JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Mon Mar 31 14:34:08 2014
/journals/journal/abr/vol38/02-38026

Case Note

Fortescue Metals Group Ltd v Commonwealth: The mining tax, discrimination and federalism

Andrew Lynch[*]

Introduction

The Minerals Resource Rent Tax (MRRT) was devised by the Gillard Labor government mindful of the constitutional limitations upon its power of taxation. Yet it was immediately challenged by mining interests as having breached those limitations in the High Court case of *Fortescue Metals Group Ltd v Commonwealth*.[1]

The arguments made by the plaintiffs, some with the support of Queensland and Western Australia as intervening states, may be divided into two groups. The first were centred on those constitutional provisions that deny to the Commonwealth a power to 'discriminate between states' in the imposition of taxes or to give 'preference' to one state over others through a revenue law. Previous High Court consideration of these sections has been marked by a high degree of formalism. The court has consistently maintained that the differential impact of local conditions upon the operation of a Commonwealth law of general application will not be a ground for invalidity. The plaintiffs in *Fortescue* sought to challenge this traditional interpretation and also the court's more recent suggestion that non-uniformity in the imposition of taxation would be valid when 'appropriate and adapted to a proper objective'.

The second set of arguments run in the case, and ultimately receiving far less attention in the decision, concerned broader principles of state immunity from Commonwealth interference. One basis for this was the little-litigated s 91 of the Constitution which protects the ability of the states to grant any 'aid' to mining for metals. But the main ground of attack was that the MRRT infringed the constitutional implication that states are protected from Commonwealth laws that impair their independent capacity to function as sovereign governments. This argument focused upon the importance of state control of their territory and mineral resources.

In this note, I explain why all these arguments failed before the High Court — and indeed why any other result would have been unexpected. The *Fortescue* case illustrates the extent to which constitutional questions around discrimination, equality and state autonomy in the Australian Federation remain narrowly conceived. The court's approach to these questions draws

* Professor, Gilbert + Tobin Centre of Public Law, University of New South Wales. I thank Lyndon Goddard for his research assistance in preparation of this casenote. I alone am responsible for any errors.

1 [2013] HCA 34; BC201311629.

heavily upon its more fundamental understanding of the Constitution as providing for Commonwealth superiority over any appeals to a federal vision that unduly constrains the legislative powers of the national government or accords the states a broad immunity from its laws. Excepting the Chief Justice's particular response to an alternative submission of the Commonwealth, the judgments delivered in *Fortescue* are an entirely orthodox disposition of all the issues raised. The efforts of the court to explain its result as one reached not simply through the application of past judicial precedent but adherence to the 'basal principles' of Australian constitutionalism signal that Commonwealth taxation laws may continue to make allowance for local circumstances without any difficulty. Indeed, members of the court insisted on the ability of the Commonwealth to do so in order to ensure its imposts are levied with fairness across the federation. Ultimately, it is hard to deny that the MRRT was a most unlikely vehicle for submissions that sought, at their heart, to assert a greater constitutional independence for the states. The particular features of the legislation posed minimal, if any, interference in state activities — to the contrary, they gave them their due. At its simplest, that is why the plaintiffs lost and the Commonwealth tax prevailed.

The MRRT legislative scheme

The MRRT is established by the Minerals Resource Rent Tax Act 2012 (Cth) (the Act) and imposed by s 3 of three related Acts (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 the latter three enactments are referred to as 'the Imposition Acts' and operate in the alternative to each other.

Section 1-10 of the Act provides that its object 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.

The MRRT liability arises when a miner's profits from 'mining project interests' exceed $75 million in a financial year. 'Mining project interests' refer to those held by the miner relating primarily to iron ore and coal covered by 'production rights', which relevantly is defined to include extraction rights conferred by a state government over a particular geographical location in the state.

The MRRT is calculated as follows:

> MRRT liability = MRRT rate x (Mining profit – MRRT allowances)

The 'mining profit' is determined, as one might expect, by deducting the

miner's expenditure from its revenue, but certain items classed as 'excluded expenditure' are not to be so deducted. The payment of mining royalties to a state is among the forms of 'excluded expenditure'.[2]

State royalties are, instead, classified as 'royalty credits' and these are one form of a 'MRRT allowance'.[3] As per the formula above, the allowances are used to reduce the profit figure that is used to calculate MRRT liability. Section 60-25(1) provides that the 'royalty credit' is calculated by dividing the liability for the mining royalty by the MRRT rate (which is set at 22.5% by s 4 in each of the Imposition Acts). The note accompanying the section states that this 'grosses up the royalty payment to an amount that will reduce the ultimate MRRT liability by the amount of the royalty payment'. In this way, the MRRT is calculated so as to be responsive to variations in the royalties charged by different states. The joint judgment of Justices Hayne, Bell and Keane in the High Court described the inverse relationship between the MRRT and state royalties as one where 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 MRRT liability, and an increase in the royalty would, other things being equal, result in an equivalent decrease in the miner's MRRT liability.[4]

The plaintiffs seized on this operation of the MRRT as the basis for two broad assertions upon which it constructed the four specific constitutional challenges to the Act's validity. The first was that liability to pay the Commonwealth's MRRT would vary on a state by state basis due to the existence of different royalty rates across the federation. Second, the effect of adjusting for the royalty credit was to create uniformity in respect of a miner's *total* liability (that is, MRRT + state royalty charges). However, the basic accuracy of those two descriptions of the MRRT's operation did not easily translate to convincing constitutional submissions capable of supporting a finding that the tax was invalid.

The Constitutional arguments

The plaintiffs' specific challenges to the MRRT, and the Commonwealth's rejoinders, may be briefly detailed as follows.

