HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, KIEFEL AND BELL JJ

RALPH DESMOND CLARKE APPELLANT

AND

COMMISSIONER OF TAXATION & ANOR RESPONDENTS

Clarke v Commissioner of Taxation [2009] HCA 33
2 September 2009
A35/2008

ORDER

1. *Appeal allowed.*

2. *Set aside order 1 of the orders of the Full Court of the Federal Court of Australia made on 13 June 2008, and in lieu thereof, order that question 3 of the questions referred to the Full Court by the Administrative Appeals Tribunal on 6 July 2007 be answered as follows:*

Question 3: Are the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Act* 1997 (Cth) *("the Imposition Act")* and/or the *Assessment Act* [*Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act* 1997 (Cth)] invalid in their application to the applicant:

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

b) on the ground that the *Imposition Act* imposes a tax on property belonging to the State of South Australia contrary to section 114 of the Commonwealth Constitution?

Answer: *As to question 3(a), the Imposition Act and the Assessment Act are invalid insofar as they purport to create the*

liability of the appellant to superannuation contributions surcharge in respect of his membership of the Parliamentary Superannuation Scheme, the State Superannuation Benefit Scheme and the Southern State Superannuation Scheme.

3. *First respondent to pay the costs of the appellant.*

On appeal from the Federal Court of Australia

Representation

P A Heywood-Smith QC with A L Tokley for the appellant (instructed by Johnston Withers)

M A Perry QC with M C Wall for the first respondent (instructed by Australian Government Solicitor)

M G Hinton QC, Solicitor-General for the State of South Australia with M J Wait for the second respondent (instructed by Crown Solicitor for the State of South Australia)

Interveners

S J Gageler SC, Solicitor-General of the Commonwealth of Australia with M A Perry QC and M C Wall intervening on behalf of the Attorney-General of the Commonwealth of Australia (instructed by Australian Government Solicitor)

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 State Solicitor for Western Australia)

P M Tate SC, Solicitor-General for the State of Victoria with G A Hill intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

W Sofronoff QC, Solicitor-General of the State of Queensland with G J D del Villar intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Law (Qld))

M J Leeming SC with S J Free intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for New South Wales)

CATCHWORDS

Clarke v Commissioner of Taxation

Constitutional law (Cth) – Powers of Commonwealth Parliament – Taxation – Superannuation contributions surcharge – State parliamentary pensions – Implied limitation on Commonwealth legislative power – *Melbourne Corporation* doctrine – Where appellant former member of South Australian Parliament – Where appellant eligible for parliamentary pension – Whether Acts assessing and imposing superannuation contributions surcharge invalid in application to appellant – Relevance of fact that State Acts passed in response to surcharge.

Words and phrases – "curtailment of capacity of the States to function as governments", "discrimination", "special burden".

Constitution, ss 7, 9, 10, 15, 25, 29, 30, 31, 41, 51(ii), 95, 107, 108, 111, 123, 124.
Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997 (Cth), ss 5, 8, 9, 11, 15(6), 15(7), 38.
Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Act 1997 (Cth), s 4.
Superannuation Guarantee (Administration) Act 1992 (Cth).
Parliamentary Superannuation Act 1974 (SA).
Southern State Superannuation Act 1994 (SA).
Statutes Amendment (Commutation for Superannuation Surcharge) Act 1999 (SA), s 4.
Statutes Amendment (Miscellaneous Superannuation Measures) Act 2004 (SA), s 14.
Superannuation (Benefit Scheme) Act 1992 (SA).

FRENCH CJ.

Introduction

1 Under the authority conferred upon it by the Constitution the Parliament of the Commonwealth can make laws affecting the States and their agencies. It cannot, however, make laws which destroy or significantly burden, curtail or weaken either the capacity of the States to carry out their proper legislative, executive and judicial functions or their exercise of those functions. An Act of the Commonwealth Parliament imposing a surcharge specifically upon the pension entitlements of State politicians is said to be such a law.

2 Ralph Desmond Clarke, who was born on 4 October 1951, was elected in 1993 to the Parliament of South Australia as a member of the House of Assembly. He commenced his term on 11 December 1993. He was re-elected in December 1997 and served as a member until 8 February 2002, when he lost his seat at the State election.

3 Between 15 February 2000 and 15 February 2005 the Commissioner of Taxation ("the Commissioner") issued assessments of superannuation contribution surcharge in respect of Mr Clarke's entitlements under three State superannuation schemes for the financial year ended 30 June 1997 up to and including the financial year ended 30 June 2001. The funds were the contributory Parliamentary Superannuation Scheme ("the PS Scheme") established by the *Parliamentary Superannuation Act* 1948 (SA) and continued under the *Parliamentary Superannuation Act* 1974 (SA) ("the PS Act"); the Southern State Superannuation Scheme ("the SSS Scheme") established by the *Southern State Superannuation Act* 1994 (SA) ("the SSS Act"); and the State Superannuation Benefit Scheme, which was established by the *Superannuation (Benefit Scheme) Act* 1992 (SA) ("the SBS Act"), and was effectively rolled over into the SSS Scheme by the *Southern State Superannuation (Merger of Schemes) Amendment Act* 1998 (SA).

4 The Commissioner's assessments were issued pursuant to the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act* 1997 (Cth) ("the CPSF Assessment Act") and the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Act* 1997 (Cth) ("the CPSF Imposition Act").

5 Mr Clarke objected to the assessments. His objections were disallowed and on 2 May 2006 he sought review by the Administrative Appeals Tribunal ("the Tribunal") of the Commissioner's disallowance decisions[1]. On the basis of

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1 Pursuant to s 14ZZ of the *Taxation Administration Act* 1953 (Cth).

a statement of agreed facts the Tribunal referred questions of law to the Full Court of the Federal Court, including the question:

> "3. Are the [CPSF Imposition Act] and/or the [CPSF Assessment Act] invalid in their application to the applicant:
>
> (a) on the ground that they so discriminate against the State of South Australia or so place a particular disability or burden upon the operations and activities of the State of South Australia, as to be beyond the legislative power of the Commonwealth".

Mr Clarke relied upon the decision of this Court in *Austin v The Commonwealth*[2], in which the CPSF Assessment and Imposition Acts were held invalid in their application to the statutory pension entitlements of a judge of the Supreme Court of New South Wales. The Full Court distinguished *Austin* and answered the question in the negative[3]. On 13 November 2008, this Court gave special leave to appeal from the judgment and orders made on 13 June 2008[4].

6 Further details of the factual and procedural history are set out in the joint judgment, as are details of the relevant State and Commonwealth legislation beyond what appears in the outline that follows[5].

7 In my opinion, the appeal should be allowed and question 3(a) should be answered in the affirmative. I agree with the orders proposed in the joint judgment.

The challenged superannuation surcharge legislation

8 By legislation of general application enacted in 1997, a surcharge was imposed on superannuation contributions made by or for taxpayers above certain taxable income thresholds[6]. The liability was imposed upon the providers of the

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2 (2003) 215 CLR 185; [2003] HCA 3.

3 *Clarke v Federal Commissioner of Taxation* (2008) 170 FCR 473.

4 [2008] HCATrans 375.

5 See reasons of Gummow, Heydon, Kiefel and Bell JJ at [38]-[58].

6 *Superannuation Contributions Tax (Assessment and Collection) Act* 1997 (Cth); *Superannuation Contributions Tax Imposition Act* 1997 (Cth).

superannuation benefits[7]. This, in effect, required payment to be made out of the superannuation funds[8]. The surcharge did not apply to the Commonwealth[9] or property of any kind belonging to a State[10].

9 A varied superannuation surcharge scheme was established by the CPSF Assessment and Imposition Acts for "constitutionally protected funds", a class defined by regulations made under Pt IX of the *Income Tax Assessment Act* 1936 (Cth)[11]. The regulations referred to funds established under a number of listed State Acts including the PS Act, the SBS Act and the SSS Act[12].

10 Liability under the CPSF Acts was imposed upon a fund member if the member's adjusted taxable income exceeded a defined threshold amount[13]. The Acts applied, inter alia, to persons entitled to benefits under a subset of constitutionally protected funds, including the PS Scheme, which were designated "defined benefits superannuation schemes"[14]. Surchargeable contributions, in respect of a defined benefits superannuation scheme, were calculated by reference to the actuarial value of the benefits accrued to the member for a given financial year, plus the actuarial value of the administration expenses and risk benefits provided in respect of the member for that year[15].

11 The CPSF Assessment Act provided for deferral of liability to pay the surcharge. Where a member became liable, the Commissioner was required to

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7 *Superannuation Contributions Tax (Assessment and Collection) Act* 1997 (Cth), ss 8A, 10(2).

8 *Austin v The Commonwealth* (2003) 215 CLR 185 at 232 [65] per Gaudron, Gummow and Hayne JJ.

9 *Superannuation Contributions Tax (Assessment and Collection) Act* 1997 (Cth), s 33.

10 *Superannuation Contributions Tax Imposition Act* 1997 (Cth), s 9.

