State Immunity from Commonwealth Laws: *Austin v Commonwealth* and Dilemmas of Doctrinal Design

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The principles governing State immunity from Commonwealth laws had, for many years, attached particular significance to 'discrimination'. In Austin v Commonwealth, *a majority of the High Court questioned the logic of the discrimination strand of State immunity jurisprudence, finding it to be inconsistent with underlying constitutional principles and an improper invocation of the legal concept of discrimination. This article takes issue with both lines of reasoning and makes a case for reinstating a focus upon discrimination.*

THE constitutional principle immunising the States from certain kinds of Commonwealth laws can be traced back, in its current form, to the High Court's decision in *Melbourne Corporation v Commonwealth*.[1] 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 apparent endorsement, through the 1990s, of a two-limbed approach favoured by Gibbs CJ and Mason J in *Queensland Electricity Commission v Commonwealth* ('*Queensland Electricity*').[2] Mason J's formulation, which quickly became the authoritative standard, identified two distinct elements or limbs:

> (1) The prohibition against discrimination which involves the placing on the States of special burdens or disabilities; and (2) the prohibition against laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments.... The second element ... is necessarily less precise than the first; it protects the States against laws which, complying with the first element because they have a general application, may

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1. (1947) 74 CLR 31.
2. (1985) 159 CLR 192. While Mason J's judgment is regarded as the leading judgment in the case, others also acknowledged that the *Melbourne Corporation* principle comprised two elements: Gibbs CJ 206-207, Wilson J 222, Deane J 247-248, Dawson J 260-262.

> nevertheless produce the effect which it is the object of the [*Melbourne Corporation*] principle to prevent.[3]

In *Austin v Commonwealth*,[4] decided by the High Court in February 2003, the *Melbourne Corporation* doctrine was untethered from the guiding principles provided in *Queensland Electricity*. In its first detailed examination of the *Melbourne Corporation* principle for several years, the Court expounded, by majority, a new approach to the application of the principle, in which considerations of 'discrimination' were given greatly diminished emphasis.

In this article I explore the rationale for this shift and explain my reasons for thinking it unnecessary and undesirable. I argue that those members of the Court who rejected the *Queensland Electricity* two-limbed formulation mistook it as both inflexible and insufficiently tailored to the constitutional rationale underpinning it. In my view, there are at least three reasons why the issue of discrimination, as it has been understood in the *Melbourne Corporation* context, might deserve a prominent and clearly framed (ie, a 'structured') role in the Court's jurisprudence. These reasons concern the practicalities of constitutional fact-finding, rule of law considerations, and something I will call the 'symbolic dimension' to federalism as a constitutional principle. Aside from these concerns about the substance of the shift announced in *Austin*, I also take issue with the leading judgment's terminology-based objections to the discrimination strand of State immunity doctrine. I conclude that, despite the Court's apparent preference for minimalism in elaborating implicit constitutional values, the maintenance of specific rules to deal with the discrimination factor is desirable in this context and is not ruled out by *Austin*.

I. THE DECISION IN *AUSTIN v COMMONWEALTH*

The plaintiffs in *Austin v Commonwealth*,[5] Austin J of the New South Wales Supreme Court and Master Kings of the Victorian Supreme Court, disputed their liability to a 'superannuation contributions surcharge' assessed and imposed under Commonwealth statutes.[6] 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,

3. Ibid, 217.
4. (2003) 215 CLR 185.
5. Ibid.
6. 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).

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 section 114 of the Constitution, which prohibits Commonwealth taxation of State property.

In recognition of those complications, the surcharge liability was imposed directly on the relevant judges. State judges appointed before 7 December 1997 were exempted from the surcharge.[7] 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, together with some other States, amended its judicial pension scheme to allow judges to commute part of their pensions to pay the tax.[8]

Master Kings was found to fall outside the tax's reach, as she was deemed a 'judge' appointed before 7 December 1997.[9] Austin J was appointed in 1998, meaning that his liability turned on the constitutionality of the impugned Commonwealth provisions.

Four judgments were delivered. Gleeson CJ and McHugh J each wrote separate judgments, while Gaudron, Gummow and Hayne JJ delivered a joint judgment. Kirby J gave a dissenting judgment.[10]

While the plaintiffs made several constitutional arguments,[11] 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 the *Melbourne Corporation* principle 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 comparative:

> 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

7. Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997 (Cth) s 7.
8. Judges' Pensions Act 1953 (NSW) as amended by the Judges' Pensions Amendment Act 1998 (NSW). See eg Judicial and Other Pensions Legislation (Amendment) Act 2001 (Vic).
9. *Austin* above n 4, Gleeson CJ 206, Gaudron, Gummow & Hayne JJ 236-237, McHugh J 275, Kirby J 295.
10. Callinan J did not sit.
11. The other constitutional arguments related principally to the scope of the Commonwealth's taxing power: *Austin* above n 4, Gaudron, Gummow & Hayne JJ 271-275.

> treatment and unequal outcome is not the product of a distinction which is appropriate and adapted to the attainment of a proper objective.[12]

The test applied under the *Queensland Electricity* first limb did not conform to that pattern, as it did not demand explicit and precise comparisons.