The taxation power in s 51(ii)

Under s 51(ii) of the Constitution the Commonwealth Parliament enjoys a power to make laws with respect to taxation 'but so as not to discriminate between States or parts of States'. Those words have been recognized as constituting a 'positive prohibition or limitation'.[5] If a tax is imposed so that taxpayers are treated differently in different states because of the non-uniform levy of the tax, then s 51(ii) is breached.[6]

---

2 Minerals Resource Rent Tax Act 2012 (Cth) s 35-40(1)(a).
3 Minerals Resource Rent Tax Act 2012 (Cth) s 10-10.
4 [2013] HCA 34; BC201311629 at [53] per Hayne, Bell and Keane JJ.
5 *WorkChoices Case* (2006) 229 CLR 1; 231 ALR 1; [2006] HCA 52; BC200609129 at [219]–[220].
6 *R v Barger* (1908) 6 CLR 41 at 70–80, 105–11; 14 ALR 374; BC0800044; *Cameron v*

Fortescue submitted that, although the 'MRRT rate' is set at 22.5% in s 4 of each Imposition Act, the Commonwealth tax is effectively *not* imposed at a uniform rate throughout Australia due to the liability being determined by reference to the rate of mining royalties set in a particular state. The plaintiffs urged that the 'real substance and effect', not just the 'form', of the impugned tax must be considered.[7] Although the court has rejected any suggestion of a breach of the limitation in s 51(ii) merely because a tax that is imposed uniformly happens to extract different amounts of tax in different states because of local conditions,[8] the plaintiffs sought to distinguish the MRRT. The latter is, they argued, a Commonwealth tax structured in direct relation to the rate of state taxes so that taxpayers effectively pay *different rates of Commonwealth tax depending on the state tax rate*. So, despite the existence of a single rate in s 4 of the Imposition Acts, the legislation amounts to non-uniform imposition, with miners in states with lower royalties being required to pay a greater amount of Commonwealth tax, thus resulting in a breach of s 51(ii). That breach persists even if, as here, the *cumulative* tax paid by the taxpayer in each state is the same. Indeed, that equality of liability is achieved only by the Commonwealth's imposition of a different tax rate on different taxpayers in different states.

In making this argument the plaintiffs relied particularly on a hypothetical pondered by the High Court in the 1908 case of *R v Barger*.[9] The hypothetical was based on the converse of the facts in the earlier decision of *Colonial Sugar Refining Company Ltd v Irving*.[10] In that case, the Excise Tariff 1902 (Cth) imposed a uniform excise duty on a range of goods, including manufactured sugar. Goods on which excise duties had already been paid under state legislation were exempt from the Commonwealth's charge. The product manufactured by the Colonial Sugar Refining Company Ltd (CSR) in Queensland, was not subject to any state excise. CSR challenged the Commonwealth excise as a tax that discriminated between the states. The Queensland Supreme Court and then the Privy Council on appeal, dismissed the challenge for similar reasons. These were succinctly conveyed by the words of the Privy Council that:

Deputy Federal Commissioner of Taxation for Tasmania (1923) 32 CLR 68 at 72, 76–7, 78–80; 29 ALR 119; BC2300047; *Conroy v Carter* (1968) 118 CLR 90 at 95–6; [1968] ALR 545; (1968) 42 ALJR 96; BC6800280.

7 Relying upon *W R Moran Pty Ltd v Deputy Federal Commissioner of Taxation (NSW)* [1940] AC 838; (1940) 63 CLR 338 at 345–6; [1940] ALR 241; (1940) 14 ALJR 169, and generally *Ha v New South Wales* (1997) 189 CLR 465 at 498 per Brennan CJ, McHugh, Gummow and Kirby JJ; 146 ALR 355; [1997] HCA 34; BC9703377.

8 *Austin v Commonwealth* (2003) 215 CLR 185; 195 ALR 321; [2003] HCA 3; BC200300114 at [117]; *W R Moran* (1939) 61 CLR 735 at 764; [1939] ALR 357; (1939) 13 ALJR 205; BC3900014; [1940] AC 838; (1940) 63 CLR 338 at 349; [1940] ALR 241; (1940) 14 ALJR 169; *Conroy v Carter* (1968) 118 CLR 90 at 101; [1968] ALR 545; (1968) 42 ALJR 96; BC6800280 (Taylor J, though not in the majority).

9 (1908) 6 CLR 41; 14 ALR 374; BC0800044.

10 [1903] St R Qd 261 (Qld SC); [1906] AC 360 (Privy Council) (*Colonial Sugar Refining*).

> 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.[11]

The authority of *Colonial Sugar Refining* obviously offered no support for the plaintiffs' challenge to the MRRT. But while the reasoning in that case was confirmed in the decision in *R v Barger* (which contains other, arguably more dominant features leading to a division amongst the court that are not necessary to the present discussion), the majority judges stated, by way of contrast, that:

> 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.[12]

The plaintiffs claimed that the MRRT fell within this description.

The Commonwealth rejected these arguments by appealing to the consistent course of decisions since *Colonial Sugar Refining* that confirm the irrelevance of local conditions in one or more states to any finding of discrimination in the collection of a Commonwealth tax. The limitation in s 51(ii) does not require that Commonwealth taxes operate uniformly across the Commonwealth — merely that they are imposed so as to operate generally and without distinction to different states or parts of states. It emphasised the setting of a single tax rate of 22.5% to be applied to mining super profits after deduction of MRRT allowances. In opening its submission, the Commonwealth had observed that there is nothing new in it having regard to state imposts in determining the tax base for a Commonwealth tax. The income tax regime, for example, permits a deduction for the amount of payroll tax, land tax, state royalties and others (all of which vary from state to state).

In the alternative, the Commonwealth argued that even if, contrary to its main submission with respect to s 51(ii), the MRRT produced a differential treatment or unequal outcome, it is not discriminatory between the states in the relevant sense for the reasons suggested by the plurality opinion in *Austin v Commonwealth*.[13] In that case, Gaudron, Gummow and Hayne JJ stated that:

> 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 a distinction which is appropriate and adapted to the attainment of a proper objective.[14]

The proportionality of the MRRT was, according to the Commonwealth, evidenced by its targeting of profits, not revenue generally, and only a certain category of profits identified by the parliament as above a threshold. If the Act made no allowance for state royalties in the calculation of a miner's MRRT liability, it would be at risk of imposing the tax at a higher rate than intended, or on profits less than 'super profits'.

