**FORTESCUE METALS GROUP LTD v THE COMMONWEALTH – DISCRIMINATION AND FISCAL FEDERALISM**

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Fortescue Metals Group Limited v The Commonwealth\(^1\) (the *Mining Tax Case*) involved a challenge to the Commonwealth’s ‘Mining Tax’ legislation, brought by Australia’s third largest iron ore producer Fortescue.

**FACTS**

The Mining Tax is properly known as the Minerals Resource Rent Tax (‘MRRT’). The tax is set out in the *Minerals Resource Rent Tax Act 2012* (Cth) and several associated Imposition Acts.\(^2\) The term ‘rent’ is there used in the economist’s sense of profits earned by exploiting scarce resources.

The legislation collects tax on what are deemed to be ‘above normal profits’\(^3\) flowing from certain mining activity in Australia – mostly iron ore and coal mining.\(^4\) A miner (or corporate group) with an annual profit under $75 million is exempted from the tax, as that level of profit is not what the Act considers ‘above normal’. For others, the first $75 million in profit is not taxable. For that portion of a miner’s profit that exceeds $75 million, it is first permitted to deduct certain ‘allowances’ and offsets before tax is assessed. For some, those offsets will take them under the $75 million threshold and they will pay no tax. For others, the offsets reduce their tax liability. Categories of allowance described in the legislation, but not at issue in the *Mining Tax Case*, included, for example, capital expenditure and unused offsets carried forward from previous tax periods.\(^5\)

The offset at the centre of the Plaintiff’s arguments in the *Mining Tax Case* was the allowance for State ‘royalties’ (State taxes on the taking of minerals) that had already been paid.\(^6\) The Mining Tax was structured to ensure that any increase or decrease in State royalty rates would stimulate a compensatory increase or decrease in a taxpayer’s Mining


\(^{1}\) [2013] HCA 34.


\(^{3}\) *Minerals Resource Rent Tax Act 2012* (Cth) s 1.10.

\(^{4}\) See ibid, Division 10: this sets out the ‘core rules’ that are then elaborated in detail in the rest of the Act.

\(^{5}\) Ibid Ch 3.

\(^{6}\) Ibid ss 60.1 to 60.30.
Tax liability – dollar for dollar, all else being equal. The significance of this is that, if a State put its royalty rates down, the Commonwealth would claw more Mining Tax from miners in that State. If it put royalties up, the Commonwealth would ease its tax burden on miners in that State. This could, loosely, be called an ‘equalising tax’ – because of this push-and-pull relationship with State royalties.

The Plaintiff contended in the High Court that the package of legislation implementing the Mining Tax was invalid on four grounds:

- First, that the tax ‘discriminates between States’, contrary to the proviso to s 51(ii);
- Second, that it ‘gives preference’ to one or more States, contrary to s 99;
- Third, that it interferes with the performance of States’ governmental functions, contrary to the Melbourne Corporation doctrine; and
- Fourth, that it interferes with States’ capacity to grant aid to mining operations, contrary to s 91.

Western Australia and Queensland intervened, broadly supporting the Plaintiff’s arguments.

DECISION AND CRITIQUE

A High Court bench of six heard this case in March 2013 and gave judgment on 7 August 2013. Justice Gageler did not participate, having provided advice on the law’s validity while serving as Solicitor-General to the Commonwealth. All six judges rejected all of the Plaintiff’s arguments, in four separate judgments. The only joint judgment was delivered by Hayne, Bell and Keane JJ. Chief Justice French, Crennan J and Kiefel J each wrote separately.

s 51(ii) proviso

In relation to the argument relying on the s 51(ii) proviso, all judges agreed that the Mining Tax did not ‘discriminate between States’. However, there was disagreement as to what was the appropriate test to apply.

The joint judgment understood the s 51(ii) proviso to pose a fairly simple question: – does a Commonwealth law, as a matter of form, differentiate between States (or parts of States)? Hayne, Bell and Keane JJ did not think it necessary, or appropriate, to frame this discrimination inquiry in the more ‘modern’ terms used in other constitutional contexts: with a focus on, for example, appropriate comparators, substantive disadvantage, and legitimate objectives.

