HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL AND KEANE JJ

FORTESCUE METALS GROUP LIMITED & ORS PLAINTIFFS

AND

THE COMMONWEALTH OF AUSTRALIA DEFENDANT

Fortescue Metals Group Limited v The Commonwealth
[2013] HCA 34
7 August 2013
S163/2012

ORDER

The questions reserved for the consideration of the Full Court on 5 November 2012 be answered as follows:

Question 1

Are any or all of s 3 of the Minerals Resource Rent Tax (Imposition—Customs) Act *2012 (Cth), s 3 of the* Minerals Resource Rent Tax (Imposition—Excise) Act *2012 (Cth) and s 3 of the* Minerals Resource Rent Tax (Imposition—General) Act *2012 (Cth) invalid in their application to the plaintiffs on one or more of the following grounds:*

A. *they discriminate between the States of the Commonwealth of Australia contrary to s 51(ii) of the Constitution;*

B. *they give preference to one State of the Commonwealth of Australia over another State contrary to s 99 of the Constitution;*

C. *they so discriminate against the States of the Commonwealth or so place a particular disability or burden upon the operations or activities of the States, as to be beyond the legislative power of the Commonwealth?*

Answer

No.

Question 2

Are any or all of the Minerals Resource Rent Tax (Imposition—Customs) Act *2012 (Cth), the* Minerals Resource Rent Tax (Imposition—Excise) Act *2012 (Cth), the* Minerals Resource Rent Tax (Imposition—General) Act *2012 (Cth) and the* Minerals Resource Rent Tax Act *2012 (Cth) invalid in their application to the plaintiffs on the ground that they are contrary to s 91 of the Constitution?*

Answer

No.

Question 3

Who should pay the costs of the reserved questions?

Answer

The plaintiffs.

Representation

D F Jackson QC with B Dharmananda SC and W A D Edwards for the plaintiffs (instructed by Corrs Chambers Westgarth Lawyers)

J T Gleeson SC, Solicitor-General of the Commonwealth and N J Williams SC with G J D del Villar and D F C Thomas for the defendant (instructed by Australian Government Solicitor)

Interveners

W Sofronoff QC, Solicitor-General of the State of Queensland with A D Scott for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

G R Donaldson SC, Solicitor-General for the State of Western Australia with A J Sefton and J D Berson for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor (WA))

CATCHWORDS

Fortescue Metals Group Limited v The Commonwealth

Constitutional law – Powers of Commonwealth Parliament – Constitution, s 51(ii) – "[T]axation; but so as not to discriminate between States or parts of States" – *Minerals Resource Rent Tax Act* 2012 (Cth), *Minerals Resource Rent Tax (Imposition—Customs) Act* 2012 (Cth), *Minerals Resource Rent Tax (Imposition—Excise) Act* 2012 (Cth), *Minerals Resource Rent Tax (Imposition—General) Act* 2012 (Cth) ("Acts") established and imposed minerals resource rent tax ("MRRT") – Amounts paid as State royalties allowed under Acts as royalty credits – Available royalty credits which do not exceed mining profit deductible from MRRT as royalty allowance – Effect of Acts alleged to be that liability to pay MRRT varies between States and that reduction in State royalty increases liability to pay MRRT by the amount of the reduction – Whether Acts discriminate between States contrary to s 51(ii) of Constitution.

Constitutional law – Constitution, s 99 – Prohibition on Commonwealth, by any law of revenue, giving preference to one State over another – Whether Acts give preference to one State over another.

Constitutional law – *Melbourne Corporation* doctrine – Whether Acts discriminate against or place particular burden upon operations or activities of States, beyond legislative power of Commonwealth Parliament.

Constitutional law – Constitution, s 91 – "Nothing in this Constitution prohibits a State from granting any aid to or bounty on mining for gold, silver, or other metals" – Whether Acts contravene s 91.

Words and phrases – "discrimination", "*Melbourne Corporation* doctrine", "minerals resource rent tax", "preference in trade, commerce or revenue", "State royalties", "States or parts of States".

Constitution, ss 51(ii), 91, 99.

FRENCH CJ.

Introduction

1 Fortescue Metals Group Ltd and four subsidiaries of that company commenced proceedings against the Commonwealth by way of writ issued out of this Court on 22 June 2012. They assert that provisions of the *Minerals Resource Rent Tax Act* 2012 (Cth) ("the MRRT Act") and three related Acts imposing Minerals Resource Rent Tax ("MRRT") in relation to iron ore are not valid laws of the Commonwealth. The three related Acts are the *Minerals Resource Rent Tax (Imposition—General) Act* 2012 (Cth), the *Minerals Resource Rent Tax (Imposition—Customs) Act* 2012 (Cth) and the *Minerals Resource Rent Tax (Imposition—Excise) Act* 2012 (Cth) (together referred to as "the Imposition Acts").

2 The stated object of the MRRT Act is to ensure that the Australian community receives an adequate return for its "taxable resources" having regard to their inherent value, their non-renewable nature and the extent to which they are subject to Commonwealth, State and Territory royalties[1]. The Act makes allowance, in fixing the MRRT liability of a miner, for mining royalties payable under State laws. Because the MRRT Act makes those allowances, the liabilities it imposes can vary according to State mineral royalty regimes. That potential for a differential operation from State to State underpins the plaintiffs' argument that the Act discriminates between States contrary to s 51(ii) of the Constitution and gives preference to one State over another contrary to s 99 of the Constitution. The plaintiffs also assert that, contrary to s 91 of the Constitution, the MRRT Act detracts from, impairs or curtails the grant by States of aid to mining for iron ore by the reduction of royalty rates applicable to the mining of iron ore. The Act is also said to detract from, impair or curtail the capacity of the States to function as governments contrary to the principles enunciated in *Melbourne Corporation v The Commonwealth*[2]. The Imposition Acts are challenged, along with the MRRT Act, because s 3 of each of them imposes the MRRT. A reference to the MRRT Act in these reasons is a reference to that Act read with the Imposition Acts.

3 The limitations on Commonwealth legislative power imposed by ss 51(ii) and 99 of the Constitution protect the formal equality in the Federation of the States inter se and their people, and the economic union which came into

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1 MRRT Act, s 1–10.

2 (1947) 74 CLR 31; [1947] HCA 26.

existence upon the creation of the Commonwealth[3]. They must be read in their context with s 51(iii), which limits legislative power with respect to bounties on the production or export of goods by requiring that they shall be "uniform throughout the Commonwealth", and s 88, which requires that customs duties be "uniform". The scheme of economic unity which they support is reinforced by s 102, which empowers the Parliament, by laws with respect to trade or commerce, to forbid as to railways any preference or discrimination by any State. The relationship between those provisions, the exclusivity provided by s 90 for Commonwealth legislative power with respect to customs, excise and bounties, and the guarantee of freedom of trade, commerce and intercourse among the States made by s 92, was encapsulated in the joint majority judgment in *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]*[4]:

> "ss 90 and 92, taken together with the safeguards against Commonwealth discrimination in s 51(ii) and (iii) and s 88, created a Commonwealth economic union, not an association of States each with its own separate economy." (footnote omitted)

Importantly, the proscription of differential taxes avoided distortion of "local markets within the Commonwealth."[5]

4 At a more detailed level, the interactions between ss 51(ii), 51(iii), 88 and 99 are as summarised by Latham CJ in *Elliott v The Commonwealth*[6]:

> "The sections mentioned operate independently, but they overlap to some extent. Laws of taxation, including laws with respect to customs duties, fall under sec 51(ii) and as laws of revenue they fall under sec 99. Laws with respect to bounties on the export of goods fall under sec 51(iii) and also, as laws of trade or commerce, under sec 99. A preference in

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3 A formal equality which belied persistent economic and geographical inequalities: Anderson, "The States and Relations with the Commonwealth", in Else-Mitchell (ed), *Essays on the Australian Constitution*, (1961) 93 at 108.

4 (1993) 178 CLR 561 at 585; [1993] HCA 67. See also *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120 at 153 per Barwick CJ; [1978] HCA 34; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 660 per Deane J; [1983] HCA 23; *Australian Coarse Grains Pool Pty Ltd v Barley Marketing Board* (1985) 157 CLR 605 at 647–648 per Brennan J; [1985] HCA 38; *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 426 per Mason CJ and Deane J; [1989] HCA 38.

5 (1993) 178 CLR 561 at 585.

6 (1936) 54 CLR 657 at 668; [1936] HCA 7.

relation to any of these subjects which infringed sec 99 would also be a prohibited discrimination or a prohibited lack of uniformity under one of the other sections. Preference necessarily involves discrimination or lack of uniformity, but discrimination or lack of uniformity does not necessarily involve preference."

5 The limitations imposed by ss 51(ii) and 99, which are in issue in this case, operate at a level of generality appropriate to their federal purposes. They do not prevent the Parliament of the Commonwealth from enacting uniform laws which have different effects in different States because of differences in the circumstances to which they apply, including different State legislative regimes. Nor do they apply to a law with respect to taxation merely because it provides for adjustments to the liabilities it imposes according to liabilities which might from time to time be imposed by differing State laws. The generality of the non-discrimination and no-preference limitations permits differences between States in the application of the law, for which the law makes provision, if such provision is based upon a distinction which is appropriate and adapted to the attainment of a proper objective[7]. Such a provision neither discriminates nor gives a preference within the meaning of those terms in ss 51(ii) and 99.

6 For the reasons that follow, the MRRT Act neither discriminates between States or parts of States nor gives preference to one State over another. For the reasons given in the joint judgment of Hayne, Bell and Keane JJ, s 91 of the Constitution has no effect on the validity of the Act. Nor, for the reasons given by their Honours, does the Act impair the capacity of the States to function as governments contrary to the principles explained in *Melbourne Corporation v The Commonwealth*[8] and more recently in *Austin v The Commonwealth*[9] and *Clarke v Federal Commissioner of Taxation*[10]. The plaintiffs' challenges to the MRRT Act fail.

The questions reserved

7 On 5 November 2012, the Court ordered that the following questions be reserved for determination by the Full Court (on the basis of the pleadings and documents referred to in the pleadings):

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7 *Austin v The Commonwealth* (2003) 215 CLR 185 at 247 [118]; [2003] HCA 3; *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vict)* (2004) 220 CLR 388 at 424 [89]; [2004] HCA 53.

8 (1947) 74 CLR 31.

9 (2003) 215 CLR 185.

10 (2009) 240 CLR 272; [2009] HCA 33.

"(i) Are any or all of s 3 of the *Minerals Resource Rent Tax (Imposition—Customs) Act* 2012 (Cth), s 3 of the *Minerals Resource Rent Tax (Imposition—Excise) Act* 2012 (Cth) and s 3 of the *Minerals Resource Rent Tax (Imposition—General) Act* 2012 (Cth) invalid in their application to the plaintiffs on one or more of the following grounds:

A. they discriminate between the States of the Commonwealth of Australia contrary to s 51(ii) of the *Constitution*;

B. they give preference to one State of the Commonwealth of Australia over another State contrary to s 99 of the *Constitution*;

C. they so discriminate against the States of the Commonwealth or so place a particular disability or burden upon the operations or activities of the States, as to be beyond the legislative power of the Commonwealth?

(ii) Are any or all of the *Minerals Resource Rent Tax (Imposition—Customs) Act* 2012 (Cth), the *Minerals Resource Rent Tax (Imposition—Excise) Act* 2012 (Cth), the *Minerals Resource Rent Tax (Imposition—General) Act* 2012 (Cth) and the *Minerals Resource Rent Tax Act* 2012 (Cth) invalid in their application to the plaintiffs on the ground that they are contrary to s 91 of the *Constitution*?

(iii) Who should pay the cost of the reserved questions?"

An outline of the scheme of the legislation follows.

The structure of the tax

8 A miner is liable to pay MRRT for an MRRT year equal to the sum of its MRRT liabilities for each of its mining project interests for that year[11]. MRRT liability for a mining project interest for an MRRT year is calculated by the following formula[12]:

"MRRT liability = MRRT rate x (Mining profit – MRRT allowances)".

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11 MRRT Act, s 10–1.

12 MRRT Act, s 10–5.

The MRRT rate is 22.5%[13]. MRRT allowances are listed in Ch 3 of the MRRT Act. The "mining profit" for a mining project interest is the difference between "mining revenue" and "mining expenditure"[14].

9 The "mining revenue" for a mining project interest for an MRRT year is "the sum of all the amounts that, under this Act, are included in the miner's mining revenue for that interest for that year."[15] It includes revenue from taxable resources extracted from the project area for the mining project interest, to the extent that the revenue is reasonably attributable to the taxable resources in the form and place they were in when they were at their valuation point[16]. It is not necessary for present purposes to explore the full complexity of the definition of mining revenue.

10 The "mining expenditure" for a mining project interest for an MRRT year is "the sum of all the amounts that, under this Act, are included in the miner's mining expenditure for that interest for that year."[17] It does not include amounts designated as "excluded expenditure"[18]. Payment of a "mining royalty" is "excluded expenditure"[19]. The term "mining royalty" is defined and, relevantly for present purposes, is an expenditure which[20]:

> "(a) is made in relation to a taxable resource extracted under authority of a production right; and
>
> (b) is made under a Commonwealth law, a State law or a Territory law; and

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13 The rate is specified in s 4 of each of the Imposition Acts as "30% x (1 – Extraction factor)" where the extraction factor is 25%.

14 MRRT Act, s 25–5.

15 MRRT Act, s 30–5.

16 MRRT Act, s 30–1(a). Section 40–5(1) provides that the valuation point for a "taxable resource" is the point just before the resource is removed from the run-of-mine stock pile on which it is stored.

17 MRRT Act, s 35–5(1).

18 MRRT Act, s 35–5(2).

19 MRRT Act, s 35–40.

20 MRRT Act, s 35–45(1).

(c) either:

(i) is a royalty; or

(ii) would be a royalty, if the taxable resource were owned by the Commonwealth, State or Territory (as the case requires) just before the recovery of the resource."[21]

Although mining royalties payable to a State are excluded expenditure, they are to be deducted from mining profit in calculating MRRT liability. That is because they fall into the category of "MRRT allowances"[22]. That category is dealt with in Ch 3 of the MRRT Act. It consists of a number of classes of allowances which are defined by the Act[23]. The class immediately relevant to these proceedings is the "royalty allowance"[24].

11 Royalty allowances are dealt with in Pt 3–1 of Ch 3. That Part consists of Div 60, also entitled "Royalty allowances". The overview of the Division states[25]:

> "Mining royalties paid to the Commonwealth, States and Territories reduce a miner's MRRT liabilities for a mining project interest.
>
> To work out the royalty allowance, the amount of the royalty is grossed-up using the MRRT rate, in effect reducing the MRRT liability by the amount of the royalty."

The mechanism that is adopted for bringing royalties into account is that of "royalty credits"[26]. Royalty credits not applied in one MRRT year can be applied

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21 Section 35–45(1)(c)(ii) covers the case where an amount is payable under an Australian law in relation to minerals owned by private landowners.

22 MRRT Act, s 10–10, item 1 and see Pt 3–1.

23 The MRRT allowances are listed in s 10–10 with cross-references to the numbered Parts of Ch 3 which apply to them. They are: royalty allowance (Pt 3–1), transferred royalty allowance (Pt 3–2), pre-mining loss allowance (Pt 3–3), mining loss allowance (Pt 3–4), starting base allowance (Pt 3–5), transferred pre-mining loss allowance (Pt 3–6), transferred mining loss allowance (Pt 3–7).

24 MRRT Act, Pt 3–1.

25 MRRT Act, s 60–1.

26 MRRT Act, s 60–10.

in later years[27]. They are reduced if a miner recoups an amount giving rise to a royalty credit[28].

12 A royalty credit includes a liability to pay a mining royalty in relation to a taxable resource extracted under the authority of the production right to which the relevant mining project interest relates[29]. The royalty credit arises at the time the miner incurs the liability and relates to the MRRT year in which it arises[30]. The amount of the royalty credit in the MRRT year in which the royalty credit arises in relation to a liability of a miner is calculated by determining how much of the liability gives rise to a royalty credit and dividing the result by the MRRT rate[31]. A "royalty allowance" is so much of the "royalty credits" as do not exceed the mining profit[32]. The mining project interests to which the MRRT Act applies are interests in relation to iron ore and coal and some related substances. They are called "taxable resources"[33]. If royalty credits in one year are not needed to offset the mining profit in that year, they can be carried over for use in subsequent years[34]. In that event, the amount of the royalty credits is uplifted to take account of the time value of money[35].

13 The MRRT does not become payable until the miner's group mining profit for an MRRT year exceeds $75 million[36]. The full amount of MRRT does not become payable until the group mining profit reaches $125 million[37].

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27 MRRT Act, s 60–25(2).

28 MRRT Act, s 60–30.

29 MRRT Act, s 60–20(1)(a). There is an extended aspect of the definition which is not material for present purposes.

30 MRRT Act, s 60–20(2).

31 MRRT Act, s 60–25(1).

32 MRRT Act, s 60–15(1).

33 MRRT Act, ss 15–5(4) and 20–5.

34 MRRT Act, s 60–25(2).

35 MRRT Act, s 60–25(2).

36 MRRT Act, ss 10–15 and 45–5.

37 MRRT Act, ss 10–15 and 45–10.

14 The plaintiffs submitted that the effect of the MRRT Act is that a miner's MRRT liability, when payable, is either inversely proportional to the miner's liability for State mining royalties or is directly related to the extent of the miner's liability for such royalties. That is to say, the MRRT Act is expressly designed so that if more State royalties are payable, less MRRT is payable, and vice versa. The plaintiffs submitted that, in the result, where MRRT is payable, a miner's liability will vary from State to State, depending upon the royalty rate applicable in that State. The Commonwealth took issue with the plaintiffs about the relationship between MRRT liabilities and State royalties. It did so by reference to the different times at which, and conditions under which, MRRT liabilities and State royalties could become payable.

15 There are undoubtedly a number of variables which can affect the liability of a miner for MRRT in a given year or over a number of years. One of those variables is the royalty payable from time to time under State law. It is not necessary for present purposes to explore hypothetical cases that might arise and differences in the liabilities which might attach or be attributed to mining projects in one State or another. The issues raised in the questions reserved can be decided on the basis that, all other things being equal, the MRRT Act can have the effect that a miner's liability for MRRT is greater in a State with a lower applicable royalty than in a State with a higher applicable royalty. It can therefore also have the effect that when a State reduces the applicable royalty, a miner's liability for MRRT, all other things being equal, will increase. The arithmetical gymnastics that, according to the plaintiffs, would enable the outcomes to be characterised as the application of different "effective" MRRT rates between States can be disregarded.

16 In the forefront of consideration in this case is the interpretation and application of ss 51(ii) and 99 of the Constitution. Their interpretation depends upon their text. It is informed by their drafting history and the decisions of this Court interpreting and applying them. Those decisions do not yield single, simply expressed and exhaustive explanations and definitions of the limitations on legislative power imposed by those provisions. The Court responds to the cases it is called upon, by the accidents of history, to decide. Judicial interpretation in particular cases must be seen in the context of the Court's function. As Windeyer J said in the *Payroll Tax Case*[38]:

> "Exegesis must not be substituted for the text."

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38 *Victoria v The Commonwealth* (1971) 122 CLR 353 at 403; [1971] HCA 16.

That observation should be read in light of his Honour's approach to constitutional interpretation in the Australian context[39]:

> "In any country where the spirit of the common law holds sway the enunciation by courts of constitutional principles based on the interpretation of a written constitution may vary and develop in response to changing circumstances. This does not mean that courts have transgressed lawful boundaries: or that they may do so."

What Windeyer J said echoed the remarks of Alfred Deakin, first Attorney-General of the Commonwealth, in his Second Reading Speech for the Judiciary Bill 1902 (Cth) in March 1902[40]:

> "It is as one of the organs of Government which enables the Constitution to grow and to be adapted to the changeful necessities and circumstances of generation after generation that the High Court operates."

It is in that spirit that ss 51(ii) and 99 in their application to this case should be interpreted. That is a conservative spirit which nevertheless recognises that a written constitution should be able, consistently with textual limitations, to accommodate changing circumstances. That approach, in this case, requires consideration of the text and the drafting histories of ss 51(ii) and 99, their judicial exegesis and the particular questions to be decided about their application.

Constitution, s 51(ii) — drafting history

17 Section 51(ii) confers power on the Parliament of the Commonwealth, subject to the Constitution, to make laws for the peace, order and good government of the Commonwealth with respect to:

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

The ambit of the power is expressly confined by the "positive prohibition or restriction" against discrimination between States or parts of States[41]. It stands adjacent to s 51(iii), which authorises the Parliament to make laws with respect

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39 (1971) 122 CLR 353 at 396–397.

40 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 18 March 1902 at 10967, cited in *New South Wales v The Commonwealth* (*Work Choices Case*) (2006) 229 CLR 1 at 73–74 [54] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; [2006] HCA 52.

41 *Work Choices Case* (2006) 229 CLR 1 at 127 [219]–[221].

to "bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth". Their drafting histories are closely connected. In the drafts proposed at the National Australasian Convention in Sydney in 1891[42] and the drafts reviewed at the Adelaide[43] and Sydney[44] sessions of the Convention in 1897, the powers in relation to both taxation and bounties were subject to a uniformity requirement. The provisions relating to customs and excise and bounties were separated into two clauses in 1898 and the former was overtaken by the general taxation power[45], a separation maintained in the final draft adopted by the Convention[46].

18 From the first drafts of the Constitution considered at the National Australasian Convention in Sydney in 1891[47] up to those considered at the 1898 Convention session held in Melbourne[48], it was proposed that the Commonwealth

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42 Inglis Clark Draft, 1891, cll 45(I), 55, reproduced in Williams, *The Australian Constitution: A Documentary History*, (2005) at 85, 87; Kingston Draft, 1891, Pt XII, cl IV, reproduced in Williams, *The Australian Constitution: A Documentary History*, (2005) at 129; First Official Draft, Sydney, 1891, cl 30(2), reproduced in Williams, *The Australian Constitution: A Documentary History*, (2005) at 143; Final Draft, Sydney, 1891, cl 52(2), (3), reproduced in Williams, *The Australian Constitution: A Documentary History*, (2005) at 446.

