

# State Immunity from Commonwealth Legislation: Assessing its Development and the Roles of Sections 106 and 107 of the *Commonwealth Constitution*

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*This article reviews the development of the law of State immunity from Commonwealth legislation from Federation to the present day. It analyses the origins of the elements and structure of the current doctrine, and examines the fluctuating importance given to ss 106 and 107 of the Commonwealth Constitution as a direct source for the immunity. The significance of recent decisions in a State constitutional context is assessed.*

Inherent in the federal system created by the *Commonwealth Constitution* is a fundamental question: To what extent are the States immune from Commonwealth legislation? Put from the converse perspective: What is the limit on the power of the Commonwealth Parliament to enact legislation that binds the States? These questions have yielded significantly different answers through the history of the Australian Federation.

This article tracks the evolution and the points of revolution in this critical area of constitutional law. Starting with implied immunities in the early High Court, it moves through abolition of that doctrine by *Engineers*<sup>1</sup> and the revival of State immunity which culminated in *Melbourne Corporation*<sup>2</sup> to the enunciation of a two-limbed doctrine in *QEC*<sup>3</sup> and the reformulation of the immunity as consisting of “but one limitation” in *Austin*.<sup>4</sup> As the law has been developed, the significance

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1 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('*Engineers*').

2 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 ('*Melbourne Corporation*').

3 *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 ('*QEC*').

4 *Austin v Commonwealth* (2003) 215 CLR 185 ('*Austin*'), 249 [124] (Gaudron, Gummow and Hayne JJ).

attributed to ss 106<sup>5</sup> and 107<sup>6</sup> of the *Commonwealth Constitution* as sources of the doctrine of State immunity has waxed and waned. This article aims to give a deeper understanding of the current doctrine by two principal means:

- first, by identifying the elements of earlier iterations of the law of State immunity from which it draws; and
- secondly, by analysing the relationship of the doctrine to the text and structure of the *Constitution*.

This first of these approaches reveals:

- that the doctrinal structure enunciated in *Austin* and confirmed in *Clarke*<sup>7</sup> as well as the emphasis upon State legislative choice in those decisions owe much to the judgment of Dawson J in *QEC*; and
- that the present law draws heavily on key elements of the doctrine identified by Starke J in *Melbourne Corporation*.

The analysis of the historical relationship of the doctrine to the *Constitution's* text and structure elucidates the constitutional source of the *Austin/Clarke* doctrine, namely that the doctrine is implication drawn from the federal structure of the *Constitution*. Sections 106 and 107 play a role that is essentially indirect, by contributing to an implication about federalism, rather than as a direct source of the doctrine.

This article also advances a separate but related thesis: That the modification of the *Melbourne Corporation* doctrine in *Austin's* case was designed to ensure that the doctrine conformed to the 'text and structure' methodology of drawing constitutional implications that was established by the High Court in its cases on the implied freedom of political communication.

Ultimately, this article suggests that the loss of the discrimination limb in *Austin* and *Clarke* does not represent a weakening of the protection of the exercise of constitutional powers by the States from Commonwealth interference. To the contrary, *Austin* and *Clarke* may augment the scope of the State immunity by confirming that the ability of the States to choose how to exercise their constitutional powers, free from significant interference from the Commonwealth Parliament, is a fundamental part of the constitutional design established by the text and structure of the *Commonwealth Constitution*.

5 Section 106, titled 'Saving of Constitutions' provides: 'The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.'

6 Section 107, titled 'Saving of Power of State Parliaments' provides: 'Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.'

7 *Clarke v Commissioner of Taxation* (2009) 240 CLR 272 ('*Clarke*').

## A HISTORY OF STATE IMMUNITY FROM COMMONWEALTH LEGISLATION

### ‘Reserved powers’ and ‘implied immunities’

From the establishment of the High Court in 1903 until the decision in *Engineers* in 1920, the doctrines of ‘reserved powers’ and ‘implied immunity of instrumentalities’ prevailed. The ‘reserved powers’ doctrine of the early High Court required a construction of heads of Commonwealth legislative power which did not impinge upon the legislative power which the early High Court saw as being reserved to State Parliaments by s 107 of the *Commonwealth Constitution*. For example, in *R v Barger*,<sup>8</sup> a majority of the High Court held that a Commonwealth law which purported to regulate labour conditions by using tax incentives was not a law with respect to ‘taxation’ under s 51(ii) of the *Commonwealth Constitution* because the regulation of labour conditions was reserved to State Parliaments. The ‘implied immunity of instrumentalities’ doctrine provided that the Commonwealth Executive would generally be immune from State legislation and vice versa. The ‘implied immunities’ doctrine was based more on an implication drawn from the federal nature of the *Commonwealth Constitution* than on any particular provision, in particular, the notion that each of the Commonwealth and the States was:

within the ambit of its authority, a sovereign State, subject only to the restrictions imposed by the Imperial connection and to the provisions of the Constitution, either expressly or implied.<sup>9</sup>

### Engineers

In 1920, in *Engineers*,<sup>10</sup> the ‘reserved powers’ and ‘implied immunities’ doctrines were both decisively rejected by the High Court. In dispensing with the ‘reserved powers’ doctrine, the Court denied any role to s 107 in reserving legislative powers to the States:

it is a fundamental and fatal error to read sec 107 as reserving any power from the Commonwealth that falls fairly within the explicit terms of an express grant in sec 51, as that grant is reasonably construed, unless that reservation is as explicitly stated.<sup>11</sup>

The High Court disposed of the ‘implied immunities’ doctrine as relying on an implication in a manner that was inconsistent with the “‘golden rule” or “universal rule”<sup>12</sup> of construction that the words of a statute should be given their ordinary or natural meaning. It followed that:

The doctrine of ‘implied prohibition’ finds no place where the ordinary

<sup>8</sup> (1908) 6 CLR 41.

<sup>9</sup> *D’Emden v Pedder* (1904) 1 CLR 91, 109.

<sup>10</sup> (1920) 28 CLR 129.

<sup>11</sup> *Ibid* 154 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>12</sup> *Ibid* 148.

principles of construction are applied so as to discover in the actual terms of the instrument their expressed or necessarily implied meaning.<sup>13</sup>

*Engineers* had two critically important consequences for the relationship between the Commonwealth and the States. First, by requiring a literal reading of heads of Commonwealth legislative powers, it paved the way for a significant expansion of those Commonwealth legislative powers during the twentieth century. Secondly, it meant that the Commonwealth Parliament could enact legislation which would bind the States. Although the States could also now enact legislation binding the Commonwealth, that State legislation would be liable to being invalid under s 109 of the *Commonwealth Constitution* by reason of inconsistency with Commonwealth legislation. The law of intergovernmental immunity was no longer a level playing field; it was now distinctly sloping in favour of the Commonwealth. In this way, *Engineers* significantly increased the power of the Commonwealth relative to the States within the Australia federation and its influence continues to the present day.

