

Clarke v Commissioner of Taxation
[2009] HCA 33

**Politicians' superannuation
and the
constitutional capacities of State government¹**

Introduction

It is said that life's only certainties are death and taxes. That is, unless you were a member of State Parliament entitled to benefits under a constitutionally protected superannuation fund, in which case you were not liable for the superannuation contributions surcharge (tax), so the High Court held in *Clarke v Commissioner of Taxation*.² On 2 September 2009, the High Court unanimously held that it was constitutionally impermissible for the Commonwealth to impose upon members of State Parliaments a superannuation contributions surcharge tax in respect of membership of constitutionally protected superannuation funds on the basis of the *Melbourne Corporation*³ doctrine as most recently developed and applied, prior to *Clarke*, in *Austin v Commonwealth*⁴.

It will be recalled that in *Engineers*⁵ the High Court abolished the doctrine of mutual non-interference holding that the Commonwealth Parliament has the ability to make laws affecting the States and their agencies. However, in the *Melbourne Corporation* case the High Court recognised from the necessity to preserve the *Constitution's* federal structure that the Commonwealth

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² (2009) 83 ALJR 1044; (2009) 258 ALR 623; [2009] HCA 33 ('*Clarke*').

³ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 ('*Melbourne Corporation*').

⁴ (2003) 215 CLR 185 ('*Austin*').

⁵ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 29.

Parliament's legislative power is implicitly limited. Accordingly, the Commonwealth Parliament cannot exercise its legislative power so as to destroy or curtail, in a significant manner, the continued existence of the States or their capacity to function as governments.⁶ The conventional understanding of the *Melbourne Corporation* doctrine prior to *Austin* was that it comprised two limbs: first, a prohibition against discrimination which involves the placing on the States of special burdens or disabilities; secondly, a prohibition against laws which operated to destroy or curtail the continued existence of the States or their capacity to function as governments.⁷

Of course, in *Austin* a majority of the High Court⁸ held that there was "but one limitation",⁹ namely, the second prohibition of the previous two-limb approach; "whether the [Commonwealth] law restricts or burdens one or more of the States in the exercise of their constitutional powers"¹⁰ in a "significant manner".¹¹ These criteria are to be applied by consideration not only of the form but also the substance and actual operation of the Commonwealth law.¹² Nevertheless, the first or discrimination limb is still considered relevant to ascertaining whether there has been the required curtailment of the capacity to exercise the constitutional powers of a State.

Clarke provided the High Court with its first opportunity to consider the *Melbourne Corporation* doctrine since *Austin*. Further, only two of the present justices (Gummow and Hayne JJ) were members of the Court in *Austin*.

Background

⁶ (1947) 74 CLR 31 at 74 - 75 (Starke J), 81, 83 (Dixon J).

⁷ See, for example, *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 217 (Mason J).

⁸ *Austin* (2003) 215 CLR 185, 249 [124] (Gaudron, Gummow and Hayne JJ), 301 [281] (Kirby J). Gleeson CJ did not expressly agree but expressed sentiments not dissimilar to the plurality: (2003) 215 CLR 185, 208-9 [11], 217 [24]. McHugh J expressly disagreed: (2003) 215 CLR 185, 281 [223].

⁹ *Austin* (2003) 215 CLR 185, 249 [124].

¹⁰ *Austin* (2003) 215 CLR 185, 258 [143] (Gaudron, Gummow and Hayne JJ).

¹¹ *Austin* (2003) 215 CLR 185, 265 [168] (Gaudron, Gummow and Hayne JJ).

¹² *Austin* (2003) 215 CLR 185, 249 [124], 265 [168] (Gaudron, Gummow and Hayne JJ).