The plaintiffs rejected the validity of excusing differential treatment or an

---

11 [1906] AC 360 at 367.
12 (1908) 6 CLR 41 at 70–1; 14 ALR 374; BC0800044.
13 *Austin v Commonwealth* (2003) 215 CLR 185; 14 ALR 374; BC0800044.
14 Ibid, at [118].

unequal outcome between states of a Commonwealth tax on the basis this was 'appropriate and adapted' to the attainment of 'proper' legislative objectives. They pointed out that in neither *Austin* itself, nor the subsequent case of *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)*,[15] had the High Court applied that test to a law imposing taxation made under s 51(ii). They rejected any extension of the proposition in this way.

Preference under s 99

Section 99 of the Constitution provides that 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'. This provision is often raised alongside the limitation in s 51(ii) and has been approached in a similar way by the High Court. That is encapsulated in the statement of Higgins J that the Commonwealth is guilty of neither discrimination nor preference between states merely because a general rule:

> applicable to all the states alike, but . . . found to operate unequally in the several states, not from anything done by the Commonwealth Parliament, but from the inequality in the conditions existing in . . . the states themselves.[16]

That said, s 99 is both slightly wider and narrower in application than s 51(ii). The width comes, obviously, from its application to laws of 'trade, commerce, or revenue' rather than simply 'taxation'. Even so, the reference to 'trade' and commerce' has not been interpreted loosely but as applying to those laws which derive their validity from s 51(i) (the 'trade and commerce power') of the Constitution.[17] At the same time, the reference to 'revenue', it now appears, does *not* correspondingly limit the ban on preference to laws made under s 51(ii). In *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)*,[18] the court held that s 99 applies to 'revenue' laws enacted under s 52(i) (power with respect to Commonwealth places) as well as under s 51(ii).

The narrowness of s 99 attaches to the very specific sense of 'preference' as referring only to a trading or commercial advantage. In the leading authority on point, *Elliot v Commonwealth*, Latham CJ, speaking as a member of the majority, required the giving of 'a tangible commercial advantage'.[19] Even in dissent, Evatt J found a preference had been given in that case because the differential treatment amounted to a 'definite material and economic advantage' to the sea ports of particular states.[20] Clearly, the mere fact that a law discriminates does not amount to, but is a step towards establishing, the giving of a 'preference'. Conversely, a law that effects no discrimination between the states cannot offend s 99, a point the plaintiffs in *Fortescue* conceded. Hence, although the provisions are linked through the concept of 'discrimination', it is s 51(ii) not s 99 that tends to dominate the court's

15 (2004) 220 CLR 388; 211 ALR 18; [2004] HCA 53; BC200407491.
16 *James v Commonwealth* (1928) 41 CLR 442 at 462; 2 ALJR 322.
17 *Morgan v Commonwealth* (1947) 74 CLR 421; [1947] ALR 161; (1947) 21 ALJR 25; BC4700210.
18 (2004) 220 CLR 388; 211 ALR 18; [2004] HCA 53; BC200407491.
19 (1936) 54 CLR 657 at 670; [1936] ALR 174; (1936) 9 ALJR 455; BC3600041.
20 Ibid, at CLR 700.

consideration of issues that may enliven both.

That was certainly the case in *Fortescue* in which it was agreed that the Imposition Acts are laws 'of revenue' within the meaning of s 99. The plaintiffs argued, consistently with their claim of discrimination under s 51(ii), that the effect of those Acts and the MRRT Act is to give a preference to some states by requiring the mining operations within them to pay MRRT at a lower rate than miners in other states. They acknowledged the proposition stated in respect of s 99 by the majority in *Permanent Trustee v Commissioner of State Revenue (Vic)* that 'differential treatment and unequal outcome that is . . . the product of distinctions that are appropriate and adapted to a proper objective' may indicate the absence of 'preference'.[21] But they responded to this in two ways. First, they sought to distinguish *Permanent Trustee* since the law in that case was found not to give preference because it simply replicated existing state taxes and applied them to Commonwealth places within each state accordingly, and this was different from a law that adjusted the amount of Commonwealth tax to be paid inversely to the mining royalty amount charged by the states. Second, to the extent that *Permanent Trustee* applied to s 99 a test of whether the differential treatment was 'appropriate and adapted to a proper purpose', it should simply not be followed. The test puts a gloss over the clear phrase 'give preference . . . over' in s 99 that was not acknowledged in earlier High Court cases.

In response, the Commonwealth essentially relied upon its case for an absence of discrimination to reject any infringement of s 99. But it did also say that even if it were wrong and that s 99 could apply to a valid law under s 51(ii), then there was no 'tangible advantage' conferred upon the states themselves as a result of the MRRT legislative scheme. The Commonwealth also defended the majority statement from *Permanent Trustee*, saying that the plaintiffs 'mischaracterise[d]' the earlier decision:

> Far from establishing a judge-made exception to an express constitutional prohibition, the plurality in *Permanent Trustee* merely observed that the case as to invalidity there asserted fell at the threshold because, even if a differential treatment or unequal outcome could be identified, it was the product of distinctions that were appropriate and adapted to a proper objective. It was therefore unnecessary for the Court to go on to consider. . .the requirements of a 'preference'. . .[22]

In other words, to the extent it was possible to find discrimination in the Commonwealth law that applied taxes in Commonwealth places that mirrored those charged by the state within which a particular Commonwealth place is found, no more could be established towards the existence of a 'preference' under s 99 because of the clear basis for that differentiation.