11 CPSF Assessment Act, s 38; *Income Tax Assessment Act* 1936 (Cth), s 267(1); and Income Tax Regulations 1936 (Cth), reg 177.

12 Income Tax Regulations 1936 (Cth), Sched 14.

13 CPSF Assessment Act, ss 8, 9, 10.

14 A term defined in the CPSF Assessment Act, s 38. The term also includes statutory pension schemes such as the judicial pension scheme considered in *Austin*.

15 CPSF Assessment Act, s 9(4).

give the member a notice of liability. The amount was to be paid within three months of the date on which the notice was issued[16]. If the surcharge was not paid when due, the person was liable to pay the general interest charge[17] on the unpaid amount[18].

Commutation rights

12 It was open to Mr Clarke, under s 21(1) of the PS Act, to commute part of his PS Scheme pension. By so doing he could have covered the potential or actual surcharge liability, in respect of his membership of the PS Scheme. This was true of all members affected by the surcharge. It was also an agreed fact that the commutation factor of $10 for every $1 reduction in the pension would be likely to result in the lump sum payable being less than the present value of the amount of pension foregone for members aged under 75 at the date of commutation.

13 In 1999, s 21AA was introduced into the PS Act[19] to ameliorate the position of members of the South Australian Parliament. It provided for PS Scheme members to commute enough of their pension entitlement to pay the deferred superannuation contribution surcharge. The applicable commutation factors were to be determined by the South Australian Treasurer on the recommendation of an actuary[20]. Similar amendments were made to the *Judges' Pensions Act* 1971 (SA), the *Police Superannuation Act* 1990 (SA) and the *Superannuation Act* 1988 (SA).

14 In the Second Reading Speech for the 1999 Bill introducing s 21AA the Minister said that the surcharge debt at retirement could be substantial, leading "to the problems which are to be addressed by this Bill". One of the problems was that it might be up to 18 months after retirement before the member was aware of the extent of the total debt. Another problem was that persons receiving benefit in the form of an income stream or pension might not have funds readily available to pay the debt. He said[21]:

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16 CPSF Assessment Act, s 15(7) and (8).

17 Calculated under Div 1 of Pt IIA of the *Taxation Administration Act* 1953 (Cth).

18 CPSF Assessment Act, s 21.

19 *Statutes Amendment (Commutation for Superannuation Surcharge) Act* 1999 (SA), s 4.

20 PS Act, s 21AA(6).

21 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 9 March 1999 at 1036.

> "The general aim of the Bill is to ensure that persons with an accumulated surcharge debt with the Australian Taxation Office, have at retirement a method of obtaining a lump sum to expunge the debt with the Australian Taxation Office."

A similar provision was made for the SSS Scheme and is described in the joint judgment.

Implied limits on Commonwealth legislative power affecting the States

15 The Constitution assumes the continuing existence of the States, their co-existence as independent entities with the Commonwealth, and the functioning of their governments. This assumption is readily inferred from the reference to "one indissoluble Federal Commonwealth" in the Preamble and the terms of ss 3, 5 and 6 of the *Commonwealth of Australia Constitution Act* 1900 (Imp)[22] and the provisions of Ch V of the Constitution itself. It underpins an implied limitation on Commonwealth power to make laws affecting the States. The existence of that limitation, variously expressed, has been acknowledged repeatedly in the decisions of this Court. In the early, post-*Engineers*[23] authorities, it was expressed in terms of "reservations" from the *Engineers* principle. The "reservations" evolved into propositions, sometimes treated as discrete principles or elements, that the Commonwealth could not make laws singling out the States by placing special burdens on them, nor could it make laws of general application which would destroy or curtail the continued existence of the States or their capacity to function as governments[24].

16 In their joint judgment in *Austin*, Gaudron, Gummow and Hayne JJ identified "but one limitation" requiring the assessment in any given case of "the impact of particular laws by such criteria as 'special burden' and 'curtailment' of 'capacity' of the States 'to function as governments'"[25]. These criteria required consideration of the form, substance and actual operation of the relevant federal

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22 63 & 64 Vict c 12.

23 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ("the *Engineers Case*") (1920) 28 CLR 129; [1920] HCA 54.

24 See for example *Re Australian Education Union; Ex parte Victoria* ("the *AEU Case*") (1995) 184 CLR 188 at 231; [1995] HCA 71, referring in fn 211 to *Queensland Electricity Commission v The Commonwealth* ("the *Queensland Electricity Commission Case*") (1985) 159 CLR 192 at 217 per Mason J; [1985] HCA 56.

25 (2003) 215 CLR 185 at 249 [124].

law[26]. They would involve "matters of evaluation and degree and of 'constitutional facts' which are not readily established by objective methods in curial proceedings"[27]. Kirby J expressed a similar view[28]. Gleeson CJ, in like vein, put it thus[29]:

> "Discrimination is an aspect of a wider principle; and what constitutes relevant and impermissible discrimination is determined by that wider principle."

Gleeson CJ referred back to the identification by Mason J in the *Queensland Electricity Commission Case*[30] of the foundation for the implied limitation in 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 organised State governments"[31]. The identification in *Austin* of a generally stated implied limitation, variously manifested, is consistent with the origins and evolution of the implication through decisions of this Court after the *Engineers Case*.

17 In the *Engineers Case*, the Court held that the Parliaments of the Commonwealth and the States each have the power to enact laws, within their legislative competency, binding on the Commonwealth, the States and the people[32]. The effect, on specific legislative powers such as taxation, of the words "subject to this Constitution" at the commencement of s 51 was left open. So too was the position of the State prerogative[33], although that reservation has since

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26 (2003) 215 CLR 185 at 249 [124], referring in fn 155 to the *AEU Case* (1995) 184 CLR 188 at 240, the *Queensland Electricity Commission Case* (1985) 159 CLR 192 at 249-250, and *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 500; [1996] HCA 56.

27 (2003) 215 CLR 185 at 249 [124].

28 (2003) 215 CLR 185 at 301 [281].

29 (2003) 215 CLR 185 at 217 [24].

30 (1985) 159 CLR 192 at 218.

31 (2003) 215 CLR 185 at 217 [24].

32 (1920) 28 CLR 129 at 153-155 per Knox CJ, Isaacs, Rich and Starke JJ.

33 (1920) 28 CLR 129 at 143-144.

been eroded[34]. The Court did not specifically refer to an implied limitation on the legislative powers of the Commonwealth or the States. But as Dixon J was later to point out in *West v Commissioner of Taxation (NSW)*[35], Isaacs J, who delivered the plurality judgment in the *Engineers Case*, referred in his dissenting judgment in *Pirrie v McFarlane*[36] to the:

> "natural and fundamental principle 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." (emphasis in original)

Such destruction or weakening, according to Isaacs J, was prima facie outside the respective grants of power[37]. The implied limitation was expressed in general terms. So expressed, it was capable of being applied by reference to the attributes and consequences of a Commonwealth law including whether it singled out the States, the nature and extent of the burden which it imposed upon State functions, and the nature of the functions which it burdened. There was never any constitutional imperative to treat as the only elements of the general principle, or as distinct and exhaustive rules, particular ways in which it could be infringed or its infringement ascertained.

18 What Isaacs J said in dissent in *Pirrie v McFarlane* might have to be considered in the light of the distinction which he made, again in dissent, in the *Teachers' Case*[38] between "the primary and inalienable functions of a constitutional Government", and other functions "voluntarily undertaken by the State, but which are ordinarily or primarily the subject of private individual enterprise". The distinction was rejected by Windeyer J in the *Professional Engineers' Case*[39]. A similar distinction between "governmental functions" and

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34 See the *Queensland Electricity Commission Case* (1985) 159 CLR 192 at 213 per Mason J, cited in the *AEU Case* (1995) 184 CLR 188 at 226 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

35 (1937) 56 CLR 657 at 682; [1937] HCA 26.

36 (1925) 36 CLR 170 at 191; [1925] HCA 30.

37 (1925) 36 CLR 170 at 191.

38 *Federated State School Teachers' Association of Australia v State of Victoria* (1929) 41 CLR 569 at 584-585 per Isaacs J; [1929] HCA 11.

39 *Ex parte Professional Engineers' Association* (1959) 107 CLR 208 at 274-275; [1959] HCA 47.

"trading functions" was rejected in the *AEU Case*[40]. The rejection of such distinctions makes no difference to the content of the limitation, but rather widens the scope of its application.