The *Clarke* litigation was prompted by Mr Ralph Clarke who served as a Member of the House of Assembly in the South Australian Parliament from December 1993 until February 2002. During that time, he was a member of three state superannuation schemes:

- (i) the Parliamentary Superannuation Scheme ("the PS Scheme");¹³
- (ii) the Southern State Superannuation Scheme ("the SSS Scheme");¹⁴
and
- (iii) the Superannuation Benefits Scheme¹⁵ ("the SB Scheme") which merged into the Southern State Superannuation Scheme in 1998.¹⁶

Membership of the PS Scheme was confined to parliamentarians; however, membership of the SSS and SB Schemes extended to a wider range of State government employees.¹⁷

In 1997, the Commonwealth Parliament enacted the *Superannuation Contributions Tax Imposition Act 1997* (Cth) and the *Superannuation Contributions Tax (Assessment and Collection) Act 1997* (Cth).¹⁸ This legislation imposed a "surcharge" (in other words, a tax) of 15% on the tax deductible contributions made to superannuation funds by or on behalf of taxpayers above certain taxable income thresholds. The legislation's rationale was that high income earners had been benefiting from the concessional taxation treatment of superannuation to a much greater extent than low income earners. Under the legislation, the surcharge was payable by the providers of superannuation benefits.¹⁹

¹³ Established under the *Parliamentary Superannuation Act 1948* (SA) and continued under the *Parliamentary Superannuation Act 1974* (SA).

¹⁴ Established by the *Southern State Superannuation Act 1994* (SA).

¹⁵ Established by the *Superannuation (Benefit Scheme) Act 1992* (SA).

¹⁶ By the *Southern State Superannuation (Merger of Schemes) Amendment Act 1998* (SA).

¹⁷ (2009) 83 ALJR 1044, 1063 [91] (Hayne J).

¹⁸ The surcharge tax was abolished by the *Superannuation Laws Amendment (Abolition of Surcharge) Act 2005* (Cth) with effect from 1 July 2005.

¹⁹ *Superannuation Contributions Tax (Assessment and Collection) Act 1997* (Cth) ss.8A and 10(2).

Importantly, this legislation expressly provided that it did not apply to property of any kind belonging to the Commonwealth or a State.²⁰ This was to ensure that the constitutional prohibition contained in s.114 of the Commonwealth *Constitution* was not enlivened. Section 114 provides, *inter alia*, that the Commonwealth shall not “impose any tax on property of any kind belonging to a State”. There was apparently a concern that in respect of some State superannuation funds, the imposition of a superannuation contributions surcharge on the funds would contravene s.114. Accordingly, the Commonwealth Parliament enacted the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997* (Cth) (“the Assessment Act”) and the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Act 1997* (Cth) (“the Imposition Act”) (collectively “the surcharge legislation”) applicable to members of “constitutionally protected funds” whose taxable income exceeded a defined threshold amount.²¹

“Constitutionally protected funds” were defined by s.38 of the Assessment Act by reference to the Income Tax Regulations 1936 (Cth) reg 177 and Schedule 14 through s.267(1) of the *Income Tax Assessment Act 1936* (Cth). Those regulations expressly designated funds established under listed State Acts including the PS Act, SBS Act and the SSS Act to be “constitutionally protected superannuation funds”. That definition accordingly made it unnecessary for the High Court in *Clarke* to examine the provisions of the legislation establishing the superannuation fund which aim to clearly designate that fund as property belonging to the State for the purposes of s.114 of the *Constitution*. However, it is useful to point out that two of those establishing

²⁰ *Superannuation Contributions Tax (Assessment and Collection) Act 1997* (Cth) s.33.
²¹ Assessment Act ss.5, 8, 9, 10.

statutes did contain provisions which sought to bring those superannuation funds within the protection of s.114 in any event by providing that:²²

(2) The assets of the Fund belong (both at law and in equity) to the Crown.²³

Such provisions in the establishing statutes did have some practical utility, since, in *Austin*, some members of the court had considered that it was not self-evident that a State could not be taxed as a superannuation provider for unfunded pension schemes.²⁴ This was said to be because s.114 only prohibits the taxing of property²⁵ in the sense of the ownership or holding of property, not the taxing of transactions that affect property.²⁶ Accordingly, the Commonwealth may validly impose pay-roll tax²⁷ and fringe benefits tax²⁸ on the States.²⁹ Such taxes also did not infringe the *Melbourne Corporation* doctrine because they were non-discriminatory taxes and did not operate to interfere with a State carrying out its constitutional functions of government.³⁰

