QUEENSLAND ELECTRICITY COMMISSION AND OTHERS v *COMMONWEALTH OF AUSTRALIA*[1]

Constitutional law — Commonwealth — Legislative power — Implied limitations — Power to bind States — Power to bind State authorities — Discriminatory law — Invalidity of law — Commonwealth Constitution s 51(xxxv) — Conciliation and Arbitration (Electricity Industry) Act 1985 (Cth).

Industrial law — Commonwealth — Conciliation and arbitration — Legislative power — Implied limitations — Power to bind States — Power to bind State authorities — Discriminatory law — Extent to which discrimination authorised — Commonwealth Constitution s 51 (xxxv) — Conciliation and Arbitration (Electricity Industry) Act 1985 (Cth).

This case (the *Electricity Commission* Case) will be of enduring interest to constitutional lawyers as an example of a Commonwealth law being held invalid for exceeding the implied limitations on legislative power to be derived from the federal nature of the Constitution, being only the second such instance[2] since the "complete overthrow"[3] of the doctrine of intergovernmental immunity in the *Engineers'* Case.[4] It establishes that government authorities not within the shield of the Crown can, under this doctrine, be beyond the reach of Commonwealth legislation and gives an instructive insight into then current Bench's view of the nature and scope of the limitations to be implied from the Constitution. The degree to which s 51 (xxxv) of the Constitution (the conciliation and arbitration power) authorises discrimination against the States is also canvassed. More generally the events surrounding this case reveal how the Australian federation works in practice and demonstrate the operation of some extra-constitutional limitations on Commonwealth power.

1. The Background

The *Electricity Commission* Case was one of two decisions handed down by the High Court on 5 September 1985.[5] Both arose out of the dramatic events of the "Queensland power dispute", a major industrial dispute between power workers and the Queensland Government that came to a head in the

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[1] (1985) 61 ALR 1; (1985) 59 ALJR 699: High Court of Australia; Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ. All following references are to the ALR report. For commentary see "The metes and bounds of Commonwealth legislative powers" (1986) 60 ALJ 55.

[2] Section 48 of the Banking Act (1945) (Cth) was held not to be a valid exercise of Commonwealth power in *Melbourne Corporation* v *The Commonwealth* (The *State Banking* Case) (1947) 74 CLR 31.

[3] *Electricity Commission* (1985) 61 ALR 1, 41 *per* Deane J.

[4] *Amalgamated Society of Engineers* v *Adelaide Steamship Co Ltd* (The *Engineers'* Case) (1920) 28 CLR 129.

[5] The other was *Re Ludeke; ex parte Queensland Electricity Commission* (1985) 60 ALR 641 (*Re Ludeke*) which is discussed briefly below.

first few months of that year. It had its origins[6] in early 1984 when the South East Queensland Electricity Board (SEQEB), a regional electricity board constituted, like the Queensland Electricity Commission, under the Electricity Act 1976 (Qld), attempted to have electrical installation work carried out, not by its employees, but by independent contractors. The Electrical Trades Union (ETU) responded by imposing work bans on the site involved. A confrontation developed with both sides showing remarkable intransigence. The issue of the use of contract labour remained unresolved but it soon became clear that Queensland's National Party Government was intent on using the dispute to diminish the power of the trade unions in the electrical industry.[7]

Industrial action in January and February 1985 resulted in large numbers of consumers in the Brisbane area being without power and the situation was exacerbated by a severe hailstorm which, it is estimated, cut 80,000 supplies. When, on 7 February, the ETU informed the media that it would ignore an order of the State Industrial Commission to return to work, the Queensland Government proclaimed a state of emergency under the State Transport Act 1938-81. Orders in Council were issued facilitating the reconnection of power supplies, ordering the striking unionists back to work and authorising conscription of non-employees. Industrial action continued and notices were issued by SEQEB to employees who failed to comply with the Orders, terminating their employment. Subsequently a further Order in Council directed that replacement staff, employed during the state of emergency, would be subject to a contract of service less favourable than the existing award conditions. It lengthened working hours, eliminated employment preference for unionists and contained a no-strike clause.

The Queensland Government introduced six pieces of legislation as a result of the dispute.[8] The Electricity (Continuity of Supply) Act 1985 (Qld) confirmed actions taken under the emergency including the dismissal of SEQEB employees, imposition of the new employment contracts and conferring on the Commissioner the power to "direct any person whatever who, in his opinion, is capable ... to provide, to maintain or to restore a supply of electricity" (s 3). It also contained the much publicised s 5(1)(c) that made it an offence to "harass, annoy or cause harm or distress to" persons carrying out electrical work.