### From *Engineers* to *Melbourne Corporation*

In the two decades following *Engineers*, there was a gradual move by the High Court, led by Dixon J, to recognise that intergovernmental immunities might be implied from the *Commonwealth Constitution* notwithstanding the abandoning of the ‘implied immunities’ doctrine.<sup>14</sup> In 1937, in *West v Commissioner of Taxation (NSW)*, Dixon J identified the principle established by *Engineers* to be:

that whenever the Constitution confers a power to make laws in respect of a specific subject matter, prima facie it is to be understood as enabling the Parliament to make laws affecting the operations of the States and their agencies.<sup>15</sup>

However, Dixon J added a significant rider, which foreshadowed the *Melbourne Corporation* decision, and suggested a new appreciation of the role that might be played by ss 106 and 107:

It is, perhaps, desirable to add that, in applying the general principle to a legislative power of the Commonwealth, the words at the head of secs 51 and 52, ‘Subject to this Constitution’, must not be overlooked and that these words together with sec 106 and perhaps sec 107 may be of great importance in a question how far a law of the Commonwealth may affect the States.<sup>16</sup>

13 Ibid 155.

14 Tony Blackshield & George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (The Federation Press, 5<sup>th</sup> ed, 2010), 1102-4 traces this development.

15 (1937) 56 CLR 657, 682.

16 Ibid 683.

## Melbourne Corporation

*Melbourne Corporation*,<sup>17</sup> decided in 1947, involved a challenge to s 48 of the *Banking Act 1945* (Cth). That section prohibited private banks in Australia from conducting banking business for States and their agencies without the Commonwealth Treasurer's consent. Effectively, it prevented States and their agencies from banking with private banks. A majority held this law to be invalid.<sup>18</sup> Importantly, this decision has no ratio decidendi. On its face, s 48 was within the Commonwealth legislative power with respect to banking.<sup>19</sup> Among the five Justices who held s 48 to be invalid, three different bases for invalidity are discernible. Only two of those are important to the *Melbourne Corporation* doctrine's later development.<sup>20</sup> The first of these two, enunciated by Dixon J, was that s 48 was invalid because it discriminated against the States, in the sense that it imposed a legal disability which only applied to the States.<sup>21</sup> The second, applied by Starke and Rich JJ, was that s 48 interfered, to a constitutionally impermissible degree, with the States' exercise of their constitutional powers.<sup>22</sup> As for the source of the immunity, Rich, Starke and Dixon JJ relied upon implications from the *Commonwealth Constitution* relating to 'the continued existence of the States',<sup>23</sup> the 'maintenance of the States and their powers'<sup>24</sup> and the States' 'position as separate governments in the system exercising independent functions'<sup>25</sup> rather than express provisions such as ss 106 and 107 in giving their reasons for holding s 48 to be invalid.

## Tracey

In 1985, in *QEC*,<sup>26</sup> the High Court applied the *Melbourne Corporation* doctrine<sup>27</sup>

17 (1947) 74 CLR 31.

18 Chief Justice Latham, Rich, Starke, Dixon and Williams JJ; McTiernan J dissenting.

19 *Commonwealth Constitution* s 51(xiii).

20 The third was employed by Latham CJ who held that s 48 was a law with respect to State powers and therefore could not be characterised as a law with respect to banking: (1947) 74 CLR 31, 62. Williams J relied upon a similar approach: at 99-100. Subsequent decisions have clearly established that Commonwealth legislation can have multiple characterisations with the consequence that this reasoning is no longer tenable: see *Victoria v Commonwealth* (1969) 122 CLR 353 ('Payroll Tax Case'), 388-92 (Menzies J), 399 (Windeyer J), 411 (Walsh J), 424 (Gibbs J); *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 93 (Mason J); *Commonwealth v Tasmania* (1983) 158 CLR 1 ('Tasmanian Dam Case'), 128 and 139 (Mason J), 214-16 (Brennan J).

21 *Melbourne Corporation* (1947) 74 CLR 31, 84 (Dixon J).

22 Ibid 67 (Rich J), 75 (Starke J).

23 Ibid 66 (Rich J).

24 Ibid 70 (Starke J), quoting *South Australia v Commonwealth* (1942) 65 CLR 373, 442, *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Victoria* (1942) 66 CLR 488, 515.

25 (1947) 74 CLR 31, 83 (Dixon J).

26 (1985) 159 CLR 192.

27 Given the lack of a ratio decidendi in the *Melbourne Corporation* case, it may seem inaccurate to refer to a "*Melbourne Corporation* doctrine". To be precise, I use the "*Melbourne Corporation* doctrine" as a convenient shorthand to refer to the limitation upon

and unanimously held that the *Conciliation and Arbitration (Electricity Industry) Act 1985* (Cth) infringed that doctrine.<sup>28</sup> The Act provided a mechanism for the resolution of a single industrial dispute in Queensland, which involved agencies of the State of Queensland.

In cases prior to *QEC*, some Justices had suggested that the *Melbourne Corporation* doctrine comprised two limbs.<sup>29</sup> In *QEC*, a majority confirmed the existence of the two-limbed structure, which is encapsulated by Mason J's oft-cited formulation of the doctrine as:

(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 States or their capacity to function as governments.<sup>30</sup>

Unlike *Melbourne Corporation*, where ss 106 and 107 were not referred to in limiting the scope of Commonwealth legislative power, in *QEC*, Brennan J referred to s 106 and Deane J referred to ss 106 and 107 as textual sources for the implied limitation. Justice Brennan stated:

A prohibition against the making of laws 'which operate to destroy or curtail the continued existence of the States or their capacity to function as a government, that is, their capacity to exercise their powers' is necessarily implied by s.106 of the Constitution if not from the nature of a federation.<sup>31</sup>

Justice Deane observed of the rejection of the "implied immunities" and "reserved powers" doctrines in *Engineers*:

That rejection did not, however, involve a denial of the fact that the written terms of the Constitution were predicated upon and embodied (cf., particularly, Constitution, ss 106, 107) an assumption of the continued existence of the States as viable political entities.<sup>32</sup>

Tracey

Within a short period, it appeared that the *Melbourne Corporation* implication

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28 Commonwealth legislative power which is associated with the *Melbourne Corporation* case. Four Justices (Gibbs, Mason, Wilson and Dawson JJ) held that the Act was wholly invalid; two Justices (Deane and Brennan JJ) held that it was partially invalid.