43 Adelaide Draft, 1897, cl 50(II), (III), reproduced in Williams, *The Australian Constitution: A Documentary History*, (2005) at 509.

44 Sydney Draft, 1897, cl 52(II), (III), reproduced in Williams, *The Australian Constitution: A Documentary History*, (2005) at 777.

45 Melbourne Draft, 1898, cl 52(II), (III), reproduced in Williams, *The Australian Constitution: A Documentary History*, (2005) at 873.

46 Final Draft, 1898, cl 51(II), (III), reproduced in Williams, *The Australian Constitution: A Documentary History*, (2005) at 1127.

47 Inglis Clark Draft, 1891, cll 45(I), 55, reproduced in Williams, *The Australian Constitution: A Documentary History*, (2005) at 85, 87; Kingston Draft, 1891, Pt XII, cl IV, reproduced in Williams, *The Australian Constitution: A Documentary History*, (2005) at 129; First Official Draft, Sydney, 1891, cl 30(2), reproduced in Williams, *The Australian Constitution: A Documentary History*, (2005) at 143; Final Draft, Sydney, 1891, cl 52(3), reproduced in Williams, *The Australian Constitution: A Documentary History*, (2005) at 446.

48 Adelaide Draft, 1897, cl 50(III), reproduced in Williams, *The Australian Constitution: A Documentary History*, (2005) at 509; Sydney Draft, 1897, cl 52(III), reproduced in Williams, *The Australian Constitution: A Documentary History*, (2005) at 777; Melbourne Draft, 1898, cl 52(II), reproduced in Williams,

(Footnote continues on next page)

Parliament's power to impose taxation should be "uniform" throughout the Commonwealth. That constraint appeared in cl 55 of Inglis Clark's draft[49], which informed much of the draft adopted by the 1891 Convention. It also appeared in Charles Kingston's draft[50]. It was inspired by Art I, s 8(1) of the United States Constitution, which required that "all Duties, Imposts and Excises shall be uniform throughout the United States".

19 At the time of the 1891 Convention, the uniformity requirement in Art I, s 8(1), which applied only to indirect taxes, had been considered by the Supreme Court of the United States in the *Head Money Cases*[51]. Miller J, delivering the opinion of the Court, said[52]:

> "The tax is uniform when it operates with the same force and effect in every place where the subject of it is found."

The criterion of uniformity under Art I was understood to be geographical. However, that understanding was called into question shortly before the 1897 and 1898 Convention sessions by a separate concurring opinion of Field J in *Pollock v Farmers' Loan and Trust Co*[53]. Field J construed the uniformity requirement as forbidding a tax-free threshold and the imposition of different rates of the same tax on property income according to whether the income was derived by natural persons or various classes of corporation[54]. That opinion raised a concern at the National Australasian Convention which led to a change in the text of what became s 51(ii).

The Australian Constitution: A Documentary History, (2005) at 922; cf Final Draft, 1898, cl 51(II), reproduced in Williams, *The Australian Constitution: A Documentary History*, (2005) at 1127.

49 Inglis Clark Draft, 1891, cl 55, reproduced in Williams, *The Australian Constitution: A Documentary History*, (2005) at 87.

50 Kingston Draft, 1891, Pt XII, cl IV, reproduced in Williams, *The Australian Constitution: A Documentary History*, (2005) at 129.

51 *Edye v Robertson* 112 US 580 (1884).

52 112 US 580 at 594 (1884).

53 157 US 429 (1895).

54 157 US 429 at 595 (1895). The observations were not part of the ratio of the Court as the challenged law was held by the majority to be invalid on the basis that the tax was a direct tax, which did not attract the uniformity requirement: 157 US 429 at 583 (1895); see also at 607 per Field J.

20 The change from a requirement of uniformity to a prohibition against discrimination appeared in the draft Constitution produced at the Melbourne session of the Convention on 12 March 1898[55]. It was explained by Edmund Barton as a cautious response to the "expressions" in the opinion of Field J in *Pollock*. In moving his amendment, Barton said[56]:

> "I think that although the word 'uniform' has the meaning it was intended to have—'one in form' throughout the Commonwealth—still there might be a difficulty, and litigation might arise about it, and prolonged trouble might be occasioned with regard to the provision in case, for instance, an income tax or a land tax was imposed. What is really wanted is to prevent a discrimination between citizens of the Commonwealth in the same circumstances."

He described the amendment as preventing discrimination "or any form of tax which would make a difference between the citizen of one state and the citizen of another state, and to prevent anything which would place a tax upon a person going from one state to another."[57] Professor Harrison Moore, writing in 1910, summed up the concerns enlivened by the opinion of Field J. The uniformity requirement, he said, "was more than the federal spirit required; it prevented not merely discrimination among the States, but discrimination in the case of individuals", so the Convention "adopted terms of geographical limitation."[58]

21 Quick and Garran characterised the constraint in s 51(ii) as a "limitation ... provided for federal reasons"[59] being directed against "a system of taxation

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55 Clause 52(II), reproduced in Williams, *The Australian Constitution: A Documentary History*, (2005) at 954 read with the statements at 802 regarding Document 31.7B.

56 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 11 March 1898 at 2397.

57 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 11 March 1898 at 2397.

58 Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 516.

59 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 550.

designed to press more heavily on people or property in some States than on people or property in other States."[60] Thus[61]:

> "to impose a high tax on commodities or persons in one State and a low tax on the same class of commodities or persons in another State, would be to discriminate. Such discriminations are forbidden, and uniformity of taxation throughout the Commonwealth is an essential condition of the validity of every taxing scheme."

Quick and Garran characterised the constraint in s 51(ii) as "practically the same in substance as the requirement of Art 1, s 8, sub-s 1, of the United States Constitution"[62]. That conclusion rested upon the unstated but correct assumption that what Field J had said did not state the law in the United States before or after *Pollock*.

22 The connection between Art I, s 8(1) and s 51(ii), reflected in the drafting history of s 51(ii), led to submissions in this case about decisions of the Supreme Court of the United States on the uniformity requirement. Some of them should be mentioned. The *Head Money Cases* and *Pollock* have been referred to. The geographical character of the uniformity requirement, rejected by Field J in *Pollock*, was reaffirmed in *Knowlton v Moore*[63]. White J, delivering the opinion of the Court, quoted one of the delegates to the Constitutional Convention of 1787, Luther Martin, who observed that some duties might be laid on articles little used in some States and much used in others[64]:

> "in which case, the first would pay little or no part of the revenue arising therefrom, while the whole or nearly the whole of it would be paid by the last, to wit, the States which use and consume the articles on which imposts and excises are laid."

Much, of course, depends upon the level of generality of the requirement for uniformity or non-discrimination. The requirement for geographical uniformity

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60 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 550.

61 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 550.

62 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 550.

63 178 US 41 (1900): a case concerning death duties.

64 178 US 41 at 106 (1900).

in the United States was pitched by the decisions of the Supreme Court at a level of generality permitting differences across State boundaries in specific applications of the law. At a level of generality appropriate to its federal purpose, the non-discrimination requirement in s 51(ii) excludes, from legislative power with respect to taxation, laws which make distinctions between States or parts of States which are inconsistent with the economic unity of the Commonwealth and the status of the States and their people as equals inter se in the Federation. That level of generality does not require the exclusion from the scope of the taxation power of a uniform rule incorporating adjustments of liabilities that take account of liabilities imposed by State laws.

23 Reflecting that concept of uniformity informed by federal considerations, the Supreme Court of the United States in *Florida v Mellon*[65] rejected as "without merit" a contention that a federal inheritance tax was not uniform because it allowed for deductions of State inheritance taxes when not all States imposed such taxes. All that the Constitution required was that[66]:

> "the law shall be uniform in the sense that by its provisions the rule of liability shall be the same in all parts of the United States."

An analogous issue arose in *Phillips v Commissioner of Internal Revenue*[67], which concerned a federal law for recovery of corporate taxes from stockholders who had received the assets of a dissolved corporation. The Court did not accept an argument that the law offended Art I, s 8(1) on the basis that the liabilities might differ from State to State because of differences in State laws. Brandeis J, delivering the opinion of the Court, said that[68]:

> "The extent and incidence of federal taxes not infrequently are affected by differences in state laws; but such variations do not infringe the constitutional prohibitions against delegation of the taxing power or the requirement of geographical uniformity."

The "settled doctrine" of the Court that "the uniformity exacted is geographical, not intrinsic" was reaffirmed in *Steward Machine Co v Davis*[69].

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65 273 US 12 (1927).

66 273 US 12 at 17 (1927).

67 283 US 589 (1931).

68 283 US 589 at 602 (1931).

69 301 US 548 at 583 (1937) per Cardozo J, delivering the opinion of the Court.

24 What might be thought to be a limiting decision was reached in 1983 in *United States v Ptasynski*[70]. The Supreme Court held that the *Crude Oil Windfall Profit Tax Act* of 1980, which exempted from the tax which it imposed domestic crude oil produced from wells within a defined geographical area in Alaska, was valid. The exemption was found not to have been drawn on State political lines, but to reflect a legislative judgment that unique climatic and geographic conditions required that oil produced from the exempt area be treated as a separate class of oil[71]. The general principle was that[72]:

> "The Uniformity Clause gives Congress wide latitude in deciding what to tax and does not prohibit it from considering geographically isolated problems."

25 The plaintiffs submitted that the United States decisions were "not on point". They quoted an observation of Dixon CJ in *Deputy Federal Commissioner of Taxation v Brown*[73] that s 51(ii) "may not be the same as art 1, s 8 of the Constitution of the United States"[74]. In its context, which concerned the application of s 79 of the *Judiciary Act* 1903 (Cth) in taxation recovery proceedings, the observation was not apposite to the plaintiffs' proposition. The plaintiffs went further and characterised the Supreme Court's decisions on Art I, s 8(1) as "illogical" and "appear[ing] to neuter the requirement for uniformity."[75] The plaintiffs' submissions on the utility of the decisions of the Supreme Court

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70 462 US 74 (1983).

71 462 US 74 at 78 (1983) per Powell J, delivering the opinion of the Court.

72 462 US 74 at 84 (1983).

73 (1958) 100 CLR 32; [1958] HCA 2.

74 (1958) 100 CLR 32 at 39; the balance of the sentence being "but what the Supreme Court has said about State law in the collection of federal taxes seems to me to be true of our system."

75 The plaintiffs cited, in support of their criticism of the United States decisions, a trenchant academic article: Claus, "'Uniform Throughout the United States': Limits on Taxing as Limits on Spending", (2001) 18 *Constitutional Commentary* 517 at 522-529. Not surprisingly, a variety of academic perspectives have been expressed in relation to decisions of the United States Supreme Court on Art I, s 8(1): eg Lund, "The Uniformity Clause", (1984) 51 *University of Chicago Law Review* 1193 especially at 1200; Norton, "The Limitless Federal Taxing Power", (1985) 8 *Harvard Journal of Law and Public Policy* 591 at 604–605; Eggleston, "*United States v Ptasynski*: A Windfall for Congress", (1984) 61 *Denver Law Journal* 395 at 402.

on Art I, s 8(1) should not be accepted. They reduce to a complaint about the level of generality at which the uniformity requirement in Art I, s 8(1) has been interpreted.

26 The drafting history of s 51(ii) does not support an argument that the non-discrimination limitation differs fundamentally from the uniformity requirement in Art I, s 8(1) as it was understood before and after the "expressions" of Field J in *Pollock*. Quick and Garran's treatment of the two provisions as equivalent is supportive of that proposition, as are the observations of Harrison Moore. While decisions of the Supreme Court of the United States on uniformity cannot automatically be treated as applicable to the non-discrimination constraint in s 51(ii), they are appropriate sources of comparative constitutional law in its construction. In each case the principle underlying the limitation is a federal principle. In this country it allows the Commonwealth Parliament to make laws with respect to taxation which, by reason of differing circumstances, including State legal regimes, may have different effects in different States. As appears below, the principle does not preclude the Commonwealth Parliament from incorporating in its taxation laws uniform provisions of general application providing adjustments to the liabilities which they impose by reference to liabilities imposed under State law. It has done so for very many years.

Drafting history — s 99

27 Section 99 of the Constitution provides:

> "The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof."

Section 99 was inspired by Art I, s 9(6) of the United States Constitution, which provides that:

> "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another".

Clause 54 of Inglis Clark's draft in 1891, like the United States provision, prohibited preference to the "ports of one Province over those of another" and added "nor shall vessels bound to or from one Province be obliged to enter or clear or pay duties in another."[76] Kingston's draft contained a similar provision[77]. In the final draft, which emerged from the 1891 Sydney session of the

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76 Inglis Clark Draft, 1891, cl 54, reproduced in Williams, *The Australian Constitution: A Documentary History*, (2005) at 87.

77 Kingston Draft, 1891, Pt XII, reproduced in Williams, *The Australian Constitution: A Documentary History*, (2005) at 130.

Convention, the equivalent provision, under the heading "*Equality of Trade*", was cl 11 of Ch IV, entitled "Finance and Trade" and provided[78]:

> "Preference shall not be given by any law or regulation of commerce or revenue to the ports of one part of the Commonwealth over those of another part of the Commonwealth."

28 The no-preference provision, which emerged from the 1897 sessions of the Convention as cl 95, prohibited preference to the ports of one State over the ports of another with the addition that any law or regulation derogating from freedom of trade and commerce between different parts of the Commonwealth should be null and void[79]. A number of amendments were debated at the Melbourne session of the Convention in 1898. There was substantive discussion at that session which, among other things, canvassed the necessity for the provision and whether it should apply to State laws. The final text of s 99 reflected in substance wording proposed by Edmund Barton[80].

29 Quick and Garran viewed s 99 in its application to taxation laws as adding little, if anything, to s 51(ii). They said[81]:

> "This section, therefore, extends to all laws and regulations of trade, commerce, and revenue, the condition which is elsewhere imposed with regard to laws dealing with taxation—viz, that they shall not discriminate between States or parts of States."

Its object was "to prevent federal favoritism and partiality in commercial and other kindred regulations."[82] A similar view of the relationship between the uniformity and no-preference rules in Art I, s 8(1) and Art I, s 9(6) of the United States Constitution had been expressed in *Knowlton v Moore*[83], in which the

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78 Final Draft, Sydney, 1891, Ch IV, cl 11, reproduced in Williams, *The Australian Constitution: A Documentary History*, (2005) at 454.

79 Final Draft, Adelaide, 1897, cl 95, reproduced in Williams, *The Australian Constitution: A Documentary History*, (2005) at 606.

80 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 22 February 1898 at 1329.

81 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 877.

82 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 877.

83 178 US 41 (1900).

Supreme Court held that, although couched in different language, they had "absolutely the same significance."[84]

30 This Court's treatment of the relationship between the non-discrimination and no-preference limitations recognises that "while preference necessarily involves discrimination or lack of uniformity, the latter does not necessarily involve the former."[85] In this case that has the consequence that if the MRRT Act cannot be said to discriminate within the meaning of s 51(ii) it cannot be said to give a preference within the meaning of s 99.

31 The difficulty of identifying a prohibited preference given to one State over another where there were dissimilar circumstances was recognised by Quick and Garran. They foreshadowed the application of a criterion of reasonableness to the characterisation of preferences[86]:

> "If a difference of treatment is arbitrary, or if its purpose is to advantage or prejudice a locality, it is undue and unreasonable, and is accordingly a preference. If on the other hand the difference of treatment is the reasonable result of the dissimilarity of circumstances—or if it is based on recognized and reasonable principles of administration—it is no preference."

That approach to characterisation was reflected in the general observation about the concept of discrimination made by Gaudron, Gummow and Hayne JJ in *Austin v The Commonwealth*[87], and quoted by the majority in *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vict)* in its discussion of the application of s 99[88]:

> "The essence of the notion of discrimination is said to lie in the unequal treatment of equals or the equal treatment of those who are not equals, where the differential treatment and unequal outcome is not the product of

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84 178 US 41 at 104 (1900).

85 *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vict)* (2004) 220 CLR 388 at 423 [88] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ, citing *Elliott v The Commonwealth* (1936) 54 CLR 657 at 668 per Latham CJ, see also at 683 per Dixon J.

86 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 878.

87 (2003) 215 CLR 185 at 247 [118].

88 (2004) 220 CLR 388 at 424 [89].

> a distinction which is appropriate and adapted to the attainment of a proper objective." (footnotes omitted)

Their Honours' observation did not amount to a qualification justifying a law which would otherwise exceed the constitutional limitations. It set out a criterion for characterisation of a law as discriminatory for the purposes of s 51(ii). It was invoked by the Commonwealth in its submissions. The plaintiffs submitted that the reasoning of the majority in *Permanent Trustee* in this respect should not be followed. That submission should not be accepted. Before considering it further, however, it is desirable to consider the concepts of discrimination and preference in ss 51(ii) and 99 as they have emerged from the decisions of this Court.

Sections 51(ii) and 99 — discrimination, preference and differential operation

32 The uniformity requirement in the draft Constitution, as it stood after the Convention session held in Adelaide in 1897, attracted a "friendly suggestion"[89] from the Colonial Office in the form of a question: "does 'uniform' mean uniform in law, or uniform in effect?"[90] When Edmund Barton moved his amendment to replace uniformity with non-discrimination he made clear that the answer was "uniform in law". Laws with respect to taxation were to be "one in form" throughout the Commonwealth[91]. That approach was reflected in the first reported judicial consideration of s 51(ii), which was undertaken by the Full Court of the Supreme Court of Queensland, in *The Colonial Sugar Refining Co Ltd v Irving*[92]. Sir Samuel Griffith, then Chief Justice of Queensland and one month short of his appointment as the first Chief Justice of this Court, observed, consistently with the drafting history of s 51(ii), that[93]:

> "the discrimination must depend upon the geographical position, and not upon the accident of whether things happen to be found in one State or in another."

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89 So described by Colonial Secretary Joseph Chamberlain in a covering letter to George Reid in July 1897, reproduced in Williams, *The Australian Constitution: A Documentary History*, (2005) at 714.

90 Memorandum C, "Australian Federal Constitution. Criticisms on the Bill", reproduced in Williams, *The Australian Constitution: A Documentary History*, (2005) at 728.

91 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 11 March 1898 at 2397.

92 [1903] St R Qd 261.

93 [1903] St R Qd 261 at 276–277, Cooper J agreeing at 277, Real J agreeing at 281.

The Full Court held that a Commonwealth law, imposing liability to excise duty on goods and providing an exemption for goods which had been subject to excise duties under State laws, did not discriminate within the meaning of s 51(ii). The Privy Council agreed[94]:

> "The rule laid down by the Act is a general one, applicable to all the States alike, and the fact that it operates unequally in the several States arises not from anything done by the Parliament, but from the inequality of the duties imposed by the States themselves."

33 The plaintiffs submitted that a Commonwealth tax cannot impose different tax rates on different taxpayers in different States even when the result is that the total tax burden, both Commonwealth and State, upon all taxpayers is the same. They argued that *CSR* did not apply to such a case because in *CSR* the impugned duty was made payable on all sugar on which customs or excise duty had not been paid pursuant to State laws before 8 October 1901. That criterion of liability was said to identify a class of goods in respect of which excise duty was payable and to which it applied uniformly. That may be one way of characterising the tax in *CSR*. But, as appears from the judgments of the Full Court and the Privy Council, the basis upon which the tax was upheld was not so narrowly framed[95].

34 It is not controversial that a law which is uniform across the Commonwealth and does not in terms discriminate between States or parts of States can nevertheless have different effects between and within the States because of the circumstances upon which it operates, including the different State legal regimes with which it interacts. An example in the latter category from the United States is a law of the kind considered in *Phillips v Commissioner of Internal Revenue*[96], referred to earlier in these reasons.

35 It may be accepted that a Commonwealth law with respect to taxation which expressly provides, in a uniform rule, for the adjustment of the liabilities it imposes by reference to liabilities imposed by State laws is not logically completely congruent with a law which has differential effects across State boundaries or between parts of States because of its interaction with particular State laws. That does not mean, however, that such a law discriminates between States or parts of States. The term "discriminate" may vary in its precise meaning according to its context and can be difficult to define and apply. However that may be, as interpreted by the decisions of this Court on s 51(ii), it

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94 *Colonial Sugar Refining Co Ltd v Irving* [1906] AC 360 at 367.

95 [1903] St R Qd 261 at 276–277; [1906] AC 360 at 367.

96 283 US 589 (1931).

does not place the MRRT Act beyond power. As the plurality said of the concept of discrimination generally in *Bayside City Council v Telstra Corporation Ltd*[97]:

> "It involves a comparison, and, where a certain kind of differential treatment is put forward as the basis of a claim of discrimination, it may require an examination of the relevance, appropriateness, or permissibility of some distinction by reference to which such treatment occurs, or by reference to which it is sought to be explained or justified." (footnote omitted)

Their Honours went on to emphasise that judgments about relevance, appropriateness or permissibility of a distinction may be influenced strongly by context[98].

36 The Commonwealth submitted that a correct formulation of the concept of discrimination in s 51(ii) was to be found in the judgment of Isaacs J in his dissent in *R v Barger*[99], the first reported decision of this Court on s 51(ii). Isaacs J said[100]:

> "Discrimination between localities in the widest sense means that, because one man or his property is in one locality, then, regardless of any other circumstance, he or it is to be treated differently from the man or similar property in another locality."

Higgins J reasoned along similar lines and observed that it would not be discrimination between States or parts of States if a graduated income tax were introduced when incomes were higher in one State than in another[101].

37 Controversy later attended another observation made by Isaacs J, in the same judgment, that discrimination under s 51(ii) was "preference of locality merely because it is locality, and because it is a particular part of a particular State."[102] Although quoted and approved by the Privy Council in *W R Moran Pty*

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97 (2004) 216 CLR 595 at 629–630 [40]; [2004] HCA 19.

