

*University of New South Wales*  
University of New South Wales Faculty of Law Research Series  
2011

---

*Year 2011*

*Paper 50*

---

State Immunity from Commonwealth Laws:  
Austin v Commonwealth

Amelia Simpson\*

\*Australian National University

This working paper is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

<http://law.bepress.com/unswwps-flrps11/art50>

Copyright ©2011 by the author.

# State Immunity from Commonwealth Laws: Austin v Commonwealth

Amelia Simpson

## Abstract

The constitutional principle immunising the States from certain kinds of Commonwealth laws traces back, in its current form, to the High Court's 1947 decision in *Melbourne Corporation v Commonwealth*. The contours of that principle – known as the State immunity principle or the Melbourne Corporation principle – have never been entirely clear.

However, a measure of certainty followed the Court's endorsement, through the 1990s, of the formulation contained in the judgment of Mason J in *Queensland Electricity Commission v Commonwealth* ("QEC"). He framed the principle as comprising 2 elements, or limbs. The first limb, described in terms of discrimination, dealt with Commonwealth laws that singled out States for special burdens or disabilities; the second limb dealt with Commonwealth laws which, while not singling States out, operated so as to destroy or curtail their continued existence or capacity to function.

## State Immunity from Commonwealth Laws: *Austin v Commonwealth* Amelia Simpson, 20 February, 2004

### Background

The constitutional principle immunising the States from certain kinds of Commonwealth laws traces back, in its current form, to the High Court's 1947 decision in *Melbourne Corporation v Commonwealth*.<sup>1</sup> The contours of that principle – known as the State immunity principle or the *Melbourne Corporation* principle – have never been entirely clear.

However, a measure of certainty followed the Court's endorsement, through the 1990s, of the formulation contained in the judgment of Mason J in *Queensland Electricity Commission v Commonwealth* ("QEC").<sup>2</sup> He framed the principle as comprising 2 elements, or limbs.<sup>3</sup> The first limb, described in terms of discrimination, dealt with Commonwealth laws that singled out States for special burdens or disabilities; the second limb dealt with Commonwealth laws which, while not singling States out, operated so as to destroy or curtail their continued existence or capacity to function.

*Austin v Commonwealth*,<sup>4</sup> decided by the High Court in February 2003, represents the Court's first detailed examination of the *Melbourne Corporation* principle in several years. The plaintiffs, Justice Austin of the NSW Supreme Court and Master Kings of the Victorian Supreme Court, disputed their liability to a "superannuation

---

<sup>1</sup> (1947) 74 CLR 31.

<sup>2</sup> (1985) 159 CLR 192.

<sup>3</sup> *Id* at 217.

<sup>4</sup> (2003) 195 ALR 321; [2003] HCA 3.

contributions surcharge” assessed and imposed under Commonwealth statute.<sup>5</sup> The enactments under challenge were collateral to a wider scheme imposing a surcharge on the superannuation benefits accruing to high income earners. The purpose of the impugned provisions was to equalise the liability of State judges, as against other high-income earners. State judicial pension schemes are not covered by the general provisions in parallel statutes; as “unfunded” schemes, paid out of consolidated revenue, those schemes do not generate a fund able to absorb the surcharge. As a further complication, imposing the surcharge directly upon the States as employers may have infringed s 114 of the Constitution, which prohibits Commonwealth taxation of State property.

Liability was, then, imposed directly on the judges. Judges appointed before 7 December 1997 were exempted from the surcharge.<sup>6</sup> For others, surcharge liability was calculated upon notional contributions made to a notional fund. The liability continued to grow if a judge remained on the bench after becoming entitled to a pension. As the liability could run to hundreds of thousands of dollars, New South Wales, at least, amended its judicial pension scheme to allow judges to commute part of their pensions to pay the tax.<sup>7</sup>

Master Kings was found to fall outside the tax’s reach, as she was deemed a “judge” appointed before December 1997.<sup>8</sup> Justice Austin was appointed in 1998, meaning that his liability turned on the constitutionality of the impugned Commonwealth provisions.

---

<sup>5</sup> *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Act 1997 (Cth)*; *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997 (Cth)*.