19 The principle emerging from the *Engineers Case* was formulated by Dixon J in a number of cases as requiring a broad interpretation of Commonwealth legislative power, and an acceptance of the capacity of the Commonwealth to enact legislation affecting States and their agencies[41]. But no law of the Commonwealth could "impair or affect the Constitution of a State"[42]. In *Farley's Case*[43], in obiter on the constitutional question, Dixon J referred to the identification in the *Engineers Case* of the taxation power as one which might come up for special consideration in relation to the States[44]. And in *Essendon Corporation v Criterion Theatres Ltd*[45] he said that the extent of the taxation power was a third reservation in relation to the principle in the *Engineers Case*, as he had reformulated it. Nevertheless, the States have no general immunity from the taxation power of the Commonwealth[46]. State employees or what might broadly be described as "constitutional office holders" do not enjoy such an immunity. The imposition of income tax on the salaries of members of Parliament, State Ministers, and judges does not infringe any implied prohibition. Nor does the imposition of fringe benefits tax in respect of benefits provided to

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40 (1995) 184 CLR 188 at 230. A similar distinction, taking as its criterion the traditional governmental functions of the States, was made in *National League of Cities v Usery* 426 US 833 (1976) but subsequently rejected in *Garcia v San Antonio Metropolitan Transit Authority* 469 US 528 at 531 (1985).

41 *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 390; [1930] HCA 52; *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657 at 682; *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* ("*Farley's Case*") (1940) 63 CLR 278 at 316-317; [1940] HCA 13.

42 *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 392 per Dixon J; see also *New South Wales v The Commonwealth [No 1]* (1932) 46 CLR 155 at 176 per Rich and Dixon JJ; [1932] HCA 7.

43 (1940) 63 CLR 278.

44 (1940) 63 CLR 278 at 316.

45 (1947) 74 CLR 1 at 23; [1947] HCA 15.

46 *Victoria v The Commonwealth* ("the *Payroll Tax Case*") (1971) 122 CLR 353 at 374-375 per Barwick CJ, 385 per McTiernan J, 392 per Menzies J, 397-398 per Windeyer J, 408-409 per Walsh J, 423 per Gibbs J; [1971] HCA 16.

them by the State. These are laws of general application which do not inhibit the capacity of the States to appoint and remunerate public officers[47].

20 In a multifactorial approach to ascertaining whether a law of the Commonwealth infringes the general limitation against laws which destroy or weaken the capacity or functions of the States, the nature and subject matter of the law may be relevant. Thus a law with respect to taxation may be viewed differently from a law with respect to defence. As was said in the joint judgment in *Austin*[48]:

> "Special considerations arise where it is the reach of the federal legislative power with respect to taxation that is in question."

One such consideration was "the lack of ingenuity needed to burden the exercise of State functions by use of the taxation power"[49]. By way of comparison, laws with respect to "the naval and military defence of the Commonwealth and of the several States"[50] involve the protection of all polities making up the federation. The Court's decision in the *First Uniform Tax Case*[51] suggests that the limitation, which was there propounded in terms of discrimination, had little purchase on the defence power at the time. The Court upheld legislation authorising the temporary transfer from the States to the Commonwealth public service of officers concerned with the assessment and collection of State income tax.

21 Consistently with the broad approach to the interpretation of Commonwealth legislative power enunciated in the *Engineers Case*, a Commonwealth bankruptcy law under which a court ordered a weekly contribution to creditors out of a bankrupt State parliamentarian's allowances survived scrutiny in *Stuart-Robertson v Lloyd*[52]. It did so on the basis that it did

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47 *State Chamber of Commerce and Industry v The Commonwealth* (*The Second Fringe Benefits Tax Case*) (1987) 163 CLR 329 at 356 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ; [1987] HCA 38.

48 (2003) 215 CLR 185 at 256 [140].

49 (2003) 215 CLR 185 at 257 [142], referring to *Melbourne Corporation v The Commonwealth* ("the *Melbourne Corporation Case*") (1947) 74 CLR 31 at 80 per Dixon J; [1947] HCA 26.

50 Constitution, s 51(vi).

51 *South Australia v The Commonwealth* (1942) 65 CLR 373; [1942] HCA 14.

52 (1932) 47 CLR 482; [1932] HCA 33.

not impose any burden upon legislators as such[53]. It was unnecessary to consider how much further the power of the Commonwealth Parliament could have extended[54]. The law was evidently, although not expressly, upheld on the basis that it was a law of general application and did not interfere with governmental functions. A submission to the contrary was made and implicitly rejected[55].

22 Although characterisation was sufficient in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Victoria*[56] to invalidate regulations purporting to control the conditions of Victorian public servants not engaged in war-related work, Starke J foreshadowed a formulation of the limitation in terms of laws "singling out the States"[57]. While he did not use that expression, he said that the *Engineers Case* was not authority for the general proposition that the States were subject "as such" to the legislation of the Commonwealth[58].

23 It was primarily the character of the law under challenge in the *Melbourne Corporation Case* as "singling out another government and specifically legislating about it"[59] that led to its invalidation. The law prohibited banks from dealing with States or their authorities without written consent from the Treasurer. Latham CJ relied upon its characterisation as a law with respect to State government functions, which did not fall within any head of Commonwealth power[60]. Rich J, on the other hand, held it invalid because it impaired the powers of the States, essential to the effective working of their governments, to freely use banking functions[61]. Starke J saw it as "a practical

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53 (1932) 47 CLR 482 at 488 per Gavan Duffy CJ and Dixon J.

54 (1932) 47 CLR 482 at 488 per Gavan Duffy CJ and Dixon J, 488 per Rich J, 491-492 per Evatt J, 496 per McTiernan J.

55 (1932) 47 CLR 482 at 485 per Loxton KC for the appellant, see at 488 per Gavan Duffy CJ and Dixon J, 491-492 per Evatt J.

56 (1942) 66 CLR 488 at 506-507 per Latham CJ, 513 per Starke J, 533 per Williams J (Rich J agreeing at 510); [1942] HCA 39.

57 (1942) 66 CLR 488 at 513 and 515.

58 (1942) 66 CLR 488 at 515.

59 (1947) 74 CLR 31 at 61 per Latham CJ, see also at 66 per Rich J, 81 per Dixon J, 99-100 per Williams J.

60 (1947) 74 CLR 31 at 61.

61 (1947) 74 CLR 31 at 67.

question" whether legislation or executive action by the Commonwealth destroyed, curtailed or interfered with the operations of a State. He said[62]:

> "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 or the executive action curtails or interferes in a substantial manner with the exercise of constitutional power by the other."

One question was posed, and one principle applied.

24 Dixon J relied upon the character of the statutory prohibition as one which was "directed to control or restrict" the States[63]. In that respect it fell within a reservation to his previously repeated restatement of the principle in the *Engineers Case*. That reservation was related to[64]:

> "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." (emphasis added)

The second disjunctive limb, relating to a law which places "particular disability or burden" upon an operation or activity of a State, on its face extended to general laws but was expressed widely enough to pick up "discriminatory" laws singling out the States. Williams J held the law to be invalid on similar grounds, describing it as legislation which clearly discriminated against the States and their agencies[65].

25 Characterisation is anterior to the application of the implied limitation to a Commonwealth law affecting the States or their agencies. But consideration of the two questions may overlap. The approach adopted by Latham CJ in the *Melbourne Corporation Case* demonstrated that kind of overlap. In the *Professional Engineers' Case*[66], Dixon CJ in considering the scope of s 51(xxxv)

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62 (1947) 74 CLR 31 at 75.

63 (1947) 74 CLR 31 at 85.

64 (1947) 74 CLR 31 at 78-79.

65 (1947) 74 CLR 31 at 99.

66 (1959) 107 CLR 208 at 233.

of the Constitution referred to the "inapplicability of the federal industrial power to the administrative services of the States notwithstanding the interpretation placed upon it in the *Engineers Case*". Barwick CJ, McTiernan and Owen JJ upheld the *Pay-roll Tax Act* 1941 (Cth) upon characterisation grounds in the *Payroll Tax Case*[67]. Rather than relying upon an implication, their Honours took the view that the Constitution did not give the Commonwealth legislative power over the States or their powers and functions of government as subject matters of legislation. In *R v Coldham; Ex parte Australian Social Welfare Union*[68], the Court found that the reasons for the conclusion in the *Professional Engineers' Case* that federal industrial power was inapplicable to the administrative services of the State were no longer fully acceptable. Nevertheless, that conclusion, which had been based on characterisation, might be supportable by reference to the prefatory words of s 51 whereby the power is made "subject to this Constitution"[69]:

> "The implications which are necessarily drawn from the federal structure of the Constitution itself impose certain limitations on the legislative power of the Commonwealth to enact laws which affect the States (and vice versa)."

The Court observed that the nature of the limitation had been discussed in the *Melbourne Corporation Case* and in the *Payroll Tax Case*. Their Honours agreed[70] with the observation of Walsh J in the *Payroll Tax Case*[71] that "the limitations … have not been completely and precisely formulated".

26 It was the imposition of a special burden or disability on a State or its agencies not imposed on persons generally which spelt invalidity for the law under challenge in the *Queensland Electricity Commission Case*. Nevertheless, Gibbs CJ referred to "two distinct rules, each based on the same principle, but dealing separately with general and discriminatory laws"[72]. The two rules were[73]:

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67 (1971) 122 CLR 353 at 372 per Barwick CJ (Owen J agreeing at 405), 385-386 per McTiernan J.

68 (1983) 153 CLR 297; [1983] HCA 19.

69 (1983) 153 CLR 297 at 313.