29 See *Payroll Tax Case* (1969) 122 CLR 353, 388-392 (Menzies J), 411 (Walsh J), 424 (Gibbs J); *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 93 (Mason J); *Tasmanian Dam Case* (1983) 158 CLR 1, 139 (Mason J), 214-16 (Brennan J).

30 1985) 159 CLR 192, 217 (Mason J). See also *QEC* (1985) 159 CLR 192, 206 (Gibbs CJ), 226 (Wilson J), 231-6 (Brennan J).

31 *QEC* (1985) 159 CLR 192, 231. See also at 235.

32 *Ibid* 245.

might be supplanted by a direct reliance on s 106. In *Re Tracey; Ex parte Ryan*,<sup>33</sup> decided in 1989, the High Court held that sub-ss (3) and (5) of s 190 of the *Defence Force Discipline Act 1982* (Cth) were invalid. Those provisions purported to deny States courts the jurisdiction to try a person for a civil court offence which was ‘substantially the same offence’ as a military offence for which that person had been dealt with by a military service tribunal.

Five of the Justices in *Tracey* suggested s 106 itself may protect the exercise by State courts of their jurisdiction from Commonwealth legislation.<sup>34</sup> Justices Brennan and Toohey stated:

State courts are an essential branch of the government of a State and the continuance of State Constitutions by s 106 of the Constitution precludes a law of the Commonwealth from prohibiting State courts from exercising their functions.<sup>35</sup>

Chief Justice Mason, Wilson and Dawson JJ doubted whether Commonwealth provisions:

which strike at the judicial power of the States, could ever be regarded as within the legislative capacity of the Commonwealth having regard to s 106 of the Constitution.<sup>36</sup>

These passages suggested that s 106 might operate as a direct source of intergovernmental immunity for the States, rather than merely supporting an implication about State immunity from Commonwealth legislation. It therefore appeared that the role of s 106 in providing immunity to the States from Commonwealth legislation may have been significantly greater than previously understood.<sup>37</sup>

### ***Port Macdonnell* and the ‘subject to’ conundrum**

One difficulty for the States with a direct reliance on s 106 is the fact that the continuation of State constitutions in s 106 is said to be ‘subject to’ the *Commonwealth Constitution*.<sup>38</sup> The heads of legislative power in s 51 are also conferred ‘subject to’ the *Commonwealth Constitution* but this poses a conundrum: Is s 51 subject to s 106 or is s 106 subject to s 51?

The decision in *Tracey* was handed down on 10 February 1989. Only a few

33 (1989) 166 CLR 518.

34 Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ; Gaudron J took a different approach.

35 (1989) 166 CLR 518, 574-5.

36 Ibid 547.

37 Neil Douglas, ‘The Western Australian Constitution: Its Source of Authority and Relationship with Section 106 of the Australian Constitution’ (1990) 20 *University of Western Australia Law Review* 340, 346.

38 Greg Craven, ‘A Few Fragments of State Constitutional Law’ (1990) 20 *University of Western Australia Law Review* 353, 369.

days later, on 14 and 16 February 1989, the High Court would hear another case that would raise this dilemma. In *Port Macdonnell Professional Fishermen's Association Inc v South Australia* ('*Port Macdonnell*'),<sup>39</sup> the High Court was required to consider the interaction of ss 51(38) and 106 of the *Commonwealth Constitution*.

Section 51(38) provides that 'subject to this Constitution' the Commonwealth Parliament has legislative power with respect to:

the exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.

This provision was relied upon by the Commonwealth Parliament to enact the *Coastal Waters (State Powers) Act 1980* (Cth), following a request by State Parliaments. In *Port Macdonnell*, the validity of s 5(c) of that Act was challenged.

A unanimous High Court<sup>40</sup> concluded that s 106 was subject to s 51(38) with the result that 'the continuance of the Constitution of a State pursuant to s.106 is subject to any Commonwealth law enacted pursuant to the grant of legislative power in par.(xxxviii)'.<sup>41</sup> Accordingly, s 5(c) was valid.

The question which arises from holding that s 106 is subject to s 51(38) is whether s 106 can be an effective source of immunity for the States from Commonwealth legislation under the other heads of power in s 51. Neil Douglas suggested that s 51(38) might be treated as a special case because of the particular nature of that head of power, which was described by the High Court as being 'to ensure that a plenitude of residual legislative power is vested in and exercisable in co-operation by the Parliaments of the Commonwealth and the States'.<sup>42</sup> This issue remains unresolved. However, it may that the 'subject to' conundrum and its resolution in *Port Macdonnell* explains why the States have generally relied upon the *Melbourne Corporation* doctrine rather than s 106 itself as the basis for the State immunity in the two decades since *Tracey* was decided.<sup>43</sup>

39 (1989) 168 CLR 340.

40 Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

41 *Port Macdonnell* (1989) 168 CLR 340, 381. This proposition was affirmed in *Sue v Hill* (1999) 199 CLR 462, 495 [73] and *Attorney General (WA) v Marquet* (2003) 217 CLR 545, 571 [67], 571 [70], 574 [80].

42 *Port Macdonnell* (1989) 168 CLR 340, 381. Douglas, above n 37, 347.

43 In *New South Wales v Commonwealth* (2006) 229 CLR 1 ('*Work Choices Case*'), South Australia relied upon s 106 and the decision in *Tracey* to challenge s 117 of the *Workplace Relations Act 1996* (Cth), which empowered the Full Bench of the Australian Industrial Relations Commission ('AIRC') to restrain a State industrial authority from dealing with a matter which is the subject of a proceeding before the AIRC. South Australia also relied upon *Melbourne Corporation*. Both arguments were unsuccessful: *Work Choices Case* (2006) 229 CLR 1, 171-4 [388]-[392].