Second, the joint judgment found that a close reading of the judgments in *Melbourne Corporation* did not support a separate discrimination limb.[13] *Melbourne Corporation* was, in their view, properly concerned with a Commonwealth law's substantive effect upon a State's capacity to function, rather than the scope of a law's operation. A separate discrimination limb was, they thought, incapable of reflecting that underlying concern:

> To fix separately upon laws addressed to one or more of the States and upon laws of so-called 'general application', and to present the inquiry as differing in nature dependent upon the form taken by laws enacted under the one head of power, tends to favour form over substance.[14]

While the joint judgment insisted that *Melbourne Corporation* is best understood as a single principle, no precise formulation emerged. Rather, Gaudron, Gummow and Hayne JJ appeared content to leave the principle fluid:

> There is, in our view, but one limitation, though the apparent expression of it varies with the form of the legislation under consideration. The question presented by the doctrine in any given case requires assessment of the impact of particular laws by such criteria as 'special burden' and 'curtailment' of 'capacity' of the States 'to function as governments'.[15]

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.[16] 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.[17] Perhaps curiously, given the tenor of the earlier abstract analysis, that conclusion seemed to depend upon the fact that State judges were singled out for a special burden.[18] The

12. Ibid, 247 (footnotes omitted).
13. Ibid, 256.
14. Ibid, 257-258.
15. Ibid, 249.
16. Ibid, 262.
17. Ibid, 266-267.
18. The uncomfortable fit between the joint judgment's abstract analysis and exposition of the *Melbourne Corporation* principle and its application of those ideas in the case before it has

selective application of the Commonwealth provisions clearly counted for something, in spite of the joint judgment's earlier insistence that such singling out should not dictate any particular result.

Gleeson CJ did not 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'.[19] He emphasised that the concept of 'discrimination' picks up laws with a *purpose* inimical to federation, while the other part of the principle – the *Queensland Electricity* second limb – focuses upon the effects of impugned Commonwealth laws.[20] Gleeson CJ found that the effect of the Commonwealth law in this case was to force States to alter their judicial pension arrangements. That this was the States' response, he said, underlined rather than negated the 'interference' on the part of the Commonwealth, an interference amounting to an 'impairment of the constitutional integrity of a State government'.[21]

McHugh J was the only judge to endorse and defend the two-limbed formulation of the State immunity principle. He thought the two-limbed formula well settled and that departing from it may lead to unforseen 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.[22] Applying the first limb discrimination test from *Queensland Electricity*, McHugh J found that the Commonwealth's provisions, in singling State judges out, placed a burden upon the States and so were invalid.[23] As his reasoning indicates, McHugh J accepted that the first limb has the same rationale as the second limb – protecting States' constitutional integrity and autonomy – even though it places less emphasis upon a Commonwealth law's substantive effects.[24]

Kirby J'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 his view, the consequences for States of their judges' bearing the surcharge liability

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been pointed out: A Twomey 'Federal Limitations on the Legislative Power of the States and the Commonwealth to Bind One Another' (2003) 31 FL Rev 507, 511.

19. *Austin* above n 4, 217.
20. Ibid. This purpose and effect distinction had been emphasised in some judgments in earlier State immunity decisions. See eg *Queensland Electricity* above n 2, Gibbs CJ 206-207.
21. Ibid, 220.
22. Ibid, 282.
23. Ibid, 283-284.
24. Ibid, 282. McHugh J acknowledges that a law's effects do play into the first limb test in a limited way. Specifically, as noted by Gibbs CJ & Mason J in *Queensland Electricity*, a Commonwealth law having no, or minimal, deleterious effects upon a State or States may not be considered an instance of 'discrimination': ibid, McHugh J 384. See also *Queensland Electricity* above n 2, Gibbs CJ 208, Mason J 220.

were not substantial enough to attract immunity.[25] Any impairment of constitutional functioning was likely to be marginal, he thought, and the concerns animating the other judgments had been overstated.[26] Importantly, Kirby J seemed to apply what he thought to be the relevant test – resembling the second limb of Mason J's *Queensland Electricity* 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 parties asserting State immunity – here, the State judicial officers – and thought that on this occasion they had failed to demonstrate the requisite degree of impairment.[27]

Kirby J implied that the different conclusion reached in the majority judgments stemmed from their over-sensitivity to the position of the judicial branch, noting that 'the first plaintiff is a judicial officer whose complaints of unfairness may resonate in judicial ears'.[28] However, the differing conclusions might also be attributed to a more fundamental difference of principle. Specifically, it seems that Kirby J was alone in truly abandoning discrimination as a consideration informing the State immunity doctrine. While acknowledging that '[t]he presence of discrimination against a State may be an indication of an attempted impairment of its functions', he did not attach any significance to such a showing, insisting instead that only the effects of a Commonwealth law are relevant.[29]

With no adjustment to the relevant test on account of the singling out, there was, as Kirby J recognised,[30] no reason to treat this set of impugned Commonwealth provisions any differently from those considered in the *Payroll Tax Case*[31] or the *Second Fringe Benefits Tax Case*.[32] Those cases considered tax laws of general application and found that they did not impair State constitutional functioning in sufficient degree so as to enliven the *Melbourne Corporation* principle. That other judgments in *Austin* distinguished those cases suggests that, for those judges, something must indeed have turned on the discrimination, that is, on the fact of State judicial officers having been singled out for a special burden.[33]

The next section of this article explores what *Austin* means for the future of 'discrimination', or singling out, as a feature of State immunity jurisprudence and considers the wisdom of the Court's apparent new direction.

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25. Ibid, 302.
26. Ibid, 307.
27. Ibid, 305.
28. Ibid, 306.
29. Ibid, 301.
30. Ibid, 304-305.
31. *Victoria v Commonwealth* (1971) 122 CLR 353 *('Payroll Tax Case')*.
32. *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329 *('Second Fringe Benefits Tax Case')*.
33. *Austin* above n 4, Gleeson CJ 218, Gaudron, Gummow & Hayne JJ 256.