70 (1983) 153 CLR 297 at 313.

71 (1971) 122 CLR 353 at 410.

72 (1985) 159 CLR 192 at 206.

73 (1985) 159 CLR 192 at 206.

> "A general law, made within an enumerated power of the Commonwealth, will be invalid if it would prevent a State from continuing to exist and function as such … A Commonwealth law will also be invalid if it discriminates against the States in the sense that it imposes some special burden or disability on them."

27 Mason J referred back to the formulation of the principle by Dixon J in the *Melbourne Corporation Case*[74], quoted above[75]. He identified "two elements" of the "now well established" principle, namely[76]:

> "(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".

The identification of the two elements did not negate the existence of a general principle of which they were expressions. It did not inhibit the application of that general principle to the variety of circumstances which might call for its consideration. In the event, Mason J focussed upon the discriminatory character of the impugned law[77]. Brennan J took a similar approach but noted that a general law may operate in the context of particular circumstances to single out States for discriminatory treatment[78]. Deane J said[79]:

> "The character of a law as a law of general application is ordinarily a factor, and sometimes a conclusive factor, militating against the conclusion that it discriminates against the States or a State in the relevant sense. The question whether a law does so discriminate … is however, for the purposes of the law of the Constitution, a question of substance which is not susceptible of being resolved by the mere inquiry whether, as a matter of form, the law is a general or a special one."

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74 (1947) 74 CLR 31 at 79.

75 (1985) 159 CLR 192 at 214, see [24] above.

76 (1985) 159 CLR 192 at 217.

77 (1985) 159 CLR 192 at 221.

78 See (1985) 159 CLR 192 at 243.

79 (1985) 159 CLR 192 at 249.

To the extent that this approach sought to frame the implication within an extended concept of discrimination, including operational discrimination, it would seem to have been unnecessarily restrictive. However, even within the rubric of laws "discriminating against the States", it illustrated a flexible and multifactorial approach to determining whether a law impermissibly burdens the States or a particular State. Importantly, Brennan J made the point in the *Queensland Electricity Commission Case* that[80]:

> "It would state the implication too widely to say simply that the Commonwealth is prohibited from making any discriminatory law which involves the placing on the States of special burdens or disabilities affecting the exercise of their powers. It is not consistent with the plenary nature of the powers of the Commonwealth to deny the validity of a discriminatory law enacted under a power which supports the discrimination."

He drew attention to a similar observation made by Mason J in *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation*[81]. What Brennan J said in this respect was cited in the joint judgment in *Austin*[82]. It requires that attention be directed to the discriminatory character of the law as a relevant but not determinative factor in assessing whether the law trespasses beyond constitutional boundaries in its effect upon the States.

28 The joint judgment in the *AEU Case* acknowledged that, while the comments of Dixon J in the *Melbourne Corporation Case* were couched principally in terms of discrimination against the States and the imposition of a particular disability or burden upon the operation or activities of the States or upon the exercise of their constitutional powers, "his Honour clearly had in mind … 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"[83]. Nevertheless the joint judgment left open the question whether there are two implied limitations, two elements or branches of one limitation, or simply one limitation[84]. That question was answered in favour of one limitation by a majority of the Court in *Austin*.

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80 (1985) 159 CLR 192 at 233.

81 (1982) 152 CLR 25 at 93.

82 (2003) 215 CLR 185 at 256 [139].

83 (1995) 184 CLR 188 at 227.

84 (1995) 184 CLR 188 at 227.

29 In *Austin*, the Court held that the CPSF Assessment Act and the CPSF Imposition Act were invalid in their application to the statutory pension entitlements of a judge of the Supreme Court of New South Wales. But for invalidity, a judge would have been liable to pay a surcharge calculated on "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"[85].

30 Gleeson CJ based his decision upon the difference in the treatment of the State judge under the CPSF Assessment Act and other high-income earners. He said[86]:

> "That differential treatment is 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."

31 Gaudron, Gummow and Hayne JJ referred to the significance of the provision of secure judicial remuneration in attracting persons to accept appointment as judicial officers[87]. They referred to the selection of State judicial officers for attention by the federal legislature as "high-income members" of non-contributory unfunded schemes[88] and said that differential treatment may be indicative of infringement of the limitation upon legislative power with which the doctrine in the *Melbourne Corporation Case* is concerned, but was "not, of itself, sufficient to imperil validity"[89]. The question upon which their Honours focussed was the significance of the 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 significance was to be taken to be "considerable"[90]. Their Honours then asked

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85 *CPSF Assessment Act*, s 9(4).

86 (2003) 215 CLR 185 at 219 [28].

87 (2003) 215 CLR 185 at 262-263 [159]-[160].

88 (2003) 215 CLR 185 at 263 [162].

89 (2003) 215 CLR 185 at 264 [164].

90 (2003) 215 CLR 185 at 264 [165].

the "practical question" identified by Starke J in the *Melbourne Corporation Case*[91], which they formulated as follows[92]:

> "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."

The effect upon the State of the law was indicated by its move to vary the method of judicial remuneration by legislating to offset the impact of the surcharge[93]:

> "The liberty of action of the State in these matters, that being an element of the working of its governmental structure, thereby is impaired."

Gaudron, Gummow and Hayne JJ expressed their conclusion thus[94]:

> "[I]n its application to the first plaintiff, the [CPSF Imposition Act] and the [CPSF Assessment Act] are invalid on the ground of the particular disability or burden placed upon the operations and activities of New South Wales."

32 The constitutional implication considered in *Austin* and its precursors means that the Commonwealth cannot, by the exercise of its legislative power, significantly impair, curtail or weaken the capacity of the States to exercise their constitutional powers and functions (be they legislative, executive or judicial) or significantly impair, curtail or weaken the actual exercise of those powers or functions. The Constitution assumes the existence of the States as "independent entities". This implies recognition of the importance of their status as components of the federation. The "significance" of a Commonwealth law affecting the States' functions is not solely to be determined by reference to its practical effects on those functions. This is not a return to any generalised concept of inter-governmental immunity. It simply recognises that there may be some species of Commonwealth laws which would represent such an intrusion upon the functions or powers of the States as to be inconsistent with the constitutional assumption about their status as independent entities.

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91 (1947) 74 CLR 31 at 75.

92 (2003) 215 CLR 185 at 265 [168].

93 (2003) 215 CLR 185 at 265 [170].

94 (2003) 215 CLR 185 at 267 [174].

33 The application of the implied limitation is evaluative. It has always been thus. There is a normative element in the criterion of "significance" by which the adverse effects of a Commonwealth law on State capacities or functions must be characterised, before such a law will be held to be invalid. Whether the effects of a law upon the capacities or functions of the States are "significant" is to be judged qualitatively and also, but not only, by reference to its practical effects. To take an extreme example, a law of the Commonwealth purporting to subject the Governor of each of the States to a special "gubernatorial privileges tax" might fix the tax at a level which, in a financial sense, would be of little practical importance to the States or to their Governors. It might be thought, nevertheless, that the nature of such a law would mark it as asserting an intrusive legislative authority with respect to the constitutional office of Governor that was inconsistent with the status of the States as independent entities under the Constitution.

34 In my opinion, the application of the implied limitation requires a multifactorial assessment. Factors relevant to its application include:

1. Whether the law in question singles out one or more of the States and imposes a special burden or disability on them which is not imposed on persons generally.

2. Whether the operation of a law of general application imposes a particular burden or disability on the States.

3. The effect of the law upon the capacity of the States to exercise their constitutional powers.

4. The effect of the law upon the exercise of their functions by the States.

5. The nature of the capacity or functions affected.

6. The subject matter of the law affecting the State or States and in particular the extent to which the constitutional head of power under which the law is made authorises its discriminatory application.

None of these factors, considered separately, will necessarily be determinative of the application of the limitation. The decisions of this Court indicate that the fact that a law singles out the States or a State will be of considerable significance, to be weighed together with the effects of such a law on their capacities and functions. The fact that a law is of general application may make it more difficult to demonstrate, absent operational discrimination in its impact upon the States, that it transgresses the limitation.

35 In the present case, the factors relevant to the validity of the CPSF Assessment and Imposition Acts in their application to members of the South Australian Parliament are:

1. The State is singled out by reference to benefits and funds established by State laws which are specifically designated by the Commonwealth laws.

2. The laws, in so far as they relate to the PS Scheme, impose a tax specifically upon persons holding office as members of the Parliament of the State.

3. The laws effectively and specifically burden the pension and superannuation benefits able to be enjoyed by members of the State Parliament.

4. Unlike income tax laws and other tax laws of general application, the impugned laws are specifically aimed at the remuneration arrangements between the State and members of its legislature.

5. The significance of the effects of the surcharge upon State legislators was reasonably evidenced by the amendment which the State made to the commutation provisions affecting pension and superannuation entitlements.