### *Re Australian Education Union; Ex Parte Victoria ('AEU')*<sup>44</sup>

Although the *Melbourne Corporation* doctrine was not replaced by the direct application of s 106 following *Tracey*, in *AEU*, decided in 1995, s 106 was identified as having as a crucial role in underpinning and setting the scope of the *Melbourne Corporation* doctrine. The joint judgment of six Justices stated:

In our view, the prosecutor's submission on this point is against the weight of modern authority and draws a distinction which is unsatisfactory. To say that the limitation protects the existence of the States and their capacity to function as a government is to give effect more accurately to the *constitutional foundation* for the implied limitation identified by Dixon J in the passages earlier quoted from *Australian Railways Union*, *including s.106 of the Constitution*. To press the limitation as far as the prosecutor seeks to take it *would travel beyond the language of s.106* and would confer protection on the exercise of powers by the States to an extent which is inconsistent with the subordination of those powers to the powers of the Commonwealth through the operation of s.109 of the Constitution.<sup>45</sup>

In contrast to some earlier decision involving the *Melbourne Corporation* doctrine, which drew the implication from the general conception of the Australian federation, *AEU* put s 106 at the very heart of the doctrine.

### *Austin* – A single implication

In the 2003 decision of *Austin*,<sup>46</sup> the High Court, by majority,<sup>47</sup> held that Commonwealth pension taxation legislation<sup>48</sup> was invalid in its application to State judges. In doing so, a different majority of the Court rejected Mason CJ's two-limb formulation of the *Melbourne Corporation* doctrine.

Justices Gaudron, Gummow and Hayne, in a joint judgment, accepted that the pension taxation legislation discriminated against State judges.<sup>49</sup> Applying the two-limb formulation from *QEC*, this should have been sufficient for the Court to conclude that the legislation was invalid. However, the joint judgment held that the *Melbourne Corporation* doctrine does not prohibit Commonwealth legislation

44 (1995) 184 CLR 188.

45 *AEU* (1995) 184 CLR 188, 229 (emphasis added).

46 (2003) 215 CLR 185.

47 Chief Justice Gleeson, Gaudron, McHugh, Gummow and Hayne JJ; Kirby J dissenting.

48 Specifically, the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Act 1997* (Cth) and *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997* (Cth).

49 *Austin* (2003) 215 CLR 185, 223-4 [41] and 263 [162] (Gaudron, Gummow and Hayne JJ). Chief Justice Gleeson and McHugh J also held that the legislation discriminated against State judges: at 220 [29] (Gleeson CJ), 283 [229] (McHugh J).

simply because it discriminates against the States, remarking that:

at some stages in argument ... differential treatment [of State judicial officers] was said, without more, to attract the *Melbourne Corporation* doctrine ... That would appear to give 'discrimination' a standing on its own which in this field of discourse it does not have.<sup>50</sup>

The joint judgment concluded that the *Melbourne Corporation* doctrine is 'but one limitation, though the apparent expression of it varies with the form of the legislation under consideration'.<sup>51</sup> Justice McHugh disagreed with this analysis and would have retained the two-limb structure.<sup>52</sup> In contrast, Kirby J expressly agreed with the joint judgment that the *Melbourne Corporation* doctrine's two limbs 'are essentially manifestations of the one constitutional implication'.<sup>53</sup> Justice Kirby stated:

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.<sup>54</sup>

Although Gleeson CJ did not overtly enter the debate between the joint judgment and McHugh J, the Chief Justice's judgment was consistent with the joint judgment's position.<sup>55</sup>

In 2009, in *Clarke*, the High Court confirmed that the *Melbourne Corporation* doctrine consists of a single limitation.<sup>56</sup>

### **The role of ss 106 and 107 in the *Austin/Clarke* doctrine**

In *Austin* and *Clarke*, ss 106 and 107 have receded into the background. Section 106 is not cited at all in *Austin* or *Clarke*. Section 107 is not mentioned in *Austin* and is referred to in one footnote of the joint judgment in *Clarke*, along with

<sup>50</sup> *Austin* (2003) 215 CLR 185, 248-9 [123] (Gaudron, Gummow and Hayne JJ). See also at 256 [139], 264 [164] (Gaudron, Gummow and Hayne JJ).

<sup>51</sup> *Ibid* 249 [124] (Gaudron, Gummow and Hayne JJ).

<sup>52</sup> *Ibid* 281-2 [223] (McHugh J).

<sup>53</sup> *Ibid* 301 [281] (Kirby J). However, given that Kirby J dissented in the result, this article suggests that Kirby J had a different understanding of the content of that single constitutional implication. See the analysis on page \* below.

<sup>54</sup> *Ibid*.

<sup>55</sup> For example, Gleeson CJ remarked that '[d]iscrimination is an aspect of a wider principle; and what constitutes relevant and impermissible discrimination is determined by that wider principle': *ibid* 217 [24].

<sup>56</sup> *Clarke* (2009) 240 CLR 272, 306-7 [65]-[66] (Gummow, Heydon, Kiefel and Bell JJ) and see also at 289-90 [16] (French CJ). Graeme Hill and Sarah Murray both observe that even though the discrimination limb has been abandoned, discrimination continues to remain an important concept in the post-*Austin* doctrine: Graeme Hill, 'The State of State Immunity – *Clarke* and the *Austin* Reformulation' (2011) 6 *Public Policy* 105, 112-5; Sarah Murray, 'Constitutional Musings on *Clarke* and *Austin*' (2011) 6 *Public Policy* 121, 127-8.

numerous other provisions of the *Commonwealth Constitution*.<sup>57</sup> Part III below demonstrates that the State immunity from Commonwealth legislation is now to be understood as primarily being sourced in an implication drawn from the federal structure of the *Commonwealth Constitution*.

## THE ORIGINS OF THE *AUSTIN/CLARKE DOCTRINE*

### From Mason CJ to Dawson J

The reformulation of the doctrine in *Austin* can be seen as amounting to the eventual triumph of Dawson J's formulation of the *Melbourne Corporation* doctrine in *QEC* over the competing formulation of Mason CJ in the same case, which had appeared to have achieved the status of orthodoxy.<sup>58</sup>

Until the *Western Australia v Commonwealth* ('*Native Title Act Case*')<sup>59</sup> in 1999, the two-limb formulation of Mason CJ was routinely applied by the High Court in *Melbourne Corporation* cases. In the *Native Title Act Case*, Western Australia relied upon the *Melbourne Corporation* doctrine to challenge provisions of the *Native Title Act 1993* (Cth) dealing with the validity of future acts.<sup>60</sup> The Court referred to the two-limb formulation of Mason CJ and continued:

Counsel for Western Australia submit that the two elements of the principle to which Mason J referred may not comprehend the principle in its full width. A passage from the judgment of Dawson J in *Queensland Electricity Commission v The Commonwealth* was cited to suggest a principle conferring on State functions a wider immunity from interference by Commonwealth power. Dawson J expressed the implication in terms of the Commonwealth Parliament's inability to 'impair the capacity of the States to exercise for themselves their constitutional functions: that is to say, their capacity ... to function effectually as independent units'.<sup>61</sup>