II. 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 yet clear.[34] Some guidance, at least, emerges from the recent decision in *Bayside City Council v Telstra Corporation Limited*,[35] in which Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ cited *Austin* as the leading authority on the scope and application of the *Melbourne Corporation* principle. They drew from *Austin* the following test: 'Whether the federal law in question, looking to its substance and operation, in a significant manner curtails or interferes with the capacity of the States to function as governments'.[36] However, that case had no bearing on the most interesting question emerging in *Austin's* wake, being the question of what is the appropriate role for considerations of singling out, or discrimination, in this realm. To frame the question more precisely: is the fact of a Commonwealth law's singling out States and placing burdens upon them alone a factor deserving a structured 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; it has always been accepted that some Commonwealth laws without that attribute would fall foul of the principle on other bases. The *Queensland Electricity* test has often been interpreted as treating the fact of singling out as basically a sufficient condition for invalidity.[37] In other words, absent specific constitutional authorisation, the fact of a State's being singled out for a special burden or disability would itself be enough to trigger invalidity under the *Melbourne Corporation* principle.[38] As I

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34. Other commentators have taken differing views as to the extent of the doctrinal revision undertaken in *Austin*. A Twomey suggests that *Austin* 'overturned' the previous 'split into two elements': Twomey above n 18, 509. Blackshield & Williams paint the shift as a 'fundamental conceptual return to [an] earlier understanding': A Blackshield & G Williams *Australian Constitutional Law and Theory: Commentary and Materials* 3rd edn (Sydney: Federation Press, 2002) supplement to ch 3, 2. G Hill is more circumspect, suggesting that *Austin* works a 'reformulation' intended to tether existing doctrine more firmly to its 'underlying purpose': G Hill '*Austin v Commonwealth*: Discrimination and the *Melbourne Corporation* Doctrine' (2003) 14 PLR 80, 84.
35. (2004) 206 ALR 1.
36. Ibid, 12.
37. See eg Blackshield & Williams above n 34; Cth Parliament *Final Report of the Constitutional Commission* (Canberra: AGPS, 1988) Vol 1, paras 2.34-2.36; C Tappere '*Queensland Electricity Commission and Others v Commonwealth of Australia*' (1986) 16 FL Rev 305, 315-316. The self-executing nature of the test was assumed in submissions made in *Austin* above n 4, 357. Note that some commentators have long rejected the self-executing view of the *Queensland Electricity* first limb test. Professor Zines, for instance, attributes to Mason J a more substance-oriented conception of discrimination in which legal form was not determinative: L Zines *The High Court and the Constitution* 4th edn (Sydney: Butterworths, 1997) 327.
38. As explained later in this article, there have been occasional suggestions that this rule is or should be qualified by a proviso, requiring that the impugned Commonwealth provisions

will later explain, this supposed sufficiency test probably misinterprets the leading judgments in *Queensland Electricity*. In any case, a majority in *Austin* favoured a further demotion for considerations of singling out, although the nature and degree of that downgrading remains unclear.

There are at least two distinct 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 factor having a fairly fluid evidentiary significance. That is, it might be thought indicative in some circumstances of an impairment of States' constitutional functioning, but in a way so context-dependent as to require case-by-case consideration. This is seemingly the kind of approach contemplated by the joint judgment in *Austin*, which nominated the fact of a 'special burden' as one criterion that may assist in the application of the *Melbourne Corporation* principle in some cases.[39]

Alternately, 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 out one or more States, that fact could raise a rebuttable presumption in the States' favour, with the onus shifting to the Commonwealth to demonstrate a rational basis or that no impairment of constitutional functioning followed. Or, as is perhaps suggested by McHugh J's reasons in *Austin*,[40] evidence of a singling out may operate to lower the threshold of impairment that a State needs to demonstrate in order to engage the *Melbourne Corporation* principle. Such an evidentiary role, of burden-shifting or -altering, is not unfamiliar.[41] For instance, it is clear that a role of this kind is contemplated for considerations of form-based discrimination within the High Court's current section 92 jurisprudence.[42] Either kind of role would lend more concrete significance to the fact of a singling out; it would then fall somewhere between the role typically read into the *Queensland*

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work some material detriment to the State or States concerned: *Austin* above n 4, McHugh J 282-283; *Queensland Electricity* above n 2, Gibbs CJ 208.

39. *Austin* above n 4, 248.

40. That McHugh J conceives of the relation in this way can be gleaned from: (i) his view that the first limb of the *Queensland Electricity* test, while focusing on discrimination, is nonetheless subject to a proviso that there be some minimum level of 'practical impact' upon the States; and (ii) his interest in the degree to which the impugned laws burdened States in their constitutional functioning, even while ostensibly analysing the case under the first limb: *Austin* above n 4, 283-285.

41. The constitutional jurisprudence of the US Supreme Court makes frequent and overt use of such devices. One well known example is the 'tiers of review' or 'levels of scrutiny' analysis employed in relation to the Fourteenth Amendment equal protection clause.

42. This is so even while the Court has yet to clarify whether it is the burden that is shifted, or rather the threshold that is lowered. See *Cole v Whitfield* (1988) 165 CLR 360, 408: 'If [a State law] applies to all trade and commerce, interstate and intrastate alike, it is less likely to be protectionist than if there is discrimination appearing on the face of the law.' See also *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411, 424, where the majority attached significance to the 'prima facie discrimination' evident on the face of impugned provisions.

Electricity two-limbed test – a virtual trigger for invalidity[43] – and what Kirby J seemed to favour in *Austin*, being virtual insignificance.

As was explained earlier, Kirby J's judgment in *Austin* focused entirely upon considerations of substantive effect, seeming to suggest that the *Melbourne Corporation* principle should be applied without regard to whether or not an impugned Commonwealth law singled States out.[44] That position prompts an important question: what reason is there for building the question of singling out into the doctrine in a structured way? At least three possible answers emerge from the *Austin* judgments.

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 is conceded in *Austin* to be a real problem in this area.[45] Secondly, a structured approach, incorporating specific and explicit sub-rules, could contribute greater certainty to an otherwise murky and unpredictable doctrine. This is essentially a rule of law argument. Thirdly, 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 projecting a message about the status and dignity of the States as partners in the federation, aside from protecting the substantive reality of their independence.

