12 months of reaching age 60, twelve judges who completed 10 years after attaining age 60 retired within 3 months of qualifying for a pension, and seventeen judges retired at or near age 72."

The evidence before this Court does not establish the proposition – nor is it open to reasonable inference – that the established pattern of judicial service would alter significantly following the introduction of the surcharge. There is every reason to believe that it would not.

292 Despite financial disadvantages, appropriate appointees will continue to be attracted to, and elect to remain within, judicial office, federal and State. They will do so because of the non-financial features of judicial office. The submission that the new federal surcharge would alter this, in ways seriously damaging to the government of the States, is speculative, hypothetical and unproved. It should be rejected. Whatever arguments exist for improving the general level of judicial remuneration in Australia, having regard to its relative decline in recent decades[402], they have no bearing upon the constitutional validity of the federal law challenged in this case.

293 I would infer that *some* potential appointees, suitable for appointment as State judges, might now reject the offer of judicial appointment because of the comparative decline of the financial rewards in consequence of the surcharge. Yet given the general applicability of the surcharge in some form upon high income earners, most potential appointees would be likely to face a decline in

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400 New South Wales Government Actuary's Office, *Judges' Pension Scheme (NSW)*, Actuarial Review as at 30 June 2001.

401 New South Wales Government Actuary's Office, *Judges' Pension Scheme (NSW)*, Actuarial Review as at 30 June 2001 at 7.

402 cf *Atkins v United States* 556 F 2d 1028 (1977).

post-retirement income even if they were to remain in their alternative employment. *Some*, who are appointed, might now elect to leave office earlier than they otherwise would have done. But there have always been injustices and anomalies in laws imposing taxation, as in the judicial pension scheme itself. The surcharge has now been in operation for five years whilst this case was being conceived, argued and decided. I would reject any suggestion that, in that time, there has been a fall off in the number and quality of judicial appointments, State or federal, in this country. In the future, as in the past, most persons attracted to judicial office are unlikely to nominate remuneration as one of the chief attractions of appointment. The inducements typically lie elsewhere – in the interest and responsibility of the work; the status and public respect for the judicial office; the opportunity for a change of direction involving broader public service; and the respite from the intense pressures of other legal employment. Such inducements remain unchanged.

294 *Unfairness and discrimination*: The first plaintiff argued that the mechanism by which the surcharge was imposed, upon the superannuation member rather than the provider, constituted an impermissible discrimination against State judges, rendering the legislation invalid. However, mere discrimination does not amount to impermissible interference by the Federal Parliament in the basic constitutional functions of a State. As the joint reasons point out, discrimination does not have an independent operation in this context[403]. It is only if the discrimination has the effect of impairing the constitutional functions of the State that the federal prohibition implied from the Constitution is enlivened.

295 Various incidents of the surcharge upon judicial incomes were cited by the first plaintiff to establish the financial burden that the surcharge will impose upon the first plaintiff and the disincentive that it may occasion to his continuing to serve in judicial office after the first moment at which he becomes entitled to retire on a pension[404]. From such features of the operation of such laws, the other members of this Court reach the conclusion that they constitute an impermissible disability or burden imposed upon the operations and activities of the State which, for that reason, are constitutionally invalid. I do not agree.

296 The legislation may indeed be viewed as unfair to those in the position of the first plaintiff. Indeed, he argued that its operation was "grossly unfair and irrational". Other recipients of superannuation benefits do not become personally liable for the surcharge amount, unless the superannuation provider "passes on" that liability to them. However, this Court has repeatedly recognised that it is for

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403 Joint reasons at [123].

404 Joint reasons at [169].

the Parliament to select the subjects of taxation. It is not the role of this Court to invalidate a new federal tax simply because it regards some aspects of the tax unfair[405], unwise, oppressive, discriminatory as between taxpayers or based upon disputable fictions. By the Constitution, such considerations are reserved to the Parliament accountable to the electors – not to this Court. The fact that the first plaintiff is a judicial officer whose complaints of unfairness may resonate in judicial ears is no reason to depart from the limited role enjoyed by this Court under the Constitution.

297 Many tax laws (especially when new) may be subject to criticisms similar to those voiced by the first plaintiff. Many provisions of existing tax law are founded on fictional hypotheses and some on contestable administrative calculations. Yet if the constitutional power exists for the legislation, it is not lost because the tax imposed is inconvenient to the States or even arguably unfair to some of their senior employees and officeholders. Much more is required to demonstrate a loss of the federal power with respect to taxation.