The surcharge legislation imposed the 15% surcharge directly on the high income earners who were members of constitutionally protected State superannuation funds, rather than on the funds themselves.³¹ Under some of the States' constitutionally protected superannuation schemes no contributions were made by or on behalf of members (or alternatively, the benefit payable

²² *Parliamentary Superannuation Act 1974* (SA) s.13(2); *Southern State Superannuation Act 1994* (SA) s.4(2) (repealed); *Southern State Superannuation Act 2009* (SA) s.10(2); there is no such provision in the *Superannuation (Benefit Scheme) Act 1992* (SA).

²³ Section 20 of the *Acts Interpretation Act 1915* (SA) embodies the rule of construction that statutory references to the "Crown" mean the Crown in right of the State. That is the sense in which "Crown" is used in the South Australian superannuation legislation, as opposed to the definition of "the Crown" in s.4 to mean "His Majesty the King, or Her Majesty the Queen, Sovereign for the time being of Australia, and includes the predecessors and the heirs and successors of the King or Queen".

²⁴ *Austin* (2003) 215 CLR 185, 211 [16] (Gleeson CJ), 233-4 [269] (Gaudron, Gummow and Hayne JJ).

²⁵ *Austin* (2003) 215 CLR 185, 211 [16] (Gleeson CJ).

²⁶ *Deputy Commissioner of Taxation v State Bank of New South Wales* (1992) 174 CLR 219, 227.

²⁷ *Victoria v Commonwealth* (1971) 122 CLR 353.

²⁸ *State Chamber of Commerce and Industry v Commonwealth* (the *Second Fringe Benefits Tax Case*) (1987) 163 CLR 329.

²⁹ *Austin* (2003) 215 CLR 185, 211 [16] (Gleeson CJ).

³⁰ *Austin* (2003) 215 CLR 185, 215 [22] (Gleeson CJ).

³¹ *Imposition Act* s.11.

under some schemes was a defined benefit,³² which greatly exceeded the value of contributions made for or on behalf of members of those schemes). In order to deal with this problem, the surcharge legislation calculated the 15% surcharge by reference to a notional surchargeable contributions factor set out in the legislation, which involved an actuarial valuation of the extent to which the anticipated ultimate benefit under the scheme was attributable to the member's service during the particular financial year. Effectively, the objective was to estimate the value of the contributions that would need to have been made by or on behalf of a member of such a scheme during that year in order to fund the superannuation or pension benefit ultimately provided under the scheme upon the member's retirement. Because the calculation of the surcharge was on the basis of a notional contribution, there was potentially no necessary relationship to the actual pension received. The surcharge was to be paid within three months of the date of issue of the notice.³³ If not paid within that time, the tax accrued compounding at market interest rates until the member received the superannuation benefit.³⁴ The tax could potentially equate to the entire pension due in the first year of receipt.

To ameliorate this, the South Australian Parliament inserted s.21AA into the PS Act³⁵ in 1999 to provide persons with an accumulated surcharge liability with the ability to obtain a lump sum to pay it at retirement. The second reading speech for the Bill included that the Bill was introduced to address the problems that could arise from the operation of the surcharge legislation.

The constitutional validity of the surcharge legislation in its application to judicial officers of State courts was considered by the High Court in *Austin*. In that case a judge of the Supreme Court of New South Wales and a Master of the Supreme Court of Victoria challenged their liability to pay the

³² As was the PS Scheme. The term "Defined benefit superannuation schemes" was defined in the Assessment Act s.38.

³³ Assessment Act s.15(7) and (8).

³⁴ Assessment Act s.21.