In the face of this barrage of vigorous legislation the ETU's response was to attempt to avoid the industrial provisions by seeking coverage under a federal award. To this end a log of claims was served on the Queensland

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[6] The events in the dispute up to April 1985 and the Queensland legislation passed as a result of it are discussed in P McCarthy, "Power without Glory: The Queensland Electricity Dispute" (1985) 27 JIR 364. The industrial relations aspects are discussed in the article which follows in the same issue: H Guille, "Industrial Relations in Queensland" (1985) 27 JIR 383.

[7] Political interest in the *Electricity Commission* Case derived in no small measure from Premier Bjelke-Petersen's marked antipathy towards both the Hawke Federal Labor Government and any notion of Commonwealth interference in State matters on one hand, and pressure on the Labor administration, particularly from the left wing of the party, to support the unions on the other.

[8] McCarthy *supra* n 6, 371.

Electricity Commission, the seven Queensland regional Electricity Boards (the Boards) and various electricity authorities in other States and Territories. As a result of its rejection by these employers, Mr Commissioner Brown of the Australian Conciliation and Arbitration Commission found, on 18 April, that a dispute existed. It was this finding, an essential prerequisite to the establishment of a federal award, that was challenged and upheld in the *Re Ludeke* Case.

2. *The Legislation*

The effects of the dispute spilled interstate with the Australian Council of Trade Unions imposing a blockade on Queensland affecting air, sea, road and rail links. Under considerable pressure to intervene, the Commonwealth Government enacted the Conciliation and Arbitration (Electricity Industry) Act 1985 (Cth) (the Act), to facilitate a rapid transition to coverage of the Queensland power workers under a federal award. It was this legislation, admittedly limited in its object to producing a resolution of the Queensland dispute[9], that was challenged in the *Electricity Commission* Case.

The provisions of the Act are examined in detail in the judgments.[10] Section 3 incorporates the Act into the Conciliation and Arbitration Act 1904 (Cth) (the principal Act) but, by virtue of s 5, it overrides any inconsistent provisions in that Act. Section 4 defines various terms including "an electricity authority of Queensland". The section that proved to be of fundamental importance to the determination of the validity of the Act was s 6:

> 6. (1) This Act applies to the industrial dispute between the Electrical Trades Union of Australia and certain authorities that was found to exist by a Commissioner on 18 April 1985.
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> (2) Subject to the following provisions of this section, this Act also applies to any industrial dispute that has, whether before or after the commencement of this Act, been found by the Commission to exist between —
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> (a) any organisation of employees that is declared by the regulations to be an organisation of employees to which this sub-section applies; and
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> (b) one or more electricity authorities,
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> if the industrial dispute could result in the making of an award that would be binding on an electricity authority of Queensland and would establish terms or conditions of employment of employees of that authority.

Sections 7-9 are the operative part of the Act. Section 7 requires the Commission to settle an industrial dispute to which the Act applies "as expeditiously as is appropriate". All the comment attracted by this section in the *Electricity Commission* Case is to the effect that it is otiose. Deane J characterises it as "a pious admonition".[11] The effect of s 8(1) is to deprive the Commission of all of the discretionary power granted to it by s 41(1)(d)

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[9] See the Minister's second reading speech, *House of Representatives, Weekly Hansard* No 9, 21 May 1985, 2797. He does, however, stress the national implications of the dispute.

[10] *Electricity Commission* (1985) 61 ALR 1; 4-9 *per* Gibbs CJ; 13-15 *per* Mason J; 23-25 *per* Wilson J; 33-34 *per* Brennan J.

[11] *Ibid* 47. As he says, it adds little to the existing s 39(1) of the Conciliation and Arbitration Act.

of the principal Act to dismiss or refrain from further hearing a matter on the grounds of public interest or because it would be properly dealt with by a State Industrial Authority of Queensland, in this case the body newly created by the Queensland Government in response to the dispute, the Electricity Authorities Industrial Causes Tribunal. Disputes to which the Act applies are, by virtue of s 9(1), to be heard by a Full Bench. The final sections are a regulations power, (s 10), and a three-year sunset clause, (s 11).

The effect is to provide a "fast track" through the arbitration process for certain disputes. The requirement that they are heard immediately by a Full Bench bypasses the usual procedure whereby single members conciliate and arbitrate. The possibility of appeal from such a hearing to a Full Bench is obviously also lost. The initial determination will thus, short of appeal to the courts, be conclusive. What is of overriding significance is that the only disputes to receive this treatment are those to which an electricity authority of Queensland is a party.[12] Indeed s 9(6) even empowers the Full Bench to limit its consideration of a dispute to only so much of it as involves such an authority.