<sup>6</sup> *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997 (Cth)*, s 7.

<sup>7</sup> *Judges’ Pensions Act 1953 (NSW)* as amended by the *Judges’ Pensions Amendment Act 1998 (NSW)*.

## The Decisions

There were four judgments delivered. Chief Justice Gleeson and McHugh J each wrote alone, while Gaudron, Gummow and Hayne JJ delivered a joint judgment. Justice Kirby dissented. (Justice Callinan, the only member of the Court liable to pay the surcharge, did not sit.)

While the plaintiffs made several constitutional arguments, the one winning majority acceptance was the *Melbourne Corporation* argument. The plaintiffs had framed their case under both supposed limbs. The whole Court agreed that *Melbourne Corporation* governed the case and a majority found that the Commonwealth's provisions infringed that principle. However, the judgments differed in their enthusiasm for the two-limbed formulation.

The joint judgment of Gaudron, Gummow, and Hayne JJ rejected a separate “discrimination limb” on two main bases. First, they said it did not make coherent use of the concept of discrimination, which is inherently and explicitly comparative.<sup>9</sup> The test applied under the *QEC* first limb didn't conform to that pattern, as it did not demand precise comparisons. Second, they found that a close reading of the judgments in *Melbourne Corporation* did not support a separate discrimination limb.<sup>10</sup> *Melbourne Corporation* was, in their view, concerned with a Commonwealth law's effect upon a State's capacity to function, rather than the scope of a law's operation.

---

<sup>8</sup> (2003) 195 ALR 321 at 323 [4] per Gleeson CJ, 347 [77] per Gaudron, Gummow and Hayne JJ, 378 [206] per McHugh J, 394 [265] per Kirby J.

<sup>9</sup> Id at 356 [118]-[119].

<sup>10</sup> Id at 363 [139].

While the *Austin* joint judgment insisted that *Melbourne Corporation* is best understood as a single principle, no precise formulation emerged. Rather, the joint judgment appeared content to leave the principle fluid, saying simply that concepts like “special burden”, and “curtailment” of “capacity ... to function as a government” would continue to be useful.<sup>11</sup>

In finding that the Commonwealth’s superannuation surcharge as applied to State judges infringed the *Melbourne Corporation* principle, the joint judgment emphasised the importance of judicial remuneration arrangements – in attracting and retaining suitable judges and securing their independence.<sup>12</sup> The Commonwealth’s tax, it was found, effectively forced States to adjust that remuneration in order to safeguard judicial standards. For this reason, the joint judgment found that the law impaired the States in their independent constitutional functioning.<sup>13</sup>

The puzzling thing about the joint judgment is that its application of the *Melbourne Corporation* principle doesn’t comport readily with its earlier abstract analysis and exposition. Specifically, the joint judgment’s conclusions seem to depend upon the fact that State judges were singled out for a special burden. The selective application of the Commonwealth provisions clearly counted for something, in spite of the judgment’s earlier insistence that such singling out shouldn’t dictate any particular result. As some judgments mentioned, State judges bear other federal taxes, and States presumably factor that in when setting judicial remuneration. So why was the superannuation surcharge considered qualitatively different? I’ll suggest one possible explanation later in this paper.



<sup>11</sup> Id at 357 [124].

<sup>12</sup> Id at 368 [159]-[160].

Chief Justice Gleeson didn't quibble with the language of "discrimination" in describing the singling out of States for special burdens, though he did insist that "[d]iscrimination is an aspect of a wider principle; and what constitutes relevant and impermissible discrimination is determined by that wider principle."<sup>14</sup> He emphasised that the concept of "discrimination" picks up laws with a *purpose* inimitable to federation, while the other part of the principle – the old second limb – focuses upon the effects of impugned Commonwealth laws.<sup>15</sup> He found that the effect of the Commonwealth law in this case was to force States to alter their judicial pension arrangements, which diminished their independent constitutional status and integrity.<sup>16</sup>