³⁵ *Statutes Amendment (Commutation for Superannuation Surcharge) Act 1999* (SA).

superannuation contributions surcharge tax on the ground that the surcharge legislation was invalid because (amongst other things) it contravened the implied limitation on Commonwealth legislative power recognised in the *Melbourne Corporation* doctrine. A majority of the High Court³⁶ held that in its application to the First Plaintiff, the surcharge legislation was invalid on that ground.³⁷ Accordingly, the joint judgment in *Clarke* dubbed it the “sequel to *Austin*”.³⁸

The Federal Commissioner for Taxation issued Mr Clarke with superannuation contribution surcharge assessments for the financial years ending 30 June 1997 to 2001, during which he was a parliamentarian. Mr Clarke objected to the assessments on the ground that the surcharge legislation was unconstitutional, as in *Austin*, and therefore invalid, but his objection was disallowed by the Commissioner of Taxation. Mr Clarke applied to the Administrative Appeals Tribunal for review of the Commissioner’s decision. The AAT referred three questions of law to the Full Court of the Federal Court of Australia, one of which was whether the surcharge legislation was invalid in its application to Mr Clarke as a member of a State Parliament on the ground that it infringed the *Melbourne Corporation* doctrine.

Federal Court proceedings

In the proceedings before the Full Court of the Federal Court, Mr Clarke and the South Australian Attorney-General intervening contended that the surcharge legislation discriminated against the State of South Australia or so placed a particular disability or burden upon the operations and activities of the State of South Australia, as to be beyond the Commonwealth’s legislative power. In favour of invalidity it was argued that:

³⁶ Kirby J dissented in the result.

³⁷ It was held that on its proper construction the surcharge legislation did not apply to the Second Plaintiff.

³⁸ (2009) 83 ALJR 1044, 1056 [38] (Gummow, Heydon, Kiefel and Bell JJ).

- (i) The House of Assembly was an essential organ of the constitutional structure of the State, and the surcharge legislation singled out, and discriminated against, members of constitutionally protected funds by imposing upon them a different regime from that imposed on high income earners under the general superannuation surcharge legislation. That difference between the surcharge imposed on members of constitutionally protected funds and others arose from the surcharge being imposed on the members of constitutionally protected funds and the surcharge being calculated by reference to notional rather than actual contributions. In addition, the surcharge was calculated pursuant to an actuarial calculation which might not reflect the actual benefit which would be enjoyed by the member of the fund in question.
- (ii) The surcharge legislation undermined the State's parliamentary pension arrangements which were designed to benefit parliamentarians and to encourage people to put themselves forward for election. It was argued that the surcharge legislation created a significant incentive for experienced parliamentarians who were members of the PS Scheme to retire early. It was also argued that the effect of the surcharge legislation was to dictate to the State how it was to provide for the retirement of parliamentarians.
- (iii) The surcharge legislation effectively compelled the State to set up a special parliamentary pension fund into which pensions were actually paid, or to legislate to allow commutation of pensions to enable members to meet their surcharge liabilities. The State claimed that in response to the surcharge legislation, it had amended its parliamentary superannuation legislation to permit members to commute so much of their pension as was required to provide a lump sum equivalent to the amount of the surcharge.³⁹

³⁹ Section 21AA(1) (later becoming s.23AA) was inserted into the PS Act by the *Statutes Amendment (Commutation for Superannuation Surcharge) Act 1999* (SA). Section 35AA was inserted into the *Southern State Superannuation Act 1994* (SA).