The first two of these possible justifications are often framed, at least implicitly, as defences of the assumed over-inclusiveness of any test turning upon the fact of a singling out. In that regard, they proceed upon the orthodox assumption that the purpose and role of the *Melbourne Corporation* principle is to protect States from laws which threaten their substantive constitutional functioning. If that role is taken as a given, it is clear that the *Queensland Electricity* first limb test, as conventionally understood, is indeed over-inclusive. Specifically, when understood as an invalidity trigger, it appears to operate in such a way as to invalidate not only discriminatory laws which actually do undermine State constitutional functioning in a substantial degree but also discriminatory laws giving rise to less substantial burdens.

The enterprise of doctrinal design often throws up the issue of how best to reconcile and accommodate the fundamental legal values of flexibility and certainty, so often found to pull against one another.[46] Over-inclusive rules may, in spite of their inherent

43. Although, as will be explained later in this article, a close reading of the leading judgments in *Queensland Electricity* above n 2 suggests no such rigid rule was in fact intended.
44. *Austin* above n 4, 301.
45. This possibility is developed by Hill above n 34.
46. The High Court has discussed this tension, and the doctrinal dilemmas and choices that follow, in several contexts: see eg *Cole v Whitfield* above n 42, 402; *Breavington v Godleman* (1988) 169 CLR 41, Brennan J 113. The tension, and its ramifications for doctrinal design, has been addressed: see A Stone 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 MULR 668.

inflexibility, be valued for their propensity to generate doctrinal certainty and stability. Alternately, or as well, they may be valued for their efficiency benefits, for prudential reasons, or for their propensity to confine judicial discretion. Any or all of these considerations could be invoked to defend the use of an over-inclusive test in applying the *Melbourne Corporation* principle.

The *Austin* joint judgment touched upon several of these considerations in conceding the inherent fact-finding problems attending the *Melbourne Corporation* principle's application. The joint judgment acknowledged that this task 'inevitably turns upon matters of evaluation and degree and of 'constitutional facts' which are not readily established by objective methods in curial proceedings'.[47] That observation speaks, if inadvertently, to the issue of doctrinal clarity and certainty, to the potential need to curb judicial discretion in this area, and also to the question of efficient resolution of disputes. By contrast, McHugh J quite consciously invoked considerations of doctrinal clarity and certainty to argue for the retention of the *Queensland Electricity* two-limbed formula. Moreover, in pointing out that principles of State immunity are of their nature 'vague and difficult to apply', McHugh J may have been suggesting that the *substance* of the two-limbed test, and not just the fact of its sustained acceptance, warranted its retention on rule of law grounds.[48]

Some of the commentary on the *Austin* decision has explored possible bases for retaining 'discrimination' as a pivotal concern in State immunity jurisprudence. Graeme Hill has noted that doctrinal principles minimising or circumventing difficult fact-finding tasks have a clear attraction as a matter of procedural efficiency and that this may be one reason for maintaining a free-standing prohibition against Commonwealth laws which single States out.[49] Turning to the possible prudential benefits of maintaining such a test, Hill has suggested that laws which single States out for special burdens present a particular danger within a federal system and that, on this basis, the probable over-inclusiveness of a flat prohibition upon such discriminatory laws could perhaps be justified.[50]

The rule extracted, as a matter of conventional wisdom, from the first limb of Mason J's *Queensland Electricity* formulation, taking the element of singling out to be basically a sufficient basis for invalidating a Commonwealth law, probably created at least the appearance of doctrinal certainty and predictability and of some containment of judicial discretion. It might also be assumed that the lessened emphasis upon judicial fact-finding contributed to the efficient resolution of State immunity claims.

47. *Austin* above n 4, 249.
48. Ibid, 281-282.
49. Hill above n 34, 83.
50. Ibid. The suggested danger stems from the fact that burdens visited exclusively upon the States are less likely to incur the widespread 'political opprobrium' that might, where anticipated, serve as a brake upon intrusive or burdensome Commonwealth laws.

Nevertheless, the joint judgment in *Austin* objected to, among other things, the over-inclusiveness of what it took to be the *Queensland Electricity* first limb test – that is, its detachment from the ultimate rationale for the *Melbourne Corporation* principle and its propensity to catch Commonwealth laws not in fact offensive to that ultimate rationale. To invalidate a Commonwealth law on the basis that it singles States out is, the joint judgment asserts:

> To attend insufficiently to what in this realm of discourse is the essential question in all cases ... [being] whether the law restricts or burdens one or more of the States in the exercise of their constitutional powers.[51]

That essential question was said to fix upon burdens of substance rather than form.[52] Kirby J agreed with the joint judgment's critique of a separate discrimination limb. In his view:

> The presence of discrimination against a State may be an indication of an attempted impairment of its functions as the Constitution envisaged them. But any discrimination against States must be measured against that underlying criterion.[53]

Assuming for the moment that the ultimate justification for the *Melbourne Corporation* principle is the need to avoid substantive burdening of State constitutional functioning, an over-inclusive test, pursuing that goal with some imprecision, might be adopted and the imprecision tolerated on any of the bases outlined earlier. Alternatively, some other accommodation of the competing concerns might be attempted. A finding that a Commonwealth law singles States out for special burdens might, for instance, be treated as merely suggestive, not determinative, of unconstitutionality.[54] Burden-shifting and threshold-lowering roles represent two of the many ways this compromise might be framed. When deployed in this way, the element of singling out might further the *Melbourne Corporation* principle's claimed rationale without succumbing to over-inclusiveness. Of course, the price of this better fit would be some dilution of the suggested virtues of fixed rules, including those mentioned earlier.[55] Where the balance should lie is a difficult question, as the spectrum of views expressed in the *Austin* judgments attests.