298 The law reports are full of cases, and not only in wartime[406], in which this Court has upheld the constitutional validity of federal taxing statutes imposing extremely burdensome obligations upon the taxpayer. The introduction of liability to provisional tax[407], obliging advance payment of taxation in respect of a future year's income at the same time as paying the taxes levied in the current year, is a clear case in point. In particular circumstances such a tax might be much more onerous on a taxpayer than the legislation whose constitutionality is attacked in this case. Yet after the overthrow of the doctrine of implied immunities[408], this Court has consistently upheld the validity of such measures[409]. It has eschewed the temptation to turn criticism of the burdens of the mechanics of collecting the tax into defects of constitutional validity. Once begun, in respect of a burden upon judges, there is no way of knowing where such legal alchemy might finish in response to the complaints of other taxpayers.

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405 *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 at 71 where Rowlatt J pointed out "[t]here is no equity about a tax".

406 *South Australia v The Commonwealth* (1942) 65 CLR 373; cf *The State of Victoria v The Commonwealth* (1957) 99 CLR 575.

407 *Income Tax and Social Services Contribution Assessment Act* 1936-1956 (Cth), ss 221YA.

408 cf *The Municipal Council of Sydney v The Commonwealth* (1904) 1 CLR 208 at 232.

409 *Moore v The Commonwealth* (1951) 82 CLR 547; *Commissioner of Taxation v Clyne* (1958) 100 CLR 246. cf Wynes, *Legislative, Executive and Judicial Powers in Australia*, 5th ed (1976) at 181-184.

299 In my view, the effect[410] of the federal legislation impugned in these proceedings does not even come close to jeopardising the selection and retention of State Supreme Court judges. It falls far short of impairing, in a substantial degree, the State's capacity to function as an independent constitutional entity. The decision of this Court to the contrary pushes the implied constitutional prohibition to a new and radical application that has no foundation in the Constitution. Since the impugned federal laws were enacted, the New South Wales Parliament has demonstrated the capacity of that State to adapt the pension arrangements for its judges, including the first plaintiff, to the new federal legislation, in order to ameliorate any hardships to retired judges or other beneficiaries under the judicial pension scheme[411]. No doubt similar or other provisions could be implemented by the States if they really felt that their court system or the judicial office were endangered by the federal law. Such measures contradict the suggestion of a relevant constitutional impairment.

300 The surcharge, applying as it does directly to judges in the position of the first plaintiff, imposes a financial burden upon them. That is true. But it is a burden that is imposed by a valid federal taxation law, and, as such, has to be borne by those subject to it. Compared with some other lawyers and certain other income earners, judicial officers in Australia may not be particularly well remunerated. Yet, compared to the great mass of the population – including many of those subject to the superannuation contributions surcharge, they are very well remunerated indeed. It is unconvincing to suggest that the burden exacted by the impugned law could affect the proper discharge of the judicial role of persons such as the first plaintiff, their determination of matters coming before them in their judicial capacity or their integrity in carrying out their respective functions. In these circumstances I am unconvinced by the argument that the State judicial institution is damaged or weakened in a way that substantially impairs the capacity of the States to function as the Constitution envisaged that they would. The invocation of the implied constitutional limitation, defensive of the capacity of the State to function as such, fails.

Approaches in other jurisdictions

301 *Final courts and judicial remuneration*: I turn finally to a number of overseas decisions to which some reference was made by the parties during argument. In particular, these were decisions from Canada and the United States

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410 *Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 214 per Brennan J, where his Honour stated that the consideration which determines the invalidity is "the actual operation" of the legislative measures.

411 *Judges' Pensions Amendment Act* 1998 (NSW). See the joint reasons [172]-[173].

in which issues relating to the liability of judges to pay various taxes on different aspects of their remuneration (including pensions) were considered. Care must be taken in making a comparison with overseas decisions because of differences in the constitutional provisions and in the development of constitutional doctrine. However, in my view the principles upon which those decisions were based support the Commonwealth's submissions and the conclusions that I have reached.

302 *Canadian cases*: In Canada, until 1975, the judges of federally appointed superior courts were, like judges in most parts of Australia, entitled to non-contributory pensions under the *Judges Act* 1970 (Can)[412]. By the *Statute Law (Superannuation) Amendment Act* 1975 (Can), it was provided that judges appointed before a specified date in 1975 would contribute 1.5% of their salary towards the cost of their pensions (intended to be a contribution towards improved pensions for spouses and children of judges). Judges appointed after that date would contribute 6% of their salaries towards the cost of pensions, with a provision for further contribution for future inflation. This legislation was later followed by a significant increase in the salaries and pensions of all such judges.