The *Melbourne Corporation* principle

When first articulated in its eponymous case of 1947,[23] the contours of what is known as the *Melbourne Corporation* principle were stated with differing

21 (2004) 220 CLR 388; 211 ALR 18; [2004] HCA 53; BC200407491 at [91].

22 Commonwealth, 'Submissions of the Commonwealth of Australia', Submission in *Fortescue Metals Group Ltd v Commonwealth*, 5163/2012, 25 January 2012 at [82].

23 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; [1947] ALR 161; (1947) 21 ALJR 25; BC4700210.

emphasis by the five individual Justices sitting. For a substantial period the principle was thought to consist of two alternative limbs one of which was concerned directly with 'discrimination' against the states,[24] though this has since been viewed as simply one indication of an infringement of the principle as conceived more broadly. The essential contemporary meaning of the *Melbourne Corporation* principle is captured by the recent formulation given by French CJ in *Clarke v Federal Commissioner of Taxation* that:

> the Commonwealth cannot, by the exercise of its legislative power, significantly impair, curtail or weaken the capacity of the states to exercise their constitutional powers and functions (be they legislative, executive or judicial) or significantly impair, curtail or weaken the actual exercise of those powers or functions . . . [This] simply recognises that there may be some species of Commonwealth laws which would represent such an intrusion upon the functions or powers of the states as to be inconsistent with the constitutional assumption about their status as independent entities.[25]

In the earlier decision of *Austin v Commonwealth*, which invalidated a special Commonwealth tax upon the pensions of state judges, Gaudron, Gummow and Hayne JJ declined to offer a definitive statement but emphasised the same pivotal considerations:

> The question presented by the doctrine in any given case requires assessment of the impact of particular laws by such criteria as 'special burden' and 'curtailment' of 'capacity' of the states 'to function as governments'. These criteria are to be applied by consideration not only of the form but also 'the substance and actual operation' of the federal law.[26]

The plaintiffs in *Fortescue* submitted that the MRRT infringed this limitation upon Commonwealth power. They pointed out that in *Austin v Commonwealth* the *Melbourne Corporation* principle invalidated legislation enacted pursuant to s 51(ii) that imposed taxation upon persons other than the state itself — as with the MRRT in this case.

In order to meet the necessary criteria, the plaintiffs submitted that the Constitution recognises that the political and territorial or geographical aspects of statehood are intrinsically linked. Critical to a state's ability to function as a government is the ability of its legislature and executive to control the development of its territory and mineral resources (being, among other things, a source of its revenue). In support, they cited a passage from the opinion of Starke J in the *Melbourne Corporation* case:

> management and control by the states and local governing authorities of their revenues and funds is a constitutional power of vital importance to them. Their operations depend upon the control of those revenues and funds. And to curtail or interfere with the management of them interferes with their constitutional power.[27]

---

24 *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192; 58 LGRA 1; 61 ALR 1; BC8501108.

25 *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272; 258 ALR 623; [2009] HCA 33; BC200908000 at [32].

26 (2003) 215 CLR 185; 195 ALR 321; [2003] HCA 3; BC200300114 at [124].

27 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 75; [1947] ALR 377; (1947) 21 ALJR 188; BC4700100.

In a fairly bold use of this opinion, the plaintiffs argued that substituting the phrase 'revenues and funds' with 'natural resources' revealed the interference of the MRRT as an unconstitutional intrusion into a matter central to the states' identity as independent governments.

All parties were agreed that mineral resources are the property of the Crown in right of the state which has the right to manage and control them and appropriate to itself revenues derived from them.[28] But the plaintiffs and the two interveners argued that the imposition of the MRRT effectively prevents a state from reducing, or giving concessions in respect of, royalties payable, since the way in which the MRRT is levied neutralises the impact of that reduction and leads to no lessening of the miner's cumulative taxation liability. This diminishes a state's ability to vary its royalty in order to influence the rate and manner of economic development of its territory. Examples were given to the court of agreements made by both interveners with companies providing for royalty concessions applicable to particular mining projects and later ratified by legislation.

The Commonwealth insisted that a breach of the *Melbourne Corporation* principle requires a significant or substantial burden on a state's *constitutional* functions.[29] The MRRT does not have such a result — states remain free to increase or decrease the amount of mining royalties they choose to charge, leaving their ability to obtain revenue from mining unimpaired. Unlike the targeting of state judicial officers in *Austin*, the MRRT is imposed on miners, who are not within the class of persons previously identified by the court as 'at the higher levels of government'.[30] Mining companies do not perform any constitutional function intrinsic to the existence of a state. Further, the Commonwealth rejected any broad immunity enjoyed by the states in respect of their natural resources, the economic development of which may clearly be subject to adverse Commonwealth laws.[31]

Breach of s 91

Section 91 of the Commonwealth Constitution provides that '[n]othing in this Constitution prohibits a state from granting any aid to or bounty on mining for gold, silver, or other metals . . .'. The provision has been the subject of substantial judicial consideration on only one occasion — the 1978 case of *Seamen's Union of Australia v Utah Development Company*.[32] In that decision the court held that 'any aid' referred to monetary aid. The plaintiffs rejected

28 See, eg, s 9 of the Mining Act 1978 (WA) which declares the waste lands of the Crown to be the property of the Crown in right of the state of Western Australia.

29 *Austin v Commonwealth* (2003) 215 CLR 185; 195 ALR 321; [2003] HCA 3; BC200300114 at [168]; *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272; 258 ALR 623; [2009] HCA 33; BC200908000 at [33].

30 *Australian Education Union Case* (1995) 184 CLR 188 at 233; 128 ALR 609; 69 ALJR 451; 58 IR 431.

31 As examples, the Commonwealth cited *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1; 9 ALR 199; 50 ALJR 570; BC7600043 and *Tasmania v Commonwealth (Tasmanian Dam Case)* (1983) 158 CLR 1; 46 ALR 625; 57 ALJR 450; BC8300075.