98 (2004) 216 CLR 595 at 630 [40].

99 (1908) 6 CLR 41; [1908] HCA 43.

100 (1908) 6 CLR 41 at 110.

101 (1908) 6 CLR 41 at 133.

102 (1908) 6 CLR 41 at 108.

Ltd v Deputy Federal Commissioner of Taxation (NSW)[103], it was a proposition which many years later in *Commissioner of Taxation v Clyne*[104] Dixon CJ had the "greatest difficulty in grasping"[105] and which Professor Geoffrey Sawer critically characterised as establishing a special criterion of "Stateishness"[106].

38 The majority in *Barger*[107] took a stronger view of the prohibition against discrimination in s 51(ii) in its application than did Isaacs and Higgins JJ but did not in terms disagree with the "widest sense" of discrimination formulated by Isaacs J. Moreover, the primary finding of the majority was that the impugned legislation, which provided for the exemption from excise of certain articles according to labour conditions in the area in which the articles were manufactured, was not a law with respect to taxation. Their secondary finding, that it discriminated between States or parts of States, was necessarily made on the hypothesis that the primary finding was wrong. Their conclusion as to discrimination was reached in the shadow of the reserved powers doctrine, which the majority described as a rule which was "different, but ... founded upon the same principles."[108] In that setting a strong view of the prohibition was not surprising. In a passage relied upon by the plaintiffs, the majority also distinguished *CSR*, observing that[109]:

> "if the Excise duty had been made to vary in inverse proportion to the Customs duties in the several States so as to make the actual incidence of the burden practically equal, that would have been a violation of the rule of uniformity."

39 Despite their dissent in *Barger*, the differential operation of laws permitted under the approach taken by Isaacs and Higgins JJ did not differ markedly from that permitted in later cases and in decisions on Art I, s 8(1) by the United States Supreme Court. The formulation by Isaacs J of discrimination in the "widest sense" was expressly adopted and applied in *Cameron v Deputy*

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103 (1940) 63 CLR 338; [1940] AC 838.

104 (1958) 100 CLR 246; [1958] HCA 10.

105 (1958) 100 CLR 246 at 266.

106 "Commonwealth Taxation Laws—Uniformity and Preference", (1958) 32 *Australian Law Journal* 132.

107 Griffith CJ, Barton and O'Connor JJ.

108 (1908) 6 CLR 41 at 72.

109 (1908) 6 CLR 41 at 70–71.

Federal Commissioner of Taxation[110]. Starke J drew the necessary distinction between a discriminatory tax law and a non-discriminatory tax law which has a differential operation or effect[111]:

> "A law with respect to taxation applicable to all States and parts of States alike does not infringe the Constitution merely because it operates unequally in the different States—not from anything done by the law-making authority, but on account of the inequality of conditions obtaining in the respective States."

Knox CJ and Powers J, in *James v The Commonwealth*[112], also expressly adopted the formulation by Isaacs J in *Barger* and his equation of the non-discrimination limitation in s 51(ii) with the no-preference rule in s 99[113]. Higgins J, "[a]fter twenty years", adhered to what he had said in *Barger* and asserted its relevance to s 99 "as one cannot conceive of any preference without discrimination"[114]. Starke J adhered to what he had said in *Cameron*[115]:

> "if a law is not applicable to all States alike, then it operates unequally between the States, and discriminates as a law between them."

40 As Dennis Rose wrote in 1977, what Isaacs J said in his often quoted definition of discrimination in the "widest sense" had nothing to do with the proposition in the same judgment that discrimination for the purposes of s 51(ii) is limited to discrimination between localities as States or as parts of States[116].

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110 (1923) 32 CLR 68 at 72 per Knox CJ, 76 per Isaacs J, 78–79 per Higgins J, 79 per Rich J; see also at 79 per Starke J; [1923] HCA 4 (in which the Court held invalid a regulation under the *Income Tax Assessment Act* 1915 (Cth) fixing the value of various classes of livestock by State for the purpose of calculating profits and assessable income).

111 (1923) 32 CLR 68 at 79.

112 (1928) 41 CLR 442; [1928] HCA 45.

113 (1928) 41 CLR 442 at 455–456.

114 (1928) 41 CLR 442 at 460.

115 (1928) 41 CLR 442 at 464.

116 Rose, "Discrimination, Uniformity and Preference—Some Aspects of the Express Constitutional Provisions", in Zines (ed), *Commentaries on the Australian Constitution*, (1977) 191 at 194.

Rose correctly observed that much of the subsequent support for what Isaacs J had said referred to the "widest sense" formulation.

41 In *Elliott v The Commonwealth*[117], which involved the trade and commerce aspect of s 99, the Court, by majority[118], held valid regulations for the licensing of seamen applicable only to ports specified by the Minister. Latham CJ followed the approach taken by Isaacs and Higgins JJ in *Barger*, by the majority in *Cameron*, and by Knox CJ and Powers J in *James*. The Commonwealth, he held, was empowered to adjust its legislation to the varying circumstances of particular ports[119]. Rich J reasoned similarly, but more briefly[120]. Starke J held that legislation which discriminated between localities and made special rules for various occupations was "often desirable, but ... by no means preferences prohibited by sec 99."[121] Dixon J, in dissent, also took the view that discrimination between States did not necessarily involve a preference of one over the other[122]. Evatt J acknowledged that *Barger* remained the leading authority on s 99, but preferred the view of the majority of the Court in that case, that s 99 "forbids all preferences which arise solely as a legal consequence of association with or reference to any locality in 'Australia,' ie, 'one or more of the States of Australia.'"[123]

42 In *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd*[124], little was said by the High Court about discrimination. The legislative scheme in issue comprised a Commonwealth law which imposed a uniform tax coupled with a law appropriating money for grants to Tasmania. The grants were made to enable the State to pay rebates to Tasmanian flour and wheat producers on the tax which they had paid to the Commonwealth. Once it was accepted that the relevant taxation laws, applying as they did a common rule, did not

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117 (1936) 54 CLR 657.

118 Latham CJ, Rich, Starke and McTiernan JJ, Dixon and Evatt JJ dissenting.

119 (1936) 54 CLR 657 at 676 — on the basis that discrimination forbidden by s 99 was "not merely locality as such, but localities which for the purpose of applying the *discrimen* are taken as States or parts of States": at 675.

120 (1936) 54 CLR 657 at 678.

121 (1936) 54 CLR 657 at 680.

122 (1936) 54 CLR 657 at 683.

123 (1936) 54 CLR 657 at 690.

124 (1939) 61 CLR 735; [1939] HCA 27.

discriminate, the conclusion that the scheme as a whole did not contravene s 51(ii) did not require exegesis of the concept of discrimination. To that extent, the approval by the Privy Council of what Isaacs J said in *Barger* was not directly apposite to its reasoning, which rejected the attack on the scheme as one "really based on the exercise by the Commonwealth Parliament of its powers under sec 96."[125]

43 *Commissioner of Taxation v Clyne*[126] involved, inter alia, a question whether s 79A of the *Income Tax and Social Services Contribution Assessment Act* 1936 (Cth), which prescribed allowable deductions in different amounts for residents of different geographical zones, offended against the restrictions in ss 51(ii) and 99. That question was not answered for reasons to do with the way the issues fell out in the case. However, Dixon CJ, with whom McTiernan, Williams, Kitto and Taylor JJ agreed, rejected the proposition, derived from the judgment of Isaacs J in *Barger*, that taxing legislation would not discriminate unless in some way the parts of the State in respect of which it discriminates were selected by virtue of their character as parts of a State[127]. Dixon CJ said[128]:

> "I find myself unable to appreciate the distinction between the selection by an enactment of an area in fact forming part of a State for the bestowal of a preference upon the area and the selection of the same area for the same purpose 'as part of the State'."

That observation did not involve any rejection of the formulation by Isaacs J of "discrimination" in its "widest sense" as used in s 51(ii).

44 Under the general principle that a non-discriminatory law may have different effects according to its interaction with different State laws, Taylor J in *Conroy v Carter*[129], with the concurrence of Kitto and Windeyer JJ, characterised as non-discriminatory the deductibility under Commonwealth income tax laws of sums paid by taxpayers for land tax imposed under any law of a State. He said[130]:

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125 (1940) 63 CLR 338 at 349; [1940] AC 838 at 857.

126 (1958) 100 CLR 246.

127 (1958) 100 CLR 246 at 266.

128 (1958) 100 CLR 246 at 266.

129 (1968) 118 CLR 90; [1968] HCA 39.

130 (1968) 118 CLR 90 at 101, Kitto J agreeing at 96, Windeyer J agreeing at 104.

> "This is a provision which operates generally throughout the Commonwealth and the fact that in some States there may be no legislation imposing land tax does not mean that it discriminates between the States."

The asserted discrimination in *Conroy* was related to liability for certain Commonwealth levies, which depended upon the existence or otherwise of arrangements between the Commonwealth and particular States. The Court divided evenly and, by a statutory majority, held the impugned provision invalid. However, nothing in the reasons of Menzies J, who wrote the principal judgment for that majority, conflicted with the observation of Taylor J concerning the deductibility of sums paid under State law from income assessable for the purposes of the Commonwealth law. The Commonwealth relied upon the statement by Menzies J, with which Barwick CJ and McTiernan J agreed[131]:

> "in determining whether a law imposes such a discriminatory burden, it is to the law itself that attention must be paid, not to the laws of any State or States."

45 The passage from the judgment of Taylor J, including what his Honour said about the deductibility of State land tax from assessable income, was footnoted by Gleeson CJ, Gummow and Hayne JJ in support of their Honours' observation in *Austin v The Commonwealth*[132]:

> "A law with respect to taxation, in general, does not discriminate in the sense spoken of in s 51(ii) if its operation is general throughout the Commonwealth even though, by reason of circumstances existing in one or more of the States, it may not operate uniformly."

The inclusion, under the rubric of differential but non-discriminatory operation, of a taxation law providing for the deductibility of expenditures incurred under State laws may unite categories of differential operation which are not precisely logically congruent. It nevertheless reflects an interpretation of the non-discrimination constraint at a level of generality which is consistent with its federal purpose.

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131 (1968) 118 CLR 90 at 103.

132 (2003) 215 CLR 185 at 247 [117]. Their Honours also cited *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735 at 764 and *W R Moran Pty Ltd v Deputy Federal Commissioner of Taxation (NSW)* (1940) 63 CLR 338 at 349; [1940] AC 838 at 857.

46 The Commonwealth invoked the longstanding deductibility, for income tax purposes, of State payroll tax, State land tax, State royalties and "indeed any State impost that is an expense or outgoing incurred by a taxpayer in the circumstances identified in s 8–1(a) or (b) of the *Income Tax Assessment Act 1997* (Cth)" ("the ITAA 1997"). The plaintiffs argued that there is a critical difference between the way in which royalty credits affect the imposition of the MRRT and the way in which deductions for State imposts are permitted by the ITAA 1997. That distinction was, with respect, an irrelevant matter of form rather than of substance. It may be accepted that the longstanding provision in taxation laws for deductions for expenses which may include liabilities under State laws does not itself provide the determinative answer to the constitutional question in any given case: does a law of taxation which makes such allowances impermissibly discriminate between States? Nevertheless, the subsistence of such laws over a long period of time, reflecting a practical and legitimate interaction in Commonwealth and State financial relationships, may constitute "circumstances" of the kind to which Windeyer J referred in the *Payroll Tax Case* which in turn inform the contemporary interpretation and application of the Constitution. They may, on that basis, be relevant to the application of a criterion of the kind foreshadowed by Quick and Garran in determining whether an impugned law discriminates or gives a preference within the meaning of the limitations imposed by ss 51(ii) and 99. That question is considered in the next section of these reasons.

Reasonable differences

47 The Commonwealth submitted that even if the MRRT Act gave rise to differential treatment or unequal outcomes as between States, it did not follow that it was a law made "so as to discriminate between States or parts of States". Relying upon the passage from *Austin* quoted in *Permanent Trustee* and set out earlier in these reasons[133], the Commonwealth submitted that:

- the MRRT being a tax on profits, not on revenue, Parliament was entitled to conclude that profits could not accurately be identified without regard to costs and outgoings incurred in the course of deriving revenue — one such class of costs and outgoings being royalty payments made to the relevant State Government;

- the MRRT being a tax on above normal profits or economic rents, the Act proceeds on the basis that royalties may indirectly and at least in part constitute charges on the economic rents which the Act makes subject to taxation. To ignore State royalties in the calculation of the MRRT liability would be to risk imposing a tax on economic rents at a higher rate

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133 See above at [31].

than intended or on profits that were merely necessary to preserve the economic viability of a mining project.

On that basis, the Commonwealth submitted that any differential treatment or unequal outcome under the MRRT Act was the product of a distinction which was appropriate and adapted to the attainment of the objectives identified, each of which was a proper objective of the Parliament. The plaintiffs submitted, in effect, that such reasoning had no place in the characterisation of the MRRT Act as discriminatory or otherwise. If the law were unequally imposed it was prohibited by s 51(ii) regardless of the objectives.

48 It should be noted that although the Commonwealth put its argument on the hypothesis, which it denied, that the MRRT Act had a differential treatment or unequal outcome as between States the constitutional question is one of discrimination or preference. What the Commonwealth seemed to argue as a matter of confession and avoidance was in truth an aspect of characterisation of the MRRT Act for the purposes of ss 51(ii) and 99.

49 As explained earlier in these reasons, the constraints imposed by ss 51(ii) and 99 of the Constitution serve a federal purpose — the economic unity of the Commonwealth and the formal equality in the Federation of the States inter se and their people. Those high purposes are not defeated by uniform Commonwealth laws with respect to taxation or laws of trade, commerce or revenue which have different effects between one State and another because of their application to different circumstances or their interactions with different State legal regimes. Nor are those purposes defeated merely because a Commonwealth law includes provisions of general application allowing for different outcomes according to the existence or operation of a particular class of State law. A criterion for determining whether that category of Commonwealth law discriminates or gives a preference in the sense used in ss 51(ii) and 99 is whether the distinctions it makes are appropriate and adapted to a proper objective.

50 The *Commonwealth Places (Mirror Taxes) Act* 1998 (Cth) ("the Mirror Taxes Act") fell into the category just described, applying as it did the different tax laws of each State to Commonwealth places within that State. As this Court held in *Permanent Trustee*, s 51(ii) did not apply at all to the Act because it was a law made under s 52(i)[134]. As a law of revenue, however, the Act did attract the no-preference limitation in s 99. On reasoning applicable to s 51(ii), the Court

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134 (2004) 220 CLR 388 at 421 [79], applying *Allders International Pty Ltd v Commissioner of State Revenue (Vict)* (1996) 186 CLR 630 at 662, 678–680; [1996] HCA 58.

held that the Mirror Taxes Act did not give a preference to one State or any part thereof over another State or any part thereof. The majority said[135]:

> "The scheme of the Mirror Taxes Act may produce differences in revenue outcomes between States, but that mirrors the differences that exist between the different taxation regimes from State to State. The differential treatment and unequal outcome that is involved here is the product of distinctions that are appropriate and adapted to a proper objective."

The objective of the impugned provision in that case was non-discriminatory. So too are the objectives of the impugned provisions of the MRRT Act. In general terms, they are those set out in the stated objectives of the Act referred to at the commencement of these reasons. The differences in the operation of the MRRT Act which arise out of its interaction with different royalty regimes serve those objectives. They are proper objectives, to which the impugned provisions are appropriate and adapted. The text, history, purpose and judicial exegesis of s 51(ii) require that the question whether the MRRT Act discriminates impermissibly be answered in the negative. It follows for reasons given earlier that the question whether the MRRT Act gives a preference contrary to s 99 is also to be answered in the negative.

Conclusion

51 The questions reserved should be answered:

(i) No.

(ii) No.

(iii) The plaintiffs.

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135 (2004) 220 CLR 388 at 425 [91] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ.

52 HAYNE, BELL AND KEANE JJ. The minerals resource rent tax ("MRRT") is imposed by the *Minerals Resource Rent Tax (Imposition—Customs) Act* 2012 (Cth), the *Minerals Resource Rent Tax (Imposition—Excise) Act* 2012 (Cth) and the *Minerals Resource Rent Tax (Imposition—General) Act* 2012 (Cth) (together "the Imposition Acts"). The assessment of the MRRT is provided for by the *Minerals Resource Rent Tax Act* 2012 (Cth) ("the MRRT Act").

53 In conformity with the intention declared in s 1-10 of the MRRT Act to tax "above normal profits" from certain mining operations, MRRT is not exigible until a miner's group mining profit exceeds a prescribed threshold. Under the MRRT Act, a liability to pay MRRT arises only when a miner derives an annual profit of a given amount after taking into account all deductions for expenditure (including of capital), all allowances (including those carried forward at uplifted rates) and any applicable tax offsets. Once MRRT is payable, however, the formula by which its amount is calculated operates so that a reduction in the mining royalty payable to a State government would, other things being equal, result in an equivalent increase in the amount of the MRRT liability, and an increase in the royalty would, other things being equal, result in an equivalent decrease in the miner's MRRT liability. As it happens, State mining royalties differ between the States within the federation.

54 The plaintiffs, who are members of a group of companies which mine iron ore in Western Australia, brought proceedings in the original jurisdiction of this Court challenging the validity of the MRRT Act and of those provisions of the Imposition Acts which impose the tax. Pursuant to s 18 of the *Judiciary Act* 1903 (Cth), questions were reserved for determination by the Full Court on the basis of the parties' pleadings and documents referred to in the pleadings.

The issues

55 The plaintiffs founded their challenge to the validity of the MRRT Act and s 3 of each of the Imposition Acts (together "the MRRT Legislation") principally on the ground that s 51(ii) of the Constitution expressly precludes the imposition by the Commonwealth of a tax which would exact a greater amount of tax from a taxpayer whose mining operations are conducted in a State with a lower mining royalty rate than would be exacted from the same miner if the same mining operations were conducted by it in a State with a higher State royalty rate. The plaintiffs also contended for the same result by invoking the constitutional implication associated with this Court's decision in *Melbourne Corporation v The Commonwealth*[136] and by reference to s 99 of the Constitution and its prohibition

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136 (1947) 74 CLR 31; [1947] HCA 26.

against the Commonwealth, by any law or regulation of trade, commerce or revenue, giving "preference to one State or any part thereof over another State or any part thereof". Finally, the plaintiffs argued that the MRRT Legislation is invalid because it is inconsistent with s 91 of the Constitution. The Attorneys-General for the States of Queensland and Western Australia intervened to support the plaintiffs' challenge.

56 These reasons will demonstrate that the plaintiffs' challenge fails and the questions reserved should be answered accordingly. The reasons will first provide a summary of the relevant legislative provisions and then deal, in turn, with s 51(ii), s 99, the *Melbourne Corporation* principle and s 91.

The MRRT Legislation

57 Each of the Imposition Acts provided in s 3(1) that MRRT payable under the MRRT Act "is imposed". Section 4 of each of the Imposition Acts provided for an "MRRT rate" of 22.5 per cent. The Imposition Acts operated in the alternative to each other: see s 3(2). It was not disputed that the *Minerals Resource Rent Tax (Imposition—General) Act* 2012 was the relevant Imposition Act for present purposes.

58 The Revised Explanatory Memorandum to the Bills for the MRRT Legislation explained[137] that the MRRT is a tax on "economic rents", which constitute "the return in excess of what is needed [by miners engaged in extracting iron ore, coal and some gases from the ground] to attract and retain factors of production in the production process". It went on to explain[138] that "[a]s the MRRT taxes profits from minerals that are commonly subject to State and Territory royalties, it provides a credit for royalties".

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137 Australia, Senate, Minerals Resource Rent Tax Bill 2011, Minerals Resource Rent Tax (Consequential Amendments and Transitional Provisions) Bill 2011, Minerals Resource Rent Tax (Imposition—Customs) Bill 2011, Minerals Resource Rent Tax (Imposition—Excise) Bill 2011, Minerals Resource Rent Tax (Imposition—General) Bill 2011, Revised Explanatory Memorandum at 3.

138 Australia, Senate, Minerals Resource Rent Tax Bill 2011, Minerals Resource Rent Tax (Consequential Amendments and Transitional Provisions) Bill 2011, Minerals Resource Rent Tax (Imposition—Customs) Bill 2011, Minerals Resource Rent Tax (Imposition—Excise) Bill 2011, Minerals Resource Rent Tax (Imposition—General) Bill 2011, Revised Explanatory Memorandum at 8 [1.25].

59 The MRRT Legislation is complex; and it is unnecessary to grapple with all of its complexities. It is sufficient for the purposes of this case to refer only to the central provisions that bear upon the calculation of the MRRT.

Calculating MRRT

60 Section 1-10 of the MRRT Act provides that:

> "The object of this Act is to ensure that the Australian community receives an adequate return for its taxable resources, having regard to:
>
> (a) the inherent value of the resources; and
>
> (b) the non-renewable nature of the resources; and
>
> (c) the extent to which the resources are subject to Commonwealth, State and Territory royalties.
>
> This Act does this by taxing above normal profits made by miners (also known as economic rents) that are reasonably attributable to the resources in the form and place they were in when extracted."

61 MRRT is payable for an "MRRT year"[139] by a miner in an amount equal to the sum of its MRRT liabilities for each of its "mining project interests"[140] for that year. Section 10-1 of the MRRT Act provides that:

> "A miner is liable to pay MRRT, for an MRRT year, equal to the sum of its MRRT liabilities for each of its mining project interests for that year."

Mining project interests are associated with "production rights" and, for present purposes, it is enough to notice that "production rights" include[141] extraction rights conferred by a State government in respect of a particular geographical

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139 Each MRRT year is a financial year and commences on 1 July: s 10-25.

140 This and other terms used in the MRRT Act are defined in the Dictionary set out in s 300-1. For the most part, it is sufficient to indicate, by the use of quotation marks, that a term is defined in s 300-1 without setting out the content of its definition.