3. The Challenge

The Queensland Government's response to this federal intervention was a twofold challenge in the High Court. The first, the *Re Ludeke* Case, was an attempt to deny entirely the jurisdiction of the Australian Conciliation and Arbitration Commission and so defeat the attempt to achieve a federal award. As previously stated, the electricity authorities of Queensland challenged the finding of a dispute by the Commission. The grounds were that the log of claims was not bona fide but a mere ploy to bring the intrastate dispute before the Commission and that non-acceptance of the log could not generate a real or genuine dispute. In a unanimous joint judgment the Court found for the unions. In summary, they held that a dispute did have to be genuine but that it is not an objection to the genuineness of a dispute that a log of claims has been served to create a dispute and thereby give the Commission jurisdiction to make an award.[13] The second prong of the attack was the challenge to the validity of the Commonwealth's legislation. This could, of course, do no more than delay the consideration of the application for a federal award and, perhaps, give some greater opportunity to oppose it. It is this challenge that constituted the *Electricity Commission* Case.

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[12] Approximately three percent of electricity generated for distribution to consumers in Queensland was found to derive from entities other than the plaintiffs. These were various private corporations and NSW Government bodies. However, a submission that they fell within the extended definition of "an electricity authority of Queensland" in sub-s 4(1)(d) was rejected. See *Ibid* 6, *per* Gibbs CJ; 22 *per* Mason J.

[13] Neither the Commonwealth nor the union could have been confident of this outcome in view of previous decisions where generation of a "paper dispute" had not, in the particular circumstances, been capable of attracting federal jurisdiction. See the *Collieries* Cases, particularly *Caledonian Collieries* v *Australasian Coal and Shale Employees' Federation (No 2)* (1930) 42 CLR 558.

The plaintiffs based their attack on two grounds. First that the Parliament's legislative powers are subject to an implied prohibition against discriminating against States (or their agencies) or the residents of States; and secondly, that the words "of any one State" in the description "industrial disputes extending beyond the limits of any one State" in s 51(xxxv) of the Constitution are inconsistent with the notion that laws made in exercise of the power may differ depending on the identity of the States in which the interstate dispute arose. In the event the case was disposed of on the first ground and the second was not decided.[14]

4. The Decision

All the judges found that provisions trespassed beyond the implied limitations on Commonwealth power. Gibbs CJ, Mason, Wilson and Dawson JJ held the entirety of the enactment unconstitutional and void. Brennan J would have invalidated s 6(2) only, while Deane J held ss 6(2), (3), (4), (5), 8 and 9 beyond power but would have saved ss 6(1) and 7. Only Brennan J would have left the Act any meaningful operation.

In deciding this case all of the judges apply essentially the same legal principles. Dawson J chooses to express them in somewhat distinctive terms but this results in what is largely a difference in emphasis. All judges indicate, or are prepared to assume, that the Act is *prima facie* within the conciliation and arbitration power and only impeachable on the basis of the implied limitations.[15] It is pointed out that the power extends to bind all parties to an interstate dispute including States[16] and that it may be invoked to legislate provisions dealing with a particular industry[17] and perhaps a particular dispute[18] or part thereof.[19] The fundamental principle identified[20] and applied[21] is that the Commonwealth cannot use its legislative power so as to discriminate against the States, or any number of them, by the imposition of some special burden aimed at them and not generally shared. It is accepted that some constitutional powers could authorise discrimination against States[22] but judges differ on the extent to which s 51(xxxv) is such a power. This difference, in essence, accounts for the non-uniform result in the case. All their Honours agree that the implied limitations extend to State authori-

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[14] *Electricity Commission* (1985) 61 ALR 1, 22 where Mason J observes that his initial reaction to it was "less than favourable".

[15] *Ibid* 10 *per* Gibbs CJ; 21 *per* Mason J; 23 *per* Wilson J; 45 *per* Deane J; 53 *per* Dawson J.

[16] *Ibid* 45 *per* Deane J.

[17] *Ibid* 21 *per* Mason J.

[18] *Ibid* 45 *per* Deane J.

[19] *Ibid* 10 *per* Gibbs CJ.

[20] *Ibid* 11-12, *per* Gibbs CJ; 19 *per* Mason J; 26-27 *per* Wilson J; 30, 33 *per* Brennan J; 42 *per* Deane J; 52 *per* Dawson J. Dawson J sees the rule against discrimination as but one possible example of a general principle protecting the States from undue interference with their governmental functions. See discussion under the heading "The State of the Law" below.