32 (1978) 144 CLR 120; 22 ALR 291; 53 ALJR 83; BC7800083.

any limitation upon the meaning of 'aid' as simply a money *payment*[33] as excessively formalistic. They submitted that the mining of iron ore, in which they are engaged, is an 'other metal' under s 91, and that the concept of 'aid' includes the reduction of, or exemption from, state royalties. The MRRT, in neutralising any reduction in state royalties by making a corresponding increase in the payment owed to the Commonwealth, frustrated the giving of 'aid' by the state.

The Commonwealth not only rejected any more expansive meaning in the word 'aid' but also insisted the correctness of the views expressed in *Seamen's Union* that the purpose of s 91 is to establish an exception to a prohibition on the states granting certain kinds of aid that would otherwise derive from s 90.[34] That provision states that upon the imposition of uniform customs duties, the power of the Commonwealth Parliament 'to grant bounties on the production or export of goods, shall become exclusive'. Thus, s 91 is concerned with a prohibition placed directly on the states by the Constitution. It does not provide a basis for invalidating Commonwealth legislation such as that which imposes the MRRT.

The High Court decision

Based, as they were, upon a set of core assertions about the operation of the MRRT, the plaintiffs' submissions were united in their vulnerability should the court reach a different view on the operation of the tax. The rejection of one line of argument was very likely to prove fatal to all the others. And so it proved to be. The loss of Fortescue ultimately hinged upon the court's rejection of the argument that the MRRT was 'effectively' levied at a different rate depending on the amount of state royalties state by state. The true position was simply that the royalties were offset against the miners' profits which, if remaining above the threshold after the deduction of MRRT allowances, were subject to the same rate of 22.5%. In this way the case for finding 'discrimination' or 'preference' clearly collapsed. But additionally, the consequence of accepting that the Commonwealth tax was levied at a single rate but attached to profits after allowing for deductions of amounts paid in royalties to the states, was to affirm that the latter retained the power to raise or lower their mining royalty rate. As a result, it was hard to accept any significant impairment of the power to control the revenue accrued to a state by its mining royalties — let alone, of any constitutional capacity it possesses.

The main focus of the court's judgments was the discrimination argument under s 51(ii), with the prohibition on the giving of preference under s 99 basically subsumed in this discussion. The joint judgment of Hayne, Bell and Keane JJ was particularly explicit in rejecting the plaintiffs' submissions as contrary to the 'basal principles' of the Commonwealth's constitutional superiority to the states. These principles were applied to defeat both the submissions alleging that the MRRT effected a differential treatment of the states and that which sought to invoke the *Melbourne Corporation* immunity. The resort to broader conceptions of the Australian federal system to dispose

33 *Seamen's Union of Australia v Utah Development Company* (1978) 144 CLR 120 at 148; 22 ALR 291; 53 ALJR 83; BC7800083.

34 Ibid, at CLR 126, 142–4, 147, 154, 159.

of the challenge brought a welcome depth to an area of constitutional interpretation that has frequently been viewed as excessively formalistic and narrow.

The argument under s 91 was probably the plaintiffs' weakest in a case not distinguished by strong lines of attack and may be briefly dealt with before turning to the substantial issues. It was curtly rejected by Hayne, Bell and Keane JJ (with French CJ and Crennan J agreeing; and Kiefel J stating similar reasons) as inconsistent with that provision's purpose as an exemption from the constitutional prohibition in s 90, as had been earlier made clear in the *Seamen's Union* case. In short, s 91 is not a restraint upon Commonwealth legislative power generally.

Discrimination, differential effect and equalisation

The opinions in *Fortescue* drew on a long line of judicial authority that denies a breach of s 51(ii)'s prohibition on discrimination will exist merely through local circumstances causing a tax that is imposed generally to have a differential operation across the states. While French CJ additionally considered the Convention Debates and American authorities on Art I, s 8(1) of the United States Constitution, these further sources did not lead him to a different conclusion in this regard. Indeed, up to a point, even Fortescue accepted as much:

> 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.[35]

Nevertheless, in arguing that the MRRT 'in terms' imposed a rate that varied according to the different royalty payments charged by the states, the plaintiffs were, in a sense, attempting to portray the MRRT as on a par with the second scenario in the passage quoted above — and just as invalid. As the joint judgment noted, the 'considerable irony' in making such an argument was that had the MRRT been levied with no allowance for state royalties the result 'might fairly be said to be unfair to taxpayers'.[36] That observation does not exist in any tension with French CJ's claim that the limitations in both ss 51(ii) and 99 'protect the formal equality in the Federation of the States inter se and

35 [2013] HCA 34; BC201311629 at [73] per Hayne, Bell and Keane JJ.
36 Ibid, at [74] per Hayne, Bell and Keane JJ.

their people, and the economic union which came into existence upon the creation of the Commonwealth'.[37] For as the Chief Justice pointed out:

> The limitations imposed by ss 51(ii) and 99 . . . 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.[38]

It follows that it would be a curious inversion of those limitations if they were to frustrate the uniform imposition of a Commonwealth tax under either circumstance. In particular, the idea that those limitations prevent the Commonwealth from making allowance for taxpayers' liabilities to their respective state governments when levying a general impost seems to run counter to their intended purpose in protecting the 'economic union' established by Federation. As already noted the Commonwealth pointed to an existing demonstration of this very practice in the 'the longstanding deductibility, for income tax purposes, of state payroll tax, state land tax, state royalties' and other state charges.[39] While French CJ acknowledged that this could 'not itself provide the determinative answer to the constitutional question in any given case', he also rejected the purported distinction between those other schemes and the MRRT as 'an irrelevant matter of form rather than of substance'.[40] The joint judgment was even clearer in accepting the analogy between the MRRT and legislation allowing the deduction of state taxes from the assessment of income upon which Commonwealth tax was to be paid. Any differences in form and application between the two were 'not constitutionally relevant'.[41]