Quite apart from the question of what would be an optimal balance, there is the question of what balance had in fact been struck in the case law preceding *Austin*.

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51. *Austin* above n 4, 258.
52. This emphasis upon substance was reiterated in *Bayside City Council v Telstra* above n 35, Gleeson CJ, Gummow, Kirby, Hayne & Heydon JJ 12.
53. *Austin* above n 4, 301.
54. Professor Blackshield has suggested that this was the role envisaged for considerations of discrimination in *Melbourne Corporation* itself: AR Blackshield 'Damadam to Infinities! The Tourneyold of the Wattarfalls' in M Sornarajah *The South West Dam Dispute: The Legal and Political Issues* (Hobart: Uni of Tasmania Press, 1983) 57-58.
55. For a careful discussion of this tension in a different constitutional context, see Stone above n 46, 691-694.

As to this, several of the *Austin* judgments seem to misconstrue the position emerging from *Queensland Electricity*. In particular, the joint judgment in *Austin* was critical of the received wisdom, reflected in the parties' submissions, that under the two-limbed *Queensland Electricity* formula the element of singling out triggered a self-executing test leading to automatic invalidity.[56] While not squarely attributing that view to Mason J himself, the joint judgment was nevertheless anxious to avoid perpetuating it as a presumed consequence of Mason J's two-limbed formulation. However, had the joint judgment elaborated more fully upon the reasoning in *Queensland Electricity*, it would probably have noted the significant indications there that no such self-executing test was actually intended.[57] Neither Mason J nor the other proponent of a two-limbed formulation, Gibbs CJ, proposed a purely form-based test in which a singling out would trigger invalidity. Rather, both were seeking to reserve some room to manoeuvre by reference to considerations of substance. Gibbs CJ noted that a Commonwealth law burdening some States more than others in consequence of their 'different needs' might not exhibit 'discrimination'; nor would a law singling States out for a special burden or disability if the burden in question was 'clearly de minimis'.[58] Mason J attached a still broader reservation:

> A provision, which on its face appears to discriminate against a particular State, [may cease] to have that character, when attention is given to the nature of the law and the purpose and effect which it has.[59]

In *Austin*, only McHugh J adverted to these important qualifications, noting that the first limb of the *Queensland Electricity* test, as he understood it, rendered laws discriminating against States invalid 'unless the discrimination ... has no practical impact' upon State constitutional functioning.[60]

If, as McHugh J's analysis seems to acknowledge, the *Queensland Electricity* two-limbed test in fact treated 'singling out' as a burden-shifting or threshold-lowering consideration, rather than as an inflexible trigger of invalidity, the concerns about over-inclusiveness underlying the *Austin* joint judgment lose much of their force. In fact, the joint judgment seems in places quite consistent with McHugh J's position, conceding that 'differential treatment may be indicative of infringement of the limitation ... [though] it is not, of itself, sufficient to imperil validity'.[61] This concession seems at least to leave the way open for further refinement of the *Melbourne Corporation* principle, to give a more clearly defined role to the singling out factor within the broader test.

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56. *Austin* above n 4, 249.
57. While in *Austin,* Gaudron, Gummow and Hayne JJ do note Brennan J's disavowal of such an approach in *Queensland Electricity*, there is no mention of the similar cautions found in the judgments of Gibbs CJ and Mason J: *Austin* above n 4, 256.
58. *Queensland Electricity* above n 2, 206-208.
59. Ibid, 220.
60. *Austin* above n 4, 283.
61. Ibid, 264.

III. A SYMBOLIC DIMENSION TO FEDERALISM AS A CONSTITUTIONAL VALUE?

The third potential argument, noted earlier, for giving a structured role to considerations of discrimination is qualitatively different. This 'symbolism argument', as I will call it, is unlike those developed above in that it takes a different view of the underlying rationale for a principle of State immunity. Rather than accepting the orthodox view of *Melbourne Corporation* as concerned solely with the substance of State constitutional functioning,[62] the symbolism argument contends that there is a further, less clearly articulated, dimension to the principle. Specifically, the symbolism argument contends that in this realm surface appearances have intrinsic importance and are not merely indicative of matters of substance. In other words, it contends that the *appearance* or image of States as dignified, autonomous partners in the federal compact is a matter of constitutional concern, aside from and in addition to the substantive actuality of that autonomy.

The term 'symbolism' is not entirely satisfactory to convey the point. Its inadequacy lies in the fact that the image of States as possessing dignity and status as federal partners is not without substantive importance in our constitutional system. Rather, its projection is essential to securing the goodwill between governments that is necessary to the cohesion and stability of a federal system of government. Put simply, it may be impossible to secure State constitutional autonomy and integrity as a matter of substantive effect without also securing that autonomy and integrity as a matter of surface impression. To draw an analogy, this is rather like the importance of the appearance of judicial independence which, together with the reality of that independence, sustains the practice of judicial review.[63] The separation of judicial power mandated by the Constitution also requires and relies upon a synergy between an appearance of separation, on the one hand, and its actuality, on the other.[64] This article uses the term 'symbolism', then, as a convenient shorthand for that more complex and nuanced idea.

This suggested symbolic dimension perhaps already lurks implicitly in the case law, especially in periodic references to legislative purpose as a consideration in applying

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62. This orthodox view is clearly evident in the joint judgment in *Austin* ibid, 246-248.
63. J Webber alludes to this synergy between the appearance and the substantive reality of judicial independence in the course of making a quite different point about the symbolism of federalism: J Webber 'Constitutional Poetry – The Tension Between Symbolic and Functional Arms in Constitutional Reform' (1999) 21 Syd LR 260, 269, n 31. See also M Gleeson *Boyer Lectures 2000: The Rule of Law and the Constitution* (Sydney: ABC Books, 2000) 3-4.
64. See eg the discussion of 'public confidence in the integrity of the judiciary' in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, Brennan CJ, Dawson, Toohey, McHugh & Gummow JJ 16. The same synergy between appearances and substantive realities features in discussions of the principle of judicial impartiality: see eg *R v Webb* (1994) 181 CLR 41, Mason CJ & McHugh J 50.

