THE AUSTRALIAN EDUCATION UNION CASE: A Quiet Revolution?

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Introduction

In recent years, 'implications' have been at the centre of many of the exciting developments that have taken place in the field of Australian constitutional law. Whilst most of the attention has focused on implied constitutional freedoms and the separation of judicial power, another established field of implications, those derived from federalism, has not excited quite so much interest. Nonetheless, important developments have taken place in that area, too, and these are the focus of this article.

Federalism-based implications have developed in two directions. One stream, sometimes called the *Cigamatic* doctrine,[1] concerns implications protecting the Commonwealth from certain State legislative measures. A second stream, which will be considered here, concerns implications operating to shield the States from Commonwealth legislation.

It will be argued that the most recent case to apply federalism-based implications, *Re Australian Education Union; ex parte Victoria* (*AEU*),[2] marks a significant shift in the Court's attitude to Australian federalism. The case departs from its predecessors on both a legal level and a policy level.[3] On a legal level, *AEU* appears inconsistent with the formulation of the implied limitation doctrine expounded in earlier cases and, further, departs from more general principles of constitutional interpretation. On a policy level, the case departs from its predecessors in that it places some value on the maintenance of State fiscal autonomy. Further, unlike earlier cases, it is irreconcilable with the decision in the landmark *Engineers*,[4] though it does, ironically, exhibit deficiencies in its reasoning similar to those often attributed to *Engineers*. This article aims to illuminate some of these oft- neglected themes and to consider the significance of the newly revamped 'implied

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1 Named after *Commonwealth v Cigamatic Pty Ltd* (1962) 108 CLR 372.

2 (1995) 184 CLR 188.

3 The themes developed in my analysis of *AEU* may also have some application to *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192. However, as my focus is upon the 'second limb' of the implied limitation doctrine, the possible analogy with *Queensland Electricity* is beyond the scope of this discussion.

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

limitation' doctrine within the broader context of constitutional interpretation.

The first section outlines the development of the 'implied immunity of instrumentalities' doctrine and examines its downfall in *Engineers*. The second section traces the re-emergence of federalism-based implications, focusing primarily upon *State Banking*[5] and attempting to reconcile that case with the principles established in *Engineers*. The refinement of the implied limitation doctrine is then traced through several more recent cases. In section three, *AEU* is explained and then analysed with a view to its problems, its potential wider ramifications and possible explanations for the majority's reasoning.

The Emergence of the *Engineers* Orthodoxy

The reign of the implied immunities doctrine

The doctrine of 'immunity of instrumentalities' was among the first constitutional doctrines formulated by the High Court of Australia. That doctrine protected the independence of the separate bodies politic comprising the Australian federation by striking down laws of one government, State or Commonwealth, that interfered with another government's performance of its functions. The doctrine gave legal effect to the then dominant 'coordinate' theory of federalism, the essence of which is equality among governments manifested in mutual non-interference.[6]

The doctrine was first applied in *D'Emden v Pedder*, where it was held that:

> [w]hen a State attempts to give its legislative or executive authority an operation which, if valid, would fetter, control or interfere with the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorised by the Constitution, is to that extent invalid and inoperative.[7]

Soon after, the doctrine was extended to cover the converse situation of Commonwealth interference with State functions.[8] Thereafter, the doctrine was regularly invoked to strike down Commonwealth as well as State laws.

However, from 1906, the doctrine was the subject of repeated criticism at the hands of new appointees Isaacs and Higgins JJ. In a series of cases, their Honours attacked as nonsensical the essential principle underpinning the doctrine; that is, the notion that the Constitution's division of powers implicitly requires that each government in the federation operate in its own discrete sphere.[9] Both judges openly espoused the enhancement of

5 *Melbourne Corporation v Commonwealth (State Banking)* (1947) 74 CLR 31.

6 J Bryce (1912) *The American Commonwealth*, Macmillan, vol 1, p 432.

7 *D'Emden v Pedder* (1904) 1 CLR 91 at 116.

8 *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Traffic Employees Association (Railway Servants)* (1906) 4 CLR 488.

9 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1164 per

Commonwealth power and clearly viewed the immunity of instrumentalities doctrine as a key impediment to the achievement of that goal.[10] As regards the other members of the Court, Isaacs and Higgins JJ had, it seems, planted the seeds of doubt that culminated in the *Engineers* decision.

The Engineers *revolution*

Engineers involved an industrial dispute initiated by a trade union among whose members were employees of Western Australian government instrumentalities. These instrumentalities argued before the Commonwealth Arbitration Court that the *Conciliation and Arbitration Act* 1904 (Cth), under which the union had initiated proceedings, did not extend to bind employers who were instrumentalities of the Crown in right of a State. The High Court's ruling was sought on this question.