303 In *R v Beauregard*[413], a superior court judge challenged the constitutional validity and application of the amending law. It is unnecessary to notice the detail of his arguments. The Supreme Court of Canada dismissed his challenge. The majority held that there was no relevant "federalism" limitation on the power of the Canadian Parliament to legislate for the impugned contributions by superior court judges'[414]. This was despite the shared responsibilities for the administration of superior provincial courts between the federal and provincial polities. Section 92 of the Canadian Constitution gives the provincial parliaments legislative power with respect to the administration of justice and the constitution, maintenance and organisation of provincial courts[415]. Critically, however, s 100 of that Constitution assigns to the federal parliament the power to enact provisions for the remuneration (including pensions) of such judges.

304 Dickson CJ, writing for the majority, noted that, like other citizens, judges were obliged to "bear their fair share of the financial burden of administering the country"[416]. They were liable to pay the "general taxes of the land"[417]. The

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412 *R v Beauregard* [1986] 2 SCR 56 at 62-63. See also *Valente v The Queen* [1985] 2 SCR 673.

413 [1986] 2 SCR 56.

414 [1986] 2 SCR 56 at 80-81.

415 [1986] 2 SCR 56 at 79-80.

416 With whom Estey and Lamer JJ agreed: [1986] 2 SCR 56 at 76.

Court made it clear that Parliament's powers were not unlimited. If it had been shown that the impugned federal law was enacted for "improper or colourable" purposes, or if there were discriminatory treatment of judges when compared to other citizens[418], issues might arise that could demand a conclusion that the law was beyond power as contrary to the Canadian Constitution[419]. A challenge by reference to the Canadian Bill of Rights was also rejected.

305 Addressing the arguments pointing to the fact that the measures and mechanisms applied specially and differentially only to judges, Dickson CJ[420] acknowledged that this was so. However, he went on[421]:

> "Conceding the factual difference that s 29.1 of the *Judges Act* is directed only at judges, I fail to see that this difference translates into any legal consequence. … At the end of the day, all s 29.1 of the *Judges Act* does, pursuant to the constitutional obligation imposed by s 100 of the *Constitution Act, 1867*, is treat judges in accordance with standard, widely used and generally accepted pension schemes in Canada."

306 To the same effect are the later remarks of the Supreme Court of Canada in *Re Provincial Court Judges*[422]. That case involved four appeals raising common issues concerning whether provincial governments and legislatures in Canada could reduce the salaries of already appointed provincial court judges (as part of budget tightening measures aimed at reducing salaries in the public sector). Lamer CJ, for the majority, made it plain that *Beauregard* stood for the proposition that the Canadian Parliament could effectively reduce the salaries of superior court judges to the extent of imposing new income tax and other financial burdens on them[423]. He pointed out that "the contributory pension scheme for superior court judges at issue [in *Beauregard*] was not part of a scheme for the public at large, and in this sense had discriminated against the judiciary *vis-à-vis* other citizens". Yet that fact had not been regarded as

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417 [1986] 2 SCR 56 at 76 applying *Judges v Attorney-General of Saskatchewan* [1937] 2 DLR 209 (PC).

418 [1986] 2 SCR 56 at 77.

419 s 100. See [1986] 2 SCR 56 at 83.

420 [1986] 2 SCR 56 at 61.

421 [1986] 2 SCR 56 at 77.

422 [1997] 3 SCR 3.

423 [1997] 3 SCR 3 at 95-96 [150].

"constitutionally significant"[424]. Likewise, a salary cut for judges in company with other public employees and officeholders did not involve singling them out for differential treatment[425]. On the other hand, "if superior court judges alone had their salaries reduced, one could conclude that Parliament was somehow meting out punishment against the judiciary for adjudicating cases in a particular way"[426].

307 It is unnecessary to consider the applicability of these conclusions in an Australian context. Australian doctrine, derived from the implications within Ch III of the Constitution concerning the integrated Judicature and from the "very frame of the Constitution" and the nature of federation it creates, is more elaborate than that so far expounded in Canada. However, it is sufficient to notice the extent to which the Canadian Supreme Court treated as permissible in a federal context measures that have the practical purpose and effect of assimilating judges with other citizens (or only those receiving remuneration from the public purse) so far as laws involving taxation upon their remuneration (including pensions) are concerned.

308 *United States cases*: In the United States, the Supreme Court has adopted a similar approach. Despite the Compensation Clause, federal judges in that country have gradually lost the immunity from universal taxation laws. This has been so although such laws necessarily have the effect of reducing a judge's take-home pay[427]. State judges have also lost that immunity[428].