Melbourne Corporation.[65] Nevertheless, the idea that symbolic considerations could play into the *Melbourne Corporation* principle's operation in a significant way is likely to unsettle those committed to the contemporary 'substance' approach to interpreting and applying the Constitution. In several areas, the rise of a substance-focused orthodoxy followed only after many decades of persistent dissent from and critique of formalist interpretations.[66] An explicit concern with matters of appearance may strike some as a dangerous throwback to legal formalism. However, as the High Court has acknowledged in much of its contemporary constitutional jurisprudence, a concern with matters of substantive effect need not exclude concern with legal form, legislative purpose, or other matters not pivoting on fact ascertainment.[67] Similarly, the suggested distinction between substance and symbolism in the context of State immunities jurisprudence need not represent a zero sum game. This article's claim is, in any case, a descriptive one; the idea of federal symbolism seems to resonate with what the High Court is actually doing, if not always with what it is saying, as it extends and refines its immunities jurisprudence.[68]

A formulation of the *Melbourne Corporation* principle that gives the 'singling out' factor a prominent and clearly defined role seems better able than more amorphous tests to point up the suggested symbolic dimension of State immunity. In fact, something akin to Mason J's two-limbed formulation seems especially well-suited to capturing a principle moving along two distinct dimensions – the symbolic and the substantive.[69] Each limb of the *Queensland Electricity* two-limbed formulation

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65. See eg *Austin* above n 4, Gleeson CJ 218; *Queensland Electricity* above n 2, Gibbs CJ 203-204, Wilson J 227; *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ 240; *Victoria v Commonwealth* (1996) 187 CLR 416 *('Industrial Relations Act Case')*, Brennan CJ, Toohey, Gaudron, McHugh & Gummow JJ 500.

66. For instance, the Mason High Court's reorientation of ss 90, 92 and 117 around a principal concern for substance attracted widespread comment. For discussion of the reason for the shift, see *Philip Morris Ltd v Commissioner of Business Franchises* (1989) 167 CLR 399; *Cole v Whitfield* above n 42; *Street v Queensland Bar Association* (1989) 168 CLR 461, especially Deane J 522-524.

67. See, in the s 90 context: *Ha v New South Wales* (1997) 189 CLR 465, 498, 501-502; in the s 92 context: *Cole v Whitfield* above n 42, 394-395, 399; *Bath v Alston Holdings Pty Ltd* above n 42, 425; in the s 117 context: *Street v Queensland Bar Association*, ibid, Brennan J 508, Deane J 528; *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463, 494. In the context of the separation of judicial power, see *Wilson* above n 64, 16. Furthermore, it seems that the Court at least in some areas employs tests focused upon effects principally as a basis for inferring legislative purpose, providing powerful evidence that a concern with substantive effect need not stand in isolation: see eg Gaudron J's discussion in *Kruger v Commonwealth* (1997) 190 CLR 1, 128.

68. Prescriptively, the role of symbolism in the constitutional setting is certainly more complex and contested: see eg Webber above n 63.

69 While this suitability alone does not demonstrate that the two-limbed formulation incorporates such a dualistic view, the leading judgments in *Queensland Electricity* do in places seem suggestive of such a link. Mason J explained that '[t]he foundation for the [State immunity] implication is ... the constitutional conception of the Commonwealth and the States as constituent entities of the federal compact': above n 2, 218. Emphasising

could be understood to isolate a different dimension of the federal constitutional imperative. The first limb could be characterised as addressing the symbolic level of intergovernmental relations – a constitutional demand for mutual respect and some consequent forbearance.[70] In fixing upon laws purposefully singling another government out, the first limb emphasises the importance of intergovernmental respect and goodwill. The second limb, on the other hand, is readily characterised as geared to the substance or actuality of a State's independent standing. Clearly, these are two sides of a single coin. Nevertheless, addressing each concern with a distinct test would at least emphasise that there are two dimensions to State autonomy and integrity, each turning on somewhat different considerations. An explicitly two-limbed doctrine might lessen the extent to which one locus of concern overshadows the other, a tendency that seems predictable enough given the Court's focus upon substance in recent times.

In any event, the crucial point is that if the Court were to concede this symbolic dimension – that is, accept that the *Melbourne Corporation* principle must be concerned with keeping up federal appearances in addition to actualities – this may offer a further reason, aside from fact-finding and rule of law arguments, to give the concept of singling out a more clearly articulated role within State immunity doctrine.[71]

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the 'conception' of a 'compact' embeds the *Melbourne Corporation* principle in the constitutional imagery of free agreement among equals – equals presumably not contemplating or consenting to subjugation, neither on the level of appearance or in actuality. Mason J also refers to the *Melbourne Corporation* principle as having 'its basis in a constitutional conception of a relationship between [governments]' – an image suggestive, perhaps, of some dimension of protocol alongside concerns of substance: ibid, 217. Gibbs CJ also indicates that, in his view, the *Melbourne Corporation* principle contemplates more than just the capacity of States to function in a substantive sense. He emphasises that the principle, in order effectively to protect the 'integrity' of States, must concern itself with interferences 'of no great importance' as well as with others more substantial. This follows, Gibbs CJ notes, from the fact that '[t]he integrity of a State could be destroyed as effectively by a succession of minor infringements as by one gross violation of the principle': ibid, 208-209.