The decision in *Engineers* conclusively swept aside the immunity of instrumentalities doctrine. The main judgment of Knox CJ, Isaacs, Rich and Starke JJ was delivered by Isaacs J. It is often noted that this judgment adopts a particularly rhetorical style.[11] Indeed, it gives only brief consideration to the facts at issue before launching into an attack on earlier decisions applying the immunity of instrumentalities doctrine. Isaacs J criticised the doctrine's tendency to draw upon judges' subjective views, regarding the principle of 'necessity', previously invoked to justify the doctrine, as being 'referable to no more definite a standard than the personal opinion of the Judge who declares it'.[12] He scathingly attacked the reasoning of Griffith CJ in *Attorney-General for Queensland v Attorney-General for the Commonwealth*,[13] which he regarded as the most precise formulation of the doctrine. He described that view as:

> an interpretation of the Constitution depending on an implication which is formed on a vague, individual conception of the spirit of the compact, which is not the result of interpreting any specific language to be quoted, nor referable to any recognised principle of the common law of the Constitution ... but [which is] arrived at by the

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Higgins J; *R v Sutton* (*Wire Netting*) (1908) 5 CLR 789 at 811 per Isaacs J; *Federal Municipal and Shire Council Employees' Union of Australia v Melbourne Corporation* (1919) 26 CLR 508 at 525–526, 531–533 per Isaacs and Rich JJ; *Federated Engine Drivers' and Firemen's Association of Australia v Broken Hill Proprietary Co Ltd* (1911) 12 CLR 398 at 459–460 per Higgins J.

10 B Galligan (1987) *Politics of the High Court*, University of Queensland Press, pp 86, 91; G Sawer (1967) *Australian Federalism in the Courts*, Melbourne University Press, pp 62–3.

11 RTE Latham (1937) *The Law and the Commonwealth*, LSE Press, pp 563–4; N Douglas, "Federal" Implications in the Construction of Commonwealth Legislative Power: A Legal Analysis of their Use' (1985) 16 *WALR* 105, p 106; L Zines (1989) 'Federal Theory and Australian Federalism: A Legal Perspective' in B Galligan (ed) *Australian Federalism*, Longman Cheshire, p 21.

12 *Engineers* at 142.

13 (1915) 20 CLR 148.

> Court on the opinions of Judges as to hopes and expectations respecting vague external considerations.[14]

Given these alleged problems with the doctrine, Isaacs J declared it to be the Court's responsibility to redirect the focus of interpretive methods toward the text of the Constitution. Such a focus, his Honour insisted, would not only provide a greater degree of objectivity and hence predictability in constitutional interpretation but would also ensure that the will of the people, documented in the very terms of the Constitution, would prevail as the ultimate criterion of legality.[15]

Significantly, the joint judgment rejected reliance on US constitutional doctrine in interpreting the Australian Constitution. Isaacs J claimed that Australia's inheritance, from the British politico-legal tradition, of an 'indivisible' Crown together with the structures of responsible government render the Australian constitutional position fundamentally different from that of the United States. Given these differences, his Honour said, it is inappropriate for the High Court to adopt uncritically US constitutional doctrines concerning the practical operation of federalism.[16] The clear implication was that the immunity of instrumentalities doctrine represented just such an uncritical adoption, a view shared by more recent commentators.[17]

Instead, Isaacs J insisted, the High Court ought to seek guidance in the rules of construction developed by the British courts. In particular, his Honour regarded as fundamental the so-called 'golden rule': the principle that interpretation of any legal instrument should involve a search for the 'natural' meaning that the text, either expressly or by necessary implication, conveys.[18] Only where the constitutional text is ambiguous, his Honour said, should a court consider other, contextual, considerations from which implications might be drawn.

To the extent that the immunity of instrumentalities doctrine was directed at preventing Commonwealth abuse of its express powers, the joint judgment regarded it as an inappropriate means of securing such protection. According to Isaacs J, such abuse is 'a matter to be guarded against by the constituencies and not by the Courts'.[19] In other words, his Honour thought it a political matter, best resolved through political rather than legal processes.

As to the facts at hand, Isaacs J concluded that the Constitution's section 51(xxxv) power over industrial disputes is, according to its terms, prima facie applicable to any interstate 'industrial dispute',[20] regardless of the

14 *Engineers* at 145.

15 Ibid.

16 Ibid at 146-147.

17 R Sackville, 'The Doctrine of Immunity of Instrumentalities in the United States and Australia: a Comparative Analysis' (1969) 7 *Melb ULR* 15, p 36; Sawer (1967) p 126; Galligan (1987) p 80.

18 *Engineers* at 148–149.

19 Ibid at 151.

20 At the time of this decision, 'industrial dispute' was taken to mean a dispute

employers concerned. His Honour further concluded that no other constitutional provision expressly or by necessary implication requires a narrower reading of section 51(xxxv).[21] Consequently, the joint judgment held that the *Conciliation and Arbitration Act* 1904 (Cth) bound the relevant West Australian Government instrumentalities in their capacity as employers in an 'industry'.