Justice McHugh was the only judge to endorse and defend the two-limbed formulation of the State immunity principle. He thought the two-limbed formula was well settled, and that departing from it may lead to unforeseen problems in the future. He saw no reason to tinker with clear, established, doctrine in a realm that is "vague and difficult" at the best of times.<sup>17</sup> Applying the first limb "discrimination" test, McHugh J found that the Commonwealth's provisions, in singling State judges out, placed a burden upon the States and so was invalid.<sup>18</sup> As his reasoning indicates, McHugh J accepted that the first limb has the same rationale as the second limb – protecting State constitutional integrity and autonomy – even while placing less emphasis upon a Commonwealth law's substantive effects.<sup>19</sup>

---

<sup>13</sup> Id at 371-372 [173]-[174].

<sup>14</sup> Id at 331 [24].

<sup>15</sup> Id at 332 [24].

<sup>16</sup> Id at 334 [29].

<sup>17</sup> Id at 383 [224].

<sup>18</sup> Id at 384-385 [228]-[229].

<sup>19</sup> Id at 335 [232].

Justice Kirby's dissenting judgment is interesting, in that it endorses the joint judgment's doctrinal revision yet applies that revised doctrine to reach the opposite result. In Kirby J's view, the consequences for States of their judges' bearing the surcharge liability were not substantial enough to attract immunity.<sup>20</sup> Any impairment of constitutional functioning was likely to be marginal, he thought, and the concerns animating the other judgments had been overstated.<sup>21</sup> Importantly, Kirby J seemed to apply the old second limb test, without implicitly lowering or altering the threshold in response to the element of singling out. He clearly saw the burden of proof in such cases as resting with the States, and thought that they'd failed to demonstrate impairment here.<sup>22</sup>

Justice Kirby implied that the different conclusion reached in the majority judgments stemmed from their over-sensitivity to the position of the judicial branch.<sup>23</sup> However, the differing conclusions might also be attributed to a doctrinal source. Specifically, I think that Kirby J was alone in truly abandoning "discrimination" as a consideration informing the State immunity principle. With no adjustment to the relevant test on account of the singling out, there was, as Kirby J recognised,<sup>24</sup> no reason to treat this set of impugned Commonwealth provisions any differently from those considered in the *Payroll Tax Case*<sup>25</sup> or the *Second Fringe Benefits Tax Case*.<sup>26</sup> Those cases considered laws of general application and found that they did not sufficiently impair the States' constitutional functioning. That other judgments in *Austin* distinguished those cases suggests that, for those judges, something turned on the "discrimination".

---

<sup>20</sup> Id at 400 [285].

<sup>21</sup> Id at 404 [299].

<sup>22</sup> Id at 402 [291].

<sup>23</sup> Id at 403-404 [296].

<sup>24</sup> Id at 402 [290].

<sup>25</sup> *Victoria v Commonwealth (Payroll Tax Case)* (1971) 122 CLR 353.

The next section of this paper considers what *Austin* means for the future of “discrimination”, or singling out, as a factor featuring in State immunity jurisprudence. It also develops two further reflections concerning where *Austin* leaves that jurisprudence.

## Critique

### A role for discrimination?

If *Austin* has indeed ushered in a new “single test” through which to apply the *Melbourne Corporation* principle, the precise contours of that test are not clear. In any case, it may be overstating things to proclaim a new test; it may become clear in future cases that *Austin* has merely repackaged what went before it without any material alteration. Either way, the most interesting question *Austin* leaves us with is “what *is* the appropriate role for considerations of singling out, or discrimination, in this realm?” Put differently, is the issue of whether a Commonwealth law singles out States, and places burdens upon them alone, a factor deserving a concrete role in the Court’s state immunity jurisprudence?

A law’s selective application to States – or “singling out” – has never been a necessary condition for invalidity under any version of the *Melbourne Corporation* principle. The Mason J *QEC* test seemed to treat it as, basically, a sufficient condition for invalidity. The joint judgment in *Austin* suggests a further downgrading, but does not articulate clearly what the new role is.