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7 See the Mining Tax Case [2013] HCA 34, [53] (Hayne, Bell & Keane JJ).
9 Mining Tax Case [2013] HCA 34, [50] (French CJ), [121]-[122] (Hayne, Bell & Keane JJ), [175] (Crennan J), [227] (Kiefel J).
10 Ibid [104], [108]-[117].
For Hayne, Bell and Keane JJ, the fact that the Mining Tax scheme applied a ‘uniform rule’, as a matter of form, meant that it could not offend the s 51(ii) proviso.\(^{11}\) That conclusion was said to follow from a long line of cases treating such ‘uniform’ application as a decisive answer to any claim of discrimination inherent in a Commonwealth tax.\(^{12}\) Justice Kiefel, in her separate judgment, broadly agreed.\(^{13}\) Both judgments hint at a concern about the increased demands that might be placed on the Court if it undertook to go behind uniform Commonwealth tax laws to scrutinise their differential effects.\(^{14}\) Indeed, it is true that almost any tax law will show some geographic trends in how its burden falls – and, historically, this hasn’t been considered constitutionally suspect.

These apprehensions about the practical consequences of a change in approach were nowhere evident in the judgment of French CJ. He clearly favoured an assimilation of the s 51(ii) proviso to the modern, substantive understanding of discrimination found in s 92, s 117 and a number of other places in the Constitution.\(^{15}\) The Chief Justice thought that consideration of appropriate comparators, reasonableness, proportionality, and other key elements of a substance focus, could all feed into the process of characterisation – what I have elsewhere described as an ‘holistic’ model of discrimination analysis.\(^{16}\) In particular, French CJ was prepared to look behind the Mining Tax’s uniform application and consider whether it worked any unfair disadvantage – which, he said, it did not. This part of his reasons highlights an important, though sometimes overlooked, fact about substantive tests for discrimination: substance-focused tests can, and often will, vindicate laws imposing uniform treatment, provided that any differential outcomes that those uniform rules generate seem justifiable.\(^{17}\)

Justice Crennan specifically left for another day the question of a modernised approach to the s 51(ii) proviso.\(^{18}\) Nevertheless, in the course of finding the Mining Tax valid by reason of a ‘uniform rule’ test, Crennan J does perhaps demonstrate a greater level of comfort with the concepts and categories of modern discrimination analysis than can be found in the joint judgment.\(^{19}\)

In assessing the adequacy of these reasons it is important to recall what was decided almost 10 years earlier in Permanent Trustee Australia Ltd v Commissioner of State Revenue.\(^{20}\) A 5:2 High Court majority there said that proportionality-type questions were relevant in the

\(^{11}\) Ibid [115]-[116] (Hayne, Bell & Keane JJ).


\(^{13}\) Ibid [202], [223]-[225].

\(^{14}\) Ibid [117] (Hayne, Bell & Keane JJ), [225] (Kiefel J).

\(^{15}\) Ibid [45]-[50].


\(^{17}\) Simpson, ibid, 278.

\(^{18}\) Mining Tax Case [2013] HCA 34 [175].

\(^{19}\) Ibid [155]-[156], [161]-[162].

application of s 99 of the Constitution and chose to assimilate s 99 to the emerging standardised approach to all discrimination questions arising in constitutional law.\textsuperscript{21} Vigorous dissents from McHugh J and Kirby J insisted that the majority’s approach made little sense, given that s 99 (like s 51(ii)) was not intended as a protection for individuals. It was, they said, a purely federal protection and couldn’t realistically function as such if its prohibition ceded to ‘reasonableness’.\textsuperscript{22}

In the Mining Tax Case, Hayne, Bell and Keane JJ, along with Kiefel J (and perhaps also Crennan J), were reluctant to transform the s 51(ii) proviso in the way that Permanent Trustee had transformed s 99 – that is, by modernising the non-discrimination rule that it contains. In some passages, these two judgments seem to regard their objections to a substance test as merely obiter dicta – saying, in essence, that because the Mining Tax imposed a uniform rule there was no need to ‘go further’ and ask questions about substance. In presenting that view, these judgments claimed direct support from earlier authorities.\textsuperscript{23}