Consistent with his reasoning in earlier cases, Higgins J expressly rejected the principles established in *D'Emden v Pedder* and *Railway Servants*, finding them illogical and contrary to fundamental interpretive principles. Like the other majority judges, his Honour questioned the relevance and usefulness of the US authorities to which earlier courts had made extensive reference.[22]

The sole dissenting judgment was that of Gavan Duffy J. His Honour based his reasoning not on past authorities but on a view that:

> [t]he fundamental conception of the Federation as set out in the Constitution is that the people of Australia ... should ... unite for certain specific purposes in one Federal Commonwealth, but for all other purposes should remain precisely as they had been before Federation.[23]

His Honour inferred from sections 106–107, which preserve State Constitutions, that the Commonwealth's industrial power does not extend to disputes in which the employers concerned are State instrumentalities. As the Constitution does not, he insisted, expressly confer such power upon the Commonwealth, such matters must remain the exclusive concern of the States.[24]

The relationship between the several manifestations of the Crown in the Australian federation also received consideration in the Isaacs-led majority judgment. That judgment, however, reached an entirely different conclusion. Section 5 of the Constitution's 'covering clauses' states that Commonwealth statutes are to be 'binding on the courts, judges and people of every State ... notwithstanding anything in the laws of any States'. The majority regarded that provision as rebutting Gavan Duffy J's view that the Constitution does not, unless by express words, abrogate powers previously vested in the States.[25]

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involving employees in productive 'industry': trades, manufacturing and the like. This was thought to exclude persons employed in professional and administrative fields. The Court has since widened the definition of 'industrial dispute' to cover the latter types of employees: see below.

21 *Engineers* at 154-155.

22 Ibid at 168-169.

23 Ibid at 174.

24 Ibid at 174-176.

25 Ibid at 152-154.

The role of policy considerations

The apparent disagreement between Isaacs J and Gavan Duffy J, as to how best to reconcile the operation of two bodies politic exercising the same Crown authority within a single territory, arguably reflects their differing views as to the purpose of federation, a matter in turn influenced by their respective political and social values. Isaacs J, in particular, was fearlessly partisan when it came to questions of federalism. Throughout his public life, Isaacs made no secret of his centralist views, believing that the Commonwealth Parliament was intended, and ought, to have wide-ranging powers enabling it to dictate and implement policy on a national basis.[26] Given that his views were so widely known, it is somewhat curious that he should attempt to conceal their role in shaping the result in *Engineers*.

Despite the majority's overt reliance on strictly legal reasoning, many commentators suggest the decision was more a product of social, political and economic policy considerations.[27] In *Payroll Tax*, Windeyer J viewed the *Engineers* decision as a quite deliberate intervention in the political development of the Australian federation.[28] According to his Honour, an augmentation of Commonwealth power was considered necessary for Australia's development as a nation. In particular, Australia's involvement in two world wars and the States' rapid economic integration contributed to a judicial perception that Australia needed, at that point in time, a stronger national government.[29]

This argument was taken one step further by Richard Latham. Latham not only contended that the result in *Engineers* was motivated by political considerations, he was also critical of the majority's elaborate efforts to conceal the true basis for its findings.[30] This deception, he claimed, forced the majority to commit to extreme principles of literalism, in turn rendering other aspects of their judgment absurdly hypocritical.[31]

The present author concurs in Latham's critique and submits that the purely legalistic, doctrinal reasoning expressed by the majority in *Engineers* has since proved problematic. The literalist principles expounded by that majority, which probably somewhat overstated their own views,[32] were expressed in such strong and unequivocal terms as to have hamstrung the Court in subsequent cases where it may have preferred to exercise a degree of interpretive flexibility. Thus, in achieving its policy ends, the Isaacs-led majority in *Engineers* effectively precluded future courts from doing likewise by committing them to rigid interpretive doctrines.

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26 Sir Zelman Cowen (1967) *Isaac Isaacs*, Oxford University Press, ch 7.

27 See, eg, Sir Anthony Mason, 'Trends in Constitutional Interpretation' (1995) 18 *UNSWLJ* 237, p 242.

28 *Victoria v Commonwealth* (*Payroll Tax*) (1971) 122 CLR 353 at 396.