In line with its earlier decisions, the court highlighted the limits to be applied to entreaties, such as those made by the plaintiffs, to look to the 'real substance and effect' of a tax in order to reveal its discriminatory qualities. While form is not to be prioritised to the exclusion of substance, certainly the form of the Commonwealth tax matters — not for its own sake, but in order to identify the existence of that discrimination against which, consistently with their 'federal purposes', the limitations guard. This is crucial to appreciating the court's rejection of the attempt to rely on the obiter dicta of the majority judgment in *R v Barger* that:

---

37 Ibid, at [3] per French CJ.
38 Ibid, at [5] per French CJ.
39 Ibid, at [46] per French CJ.
40 Ibid.
41 Ibid, at [122] per Hayne, Bell and Keane JJ. They also approved (at [98]) the opinion of Taylor J in *Conroy v Carter* (1968) 118 CLR 90 at 101; [1968] ALR 545; (1968) 42 ALJR 96; BC6800280 that the ability of taxpayers to deduct different state land taxes in calculating their assessable income under Commonwealth law was not discriminatory because land tax was not levied in some states. See also Crennan J at [173] and Kiefel J at [216].

> 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.[42]

No judge suggested that hypothetical was incorrect, but they all distinguished it from the MRRT.

The joint judgment did so most cleanly. They accepted the *Barger* majority's recognition that the limitation of s 51(ii):

> prohibit[s] 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.[43]

They then went on to explain:

> 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 . . . 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.[44]

Kiefel J agreed that the hypothetical was describing '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'.[45] In other words, what is prohibited is the imposition of a Commonwealth tax levied at a rate that fluctuates in response to that charged over the same taxable item by the various states. This is not a feature of the MRRT scheme. As the joint judgment said, the 'central fallacy' in the plaintiffs' submissions was their adoption of the 'mining profit' amount as the base for calculation of the MRRT, when instead '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'.[46] Consequently, it was an error to regard the deduction of MRRT allowances, reflecting variations to the extent these included payment of different state royalties, as essentially effecting a variable rate in the Commonwealth's imposition of the tax. The tax was imposed only upon the amount reached after such allowances were deducted from the profit and then at a uniform rate of 22.5%.

On this view, the absence of any discrimination of the Commonwealth's making was apparent. Hayne, Bell and Keane JJ reflected on the distinction that exists between a law which discriminates between states and one which merely has different consequences for different states. Across several passages, the following points were made:

---

42 (1908) 6 CLR 41 at 70–1; 14 ALR 374; BC0800044.
43 [2013] HCA 34; BC201311629 at [90] per Hayne, Bell and Keane JJ.
44 Ibid, at [91] per Hayne, Bell and Keane JJ.
45 Ibid, at [222] per Kiefel J.
46 Ibid, at [101] per Hayne, Bell and Keane JJ.

> 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. . . .
>
> 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. . . .
>
> 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.[47]

Crennan and Kiefel JJ, each writing alone, concurred.[48] The Chief Justice also agreed with the distinction so drawn, but he was prepared to acknowledge that a Commonwealth law which made allowances for state legislation was of a slightly different order from one that did not:

> 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 does not place the MRRT Act beyond power.[49]

Underpinning the court's rejection of a differential operation of a Commonwealth tax as amounting to prohibited discrimination were considerations of fundamental constitutional structure. The articulation of these considerations by the joint judgment should dispel any temptation to view the decision in *Fortescue* (and also earlier authorities) as dependent on mere formalism. Hayne, Bell and Keane JJ endorsed the view of Griffith CJ in *Colonial Sugar Refining* that discrimination under s 51(ii) should not be established simply if:

> owing to the operation of the laws of the states, the incidence of taxation may be unequal in different states . . . [because otherwise] . . . the power of the Federal parliament would be limited by the laws of the states.[50]

As already quoted, the joint judgment recognised that no constitutional claim of discrimination could possibly lie if the states levied mining royalties uniformly. To argue that the MRRT was constitutionally vulnerable because those rates in fact vary across states and this allows miners to deduct different

47 Ibid, at [113], [117] and [121] per Hayne, Bell and Keane JJ.
48 Ibid, at [174] and [224] respectively.
49 Ibid, at [35] per French CJ.
50 [1903] St R Qd 261 at 277.

amounts from their profits to determine the extent of their MRRT liability was to invert the clear supremacy of the Commonwealth Parliament in the exercise of its legislative powers by subjecting it to the actions of the states.

> Since *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*,[51] 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.[52]

In light of those broader principles, the distinction drawn between the *Barger* hypothetical (in which the plaintiffs had put much store) and the MRRT and other Commonwealth taxes which allow the adjustment of liability by reference to amounts paid to the states is very real. The conflation of the two so that the latter, even though imposing a general rate of taxation, would infringe the non-discrimination limitation would accord a legislative supremacy to the states in direct contradiction of s 109 of the Constitution. To suggest that this result could be avoided by the Commonwealth refraining from making any allowance for state liabilities, and letting inequality lie where it falls, was not seriously countenanced. As Kiefel J said:

> 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.[53]

The reasonableness of discrimination?

It will be recalled that the Commonwealth raised an alternative submission that if the court found a differential effect in the imposition of the MRRT, this would not be discrimination if, in the words of the plurality judgment in *Austin* 'the differential treatment and unequal outcome is not the product of a distinction which is appropriate and adapted to the attainment of a proper objective'.[54] Amelia Simpson has labelled this passage as embodying the 'universal conception' of discrimination that began to emerge in constitutional jurisprudence after the appointment of Gaudron J to the bench in 1987.[55] Simpson says the vehicles for the development of the 'universal conception' were initially the guarantee of freedom of interstate trade and commerce in s 92 and the prohibition of discrimination on the basis of state residency in s 117. It was deployed in *Austin* to reject discrimination as one of two alternative limbs of the *Melbourne Corporation* principle, by showing that the

---

51 (1920) 28 CLR 129; 26 ALR 337; BC2000025 (*Engineers'*).