141 See ss 15-5(2) and 15-15 together with the definition of "Australian law" in s 300-1 of the MRRT Act, which refers to the definition of that term in s 995-1(1) of the *Income Tax Assessment Act* 1997 (Cth).

part of the State. The mining project interests to which the MRRT Act applies are interests in relation to iron ore and coal (and some related substances), located in areas covered by a production right, which together are called "taxable resources"[142].

62 Section 10-5 of the MRRT Act provides that a miner's MRRT liability for a mining project interest for an MRRT year is to be worked out as follows: "MRRT liability = MRRT rate x (Mining profit – MRRT allowances)". Thus the amount of the MRRT liability for each mining project interest is calculated by subtracting from the "mining profit" certain "MRRT allowances". The sum so arrived at is then multiplied by the MRRT rate to establish the MRRT liability for each mining project interest.

63 A miner's "mining profit" is calculated[143] by deducting the miner's "mining expenditure" from its "mining revenue". The "mining revenue" for each mining project interest is determined in accordance with the provisions of Div 30 of the MRRT Act. The "mining expenditure" for each mining project interest is determined in accordance with Div 35 of the MRRT Act. The amounts to be deducted from mining revenue as mining expenditure do not include[144] "excluded expenditure". Mining royalties payable to a State are one form of "excluded expenditure"[145].

64 If a miner's "group mining profit" for an MRRT year is less than $125 million, the miner is entitled[146] to an "offset" for that year. If the group mining profit is less than or equal to $75 million, the amount of the offset is the sum of the miner's MRRT liabilities for each mining project interest, with the consequence that no MRRT is payable[147]. If a miner's group mining profit is greater than $75 million, but less than $125 million, the amount of the offset is to be calculated in accordance with s 45-10 and the miner will be liable to pay less than the amount that would be payable if MRRT at the rate of 22.5 per cent were to be applied to the full amount of the profit.

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142 ss 15-5(4) and 20-5.

143 s 25-5.

144 s 35-5(2). See also subdiv 35-B.

145 s 35-40(1)(a).

146 ss 10-15 and 45-10.

147 ss 10-15 and 45-5.

Taking account of royalties

65 For the purposes of the MRRT Act, royalties payable under a State law by a miner in relation to a taxable resource extracted under authority of a production right are one form of "mining royalty"[148]. As already noted, amounts paid as a mining royalty are "excluded expenditure"[149] and thus are not deductible from mining revenue as mining expenditure. Instead, amounts paid as a mining royalty are used to calculate[150] the amount of a "royalty credit", and the amount of "available royalty credits" which does not exceed the mining profit is a "royalty allowance"[151]. A royalty allowance is one form of "MRRT allowance"[152] which is taken into account as part of the calculation[153] of the MRRT liability for each mining project interest.

66 The "royalty credit" attributable to payment of a mining royalty is arrived at by dividing[154] the liability for the mining royalty by the MRRT rate. If available royalty credits are not needed to offset the mining profit in any one year, they can be used[155] in subsequent years. When available in subsequent years, the amount of the royalty credits is uplifted (to take account of the time value of money) as provided by s 60-25(2).

67 The plaintiffs emphasised that the MRRT Act "is expressly designed so that, if more State royalties are payable, less MRRT is payable" and vice versa. As is later explained more fully, the plaintiffs submitted that two results followed. First, "a miner's actual liability to [pay] MRRT will vary from State to State, depending on the royalty rate applicable in that State". Second, "a State cannot reduce the royalty payable in respect of mining for iron ore, nor can it give a concession in respect of its royalty rate, nor can it change, favourably to

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148 s 35-45(1).

149 s 35-40(1)(a).

150 ss 60-20 and 60-25.

151 ss 60-10 and 60-15.

152 s 10-10.

153 s 10-5.

154 s 60-25(1).

155 s 60-25(2).

the miner, the basis of calculating royalty without the miner becoming liable to pay to the Commonwealth, as MRRT liability, the amount by which its liability to pay royalty to the State has been reduced". It followed, so the argument continued, that the MRRT Legislation in effect imposed a uniform *cumulative* rate of mineral rent throughout the Commonwealth, which discriminates between the States, by equating the "sacrifice" of miners in low royalty States with that of those in high royalty States and "imposing MRRT at a different *effective* rate in different States" (emphasis added).

Section 51(ii)

68 Section 51(ii) provides that, "subject to this Constitution", the Parliament may make laws with respect to "taxation; but so as not to discriminate between States or parts of States".

69 In construing and applying s 51(ii), it is necessary to begin by identifying its place in the constitutional structure. It is a legislative power. The power is expressed very broadly, at least in the sense that "taxation" may take many forms. Apart from those forms of taxation dealt with in s 90 (duties of customs and of excise), the legislative power given by s 51(ii) is not exclusive to the federal Parliament. But the power is subject to some important limitations in addition to the express limiting clause contained within it: "but so as not to discriminate between States or parts of States". First, there is the prohibition in s 114 against the Commonwealth imposing "any tax on property of any kind belonging to a State". Second, s 99 provides that "[t]he Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof". Third, s 92 prohibits taxing interstate trade, commerce and intercourse. And fourth, there is the implied limitation on legislative power recognised in *Melbourne Corporation*[156] and later considered and applied in *Austin v The Commonwealth*[157] and *Clarke v Federal Commissioner of Taxation*[158].

70 Three textual points may then be made about the concluding words of s 51(ii). First, the reference to discriminating between "parts of States" suggests that the concluding words of s 51(ii) are to be read as directed against laws which discriminate between States, or parts of States, on the basis of *geography* or *locality*. "[P]arts of States" must be defined geographically. There is no textual

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156 (1947) 74 CLR 31.

157 (2003) 215 CLR 185; [2003] HCA 3.

158 (2009) 240 CLR 272; [2009] HCA 33.

foundation for reading the reference to "States", as distinct from "parts of States", in any different way. Second, the concluding words of s 51(ii) do not speak of a law that discriminates *against* States or parts of States. The expression used is "so as not to discriminate *between* States or parts of States" (emphasis added). Third, it is necessary to recognise that the words "but so as not to discriminate" qualify a power to make laws with respect to taxation. And as already explained, the Commonwealth's power to make laws with respect to taxation is also limited by the provisions of ss 92, 99 and 114, and by the principle in *Melbourne Corporation.*

71 The concluding words of s 51(ii) are a "positive prohibition or restriction"[159] on the legislative power. Quick and Garran said[160] of the limitation in s 51(ii) that:

> "This is a limitation which has been provided for federal reasons, viz, for the protection of States which might not possess sufficient strength in the Federal Parliament to resist the imposition of a system of taxation designed to press more heavily on people or property in some States than on people or property in other States."

72 How then should the prohibition or limitation, "so as not to discriminate between States or parts of States", be understood?

73 The plaintiffs accepted that a federal income tax imposed at the rate of 45 per cent on iron ore companies throughout Australia would not discriminate within the meaning of s 51(ii) of the Constitution, even though it might operate differently in different States. They accepted that such a law would not discriminate between States by reason only of the circumstance that, because Western Australia has the largest deposits of iron ore, Western Australian iron ore companies would contribute the largest amount of tax. And it was common ground that a federal income tax imposed at different rates in different States (say 40 per cent in New South Wales, 45 per cent in Queensland and 50 per cent in Western Australia) would discriminate between States, no matter what may be the reason for seeking to apply different rates of tax in the different States. There was no dispute that a law of this latter kind would contravene the constitutional limitation on power in s 51(ii) because it would impose different rates of tax based on the location of the subject of taxation in one State or another.

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159 *New South Wales v The Commonwealth* (*Work Choices Case*) (2006) 229 CLR 1 at 127 [219]; [2006] HCA 52.

160 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 550.

The competing arguments about discrimination

74 The plaintiffs argued that the MRRT Legislation contravened the limitation on the legislative power conferred by s 51(ii) because "in terms" the MRRT Legislation imposed a tax calculated and payable at a different rate for each State by reference to the different royalty rates of the various States. The MRRT Legislation was structured, the plaintiffs argued, "so as to impose MRRT on miners in different States at different effective rates". The MRRT Legislation was said to discriminate against the low royalty States by imposing an equalising burden of tax on mining operations in those States. There is considerable irony in the circumstance that the plaintiffs' argument, that the allowance made for State royalties invalidates the MRRT Legislation, would be obviated if the Parliament had made no allowance for those outlays, when that is a course that might fairly be said to be unfair to taxpayers.

75 The plaintiffs argued that it is not correct to say that, because s 4 of each Imposition Act provided for an "MRRT rate" of 22.5 per cent, MRRT was imposed at a uniform rate throughout the Commonwealth. The plaintiffs submitted that the MRRT Legislation was enacted in the face of existing and different State royalty regimes. The MRRT liability is the product of the formula in s 10-5 of the MRRT Act, in which one element, the royalty allowance, varies from State to State. The consequence, the plaintiffs submitted, was that, as a matter of substance, the MRRT was imposed at different rates in different States and thus discriminated between States.

76 The plaintiffs and Queensland emphasised that it was the royalty credits comprising the royalty allowance, and not the actual amount of royalty paid by a miner to a State, which ss 10-5 and 60-25 of the MRRT Act required to be deducted from mining profit before applying the MRRT rate to determine the MRRT liability. Section 60-25 required that royalty payments made by a miner be "grossed-up" by dividing them by the MRRT rate to determine the amount of the royalty credit. Thus, a miner which paid to a State royalties of $22.5 million was entitled to a royalty credit of $100 million (being the royalty payment divided by the MRRT rate of 22.5 per cent).

77 Queensland submitted that the economic effect of ss 10-5 and 60-25 was the same as if the amounts paid for State royalty were deducted directly from the MRRT liability. Accordingly, so it was submitted, the effect of the MRRT Legislation was to impose on miners a uniform cumulative rate of what was described as "mineral rent".

78 By contrast, the plaintiffs relied upon the same provisions to submit that mining profit was not taxed at a uniform MRRT rate. The plaintiffs sought to demonstrate this mathematically. If the only MRRT allowance a miner had was

a royalty allowance, the equation stated in s 10-5 ("MRRT liability = MRRT rate x (Mining profit – MRRT allowances)") could be rendered as "MRRT liability = (22.5 per cent x mining profit) – (22.5 per cent x royalty credit divided by 22.5 per cent)". That is, the plaintiffs submitted, "MRRT liability = (22.5 per cent x mining profit) – royalty credit". It followed, so the plaintiffs submitted, that in substance the MRRT liability was imposed on miners at different rates.

79 The plaintiffs further submitted that the equations described also revealed that the "effective rate" of MRRT liability varied from State to State depending upon the amount paid for State royalty. That "effective rate" was to be calculated, the plaintiffs argued, by expressing the amount of MRRT liability as a percentage of the mining profit.

80 The Commonwealth submitted that the MRRT Legislation did not prescribe or make any assumption about the amount or rate of royalty paid by a miner to a State and that any difference in State mining royalties is a consequence, not of the MRRT Legislation, but of the laws of the several States. Accordingly, so the Commonwealth submitted, the MRRT Legislation did not discriminate between States because it applied the same rules "throughout the Commonwealth even though, *by reason of circumstances existing in one or other States*, it may not operate uniformly"[161] (emphasis added).

81 The Commonwealth submitted, in effect, that to speak, as Queensland had in its submissions, of a single equalised "mineral rent" throughout the Commonwealth was to introduce irrelevant considerations into the debate about the validity of the MRRT Legislation. While economists might be disposed to speak of the taxes and royalties imposed by different polities as all being species of a genus identified as "economic rent", it is critical to the debate about validity to observe not only that the charges are imposed by different polities but also that there are important differences between the two imposts. Royalties can be seen as[162] payments for the exercise of the right to exploit the property of another. Royalties are payable regardless of whether the exercise of those rights generates profit. But MRRT is payable only when a given level of profit is achieved after taking account of allowances and offsets.

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161 *Conroy v Carter* (1968) 118 CLR 90 at 101 per Taylor J; [1968] HCA 39. See also at 103 per Menzies J; *Austin v The Commonwealth* (2003) 215 CLR 185 at 247 [117].

162 *Stanton v Federal Commissioner of Taxation* (1955) 92 CLR 630 at 639-642; [1955] HCA 56.

82 As to the plaintiffs' argument that the effective rate of the MRRT is not a uniform 22.5 per cent but is dependent upon the amount of royalty payments, the Commonwealth submitted that the assumption that royalty allowance would be the only MRRT allowance to be subtracted from mining profit is unrealistic. It is not necessary to explore that issue. More importantly, the Commonwealth submitted that the MRRT Act itself created no difference based on State locality.

Earlier decisions about s 51(ii)

83 There are relatively few decisions about the meaning and application of the limiting words of s 51(ii). The effect of those decisions may be described generally as being that discrimination has been found only when the relevant Act provided for the application of different rules according to locality and has not been established by showing only that application of the Act's provisions yields an assessment which would have been different if, by operating elsewhere, the taxpayer would have incurred different outgoings. It is, however, necessary to say something about the principal decisions. It is convenient to deal with them chronologically.

Colonial Sugar Refining Co Ltd v Irving

84 Section 4 of the *Excise Tariff* 1902 (Cth) provided that the time of the imposition of uniform duties of excise was 8 October 1901 at 4.00 pm "reckoned according to the standard time in force in the State of Victoria", and that "this Act shall be deemed to have come into operation at that time". The Act imposed a uniform excise duty on, among other products, manufactured sugar. Section 5 imposed duty on all dutiable goods which were manufactured or produced after the time when the duties were deemed to have been imposed, and also imposed duty on certain dutiable goods manufactured or produced before that time. The effect of the *Excise Tariff* 1902 was to exempt from duty goods on which excise duties had been paid under State legislation. The scale of State duties differed between the States. In Queensland, no excise duty was imposed on sugar.

85 The Colonial Sugar Refining Company Limited argued that the *Excise Tariff* 1902 was a law with respect to taxation which discriminated between States. The argument was rejected by the Full Court of the Supreme Court of Queensland[163] and, on appeal, by the Privy Council[164]. The proposition, central to the argument for invalidity, that discrimination was established by showing that the incidence of taxation varied from State to State was rejected in terms

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163 *The Colonial Sugar Refining Co Ltd v Irving* [1903] St R Qd 261.

164 *Colonial Sugar Refining Co Ltd v Irving* [1906] AC 360.

directly applicable to the present matter. The Privy Council said[165] that "[t]he rule laid down by the Act is a general one, applicable to all the States alike, and the fact *that it operates unequally in the several States arises not from anything done by the Parliament, but from the inequality of the duties imposed by the States themselves*" (emphasis added). Likewise, in the Full Court, Griffith CJ had concluded[166] that the difference in the incidence of taxation was an inequality between individuals but not a discrimination between States. Griffith CJ said[167] that "I do not think that we can have regard to the fact that, owing to the operation of the laws of the States, the incidence of taxation may be unequal in different States". It is important to recognise that Griffith CJ rested[168] this conclusion on the proposition that, were this not so, "the power of the Federal Parliament would be limited by the laws of the States, and by the mode in which the States had exercised their powers of legislation".

R v Barger

86 In *R v Barger*[169], this Court was required to consider the validity of an excise duty, imposed by the *Excise Tariff* 1906 (Cth), under which goods manufactured by persons who observed federally prescribed award conditions were exempt. The award conditions differed from State to State according to local circumstances. Whether goods were dutiable therefore depended upon the person's compliance with the prescribed conditions of employment. The Act was held to be invalid.

87 *Barger* was decided in accordance with the then accepted doctrine of reserved State powers[170]. The reasons given by the Court must be considered in that light. None the less, the principles relied on by Griffith CJ, Barton and O'Connor JJ in concluding that the impugned law did discriminate between States may be understood as consistent with the views expressed by Griffith CJ in *Colonial Sugar Refining* and not affected by reserved powers reasoning.

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165 [1906] AC 360 at 367.

166 [1903] St R Qd 261 at 276.

167 [1903] St R Qd 261 at 277.

168 [1903] St R Qd 261 at 277.

169 (1908) 6 CLR 41; [1908] HCA 43.

170 (1908) 6 CLR 41 at 67.

88 Whether the application of those principles required the conclusion that the impugned legislation was invalid divided the Court in *Barger*. And in *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd*[171], Evatt J expressed the view that the conclusion reached by the majority in *Barger* was wrong and inconsistent with the reasoning of the Court in *Cameron v Deputy Federal Commissioner of Taxation*[172]. It is, however, not necessary to decide in this matter whether the actual conclusion reached in *Barger* was right.

89 Much emphasis was given in argument in this matter to a passage taken from the reasons of the majority in *Barger* which dealt with the advice of the Privy Council in *Colonial Sugar Refining*. Their Honours said[173] that the Privy Council had held in *Colonial Sugar Refining* that "the discrimination, if any, was not effected by the Act imposing the Excise duty, but by the operation of the State laws previously existing". Their Honours went on to say[174]:

> "*E converso*, if the Excise duty had been made to vary in inverse proportion to the Customs duties in the several States so as to make the actual incidence of the burden practically equal, that would have been a violation of the rule of uniformity."

The plaintiffs and Queensland argued that the MRRT Legislation presents this converse case. They submitted that the amount payable as MRRT varied in inverse proportion to the royalties in the several States "so as to make the actual incidence of the burden [of Commonwealth and State taxation on miners] practically equal".

90 The converse case postulated in *Barger* must be understood in light of all that was said in the reasons of Griffith CJ, Barton and O'Connor JJ. Their Honours recognised the great differences that can be seen between different parts of Australia. They said[175] that:

> "The fact that taxation may produce indirect consequences was fully recognized by the framers of the Constitution. They recognized,

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171 (1939) 61 CLR 735 at 781; [1939] HCA 27.

172 (1923) 32 CLR 68; [1923] HCA 4.

173 (1908) 6 CLR 41 at 70.

174 (1908) 6 CLR 41 at 70-71.

175 (1908) 6 CLR 41 at 69-70.

> moreover, that those consequences would not, in the nature of things, be uniform throughout the vast area of the Commonwealth, extending over 32 parallels of latitude and 40 degrees of longitude. The varying conditions of climate – tropical, sub-tropical and temperate – and of locality – near or at great distances from the seaboard – make an effectual discrimination for many purposes between the several portions of the Commonwealth."

Yet, despite these differences, the Constitution provides legislative power with respect to taxation "but so as not to discriminate between States or parts of States". As the majority said[176], those words "recognize the fact that nature has already discriminated, and prescribe that no attempt shall be made to alter the effect of that natural discrimination". In particular, as their Honours recognised[177], those words prohibit the Parliament from seeking to "bring about equality in the incidence of the burden of taxation, or what has been called an equality of sacrifice", by discriminating between the several portions of the Commonwealth.

91 The converse case which the majority postulated in *Barger* was a case of the kind just described. That is, their Honours were referring to a hypothetical case in which the Parliament, instead of enacting the *Excise Tariff* 1902 considered in *Colonial Sugar Refining*, had enacted a tariff which provided that the amount of duty payable to the Commonwealth should be so much as, when added to the State tax paid on that sugar, would make equal throughout the Commonwealth the *actual amount* of tax paid on sugar by every manufacturer of that commodity. But, as is explained later in these reasons, the converse case postulated by the majority in *Barger* is not this case. Any discrimination between miners is not effected by the MRRT Legislation but by the operation of State laws.

Cameron v Deputy Federal Commissioner of Taxation

92 The Income Tax Regulations 1917 (Cth) provided that the "fair average value" of certain livestock to be taken into account in assessing the amount of a taxpayer's assessable income should be the values set out in a table. The table provided different values for the same kind of livestock in different States and, in Western Australia, for the same kind of livestock in different parts of the State. In *Cameron*[178], the Court held the provisions invalid as discriminating between

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176 (1908) 6 CLR 41 at 70.

177 (1908) 6 CLR 41 at 70.

178 (1923) 32 CLR 68.

States and parts of States. The provisions applied different legal standards "simply because the subject of taxation finds itself in one State or the other"[179].

Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd and *W R Moran Pty Ltd v Deputy Federal Commissioner of Taxation (NSW)*

93 Commonwealth Acts imposed taxes on flour and wheat and provided for grants to States to be used to assist wheat growers. Because very little wheat was grown in Tasmania, and Tasmanians would bear the excise duty on flour by paying higher prices for bread and similar products, special provision was made for Tasmania. Section 14 of the *Wheat Industry Assistance Act* 1938 (Cth) provided that the Minister might make an additional grant to Tasmania not greater than the amount by which the tax raised in Tasmania under the *Flour Tax (Wheat Industry Assistance) Assessment Act* 1938 (Cth) exceeded the total amount paid to the State under the *Wheat Industry Assistance Act*. It was alleged that the Act imposing the tax discriminated between States.

94 While a majority of this Court[180] rejected the challenge, Evatt J would have held the Act imposing the tax invalid as discriminating in favour of Tasmania. Argument in the present matter directed attention to the dissenting reasons of Evatt J. His Honour concluded[181] that the discrimination established was "not constituted by mere unequal operation in the States through casual or accidental features of the laws of those States". Rather, Evatt J held[182] that the case was one where discrimination was "aimed at and achieved by the Commonwealth Act, with the favoured State playing the subordinate role of executant of the Commonwealth's scheme for refunding the tax".

95 An appeal to the Privy Council failed[183]. Viscount Maugham, delivering the advice of the Privy Council, said[184] that "it would be a mistake" to regard the

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179 (1923) 32 CLR 68 at 77 per Isaacs J.

180 *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735.

181 (1939) 61 CLR 735 at 805.

182 (1939) 61 CLR 735 at 805.

183 *W R Moran Pty Ltd v Deputy Federal Commissioner of Taxation (NSW)* (1940) 63 CLR 338; [1940] AC 838.

184 (1940) 63 CLR 338 at 348; [1940] AC 838 at 856.

restriction contained in s 51(ii) (or the requirement in s 51(iii) that bounties "be uniform throughout the Commonwealth") as "providing for equality of burden as regards taxation or equality of benefit as regards bounties". Approving reference was made[185] to the statement by Isaacs J in *Barger*[186] that "the pervading idea is the preference of locality *merely* because it is locality, and because it is a particular part of a particular State" (emphasis added). "It does not include a differentiation based on other considerations, which are dependent on natural or business circumstances, and may operate with more or less force in different localities"[187].