29 Ibid.

30 Latham (1937) p 564.

31 Ibid, pp 563–4.

32 AR Blackshield et al (1996) *Australian Constitutional Law and Theory: Cases and Materials*, Federation Press, p 247.

Moreover, that this landmark case failed to address competing views as to the purpose and nature of Australian federalism has meant that constitutional interpretation has since proceeded on a theoretically impoverished foundation. Subsequent courts have been ill-equipped to grapple with questions of federal purpose, given a leading case that seemingly repudiates such considerations and relegates them to the arena of politics.[33] Equally, it has proven difficult for judges to question the result in *Engineers*, given that the reasoning employed bears little relation to the motivations arguably underpinning that result. To avoid centralist outcomes, under the shadow of *Engineers*, it would have been necessary first to question the value of literalist interpretive principles, until recently an almost sacrilegious endeavour in any common law system. As will become apparent in the next section of this discussion, it took the brilliance and conviction of Sir Owen Dixon to take a judicial chisel to the reasoning in *Engineers*. Were it not for his influence, the *Engineers* edifice might perhaps have remained unmarked to this day.

A further problem with the decision in *Engineers* is that it established a precedent for the concealment of potentially controversial shifts in judges' policy priorities behind elaborate facades of legal reasoning. The Court's latest attitudinal shift on issues of 'federal balance', in *AEU*,[34] is buried within a similarly legalistic judgment. This approach was perhaps influenced by that taken in *Engineers*; the members of the majority may have thought that the precedent set in *Engineers* excused, or perhaps compelled, the non-disclosure of policy considerations underpinning their decision.

The legalistic reasoning exhibited by the majority in *Engineers* may have been a factor in the longevity of the principles there set down. For, as will soon become evident, the shadow of *Engineers* has loomed large over the High Court ever since.

The *State Banking* Case and the Rediscovery of Federalism-Based Implications

Upon his appointment to the High Court in 1929, Dixon J immediately began undermining the interpretive approach established in *Engineers*. In a series of cases, his Honour suggested that the *Engineers'* majority had not intended their interpretive principles to apply in certain situations; specifically, where Commonwealth legislation interferes with States by usurping their prerogative powers,[35] 'discriminating' against them[36] or taxing their 'governmental functions'.[37] However, these supposed exceptions stood as ad hoc deviations from a general principle, having no real philosophical

33 Zines (1989) p 22; D Meale, 'The History of the Federal Idea in Australian Constitutional Jurisprudence: A Reappraisal' (1992) 8 *Aust J L & Soc'y* 25, p 55.

34 (1995) 185 CLR 188.

35 *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 390.

36 Ibid.

37 *Essendon Corporation v Criterion Theatres Limited* (1947) 74 CLR 1 at 18–19.

momentum. Not until 1947 in *State Banking*[38] did the Court, most likely at Dixon J's instigation, attempt a well-reasoned and comprehensive departure from *Engineers*.

The State Banking case

In *State Banking*, a 5:1 majority declared unconstitutional section 48 of the *Commonwealth Banking Act* 1945 (Cth) which provided that: '[e]xcept with the consent in writing of the Treasurer, a bank shall not conduct any banking business for a State or for any authority of a State, including a local governing authority'. The plaintiff was the City of Melbourne, which, as a result of the Act, had been denied access to the facilities of its preferred private bank. The provision, enacted pursuant to the Constitution's section 51(xiii) power over '[b]anking, other than State banking', was designed to enable the Commonwealth to force all State governments and their instrumentalities to 'bank with' the Commonwealth Bank, in furtherance of the economic theory of 'central banking'.

The plaintiff, represented by Barwick KC, attacked the provision's validity on two main grounds. The first proceeded from an assumption that any Commonwealth law has only one 'true' characterisation which must, for validity, coincide with a head of Commonwealth power. It was contended that section the *Commonwealth Banking Act* was not truly a law 'with respect to' banking but rather was 'aimed at' the States, subjecting them to a special burden for reasons not directly connected with banking. As such, Barwick insisted, its 'true' characterisation was as a 'law "with respect to" the States and their domestic activities', over which the Commonwealth has no power.[39]

The second argument appealed directly to the concept of implied limitation. According to the plaintiff, existing authorities suggested that 'under the Constitution neither Commonwealth nor State may pass discriminatory legislation aimed at the other with respect to an essential governmental function of that other'.[40] Section 48 allegedly violated that limitation, being a discriminatory law aimed at impeding States and State instrumentalities in their performance of a 'governmental' function, the administration of their financial affairs.

The judgment most often cited is that of Dixon J. His Honour rejected unequivocally the characterisation submissions, insisting that a Commonwealth law can indeed incorporate two or more central purposes of which only one need disclose a relation to a head of power.[41] Dixon J regarded section, among other things, a law 'with respect to' banking, thereby having sufficient connection to an enumerated Commonwealth power to ensure prima facie validity.[42]

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38 (1947) 74 CLR 31.

39 Ibid at 35.

40 Ibid at 36.

41 This approach was ultimately accepted by the High Court in *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1.

42 (1947) 74 CLR 31 at 79.