[21] *Ibid* 12-13 *per* Gibbs CJ; 21-22 *per* Mason J; 27-29 *per* Wilson J; 30, 33 *per* Brennan J; 46-47 *per* Deane J; 54 *per* Dawson J.

[22] *Ibid* 12 *per* Gibbs CJ; 21 *per* Mason J; 26 *per* Wilson J; 31 *per* Brennan J; 44-45 *per* Deane J; 52 *per* Dawson J.

ties or at least to those as closely identified with government as the Boards are in this instance.[23]

The judgments of Gibbs CJ and Mason J are in similar terms and may be characterised as the leading statements of the majority position. Both find in the curtailment of normal powers and procedures, effected by ss 8 and 9 of the Act, the necessary, special disability[24] and deny to the s 51(xxxv) power any attribute authorising discrimination against States.[25] It is the fact that the Act, by virtue of s 6, only applies to disputes to which Queensland authorities are a party that constitutes discrimination *against* that State. Gibbs CJ says:

> In fact, the only Queensland employers who were parties to the dispute described in s 6(1) were the Queensland Electricity Commission and the Electricity Boards and there will be a dispute within s 6(2) only if an electricity authority of Queensland is a party to the dispute. The Act does not apply to a dispute in the electricity industry to which no electricity authority of Queensland is a party. Plainly the provisions of the Act are directed against the electricity authorities of Queensland.[26]

In his judgment Mason J says:

> It is not to the point that parties to the dispute other than the Queensland electricity authorities are subject to the same procedures. They are subject to those procedures if, and only if, the dispute could result in an award that would be binding on a Queensland authority and would establish the terms and conditions of employment by that authority. It is this circumstance that attracts the new regime with its attendant special disabilities. This regime is tailored for Queensland authorities, as distinct from the authorities of other States, and, what is more important, from the general run of employers in the industry.[27]

Gibbs CJ strikes down the Act because as an entity its purpose is discriminatory.[28] Mason J's reasoning leads to the finding that ss 8 and 9 are invalid and he concludes that they cannot be severed.[29]

The distinguishing feature of the judgments of Brennan and Deane JJ is that they descry in the conciliation and arbitration power authority for some discriminatory legislation. Brennan J lays stress on the principle that the power is intended "to serve a public interest, not only the interests of the disputing parties".[30] Where, therefore, the public interest requires it, a law can prescribe a special procedure for the speedy settlement of a dispute even if the result is that a burden or disability is placed on a State employment authority that is not imposed on other employers, "*provided* the burden or disability is imposed not by reference to the governmental character of the

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[23] *Ibid* 12 *per* Gibbs CJ; 20 *per* Mason J; 25-26 *per* Wilson J; 35 *per* Brennan J; 43 *per* Deane J; 48 *per* Dawson J.

[24] *Ibid* 9 *per* Gibbs CJ; 21 *per* Mason J.

[25] *Ibid* 13 *per* Gibbs CJ; 21 *per* Mason J.

[26] *Ibid* 10 *per* Gibbs CJ.

[27] *Ibid* 21-22.

[28] *Ibid* 13.

[29] *Ibid* 22.

[30] *Ibid* 36 citing Isaacs J in *R* v *Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild* (1912) 15 CLR 586, 609-10.

employing authorities but by reference to the character of the dispute to which they are parties".[31] His Honour then undertakes an analysis of the nature of this dispute including the effect of the laws passed by the Queensland Government in response to it. He is the only judge so to do. While disavowing any assessment of the political questions involved, he concludes that the Commonwealth could reasonably have determined that the public interest required the type of measures provided for in the Act. In consequence he upholds the enactment with the exception of s 6(2), because it, in contradistinction to s 6(1), identifies a dispute to which the special procedures are to apply by reference to its resulting in an award being made binding on an electricity authority of Queensland, rather than by reference to a dispute, requiring such procedures, to which such an authority happens to be a party. As he points out, the section would be capable of application to some other dispute not exhibiting the characteristics that justify the special procedures the Act prescribes.[32] For Brennan J, so long as the dispute itself is the focus of legislation justifiable on the public interest component of s 51(xxxv), it does not matter that the dispute, or that part of it that is made subject to the legislation, is identified by reference to a State as one of the parties. This must be the basis on which he supports ss 8 and 9. Deane J, on the other hand, while applying essentially the same reasoning, strikes down these two sections on the basis that they discriminate against the electricity authorities *vis à vis* any other parties by "singling out, for restrictive treatment, the dispute or a part of the dispute by reference to whether an electricity authority remains or is a party to it".[33]