Conroy v Carter

96 Section 5 of the *Poultry Industry Levy Collection Act* 1965 (Cth) provided for the Commonwealth to make an arrangement with a State for the State Egg Board to collect the levy imposed by that Act on behalf of the Commonwealth. Section 6(1)(a) of the Act provided that, while an arrangement made under s 5 remained in force, payments of the levy were to be made to the State Egg Board. Section 6(1)(b) permitted the State Egg Board to retain, out of any moneys payable by the Board to any person, an amount not exceeding the amount of any levy that the person was liable to pay.

97 In *Conroy v Carter*[188], this Court considered whether s 6(1)(a) and s 6(1)(b) discriminated between States or parts of States. All members of this Court held that s 6(1)(a) did not so discriminate; the Court divided equally on whether s 6(1)(b) did so.

98 Barwick CJ, McTiernan and Menzies JJ were of the opinion that s 6(1)(b) discriminated between States. Menzies J described[189] the provision as subjecting a person liable to pay the levy "to a particular disadvantage at law to which a person in respect of hens kept in a State which has made no arrangement with the Commonwealth under s 5, is not". By contrast, Taylor J, with whom Kitto and Windeyer JJ agreed, concluded[190] that neither s 6(1)(a) nor s 6(1)(b)

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185 (1940) 63 CLR 338 at 348; [1940] AC 838 at 856-857.

186 (1908) 6 CLR 41 at 108.

187 (1908) 6 CLR 41 at 108.

188 (1968) 118 CLR 90.

189 (1968) 118 CLR 90 at 103-104.

190 (1968) 118 CLR 90 at 102.

discriminated between States. Having referred to the earlier decisions of this Court and to several decisions[191] of the United States Supreme Court about the application of Art I, s 8 of the United States Constitution[192], Taylor J concluded[193] that neither of the impugned provisions discriminated between States or parts of States because there was no discrimination in the manner in which the impost was imposed or in the method of its collection. The impugned provisions were, in his Honour's opinion, not relevantly different from a law providing that, in calculating assessable income for income tax, sums paid as State land tax should be allowable as deductions. A provision of the kind just described was one "which operates generally throughout the Commonwealth and the fact that in some States there may be no legislation imposing land tax does not mean that it discriminates between States"[194].

Different "effective" MRRT rates?

99 It is not right to say, as the plaintiffs did, that "in terms" the MRRT Legislation imposes a tax calculated at a rate that differs from State to State. The amounts on which MRRT is levied will differ between different miners. If one of those miners had conducted identical operations in a different State, the amount on which MRRT would be levied would be different. The miner would have different outgoings, including a different outgoing for State royalties. But the rate at which the tax would be levied would remain 22.5 per cent, regardless of the State in which the miner operated.

100 The plaintiffs submitted calculations directed to showing that the "effective" rate of MRRT imposed on a miner depended upon the amount of State royalty paid by that miner. The plaintiffs argued that, because the "effective" rate of MRRT depended upon the amount of State royalty paid, the MRRT Legislation discriminated between States by imposing different rates of tax according to locality.

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191 *United States v Snyder* 149 US 210 (1893); *Knowlton v Moore* 178 US 41 (1900); *Florida v Mellon* 273 US 12 (1927).

192 "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises ... but all Duties, Imposts and Excises *shall be uniform* throughout the United States" (emphasis added).

193 (1968) 118 CLR 90 at 101.

194 (1968) 118 CLR 90 at 101.

101 The utility and relevance of the calculations and comparisons advanced by the plaintiffs depended upon the manner of their calculating the "effective" rate of MRRT. The central fallacy in the calculations was that each took as the base for the calculation of an effective rate of MRRT the amount of a miner's "mining profit". It will be recalled that s 10-5 of the MRRT Act required calculation of a miner's mining profit as the first step along the way to determining the miner's MRRT liability. But from the miner's mining profit there must be deducted the miner's MRRT allowances (including royalty allowances) before arriving at the sum on which MRRT is payable. It is neither useful nor relevant to consider any comparison made between the proportion of two different miners' mining profit which is payable as MRRT. That comparison is neither useful nor relevant because it does not take the amount on which MRRT is levied as the basis for comparison. Discrimination is not revealed by making the comparison advanced by the plaintiffs based on only one of the several integers used to calculate the amount on which MRRT is levied.

Discrimination

102 As five members of this Court pointed out in *Bayside City Council v Telstra Corporation Ltd*[195], "[d]iscrimination is a concept that arises for consideration in a variety of constitutional and legislative contexts". Thus, s 102 of the Constitution provides power for the Parliament "by any law with respect to trade or commerce [to] forbid, as to railways, any *preference or discrimination* by any State, or by any authority constituted under a State, if such *preference or discrimination* is undue and unreasonable, or unjust to any State" (emphasis added). Section 117 provides that "[a] subject of the Queen, resident in any State, shall not be subject in any other State to any *disability or discrimination* which would not be equally applicable to him if he were a subject of the Queen resident in such other State" (emphasis added). Section 99 does not use the word "discrimination" but does provide that "[t]he Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give *preference* to one State or any part thereof over another State or any part thereof" (emphasis added).

103 As the plurality also pointed out in *Bayside City Council*[196], discrimination "involves a comparison". Usually that comparison will be informed by notions of difference and equality. In at least some cases, the notions of difference and equality which underpin the comparison will be supplemented by consideration

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195 (2004) 216 CLR 595 at 629 [40]; [2004] HCA 19.

196 (2004) 216 CLR 595 at 629 [40], citing *Street v Queensland Bar Association* (1989) 168 CLR 461 at 506 per Brennan J; [1989] HCA 53.

of *why* some distinction is discerned in the relevant treatment of, or outcome for, the subject of the alleged discrimination.

104 Whether, or to what extent, these notions may apply in connection with constitutional provisions other than s 51(ii) need not be, and is not, examined here. But it is necessary to exercise some care in determining whether, or to what extent, these are notions that can have a direct or immediate application in connection with s 51(ii). In that regard, it is relevant to notice that s 51(ii) "with its prohibition of discrimination may not be the same as art 1, s 8 of the Constitution of the United States requiring uniformity"[197] of taxation. Different outcomes may be sufficient to demonstrate lack of uniformity but may not suffice to show discrimination.

105 Quick and Garran said[198] of the limiting clause in s 51(ii) that "[t]o discriminate obviously means to make differences in the nature, burden, incidence and enforcement of taxing law; to impose a high tax on commodities or persons in one State and a low tax on the same class of commodities or persons in another State, would be to discriminate". This understanding of "discriminate" accords with its basic dictionary meaning: "[t]o make a distinction; to perceive or note the difference (*between* things)"[199] (original emphasis). Thus, when s 51(ii) speaks of a law with respect to "taxation; but so as not to discriminate between States or parts of States", it is speaking of a law with respect to taxation which does not, in its terms, draw any distinction between States or parts of States. Regardless of what differences can be perceived between States or parts of States, a law with respect to taxation may itself make no distinction between them, whether by reference to differences that have been or could be perceived, or otherwise. That is, adopting the words quoted earlier from Quick and Garran, the limiting clause of s 51(ii) prevents the enactment of laws which "*make differences* in the nature, burden, incidence and enforcement of taxing law" (emphasis added).

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197 *Deputy Federal Commissioner of Taxation v Brown* (1958) 100 CLR 32 at 39 per Dixon CJ; [1958] HCA 2; cf Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 550.

198 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 550.

199 *The Oxford English Dictionary*, 2nd ed (1989), vol IV at 758, "discriminate", meaning 3a.

Discrimination in effect?

106 Many of the submissions made by the plaintiffs and Queensland took as their premise that the MRRT Legislation sought to make the tax burden on miners equal throughout the federation. That is, it was submitted that the MRRT Legislation imposed a uniform cumulative rate of "mineral rent" throughout the Commonwealth which discriminated between the States by equating the "sacrifice" of miners in low royalty States with that of miners in high royalty States.

107 The plaintiffs and Queensland thus submitted that, in effect if not in form, the MRRT Act was the converse case postulated by the majority in *Barger* because the royalty provisions of the MRRT Act sought to equalise the total tax "take" from miners by the federal and State governments. But unlike the converse case considered in *Barger*, the MRRT Act does not provide for any difference in MRRT liability according to where the miner operates. To the extent that the amount of MRRT paid varies from State to State because different rates of State royalty are charged, those variations are due to the different conditions that exist in the different States and, in particular, the different legislative regimes provided by the States.

108 Other submissions of the plaintiffs and Queensland took as their premise that the MRRT Legislation treated equals unequally and, on that account, was discriminatory. More particularly, those submissions proceeded from the premise that s 51(ii) should be read as preventing the enactment of a law with respect to taxation which has different economic or other consequences in different States. And the plaintiffs argued that the MRRT Legislation discriminates against those States which wished to consider lowering their State royalty rates.

109 None of these propositions is consistent with any of the cases that have been decided about s 51(ii), and that is reason enough to reject each of them. All of *Colonial Sugar Refining*, *Barger*, *Cameron*, *Moran* and *Conroy* require their rejection. It is, however, desirable to say more about why bare demonstration of different consequences in different States does not show that a law with respect to taxation discriminates between States or parts of States.

Different consequences in different States

110 As already noted, the limiting words of s 51(ii) do not speak of a law that discriminates *against* States or parts of States and should be read as referring to geographic differentiation, not to the effect of the relevant law on a State as a polity.

111 To discriminate *against* someone or something is "to make an adverse distinction with regard to; to distinguish unfavourably from others"[200]. And, of course, there has evolved a developed body of thinking about how the notions of "adverse" or "unfavourable" discrimination are to be understood and applied.

112 Discrimination connotes comparison[201]. It directs attention to whether like cases are treated alike and different cases differently. But there may be two distinct questions that must be answered. First, are the cases that are being compared alike or different? Second, are the two cases treated alike or differently? It is particularly in the context of questions of "adverse" or "unfavourable" discrimination (or their converse cases of "preference" or "advantage") that comparison is central to identifying discrimination. In undertaking the task of comparison, it is often necessary to exercise great care when identifying the relevant comparator[202]; for it is necessary to identify a comparator that will enable identification of some relevant difference in treatment of cases that are alike, or some relevant identity of treatment of cases that are different. And it is in that same kind of context that it may be necessary to examine "the relevance, appropriateness, or permissibility of some distinction by reference to which such treatment occurs, or by reference to which it is sought to be explained or justified"[203].

113 In applying the limitation contained in s 51(ii), there is no question about selecting an appropriate comparator. Section 51(ii) expressly provides for the comparison that must be made. Does the impugned law discriminate *between States or parts of States*? Section 51(ii) thus provides that, whatever differences may be observed between States or parts of States, a law of the Parliament with respect to taxation may itself neither create nor draw any distinction between States or parts of States.

114 In that sense, at least, the prohibition which the qualifying words of s 51(ii) provide is cast in absolute terms. The power to make a law with respect to taxation may not be exercised so as to discriminate. By contrast, as noted earlier, s 102 gives power to the Parliament, by any law with respect to trade or commerce, to forbid, as to railways, "any preference or discrimination by any

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200 *The Oxford English Dictionary*, 2nd ed (1989), vol IV at 758, "discriminate", meaning 3b.

201 *Street* (1989) 168 CLR 461 at 506 per Brennan J.

202 See, for example, *Purvis v New South Wales* (2003) 217 CLR 92; [2003] HCA 62.

203 *Bayside City Council* (2004) 216 CLR 595 at 629-630 [40].

State, or by any authority constituted under a State, *if* such preference or *discrimination is undue and unreasonable, or unjust* to any State" (emphasis added), when "due regard" is had to certain matters. Section 51(ii) uses no qualifying words like "undue", "unreasonable" or "unjust". It erects a rule expressed simply as "so as *not* to discriminate" (emphasis added).

115 In its terms, then, s 51(ii) may be read as assuming that there are no differences between States (or parts of States) which could warrant a law with respect to taxation distinguishing between them. An assumption of that kind would fit comfortably with the limiting words of s 51(ii) fulfilling a fundamental federal purpose: that laws with respect to taxation enacted by the federal Parliament treat all States and parts of States alike. If this is the assumption that underpins s 51(ii), it would follow that, if a law with respect to taxation does discriminate between States (or parts of States), no further question could arise about whether the distinction that the law created or drew might none the less be explained or justified in a way that would take the challenged law outside the qualifying words of the provision. And if no further question of that kind need be answered, there would be no occasion to identify or consider the relationship that the law may have with some object or end which is identified as "proper" or "legitimate", because there could be no object or end that could constitute or reflect some difference between States (or parts of States) which would justify distinguishing between them. It is not necessary, however, to decide in this matter whether s 51(ii) should be understood as embodying or proceeding from an assumption of the kind described.

116 The Commonwealth submitted that if, contrary to its principal submission, the MRRT Legislation "somehow had a relevant differential treatment or unequal outcome, it does not follow that the legislation is discriminatory between States". In support of that submission, the Commonwealth referred to the plurality's reasons in *Austin*, which noted[204] that "[t]he essence of the notion of discrimination is said to lie in the unequal treatment of equals or the equal treatment of those who are not equals[205], *where the differential treatment and unequal outcome is not the product of a distinction which is appropriate and*

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204 (2003) 215 CLR 185 at 247 [118].

205 *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 240; [1985] HCA 56; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 480; [1990] HCA 1; *Cameron v The Queen* (2002) 209 CLR 339 at 343-344 [15]; [2002] HCA 6.

adapted to the attainment of a proper objective[206]" (emphasis added). Whether, or how, this proposition was to be applied to a law with respect to taxation did not have to be, and was not, explored in *Austin*. And although the proposition was repeated in *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vict)*[207], it was again unnecessary to explore its application to a law with respect to taxation. Nor is it necessary to undertake that task in this matter. The MRRT Legislation does not discriminate between States or parts of States. It has no different application between States. Observing that a miner would pay a different amount of MRRT if that miner conducted identical operations in a different State does not demonstrate discrimination.

117 It may be accepted that consideration of whether a law discriminates between States or parts of States is not to be resolved by consideration only of the form of the law. The legal and practical operation of the law will bear upon the question. It by no means follows, however, that the law is shown to discriminate by demonstrating only that the law will have different effects on different taxpayers according to the State in which the taxpayer conducts the relevant activity or receives the relevant income or profit. In particular, a law is not shown to discriminate between States by demonstrating only that it will have a different practical operation in different States because those States have created different circumstances to which the federal Act will apply by enacting different State legislation.

118 To the extent to which the plaintiffs' arguments depended upon the proposition that the federal legislative power to enact the MRRT Legislation was restricted because State Parliaments had made legislative provision for mining royalties which differed from State to State, the arguments must be rejected. Those arguments run counter to fundamental constitutional considerations.

119 Central to the Australian federal system is "[t]he conception of independent governments existing in the one area and exercising powers in different fields of action carefully defined by law"[208]. "The position of the federal government is necessarily stronger than that of the States. The Commonwealth is a government to which enumerated powers have been

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206 *Street* (1989) 168 CLR 461 at 510-511, 548, 571-573, 582; *Cameron v The Queen* (2002) 209 CLR 339 at 343-344 [15].

207 (2004) 220 CLR 388 at 424 [89]; [2004] HCA 53.

208 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 267-268; [1956] HCA 10.

affirmatively granted."[209] And s 109 gives supremacy to the valid exercise of the federal Parliament's legislative powers. The plaintiffs' arguments sought to invert that structure by asserting that the ambit of the Parliament's power under s 51(ii) to make a law with respect to taxation depends upon whether and how States have legislated for the different, if closely related, subject of mineral royalties. The inversion was effected by asserting that the practical effect of the MRRT Legislation is to discriminate between States. But the practical effect of the plaintiffs' point was no more than that taxpayers pay different amounts of MRRT according to what outgoings each actually incurs and those outgoings differ in amount according to where the taxpayer has its mining operations.

120 Since *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ("the *Engineers' Case*")[210], it has been securely established that the legitimate extent of the law-making power of the Commonwealth is not to be limited by first assuming the existence of State laws or law-making power, or by according precedence to State laws made in the exercise of State law-making power on those occasions when a State is the first to enter upon the legislative regulation of a particular activity. The plaintiffs' arguments for invalidity cut directly across these basal principles.

121 The MRRT Legislation does not discriminate between States. If the States had enacted no provision for royalties or if all States had chosen to exact royalties at identical rates, the plaintiffs' argument of discrimination would evidently be without foundation. The possibility that a law of the federal Parliament might become invalid upon, and by reason of, one State changing its royalty rate would not be consistent with the observations of Griffith CJ in *Colonial Sugar Refining*[211], much less the decision in the *Engineers' Case*[212].

122 The plaintiffs and Queensland rightly accepted that a federal taxing Act permitting deduction from the amount on which the tax was to be levied of expenses actually and necessarily incurred in conducting a business was not shown to be discriminatory by showing only that one of those expenses was a compulsory State exaction, the amount of which varied between the States. The MRRT Act's provisions about State royalties are different in their form, and thus their application, from provisions for deduction from taxable income commonly

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209 *Melbourne Corporation* (1947) 74 CLR 31 at 82-83.

210 (1920) 28 CLR 129; [1920] HCA 54.

211 [1903] St R Qd 261 at 276-277.

212 (1920) 28 CLR 129 at 144-145, 154.

found for many years in Commonwealth income tax Acts. Those differences in form and application are not constitutionally relevant. Neither income tax Act provisions permitting deduction of State taxes from taxable income nor the royalty provisions of the MRRT Act discriminate between States.

Section 99

123 The plaintiffs accepted that, if the MRRT Legislation did not discriminate between States, it was not a "law ... of trade, commerce, or revenue" which gave "preference to one State or any part thereof over another State or any part thereof".

124 In *Permanent Trustee*[213], the plurality said that it was not the occasion in that case "to seek to disentangle the reasoning in all the disparate authorities in the first fifty years of the Court which concern s 99 in its operation upon 'any law or regulation of trade, commerce ...'". Nor, given the conclusions reached about s 51(ii) and the plaintiffs' concession that s 99 is not then engaged, is this a case in which it is necessary or desirable to attempt that task. It is enough to repeat some points made[214] by the plurality in *Permanent Trustee* by reference to *Elliott v The Commonwealth*[215]. As Dixon J said[216] in *Elliott*, the critical phrase in s 99, "give preference ... over", expresses "a conception necessarily indefinite". Much therefore depends upon the level of abstraction at which debate enters upon the issue. Second, and of most immediate relevance in this case, "[t]o give preference to one State over another State discrimination or differentiation is necessary"[217]. But not every discrimination between States may amount to preference of one over another[218].

125 Because the MRRT Legislation does not discriminate between States, there is no preference of one State over another.

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213 (2004) 220 CLR 388 at 423 [86].

214 (2004) 220 CLR 388 at 423 [87]-[88].

215 (1936) 54 CLR 657; [1936] HCA 7.

216 (1936) 54 CLR 657 at 682.

217 (1936) 54 CLR 657 at 683 per Dixon J; see also at 668 per Latham CJ.

218 (1936) 54 CLR 657 at 683 per Dixon J.

The *Melbourne Corporation* principle

126 The plaintiffs submitted that the States own the minerals in their lands and have the ability to regulate extraction of those minerals on terms that the persons granted the right to take minerals pay in return royalties fixed by the States at whatever level the States choose. The plaintiffs submitted that the MRRT Legislation interfered with the States' management of the mineral resources under their control. The colony's control over minerals was recognised in the pre-federation constitutions of Queensland and Western Australia[219]. And upon federation, the States came to derive their existence from the Constitution itself, which, by s 106, continued the State constitutions in force (but subject to the Constitution)[220]. The plaintiffs and Western Australia argued that the MRRT Legislation was apt to neutralise the positive effect upon the level of mining activity in a State that might be expected to flow from the exercise of the State's ability to effect a reduction in the State's royalty rate.

127 The plaintiffs' argument began with a passage from the judgment of Starke J in *Melbourne Corporation*[221]:

> "[I]n 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. The management and control by the States and by local governing authorities of their revenues and funds is a constitutional power of vital importance to them. Their operations depend upon the control of those revenues and funds. And to curtail or interfere with the management of them interferes with their constitutional power."

The plaintiffs submitted that the infirmity of the MRRT Legislation was revealed by substituting "natural resources" for "revenues and funds" in the passage just set out.

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219 *Constitution Act* 1867 (Q), ss 30, 34 and 40; *Western Australia Constitution Act* 1890 (Imp), s 3; *The Constitution Act* 1889 (WA), s 64. See also *New South Wales Constitution Act* 1855 (Imp) (18 & 19 Vict c 54), Preamble, s 2, Sched 1, ss 43, 47 and 50; *Victoria Constitution Act* 1855 (Imp) (18 & 19 Vict c 55), Preamble, Sched 1, ss 44 and 54.

220 *Victoria v The Commonwealth* ("the *Pay-roll Tax Case*") (1971) 122 CLR 353 at 371 per Barwick CJ; [1971] HCA 16; *New South Wales v The Commonwealth* ("the *Seas and Submerged Lands Case*") (1975) 135 CLR 337 at 372 per Barwick CJ; [1975] HCA 58.

221 (1947) 74 CLR 31 at 75.

128 The plaintiffs further submitted that a State is necessarily both a territorial entity and a polity with responsibility for the management and control of the waste lands of the Crown and is expressly given the right to appropriate the proceeds of sale and revenues from such land, including royalties, mines and minerals in such lands[222].

129 The Commonwealth did not dispute that each State's ownership, management and control of its territory (including, particularly, the waste lands of the Crown within that territory) is a necessary attribute of statehood and that a State's ability by legislation to make laws to promote the development of its territory in the interests of, or to promote the welfare of the community of, the State is important. And the Commonwealth did not dispute that it is for the States to determine the level of royalty to be paid as the price for extracting minerals from their territories. But the Commonwealth submitted that the MRRT Legislation does not subject that ability to Commonwealth control and proceeded on the assumption that the States were free to fix royalties as they chose.