70. This explanation might seem inconsistent with an established qualification to the *Melbourne Corporation* principle, being the fact that it does not protect States from Commonwealth laws removing special privileges enjoyed by the States to the exclusion of other legal subjects. It might be thought that the discrimination strand of the *Queensland Electricity* formulation, if indeed motivated by a need to safeguard States' 'dignity' and promote a federal ethos of respect and goodwill, would necessarily extend to protect unique privileges enjoyed by States. However, the privileges qualification may be explained readily enough as a function of contemporary judicial attitudes in relation to the scope and content of executive power. Respecting a State's dignity and constitutional status may not require preservation of archaic Crown prerogatives in which a State's dignity is unlikely to remain invested.

71. Aside from indicating that 'singling out' may deserve a more prominent role within the Court's State immunity jurisprudence, explicit attention to a symbolic dimension would have other ramifications. In particular, it may help the Court to explain and justify two features of its jurisprudence that have attracted criticism: the apparent interest in legislative purpose and the lack of interest in the extent of particular financial burdens.
Judgments in several key cases appear to attribute significance to legislative purpose, as a factor in applying the *Melbourne Corporation*

Whether this clearer articulation really requires a two-limbed formulation, or could instead be achieved satisfactorily within a 'single test' framework, represents a further question into which I will not delve here.

IV. THE LANGUAGE OF DISCRIMINATION

Austin raises a further issue: whether the fact of a singling out, if importance is to attach to it, is something that can be described and analysed adequately in the language of discrimination. The joint judgment emphasises that the first limb of Mason J's *Queensland Electricity* test, in ignoring the question of a relevant comparator, was not actually concerned with discrimination in the strict sense:

> 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.... [In the present case] where is the first step, the unequal treatment of equals or equal treatment of the unequal?[72]

This statement recounts, and proceeds from, the conception of 'discrimination' that Gaudron and Gummow JJ, in particular, have articulated carefully in a number of settings.[73] That conception is informed by many of the ideas and themes featuring

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principle. As yet, however, the Court has proffered no explanation of this interest in legislative purpose. If the Court were to acknowledge a symbolic dimension to the *Melbourne Corporation* principle, this would provide a ready explanation for the relevance of legislative purpose within the doctrine – federal goodwill and mutual respect among component polities would, presumably, be damaged just as readily by an improper legislative purpose as by a law's substantive effect.

Similarly, the Court might invoke the notion of symbolism to explain the distinction it draws between a law's financial impact upon States and its propensity to inflict 'constitutional' impairment. The Court has long insisted that substantial financial burdens visited upon States by Commonwealth laws of general application are acceptable, provided they do not push States to the brink of collapse. Meanwhile, Commonwealth laws making a much smaller dent in a State's bottom line, yet having a 'disabling effect on state authority', have been found invalid: *Austin* above n 4, 217. In the *Australian Education Union Case*, Dawson J pointed out that this aspect of the Court's State immunity jurisprudence did not rest easily with its determined focus upon an impugned law's substantive effect: above n 65, 249-250. The distinction might be less vulnerable to such criticism if housed within a doctrine geared to protecting States' 'status' along more than one dimension, and thus transcending the limitations and implications of a focus upon substance alone.

72. *Austin* above n 4, 247 (footnotes omitted).

73. The *Austin* joint judgment references three cases in particular in which Gaudron J and/or Gummow J have expounded this conception of discrimination: *Street* above n 66; *IW v City of Perth* (1997) 191 CLR 1; *R v Cameron* (2002) 209 CLR 339. The legal concept of discrimination was defined recently in essentially the same terms by Gleeson CJ, Gummow, Kirby, Hayne & Heydon JJ in *Bayside City Council v Telstra* above n 35, 15. See also *Permanent Trustee Australia Ltd v Commissioner of State Revenue* [2004] HCA 53, Gleeson CJ, Gummow, Hayne, Callinan & Heydon JJ paras 88–91.

in the discrimination jurisprudence of leading jurisdictions in the field, including that of United States, Canadian, and European courts.[74]

Importantly, though, the term 'discrimination' can be understood and used in a different, older, sense which denotes a lack of general application in a law and draws upon the concept of formal equality.[75] Viewed through this lens, a complaint that a law lacks generality of application does hinge upon a comparison.[76] However, it tends not to be an explicitly identified and carefully constructed comparison of the sort featuring in most modern discrimination jurisprudence. An observation that a law singles out a class of subjects and exposes it to a burden not visited upon other legal subjects is, in a crucial sense, an assertion of 'different' treatment – different from the normal run of laws which are expressed in general terms and attach consequences to conduct, or objective status, rather than subjective identity. The relevant 'comparator' becomes all other legal subjects not exposed to this form of regulation – regulation which, within some formal theories of equality and the rule of law, has typically been cast as undesirable or even presumptively unjust.[77] Modern discrimination jurisprudence views such a form-based conception of equality, at least when standing alone, as impoverished and inadequate.[78] That criticism, however, differs from the one levelled in the *Austin* joint judgment, that is, that such an approach is not even cognisable as a species of discrimination analysis.

The joint judgment in *Austin* implies that the conception of discrimination at work in the State immunity context is, because it is different from the favoured modern

74. See eg *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165, Deane & Gaudron JJ 175-176, 179; *Street* above n 66, Gaudron J 571, 573; *Waters v Public Transport Commission* (1991) 173 CLR 349, Mason CJ & Gaudron J 359, 361, 363-364; *IW v City of Perth* ibid, Gummow J 41-42; *X v Commonwealth* (1999) 200 CLR 177, Gummow & Hayne JJ 203-204, n 84; *Purvis v New South Wales* (2003) 202 ALR 133, Gummow, Hayne & Heydon JJ 181.