Addressing the plaintiff's second argument, Dixon J elaborated on his earlier-mooted 'discrimination' reservation, suggesting it applies to:

> the use of federal legislative power to make, not a general law which governs all alike ... but a law which discriminates against States, or a law which places a particular disability or burden upon an operation or activity of a State ... especially upon the execution of its constitutional powers.[43]

His Honour said that where such Commonwealth laws are concerned, *Engineers'* is not authoritative.[44] He insisted that implications derived from the federal nature of the Constitution still have a role to play in its interpretation and proffered a philosophical justification for this view. According to Dixon J, the Constitution's establishment of separately organised Commonwealth and State governments 'predicates their continued existence as independent entities', hence 'the efficacy of the [federal] system logically demands' that the Commonwealth be restrained in its capacity to make laws destructive of that system. Such an intention is, his Honour said, 'to be plainly seen in the very frame of the Constitution'.[45]

Dixon J concluded that the implied limitation thus revealed invalidated section 48 of the *Commonwealth Banking Act.* He viewed that provision as 'a law directly operating to deny to the States banking facilities open to others, and so to discriminate against the States or to impose a disability upon them'.[46] Moreover, he clearly regarded the States' right to exercise day-to-day control over their financial resources as a key constitutional power.[47]

Starke J agreed that the Constitution necessarily implies some limitation on Commonwealth legislative powers so as to ensure the continued existence of the States as separate political entities.[48] However, he identified two distinct situations where this limitation might be invoked: where Commonwealth legislation discriminates against a State; and where a 'general' Commonwealth law interferes unduly with the performance of State governmental functions. Starke J thus found section 48 of the *Commonwealth Banking Act* invalid as infringing the implied limitation, given that States' 'management and control of their revenue and funds [is] a constitutional power of vital importance'.[49]

In separate judgments, Latham CJ, Rich and Williams JJ emphasised the plaintiff's characterisation argument.[50] However, whilst a characterisation test was the ultimate basis for their Honours' finding that section 48 was

43 Ibid at 78–79.

44 Ibid at 79.

45 Ibid at 82.

46 Ibid at 84.

47 Ibid at 77, 79–80.

48 Ibid at 70.

49 Ibid at 75.

50 Ibid at 61–62 per Latham CJ, 66–67 per Rich J and 98–99 per Williams J.

invalid, their application of that test drew heavily on the language and philosophy of Dixon J's implied limitation principle.[51]

The principle emerging from the majority's reasoning, though lacking focus, has much in common with the pre-*Engineers* implied immunity of instrumentalities doctrine. Both are grounded in inferences drawn from the federal nature of the political system established by the Constitution. Both proceed from the premise that it is desirable for the States and the Commonwealth to maintain a certain minimal level of independence from one another.[52] Unlike the pre-*Engineers* doctrine, however, the *State Banking* principle confers no reciprocal protection on the Commonwealth. Nevertheless, in so far as it protects the States, it operates in a similar way to the former doctrine, having no effect upon the *construction* of particular Commonwealth heads of power but serving instead as a *subsequent* consideration that may operate to fetter particular invocations of those powers. These similarities beg the question of whether the decision in *State Banking* can be reconciled with that in *Engineers* in light of the latter's clear denunciation of implications of this sort.

Reconciling the State Banking *decision with the* Engineers' *orthodoxy*

It is sometimes suggested that *State Banking* cannot be regarded as clearly inconsistent with *Engineers* given the absence, in the former, of a clear majority supporting the implied limitation principle.[53] So much has been pointed out by Barwick CJ.[54] Indeed, only Dixon and Starke JJ unequivocally based their reasons on an implied limitation principle. Therefore, such 'number-crunching' exercises do provide some basis for claiming that *State Banking* was not repugnant to the principles laid down in *Engineers* but they are not a particularly compelling basis for that conclusion.

Nor does the majority's own reasoning aid such reconciliation. Most members of the majority in *State Banking* adverted to certain passages in *Engineers* supposedly indicating a 'reservation' as to 'discriminatory' Commonwealth laws.[55] Subsequent academic analysis has, however, convincingly debunked this justification for the decision.[56]

Nonetheless, there remains one possible basis for reconciliation. On re-examining pre-*Engineers* decisions invoking the 'implied immunity of instrumentalities', it seems the doctrine was never applied to invalidate a law that posed a genuine threat to the States' continued existence as independent polities. Arguably, then, that doctrine might only have been discredited in so far as it encompassed situations of one government's interference with

51 Ibid at 55–56 per Latham CJ, 67 per Rich J and 99–100 per Williams J.

52 Bryce (1912).

53 G Sawer, 'Implication and the Constitution, Part I' (1948) 4 *Res Judicatae* 15, pp 15–6; Blackshield et al (1996) p 570.

54 *Payroll Tax* (1971) 122 CLR 353 at 382.

55 (1947) 74 CLR 31 at 55–56 per Latham CJ, 73 per Starke J, 78–79 per Dixon J and 99 per Williams J.