130 In *Melbourne Corporation*, Dixon J said[223] that:

> "The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities."

And as was said in the *Work Choices Case*[224], the separate polities whose continued existence is predicated "are to continue as separate bodies politic each having legislative, executive and judicial functions". Hence, as the decisions in *Austin*[225] and *Clarke*[226] each demonstrate, the *Melbourne Corporation* principle requires consideration of whether impugned legislation is directed at States, imposing some special disability or burden on the exercise of powers and

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222 See, for example, *New South Wales Constitution Act* 1855 (Imp); *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 at 425-426; [1913] HCA 33.

223 (1947) 74 CLR 31 at 82; See also *Austin* (2003) 215 CLR 185 at 245-246 [111]-[115]; *Work Choices Case* (2006) 229 CLR 1 at 119-120 [194].

224 (2006) 229 CLR 1 at 120 [194].

225 (2003) 215 CLR 185.

226 (2009) 240 CLR 272.

fulfilment of functions of the States which curtails their capacity to function as governments.

131 The extent and importance of the States' function of managing their lands and mineral resources must be acknowledged. But the plaintiffs' submissions contended for a view of the *Melbourne Corporation* principle which, if accepted, would subvert not only the position established by the decision in the *Engineers' Case* but also s 109 of the Constitution.

132 Western Australia submitted that it is "central to the capacity of [the] State to function as a government under the Constitution that it have the power to determine the most appropriate means of financing the development of communities in Western Australia". This submission bore a striking resemblance to arguments advanced by that State, and rejected, in *Western Australia v The Commonwealth* (*Native Title Act Case*)[227]. Western Australia alleged[228], in the *Native Title Act Case*, that, because the "capacity and power to grant, regulate and otherwise deal with land and other resources in Western Australia ... is a fundamental sovereign function of the Government of Western Australia as a State", provisions of the *Native Title Act* 1993 (Cth) were invalid. But as the plurality held[229] in that case:

> "The [*Native Title Act*] does not purport to affect the machinery of the government of the State. The constitution of the three branches of government is unimpaired; the capacity of the State to engage the servants it needs is unaffected; the acquisition of goods and services is not impeded; nor is any impediment placed in the way of acquiring the land needed for the discharge of the essential functions of the State save in one respect, namely, the payment of compensation. The Act does not impair what Dawson J described [in *Queensland Electricity Commission v The Commonwealth*[230]] as 'the capacity to exercise' constitutional functions though it may affect the ease with which those functions are exercised."

133 If the MRRT Legislation does affect the States' control over land and resources, the effect is less direct and more speculative than the effect of the *Native Title Act*. If, then, the MRRT Legislation does diminish the choices

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227 (1995) 183 CLR 373; [1995] HCA 47.

228 (1995) 183 CLR 373 at 478-479.

229 (1995) 183 CLR 373 at 481.

230 (1985) 159 CLR 192 at 260.

available to the executive governments of the States, that diminution does not engage the *Melbourne Corporation* principle.

134 In *Austin*, the plurality noted[231] that the fundamental constitutional conception which underpins the *Melbourne Corporation* principle "has proved insusceptible of precise formulation". Accordingly, the plurality warned[232] against the risk of propositions stated in particular cases taking on, "by further judicial exegesis, a life of their own which is removed from the constitutional fundamentals which must sustain them". It remains important, however, to recognise how that fundamental constitutional conception has been applied in earlier decisions of this Court.

135 In *Austin* and *Clarke*, the perceived vice of the Commonwealth law in question lay in its impact upon the capacity of a State to fix the terms of its relationships with its judiciary and legislature as branches of the government of that State. As had previously been pointed out, in *Re Australian Education Union; Ex parte Victoria*[233], "critical to a State's capacity to function as a government is its ability, not only to determine the number and identity of those whom it wishes to engage at the higher levels of government, but also to determine the terms and conditions on which those persons shall be engaged".

136 The legislation held invalid in *Queensland Electricity Commission*[234] was directed only at a State. It provided a special set of rules concerning the resolution of an industrial dispute between certain Queensland State electricity authorities and the Electrical Trades Union, which represented employees of those authorities. That is, the law sought to burden the State by providing special rules to govern decisions about the relationship between agencies of the State and their employees. By contrast, in the *Pay-roll Tax Case*[235], legislation imposing pay-roll tax on *all* employers (including the States) was held to be valid even though, of course, it placed a burden on the States.

137 The MRRT Legislation is not aimed at the States or their entities as was the legislation considered in each of *Melbourne Corporation*, *Queensland*

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231 (2003) 215 CLR 185 at 258 [145].

232 (2003) 215 CLR 185 at 258-259 [145].

233 (1995) 184 CLR 188 at 233; [1995] HCA 71.

234 (1985) 159 CLR 192.

235 (1971) 122 CLR 353.

Electricity Commission, *Austin* and *Clarke*. The MRRT Legislation does not impose any special burden or disability on the exercise of powers and fulfilment of functions of the States which curtails their capacity to function as governments. The MRRT Legislation does not deny the capacity of any State to fix the rate of royalty for minerals extracted by miners, and no burden upon a State attaches to any decision by the State to raise or lower that rate. If, as the plaintiffs asserted, the MRRT Legislation affects the States' ability to use a reduction in royalty rate as an incentive to attract mining investment in the State, the MRRT Legislation does not impose any limit or burden on any State in the exercise of its constitutional functions.

Section 91

138 Section 91 of the Constitution provides that:

> "Nothing in this Constitution prohibits a State from granting any aid to or bounty on mining for gold, silver, or other metals, nor from granting, with the consent of both Houses of the Parliament of the Commonwealth expressed by resolution, any aid to or bounty on the production or export of goods."

It was common ground that the plaintiffs engaged in mining for iron ore and that iron ore is an "other metal" within s 91.

139 The plaintiffs argued that s 91 not only preserves the powers of a State to grant any aid or bounty on mining for gold, silver or other metals, but also limits the legislative power of the federal Parliament. In particular, the plaintiffs submitted that s 91 prevents the enactment of a federal law which impedes States granting an "aid ... on mining" for iron ore by reducing the rate of State royalty charged or exempting a miner from paying royalty. They submitted that, because the grant of any such reduction or exemption would have the effect that the MRRT otherwise payable by the miner would be increased by an amount equivalent to such reduction or exemption, the grant of the aid would be illusory. This result, the plaintiffs submitted, was precluded by the phrase "[n]othing in this Constitution prohibits". Insofar as the provisions of the Constitution might otherwise have authorised the making of the law, the introductory words of s 91 limited the ambit (or perhaps the exercise) of the relevant power.

140 The first step in the plaintiffs' argument is undermined by observations in *Seamen's Union of Australia v Utah Development Co*[236] which suggest that "aid"

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236 (1978) 144 CLR 120 at 126 per Barwick CJ, 135 per Gibbs J, 140 per Stephen J, 148 per Mason J; [1978] HCA 46.

in s 91 should be read as limited to "financial assistance". And as the argument of Mr B H McPherson QC in *Seamen's Union* noted[237], parliamentary usage of the term "aid" would support that view. It is, however, not necessary to reach any concluded view about this aspect of the matter. The plaintiffs' arguments fail for other reasons.

141 Section 91 is not framed in terms of prohibition. As Mason J said[238] in *Seamen's Union*, in respect of the second part of the section, "[i]t is inconceivable that a section, not cast in the form of a prohibition, should be widely interpreted so as to prevent a State, without the consent of both Houses of the Commonwealth Parliament, from granting ... benefits of any kind ... that might operate as an aid to production or export". Likewise, there is no reason to read the introductory words as limiting the legislative powers of the Commonwealth. Indeed, to read those words in the manner proposed by the plaintiffs would be to read them as providing for the legislative supremacy of State laws "granting any aid to or bounty on mining for gold, silver, or other metals". How that result would be consistent with s 109 was not explained.

142 Section 91 denies any constitutional *prohibition* on granting any aid or bounty of the kind described. The expression "[n]othing in this Constitution prohibits" directs the reader to what might otherwise be read as working a prohibition. In particular, the introductory words of s 91 invite attention to s 90. When ss 90 and 91 are read together, there is evident reason for reading s 91 as qualifying s 90. Section 90 provides for the power of the Parliament to impose duties of customs and of excise and to grant bounties to become exclusive. Section 91 provides that nothing in the Constitution prohibits States granting any aid to or bounty on certain mining. Including reference in s 91 to "any aid" foreclosed any debate about whether a grant of financial aid to mining is a bounty on the production of goods. A grant or loan of money to encourage mining for particular metals would be an aid to mining. No great imagination is needed to see that the terms on which a grant or loan was made might provide some basis for arguing that it was a bounty on the production of the metal concerned. Section 91 was cast in terms that avoided that debate.

143 But the words of s 91 do not admit of the construction which the plaintiffs urged. Section 91 preserves the States' legislative powers with respect to granting certain kinds of aid or bounty. It does not limit the legislative powers of the federal Parliament. In particular, there is no warrant for reading s 91 as if it

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237 (1978) 144 CLR 120 at 125.

238 (1978) 144 CLR 120 at 149.

said "[n]o law of the Commonwealth may impair the effect of the provision of assistance by a State to mining for gold, silver, or other metals". Yet it is only by reading s 91 as having this effect that the plaintiffs' submissions about s 91 would be made good.

Conclusion and orders

144 For these reasons, the plaintiffs' challenges to validity are not made out. The plaintiffs should pay the costs of the reserved questions. The questions reserved for the opinion of the Full Court should be answered as follows:

(i) Are any or all of s 3 of the *Minerals Resource Rent Tax (Imposition—Customs) Act* 2012 (Cth), s 3 of the *Minerals Resource Rent Tax (Imposition—Excise) Act* 2012 (Cth) and s 3 of the *Minerals Resource Rent Tax (Imposition—General) Act* 2012 (Cth) invalid in their application to the plaintiffs on one or more of the following grounds:

A. they discriminate between the States of the Commonwealth of Australia contrary to s 51(ii) of the Constitution;

B. they give preference to one State of the Commonwealth of Australia over another State contrary to s 99 of the Constitution;

C. they so discriminate against the States of the Commonwealth or so place a particular disability or burden upon the operations or activities of the States, as to be beyond the legislative power of the Commonwealth?

Answer: No.

(ii) Are any or all of the *Minerals Resource Rent Tax (Imposition—Customs) Act* 2012 (Cth), the *Minerals Resource Rent Tax (Imposition—Excise) Act* 2012 (Cth), the *Minerals Resource Rent Tax (Imposition—General) Act* 2012 (Cth) and the *Minerals Resource Rent Tax Act* 2012 (Cth) invalid in their application to the plaintiffs on the ground that they are contrary to s 91 of the Constitution?

Answer: No.

(iii) Who should pay the costs of the reserved questions?

Answer: The plaintiffs.

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Further proceedings in the matter will be for determination by a single Justice.

145 CRENNAN J. I agree that the plaintiffs' constitutional challenge to the mining tax cannot be accepted and that the questions reserved for the opinion of the Full Court should be answered as proposed by Hayne, Bell and Keane JJ. The issues and the MRRT legislation (collectively, legislation imposing a minerals resource rent tax ("MRRT")[239] and providing for the calculation of a taxpayer's MRRT liability[240]) have been set out in their Honours' joint reasons. What follows are my own reasons for not accepting the plaintiffs' submissions that the MRRT legislation contravenes the limitation on the federal legislative power to tax imposed by the proviso in s 51(ii) of the Constitution. These reasons also cover the plaintiffs' related submissions that the MRRT legislation contravenes s 99 of the Constitution. Subject to that, I agree with the joint reasons.

146 The object of the MRRT legislation is to ensure that the Australian community receives "an adequate return"[241] in respect of mined "taxable resources"[242], namely iron ore and coal (and some related substances), from which miners make profits. The MRRT is a tax on mining projects and that object is sought to be achieved "by taxing above normal profits made by miners (also known as economic rents)"[243] in respect of "mining project interests"[244]. It is explained in the Revised Explanatory Memorandum to the Bills which became the MRRT legislation ("the Revised Explanatory Memorandum") that it is "the characteristic of non-renewability that allows exploitation of [the taxable resources] to generate economic rent or above normal profit"[245].

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239 *Minerals Resource Rent Tax (Imposition—Customs) Act* 2012 (Cth), *Minerals Resource Rent Tax (Imposition—Excise) Act* 2012 (Cth) and *Minerals Resource Rent Tax (Imposition—General) Act* 2012 (Cth) ("the *Imposition Acts*").

240 *Minerals Resource Rent Tax Act* 2012 (Cth).

241 *Minerals Resource Rent Tax Act* 2012, s 1-10.

242 *Minerals Resource Rent Tax Act* 2012, s 20-5.

243 *Minerals Resource Rent Tax Act* 2012, s 1-10. The full description of the subject of the tax is "above normal profits made by miners (also known as economic rents) that are reasonably attributable to the resources in the form and place they were in when extracted". The expression "economic rents" is used in these reasons in the same way as it is used in the MRRT legislation.

244 *Minerals Resource Rent Tax Act* 2012, s 15-5.

245 Australia, Senate, Minerals Resource Rent Tax Bill 2011, Minerals Resource Rent Tax (Consequential Amendments and Transitional Provisions) Bill 2011, Minerals Resource Rent Tax (Imposition—Customs) Bill 2011, Minerals Resource Rent Tax

(Footnote continues on next page)

147 The concept that profits which exceed normal or ordinary rates of return on capital ventured are a natural subject of taxation is not novel[246]. A rational investor (and any lender to that investor) venturing capital in a large project can be expected to assess financial risks and returns in respect of the capital, skills and labour to be invested. Stated simply, necessary expenditures and outlays (including taxes) can be expected to be taken into account as costs or expenditures against profits or revenues, to establish a minimum rate of return on investment sufficient to encourage, justify and maintain that investment for some finite period. The critical feature of the MRRT legislation is that the MRRT is levied on a taxpayer's economic rent or above normal profit in respect of a relevant project, which immediately raises the need for a mechanism, or method of calculation, designed to isolate the limited portion of profit constituting the tax base.

148 Determining a taxpayer's MRRT liability involves an MRRT formula permitting the subtraction of specified "MRRT allowances"[247] from a taxpayer's "mining profit", thereby reducing that profit, in order to arrive at the above normal profit on which the MRRT is levied, and to which is applied the uniform rate of taxation of 22.5 per cent[248]. The MRRT formula is stated as:

MRRT liability = MRRT rate x (Mining profit – MRRT allowances)[249].

Whilst it is unnecessary for present purposes to describe all the details of the MRRT legislation, it is important to understand that the item "mining profit", a component of the MRRT formula, is a net profit figure, being "the excess of mining revenue[250] over mining expenditure[251]" in respect of a relevant mining project in any MRRT year[252]. Capital and operating costs (of a kind which might

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(Imposition—Excise) Bill 2011, Minerals Resource Rent Tax (Imposition—General) Bill 2011, Revised Explanatory Memorandum at 5 [1.5].

246 See, for example, *LaBelle Iron Works v United States* 256 US 377 (1921); *United States v Ptasynski* 462 US 74 (1983).

247 *Minerals Resource Rent Tax Act* 2012, Ch 3.

248 *Imposition Acts*, s 4.

249 *Minerals Resource Rent Tax Act* 2012, s 10-5.

250 *Minerals Resource Rent Tax Act* 2012, Pt 2-3, Div 30.

251 *Minerals Resource Rent Tax Act* 2012, Pt 2-3, Div 35.

252 *Minerals Resource Rent Tax Act* 2012, s 25-1.

be taken into account ordinarily when assessing a rate of return on investment) "necessarily incurred … in the carrying on … of upstream mining operations"[253] (which includes State taxes or charges, other than those excluded) are deducted immediately from the taxpayer's "mining revenue". An explanation of the purpose of the MRRT is contained in the Revised Explanatory Memorandum[254]:

> "The key purpose of the MRRT is to tax the economic rents from non-renewable resources after they have been extracted from the ground but before they have undergone any significant processing or value-add. Generally, the profit attributed to the resource at this point represents the value of the resource to the Australian community. Where the taxable resource is improved through beneficiation processes, such as crushing, washing, sorting, separating and refining, the value added is attributable to the miner."

Certain expenditures, one of which is State mining royalties[255], are "excluded expenditures" for the purposes of ascertaining a taxpayer's "mining profit".

149 The MRRT formula then provides for the calculation of MRRT profit, a net profit figure. The above normal profit upon which the MRRT is levied is arrived at after applying, in a certain order against the taxpayer's "mining profit", seven "MRRT allowances"[256].

150 The critical MRRT allowance for present purposes is the "royalty allowance"[257], giving a taxpayer credit for the amount of any mining royalties paid to the Commonwealth, a State or a Territory for the mining of taxable resources[258]. The context was explained in the Revised Explanatory Memorandum – in Australia, State and Territory governments typically tax the taxable resources covered by the MRRT legislation, by applying a royalty to

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253 *Minerals Resource Rent Tax Act* 2012, ss 35-10, 35-15 and 35-20.

254 Australia, Senate, Minerals Resource Rent Tax Bill 2011, Minerals Resource Rent Tax (Consequential Amendments and Transitional Provisions) Bill 2011, Minerals Resource Rent Tax (Imposition—Customs) Bill 2011, Minerals Resource Rent Tax (Imposition—Excise) Bill 2011, Minerals Resource Rent Tax (Imposition—General) Bill 2011, Revised Explanatory Memorandum at 12 [2.8].

255 *Minerals Resource Rent Tax Act* 2012, ss 35-40 and 35-45.

256 *Minerals Resource Rent Tax Act* 2012, s 10-10.

257 *Minerals Resource Rent Tax Act* 2012, s 10-10 and Pt 3-1, Div 60.

258 *Minerals Resource Rent Tax Act* 2012, ss 20-5 and 60-5.

production on the basis of volume or value[259]. The "royalty allowance" is the amount of State mining royalty, grossed up by using the MRRT rate of taxation, thereby reducing a taxpayer's MRRT liability by the amount of the royalty paid. The royalty allowance is the only MRRT allowance which is grossed up; however, the plaintiffs stated that the grossing up of royalty payments was not critical to their constitutional challenge to the MRRT legislation, although they said that grossing up showed that the royalty allowance was a significant allowance.

151 The plaintiffs do not complain about the calculation of a taxpayer's net mining profit. The plaintiffs only complain about the calculation of the MRRT profit, the above normal profit, and then only by reference to the allowance for State mining royalties. There is no challenge in respect of other MRRT allowances for items such as losses carried forward, starting base allowances or losses transferred from other projects.

152 Everything else being equal, a reduction in a State mining royalty will result in an equivalent increase in a taxpayer's MRRT liability and vice versa. Mining royalty regimes and royalty rates vary from State to State. Further details of the calculation of a taxpayer's MRRT liability, by bringing royalties into account fully both by grossing up and through "royalty credits", are set out in the reasons of others and are not repeated here. The critical factor for the plaintiffs' challenge to the MRRT legislation based on s 51(ii) is that a taxpayer's MRRT liability varies according to the State mining royalties paid by the taxpayer, which depend on different State mining royalty regimes and rates.

153 As a tax on above normal profit, no MRRT is payable if a taxpayer's group mining profit for the relevant financial year is less than or equal to $75 million[260], inferentially a baseline in respect of the limited portion of profit upon which the MRRT is levied. If a taxpayer's group mining profit exceeds $75 million but is less than $125 million, a taxpayer will be liable to pay MRRT, but less than the full amount, which applies once the group mining profit reaches $125 million[261].

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259 Australia, Senate, Minerals Resource Rent Tax Bill 2011, Minerals Resource Rent Tax (Consequential Amendments and Transitional Provisions) Bill 2011, Minerals Resource Rent Tax (Imposition—Customs) Bill 2011, Minerals Resource Rent Tax (Imposition—Excise) Bill 2011, Minerals Resource Rent Tax (Imposition—General) Bill 2011, Revised Explanatory Memorandum at 5 [1.7].

260 *Minerals Resource Rent Tax Act* 2012, ss 10-15 and 45-5.

261 *Minerals Resource Rent Tax Act* 2012, ss 10-15 and 45-10.

Section 51(ii) of the Constitution

154 Section 51(ii) confers a legislative power on the federal Parliament with respect to "taxation", subject to the proviso "but so as not to discriminate between States or parts of States".

155 As observed by Gaudron, Gummow and Hayne JJ in *Austin v The Commonwealth*[262], following Taylor J in *Conroy v Carter*[263], a law with respect to taxation does not discriminate in the sense spoken of in s 51(ii) if it operates generally throughout Australia "even though, by reason of circumstances existing in one or more of the States, it may not operate uniformly".

156 It was not in contest that this general principle is specifically exemplified in federal legislation with respect to income tax, providing for the calculation of taxable income by reference to deductions for State taxes or charges for the purpose of determining the amount of income tax for which a taxpayer may be liable. Equally, it was accepted in argument that a federal law with respect to taxation imposing different rates or measures of taxation between States would contravene the limitation on legislative power in s 51(ii). And it was accepted that in order to determine whether a tax discriminated between States in terms of s 51(ii) it is necessary to consider the "real substance and effect"[264], not just the form, of the tax. When a constitutional limitation on legislative power is relied on to invalidate a law, it is the law's "practical operation" which needs to be examined[265].

157 Whilst the plaintiffs' challenge to the MRRT legislation was expressed in various ways, which have been set out in the joint reasons, it was made clear in oral submissions that the plaintiffs' complaint was not that the imposition of the MRRT resulted in different amounts of tax being paid between States. Rather, the plaintiffs' complaint was that State mining royalties were picked up and applied by the federal Parliament as an essential integer in the MRRT formula, which it was contended resulted in different *effective* rates of taxation depending upon what State mining royalties were paid by a taxpayer.

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262 ("*Austin*") (2003) 215 CLR 185 at 247 [117]; [2003] HCA 3.

263 (1968) 118 CLR 90 at 101; [1968] HCA 39.

264 *W R Moran Pty Ltd v Deputy Federal Commissioner of Taxation (NSW)* (1940) 63 CLR 338 at 346; [1940] AC 838 at 854.