309 In *United States v Hatter*[429], the majority of the Supreme Court[430] concluded that there was no offence to the Compensation Clause in the extension of generally applicable Medicare taxes to current as well as newly appointed federal judges together with federal employees. The Compensation Clause of the US Constitution was held to prohibit taxation that singled out judges for especially unfavourable treatment. According to the Supreme Court majority, it

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424 [1997] 3 SCR 3 at 97 [153].

425 [1997] 3 SCR 3 at 97-98 [154].

426 [1997] 3 SCR 3 at 99 [156].

427 cf *United States v Hatter* 532 US 557 at 583-585 (2001) per Scalia J.

428 See these reasons at [247].

429 532 US 557 (2001).

430 Rehnquist CJ, Kennedy, Souter, Ginsburg and Breyer JJ; Scalia and Thomas JJ dissenting in part.

did not forbid Congress enacting a law imposing non-discriminatory taxes (including an increase in rates or a change in conditions) upon judges, as on other taxpayers[431].

310 The majority in *Hatter*[432] endorsed the opinion of Holmes J (with whom Brandeis J had agreed), dissenting in *Evans v Gore*[433], to the effect that the Compensation Clause offers

> "no reason for exonerating [a judge] from the ordinary duties of a citizen, which he shares with all others. To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge."

In like language in *Hatter*, Breyer J, for the majority, remarked[434]:

> "There is no good reason why a judge should not share the tax burdens borne by all citizens."

His Honour went on to say that even the constitutional judicial compensation guarantee could not justify a "special judicial exemption from a commonly shared tax"[435].

311 Whilst other taxing provisions were struck down in *Hatter*, as involving discrimination against judges, this was done on the basis that the statute did not "equalize with any precision" judges and other federal employees to which the impugned Social Security tax was extended[436]. It was held that the statutory amendments discriminated against the judges. They were said to single out *sitting* federal judges for unfavourable treatment because the law, as it applied, had effectively imposed upon them a new financial obligation which was not imposed on other federal employees[437]. It seems clear that, in the United States, as in Canada, the discriminatory and unfavourable treatment of judges has been

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431 532 US 557 at 567 (2001).

432 532 US 557 at 570 (2001).

433 253 US 245 at 265 (1920).

434 532 US 557 at 571 (2001).

435 532 US 557 at 571 (2001).

436 532 US 557 at 574 (2001).

437 532 US 557 at 572 (2001).

treated as the critical criterion for the constitutional validity of taxing laws having an impact upon judicial remuneration.

312 *Applicability to the present case*: Before this Court the first plaintiff did not submit that the new federal laws were a direct attack by the Commonwealth on the independence of the State judiciary. As I have pointed out, it is not clear that such an argument would have succeeded given the absence of an explicit provision in our Constitution covering State judges, as well as the limited application of the legislation to newly appointed judges only. Instead, the first plaintiff submitted that the legislation "undermines the judicial pension arrangements … enacted by the States which have as their object the recruitment of appropriately qualified candidates for judicial office and ensuring the independence of the judiciary" and thus "would detract from the integrity and independence" of the State judicature.

313 The very nature of a federal system of government imposes a special role on the judiciary. This makes the preservation of the competence, independence and impartiality of the judiciary a consideration important for the protection of the governmental functions of the component parts of the federation, including the States. At least in a federation such as Australia, where the State judiciary may be, and commonly is, vested with federal jurisdiction, it can be said that these features of the integrated judicature are part of the federal hypothesis which the *Melbourne Corporation* doctrine defends. Similar criteria have been expressed in relation to the implied federal limitation upon the taxation power as it impinges upon the States. The issue is thus whether the tax impermissibly singles out the States and their high government officeholders for special discriminatory treatment[438].

314 In the present case it could not be suggested that judges of the States had been singled out for unfavourable attention, in the form of the surcharge, in order to punish or disadvantage them for the performance of their judicial duties. Any such suggestion would be fanciful. Upon my analysis of the federal law impugned in the first plaintiff's case, there is no significant impairment of the States in the carrying out of their governmental functions. Nor is there any relevant discrimination against the judges of the States. Unequal treatment of judges in a like position is not established. In so far as there are particular laws that fall differentially upon the judges of the States when compared to other taxpayers they can be explained as they were in *Beauregard*. They are referable to the different nature of the post-retirement income arrangements of judges compared to other taxpayers, as well as the excessive caution on the part of the

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438 *Payroll Tax Case* (1971) 122 CLR 353; *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192; cf joint reasons at [119]-[122].