While this position may owe something to the way in which the parties put their arguments – in particular, the Commonwealth’s apparent confinement of proportionality-style arguments to an ‘alternative argument’ – it is puzzling nonetheless. To maintain that it was ‘unnecessary’ to make any findings about the applicability of modern non-discrimination analysis seems to miss much of the point of that analysis. Substance-focused approaches to testing for discrimination evolved to overcome evident deficiencies in the traditional form-focused approach – a focus on form, it was realised, was able to mask instances of unfairness to which the law perhaps should be responsive. For instance, that is what the refashioning of s 117 in Street v Queensland Bar Association\textsuperscript{24} was intended to achieve. To regard the organisation of the parties’ arguments in the Mining Tax Case as somehow precluding consideration of this point – that is, whether the s 51(ii) proviso should be modernised along similar lines to s 99 – raises more questions than it answers.

In the Mining Tax Case, in my view, French CJ is the only judge who engages meaningfully with the question of whether the s 51(ii) proviso – irrespective of its history – warrants ‘modernisation’. He certainly saw no procedural reason to sidestep that fundamental question. He did not share the preoccupation of the other judgments with earlier authorities endorsing form-focused discrimination analysis. Only French CJ seemed mindful of the fact that those cases – the likes of Colonial Sugar Refining Co Ltd v Irving,\textsuperscript{25} R v Barger,\textsuperscript{26} and

\begin{itemize}
  \item \textsuperscript{21} See generally Simpson above n 16.
  \item \textsuperscript{22} Permanent Trustee (2004) 220 CLR 388, 447-8 (McHugh J), 462-465 (Kirby J).
  \item \textsuperscript{23} Mining Tax Case [2013] HCA 34, [83]-[98] (Hayne, Bell & Keane JJ), [200]-[226] (Kiefel J), discussing, in particular: Colonial Sugar Refining Co Ltd v Irving [1906] AC 360; R v Barger (1908) 6 CLR 41; Cameron v Deputy Federal Commissioner of Taxation (1923) 32 CLR 68; Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd (1939) 61 CLR 735; W R Moran Pty Ltd v Deputy Federal Commissioner of Taxation (NSW) [1940] AC 838; Conroy v Carter (1968) 118 CLR 90.
  \item \textsuperscript{24} (1989) 168 CLR 461.
  \item \textsuperscript{25} [1906] AC 360.
  \item \textsuperscript{26} (1908) 6 CLR 41.
\end{itemize}
*Cameron v Deputy Federal Commissioner of Taxation*27 – were decided well before the wider corpus of law began to take substantive discrimination seriously. None of the other judgments, all of which relied to varying degrees on these decisions, acknowledges explicitly that important developments in the meantime might limit the relevance of those cases today.

With this in mind, the decision in the *Mining Tax Case* stands out as anomalous among constitutional discrimination cases spanning the last 25 or so years. For a majority of the High Court to say, in effect, ‘this law applies a uniform rule to all States – therefore, we don’t need to scrutinise it with a substance-focused test’ seems, without more, inadequate – given the trajectory of constitutional non-discrimination jurisprudence in the last quarter century. A reasoned objection to modernising the s 51(ii) proviso would have been easy enough to construct. Indeed, the dissenting judgments in *Permanent Trustee* represent two persuasive variations on such a position. A judge wishing to resist the extension of modern substance-focused non-discrimination jurisprudence to a new context could appeal to considerations of constitutional policy – including modern and historical perspectives on federalism – as well as considerations of judicial policy, such as the appropriate scope of discretion and deference.28 Alas, with the exception of French CJ’s judgment, none of that explication is present in the reasoning in the *Mining Tax Case*.

**s 99:**

The Plaintiff’s written submissions claimed that the Mining Tax ‘gave preference’ to some States over others, contrary to s 99. None of the judgments accepted this argument. For French CJ this conclusion flowed seamlessly from the analysis that he had engaged in in relation to the s 51(ii) proviso.29

The other judgments are, despite surface appearances, less straightforward in their treatment of s 99. The joint judgment and the judgments of Crennan J and Kiefel J all dodge an important issue of principle which underlay their stated conclusions. Ostensibly, the reason for the scant separate treatment of the s 99 question was the plaintiff’s ‘acceptance’, in the course of argument, that if there was no finding of discrimination in connection with s 51(ii) then nor could there be a finding of ‘preference’ for purposes of s 99.30 Kiefel J went further and stated that the s 99 question was ‘essentially the same as that arising under s 51(ii)’.31