56 L Zines, 'Sir Owen Dixon's Theory of Federalism' (1965) 1 *FLR* 221, p 225.

another's general legislative powers, as opposed to an inner core of powers essential to that government's very existence.

In none of the major pre-*Engineers* immunities cases were the powers interfered with crucial to another government's continued constitutional functioning. *D'Emden v Pedder* concerned the validity of a State tax on Commonwealth public servants' salaries.[57] The tax in no way threatened to paralyse the Commonwealth nor endanger its independent existence. Its effect would be that Commonwealth officers would take home slightly less pay, something for which the Commonwealth could, without too much difficulty, compensate. Essentially, the same analysis holds for *Deakin v Webb*[58] and *Baxter v Commissioner of Taxation (NSW)*.[59]

Commonwealth v New South Wales concerned whether the Commonwealth, as transferee of land, was liable for New South Wales stamp duty.[60] Again, such liability would not have threatened the Commonwealth with destruction; it would merely have increased the cost of performing a Commonwealth function. *Railway Servants* concerned whether a Commonwealth award could bind a State instrumentality as to employment conditions of railway workers.[61] Such employees having no role in a State's constitutional workings, their regulation by a Commonwealth award might inconvenience a State or make its rail operations more costly; it certainly would not disable it constitutionally.

It is submitted that the High Court might plausibly have taken a different view of the Commonwealth law impugned in *State Banking*. Recall that section 48 of the *Commonwealth Banking Act* effectively allowed the Commonwealth to force State governments and their instrumentalities to conduct their banking business with the Commonwealth Bank, at least in the absence of a State Bank, as was then the case in Victoria. It would not be unreasonable to construe this provision as a real threat to Victoria's independent constitutional functioning.

All majority members recognised that today's governments need to use banks in order to administer adequately the sizeable revenues they amass. Moreover, they suggested that a State's ability to exercise day-to-day control over its funds is among its most important powers.[62] Section 48, if upheld, would have allowed the Commonwealth to dictate to the States, via the Commonwealth Bank, the terms on which its funds could be withdrawn. Access to funds could be denied if the Commonwealth disapproved of the policy underpinning particular projects, a possibility adverted to by Latham CJ.[63] At the extreme, the Commonwealth could deny access to funds for basic constitutional activities — paying ministerial salaries, operating State

57 (1904) 1 CLR 91.

58 (1904) 1 CLR 585.

59 (1907) 4 CLR 1087.

60 (1906) 3 CLR 807.

61 (1906) 4 CLR 488.

62 *State Banking* at 62–63 per Latham CJ, 67 per Rich J, 74 per Starke J, 84 per Dixon J and 98 perWilliams J.

63 Ibid at 54.

courts, publishing Acts of Parliament, and so on — should a State defy Commonwealth directives on other, unrelated matters. Indeed, the ability to hold forcibly and ration a State's entire income might well give the Commonwealth a power so complete as to render the States mere conduits for Commonwealth policy.

The tenor of the majority judgments in *State Banking* suggest that these considerations may have underpinned the Court's decision to depart from *Engineers*. On one view, the Court may have intended only to distinguish, rather than reject, the reasoning in *Engineers*. Arguably, the majority in *Engineers* would not have envisaged, or perhaps did not wish to address the possibility, that a Commonwealth Act could threaten the independence of the States to such a degree as did the provisions at issue in *State Banking*. *State Banking* should not, then, be viewed as an undoubted repudiation of the interpretive principles set down in *Engineers*, given that it cannot be known whether those principles were intended to operate in such extreme situations.

Refinement of the new doctrine

Since *State Banking* was decided, subsequent developments have effectively refined its *ratio decidendi*. In particular, the Court has rejected the approach to characterisation upon which the judgments of Latham CJ and, to a lesser extent, Rich and Williams JJ were based. It is now firmly established that a law may properly be characterised as one 'with respect to' two (or more) subject matters, only one of which need be a subject over which the relevant legislature has power.[64] Consequently, the decision in *State Banking* must now rest on the implied immunities reasoning urged by Dixon and Starke JJ.

Appeal has been made to the principles outlined in *State Banking* in several subsequent cases. There was *Victoria v Commonwealth* (*Payroll Tax*), decided in 1971.[65] The issue there was whether the Commonwealth could validly impose a tax upon the public payroll of the State of Victoria, specifically in relation to officers of the Premier's Department, Education Department, Crown Law Department and the Treasury.

The Court held the levying of this tax upon the States constitutionally valid. However, only four members of the Court, Menzies, Windeyer, Walsh and Gibbs JJ, accepted and applied the notion of an implied limitation as formulated by Dixon J in *State Banking*. Of these, only three, Menzies, Walsh and Gibbs JJ, accepted that the limitation can arise in relation to a non-discriminatory law.