There are at least a couple of functions or roles that the concept of singling out could perform, short of being a direct trigger for invalidity. First, it might be treated as a

---

<sup>26</sup> *State Chamber of Commerce and Industry v Commonwealth (Second Fringe Benefits Tax Case)* (1987) 163

factor having a fairly fluid evidentiary significance – that is, it may be thought indicative, in some loose sense, of an impairment of States’ constitutional functioning. Second, the element of singling out might be given a more formalised role as a burden shifting or altering device. Where an impugned Commonwealth law was framed in a way that singled one or more States out, that fact could raise a rebuttable presumption in the State’s favour, with the onus shifting to the Commonwealth to demonstrate that no impairment of constitutional functioning followed. Or, as McHugh J intimates in *Austin*, evidence of a singling out may operate to lower the threshold of impairment that a State needs to demonstrate in order to activate the *Melbourne Corporation* principle. Either alternative would give a more concrete significance to the fact of a singling out. The impact of that feature would then fall somewhere between what Mason J contemplated – a virtual trigger for invalidity – and what Kirby J seemed to favour in *Austin* – virtual insignificance.

Justice Kirby’s position prompts an important question: “what reason is there for building this consideration into the doctrine in a structured way?” At least three possible answers emerge from the *Austin* judgments:

(1) First, if a “singling out” were to trigger some sort of abridged or simplified inquiry, this might allow the High Court to circumvent, in some cases, the difficult fact-finding that *Austin* concedes to be a real problem in this area;<sup>27</sup>

(2) Second, this kind of structured or categorical approach can, as McHugh J noted, contribute greater certainty to an otherwise murky and unpredictable doctrine – essentially a rule of law argument;



(3) Third, attaching some importance to the way in which Commonwealth laws are expressed is consistent with viewing the *Melbourne Corporation* principle as having a symbolic dimension – as protecting the *image* of States as equal partners in the federation, aside from the substantive reality of their independence.

As the first two of those arguments are well trodden, this paper will comment upon the third idea. By way of up-front disclaimer, the term “symbolism” is not entirely satisfactory to convey the point intended. That is so because the image of States as having a dignity and status equal to the Commonwealth’s is not devoid of functionality in our constitutional system. “Symbolism” does, though, serve as a convenient shorthand.

The idea that symbolic considerations could play into the *Melbourne Corporation* principle’s operation in a concrete way is likely to unsettle anyone firmly committed to the contemporary “substance” view of the Constitution. However, the substance vs. symbolism distinction doesn’t need to be regarded as a zero sum game. In any case, this paper’s claim is a descriptive one – the idea of federal symbolism seems a good fit with what the High Court is actually doing. Prescriptively, the role of symbolism is certainly more complex and contestable.

Arguably, a key virtue of the Mason J two-limbed formulation was its implicit recognition that the *Melbourne Corporation* principle protects federalism on two levels. The first limb could be characterised as addressing the symbolic level of intergovernmental relations – a constitutional demand for mutual respect and some

---

<sup>27</sup> This possibility is developed by Graeme Hill, “Austin v Commonwealth: Discrimination and the Melbourne Corporation Doctrine” (2003) 14 PLR 69.

consequent forbearance. Fixing upon laws that purposefully singled another government out emphasised the importance of intergovernmental respect and goodwill. The second limb, on the other hand, could be characterised as being geared to the substance or actuality of a State's independent standing. Clearly, these are two sides of a single coin. Nevertheless, it may be useful to address each concern with a separate test, to emphasise that there are two dimensions to State autonomy and integrity.

If the High Court does attribute importance to both of those dimensions, that may be one reason – aside from fact-finding and rule of law arguments – to give the concept of singling out an explicit and concrete doctrinal role. While the joint judgment in *Austin* rejects treating such singling out as a factor sufficient for invalidity, the judgment is certainly not inconsistent with giving the element of singling out a burden shifting or lowering function. To just treat singling out as an amorphous consideration, with no principled explanation, seems to leave things too much to chance.

#### Tension with other constitutional values:

Federalism is clearly the paramount theme or principle undergirding the High Court's various doctrines of immunity as between governments. However, other undercurrents are present in many of the cases, reminding us that other constitutional values pull against federalism and constrain the Court's responsiveness to it.