5. *The State of the Law*

In 1920 the *Engineers'* Case rejected the doctrine of inter-governmental immunity or immunity of instrumentalities as it has been called. Applied consistently by the High Court since the 1904 case of *D'Emden* v *Pedder*[34], it largely immunised State governments and their instrumentalities from the reach of Commonwealth legislation. It was said to arise as a necessary implication from the nature of the Australian federation that united under a sovereign, central government a number of equally sovereign States. Such implications were cast aside in *Engineers'* as unwarranted impositions on the plain words of the Constitution which were properly to be interpreted by recourse to nothing more than the settled or ordinary rules of statutory construction. It was subsequently pointed out, by Dixon and Evatt JJ in particular, that the decision could not have intended to suggest that implication had no part in constitutional interpretation[35] and the former went on to postulate a number of limitations on Commonwealth power in specific areas

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[31] *Ibid.*
[32] *Ibid* 37-39.
[33] *Ibid* 47.
[34] (1904) 1 CLR 91.
[35] See for example *West* v *The Commissioner of Taxation* (1937) 56 CLR 657, 681-682.

arising from the federal nature of the Constitution.[36] The end result was the birth of a new, albeit confined, doctrine of implied limitations.

It came to be applied in the *State Banking* Case where s 48 of the Banking Act 1945 was held invalid. The section singled out the States by, in effect, denying them access to the services of all private enterprise banks. This singling out was the defect identified by all the majority judges although their reasoning is far from uniform. The judgments of Latham CJ and Williams J reflect, what can be termed, the characterisation approach, the view that such a law is not in substance a law with respect to banking but rather with respect to the States, the latter not being a subject of Commonwealth power.[37] The others in the majority relied on federal implications. Dixon J would not allow Commonwealth laws to discriminate against the States or place on them a "particular disability or burden" with the immediate object of curtailing the exercise of their constitutional powers. Rich J protected instrumentalities carrying out the "essential functions of government". Starke J formulated a widely worded test: "whether the legislation or executive action curtails or interferes in a substantial manner with the exercise of constitutional power" by the States.[38]

The other comprehensive consideration of the implied limitations came in the *Pay-roll Tax* Case.[39] Here a Full Bench held that a Commonwealth pay-roll tax of general application validly applied to Victoria. The only element of discrimination to be found here was that State schools did not benefit from an exemption that operated in favour of private schools. Barwick CJ and McTiernan J avoided resort to implications by application of the characterisation approach.[40] Owen J agreed with the Chief Justice. It is in the other judgments that the scope and application of the implied limitations were explored. Windeyer J, in part, echoed the characterisation approach, however, this was in the context of accepting implied limitations arising from the existence of the States and ultimately he appears to rest his decision on the finding that the law here was not aimed at the States nor did it discriminate against them.[41] Menzies J could neither find discrimination enough to constitute the necessary "special burden" nor anything that constituted interference "with the performance by the State of its functions of government".[42] Walsh J pointed to the difficulties in formulating the satisfactory expression of a general rule but would not for this reason deny

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[36] *Australian Railways Union* v *Victorian Railways Commissioners* (1930) 44 CLR 319, 390; *West* v *The Commissioner of Taxation* (1937) 56 CLR 657, 682-683; *Essendon Corporation* v *Criterion Theatres* (1947) 74 CLR 1, 22-23.

[37] *Melbourne Corporation* v *The Commonwealth* (1947) 74 CLR 31, 99-100 *per* Williams J; 60-62 *per* Latham CJ but note the apparently inconsistent finding at 50 that "the argument that s 48 is not legislation with respect to banking should not be accepted".

[38] *Ibid* 78-80 *per* Dixon J; 66 *per* Rich J; 74-75 *per* Starke J.

[39] *Victoria* v *The Commonwealth* (1971) 122 CLR 353.

[40] *Ibid* 370-374 *per* Barwick CJ; 385-386 *per* McTiernan J.

[41] *Ibid* 403 he says that a law with respect to an enumerated head of power "cannot be for the peace, order and good government of the Commonwealth if it be directed to the States to prevent their carrying out their functions as parts of the Commonwealth". For context of this remark see *Ibid* 403-404.

[42] *Ibid* 391-392.

its existence. He accepted that a law of general application might fetter the States in an unacceptable way but held the law under challenge not to be of that description. He was also unable to detect discrimination in the "relevant sense".[43] Gibbs J found no implied limitation on the power of the Commonwealth to bind the States within the scope of taxation generally applied but he warned that "imposing taxation upon the States will be more likely than other laws to offend against the limitations that apply generally to Commonwealth powers". These he saw as discrimination against the States in the sense of imposing on them some special burden or disability, or the application to them of some general law that would "prevent a State from continuing to exist and function as such".[44] This case derives a clear outcome from a wide diversity of reasoning and principle.