36 In my opinion, when these factors are taken together, the CPSF Assessment and Imposition Acts, read with their specific application to funds designated in reg 177 of the Income Tax Regulations 1936 (Cth), significantly interfered with the remuneration arrangements made between the State and its legislators and, to that extent, significantly burdened the exercise by the State of its powers and functions in fixing the remuneration of its legislators. As to the effect of the laws upon Mr Clarke's entitlement to benefit under the SSS Scheme and the State Superannuation Benefit Scheme, I agree, for the reasons expressed by Hayne J[95], that they are invalid in their application to those Schemes.

Conclusion

37 For the preceding reasons, in my opinion, the appeal should be allowed and question 3(a) should be answered in the affirmative. I agree with the orders proposed in the joint judgment.

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95 See at [91]-[92] and [97]-[105] below.

38 GUMMOW, HEYDON, KIEFEL AND BELL JJ. This appeal from the Full Court of the Federal Court (Branson, Sundberg and Dowsett JJ)[96] is a sequel to *Austin v The Commonwealth*[97]. In that decision this Court held invalid two laws of the Commonwealth in their application to Justice Austin of the Supreme Court of New South Wales, on the ground that they placed 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[98].

39 The laws in question are the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Act* 1997 (Cth) ("the Imposition Act") and the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act* 1997 (Cth) ("the Assessment Act"). They commenced on 7 December 1997 and have been amended. The legislation received detailed treatment in *Austin*[99] and what follows should be read with an appreciation of that earlier analysis.

40 In broad terms, the legislation imposed a new tax, called a "surcharge"[100], upon contributions actually or notionally paid for the provision of retirement benefits to a class of persons including the appellant. The appellant complains that, as a former member of the South Australian legislature, he is subjected in a constitutionally impermissible manner to a special and legally different taxation regime from that applicable to persons eligible for, or in receipt of, pensions or superannuation.

41 In this Court, the second respondent, the Attorney-General for South Australia, supported the appellant, as did the intervening Attorneys-General for New South Wales, Victoria, Queensland and Western Australia. The Commonwealth Attorney-General intervened in support of the first respondent ("the Commissioner") and the Commissioner adopted the submissions of the Attorney-General.

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96 *Clarke v Federal Commissioner of Taxation* (2008) 170 FCR 473.

97 (2003) 215 CLR 185; [2003] HCA 3.

98 (2003) 215 CLR 185 at 314-316.

99 (2003) 215 CLR 185 at 233-245 [68]-[110].

100 See *Austin* (2003) 215 CLR 185 at 232 [64].

The appellant's parliamentary superannuation

42 The *Constitution Act* 1934 (SA) provides that the Parliament of South Australia comprises the Legislative Council and the House of Assembly (s 4). In the period in which the appellant was a member of the House of Assembly it consisted of 47 members elected by the inhabitants of the State legally qualified to vote (s 27). The *Parliamentary Remuneration Act* 1990 (SA) ("the Remuneration Act") conferred authority for payment from the Consolidated Account of amounts of remuneration fixed under that statute (s 6). The Consolidated Account is one of the most important of the ledger accounts maintained at the Treasury[101]. The "basic salary" of a member of the Parliament was fixed by s 3 as an annual salary at a rate equal to $2,000 less than that from time to time payable to members of the House of Representatives as "Commonwealth basic salary".

43 The appellant was a member of the House of Assembly between 1993 and 2002. During part of that period he was Deputy Leader of the Opposition, an office which attracted additional salary under s 4(1)(b) of the Remuneration Act. The appellant was a member of three superannuation schemes established by statutes of South Australia. The most significant of these for the financial position of the appellant was the Parliamentary Superannuation Scheme ("the PSS"). This was established by the *Parliamentary Superannuation Act* 1948 (SA) and continued by the *Parliamentary Superannuation Act* 1974 (SA) ("the PSS Act"). The PSS Act was amended from time to time during the period in which the appellant served in the House of Assembly, in particular by the *Parliamentary Superannuation (Establishment of Fund) Amendment Act* 1999 (SA) ("the 1999 Act"). It will be sufficient to refer to the statute as in force as at 1 January 2002[102].

44 Section 8 of the PSS Act established the South Australian Parliamentary Superannuation Board ("the Board") and s 12 obliged it to submit a report each year to the Treasurer on the operation of the Act.

45 The PSS Act defined (s 5(1)) a "member" as a member of either House of Parliament of the State, and included those former members still in receipt of a salary. As a member, the appellant was obliged by s 14 of the PSS Act to contribute 11.5 per cent of his salary which was deducted by the Treasurer from

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101 Selway, *The Constitution of South Australia*, (1997) at 134.

102 Reprint No 9.

his salary. Upon the appellant ceasing to be a member of the House of Assembly on 8 February 2002 by reason of the loss of his seat at an election, and having had not less than six years service, he became entitled for life, pursuant to s 16 of that statute, to a pension of about 43 per cent of his final salary. He continues to receive that pension. There was a limited right of commutation under s 21 of a proportion of the pension which had to be exercised by the appellant within three months of the loss of his seat. The appellant did not exercise that right.

46 The pension may not be assigned or charged and cannot pass by operation of law (s 38). Were the appellant to be re-elected in the future his pension would cease, but his previous service would again be taken into account for subsequent pension entitlement (s 20). Section 39(1) states that the money required for the purposes of the PSS Act is payable by the Treasurer from the Consolidated Account or from a special deposit account established by the Treasurer for that purpose.

47 Since the amendments made by the 1999 Act, benefits have been paid from the Parliamentary Superannuation Fund established by s 13 of the PSS Act. The assets of the fund belong, at law and in equity, to the Crown in right of the State (s 13(2)). The fund receives from the Treasurer payments equal to member contributions (s 13(4)(a)); the Treasury may charge the fund with the amount of benefits which are paid and thereby reimburse the Consolidated Account or other special deposit account (s 39(2)).

48 The particulars of the other two superannuation schemes of which the appellant was a member appear later in these reasons under the heading "The other schemes".

The Imposition Act and the Assessment Act

49 Section 5 of the 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."

50 In the Second Reading Speech on the Bill for the Assessment Act the responsible Minister said[103]:

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

> "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."

51 The Full Court gave a summary of the principal provisions of the federal legislation as follows[104]:

> "Section 4 of the [Imposition Act] imposed the surcharge 'on a member's surchargeable contributions for a financial year ...'. Section 11 of the [Assessment Act] provided that the relevant member, and not the fund trustee or manager, was liable to pay the surcharge. Section 8(1) of the [Assessment Act] provided that the surcharge was payable on 'a member's surchargeable contributions' for a relevant financial year, subject to presently irrelevant exceptions identified in s 8(2) and (3). The term 'member' was defined in s 38 of the [Assessment Act] to mean 'a member of a constitutionally protected superannuation fund and includes a person who has been a member of such a fund'. ...
>
> Section 9 defined the term 'surchargeable contribution'. In so doing it distinguished between two different kinds of superannuation scheme, defined benefits superannuation schemes and others to which we will refer as 'accumulation schemes'. Section 9(2) and (3) dealt with the latter category, while subss (4), (5) and (6) dealt with the former. Section 9(2) and (4) were the primary provisions. The reason for the distinction lay in the purpose of the legislative scheme, namely to tax superannuation benefits as they accrued. In accumulation schemes such benefits resulted from periodic payments made by employers, employees or both. The desired tax result could be achieved by taxing the amounts so paid. To avoid the problem [presented by s 114 of the Constitution] of taxing State funds, the surcharge was imposed on the relevant office-holders or employees. However some defined benefits schemes could not be so treated. It was decided to tax a potential beneficiary under a defined benefits scheme upon an actuarial valuation of the extent to which the anticipated ultimate benefit under the scheme was attributable to the beneficiary's service during the relevant year. That approach necessarily

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104 (2008) 170 FCR 473 at 477.

started with identification of the ultimate benefit. That benefit was generally tied to the relevant beneficiary's salary at, or prior to, the termination of his or her employment."

52 The PSS was an "unfunded defined benefits superannuation scheme"[105] and was a "constitutionally protected superannuation fund"[106] for the periods for which the Commissioner issued the assessments of surcharge described below.

53 Of the legislative purpose in the Assessment Act, it was said in the joint reasons in *Austin*[107]:

> "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."

The litigation

54 Section 15(6) of the Assessment Act, in the form in which it applies to the appellant, provides that when a lump sum or pension becomes payable for a member whose "surcharge debt account" is in debit, the member is liable to pay the Commissioner the lesser of the amount of the debit and 15 per cent of the employer-financed component of that part of the benefits which accrued after 20 August 1996.

55 Between 15 February 2000 and 15 February 2005 the Commissioner issued to the appellant assessments of superannuation contributions surcharge in respect of his membership of each of the three superannuation schemes. On 16 August 2004, under s 15(7) of the Assessment Act, the Commissioner issued to the appellant a notice of liability to pay surcharge in respect of his membership of the PSS. Surchargeable contributions under the PSS for the periods ending 30 June 1997–30 June 2001 had been reported in a total of $181,402 and the

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105 Superannuation Contributions Tax (Assessment and Collection) Regulations 1997 (Cth), Sched 1, Pt 1, Item 173.