Commonwealth regarding the requirements of s 114 of the Constitution[439]. The differentiation can be justified either as specifically favourable to the judges (as in the exclusion from the new tax of State judges already appointed) or as within the scope of the measures open to the Parliament to treat the notional value of entitlements derived from a non-contributory, unfunded pension as equivalent to contributory superannuation.

315 I see no reason why this Court should now adopt an approach to the constitutional validity of a federal taxation law that is more protective of newly appointed judges in Australia than the approach followed by the Supreme Courts of Canada and the United States when confronted with taxing provisions having an impact on judicial remuneration. Nothing in the text of the Australian Constitution justifies a different approach. The decisional history in this Court suggests a contrary conclusion. The notion that the judges themselves would regard their offices as compromised by the surcharge is unpersuasive. The idea that reasonable members of the Australian public might come to such a conclusion, on the basis of the new federal surcharge on the superannuation entitlements or their equivalents in the case of high income earners, including judges, must be rejected. The public and the judges themselves, as La Forest J of the Supreme Court of Canada said, regard the judiciary as made of sturdier stuff[440].

Conclusions and disposition

316 It is therefore "far too long a stretch"[441] to hold that the imposition of a federal tax, payable by persons such as the first plaintiff on notional contributions for their pensions, imperils the State judicial institution. I do not accept that the federal taxing laws challenged in these proceedings affect the selection and retention of State judicial officers to such a degree that the State judiciary is placed in jeopardy of not fulfilling its constitutional functions. Only if that were shown would the essential governmental activities of a State be impaired and the continued existence and integrity of a State threatened, contrary to the constitutional implication invoked by the first plaintiff.

317 The evidence in this case falls far short of such a gloomy estimate of the resilience of State governmental institutions in Australia – and the State judiciary in particular. The tax neither impedes the functioning of the States nor the independence of the judicature implicit in the Constitution. Other taxpayers

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439 cf reasons of Gleeson CJ at [16]. I share the Chief Justice's doubts on this point.

440 *Re Provincial Court Judges* [1997] 3 SCR 3 at 192 [337]. See also at 197 [346].

441 *R v Beauregard* [1986] 2 SCR 56 at 77 per Dickson CJ.

cannot escape the burden of the surcharge. Their complaints of unfairness, if any, must be addressed to the Parliament and the Government, not the courts. In the past, Australian judges have shared equally prospective taxes of general application imposed on them without relevant discrimination. This case represents the first departure from that principle. In my view the departure has no constitutional or other legal validity. It appears to be contrary to the approaches taken by the final courts of Canada and the United States in analogous circumstances.

318 I do not deny the premise that the Constitution is based on certain assumptions and contains implications[442]. But, with all respect, I find the invocation of the federal implication in this case unconvincing. When expressly stated constitutional guarantees[443], and particular words in the Australian Constitution[444], are read in ways that confine the rights of individuals, and when implied constitutional rights of persons arguably more vulnerable and needy are rejected[445], it is singularly unconvincing to say that an unwritten implication can be invoked to protect from a federal taxing law the value of judicial pensions. Such an implication is unconvincing when virtually all other Australian taxpayers in receipt of equivalent remuneration have been subjected to a surcharge upon that element of their receipts. Least of all is such a conclusion convincing when the legal foundation of the implication is said to arise from the suggestion that the tax impairs, in a substantial degree, the very capacity of the States to operate as the Constitution envisaged for them. I would reject all of the first plaintiff's constitutional challenges.

319 I agree in the conclusions and answers proposed in the joint reasons in respect of questions 1(a) and (b).

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442 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Roberts v Bass* (2002) 194 ALR 161 at 199-200 [145]-[146].

443 eg under s 80 of the Constitution: *Re Colina; Ex parte Torney* (1999) 200 CLR 386; *Cheng v The Queen* (2000) 203 CLR 248; *Brownlee v The Queen* (2001) 207 CLR 278.

444 eg the word "appeals" in s 73 of the Constitution: *Eastman v The Queen* (2000) 203 CLR 1 at 79-89 [240]-[266]; *Crampton v The Queen* (2000) 206 CLR 161 at 203-204 [114].

445 eg the claims of Aboriginal plaintiffs to a constitutional implication of equality before the law: *Kruger v The Commonwealth* (1997) 190 CLR 1 at 45, 63-68, 142-144, 153-157. See also *Leeth v The Commonwealth* (1992) 174 CLR 455 at 466-470, 476-479; cf 483-489.

320 In relation to question 2, the question should be answered by stating that the federal legislation is valid.

321 The first plaintiff should pay the costs of the Commonwealth. The Commonwealth should pay the costs of the second plaintiff.