The *Electricity Commission* Case provides considerable clarification. None of the judges places any reliance on the characterisation approach and for all the doctrine of implied limitations on Commonwealth power is determinative.[45] Of equal importance is that discrimination against States emerges as an independent head of invalidity within that doctrine. Only Dawson J decides the case by application of a wider principle. For him Commonwealth power does not extend to "interference with the manner in which the States may exercise their constitutional functions, be they legislative, executive or judicial"[46] or, at least, not to a law that would "unduly interfere" with these functions. Discrimination or the imposition of a special burden, he says, "may point to [a] breach", but they are clearly not automatically conclusive.[47] Both Wilson and Deane JJ recognise the existence of a wider principle but confine their consideration to the question of discrimination.[48] The other judges explicitly characterise the doctrine as consisting of two distinct rules. The one that is applied is that which prevents discrimination against States. The other, whose existence is affirmed, would strike down a law of general application that would prevent a State from continuing to exist and function as such.[49] As this latter proves irrelevant to the decision in this case, nothing is said that materially advances an understanding of what such a law might be.

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[43] *Ibid* 411-412.

[44] *Ibid* 424.

[45] Some of the judges explicitly reject the characterisation approach: *Electricity Commission* (1985) 61 ALR 1, 18 *per* Gibbs CJ; 44 *per* Deane J; 52 *per* Dawson J. Brennan J (*ibid* 33) does, however, suggest that a prohibition may only be *implied* when "a law seeks to impose a discriminatory burden on a State in consequence of a law directed to another entity" and that a discriminatory law directed at the States themselves may not depend for its validity on implications but on the "proper characterisation of the law".

[46] *Ibid* 50.

[47] *Ibid* 52.

[48] *Ibid* 23 *per* Wilson J; 42 *per* Deane J. Interestingly Deane J sees the prohibition on discrimination against a State as, perhaps, but one example of a broader restraint upon Commonwealth power that arises "as an implication of the underlying equality of the people of the Commonwealth under the law of the Constitution". On this basis laws discriminating against any subject, or group of subjects, would have to be based on legislative power that authorises such discrimination (*ibid* 42-43). If this is truly the case, it might be asked why it was felt necessary to include in the Constitution specific prohibitions against discrimination such as those in ss 51(ii), 99 and 117.

[49] *Ibid* 11 *per* Gibbs CJ; 19 *per* Mason J; 30 *per* Brennan J.

The discimination rule, on the contrary, receives considerable definition. In the *Pay-roll Tax* Case there was an element of discrimination in the legislation under challenge but, as pointed out above, this was said not to be discrimination in the "relevant sense". What is that relevant sense?

Where the Constitution expressly or necessarily authorises a discriminatory law, that law will not offend the implied limitations. The case did not call for an examination of which powers might possess this attribute but the majority must be taken as rejecting the assertion of Brennan and Deane JJ that conciliation and arbitration is such a power. Gibbs CJ insists that this is a matter for the Court, and not Parliament to decide.[50] Only Deane J discusses the general question in detail. His comments are instructive. He says in part:

> the singling out of the States for the imposition of some special burden or disability must itself have such a real and close connection with the subject matter of legislative power as to warrant the positive conclusion that the grant of legislative power was intended to authorise such discrimination against the States in the context of such a law. An example of such an exceptional case is where the nature of the subject matter of legislative power is such that the discriminatory operation of a law may do no more than reflect the necessary ingredient of what gives the law its character. Thus, to take the most obvious illustration, a law providing for the acquisition of property on just terms from a particular State (Constitution, s 51(xxxi)) will discriminate against the State if the acquisition is against its will.[51]

He goes on to point to powers that "necessarily [involve] distinctions between geographical areas" citing defence (s 51(vi)), quarantine (s 51(ix)) and medical services such as immunization (s 51(xxiiiA)). More broadly, he invisages States being subject to permissible discrimination because of their relationship with a "particular identified object, activity or situation" which may properly be singled out under some head of power, but does not give examples.

All of the judges echo the terminology employed by Dixon J in the *State Banking* Case where he said that it was beyond Commonwealth power to make a law "aimed" at the restriction or control of a State in the exercise of its executive authority.[52] Thus it is not enough that a law merely distinguishes between one State and another[53] or between States and subjects generally in order to put it beyond power. Rather it must aim at them by singling them out for some special burden or disability. It must be discrimination *against* the State or States; it must work disadvantage. Further this must be the "purpose" of the law, not in the sense of a subjective intention attributable to Parliament, but in the sense of that being the law's "legal operation and effect".[54] Deane J points out that a general law may, in some circumstances, have the effect of singling out a State for discriminatory treatment and that whether or not a law is truly one of general application is a

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[50] *Ibid* 12-13 *per* Gibbs CJ; 21 *per* Mason J; 26 *per* Wilson J; 31-33 *per* Brennan J; 44-45 *per* Deane J; 52 *per* Dawson J.