106 Income Tax Regulations (Amendment) (Cth) SR 1997 No 191.

107 (2003) 215 CLR 185 at 242 [99].

"surcharge rate" was 15 per cent. A surcharge amount was included in the taxable income of the appellant for each of these five years. Some 93 per cent of the surchargeable contributions were calculated in respect of membership of the PSS, with the result that of the assessed surcharge of $29,260 approximately $27,210 was imposed in respect of the PSS membership of the appellant. Objections by the appellant, based upon the application to his position of the reasoning and outcome in *Austin*, were disallowed by the Commissioner.

56 The appellant applied to the Administrative Appeals Tribunal ("the AAT") for review of those decisions of the Commissioner. The AAT then referred three questions to the Federal Court. These were argued before the Full Court which answered the two limbs of Question 3 adversely to the interests of the appellant.

57 The Full Court, consistently with the decision in *Austin*, answered "No" to Question 3(b)[108]. This asked whether the Imposition Act imposed a tax on property belonging to a State, contrary to s 114 of the Constitution.

58 In this Court the appellant confines his case to the treatment by the Full Court of Question 3(a). The Full Court answered "No" to the question whether the Imposition Act and the Assessment Act are invalid in their application to the appellant on the ground that they so discriminate against the State of South Australia, or so place a particular disability or burden upon the operations and activities of that State, as to be beyond the legislative power of the Commonwealth.

59 For the reasons that follow, together with those of Hayne J, the appellant should succeed in respect of liability to pay surcharge by reason of his membership of the PSS and of the other two schemes.

The *Melbourne Corporation* doctrine

60 The appellant, and the States of South Australia, New South Wales, Victoria, Queensland and Western Australia in his support, rely upon that implication, derived from the federal structure established by the Constitution and consistent with its express terms, which is associated with *Melbourne Corporation v The Commonwealth*[109] and has been elucidated in later authorities, of which *Austin* is the most recent. The effect of the implication for which the

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108 (2008) 170 FCR 473 at 504.

109 (1947) 74 CLR 31; [1947] HCA 26.

appellant and his supporters contend is to restrain, in addition to the express limitation in s 114 of the Constitution, the scope of the power of the Parliament to make laws with respect to "taxation; but so as not to discriminate between States or parts of States" (s 51(ii)).

61 Six points may conveniently be made here. The first concerns the emphasis placed in *Austin*[110] upon both the reference in s 5 of the Assessment Act to "high-income members of constitutionally protected superannuation funds" and the different taxation regime applicable to other superannuation funds as indicative that the Imposition Act and the Assessment Act are not laws of "general application" which the States must take as they find them as part of the system governing the whole community[111]. In *Austin*[112] Gleeson CJ pointed out, as instances of federal laws of "general application" that validly had been imposed on the States, along with taxpayers generally, pay-roll tax and fringe benefits tax.

62 The second point is that members of a State legislature are within that class of persons "at the higher levels of government" in respect of whom it is critical to the State's capacity to function as a government that it retain the ability to fix the terms and conditions under which they serve upon election to the Parliament of the State in question[113].

63 The third concerns the significance of the size of any financial burden. In that regard the following remarks of Gleeson CJ in *Austin* are in point[114]:

> "The adverse financial impact on the States of the pay-roll tax, or the fringe benefits tax, both of which were held valid, far 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

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110 (2003) 215 CLR 185 at 263 [162].

111 See *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 337-338 per Dixon J; [1948] HCA 7.

112 (2003) 215 CLR 185 at 210-211 [16]. See also *Stuart-Robertson v Lloyd* (1932) 47 CLR 482 at 488, 491-492; [1932] HCA 33.

113 See *Austin* (2003) 215 CLR 185 at 260-261 [152].

114 (2003) 215 CLR 185 at 217 [24].

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."

64 The fourth point is a corollary to the third. The governmental capacities of the States, for example with respect to the terms and conditions under which parliamentarians serve, often will be manifested in legislation. But this will not always be so. The *Melbourne Corporation Case* immediately concerned the effect of the *Banking Act* 1945 (Cth) upon the freedom of the plaintiff to continue to bank with the National Bank of Australasia Ltd, a private bank, rather than with the Commonwealth Bank of Australia[115]. The more general consideration, emphasised by Dixon J[116], was that State and federal governments being separate bodies politic, "prima facie each controls its own moneys". Further, where there is State legislation, as in the present case, this does not entail the consequence that the question of the application of the *Melbourne Corporation* doctrine as a restraint upon federal legislative power is to be determined by the methods of comparison between federal and State laws enacted under concurrent powers but said to attract the operation of s 109 of the Constitution. The issue in this appeal concerns alleged federal legislative impairment of the relevant capacity of the State of South Australia.

65 The fifth point is that in *Austin*, a majority of the Court, Gleeson CJ[117] and Gaudron, Gummow and Hayne JJ[118], concluded that the notion of "discrimination" by federal law against a State is but an illustration of a law which impairs the capacity of the State to function in accordance with the constitutional conception of the Commonwealth and States as constituent entities of the federal structure. Too intense a concern with identification of discrimination as a necessity to attract the *Melbourne Corporation* doctrine involves the search for the appropriate comparator, which can be a difficult inquiry[119] and is apt to confuse, rather than to focus upon the answering of the

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115 See (1947) 74 CLR 31 at 32-34, 68.

116 (1947) 74 CLR 31 at 77.

117 (2003) 215 CLR 185 at 217 [24].

118 (2003) 215 CLR 185 at 246-249 [116]-[124].

119 See, for example, the differing identification of the relevant comparator for the legislation considered in *Purvis v New South Wales* (2003) 217 CLR 92 at 130-131 [113]-[118], 158-161 [213]-[224]; [2003] HCA 62.

essential question of interference with or impairment of State functions. It also may be that the references to discrimination by Dixon J in *Melbourne Corporation*[120] use the term in the somewhat different sense of a law which is "aimed at" or places a "special burden" on the States.

66 This leads to the final point, which indicates the nature of the inquiry for the present appeal. It was made as follows in the joint reasons in *Austin*[121]:

> "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 applied by consideration not only of the form but also 'the substance and actual operation' of the federal law[122]. 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."

Conclusions respecting the PSS

67 The practical operation of the Imposition Act and the Assessment Act with respect to State parliamentarians, as much as to State judges in the position of Justice Austin, is to create an obligation on their part to pay a deferred compounding tax when leaving office. An occasion for the imposition of that obligation upon the appellant was his membership of the PSS, which was an incident of his service as a member of the House of Assembly.

68 The tax which is assessed and imposed by the federal legislation upon the appellant, as upon Justice Austin, is based upon notional contributions and these are determined by actuarial calculations. The result is that the notional contributions upon which the appellant has been assessed bear no necessary relation to the pension he receives. Assumptions as to salary increases, increases

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120 (1947) 74 CLR 31 at 81, 83, 84.

121 (2003) 215 CLR 185 at 249 [124].

122 *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 240; [1995] HCA 71; *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 249-250; [1985] HCA 56; *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 500; [1996] HCA 56.

in the Consumer Price Index, marital status upon retirement, likely commutation and mortality may reflect "average" experience of members of the PSS without being accurate in their application to the appellant. The result, as New South Wales submitted, is that benefits actually received may be less than those assumed in the actuarial calculations. Moreover, the tax accrues, compounding at market interest rates, until the defined benefit is received, and may approximate the whole of the pension paid under the PSS for the first year.

69 It may be accepted that some of the considerations present in *Austin* do not apply to the appellant. In particular, there is the absence of judicial tenure and the requirement for continued electoral success. But the interest of the State in attracting, by the making of suitable remuneration, competent persons to serve as legislators, and thus as potential Ministers, is a long-standing constitutional value. The matter was considered by this Court in *Theophanous v The Commonwealth*[123] where reference was made to the remuneration, before Federation, of members of the colonial legislatures. The fixing of the amount and terms of that remuneration is a critical aspect of the capacity of a State to conduct the parliamentary form of government. Numerous provisions of the Constitution[124] assume the continued operation of that form of government in the States.

70 Section 21 of the PSS Act permitted partial commutation but this was likely to produce a lump sum less than the present value of the pension entitlement. To the federal laws introduced in 1997, the Parliament of South Australia responded in the *Statutes Amendment (Commutation for Superannuation Surcharge) Act* 1999 (SA) ("the Commutation Act"), s 4 of which introduced s 21AA of the PSS Act. This obliged the Board, on application of a member liable under s 15(6) of the Assessment Act to a deferred superannuation contribution surcharge, to "commute so much of the pension as is required to provide a lump sum equivalent to the amount of the surcharge". The application had to be made not within three months of leaving the Parliament, but within three months of the receipt of the notice by the Commissioner under s 15(7) of the Assessment Act (s 21AA(2)).

71 The Second Reading Speech in the House of Assembly on the Bill for the 1999 Act indicates the legislative purpose of assisting members who might

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123 (2006) 225 CLR 101 at 113-114 [7], 119-121 [33]-[37]; [2006] HCA 18.