Menzies, Walsh and Gibbs JJ stated, in separate judgments, that although a non-discriminatory Commonwealth law can infringe the implied limitation it will only do so where it interferes with a State's constitutional

64 *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1. Affirmed, *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169. In the context of the implied limitation doctrine, see the judgments of Mason J and Dawson J in *Queensland Electricity* (1985) 159 CLR 192.

65 (1971) 122 CLR 353.

functions. According to Gibbs J, such a law would need to 'prevent a State from continuing to exist and function as such' before it would be invalidated.[66] All three judges found that the effect which the *Payroll Tax Act* 1941 (Cth) had upon Victoria fell short of an interference with its constitutional functions and so refused to apply the implied limitation principle to invalidate the Act. Their shared view was well expressed by Gibbs J.

> Although in some cases it may be possible to show that the nature of a tax on a particular activity, such as the employment of servants, renders the continuance of that activity practically impossible, it has not been shown that the tax in the present case prevents the States from employing civil servants or operates as a substantial impediment to their employment.... They may have less money available for public purposes because they have to pay the tax, but that could be said in every case in which a tax is imposed on the States, and in itself it cannot amount to an impediment against State activity sufficient to invalidate the tax.[67]

This argument was replicated by the majority in the later case of *State Chamber of Commerce and Industry v Commonwealth* (*Second Fringe Benefits Tax*),[68] where it was held that the Commonwealth's imposition of fringe benefits tax upon certain State 'employees', including government ministers, parliamentarians and judges, was not rendered invalid by the implied limitation. The majority found that the extra financial burden thereby imposed on the States was insufficient to impede their constitutional functioning.[69]

The principle supported by Menzies, Walsh and Gibbs JJ in *Payroll Tax* was again raised in *Commonwealth v Tasmania* (*Tasmanian Dam*).[70] Tasmania claimed that Commonwealth legislation preventing the construction of a hydro-electric dam on Tasmanian Crown land was invalid as it impinged upon the State governmental function of managing Crown lands. Of the majority judges, only Mason and Brennan JJ considered whether a non-discriminatory Commonwealth law can be held invalid in so far as it interferes with the States. Mason J accepted that such invalidity would arise where the law in question involves a 'substantial interference with the State's capacity to govern, an interference which will threaten or endanger the continued functioning of the State as an essential constituent element in the federal system'.[71] Brennan J insisted that only the functioning of the organs of State government is protected by *State Banking* principle.[72] On the facts at issue, neither judge found that the implied limitation operated to strike down the relevant Commonwealth law. Rather than impinging upon

66 Ibid at 424.

67 Ibid at 425.

68 (1987) 163 CLR 329.

69 Ibid at 356 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ.

70 (1983) 158 CLR 1.

71 Ibid at 139.

72 Ibid at 214.

Tasmania's constitutional functions, the law simply eroded one area of its substantive power: the power to use certain Crown lands as it wished.[73]

The implied limitation doctrine was refined in the 1985 case of *Queensland Electricity Commission v Commonwealth*.[74] Mason J gave the leading judgment, describing the implied limitation doctrine as consisting of:

> two elements: (1) the prohibition against discrimination which involves the placing on the States of special burdens or disabilities; and (2) the prohibition against laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments.[75]

All judgments in *Queensland Electricity* based their findings on the 'discrimination' principle enunciated by Dixon J in *State Banking*. However, their Honours also accepted the more general formulation favoured by Rich and Starke JJ in that case, that is, the view that a non-discriminatory law will offend against the implied limitation where it threatens the continued existence or capacity to function of another constituent polity in the federation.[76]

This general formulation, which has become known as the doctrine's 'second limb', was applied in *AEU*. It will be argued in the next section that that case has altered significantly the scope of the second limb, calling into question its consistency with past authority.

The Resurgence of Federalism-Based Implications in the 1990s

AEU: The doctrine's second limb applied

Whilst *Victoria v Commonwealth (Industrial Relations Act)* is the latest High Court decision to have applied the implied limitation doctrine,[77] the most recent elucidation of the doctrine's scope came in the earlier *AEU*.[78] That case's significance is twofold. It represents the first instance, since *State Banking*, of a State successfully invoking the principle that has since become the 'second limb' of the implied limitation. Hence it provides valuable insights into how the Court might develop this limb in the future. Also, as we shall see, it signals a shift in the Court's attitude to matters of fiscal

73 Ibid at 139–40 per Mason J, 213–15 per Brennan J.

74 (1985) 159 CLR 192.

75 Ibid at 217.

76 Ibid at 206 per Gibbs CJ, 217 per Mason J, 226 per Wilson J, 231 per Brennan J, 247 per Deane J and 260 per Dawson J.

77 (1996) 187 CLR 416. The majority engaged in a straightforward application of the formulation enunciated in *AEU*, again in the context of state public sector employment: at 503 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ. The decision does nothing to further clarify the doctrine's philosophical underpinnings. Neither does it expand the doctrine's potential scope nor suggest other contexts in which it might be applied. Accordingly, it is not considered in this article.