One of those competing themes sometimes emerging in immunities cases is the "rule of law" notion that governments are not above the law. Many of the Court's decisions on Commonwealth immunity from State laws, from *Pirrie v MacFarlane*<sup>28</sup> through to

---

<sup>28</sup> (1925) 36 CLR 170.

*Henderson's Case*,<sup>29</sup> seem imbued with this concern. In the State immunities context, the Court has at times insisted that the doctrine does not protect States from Commonwealth laws removing special privileges, enjoyed by States to the exclusion of other legal subjects.<sup>30</sup>

While that might seem contrary to the suggestion, made above, that the *QEC* first limb was geared to protecting the States on a symbolic level, the “privileges” qualification is readily explained as a product of the tension between State immunity and notions of formal legal equality. From that vantage point, it may do little to undermine this paper’s suggestion that *Melbourne Corporation* has a symbolic dimension. Respecting a State’s dignity and constitutional status needn’t require preservation of archaic Crown prerogatives in which a State’s dignity is unlikely to remain invested.

How the different themes or values cash out in particular cases, and which will prevail, depends upon how skilfully the parties deploy them and where the High Court’s broader interests lie at any moment. While the *Austin* judgments suggest that federalism prevailed there, other values or themes – like the rule of law, equality, and democracy – may qualify federalism more heavily in future cases. Justice Kirby’s judgment is a reminder that these competing considerations are always lurking in the background.

#### Terminology:

*Austin* raises the further question of whether, if importance is to attach to the question of singling out, the language of discrimination is really appropriate to convey that. The

---

<sup>29</sup> *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority (Henderson's Case)* (1997)

joint judgment emphasises that the *QEC* first limb, in ignoring the question of a relevant comparator, was not really concerned with discrimination in the strict sense. This view proceeds from the holistic conception of discrimination that Justices Gaudron and Gummow, in particular, have articulated in several contexts.<sup>31</sup>

Whether or not a single conception of discrimination, spanning several constitutional contexts, is a viable doctrinal objective is too large a question to be tackled in this paper. Importantly, though, the holistic view of the concept of discrimination is not the only view infusing Australian constitutional jurisprudence. The term “discrimination” can, and often has, been understood and used in a different sense – the older sense which denotes a lack of general application in a law and draws upon the concept of formal equality.<sup>32</sup>

It has been clear over recent years that some members of the High Court would like to weed out that particular usage. The joint judgment in *Austin* implies that to use the terminology of discrimination imprecisely – that is, not in the favoured holistic sense – causes confusion, and perhaps invites reference to principles taken from other areas which are actually irrelevant or misleading in the *Melbourne Corporation* setting. Regardless of whether that fear is well-grounded, it is a criticism of the old *QEC* first limb that only goes to the label. The term discrimination harks back in this context to the *Engineers’ Case*,<sup>33</sup> where it was used in foreshadowing exceptions to the general position on implications. The Court is, these days, not particularly concerned about

---

190 CLR 410.

<sup>30</sup> See, eg, *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 217 per Mason J.

<sup>31</sup> The *Austin* joint judgment references three cases in particular in which Justice Gaudron and/or Justice Gummow have expounded this conception of discrimination: *Street v Queensland Bar Association* (1989) 168 CLR 461; *I W v City of Perth* (1997) 191 CLR 1; *Cameron v R* (2002) 209 CLR 339.

<sup>32</sup> See, for instance, the Court’s treatment of s 51(ii) of the Constitution, prohibiting discrimination between States in the imposition of Commonwealth taxes: *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735; *Conroy v Carter* (1968) 118 CLR 90.

<sup>33</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co.(Engineers’ Case)* (1920) 28 CLR 129.

paying lip service to *Engineers*. But even so, the appropriateness of the “discrimination” label has no bearing on the importance or usefulness of the ideas that it represented.

### **Conclusion**

Other commentators are correct to view *Austin v Commonwealth* as further exposing the High Court’s determined silence about its vision of federalism. If the Court is indeed trying to rationalise constitutional jurisprudence and hitch it to strong undergirding themes, we can remain hopeful that it will, eventually, spell out a clear vision of federalism that we can debate directly.