Important to understanding the implications of this concession, and interesting in its own right, is the question of how accepting the judgments were of the result in *Permanent Trustee*. In short, all judgments considering the s 99 question seemed content with that test

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27 (1923) 32 CLR 68.
29 *Mining Tax Case* [2013] HCA 34 [46], [50].
30 Ibid [123] (Hayne, Bell & Keane JJ); [176] (Crennan J).
31 Ibid [183].
as applied to s 99. For French CJ, support for the Permanent Trustee test was entirely congruent with his approach to applying the s 51(ii) proviso. However, the reasons of Hayne, Bell and Keane JJ have a harder time reconciling support for the Permanent Trustee test, on the one hand, and a reluctance to extend that approach to the s 51(ii) proviso, on the other. They perceived the potential incongruity, though, and set about explaining why, in their view, a modern, substance-based test of discrimination was acceptable in the s 99 context but apparently unsuitable in the context of the s 51(ii) proviso.

The semantic distinction that Hayne, Bell and Keane JJ offer in explanation is unconvincing. Specifically, they observe that s 51(ii) is directed to laws that ‘discriminate between’ States or parts of States. This fact, they claim, distinguishes the s 51(ii) proviso from most other modern non-discrimination rules, which are typically directed to the vice of ‘discrimination against’.

This idea of discrimination ‘between’ States allows, they insist, no flexibility as to choice of comparator. Rather, the comparator is pre-set: States (or parts of States) are compared with other States (or parts). Locking that comparator in place, the joint judgment suggests, makes it futile to ask all the other questions that modern non-discrimination tests ask, about reasonableness, proportionality, and so on. So, in short, the joint judgment takes the view that the s 51(ii) proviso’s own terms fuse it at the level of a form-based test, effectively blocking the introduction of further elements typically associated with modern, substance-focused tests of discrimination.

The idea that the phrase ‘discrimination between’ has to mean something different from ‘discrimination against’ is, in my view, far from self-evident; it is certainly not, alone, a solid basis for departing from a consistent line of reasoning in related contexts over 25 years.

As for the implications of all of this for the plaintiff’s case: the plaintiff’s apparent concession as to the fate of the s 99 argument was either a significant strategic error or, perhaps, a tragedy of miscommunication. Either way, the preference for different understandings of discrimination in the contexts of s 51(ii) and s 99 must have come out of left field for the plaintiff. It would make little sense to concede the s 99 point if the plaintiff saw any chance that the test of discrimination to be applied there was significantly different from the test that would be applied in relation to the s 51(ii) proviso.

State Immunity:

Both the plaintiff and Western Australia made detailed submissions contending that the Mining Tax offended the Melbourne Corporation principle. They argued that the

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32 Ibid [104], [110]-[111].
33 Ibid [113].
‘equalising’ effect of the Mining Tax interfered with States’ ability to use mining royalties as an economic lever – to attract investment, or incentivise particular activity.\textsuperscript{35}

This claim got short shrift in the joint judgment, with which all other judgments expressed agreement on this issue.\textsuperscript{36} In applying the \textit{Melbourne Corporation} test, Hayne, Bell and Keane JJ considered that the ‘impaired economic lever’ claim, even if it was an accurate assessment of the impact of the Mining Tax on State economic management, still did not qualify as a ‘limit or burden on any State in the exercise of its constitutional functions.’\textsuperscript{37} Put another way, while the Mining Tax formula clearly had the potential to cause some frustration for some States, it could not be considered a threat to States’ separate constitutional functioning.