52 [2013] HCA 34; BC201311629 at [120] per Hayne, Bell and Keane JJ. See also [217] per Kiefel J.

53 Ibid, at [225] per Kiefel J.

54 (2003) 215 CLR 185; 195 ALR 321; [2003] HCA 3; BC200300114 at [118].

55 A Simpson, 'The High Court's Conception of Discrimination: Origins, Applications and Implications' (2007) 29 *SydLRev* 263 at 267–9.

key elements of an appropriate comparator were lacking, preventing the necessary identification of difference.[56]

The joint judgment's proposition in *Austin* was repeated and seemingly applied by the majority in *Permanent Trustee* to reject a challenge under s 99 to a law passed under s 52(i) so as to impose a tax in Commonwealth places that 'mirrored' those of the surrounding state.[57] As Simpson surmised, the majority 'in turning to the universal conception of discrimination to inform its interpretation of s 99, embraces a flexible view of alikeness that brings with it the need for assessments of reasonableness'.[58] It was strongly criticised by McHugh and Kirby JJ in dissent in that case, with the former stating:

> The differential treatment of states or parts of states cannot be justified by saying that the difference is the product of a distinction which is appropriate and adapted to the attainment of some proper objective of the parliament of the Commonwealth. The mischief to which s 99 is directed is not the fairness or unfairness of the effect of any preference given in a particular case. The section is contravened by the mere giving of a preference referable to the state or part of a state to which the law applies.[59]

In *Fortescue* the plaintiffs, as already noted, likewise questioned the correctness of the proposition and certainly resisted the Commonwealth's attempt to invoke it as a test for validity in respect of the limitation in s 51(ii). Barring the Chief Justice, the rest of the court declined to consider the alternative submission of the Commonwealth, though the joint judgment signalled scepticism as to the use of a 'proper objective' to justify discrimination in a law passed under the power.

French CJ was far more willing to explore these ideas. Throughout his opinion he laced considerations of the appropriateness of the Commonwealth law imposing differential treatment between the states as a guide to whether the limitation had been infringed. This was not apparently limited to the Commonwealth's alternative submission. He began his judgment with the broad observation that:

> 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. Such a provision neither discriminates nor gives a preference within the meaning of those terms in ss 51(ii) and 99.[60]

He also drew on another statement of the 'universal conception' of discrimination in the plurality judgment of *Bayside City Council v Telstra Corporation Ltd* about the need to examine 'the relevance, appropriateness, or permissibility of some distinction by reference to which such treatment

---

56 Ibid, at 270; see also A Simpson, 'State Immunity from Commonwealth Laws: *Austin v Commonwealth* and Dilemmas of Doctrinal Design' (2004) 32 *UWALR* 44 at 59–61.

57 (2004) 220 CLR 388; 211 ALR 18; [2004] HCA 53; BC200407491 at [91] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ. See discussion Simpson, above n 53, at 273–7.

58 Simpson, above n 53, at 280.

59 (2004) 220 CLR 388; 211 ALR 18; [2004] HCA 53; BC200407491 at [156].

60 [2013] HCA 34; BC201311629 at [5] per French CJ.

occurs, or by reference to which it is sought to be explained or justified'.[61] These considerations assumed central importance in the closing paragraphs of his judgment when French CJ explicitly referred to them as 'an aspect of characterisation of the MRRT Act for the purposes of ss 51(ii) and 99'.[62] He concluded that:

> The differences in the operation of the MRRT Act which arise out of its interaction with different royalty regimes serve . . . 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.[63]

These views are unique amongst those that have been expressed to date regarding s 51(ii). The claim that the need for any differential treatment to be 'appropriate and adapted to the attainment of a proper objective' is in fact a 'criterion for characterisation of a law as discriminatory for the purposes of s 51(ii)'[64] is arguably a much bolder consequence than that intended by the authors of the proposition in *Austin*. It certainly extends the significance of that passage beyond the use made of it in respect of s 99 by the majority in *Permanent Trustee*. Arguably French CJ's willingness to adopt this approach in respect of laws made under a power previously thought to be free of any consideration such as 'reasonableness' is not just an example of the further rollout of a 'universal conception' of discrimination as illustrated by Simpson's analysis, but reflects more generally the ever-growing insidiousness of proportionality in Australian constitutional discourse. So far, at least, French CJ's colleagues appear unenthusiastic about this particular application.

The *Melbourne Corporation* principle

Only the reasons of Hayne, Bell and Keane JJ considered the plaintiffs' challenge to the MRRT as an infringement of the limitation upon Commonwealth power known as the *Melbourne Corporation* principle. The other three members of the bench simply endorsed the joint judgment on this issue.

The argument of the plaintiffs and interveners that the MRRT impaired or curtailed the capacity of state governments to independently manage the mineral resources of their geographical territory for the benefit of their communities was rejected. The joint judgment viewed these submissions as an attempt to extend the principle beyond its concern with Commonwealth legislation that is 'directed at states, imposing some special disability or burden on the exercise of powers and fulfilment of functions of the states which curtails their capacity to function as governments'.[65]

The MRRT is not directed at the states or the entities through which it exercises its constitutional functions, such as their judicial officers or

61 (2004) 216 CLR 595; 206 ALR 1; [2004] HCA 19; BC200402132 at [40], cited in [2013] HCA 34; BC201311629 at [36] per French CJ.
62 [2013] HCA 34; BC201311629 at [48] per French CJ.
63 Ibid, at [50] per French CJ (emphasis added).
64 Ibid, at [31] per French CJ.
65 Ibid, at [130] per Hayne, Bell and Keane JJ.

parliamentarians.[66] The Commonwealth legislation does not prevent the states from increasing or lowering their mining royalty rate and no burden attaches to a decision of the state to do so in either direction. The judgment likened the submissions in this case to those that had been made by the state in *Western Australia v Commonwealth (Native Title Act Case)*.[67] Western Australia's attempt to invoke *Melbourne Corporation* on that occasion was rebuffed on the simple basis that the Commonwealth's Native Title Act 1995 did not 'affect the machinery of the government of the state'.[68] The joint judgment in *Fortescue* observed that to the extent it can be said that the MRRT affects state control over its land and resources, it follows that this does not offend the *Melbourne Corporation* principle since any impact of the MRRT is far less direct than the requirements imposed by the Native Title Act 1995.