The Full Court of the Federal Court unanimously upheld the validity of the surcharge legislation in its application to the Appellant.⁴⁰ The findings of the Court relevant to this conclusion were:

- (i) High income earners of constitutionally protected funds were not singled out from high income earners of other superannuation funds by virtue of the fact that the surcharge was based on notional, not actual, contributions as calculated by an actuary. The Court relied on the fact that under the surcharge legislation, the surcharge for members of all defined benefit schemes was determined on a notional basis.⁴¹ There was no differential treatment between Mr Clarke and other high income earners in relation to pension commutation and lump sum benefits.⁴²
- (ii) The State's claims that the surcharge legislation undermined the State's parliamentary pension arrangements, discouraged people putting their names forward for election to Parliament⁴³ and created a significant incentive for parliamentarians to retire early⁴⁴ were speculative and unsupported by evidence.
- (iii) The evidence before the Court did not establish that there had been an impermissible interference in the constitutional capacity of the State to function as a government because the State had not in fact been "compelled" to introduce the legislative changes affecting the Appellant's commutation rights.⁴⁵

The High Court granted special leave to appeal from the decision of the Full Court of the Federal Court.⁴⁶ When the matter came on for hearing in the High Court the Attorneys-General for the Commonwealth, Western Australia, Victoria, Queensland and New South Wales intervened.

⁴⁰ *Clarke v Commissioner of Taxation* (2008) 170 FCR 473.

⁴¹ (2008) 170 FCR 473 at 499 [112].

⁴² (2008) 170 FCR 473 at 501 [122].

⁴³ (2008) 170 FCR 473 at 500 - 501 [117], 504 [136].

⁴⁴ (2008) 170 FCR 473 at 500 [116], 504 [136].

⁴⁵ (2008) 170 FCR 473 at 502 [127], 503 [131], 504 [134], [136].

⁴⁶ [2008] HCATrans 375.

High Court's reasons for decision

French CJ and Hayne J each delivered separate judgements, Gummow, Heydon, Kiefel and Bell JJ delivered a joint judgment. All members of the Court reaffirmed and applied the *Melbourne Corporation* doctrine, as explained in *Austin*, holding the surcharge legislation invalid in its application to Mr Clarke.

The Court held that the surcharge laws were not laws of general application. The laws were directed only to benefits received under constitutionally protected funds and the taxation regime imposed was legally different from that applied generally to those receiving pensions and superannuation benefits because the surcharge was payable by superannuation providers, not members of the fund.⁴⁷ Accordingly, instead of being laws of general application, the laws placed a special disability or burden on the State in relation to the way in which it remunerated members of State Parliament. The fact that the law was not of general application distinguished the surcharge legislation from income, pay-roll and fringe benefits tax legislation.⁴⁸

As I have mentioned, the ostensible purpose of the surcharge legislation was to implement economic equivalence between members of constitutionally protected superannuation funds and other high income earners. However, this purpose received little attention in the High Court's reasons in *Clarke*, as had been the approach of the High Court in *Austin*. As Gaudron, Gummow and Hayne JJ had espoused in *Austin*:

It should be emphasised that, contrary to what at times in the argument appeared to be some colour given by the Commonwealth to its submissions, the issues...are not to be approached with some broad view which takes as dispositive in this Court the economic results sought to be obtained by the legislation in question. It is the

⁴⁷ (2009) 83 ALJR 1044, 1059 [61] (Gummow, Heydon, Kiefel and Bell JJ), 1065 [97] (Hayne J); 1056 [35] (French CJ) agreeing.

⁴⁸ (2009) 83 ALJR 1044, 1059 [61] (Gummow, Heydon, Kiefel and Bell JJ).

character in constitutional law of what was done, as it bears upon the plaintiffs and the States of whose courts they are members, which is in issue. **What resort to arguments of economic equivalence does reveal is that the impugned legislation is legally different from other, generally applicable legislation providing for the taxation of other pension and superannuation entitlements. That is, the impugned legislation subjects the plaintiffs, as State judicial officers, to special and legally different taxation arrangements from those generally applicable to persons eligible for, or in receipt of, pensions or superannuation.**⁴⁹ (*emphasis added*)

The Court in *Clarke* similarly highlighted the legal differences between how the surcharge legislation treated State parliamentarians in comparison to other high income earners.⁵⁰ As Hayne J pointed out:⁵¹