124 Including ss 7, 9, 10, 15, 25, 29, 30, 31, 41, 95, 107, 108, 111, 123 and 124.

otherwise lack the means to meet the deferred surcharge liability, the final amount of which might not be known until the due date for payment was past[125].

72 The Full Court said of the enactment of s 21AA that the State "was not compelled by the surcharge legislation to make the amendment" and that s 21AA was "a piece of fine tuning"[126]. However, the introduction of that provision had a greater significance. It was indicative of the curtailment or restriction of legislative choice for South Australia to provide remuneration to senior office holders. The appellant entered the Parliament under a system provided by the PSS. This provided a life pension after at least six years of service, with a limited right of commutation under s 21. The practical operation of the Assessment Act and the Imposition Act was to curtail the continued exercise of State legislative choice, as expressed in the PSS. The introduction of s 21AA was responsive to and indicative of that curtailment. As Hayne J explains in his reasons, the State was left with no real choice but to provide retirement benefits by a method which enabled parliamentarians to meet the burden imposed by the surcharge legislation.

73 The Commonwealth Solicitor-General submitted, with respect to the PSS Act, that the basic question was (i) whether the liability to pay the surcharge created a substantial disincentive to take, stand for, or continue in parliamentary office and (ii) if so, whether there was thereby a significant impairment of the ability of the State of South Australia to attract and retain appropriate people as parliamentarians. This frames the basic question too narrowly.

74 Reference has been made earlier in these reasons to the interest of the State in attracting competent persons to serve as legislators. This supports the proposition that the capacity to fix the amount and terms of remuneration of parliamentarians is a critical aspect of the conduct of the parliamentary form of government by the State.

75 To adapt what was said in the joint reasons in *Austin*[127], one tendency of the federal laws in question here is to induce the States to vary their method of remuneration of members of the legislatures, and:

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125 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 9 March 1999 at 1036.

126 (2008) 170 FCR 473 at 503.

127 (2003) 215 CLR 185 at 265 [170].

> "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* [1945 (Cth)]."

76 With respect to that statute, in *Austin* their Honours had earlier posed the practical question put by Starke J in the *Melbourne Corporation Case*[128]. This was[129]:

> "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".

77 The answer with respect to this appeal, as with *Austin*, is in the affirmative, at least as regards the operation of the PSS.

The other schemes

78 The surcharge liabilities of the appellant which arose under s 15(6) of the Assessment Act included assessments for 1997 and 1998 in respect of his membership of the State Superannuation Benefit Scheme ("the SBS"), and for 1999, 2000 and 2001 in respect of his membership of the Southern State Superannuation Scheme ("the Southern Scheme").

79 The first of these was established under the *Superannuation (Benefit Scheme) Act* 1992 (SA) ("the SBS Act") and the other under the *Southern State Superannuation Act* 1994 (SA) ("the Southern Scheme Act"). The SBS Act was repealed with effect 1 July 1998 by s 32 of the *Southern State Superannuation (Merger of Schemes) Amendment Act* 1998 (SA) ("the Merger Act")[130]. The appellant was a member of the SBS from 11 December 1993 to 30 June 1998 and of the Southern Scheme from 1 July 1998 to 8 February 2002; on repeal of the SBS Act by the Merger Act, his benefits in the first scheme were transferred by

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128 (1947) 74 CLR 31 at 75.

129 (2003) 215 CLR 185 at 265 [168].

130 By virtue of the addition by the Merger Act of Sched 3 to the Southern Scheme Act.

operation of law to the second scheme[131]. In 2002 the appellant carried over his entitlement (consisting of an "employer" component) to another scheme which does not attract the surcharge under the Assessment and Imposition Acts. The Southern Scheme and the SBS both attracted the surcharge provisions and under the former the appellant would have been entitled to a lump sum benefit on attaining 55 years of age.

80 Section 14(1) of the Southern Scheme Act rendered, by its own force, a member of that scheme a person in relation to whom the Crown in right of South Australia was liable to pay a superannuation guarantee charge under the *Superannuation Guarantee (Administration) Act* 1992 (Cth) ("the Guarantee Act").

81 That federal statute applied to State employees and s 12(5) classified a member of the Parliament of a State as "an employee of the State". Section 16 obliged employers to pay a "superannuation guarantee charge" in respect of the employer's "shortfall" in making stipulated contributions in respect of employees. The effect was to require employers to pay stipulated contributions to a "complying superannuation fund"[132].

82 The same state of affairs respecting the treatment of parliamentarians as employees of the State and so as members of the SBS had been established by s 4(1) of the SBS Act. This also had "picked up" the definition in s 12(5) of the Guarantee Act.

83 Unlike the PSS, the membership of these two schemes was not confined to parliamentarians. Membership was linked to the operation of the Guarantee Act which imposed liability to pay a superannuation guarantee charge upon a widely drawn class of employers and employees. This relevantly included "employees" of the State of South Australia and its agencies and instrumentalities. Further, as already remarked, the surcharge amounts in respect of the appellant's membership of the SBS ($491.70 for 1997 and $424.60 for 1998) and the Southern Scheme ($359.35 for 1999, $368.65 for 2000 and $405 for 2001) were much smaller than those in respect of the PSS.

84 It also should be noted that the appellant, and the State, were drawn into these two schemes only because of the artificial classification by the Guarantee

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131 By virtue of the Merger Act.

132 See *Austin* (2003) 215 CLR 185 at 229-230 [57]-[58].

Act of the appellant as a State employee. That may raise a question of whether in this respect the Guarantee Act itself had the character of a law of general application in the sense discussed earlier in these reasons. The circumstances in which the Guarantee Act was introduced were discussed in *Austin*[133]. But neither in that case nor in the present litigation is any point taken respecting the validity of the Guarantee Act and nothing more should be said here on the matter.

85 However, the assets of the fund maintained under the Southern Scheme Act (s 4(2)), like those of the fund maintained under the PSS Act, belonged both in law and in equity to the Crown in right of South Australia. Both the SBS and the Southern Scheme, like the PSS, were classed as constitutionally protected superannuation funds[134]. Further, the surcharge legislation represented by the Imposition Act and the Assessment Act was attracted to the appellant as a "high-income" member of constitutionally protected funds, regardless of the amounts later payable in respect of any of the three funds.

86 The Parliament of the State responded with respect to the operation of the surcharge upon members of the Southern Scheme by the *Statutes Amendment (Miscellaneous Superannuation Measures) Act* 2004 (SA) ("the Second Commutation Act"). This commenced on 19 August 2004. Section 14 added s 35AA to the Southern Scheme Act, which provided, upon application, for a member liable for a deferred superannuation contributions surcharge, as a result of a benefit becoming payable under the scheme, to commute fully the pension or to receive part of the benefit in the form of a commutable pension.

87 The Attorney-General, in the Second Reading Speech on the Bill for the Second Commutation Act, said that the proposed law would, among other things, bring members of any of the government's lump sum schemes "into line" with members of the PSS, who "already have the ability to leave part of their retirement benefit in the scheme and use it to extinguish a surcharge liability"[135].

88 The Southern Scheme was of the general character described above but the Attorney-General was concerned with the differential treatment of "private sector schemes, [where] the fund itself is liable for the surcharge tax" and the

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133 (2003) 215 CLR 185 at 229-230 [57]-[58].

134 Income Tax Regulations (Amendment) (Cth) SR 1997 No 191.

135 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 24 March 2004 at 1629.

impact upon members of "government superannuation funds"[136] generally. To that broad concern the *Melbourne Corporation* doctrine is not directed. But to higher office holders such as the appellant the same reasoning applies here as to the PSS. There was the necessary impairment of the governmental functions of South Australia. Matters of evaluation and degree are necessarily involved in reaching that conclusion.

Orders

89 The appeal should be allowed and, in place of the answer given by the Full Court to Question 3(a) of the Questions referred by the AAT, it should be answered that the Imposition Act and the Assessment Act are invalid insofar as they purport to create the liability of the appellant to superannuation contributions surcharge in respect of his membership of the PSS, the SBS and the Southern Scheme, the details of which are set out in par 59 of the Statement of Agreed Facts. The first respondent should pay the costs of the appellant. The second respondent, like the State interveners, should bear his own costs.

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136 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 24 March 2004 at 1629.

90 HAYNE J. I agree with Gummow, Heydon, Kiefel and Bell JJ that, for the reasons they give, the appeal should be allowed and consequential orders made in the form proposed.

91 The appellant's argument gave greater prominence to the Parliamentary Superannuation Scheme ("the PSS") than to the other two schemes: the State Superannuation Benefit Scheme ("the SBS") and the Southern State Superannuation Scheme ("the Southern Scheme"). There were at least two reasons for the focus of argument falling upon the PSS. First, the amounts at stake in relation to the appellant's membership of the PSS were much larger than the amounts referable to the other two schemes. Secondly, membership of the PSS was evidently related to the appellant's membership of a State legislature whereas membership of the other two schemes was not. The SBS and the Southern Scheme each embraced a wide range of State government employees.