The High Court held that the *Melbourne Corporation* would not succeed on either formulation. Crucially, the Court did not resolve the question of which formulation was to be preferred. However, it appears that the seed may have been sown for a reshaping of the doctrine because in *Austin*, Dawson J's exposition of the *Melbourne Corporation* doctrine in *QEC* was preferred to that of Mason CJ. Chief Justice Gleeson in the paragraph in which his Honour observed that '[d]iscrimination is an aspect of a wider principle' noted that in *QEC*:

Dawson J expressed the general proposition that arises by implication from the

57 Footnote 170 refers to 'ss 7, 9, 10, 15, 25, 29, 30, 31, 41, 95, 107, 108, 111, 123 and 124': *Clarke* (2009) 240 CLR 272, 308.

58 It should be observed that McHugh J, in the course of arguing that Mason CJ's approach should not be overturned, took the view that Dawson J had accepted that the *Melbourne Corporation* doctrine had two elements: *Austin* (2003) 215 CLR 185, 281 [220]-[221].

59 (1995) 183 CLR 373.

60 Ibid 476-82.

61 Ibid 477 quoting *QEC* (1985) 159 CLR 192, 260.

federal structure of the Constitution as being that ‘the Commonwealth Parliament cannot impair the capacity of the States ... to function effectually as independent units’.<sup>62</sup>

The joint judgment in *Austin* also referred to Dawson J’s judgment in *QEC* with approval:

In *Queensland Electricity*, in a passage with which we respectfully agree, Dawson J referred to these difficulties as inherent in any attempt to formalise the *Melbourne Corporation* doctrine and added:

These difficulties explain why there has been a preference to speak in terms of those aspects of legislation which may evidence breach of the doctrine rather than to generalize in terms of the doctrine itself. Discrimination against the States or their agencies may point to breach as may a special burden placed upon the States by a law of general application.

The reasoning in the foundation decisions, and that in the contemporary United States cases, bears out the view later taken by Dawson J in this passage.<sup>63</sup>

These passages confirm the significance of Dawson J’s judgment in *QEC* for the reformulation of the *Melbourne Corporation* doctrine in *Austin*.

### **Starke J’s contribution**

While Dawson J’s judgment in *QEC* was influential upon the structure of the *Austin/Clarke* doctrine, the content given to the doctrine in *Austin* draws substantially upon the judgment of Starke J in *Melbourne Corporation* itself. In *Melbourne Corporation*, Rich and Starke JJ relied upon a concept of impairment of the States’ exercise of their powers in determining the validity of a Commonwealth law that discriminated against the States. Justice Starke stated that validity was to be determined by:

a practical question ... [which is] ... whether the legislation or the executive action [of the Commonwealth or a State] curtails or interferes in a substantial manner with the exercise of constitutional power by the other, depending upon the character and operation of the legislation.<sup>64</sup>

Although phrased in reciprocal terms which may not reflect the current law regarding Commonwealth immunity from State legislation,<sup>65</sup> there are three pertinent features in this test which were adopted in *Austin* as giving content to

<sup>62</sup> *Austin* (2003) 215 CLR 185, 217 [24] (footnote omitted).

<sup>63</sup> *Ibid* 249 [125] quoting *QEC* (1985) 159 CLR 192, 260.

<sup>64</sup> *Melbourne Corporation* (1947) 74 CLR 31, 75.

<sup>65</sup> As to whether there should be reciprocal immunity doctrines, see Hill, above n 56, 118-19; Murray, above n 56, 131.

State immunity from Commonwealth legislation.

First, it focuses upon the States' exercise of their 'constitutional power'. 'Constitutional power' in this context would seem to denote the executive, judicial and legislative power which the *Commonwealth Constitution* contemplates that the States will exercise.

Secondly, the test indicates that there must be a *significant* interference with the States' exercise of their constitutional powers for the Commonwealth legislation to be invalidated. As Starke J observed, the earlier implied immunities doctrine had been completely abandoned prior to *Melbourne Corporation*.<sup>66</sup> With limited exceptions, that doctrine protected the States from any interference by Commonwealth legislation. Justice Starke used the terminology 'curtails' and 'interferes in a substantial manner' to formulate a higher threshold than mere interference.<sup>67</sup>

Thirdly, Starke J focussed on Commonwealth legislation's substantive, as opposed to formal, effect on the States' exercise of their constitutional powers by directing attention to a 'practical question' that is answered by examining the 'character and operation of the legislation'.

Justice Starke's test was substantially adopted by a majority of the High Court in *Austin*. Chief Justice Gleeson expressly endorsed Starke J's test.<sup>68</sup> In applying the *Melbourne Corporation* doctrine, the joint judgment stated:

There then is posed the "practical question" identified by Starke J in *Melbourne Corporation*. This, in the end, is whether, looking to the *substance and operation* of the federal laws, there has been, *in a significant manner, a curtailment or interference with the exercise of State constitutional power*.<sup>69</sup>

This statement contains the three key features of Starke J's test.

### **The importance of choice**

The answer to this 'practical question' was informed by an analysis by the joint judgment of how the Commonwealth law affected the State's power to choose how to remunerate its judges. The critical question was whether there was:

a sufficiently significant impairment of the exercise by the State of its *freedom to select* the manner and method for discharge of its constitutional functions respecting the remuneration of the judges of the

<sup>66</sup> *Melbourne Corporation* (1947) 74 CLR 31, 71.

<sup>67</sup> See Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 136. As to how a 'significant' impairment or curtailment should be identified, see Hill, above n 56, 115-18.

<sup>68</sup> *Austin* (2003) 215 CLR 185, 218 [26].

<sup>69</sup> *Ibid* 265 [168] (emphasis added).

courts of the State. That requires consideration of the significance for the government of the State of its *legislative choice* for the making of provision for judicial remuneration.<sup>70</sup>

Although the pension legislation did not impose a legal requirement that the States exercise their power to remunerate judges in a particular manner, a majority found that the imposition of a lump sum liability upon retirement had the practical effect of forcing the States to amend their judicial remuneration schemes so that judges were paid a lump sum upon retirement.<sup>71</sup> This led the joint judgment to observe that:

one tendency of the federal laws readily apparent from their legal operation is to induce the State to vary the method of its judicial remuneration. The *liberty of action* of the State in these matters, that being an element of the working of its governmental structure, thereby is impaired. No doubt there is no direct legal obligation imposed by the federal laws requiring such action by the State. But those laws are effectual to do so, as was the *Banking Act*.<sup>72</sup>

There was, therefore, an impairment of the State's power to determine the remuneration paid to its judges.<sup>73</sup> This was critical to the majority holding in *Austin* that the pension tax legislation was invalid to the extent that it applied to State judges.