75. See eg AV Dicey *Introduction to the Study of the Law of the Constitution* 10th edn (London: Macmillan & Co, 1959) 193. Dicey describes 'equality before the law' as involving the idea that 'every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals'.

76. Or, even if expressed in general terms, clearly bears the mark of a law directed at identifiable legal subjects, rather than being genuinely addressed to an anonymous status or conduct: see eg *Queensland Electricity* above n 2, Gibbs CJ 204, Mason J 220-221.

77. On the idea of a legal rule's 'generality' as a virtue within a formal conception of the rule of law, see Dicey above n 75, 188-193; FA Hayek *The Constitution of Liberty* (London: Routledge,1960) 153-154; TRS Allan *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: OUP, 2001) 3-4; G de Q Walker *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne: MUP, 1988) 25-26. For a critique of this formal value of generality, see R Unger *Law in Modern Society: Toward a Criticism of Social Theory* (New York: Free Press, 1976).

78. The inadequacy of a form-based conception of discrimination is discussed in several of the judgments in *Street* above n 66, Mason CJ 487-488, Brennan J 518, Deane J 523-525, Dawson J 545-546, Gaudron J 569, McHugh J 581-582. Importantly, though, the Court has never ruled out the harnessing of form-based tests within a broader conception of discrimination: see eg *Cole v Whitfield* above n 42, 394-395, 408.

conception, a source of confusion and distraction.[79] Regardless of whether that concern is well-grounded, it is a criticism going only to the label. The appropriateness of the 'discrimination' label has no bearing on the importance or usefulness of the ideas that it had come to represent within the Court's State immunity jurisprudence. Nor does the joint judgment's terminological quibble bear upon the utility of maintaining a separate test in relation to Commonwealth laws which single States out. As explained above, there may be good reasons for retaining a prominent and structured doctrinal role for considerations of singling out, and if the language of 'discrimination' is deemed inappropriate something else can be substituted readily enough.[80] To attempt to resolve these deeper questions on a shallow conceptual level would be to fall into the very trap of 'favour[ing] form over substance', against which the joint judgment cautions.[81]

V. CONCLUSION

The High Court's acceptance that the Constitution reflects and sustains a number of distinct and sometimes competing politico-legal values provides important context when seeking to explain or evaluate its federal immunities jurisprudence. The depth and complexity of the tensions among those values has, in other settings, led the Court to exercise particular caution in the elaboration of constitutional values. For instance, in developing implied limitations grounded in the constitutional principle of representative democracy, the Court has been reluctant to explore beyond the incontestable core requirements seen to stem from that principle.[82] It may be that the Court considers this minimalist stance a prudent response when interpreting a document that is conflicted, and thus imperfect, in its expression of particular constitutional values.[83]

It comes as no surprise that this preference for minimalism is evident within the Court's jurisprudence of federalism-based implications. While some scholars hope

79. *Austin* above n 4, 258-259.
80. In any case, the terminological objection should have little force when the singling out factor is understood as a burden-shifting or -altering device, rather than as a trigger for invalidity.
81. Ibid, 257-258.
82. See, in particular, *McGinty v Western Australia* (1996) 186 CLR 140, Brennan CJ 171, Dawson J 180-183, McHugh J 233, Gummow J 281-283; *Lange v ABC* (1997) 189 CLR 520, 566-577.
83. The potential for constitutional principles effectively to cancel one another out, thereby depleting their interpretative significance, has been noted many times in High Court decisions dealing with constitutional implications: see eg *Leeth v Commonwealth* (1992) 174 CLR 455; *McGinty* ibid. Reilly has explored this aspect of the High Court's constitutional jurisprudence by way of comparison with that of the Supreme Court of Canada: A Reilly 'Constitutional Principles in Canada and Australia: Lessons from the Quebec Secession Decision' (1999) 10 PLR 209.

to see more flesh added to the constitutional conception of federalism,[84] the Court seems, at least at present, intent upon a minimalist and unelaborated conception. The preference for an unelaborated conception of federalism is reflected in the Court's insistence, reiterated in *Austin*, that the *Melbourne Corporation* doctrine's contours and limits need not be defined with precision.[85] A preference for minimalism might be deduced from other aspects of the case law – for instance, the established view that the *Melbourne Corporation* principle does not protect the States from the erosion of special privileges enjoyed to the exclusion of other legal subjects.[86]

A preference for a minimalist and unelaborated conception of federalism might be thought to militate against any formulation of the *Melbourne Corporation* principle involving more than minimal structure and definition. This, in turn, might seem to explain both the *Austin* majority's rejection of the *Queensland Electricity* two-limbed formulation and its more general refusal to articulate a structured role for considerations of discrimination. However, as I have explained, there are several bases on which the Court might depart consciously from its usual minimalism and instead adopt more detailed and specific rules to govern cases where States are singled out. In this article I have discussed three such bases: concerns about the Court's fact-finding capabilities in this area; furtherance of rule of law values such as doctrinal clarity and certainty; and the need to give appropriate emphasis to the symbolic dimension of the States' constitutional status. It may take some time for the potential deficiencies of a fluid *Melbourne Corporation* test to come into clear focus and for the advantages of a more structured treatment of the discrimination issue to be revisited. Importantly, though, *Austin* does not seem entirely to rule out an ongoing structured role for discrimination. Given the variety of ways in which the discrimination factor could function within State immunity doctrine, and the ready availability of alternate language with which to describe that factor, its re-emergence in some form seems assured.

84. See eg G Hill 'Will the High Court "Wakim" Chapter II of the Constitution?' (2003) 31 FL Rev 445, 447; Twomey above n 18, 534-535, 539.
85. *Austin* above n 4, Gleeson CJ 217, Gaudron, Gummow & Hayne JJ 250, 259, Kirby J 300.
86. See *Queensland Electricity* above n 2, Mason J 217, 220.