92 It is important, however, to recognise that the fact that membership of the SBS and the Southern Scheme was not confined to parliamentarians or others "at the higher levels of government"[137] is not relevant to the question that arises in this matter. The principle that is engaged directs attention to whether the laws in issue interfere with, or impair, the governmental capacities of the States[138] (in this case, a State's capacity to decide the terms and conditions under which members of the State Parliament serve).

93 As pointed out in *Austin v The Commonwealth*[139], that inquiry "turns upon matters of evaluation and degree" and "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'". The matter of evaluation and degree in this case concerns the effect of imposing a surcharge on superannuation entitlements of State parliamentarians which, as explained in the reasons of Gummow, Heydon, Kiefel and Bell JJ, created an obligation to pay a deferred compounding tax when the superannuation benefits in question become payable.

94 In explaining why a State's capacity to choose the way in which State parliamentarians are remunerated is constitutionally significant, it is necessary to

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137 *Austin v The Commonwealth* (2003) 215 CLR 185 at 260-261 [152]; [2003] HCA 3; *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 233; [1995] HCA 71.

138 *Austin* (2003) 215 CLR 185 at 217 [24] per Gleeson CJ, 246-249 [116]-[124] per Gaudron, Gummow and Hayne JJ.

139 (2003) 215 CLR 185 at 249 [124].

begin by recalling that, as pointed out in *Austin*[140], the principle which is engaged in this matter is necessarily expressed in negative terms and at a high level of abstraction. But as the plurality reasons in *Austin* also show, examination of the application of the relevant principle must begin from an understanding of what was said about that principle in *Melbourne Corporation v The Commonwealth*[141].

95 The root of the relevant principle is found in the proposition, often quoted from the reasons of Dixon J in *Melbourne Corporation*[142], that "[t]he 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." This proposition, and particularly the reference to the continued existence of independent polities, must be understood in the context of the reasons as a whole.

96 The law in question in *Melbourne Corporation* in effect required States and their authorities (including local government authorities) to conduct their banking business only with the Commonwealth Bank or a State bank. A central thrust of the argument advanced by counsel for the plaintiff (Mr Garfield Barwick) against the validity of that law was that it was not properly to be characterised as a law with respect to banking "because it discriminates against (in the sense that it is 'aimed at') the States and State authorities"[143]. This argument, in so far as it was founded on ascribing a single characterisation to the law in question, was rejected[144] by Dixon J:

> "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."

But the law was held invalid. The hinge about which the reasons of Dixon J turned is found in the contrast drawn[145] between recognition that a law may be

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140 (2003) 215 CLR 185 at 246 [115].

141 (1947) 74 CLR 31; [1947] HCA 26.

142 (1947) 74 CLR 31 at 82.

143 (1947) 74 CLR 31 at 35.

144 (1947) 74 CLR 31 at 79.

145 (1947) 74 CLR 31 at 78-80.

characterised in more than one way, and the implication, drawn from the structure of the Constitution, that "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", is beyond power. The contrast was expressed[146] by Dixon J in the following terms:

> "But it is one thing to say that a federal law may be valid notwithstanding a purpose of achieving some result which lies directly within the undefined area of power reserved to the States. 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 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."

As Dixon J went on to say[147]:

> "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."

And with that in mind it is necessary, as was also said[148] in *Melbourne Corporation*, to distinguish "between a law of general application and a provision singling out governments and placing special burdens upon the exercise of powers or the fulfilment of functions constitutionally belonging to them".

97 The laws in question in this matter and in *Austin* were directed only to those who were to receive benefits from "constitutionally protected" funds. They were not laws of general application. They did not impose taxes upon the States but they did single out those "at the higher levels of government"[149]: in this case State parliamentarians; in *Austin*, State judges. The laws in issue in this matter imposed on those persons a special and legally different taxation regime from that which generally applied to those who were to receive pensions or

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146 (1947) 74 CLR 31 at 80.

147 (1947) 74 CLR 31 at 81.

148 (1947) 74 CLR 31 at 81-82.

149 *Austin* (2003) 215 CLR 185 at 260-261 [152].

superannuation benefits. Under the generally applicable regime, a surcharge was imposed on the amount of tax deductible contributions made to superannuation funds by those identified as "high income earners". That surcharge was payable by superannuation providers, not members of the fund. The laws now in issue required those who were to receive retirement benefits to which the laws applied to pay the surcharge on what the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act* 1997 (Cth) ("the Assessment and Collection Act") identified[150] as the "surchargeable contributions" of the recipient.

98 If, as with the SBS and the Southern Scheme, there were amounts contributed by an "employer" for the appellant, to a constitutionally protected superannuation fund that was a complying superannuation fund within the meaning of s 45 of the *Superannuation Industry (Supervision) Act* 1993 (Cth), those contributions were part of the surchargeable contributions of the appellant[151]. And if, as with the PSS, the appellant was a member of a defined benefits superannuation scheme, the surchargeable contributions were[152] "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 relevant financial year.

99 Satisfaction of the obligation to pay the surcharge could be deferred until receipt of the benefits[153] but interest accrued and compounded in respect of each annual assessment[154]. As pointed out in *Austin*[155], the choice whether to pay the surcharge as it accrued necessarily chanced fortune. And, as also discussed in *Austin*[156], the use of actuarial calculations to determine the value of benefits accruing to a member of a defined benefits superannuation scheme did not always accurately reflect the position of any particular member.

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150 s 9.

151 See *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act* 1997 (Cth) ("the Assessment and Collection Act"), s 9(2) and s 274 of the *Income Tax Assessment Act* 1936 (Cth).

152 Assessment and Collection Act, s 9(4).

153 Assessment and Collection Act, s 15(6).

154 Assessment and Collection Act, s 15(4).

155 (2003) 215 CLR 185 at 239-240 [89]-[91], 265 [169].

156 (2003) 215 CLR 185 at 238-239 [88].

100 As remarked in *Austin*[157], there is an apparent incongruity in singling out for the same impost those who are entitled to concessional deductions for contributions to superannuation funds and those in the public sector whose superannuation arrangements are non-contributory. But whether, or to what extent, the features of the legislation just mentioned lead to a result that members of constitutionally protected superannuation funds are taxed in a way that provides some measure of economic equivalence with the position of "high income earners"[158] made subject to a surcharge payable by their superannuation funds is not to the point.

101 What is important is that the laws now in issue, by their effect on how States may choose to remunerate their parliamentarians, place a special disability or burden upon the exercise of powers and the fulfilment of functions of the States. It is for a State to decide how and in what amount its parliamentarians are to be remunerated. Is it to be by salary, with or without funded or unfunded retirement benefits, or other forms of benefit? Are some or all of those benefits to be provided with or without contribution by the beneficiary? Are any or all of the benefits to be defined or are they to be an accumulation of whatever is contributed with interest? Are benefits to be paid by pension or in lump sum? The legislation imposing the surcharge in issue in this matter impairs the capacity of a State to choose between these various forms of remuneration of its parliamentarians in one particular but important respect: the State has no real choice but to adopt a method of providing retirement benefits that will enable parliamentarians to meet the tax liability specially imposed on them.

102 That a State may have made particular choices about these matters in the past, and the effect of the surcharge on the arrangements chosen, is not to the point. Whether a State has chosen to administer the superannuation entitlements of State parliamentarians through one or more separately established schemes, or in conjunction with other superannuation arrangements for other State "employees", does not alter the effect of the surcharge upon the capacity of the State to fix the terms and conditions under which State parliamentarians serve. The effect of the surcharge on that capacity remains the same, no matter whether, before the enactment of the legislation imposing the surcharge, the State had chosen to provide retirement benefits for parliamentarians through a separate unfunded parliamentary pension scheme providing defined benefits, or had chosen to do so through one or more general public sector schemes providing undefined benefits.

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157 (2003) 215 CLR 185 at 231 [62].

158 (2003) 215 CLR 185 at 231 [62].

103 And if, as here, a part of the overall retirement benefits provided for parliamentarians is attributable to contributions which the State makes to a superannuation fund in satisfaction of an obligation imposed on all employers to make not less than a minimum superannuation contribution, there remains the question about the effect of the surcharge on the capacity of the State to fix the terms and conditions upon which the State parliamentarians serve. Even if the law imposing an obligation on employers to make contributions is a law of general application (an issue not examined in this matter) the tax imposed on members of constitutionally protected funds is not. The tax imposes a special burden on the exercise of powers or the fulfilment of functions of the State.

104 Neither the destination of any superannuation contributions made by the State of South Australia in respect of the appellant's service as a parliamentarian, nor the reason or occasion for making those contributions, affects the assessment of the impact of the relevant provisions upon the capacity of the State to function as a government. That some of the benefits provided for State parliamentarians are defined benefits and others are not is likewise irrelevant. The necessary impairment of the governmental functions of the State was demonstrated in respect of the whole of the amounts at issue in this case.

105 The appeal should be allowed.

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