The importance of choice by the States in the manner of exercise of their constitutional powers is also evident in *Clarke*. The High Court held that the pension tax legislation that had been held invalid in its application to State judges in *Austin* was invalid in its application to State Parliamentarians. The joint judgment of Gummow, Heydon, Kiefel and Bell JJ stated: 'The practical operation of the [Commonwealth pension tax legislation] was to curtail the continued exercise of *State legislative choice*'.<sup>74</sup> Justice Hayne made the following observation, which was approved by the joint judgment:

The legislation imposing the surcharge in issue in this matter impairs the capacity of a State to choose between these various forms of remuneration of its parliamentarians in one particular but important respect: the State has *no real choice* but to adopt a method of providing retirement benefits that will enable parliamentarians to meet the tax liability specially imposed on them.<sup>75</sup>

70 *Austin* (2003) 215 CLR 185, 264 [165] (emphasis added).

71 *Ibid* 219-20 [28] (Gleeson CJ), 263-4 [163]-[164] (Gaudron, Gummow and Hayne JJ), 281-2 [223] (McHugh J). Indeed, New South Wales did amend its pension legislation by enacting the *Judges' Pensions Amendment Act 1998* (NSW): at 266 [172] (Gaudron, Gummow and Hayne JJ).

72 *Ibid* 265 [170].

73 *Ibid* 219-20 [28] (Gleeson CJ), 264 [165] (Gaudron, Gummow and Hayne JJ), 283 [228] (McHugh J).

74 *Clarke* (2009) 240 CLR 272, 308 [72] (emphasis added).

75 *Ibid* 316 [101] (emphasis added), which was approved at 308-9 [72].

The emphasis on ‘choice’ by the High Court in *Austin* and *Clarke* has some resonance with Dawson J’s judgment in *QEC*. In *QEC*, only Dawson J considered whether the *Conciliation and Arbitration (Electricity Industry) Act 1985* (Cth) should be invalidated for causing an ‘interference with the manner in which the States may exercise their governmental or constitutional functions’.<sup>76</sup> Justice Dawson found the Act caused this interference by reducing the range of choice available to the State and, therefore, reducing its capacity to make its own decisions in the exercise of its governmental functions.<sup>77</sup> For Dawson J, this finding, in combination with the discriminatory nature of the law, led to the conclusion that Queensland’s ‘constitutional integrity is impaired in a manner which the federal structure does not permit’.<sup>78</sup>

The parallels between Dawson J’s analysis in *QEC* and that in *Austin* and *Clarke* are significant for another reason. One question that remains after *Austin* is whether *QEC* was correctly decided given that a majority of the Court applied the now-abandoned discrimination limb. Those parallels suggest that the High Court would have reached the same conclusion in *QEC* even if they had been applying the *Austin/Clarke* formulation.<sup>79</sup>

## WHY REFORMULATE THE DOCTRINE?

As observed above, McHugh J objected to the restructuring of the *Melbourne Corporation* doctrine in *Austin*. His Honour argued that abandoning Mason J’s formulation ‘may lead to unforeseen problems in an area that is vague and difficult to apply’.<sup>80</sup> As recently as *AEU* in 1995, a joint judgment of six Justices had confirmed that the doctrine had two limbs, repeating verbatim the formulation of Mason J in *QEC*.<sup>81</sup> This statement was quoted with apparent approval by a joint judgment of five Justices in 1996 in the *Victoria v Commonwealth* (*‘Industrial Relations Act Case’*).<sup>82</sup> This raises two important questions: Why, in 1999, was the two-limb formulation not affirmed? Why, in 2003, was it overturned?

### The ‘Text and Structure’ Methodology

To answer these questions, it is necessary to consider the High Court’s development of a theory of implication-drawing in the 1990s in the political communication cases. This new theory ultimately demanded a reformulation of the *Melbourne Corporation* doctrine. After all, the *Melbourne Corporation* doctrine is a constitutional implication. Therefore, its nature, content and scope are significantly affected by the methodology which the Court uses to draw

76 (1985) 159 CLR 192, 261 (Dawson J).

77 *QEC* (1985) 159 CLR 192, 262 (Dawson J).

78 *Ibid.*

79 Sarah Murray makes a similar observation in relation to *QEC* in Murray, above n 56, 126.

80 *Austin* (2003) 215 CLR 185, 282 [224] (emphasis added).

81 (1995) 184 CLR 188, 231 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

82 (1996) 187 CLR 416 at 498 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).



implications from the *Commonwealth Constitution*.<sup>83</sup>

In *Nationwide News Pty Ltd v Wills* ('*Nationwide News*')<sup>84</sup> and *Australian Capital Television v Commonwealth* ('*ACTV*'),<sup>85</sup> a majority of Justices identified an implied constitutional freedom of political communication.<sup>86</sup> Of that majority, Deane, Toohey and Gaudron JJ held that the political doctrines of representative and responsible government were impliedly incorporated into the *Constitution*.<sup>87</sup> From these doctrines, they derived the implied constitutional freedom of political communication. However, that approach to implication-drawing was rejected by a majority in *McGinty* which held that implications had to be drawn directly from the *Constitution's* 'text and structure'.<sup>88</sup> *McGinty* emphasised that implications could not be drawn from 'theories or doctrines' external to the *Constitution*.<sup>89</sup>

In *Lange v Australian Broadcasting Corporation*, a unanimous High Court confirmed that constitutional implications must be drawn directly from the *Constitution's* 'text and structure':

[T]he Constitution gives effect to the institution of 'representative government' only to the extent that the text and structure of the Constitution establish it. ... Under the Constitution, the relevant question is not, 'What is required by representative and responsible government?' It is, 'What do the terms and structure of the Constitution prohibit, authorise or require?'.<sup>90</sup>

Importantly, implications drawn from the *Constitution's* structure must satisfy a further requirement; namely, they must be 'logically or practically necessary for the preservation of the integrity of [the *Constitution's*] structure'.<sup>91</sup>

### **An implication drawn from the federal structure of the *Commonwealth***

83 Tony Blackshield and George Williams have offered another explanation, suggesting that the reformulation may be 'intended to facilitate the rationalising project of Dawson, Toohey and Gaudron JJ in *Re Residential Tenancies Tribunal (NSW)*; *Ex parte Defence Housing Authority (Henderson's Case)* (1997) 190 CLR 410 ... namely, to assimilate State immunity under *Melbourne Corporation* to Commonwealth immunity under *Commonwealth v Cigmatic Pty Ltd (In Liquidation)* (1962) 108 CLR 372': Blackshield & Williams, above n 14, 1121.