But whether, or to what extent, the features of the legislation just mentioned lead to a result that members of constitutionally protected superannuation funds are taxed in a way that provides some measure of economic equivalence with the position of “high income earners” made subject to a surcharge payable by their superannuation fund is not to the point...What is important is that the laws...by their effect on how States may choose to remunerate their parliamentarians, place a special disability or burden upon the exercise of powers and the fulfilment of functions of the States.⁵²

All members of the Court in *Clarke* held that this legal difference or discrimination against State parliamentarians, while of importance for the *Melbourne Corporation* doctrine, was insufficient on its own to attract invalidity by operation of the *Melbourne Corporation* doctrine, as had the Court in *Austin*.⁵³ The Court went on to ascertain the effect that this discrimination had on the ability of the State to exercise its constitutional functions.

⁴⁹ *Austin* (2003) 215 CLR 185, 224 [41].

⁵⁰ See, for example, (2009) 83 ALJR 1044, 1056 [35] (French CJ), 1065 [97] (Hayne J).

⁵¹ (2009) 83 ALJR 1044, 1065 [100].

⁵² (2009) 83 ALJR 1044, 1065-6 [100]-[101].

⁵³ *Austin* (2003) 215 CLR 185, 264 [164].

In making that determination, the Court drew on the reasoning of *Re Australian Education Union; Ex parte Victoria* ('*AEU*')⁵⁴, as had the Court in *Austin*.⁵⁵ In *AEU* the joint judgment of six members of the High Court⁵⁶ developed two propositions. First, it is "critical to a State's capacity to function as a government" that it retain the ability to determine "the terms and conditions" on which it engages employees and officers "at the higher levels of government". Secondly, "Ministers, ministerial assistants and advisers, heads of department and high level statutory office holders, parliamentary officers and judges would clearly fall within this group".⁵⁷

In *Clarke*, it was held that members of a State legislature are within the class of persons "at the higher levels of government" in respect of whom it is critical that the State retain the ability to fix terms and conditions of service if it is to function as a government.⁵⁸ The joint judgment referred to the long standing constitutional value of attracting competent persons to serve as legislators by the making of suitable remuneration.⁵⁹ Again, this reasoning is similar to that applied by the majority in *Austin*.⁶⁰ The Court went on to consider that the fixing of the amount and terms of that remuneration was a critical aspect of the capacity of a State to conduct the parliamentary form of government.⁶¹

In *Clarke*, the joint judgment, with Hayne J agreeing, held that the practical operation of the Commonwealth legislation was to create an obligation on State parliamentarians to pay a deferred compounding tax upon leaving office. The enactment of State legislation in response to the Commonwealth surcharge legislation to commute PSS pensions to provide a sum equal to the amount of a deferred superannuation contribution surcharge assessment was

⁵⁴ (1995) 184 CLR 188.

⁵⁵ *Austin* (2003) 215 CLR 185, 260-1 [152].

⁵⁶ Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

⁵⁷ (1995) 184 CLR 188, 233.

⁵⁸ (2009) 83 ALJR 1044 [62] (Gummow, Heydon, Kiefel and Bell JJ), [97] (Hayne J).

⁵⁹ (2009) 83 ALJR 1044, 1060-1 [69] (Gummow, Heydon, Kiefel and Bell JJ).

⁶⁰ See, for example, *Austin* (2003) 215 CLR 185, 219 [28] (Gleeson CJ).

⁶¹ (2009) 83 ALJR 1044, 1056 [36] (French CJ), 1060-1 [69] (Gummow, Heydon, Kiefel and Bell JJ).

indicative of and responsive to a curtailment or restriction of legislative choice for South Australia to provide remuneration to senior office holders.⁶² The State's legislative choice was curtailed because the State was left with no real choice but to provide retirement benefits by a method enabling parliamentarians to meet the burden imposed by the surcharge legislation.⁶³ Accordingly, the response of the South Australian legislature was evidence of the curtailment of South Australia's ability to exercise its constitutional powers, contrary to the reasons of the Federal Court in *Clarke*. Again, this is consistent with the approach taken in *Austin* whereby the effect of the law on the State was indicated by the State's response of altering the method of judicial remuneration by legislating to offset the impact of the surcharge.⁶⁴

Accordingly, it was held that the surcharge legislation was beyond the Commonwealth's legislative power in respect of its application to State Parliamentarians.