[51] *Ibid* 45.

[52] *Melbourne Corporation* v *The Commonwealth* (1947) 74 CLR 31, 83.

[53] *Electricity Commission* (1985) 61 ALR 1, 11-12 *per* Gibbs CJ; 21 *per* Mason J.

[54] *Ibid* 27 *per* Wilson J.

question of substance not form.[55] It follows that a law need not be confined in its operation to the States in order to be aimed at them.[56]

Finally, and most significantly, this case appears to establish that once a discriminatory law can be said to be aimed at States, the seriousness or otherwise of the disadvantage it works is quite immaterial. So long as the disadvantage is real, that is enough to have the law struck down.[57]

The *Electricity Commission* Case demonstrates that discrimination in this relevant sense is as fatal when directed at one State as it is when it affects all the States, as in the *State Banking* Case.

The other notable finding in this case is that a State authority or agency need not fall within the shield of the Crown to benefit from the implied immunities. As Mason J points out this may have been inherent in the *State Banking* Case in as much as the offending section there was directed not only to the States but also an "authority of a State, including a local governing authority".[58] Gibbs CJ, Mason and Deane JJ explicitly extend protection to all government authorities.[59] Dawson J's reasoning is not inconsistent with this position although he does feel it necessary to note that the Boards "operate for the purpose of providing essential service".[60] Wilson and Brennan JJ confine themselves to a finding that these authorities are to be sufficiently identified with the State of Queensland to receive the same protection.[61] Mason J encapsulates the rationale. The implied limitations are to protect States in the exercise of their functions and they are at liberty to choose to have these functions performed by statutory authorities.[62]

6. *Comment*

The *Electricity Commission* Case delineates a two-limbed test of invalidity to be applied to allegedly discriminatory laws. First, is the law aimed at the States or some number of them? As is pointed out by Gibbs J in the *Pay-roll Tax* Case, this is largely a question of degree.[63] In that case the States were treated on the same basis as the vast majority of employers. The proportions were such that the discriminatory aspect could be described as aimed, not at burdening the States, but at assisting private schools. Secondly, if a law is aimed at a State or States, the decisive inquiry is whether the particular measure can nonetheless be justified under the appropriate head of Commonwealth power.

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[55] *Ibid* 43-44.
[56] *Ibid* 22 *per* Mason J.
[57] *Ibid* 13 *per* Gibbs CJ; 29 *per* Wilson J; 53 *per* Dawson J.
[58] *Ibid* 20.
[59] *Ibid* 12 *per* Gibbs CJ; 20 *per* Mason J; 43 *per* Deane J.
[60] *Ibid* 48.
[61] *Ibid* 25-26 *per* Wilson J; 35 *per* Brennan J.
[62] *Ibid* 20. Deane J points out (*ibid* 43) that this is something which Australian governments have traditionally done. If the rationale in this case is applied to Commonwealth authorities there would appear to be no need for the Commonwealth to pass "protective" legislation such as that considered in *Australian Coastal Shipping Commission* v *O'Reilly* (1962) 107 CLR 46.
[63] (1971) 122 CLR 353, 426.

The effect of this case is to give the implied limitation that prevents discrimination against States potent force and considerable inflexibility in operation. This is not only because the slightest burden aimed at a State is treated as offensive but, more importantly, because of the restrictive view taken of when constitutional power authorises such a burden. It will of course be open in many circumstances to argue that a particular measure is not aimed at the States but that will not answer the questions of policy raised by a case, such as that under consideration, where that contention is not sustained.

The Act here would have been beyond challenge had the electricity authorities of Queensland been private employers, even if all the other circumstances had been identical. There seems nothing in their State character to warrant the different outcome. The significance of the burden placed on the State appears slight in comparison with the fact that the Commonwealth was denied the ability to expedite, essentially by use of existing processes, settlement of an industrial situation with the potential of causing massive dislocation across the country. If a State government becomes an interested and intransigent party to a dispute that threatens the public interest of Australia at large, why should the Commonwealth Government not be able to act in an area of undoubted power to resolve that dispute by a particular application of that power?