265 *Ha v New South Wales* (1997) 189 CLR 465 at 498 per Brennan CJ, McHugh, Gummow and Kirby JJ; [1997] HCA 34.

158 The plaintiffs produced calculations, tables and examples designed to show that, everything else being equal, different taxpayers in different States would incur differing MRRT liabilities as a result of the *structure* of the MRRT legislation. The *method of calculation*, the MRRT formula, set by the federal Parliament was fastened upon as discriminatory in the sense spoken of in s 51(ii).

159 In terms of distinctions, developed in the relevant authorities and discussed below, the plaintiffs submitted that the MRRT legislation does not operate uniformly throughout Australia because the MRRT legislation itself effectively imposes different rates of MRRT liability on taxpayers (based on State mining royalties), and not because of different circumstances existing in one or more of the States which affect the practical operation of the MRRT. The State of Queensland, intervening, echoed that approach by contending that the MRRT is defined by reference to a variable (State mining royalties), therefore the MRRT itself "is determined by applying a State levy".

160 The Commonwealth gave two discrete answers to the plaintiffs' challenge to the MRRT legislation based on s 51(ii). Primarily, the Commonwealth submitted that although the MRRT legislation does not operate uniformly throughout Australia, the MRRT legislation does not discriminate in the sense spoken of in s 51(ii). This was said to be so because a taxpayer's MRRT liability is calculated by reference to allowances (or outlays) prefatory to determining the amount of MRRT profit, the above normal profit on which the MRRT is levied, and to which is applied the uniform rate of taxation of 22.5 per cent, irrespective of where relevant mining projects are conducted. The Commonwealth submitted that unequal MRRT liabilities result from the different business conditions in each State (unequal State mining royalties) under which taxpayers operate, not from the method of calculation of any MRRT liability.

161 In the alternative, and somewhat more faintly, the Commonwealth submitted that if the MRRT legislation results in differential treatment or an unequal outcome (which was denied), such a result was justified as the product of a distinction which was appropriate and adapted to the attainment of the objectives of the MRRT legislation.

162 The principle restated in *Austin*[266], set out above, is determinative of the questions arising from the plaintiffs' submissions, for which reason the Commonwealth's primary answer to those submissions must be accepted. The development of that general principle can be traced through a number of authorities concerned with a variety of factual circumstances, which demonstrate that a differential or unequal operation of a law with respect to taxation is not a necessary indication of discrimination in the sense spoken of in s 51(ii).

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266 (2003) 215 CLR 185 at 247 [117].

163 The drafting history of s 51(ii), dealt with in the reasons of the Chief Justice, reveals the subject to which the language of s 51(ii) is directed[267], and shows why the wide, non-exclusive power of the federal Parliament to raise money by any mode of taxation is nevertheless subject to limits. Those limits reflect the federal rationale of protecting taxpayers in the same circumstances in the various States of the Federation from discrimination by a federal law with respect to taxation, imposed differentially or unequally between States.

164 The American authorities considering Art I of the Constitution of the United States, referred to in the reasons of the Chief Justice, also shed some light on the questions raised by the plaintiffs' submissions. Those cases illustrate the limitation on Congress's power to tax, imposed by the requirement in Art I, s 8(1) that "all Duties, Imposts and Excises shall be uniform throughout the United States". The requirement of uniformity is one of geographic uniformity, which is not contravened by the differential or unequal operation of a law with respect to taxation, where the "tax structure does not discriminate among the states"[268], but the differential or unequal operation results from different conditions in different States, that being a neutral (ie a non-discriminatory) factor[269].

165 In *Colonial Sugar Refining Co Ltd v Irving*[270], the Privy Council upheld as constitutionally valid the first federal excise duty imposed on all sugar in respect of which customs duties imposed by the States had not been paid. The unequal burden which resulted was found not to contravene s 51(ii) because the inequality of burden resulted from "the inequality of the duties imposed by the States themselves"[271]. In seeking to distinguish *Irving*, the plaintiffs emphasised that the method of calculation of any MRRT liability took into account State mining royalties, which led to submissions by the plaintiffs and the State of Queensland that the MRRT legislation fell squarely within what was said by the majority in *R v Barger*[272], postulating a change in the facts of *Irving* which would have contravened s 51(ii):

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267 *Cole v Whitfield* (1988) 165 CLR 360 at 385; [1988] HCA 18.

268 Tribe, *American Constitutional Law*, 3rd ed (2000), vol 1 at 842.

269 *Knowlton v Moore* 178 US 41 (1900), *Florida v Mellon* 273 US 12 (1927) and *Gottlieb v White* 69 F 2d 792 (1934), cited by Taylor J in *Conroy v Carter* (1968) 118 CLR 90 at 100-101; see also *United States v Ptasynski* 462 US 74 (1983).

270 ("*Irving*") [1906] AC 360.

271 *Irving* [1906] AC 360 at 367.

272 ("*Barger*") (1908) 6 CLR 41 at 70-71; [1908] HCA 43.

> "if the Excise duty had been made to vary in inverse proportion to the Customs duties in the several States so as to make the actual incidence of the burden practically equal, that would have been a violation of the rule of uniformity."

166 By reference to that passage, the plaintiffs, and the State of Queensland, described the MRRT as structured to be inversely proportional, or directly related, to the rate at which a State mining royalty is levied. However, read in context, that passage in *Barger* illustrates the difference between the inoffensive tax in *Irving*, which operated unequally because of different business conditions (unequal customs duties) in the States, and a differential or unequal imposition of a federal tax by Parliament, such as imposing different rates of taxation according only to locality. Also in *Barger*, in a passage affirmed subsequently by the Privy Council in *W R Moran Pty Ltd v Deputy Federal Commissioner of Taxation (NSW)*[273], Isaacs J (in dissent in the result, but not on this point) explained that the limitation in s 51(ii) does not encompass a differential or unequal operation of a law with respect to taxation which is dependent upon "natural or business circumstances [which] may operate with more or less force in different localities"[274].

167 In *Cameron v Deputy Federal Commissioner of Taxation*[275], regulations made under the *Income Tax Assessment Act* 1915 (Cth)[276] fixed differential or unequal values as "the fair average value" of stock to be taken into account (absent actual cost prices per head) for the purposes of determining the business profits included in a taxpayer's income. That imposition of different legal standards (unequal deductions) upon taxpayers, fixed solely upon the basis of the State in which the taxpayer's stock was located, contravened s 51(ii). As Isaacs J observed, those legal standards fixed by the federal Parliament were not based on "real commercial considerations" differing between States[277]. Further, Starke J observed that an inequality imposed on taxpayers in different States by a law with respect to taxation is distinct from an unequal incidence or burden of taxation "on account of the inequality of conditions obtaining in the respective States"[278].

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273 (1940) 63 CLR 338 at 348; [1940] AC 838 at 857.

274 (1908) 6 CLR 41 at 108.

275 ("*Cameron*") (1923) 32 CLR 68; [1923] HCA 4.

276 Income Tax Regulations 1917 (Cth), as amended by Statutory Rules 1918, No 315.

277 (1923) 32 CLR 68 at 75.

278 (1923) 32 CLR 68 at 79.

168 The plaintiffs relied on *Cameron* as directly on point because the above normal profit on which the MRRT is levied is derived by subtracting different amounts of royalty credits referable to different State mining royalties charged, which depend on different State mining royalty regimes and rates. The critical difference between the regulations in *Cameron* and the MRRT formula is that the different values for stock in different States in *Cameron* were unequal standards fixed by the federal Parliament. Royalty credits, for which allowance is given in the MRRT formula, prefatory to calculating the tax base for the MRRT, are based on actual State exactions fixed (subject to change) by State legislatures.

169 Of the seven MRRT allowances, only State mining royalties explicitly bring in State laws, but the MRRT allowances differ somewhat from the capital and operating costs already taken into account before the MRRT formula is applied. The allowances are available as "credits" (State mining royalties) and "losses" (for example, transferred losses, pre-mining losses and a start-up allowance) which can be carried forward, as necessarily incurred (or suffered) before a relevant project generates above normal profit. The method of calculation of the MRRT does not impose a tax dependent on variable values; rather, it is merely a formula for calculating the tax base, in circumstances where the tax base is affected by varying State laws imposing royalty charges to which a taxpayer's profit is subject.

170 The calculations, tables and examples produced by the plaintiffs to illustrate different *effective* rates of taxation appeared to owe something to *Cameron*. Calculations took into account a taxpayer's MRRT and a taxpayer's mining profit, which led to irrelevant results, because the MRRT, being an economic rents tax (unlike an income tax on all sources of income), is not a tax on all profit. It is a tax only on the above normal portion of profit, and it is imposed only in the MRRT years in which a relevant project generates above normal profit.

171 The differential or unequal operation of a law with respect to taxation was also considered in *Conroy v Carter*[279]. In dealing with an aspect of the legislation under consideration, about which the whole Court agreed[280], Taylor J stated the principle, affirmed in *Austin*, which his Honour then illustrated by specific example[281]:

> "[A] law with respect to taxation cannot, in general, be said so to discriminate if its operation is general throughout the Commonwealth

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279 (1968) 118 CLR 90.

280 *Poultry Industry Levy Collection Act* 1965 (Cth), s 6(1)(a).

281 (1968) 118 CLR 90 at 101.

> even though, by reason of circumstances existing in one or other States, it may not operate uniformly. Such a law is s 72(1) of the *Income Tax Assessment Act* 1936-1966 (Cth) which provides, inter alia, that sums for which the taxpayer is personally liable and which are paid in Australia by him in the year of income for land tax imposed under any law of the State shall be allowable deductions. This is a provision which operates generally throughout the Commonwealth and the fact that in some States there may be no legislation imposing land tax does not mean that it discriminates between States."

172 The plaintiffs accepted the correctness of the general principle but, as already explained, the plaintiffs distinguished the MRRT legislation as structurally different from income tax legislation. The distinction does not support the plaintiffs' characterisation of the MRRT legislation or the structure of the MRRT as discriminatory. Structural differences can be acknowledged, since the MRRT, unlike income tax, is levied on a narrow portion of profit. However, in their relationship to the tax base, State mining royalties imposed under the laws of the States are not dissimilar to the example of State land tax referred to by Taylor J in *Conroy v Carter*. Differential or unequal State mining royalties, required to be paid to State governments, are part of the business conditions under which taxpaying miners operate.

173 The method of calculation of any MRRT liability, coupled with the threshold of profit (less than or equal to $75 million) after which a taxpayer becomes liable to pay MRRT, establishes the taxable net profit upon which the uniform rate of taxation is imposed. The submissions that the inclusion of an allowance for State royalties in the method of calculation of any MRRT liability is an impermissible attempt by the federal Parliament to impose the MRRT on taxpayers on a differential or unequal basis, specifically at different effective rates, cannot be sustained.

174 The MRRT legislation operates generally, notwithstanding a method of calculation of a taxpayer's liability set by the federal Parliament which includes an allowance for State mining royalties. The rate of taxation applied to the tax base, above normal profit, is imposed equally throughout Australia. Any differential or unequal operation of the MRRT legislation does not arise from the MRRT legislation, the structure of the MRRT, or a discriminatory method of calculating a taxpayer's MRRT liability, but is due to different business conditions between States (unequal mining royalties).

Conclusions

175 For these reasons, the MRRT legislation does not contravene the proviso in s 51(ii). That conclusion renders it unnecessary to deal with the Commonwealth's alternative answer to the plaintiffs' challenge based on s 51(ii), which the Commonwealth supported by reference to an approach considered in

Austin[282] and subsequently referred to in *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vict)*[283].

176 The plaintiffs agreed that the conclusions drawn in relation to s 51(ii) and the MRRT would also dispose of their constitutional challenge to the MRRT based on s 99. For the reasons given above, the MRRT legislation does not contravene s 99 by creating a preference for one State over another.

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282 (2003) 215 CLR 185 at 247 [118].

283 (2004) 220 CLR 388 at 424-425 [91] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; [2004] HCA 53.

177 KIEFEL J. The second to fifth plaintiffs are subsidiaries of the first plaintiff and the holders of registered mining leases for iron ore granted under s 71 of the *Mining Act* 1978 (WA). They are obliged to pay royalties to the Crown in right of the State of Western Australia at the rate prescribed by reg 86 of the Mining Regulations 1981 (WA) made pursuant to ss 109 and 162(1) of the *Mining Act*.

178 Section 3(1) in each of the *Minerals Resource Rent Tax (Imposition—Customs) Act* 2012 (Cth), the *Minerals Resource Rent Tax (Imposition—Excise) Act* 2012 (Cth) and the *Minerals Resource Rent Tax (Imposition—General) Act* 2012 (Cth) (collectively "the *Imposition Acts*") imposes a minerals resource rent tax ("MRRT"), the liability for which is calculated under the *Minerals Resource Rent Tax Act* 2012 (Cth) ("the *MRRT Act*"). In these reasons, "the MRRT legislation" refers to the *Imposition Acts* and the *MRRT Act* together.

179 The calculation of MRRT is based upon "above normal profits" made on a miner's mining project interests[284]. The term "above normal profits" is not defined in the *MRRT Act*, but it may be inferred from the "low profit offsets", for which the Act provides[285], that profits are above normal when the sum of profits of each mining project interest of the miner and its related entities is more than $75 million.

180 The calculation of MRRT liability[286] involves the deduction of "MRRT allowances"[287] from a miner's mining profits before the MRRT rate is applied. The MRRT allowances include a royalty allowance[288]. The effect of the royalty allowance is that full credit is given to a miner for the amount of any mining royalties paid to the Commonwealth, a State or a Territory[289] for the mining of certain resources[290]. The central feature of the MRRT legislation, so far as concerns the plaintiffs' claims, is the allowance made for mining royalties incurred by a miner.

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284 *Minerals Resource Rent Tax Act* 2012 (Cth), ss 1-10, 10-1.

285 *Minerals Resource Rent Tax Act* 2012, ss 45-5, 45-10.

286 *Minerals Resource Rent Tax Act* 2012, s 10-5.

287 *Minerals Resource Rent Tax Act* 2012, Ch 3.

288 *Minerals Resource Rent Tax Act* 2012, s 10-10.

289 See the note to s 60-25(1) of the *Minerals Resource Rent Tax Act* 2012.

290 *Minerals Resource Rent Tax Act* 2012, s 20-5.

181 The mining royalties payable by a miner in respect of the mining of iron ore vary from State to State. The combined effect of full credit being given for the amount paid by a miner for mining royalties and the variation in the rate of royalties as between States, all other things being equal, is that miners in some States will pay more by way of MRRT. A miner in a State which imposes a lower rate of mining royalties pays more to the Commonwealth by way of MRRT than a miner in a State which imposes a higher rate of mining royalties. If a State increases mining royalties, miners there will pay less MRRT.

182 The States have the capacity to alter the applicable rate of mining royalties. Although there is little evidence of it having occurred, it is at least possible that a State may reduce its rate of royalty or make other concessions to the amount of mining royalties payable in order to encourage mining and the construction of infrastructure associated with it. If a State reduces mining royalties, miners there will pay more MRRT.

The plaintiffs' claims

183 The plaintiffs' principal claim is that MRRT, as calculated under the *MRRT Act* and imposed by the *Imposition Acts*, offends s 51(ii) of the Constitution[291], the words of which contain a positive prohibition that a law with respect to taxation not discriminate between the States[292]. There is no dispute that s 3(1) of each of the *Imposition Acts* is a law with respect to taxation. The plaintiffs also contend that the MRRT legislation gives preference to one State over another, in contravention of s 99 of the Constitution[293]. This question is essentially the same as that arising under s 51(ii)[294].

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291 Section 51(ii) provides:

> "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to … taxation; but so as not to discriminate between States or parts of States".

292 *New South Wales v The Commonwealth* (*Work Choices Case*) (2006) 229 CLR 1 at 127 [219]-[220]; [2006] HCA 52.

293 Section 99 provides:

> "The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof."

294 See *R v Barger* (1908) 6 CLR 41 at 107 per Isaacs J; [1908] HCA 43.

184 The plaintiffs seek to apply the *Melbourne Corporation* doctrine[295]. The plaintiffs allege that the MRRT legislation has the effect of detracting from, impairing or curtailing the ability of a State to differentiate itself from other States by determining an applicable rate of mining royalties. Any reduction a State makes simply results in an increase in MRRT payable by a miner. This is alleged to affect the capacity of a State to function as a government with sovereign control over its territory and the economic development of its natural resources.

185 The abovementioned effect, of an increase in the amount of MRRT payable by a miner, which results where a State reduces its rate of mining royalties or exempts a miner from paying them, is also said to detract from, impair or curtail a State in granting aid to mining contrary to the terms of s 91 of the Constitution[296].

The s 51(ii) issue

186 The conclusion for which the plaintiffs contend is that the MRRT legislation discriminates between the States contrary to s 51(ii). It discriminates because the amount of MRRT paid by a miner varies according to the State in which the miner has its mining interests and according to the State to which it pays mining royalties. It may be noted at the outset that the amount of MRRT payable will vary according to a number of factors provided for in the *MRRT Act*, in the nature of items of expenditure and other allowances.

187 The plaintiffs' argument is said to rely upon the "structural" aspects of the *MRRT Act*. Those aspects of the *MRRT Act* which the plaintiffs identify as relevant and significant are that: mining royalties are expressly excluded as items of expenditure; full credit is given for mining royalties by way of allowance; and the amount paid by way of mining royalties is a critical element of the calculation of a miner's ultimate MRRT liability. An understanding of the workings of the *MRRT Act* is therefore necessary to a consideration of the plaintiffs' argument.

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295 After *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31; [1947] HCA 26.

296 Section 91 provides:

> "Nothing in this Constitution prohibits a State from granting any aid to or bounty on mining for gold, silver, or other metals, nor from granting, with the consent of both Houses of the Parliament of the Commonwealth expressed by resolution, any aid to or bounty on the production or export of goods."

The calculation of MRRT

188 By s 10-1 of the *MRRT Act*, a miner is liable to pay MRRT, for an MRRT year[297], equal to the sum of its MRRT liabilities for each of its mining project interests[298] for that year. The formula provided by s 10-5 for calculating a miner's MRRT liability for a mining project interest in an MRRT year is:

MRRT liability = MRRT rate × (Mining profit − MRRT allowances).

189 The MRRT rate is the rate of taxation at which a miner will be assessed with respect to its mining profits. The effective rate, given by the formula set out in s 4 in each of the *Imposition Acts*, is 22.5 per cent.

190 Mining profits are dealt with in Pt 2-3 of the *MRRT Act*. In general terms, a miner's mining profit is the excess of its mining revenue over mining expenditure for the year[299]. Certain expenses are excluded from mining expenditure[300] in the calculation of mining profit. Mining royalties are an item of "excluded expenditure"[301]. Other excluded expenditure includes items such as financing costs[302], payments under hire purchase agreements[303] and the cost of acquiring rights and interests in projects[304].

191 Mining royalties are then included amongst the MRRT allowances which are to be deducted from the figure for mining profit. Royalty allowances appear as item 1 in the order of the allowances which are to be applied in the calculation of MRRT liability[305]. Other allowances include pre-mining and mining loss allowances, a starting base allowance, and transferred pre-mining and mining loss allowances.

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297 Defined as each financial year starting on or after 1 July 2012: *Minerals Resource Rent Tax Act* 2012, ss 10-25, 300-1.

298 *Minerals Resource Rent Tax Act* 2012, ss 15-5, 300-1.

299 *Minerals Resource Rent Tax Act* 2012, s 25-1.

300 *Minerals Resource Rent Tax Act* 2012, Pt 2-3, Div 35, subdiv 35-B.

301 *Minerals Resource Rent Tax Act* 2012, s 35-40.

302 *Minerals Resource Rent Tax Act* 2012, s 35-50.

303 *Minerals Resource Rent Tax Act* 2012, s 35-55.

304 *Minerals Resource Rent Tax Act* 2012, s 35-35.

305 *Minerals Resource Rent Tax Act* 2012, s 10-10.

192 Chapter 3 deals with MRRT allowances and Pt 3-1, Div 60 with royalty allowances. As a guide to Div 60, it is said that "[m]ining royalties paid to the Commonwealth, States and Territories reduce a miner's MRRT liabilities for a mining project interest"[306]. The stated objects of the Division, by s 60-5, include reducing "a miner's MRRT liability relating to profits relating to taxable resources, to the extent those taxable resources are subject to Commonwealth, State and Territory royalties". A "mining royalty" is defined[307] as expenditure made under a Commonwealth, State or Territory law in relation to a taxable resource extracted under authority of a production right.

193 A miner has a royalty allowance for a mining project interest if the miner has a mining profit for that interest for the year and one or more "royalty credits" relating to the interest[308]. A royalty credit arises when a miner incurs a liability, inter alia, by way of a mining royalty[309]. A royalty credit may be transferred to the miner's other mining project interests and may be used in subsequent years[310].

194 Section 60-25 explains how a royalty credit is calculated. The amount is determined first by reference to the liability incurred for mining royalties. That liability is then divided by the MRRT rate. In the example given in the section, where a miner pays to a State mining royalties of $22.5 million in an MRRT year, the royalty credit is:

$$\frac{\text{\$22.5 million}}{\text{MRRT rate [22.5 per cent]}} = \text{\$100 million.}$$

195 In summary, for every $22.5 million paid by a miner by way of mining royalties, a credit of $100 million is given. The royalty credit will thus be 4.4 recurring times each dollar paid, or otherwise incurred, by way of State mining royalties. As the note to s 60-25(1) says, the calculation "grosses-up the royalty payment to an amount that will reduce the ultimate MRRT liability by the amount of the royalty payment". The plaintiffs' argument does not depend upon the provisions which have the effect of grossing up mining royalties. Their

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306 *Minerals Resource Rent Tax Act* 2012, s 60-1.

307 *Minerals Resource Rent Tax Act* 2012, ss 35-45(1), 300-1.

308 *Minerals Resource Rent Tax Act* 2012, ss 60-10, 300-1.

309 *Minerals Resource Rent Tax Act* 2012, s 60-20(1)(a).