In an echo of their appeal to 'basal principles' in rejecting the plaintiff's discrimination arguments, Hayne, Bell and Keane JJ stated that likewise finding Commonwealth interference with constitutionally protected state functions on the current facts would 'subvert not only the position established by the decision in the *Engineers'* case but also s 109 of the Constitution'.[69] The reference to *Engineers* suggests that the plaintiffs' submission resembled an appeal to a general level of state immunity of the kind that was emphatically rejected in that case. As the *Engineers* majority made plain, s 109 is the key to understanding the superiority of the Commonwealth in the federal relationship. While *Melbourne Corporation* ensures Commonwealth law-making power cannot strike at the essential government functions of the states or the entities through which these are carried out, the states are not otherwise immune from Commonwealth laws. The latter may, as for example in *Commonwealth v Tasmania*,[70] seriously frustrate the plans of state governments and through s 109 render state legislation invalid 'to the extent of the inconsistency', but this represents no breach of the *Melbourne Corporation* principle. The fact that the MRRT actually makes allowances for the rates at which states levy their mining royalties, highlights the absence of any direct interference in this case, let alone impairment of any state constitutional functions. Any negative impact of the MRRT upon the states' ability to use royalties to attract mining investment was simply not to the point.

Conclusion

The 2010 decision of the Labor government under Prime Minister Kevin Rudd to charge a tax upon the 'super profits' of mining companies attracted instant controversy and the industry's high profile advertising campaign against this proposal arguably helped unseat Rudd. Although Prime Minister Gillard negotiated with the larger mining interests over key aspects of the tax in order

66 As in, respectively, *Austin v Commonwealth* (2003) 215 CLR 185; 195 ALR 321; [2003] HCA 3; BC200300114 and *Clarke v Commonwealth* (2009) 240 CLR 272; 258 ALR 623; [2009] HCA 33; BC200908000.

67 (1995) 183 CLR 373; 128 ALR 1; 69 ALJR 309; BC9506415.

68 (1995) 183 CLR 373 at 481; 128 ALR 1; 69 ALJR 309; BC9506415.

69 [2013] HCA 34; BC201311629 at [131] per Hayne, Bell and Keane JJ.

70 (1983) 158 CLR 1; 46 ALR 625; 57 ALJR 450; BC8300075 (*Tasmanian Dam*).

to placate them before securing its passage through the Commonwealth Parliament, the MRRT introduced by her government was hardly free of the criticism that had attached to its antecedent proposals. It was strongly condemned by the Federal Opposition and smaller mining companies for its potential to have a negative impact upon the Australian economy. Later, and conversely, the Opposition lambasted the MRRT for its low revenue yield in practice.

However, none of the political significance of the Labor government's efforts to tax mining profits is relevant to the decision of the High Court in *Fortescue*. Despite the complexity of the MRRT's design, and the divisions to which it gave rise in public debate, the issues in the case were essentially straightforward. The course of the court's previous decisions on ss 51(ii) and 99 has consistently held that a uniform tax imposed by the Commonwealth is not invalid for effecting discrimination or preference due simply to its differential impact arising from local conditions, including interaction with state laws. In including the payment of state mining royalties amongst allowances to be deducted from a miner's profit before application of the flat rate of 22.5%, the Commonwealth's MRRT was not 'effectively' levied at a different rate in different states (the hypothetical identified as invalid in *R v Barger*). The increase or decrease in the amount of tax paid as MRRT was determined by variations in the amount charged as mining royalties across states. It was not a distinction created or drawn by the Commonwealth. Any suggestion that differences between states could be used to establish discrimination in a law of the Commonwealth was not simply impractical but, more fundamentally, an inversion of the latter's clear constitutional superiority.

At the same time, the court confirmed the modest reach of the immunity provided to states by the *Melbourne Corporation* principle. Commonwealth laws which do not interfere or impair a state's constitutional functions are not vulnerable on this score — regardless of their impact upon the state in some other way, including, as argued here, economic development through management of a state's natural resources. The argument that the MRRT would neutralise a state's ability to attract mining projects with a lower royalty rate was not merely speculative as a matter of fact — it was irrelevant to the constitutional question. Due to its design preserving the power of states to set their own mining royalties, the MRRT was always an unlikely candidate for an enactment that infringes *Melbourne Corporation*. It bears no meaningful similarity with the few Commonwealth laws that have been felled by the federal principles encapsulated in that doctrine.

From a constitutional standpoint, *Fortescue* is then fairly unremarkable. True, there is the clarity provided by the joint judgment's alignment of the court's approach in cases of this sort with 'basal principles' of the Constitution. This effectively rejects any value in loosely framed appeals to look for discrimination in 'reality and substance' which might go against the grain of the Commonwealth's superior legislative power to that exercised by the states. There is also French CJ's innovative approach to the characterisation of laws under s 51(ii) through use of the 'universal conception' of discrimination to fashion a test that looks to the proportionality of any differences drawn by such a law to its attainment of a 'proper

objective'. That suggestion was not embraced by the rest of the court and promises to remain controversial on future occasions in which the court examines the limitation in s 51(ii).

Aside from these features, *Fortescue* confirms the traditional limits, not simply of the particular provisions and principles which the plaintiffs used to frame their challenge, but also of the court's willingness to engage with federal questions in a way that would require dilution of its commitment to the constitutional orthodoxy it articulated in the *Engineers'* case of 1920.