84 (1992) 177 CLR 1.

85 (1992) 177 CLR 106.

86 Mason CJ, Deane, Toohey, Gaudron, McHugh and Brennan JJ. Dawson J did not recognise the implied freedom.

87 *Nationwide News* (1992) 177 CLR 1, 69-70 (Deane and Toohey JJ), 94 (Gaudron J). See also *ACTV* (1992) 177 CLR 106, 168 (Deane and Toohey JJ), 209-12 (Gaudron J). See Laurence Claus, 'Implication and the Concept of a Constitution' (1995) 69 *Australian Law Journal* 887, 887-888.

88 (1996) 186 CLR 140, 171 (Brennan CJ), 180-3 (Dawson J), 232 (McHugh J), 284-6 (Gummow J).

89 *Ibid* 232 (McHugh J).

90 (1997) 189 CLR 520, 566-7.

91 *ACTV* (1992) 177 CLR 106, 135 (Mason CJ); *McGinty* (1995) 186 CLR 140, 168-170 (Brennan CJ), 231-6 (McHugh J).



## Constitution

The joint judgment in *Austin* stated that the operative doctrine in that case was ‘that limitation on the legislative powers of the Commonwealth which flows from the very nature of the federal structure established by the Constitution.’<sup>92</sup> This limitation is ‘an implication necessarily to be derived from the federal structure established by the Constitution and consistent with its express terms.’<sup>93</sup> The judgment continued:

In *Australian Capital Television Pty Ltd v The Commonwealth*, in a passage later adopted by Brennan CJ in *McGinty v Western Australia*, Mason CJ said: [W]here the implication is structural rather than textual it is no doubt correct to say that the term sought to be implied must be logically or practically necessary for the preservation of the integrity of that [constitutional] structure.<sup>94</sup>

The references in these passages to the nature of the *Melbourne Corporation* doctrine as a structural implication is followed immediately by the reference to Brennan CJ’s statement of the methodology for drawing structural implications in *McGinty*. This highlights the joint judgment’s concern with ensuring that the *Melbourne Corporation* doctrine is consistent with that methodology. The next sentence of the joint judgment in *Austin* is:

Thereafter, in *Kruger v The Commonwealth*, Dawson J said that:

[t]he limitation upon the powers of the Commonwealth Parliament which prevent it from discriminating against the States is derived from ... considerations ... articulated by Dixon J in *Melbourne Corporation v The Commonwealth* when he said:

The foundation of the Constitution is the conception of a central government and a number of State governments separately organised. The Constitution predicates their continued existence as independent entities.<sup>95</sup>

This sentence gives content to the notion of the federal structure of the *Commonwealth Constitution* from which the *Melbourne Corporation* implication is drawn. Dixon J’s statement was again quoted in *Clarke* by Hayne J<sup>96</sup> and can therefore be seen as an authoritative exposition of the constitutional design

92 (2003) 215 CLR 185, 224 [42].

93 *Austin* (2003) 215 CLR 185, 245 [112]. In *Clarke*, the *Melbourne Corporation* doctrine is described identically in the joint judgment of Gummow, Heydon, Kiefel and Bell JJ as being ‘derived from the federal structure established by the Constitution and consistent with its express terms’: (2009) 240 CLR 272, 305 [60].

94 *Austin* (2003) 215 CLR 185, 245-6 [113] quoting *ACTV* (1992) 177 CLR 106, 135.

95 *Austin* (2003) 215 CLR 185, 246 [113] quoting (1997) 190 CLR 1, 64 quoting (1947) 74 CLR 31, 82.

96 In *Clarke*, Hayne J writes that ‘[t]he root of the relevant principle is found in the proposition’ that is set out in that quotation: (2009) 240 CLR 272, 313 [95].

underpinning the *Melbourne Corporation* doctrine.<sup>97</sup>

*Austin* thus emphasised that the *Melbourne Corporation* doctrine is an implication drawn from the structure of the *Commonwealth Constitution*. In light of the developments by the High Court in the 1990s, culminating in *McGinty*, of the methodology for drawing constitutional implications, it appears that the majority in *Austin* considered it necessary to ensure that the drawing of the *Melbourne Corporation* doctrine was consistent with that methodological approach. As the joint judgment in *Austin* observed: ‘The substance [of the *Melbourne Corporation* doctrine] is provided by considerations which arise from the constitutional text and structure pertaining to the continued existence and operation of the States’.<sup>98</sup> The majority rejected the separate discrimination limb because it risked taking on ‘by further judicial exegesis, a life of [its] which is removed from the constitutional fundamentals’ which must sustain constitutional implications.<sup>99</sup>

## CONCLUSION

### Summary of the development of State immunity and the roles of ss 106 and 107

The law regarding the immunity of the States from Commonwealth legislation went through dramatic shifts in the first half of the twentieth century, commencing with a complete immunity during the ‘implied immunities’ era to what may have very nearly been *carte blanche* for the Commonwealth following *Engineers*. Since the *Melbourne Corporation* decision, the law has been relatively more settled but there have still been significant doctrinal developments, in particular, the adoption of a two-limb formulation in *QEC* and its abandonment in the *Austin* decision in favour of a single principle that is implied from the federal structure of the *Commonwealth Constitution*.

Through these developments, there has been a marked fluctuation in the importance attributed to ss 106 and 107 of the *Commonwealth Constitution* as a direct source of State immunity from Commonwealth legislation. In *Melbourne Corporation*, there was no reference to ss 106 or 107. Section 106 was given a more direct role in *QEC* and reached its zenith in *Tracey* with the apparent potential to displace the need for a doctrine that was implied from the *Commonwealth Constitution*. However, perhaps due to the inclusion of ‘subject to this Constitution’ in the text of s 106, it has not yet come to assume that place in regulating relations between the Commonwealth and the States.