310 *Minerals Resource Rent Tax Act* 2012, s 60-25(2).

argument is the same regardless of those provisions. It centres upon full credit being given for mining royalties actually paid or incurred.

196 A miner's royalty allowance is so much of the royalty credits as does not exceed the mining profit[311]. The royalty allowance, together with all other allowances, is deducted from the figure for mining profit in accordance with the formula in s 10-5, which is set out above[312]. A miner's liability for MRRT is then determined by multiplying that figure by the MRRT rate. By way of example, if the mining profit is $500 million and the MRRT allowances are $200 million, a miner's liability will be:

$300 million × 22.5 per cent = $67.5 million.

197 Because the calculation of a royalty credit, and therefore the royalty allowance, gives full credit for mining royalties in fact incurred by a miner, it follows that where the rate of royalty charged by one State varies from other States there will be differences in miners' liability for MRRT. The plaintiffs provided a series of equations transforming the formula in s 10-10 that they say demonstrate the impact of royalty allowances on the ultimate liability for MRRT. Those equations, which refer to a so-called "effective rate" of MRRT, are not of particular assistance to the issues before the Court and may be put to one side.

198 There will be other differences in liability for MRRT, as between miners generally and as between miners in different States, resulting from the other allowances provided for in the *MRRT Act*. Further, MRRT liability will differ as between miners because their mining expenditure, which is deducted from revenue to ascertain mining profit, will be different. Such expenditure may include State taxes and levies other than mining royalties, such as payroll tax, workers' compensation premiums and the like. These taxes and levies may also differ as between States.

Consideration of the s 51(ii) issue

Discrimination

199 Discrimination is a concept that arises for consideration in a variety of constitutional contexts[313]. Section 51(ii) prohibits a Commonwealth taxation law discriminating "between States or parts of States". The discrimination of which

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311 *Minerals Resource Rent Tax Act* 2012, s 60-15(1).

312 See [188] above.

313 *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595 at 629 [40]; [2004] HCA 19.

it speaks is discrimination on account of locality. Section 51(ii) requires that the States be treated alike and that a Commonwealth law relating to taxation not differentiate in its effect between the States.

200 In *R v Barger*[314], Isaacs J said that "[d]iscrimination between localities in the widest sense means that, because one man or his property is in one locality, then, regardless of any other circumstance, he or it is to be treated differently from the man or similar property in another locality"[315]. Although his Honour was in dissent in *Barger*, with Higgins J, this view of s 51(ii) was subsequently cited with approval in *Cameron v Deputy Federal Commissioner of Taxation*[316], a case where a different standard was to be applied to the value of livestock solely by reference to "their State situation"[317].

201 Another statement by Isaacs J in *Barger* as to s 51(ii) is worthy of mention. It was referred to with approval by Evatt J in *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd*[318] and on appeal by the Privy Council in that case[319]. Isaacs J said[320] that the "pervading idea" of the discrimination to which s 51(ii) refers is "the preference of locality merely because it is locality … It does not include a differentiation based on other considerations, which are dependent on natural or business circumstances". Although his Honour was speaking of the reference in s 51(ii) to "parts of States", what he said applies generally to the notion of discrimination with which s 51(ii) is concerned.

202 Although discrimination can be an abstract concept, working out whether the effect of legislation is discriminatory is largely a practical question involving the consideration of unequal treatment[321]. It involves a comparison[322]. If a

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314 (1908) 6 CLR 41.

315 *R v Barger* (1908) 6 CLR 41 at 110.

316 (1923) 32 CLR 68 at 72 per Knox CJ, 79 per Rich J; [1923] HCA 4.

317 *Cameron v Deputy Federal Commissioner of Taxation* (1923) 32 CLR 68 at 76 per Isaacs J.

318 (1939) 61 CLR 735 at 781; [1939] HCA 27.

319 *W R Moran Pty Ltd v Deputy Federal Commissioner of Taxation (NSW)* (1940) 63 CLR 338 at 348; [1940] AC 838 at 856-857.

320 *R v Barger* (1908) 6 CLR 41 at 108.

321 *Street v Queensland Bar Association* (1989) 168 CLR 461 at 510; [1989] HCA 53.

Commonwealth taxation law provides that the same measure is to apply to all persons or things subject to the tax, it would not generally be regarded as likely to discriminate in fact. Where a difference results from the operation of a taxation law, the question arises whether that difference is accounted for by the geographical situation of the subject of the tax. Importantly, for there to be the discrimination of which s 51(ii) speaks, the difference must be produced by the Commonwealth law itself and by reference to that geographical situation. There may not be discrimination where the difference results from the provisions of a State law. Section 51(ii) does not prohibit a taxation law from operating differentially in all respects. It does not require that a taxation law control the effect of other, external, factors which may be productive of a difference.

A general deduction?

203 The reference in *Barger* to "business circumstances"[323] brings to mind the possibility that the *MRRT Act*, in giving full credit for State mining royalties, does little more than permit a miner something in the nature of a deduction of a business expense from mining profits before those profits are subjected to taxation. As the Commonwealth points out, miners are able to deduct State imposts when calculating their liability for income tax. It is not suggested that Commonwealth income tax legislation, in the provision for general deductions which it allows for business expenses from income, operates so as to discriminate in any relevant respect. The allowance for mining royalties in the *MRRT Act* does not appear to be so different from deductions of this kind. In common with them, the allowance for mining royalties operates generally and does not discriminate between miners in different States. The allowance is provided whenever mining royalties are incurred by a miner, regardless of the miner's locality.

204 As the plaintiffs concede, their argument could not succeed had mining royalties been treated as mining expenditure under the *MRRT Act*. But they point out that the *MRRT Act* treats mining royalties differently from other mining expenditure. It expressly excludes them as items of mining expenditure. It further differentiates mining royalties from expenditure by allowing for them in full.

205 The State of Queensland, intervening in support of the plaintiffs, submits that the royalty allowance is to be distinguished from other, more general deductions because what the *MRRT Act* deducts is not the royalty paid, but a product of the operation of "grossing up" upon an operand. What is extracted by the division by the MRRT rate, in the formula in s 60-25, is not the amount of

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322 *Street v Queensland Bar Association* (1989) 168 CLR 461 at 506.

323 See [201] above.

royalties paid, but the product of the calculation. This would seem to suggest that the royalty payment has, in the process, lost its quality as an item of business expenditure.

206 It must be accepted that the *MRRT Act* treats the payment of mining royalties separately, even from other mining allowances, in order that they may be "grossed up" and allowed for. Nevertheless, it is the payment of mining royalties upon which that calculation is based. Putting aside the inflated figure for royalty allowance, upon which the plaintiffs' argument does not rely, it is the payment of mining royalties for which full credit is given. The fact that it is allowed for in full is a distinction without a point. The *MRRT Act* plainly acknowledges mining royalties as a sum which is likely to have been paid by miners to a State in the course of mining operations. The relevant effect of the royalty allowance is to give credit for what has been paid. It applies whenever such an expense is incurred and regardless of where it is incurred.

The credit of royalty payment as a standard

207 On its face, the calculation provided for by ss 10-5 and 25-5 would appear to operate uniformly. MRRT liability is determined by first identifying mining revenue, and then deducting certain mining expenditure and mining allowances. A uniform MRRT rate is applied to the figure arrived at. But the plaintiffs submit that it would be wrong to think that, because the *Imposition Acts* provide for a rate of 22.5 per cent, MRRT is levied uniformly.

208 The plaintiffs contend that the legislation in *Cameron* is analogous in effect to the *MRRT Act*. The Income Tax Regulations 1917 (Cth) there considered provided that, so far as concerned profits made on the sale of livestock, different values were to be placed on stock of the same kind in different States. For example, a horse in New South Wales was to be valued at £8, but a horse in Victoria at £15 and in Queensland £4.

209 The Deputy Federal Commissioner of Taxation proffered the explanation that the standard adopted was not arbitrary, but the actual average value of livestock in each State, which was merely recognised and enforced by the Regulations as a convenient and just method of valuing stock[324]. That explanation was rejected. The reasons of Isaacs J[325] disclose that the value attributed to stock according to the Regulations was not in fact a "fair average value". Previously, the value of stock was to be that as determined by the Commissioner, but an amendment to the Regulations specified set values in a

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324 *Cameron v Deputy Federal Commissioner of Taxation* (1923) 32 CLR 68 at 73-74.

325 *Cameron v Deputy Federal Commissioner of Taxation* (1923) 32 CLR 68 at 74-77.

schedule[326]. Had the Commissioner retained discretion to make the determination, the Commissioner would have had to take account of values on either side of the relevant State borders. What the Regulations produced was a value rigidly fixed for the State in which the stock was located. Thus a horse in Albury was worth £8, whereas the same horse, located across the river at Wodonga, was to be valued at £15.

210 Different standards were applied to different States by the Regulations in *Cameron*[327]. This was the source of the discrimination. What was produced by the Regulations was a standard which was identified not by reference to value in fact, but by reference to locality. Unsurprisingly, the Regulations were held to offend s 51(ii). As was pointed out by Isaacs J[328], the only discrimen provided by the Regulations was "which State?" *Cameron* provides an unusually clear example of s 51(ii) discrimination.

211 The royalty allowance provided for in the MRRT calculation does not operate in this way. The standard it applies is the actual amount of mining royalties which a miner has incurred. In contrast to the facts in *Cameron*, any variation in MRRT payable from miner to miner results from that fact and not from any State-based standard applied by the *MRRT Act*. The only causal connection between the royalty allowance and a State is that mining royalties are only incurred by a miner because of a State law. The *MRRT Act* says nothing about the quantum of mining royalties except that they are to be allowed in full when incurred. This tells against notions of discrimination.

The cause of the difference?

212 In *Colonial Sugar Refining Co Ltd v Irving*[329] ("*Irving*") and in *Barger*, it was acknowledged that duties and levies in different parts of the Commonwealth would produce a differential effect for a Commonwealth law. It had been accepted by the framers of the Constitution that taxation may produce an indirect effect which was not uniform[330].

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326 Statutory Rules 1918, No 315.

327 (1923) 32 CLR 68 at 77.

328 *Cameron v Deputy Federal Commissioner of Taxation* (1923) 32 CLR 68 at 73; see also at 72 per Knox CJ.

329 [1906] AC 360.

330 *R v Barger* (1908) 6 CLR 41 at 69-70.

213 The *Excise Tariff* 1902 (Cth), considered in *Irving*, exempted from the duties thereby imposed, goods upon which State customs duties had already been paid. However, the scale of duties differed as between the States so that the exemption operated unequally. An analogy with the provisions of the *MRRT Act* in this case is evident. Lord Davey, speaking for the Judicial Committee of the Privy Council, said[331]:

> "The rule laid down … is a general one, applicable to all the States alike, and the fact that it operates unequally in the several States arises not from anything done by the Parliament, but from the inequality of the duties imposed by the States themselves."

214 A different view was taken of a similar exemption by the majority in *Barger* and this drew strong dissents from Isaacs and Higgins JJ. *Barger* is also authority for a view concerning powers reserved to the States which has long since been discredited[332]. This aspect of the case may be put to one side.

215 *Barger* was concerned with the *Excise Tariff* 1906 (Cth), which imposed duties of excise upon specified goods at specified rates. However, the tariff did not apply to goods manufactured by any person in any part of the Commonwealth under conditions of remuneration of labour which satisfied any one of four prescribed matters. The majority held there to be discrimination in the taxing scheme by reference to the criterion of locality because of the possibility that goods of the same class would be excisable in some parts of the Commonwealth, but not others[333]. Isaacs J saw the exemption as a general rule operating unequally only because of the inequality of industrial circumstances[334]. There may be something to be said for the view[335] that the approach of Isaacs J in *Barger* is more consonant with the decisions in *Cameron* and in *Irving*. It is not necessary to resolve the differences of opinion in *Barger* for the purposes of this matter.

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331 *Colonial Sugar Refining Co Ltd v Irving* [1906] AC 360 at 367, cited with approval in *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vict)* (2004) 220 CLR 388 at 434 [127]-[128]; [2004] HCA 53.

332 See *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vict)* (2004) 220 CLR 388 at 434 [129].

333 *R v Barger* (1908) 6 CLR 41 at 80.

334 *R v Barger* (1908) 6 CLR 41 at 110-111.

335 *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735 at 780-781 per Evatt J (in dissent).

216 In *Conroy v Carter*[336], Taylor J, with whom Barwick CJ, McTiernan, Kitto, Menzies and Windeyer JJ relevantly agreed, after referring to decisions concerning the United States Constitution and its command of geographical uniformity, said that it was not necessary, for a tax to be lawful by reference to s 51(ii), that it select objects which exist uniformly in all States. A law cannot, in general, be said to discriminate if its operation is general throughout the Commonwealth even if, by reason of circumstances existing in one or more States, it may not operate uniformly. This reflects the view expressed in *Irving*. Taylor J gave the example of a State land tax, which Commonwealth income tax legislation allows as a deduction from income in the relevant year. That provision for deduction, his Honour observed, operates generally throughout the Commonwealth. The fact that in some States there may be no legislation imposing land tax does not mean that the Commonwealth income tax legislation discriminates between the States.

217 In the decision of the Full Court of the Supreme Court of Queensland in *The Colonial Sugar Refining Co Ltd v Irving*[337], Griffith CJ concluded that "[i]f the imposition of these duties leads to an inequality, it is not a defect in the Federal law; it arises from the fact that the laws of the States were different, which is quite another thing". His Honour also observed that, were inequality to be viewed by reference to the operation of State law, the power of the federal Parliament would be limited by the laws of the States and by the mode in which the States had exercised their legislative powers. These observations point up the difficulties inherent in the plaintiffs' argument, which identifies differences in State laws as relevant to Commonwealth laws, particularly given the supremacy of the latter by reason of s 109 of the Constitution.

218 The plaintiffs argue that the *MRRT Act* cannot be viewed in the same way as the legislation in the abovementioned cases because the *MRRT Act* itself provides for differential rates. It makes State mining royalties incurred an essential integer in the calculation of a miner's ultimate liability for MRRT. The calculation of royalty allowance is critical to that liability. The importance of this aspect of the plaintiffs' argument may be seen from their statements that: the discrimination resides in the calculation; the *MRRT Act* is discriminatory because the royalty allowance is the basis of the Act's structure; and "the tax is one calculated directly by reference to the amount of the royalty".

219 In substance, payment of mining royalties to a State is treated no differently from any other allowance or deduction by the *MRRT Act*, save in the respects previously mentioned. Those differences do not detract from the fact

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336 (1968) 118 CLR 90 at 100-101; [1968] HCA 39.

337 [1903] St R Qd 261 at 277.

that mining royalties incurred are an amount for which credit is given and which reduces the amount of mining profits to be subjected to the MRRT rate. Mining royalties are essential to the calculation of a miner's ultimate MRRT liability in the same way as are other items of mining expenditure and mining allowances.

An equalised tax burden?

220 The State of Queensland contends that the *MRRT Act* seeks to bring about equality between miners in different States. It was the object of the *MRRT Act* to equalise a miner's overall tax burden. This can be seen by it operating so as to increase the MRRT liability in States with lower royalty rates, and vice versa.

221 In support of that argument, reliance is placed upon a statement made by Griffith CJ for the majority in *Barger*. After referring to what had been said in *Irving*, that it was the effect of the State, not the Commonwealth, laws that created the unequal burden, his Honour said[338]:

> "*E converso*, if the Excise duty had been made to vary in inverse proportion to the Customs duties in the several States so as to make the actual incidence of the burden practically equal, that would have been a violation of the rule of uniformity."

222 The *MRRT Act* does not operate as does the hypothetical law referred to in *Barger*. The law to which Griffith CJ referred is a law which itself adjusts according to the amount of State duties paid, so that the overall amount of Commonwealth and State taxes is equalised. By way of example, if mining royalties of $2 were paid by a miner in one State and $4 by a miner in another, a Commonwealth law would operate in the way contemplated by Griffith CJ if it provided that the firstmentioned miner pay Commonwealth tax of $4 and the second $2. The *MRRT Act* does not operate in this way. It is not structured to ameliorate the effect of the State mining royalties for miners, but rather makes provision for miners' business circumstances, which may be affected by various State laws. It does not breach the constitutional prohibition in s 51(ii).

Conclusion on the *MRRT Act* and s 51(ii)

223 In *Conroy v Carter*, Menzies J[339], with whom Barwick CJ and McTiernan J agreed, spoke of the discrimination to which s 51(ii) refers in the context of a taxation law which imposes a taxation burden. It may be accepted that s 51(ii) also prohibits a benefit which applies differentially as between the States. Expressing what his Honour said more generally, s 51(ii) forbids a

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338 *R v Barger* (1908) 6 CLR 41 at 70-71.

339 *Conroy v Carter* (1968) 118 CLR 90 at 103.

taxation law which operates to benefit or burden a person because of some connection with a State, but which would not be granted to or imposed on other persons not having that connection. In determining whether a law operates in that way, it is to the Commonwealth law itself that attention is directed.

224 The *MRRT Act* provides generally for a royalty allowance, the calculation of which includes a credit for the whole amount incurred by a miner by way of mining royalties paid to a State. There is no standard of locality, of connection to a State, in the allowance made and in the deduction for which it provides. The standard is the fact and amount of payment. Any difference in the amount of the deduction for mining royalties results not from the *MRRT Act* but from the State legislation.

225 Those who drafted the *MRRT Act* may be taken to have been aware that rates of mining royalties differ as between the States. The point, however, is not that there is some underlying assumption of difference on which the *MRRT Act* operates, as the plaintiffs and the State of Queensland suggest, but rather that the *MRRT Act* allows for whatever mining royalties are required to be paid under State legislation. It is not the Commonwealth Act that creates any inequality or difference, but State legislation. The Commonwealth is entitled to do what the States do and base its taxation measures on considerations of fairness, so long as it adheres to the constitutional injunction not to prefer States[340].

226 A State royalty is treated by the MRRT legislation as an amount which is likely to have been incurred by a miner in connection with its mining activities. A miner's MRRT liability will be affected by the expenses which it incurs, the other allowances for which the *MRRT Act* provides and whether, in a given MRRT year, a royalty credit has been transferred or carried over. This brings to mind what was said by Griffith CJ in the Supreme Court of Queensland in *The Colonial Sugar Refining Co Ltd v Irving*[341], that the difference effected by the *Excise Tariff* 1902 was not discrimination created by Commonwealth law, but "a difference in the individual incidence of taxation".

227 The MRRT legislation does not discriminate between States and does not create a preference for one over another.

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340 *R v Barger* (1908) 6 CLR 41 at 108; *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735 at 781-782; *W R Moran Pty Ltd v Deputy Federal Commissioner of Taxation (NSW)* (1940) 63 CLR 338 at 348; [1940] AC 838 at 856-857.

341 [1903] St R Qd 261 at 276.

The *Melbourne Corporation* doctrine

228 The plaintiffs' claim that the MRRT legislation affects a State's capacity to control its sovereign territory and to deal with its natural resources, and Western Australia's submissions to similar effect, appear to reflect arguments which were put by Western Australia, and which were rejected, in *Western Australia v The Commonwealth* (*Native Title Act Case*)[342], as Hayne, Bell and Keane JJ observe in their reasons.

229 The MRRT legislation is not directed to the States and does not affect the government of a State. It does not deny the ability of a State to fix a rate of mining royalty. Any effect upon a State's ability to offer incentives, by reducing that rate or providing an exemption, is not a burden or limit respecting a State's constitutional functions. I agree with the reasons of Hayne, Bell and Keane JJ on this issue.

Section 91

230 Section 91[343], the plaintiffs submit, takes effect as a prohibition directed to any law made under a head of power in the Constitution which may hinder a State from providing the abovementioned incentives to a miner, as an encouragement to mining activity. In this regard, the plaintiffs rely upon the express provision, made in s 91, that "[n]othing in this Constitution prohibits a State from granting any aid".

231 Section 91 must be read with s 90[344]. In *Seamen's Union of Australia v Utah Development Co*[345], the only decision of this Court which has been

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342 (1995) 183 CLR 373 at 478-479, 481; [1995] HCA 47.

343 See [185], fn 296 above.

344 Section 90 of the Constitution provides:

> "On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.
>
> On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect, but any grant of or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, one thousand eight hundred and ninety-eight, and not otherwise."

concerned with s 91, this Court discussed the relationship between ss 90 and 91. Mason J, with whom Jacobs and Aickin JJ agreed, observed[346] that s 90 contains a prohibition which arises from the exclusive conferral on the Commonwealth Parliament of a power to impose duties of customs and excise and to grant bounties on the production and export of goods. The function of s 91 was said to relax that prohibition. The words "[n]othing in this Constitution" were held to refer back primarily, if not exclusively, to s 90 because there was no other provision in the Constitution which contained a relevant prohibition.

232 What was said in *Seamen's Union* provides the answer to the plaintiffs' argument. Contrary to the plaintiffs' contention, that case did decide that the purpose of s 91 is to qualify the prohibition in s 90. Section 91 does not itself operate as a prohibition on Commonwealth laws. Section 91 confirms that a State may grant aid, which is to say a State Parliament may authorise expenditure by this means; it does not speak of how Commonwealth laws might interact with that grant.

233 It is therefore not strictly necessary to point out that the plaintiffs do not refer to "aid" in the nature of a parliamentary grant of money, which is the sense in which it appears to have been understood in *Seamen's Union*[347]. Stephen J, in particular, appears to have taken up the argument put by the State of Queensland there, that aid refers to a pecuniary payment authorised by Parliament. His Honour said that history supports a narrower view of aid than as general assistance[348]. On that view, the incentives to which the plaintiffs refer would not amount to aid within the meaning of s 91.

Conclusion and orders

234 I agree with the orders proposed by Hayne, Bell and Keane JJ.

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345 (1978) 144 CLR 120; [1978] HCA 46.

346 *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120 at 147.

347 See (1978) 144 CLR 120 at 126 per Barwick CJ, 135 per Gibbs J, 140 per Stephen J, 148 per Mason J.

348 *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120 at 140.