\textbf{Section 91:}

Section 91 of the \textit{Constitution} states that ‘[n]othing in this \textit{Constitution} prohibits a State from granting any aid to or bounty on mining for gold, silver or other metals ...’. There was unanimous agreement in the \textit{Mining Tax Case} that s 91 could not assist the Plaintiff. As Hayne, Bell and Keane JJ explained, the Plaintiff's argument was essentially that s 91 implicitly prohibits any Commonwealth law from undermining the effectiveness of State support for mining activity. That construction, they said, runs counter to earlier authority on s 91 and also to overarching principles of interpretation, according to which Commonwealth powers are to be construed expansively.\textsuperscript{38}

\textbf{FUTURE DIRECTIONS}

When the High Court next considers these federal fiscal non-discrimination rules – the s 51(ii) proviso and s 99 – its will be have (at least) three options open to it, in choosing a way forward:

1. Give both the s 51(ii) proviso and s 99 a ‘broad’ interpretation (consistently with French CJ’s view in the \textit{Mining Tax Case});
2. Give both provisions a narrow interpretation (as proposed in the dissenting judgments in \textit{Permanent Trustee});
3. Give the sections different interpretations (as seemingly endorsed in the joint judgment in the \textit{Mining Tax Case}).

I will consider, briefly, the merits of each option.

\textsuperscript{35} \textit{Mining Tax Case} [2013] HCA 34 [126], [132].
\textsuperscript{36} Ibid [6] (French CJ), [145] (Crennan J), [229] (Kiefel J).
\textsuperscript{37} Ibid [137].
\textsuperscript{38} Ibid [140]-143]; see also [231]-[233] (Kiefel J).
Option 1: using a modernised, substance-focused discrimination test for both s 99 and the s 51(ii) proviso might have these advantages:

a. Consistency with discrimination principles and tests used elsewhere in the Constitution, as well as in statutory and international law;

b. Facilitation of judicial oversight of Commonwealth fiscal policy (for the reason that this deeper engagement of judges with legislative policy is invited, if not demanded, by substance-focused non-discrimination tests).

That policy review role – if judges were to embrace it as a necessary concomitant of a broad test – could be extensive:

- A Commonwealth law which on its face gave uniform treatment to the States (eg, the Mining Tax), could nevertheless be found to infringe the s 51(ii) proviso or s 99 if a court considered that it was in substance unfair to one or more States (for instance, because it failed to respond appropriately to some relevant difference among the States as regards the subject matter of a tax – climate, resources, demographics, etc);

- Equally, a Commonwealth law treating States differently, on its face, could nonetheless be upheld as valid if a court thought that different treatment was appropriate and adapted to a legitimate policy objective (eg, tax breaks for remote areas to stimulate economic development).

Option 2: reverting to the position before Permanent Trustee, with s 99 and the s 51(ii) proviso both receiving a narrow, form-focused interpretation, could have these advantages:

a. It would constrain judicial discretion to second guess policy (which might seem appealing if, for instance, there was concern about a flood of challenges to the ‘reasonableness’ of taxes);

b. It would be faithful to the original constitutional values that inspired these provisions (ie, absolute uniformity of treatment as between States);

c. It would, in effect, neuter these limitations on Commonwealth power and allow the Commonwealth to get on with managing the economy unimpeded (at least insofar as it could pursue its objectives via uniform rules).

The most significant obstacle to the High Court’s going forward on this second basis would be the need to overrule Permanent Trustee, in spirit if not in letter.

Option 3: retaining a narrow, form-based test for the s 51(ii) proviso, while at the same time retaining Permanent Trustee’s modernised test for s 99, has in my view only possible advantage. That approach could be seen as ‘better than nothing’ by judges who are

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40 This idea is explored fully in Zines and Lindell, above n 28.
uncomfortable with modern, substance-focused discrimination tests in federal fiscal contexts but, at the same time, reluctant to overturn *Permanent Trustee*.

**CONCLUSION**

It is not hard to imagine why judges might baulk at expanding further the reach of the modern conception of discrimination in constitutional settings. The attendant tests take judges out of their comfort zone and propel them into close engagement with economic and social policy.

However, even while some judges may lack an appetite for that kind of engagement, it should never be assumed that they lack capability. On the contrary, the High Court has shown that it can do this well: for an example of this in the context of a federal fiscal non-discrimination rule, we need look no further than *Castlemaine Tooheys Ltd v South Australia*.*41*

The two dissenting judgments in *Permanent Trustee* remain important, for laying out with clarity and honesty the judicial policy choices that these federal fiscal discrimination rules present. The next case needs to engage with that material directly – no matter which path is followed – if we are to avoid continued uncertainty in this area.

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