<sup>97</sup> Similarly, in *Austin*, Gleeson CJ quoted Mason J’s observation in *QEC* that ‘that the foundation for the implication [of the *Melbourne Corporation* doctrine] is “the constitutional conception of the Commonwealth and the States as constituent entities of the federal compact having a continuing existence reflected in a central government and separately organized State governments”’: (2003) 215 CLR 185, 217 [24] quoting (1985) 159 CLR 192, 218.

<sup>98</sup> Ibid 257 [143].

<sup>99</sup> *Austin* (2003) 215 CLR 185, 258-9 [145].

In *Austin* and *Clarke*, an implication from the federal structure of the *Commonwealth Constitution* is the primary basis for the limitation upon Commonwealth legislative power initially identified in the *Melbourne Corporation* case. *Austin* and *Clarke* place little direct reliance upon ss 106 and 107 as the source of that limitation. In this way, the significance attributed to s 106 in underpinning the *Melbourne Corporation* doctrine has gone full circle. However, there can be no doubt that both ss 106 and 107 have a continuing role in the doctrine as key provisions giving the *Commonwealth Constitution* its federal structure. The less prominent role given to ss 106 and 107 as a basis for the State immunity from Commonwealth legislation in *Austin* and *Clarke* should not obscure the very significant role of, in particular, s 106 in the State constitutional context. After all, s 106 is generally recognised by the High Court as being the source of legal authority for State constitutions.<sup>100</sup>

### Significance of the *Austin* and *Clarke* decisions for the Western Australian Constitution

*Austin* and *Clarke* are significant in a Western Australian constitutional context for their confirmation of the *Commonwealth Constitution* as being founded upon the federal notion that there will be a central government and a number of State governments which are ‘separately organised’ and which will continue to exist as ‘independent entities’.<sup>101</sup> *Austin* and *Clarke* may also signal a broadening of the scope of State immunity from Commonwealth legislation.

The conclusion that *Austin* and *Clarke* may have increased the immunity of the States might seem counter-intuitive given that those cases are known for having rejected the existence of a separate discrimination limb. Indeed, questions have been raised as to whether the cases of *Melbourne Corporation* and *QEC* would be decided in the same way in the absence of the discrimination limb. However, it should be remembered that there were three distinct approaches taken in *Melbourne Corporation* which led to the invalidity of s 48 of the *Banking Act*. Given the parallels in the approach of Starke J in *Melbourne Corporation* and the judgments of Gleeson CJ and the joint judgment in *Austin*, there seems little room for doubt that the *Melbourne Corporation* case would be decided the same way in the post-*Austin/Clarke* era. A similar argument is made above to the effect that Dawson J’s judgment in *QEC* means it is likely that *QEC* would still be decided in the same way after *Austin* and *Clarke*.<sup>102</sup> It therefore does not appear that *Austin* and *Clarke* narrow the *Melbourne Corporation* doctrine such that the doctrine would not now be applied in cases in which it was previously applied.

The contention that *Austin* and *Clarke* may have strengthened State immunity is

100 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 409 [10] (Gaudron, McHugh, Gummow and Hayne JJ), 431 [74] (Kirby J); *McGinty v Western Australia* (1996) 186 CLR 140, 171-3 (Brennan J), 208 (Toohey J).

101 *Melbourne Corporation* (1947) 74 CLR 31, 82.

102 See text accompanying footnote 80 above.

supported by the importance placed upon choice by the States in the exercise of their constitutional powers. This may mark a shift in focus for the *Melbourne Corporation* doctrine from impairment of the capacity to function to impairment of the exercise of constitutional powers. The significance of this shift can be demonstrated by contrasting the dissenting judgment of Kirby J in *Austin* with the joint judgment of Gaudron, Gummow and Hayne JJ.

In *Austin*, Kirby J focussed upon the question of whether the pension taxation legislation impaired the operation of the State judicial system, observing that '[i]t is the capacity of the State to function ... that is determinative.'<sup>103</sup> Justice Kirby concluded that:

In my view, the effect of the federal legislation impugned in these proceedings does not even come close to jeopardising the selection and retention of State Supreme Court judges. It falls far short of impairing, in a substantial degree, the State's capacity to function as an independent constitutional entity.<sup>104</sup>

As a result, Kirby J concluded that the taxation legislation did not infringe the *Melbourne Corporation* principle.

In contrast with Kirby J's identification of the 'capacity of the State to function' as being determinative, the joint judgment was ultimately concerned with interference with the exercise of the constitutional power of the State to decide how to remunerate State judges.<sup>105</sup> The identification of a significant interference with the freedom to choose how to exercise this power led to the invalidity of the legislation for the joint judgment. The difference in the tests applied by Kirby J and the joint judgment may turn upon the weight to be placed upon the autonomy of the States in assessing whether Commonwealth legislation infringes the *Melbourne Corporation* doctrine. For Kirby J, the fact that the judicial system would continue to operation notwithstanding the Commonwealth legislation meant that the State was not deprived of its capacity to function and so the Commonwealth legislation was valid. For Gaudron, Gummow and Hayne JJ, the deprivation by the Commonwealth legislation of the State's autonomy to decide how to remunerate its judges was enough to spell the invalidity of that legislation.

The difference in the conclusion between Kirby J, and the joint judgment of Gaudron, Gummow and Hayne JJ suggests that the reformulation of the *Melbourne Corporation* doctrine by the joint judgment gives a broader scope to State immunity from Commonwealth legislation. The reformulation by the joint judgment in *Austin*, with its emphasis on 'choice', has now been applied by a majority in *Clarke*.<sup>106</sup> These are the doctrinal developments that suggest the

103 *Austin* (2003) 215 CLR 185, 302 [283] (footnote omitted).

104 *Ibid* [299] (footnote omitted).

105 See the text accompanying footnotes 71 and 73 above.

106 See the text accompanying footnotes 75 and 76 above.

post-*Austin/Clarke* reformulation may enhance immunity from Commonwealth legislation.

In this way, the *Austin/Clarke* reformulation appears to go beyond taking the second limb of the Mason J's *QEC* formulation and applying it not just to '[Commonwealth] laws of general application' but to all Commonwealth legislation. The purpose of the discrimination limb was to prevent the Commonwealth from legislating to control the exercise of State constitutional powers. The reformulated doctrine achieves this by adopting a single limitation which protects the States' choice of how to exercise their constitutional powers. Ultimately, *Austin* and *Clarke* may be understood as an affirmation of the federal design embodied in the text and structure of the *Commonwealth Constitution* – a design which requires not only that the States continue to function but that they be free from significant interference by the Commonwealth Parliament when choosing how to exercise their constitutional powers.