The majority judges, it appears, simply deny the conciliation and arbitration power any capacity whatever to support discriminatory legislation. There is much to be said for the alternative approach taken by Brennan J here. By countenancing that the relevant power authorises some discrimination he is not opening up to the Commonwealth a limitless field. He requires that to "establish the validity of a discriminatory law, there must appear a connection between the criterion for imposing the discriminatory burden or disability and the power relied on to support it".[64] In other words there must be a relevant connection between the circumstances in which the law is enacted, the measures it contains and the relevant head of power.

His Honour only needed, in this case, to decide that the conciliation and arbitration power admitted of some discrimination. Logically, however, the same inquiry should be undertaken in respect of any allegedly discriminatory law in relation to whatever the appropriate head of power might be. It requires great prescience to assert of any powers, except those with express provisos, that they could never support a discriminatory application. The advantage of the suggested approach is that, where that of the majority denies Commonwealth power irrespective of the circumstances, that of Brennan J allows discrimination when it is necessary and justified. It might be objected that this is to require a judicial investigation of the desirability of the legislation, a role the court, in principle and on the basis of its incapacity, is reluctant to undertake. His Honour's own judgment demonstrates this is not the case. His test in application becomes: could the Parliament, in all the circumstances, reasonably have believed that the measures were necessary for the particular circumstances affecting that State;[65] (or, it might be added, "the States",

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[64] *Electricity Commission* (1985) 61 ALR 1, 33.
[65] *Ibid* 37-38.

where they all are within the scope of the measure). This is no more than to ask if the provisions are reasonably necessary for the effectuation of the power, the familiar and frequently applied test that arises whenever the incidental area is entered. With powers such as defence, quarantine and the others referred to by Deane J as admitting discrimination, most measures should, *ex facie*, meet the requirement. Other cases will undoubtedly require a more extensive examination of the sort undertaken by Brennan J in this case.

Such an approach would be substantially more true to the *Engineers'* principles. The presence in the Constitution of ss 106, 107 and the words conditioning s 51, "subject to this Constitution", require little in the way of implication to establish that the Commonwealth cannot attack the "structural integrity of the State components"[66] of the federation. It is far more difficult, applying the ordinary principles of interpretation to a context containing generally worded grants of legislative power coupled with a few express limitations, to discover a wide and potent prohibition on the Commonwealth's ability to impose a special burden on States that is capable of operation without reference to the particular circumstances.

The policy behind the implied prohibition is clearly the fear that a power to discriminate could be abused by the Commonwealth. The answer given by the joint judgment in *Engineers'* was that it was the place of the political, not the judicial, process to remedy any such abuse.[67] The *Electricity Commission* Case is a dramatic example of just such political forces at work. It has been cogently argued that various of the Queensland Acts passed to deal with this dispute are in breach of international treaties to which Australia is a party and that much of the legislation could be invalidated by the Commonwealth exercising the external affairs power.[68] Despite its apparent capacity to intervene in this way, the Commonwealth chose to avoid a major confrontation with the politically powerful Queensland Government. Faced with the necessity of being seen to take some action, it resorted to the mildest option open to it. It is even arguable that the Conciliation and Arbitration (Electricity Industry) Act was never anything but a mere token. At the end of the Minister's second reading speech in the House of Representatives, The Honourable Donald Cameron MHR rose to his feet: "I raise a point of order. As this legislation will not hold up in the High Court, is it all right to waste the time of Parliament debating it?"[69] Even on the most charitable interpretation, the Government must have had doubts as to the validity of the Act. These could have been significantly reduced by enacting a general provision to be made applicable to specific situations by regulation on the pattern of the legislation upheld in the *Tasmanian Dam* Case.[70] Extra-constitutional

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[66] *Koowarta* v *Bjelke-Petersen* (1982) 153 CLR 168, 216 *per* Stephen J.

[67] (1920) 28 CLR 129, 151-152 *per* Knox CJ, Isaacs, Rich and Starke JJ, "If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done".

[68] McCarthy, *supra* n 6. See also Human Rights Commission, Report No 12, The Queensland Electricity (Continuity of Supply) Act 1985, March 1985 and Report No 14, *Queensland Electricity Supply and Related Industrial Legislation,* May 1985, AGPS, Canberra 1985.

[69] *Hansard, supra* n 9, 2802.

[70] *The Commonwealth* v *Tasmania* (1983) 46 ALR 625, 767 *per* Brennan J.

limitations on Commonwealth power are clearly not to be ignored and can help to justify a slightly more expansive view of its scope to operate differentially.

Testing the validity of discriminatory laws aimed at the States as if they were exercises of the incidental area of the relevant power will not effect a radical transformation in the federal balance. It will, however, allow a more appropriate and logical application of Commonwealth legislative capacity for the benefit of the national interest.

Chris Tappere*

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