In his reasons, French CJ expounded a multifactorial approach to applying the *Melbourne Corporation* doctrine, no single factor being self-sufficient. The factors were said to be:⁶⁵

- Whether the law in question singles out one or more States and imposes a special burden or disability on them which is not imposed on persons generally;
- Whether the operation of a law of general application imposes a particular burden or disability on the States;
- The effect of the law upon the capacity of the States to exercise their constitutional powers;

⁶² (2009) 83 ALJR 1044, 1061 [72] (Gummow, Heydon, Kiefel and Bell JJ); 1065-6 [101] (Hayne J); French CJ agreeing).

⁶³ (2009) 83 ALJR 1044, 1065 [72], [75] (Gummow, Heydon, Kiefel and Bell JJ), 1065-6 [101], [103] (Hayne J; 1056 [35] (French CJ agreeing).

⁶⁴ *Austin* (2003) 215 CLR 185, 265 [170].

⁶⁵ (2009) 83 ALJR 1044, 1055-6 [34].

- The effect of the law upon the exercise by the States of their functions;
- The nature of the capacity or functions affected; and
- The subject matter of the law affecting the State(s) and in particular the extent to which the constitutional head of power under which the law is made authorises its discriminatory application.

Applying this approach, French CJ considered the following factors relevant to holding invalid the Assessment and Imposition Acts because they significantly interfered with the remuneration arrangements made by States for their parliamentarians, and consequently significantly burdened the exercise by the State of its powers and functions in fixing the remuneration of its parliamentarians:⁶⁶

- The State was singled out by reference to benefits and funds established by State law which were specifically designated by the Commonwealth laws.
- The laws, in so far as they related to the PS Scheme, imposed a tax specifically upon persons holding office as members of the Parliament of the State.
- The laws effectively and specifically burdened the pension and superannuation benefits able to be enjoyed by members of the State Parliament.
- Unlike income tax laws and other tax laws of general application, the impugned laws were specifically aimed at the remuneration arrangements between the State and members of its legislature.
- The significance of the effects of the surcharge upon State legislators was reasonably evidenced by the amendment which the State made to the commutation provisions affecting pension and superannuation entitlements.

⁶⁶ (2009) 83 ALJR 1044, 1056 [35]-[36].

Conclusion

The *Clarke* case can be seen as confirming, and possibly strengthening, the operation of the *Melbourne Corporation* doctrine, as elucidated in *Austin*, in prohibiting the Commonwealth from enacting laws which restrict or burden one or more of the States in the exercise of their constitutional powers and functions in a significant manner.

That is an outcome with which the States can be reasonably satisfied, for it is what they set out to achieve by their intervention in the case; to preserve the integrity of the *Melbourne Corporation* doctrine.

As it transpires, the principal beneficiaries from the outcome of the case are past and present State parliamentarians who had or continued to have a potential liability under the surcharge legislation, as they will now be relieved of that burden. No doubt there are other past and present employees and officers of the States “at the higher levels of government” who have been placed in the same position. This has now been recognised by the Australian Tax Office in a Decision Impact Statement issued on 17 February 2010.

However, these outcomes are merely incidental in the context of the long-term constitutional significance of the case for the federal compact and in particular the functioning of the States as polities in the federation.

Will Rogers once said that: “The difference between death and taxes is death doesn't get worse every time Congress meets.” Since *Clarke*, State parliamentarians, at least, can now be assured that neither death nor taxes in the form of the surcharge legislation can get worse when the Commonwealth Parliament meets.