78 (1995) 184 CLR 188.

federalism, a shift that could have implications for several major strands of constitutional interpretation and thus for the very shape of the federation.

The case involved 15 separate, but essentially related, matters, each concerning a dispute between the Victorian Government and unions representing various Victorian public sector employees. As all but one of the matters raised the same issues, the Court heard and decided the matters together.

In 1992–3, the Kennett Government undertook a radical overhaul of the Victorian industrial relations system, abolishing the State's award system and replacing it with a regime of individual employment agreements.[79] Complementary legislation ensured that the new regime applied equally to State public sector employees.[80] Moreover, the government adopted measures to reduce substantially the number of persons it employed, particularly in the teaching and nursing professions. Thousands of voluntary redundancy packages were made available to induce employees to resign. However, many employees and unions were angered by the prospect of increased workloads for those remaining.[81]

Consequently, several unions representing State government employees attempted to secure federal award coverage for their members. Nationally organised unions representing teachers, nurses, clerical and administrative officers and various other State government employees served logs of claims on several State governments, including the Victorian Government. The logs contained demands regarding the terms and conditions of employment offered by the States to persons working in these areas. Some of the logs demanded that the Victorian Government cease to process redundancies.

The Australian Industrial Relations Commission (AIRC) made 'dispute' findings in relation to all but one of the matters. In nine cases, the Commission made interim awards dealing with wages and conditions and, in some instances, redundancies. The Victorian Government took the matters to the High Court, arguing that, in each instance, the AIRC lacked jurisdiction to make a finding of 'dispute' — in effect, a determination that a matter falls within its jurisdiction — and to make awards in settlement of disputes so ascertained.

Essentially, *AEU* concerned the extent to which the Constitution empowers the Commonwealth to make laws affecting the employment relationship between State governments and their employees. Earlier decisions had confirmed that the section 51(xxxv) industrial power permits Commonwealth regulation of the employment conditions of a variety of State employees.[82] These decisions had not, however, dealt with State

79 G Watson (1993) *Guide to Victoria's Employee Relations Law*, CCH, p 22.

80 *Public Sector Management Act* 1992 (Vic).

81 D Saunders (1995) 'Industrial disruption to continue, say teachers', *The Age*, 16 June, p 7; J Painter (1995) 'Hospitals face crisis as dispute flares', *The Age*, 14 August, p 3.

82 *R v Commonwealth Conciliation and Arbitration Commission; ex parte Professional Engineers' Association* (*Professional Engineers*) (1959) 107 CLR 208; *R v Coldham; ex parte Australian Social Welfare Union* (1983) 153 CLR 297; *Re*

employees engaged in the 'administrative services' — principally persons performing administrative work in State government departments. Numerous dicta had suggested that Commonwealth attempts to regulate the conditions of State administrative workers might violate the implied limitation doctrine.[83] Moreover, there had been suggestions, again in obiter, that disputes between State governments and their instrumentalities, on one hand, and persons employed by them to perform 'administrative services', on the other, might not possess the requisite element of 'interstateness' to invoke Commonwealth jurisdiction under section 51(xxxv).[84] In *AEU*, the Victorian Government placed great emphasis on these dicta.[85]

Two judgments were delivered: a joint judgment by Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ and a dissenting judgment by Dawson J.

The majority accepted the existence of an 'implied limitation' in the Constitution and endorsed the two-limbed formulation put forward by Mason J in *Queensland Electricity*.[86] In relation to the scope and content of the 'second limb', their Honours gave tentative approval to a conceptual framework proposed by South Australia. South Australia had suggested that the 'second limb' operates to protect the States' 'integrity' or 'autonomy'. Whilst conceding the imprecision of these concepts, the majority nonetheless found them useful as 'direct[ing] attention to aspects of a State's functions which are critical to its capacity to function as a government'.[87]

As to the case at hand, their Honours concluded that the implied limitation does restrict the Commonwealth's capacity to regulate relations between State governments and their employees. Their Honours dealt firstly with the limitation's second limb, concluding that some matters, if the subject of Commonwealth legislation or AIRC awards, would indeed inhibit the States' capacity to function as independent units of government. They included in this category regulations as to the number and identity of State employees, criteria of eligibility and qualifications, terms of appointment and the number and identity of persons dismissed on redundancy grounds.[88] Also precluded, the majority said, are Commonwealth provisions regulating the terms and conditions of 'Ministers, ministerial assistants and advisers, heads of departments and high level statutory office holders, parliamentary officers and judges'.[89] Their Honours also raised, albeit fleetingly and in

Lee; ex parte Harper (1986) 160 CLR 430.

83 *Re State Public Services Federation; ex parte Attorney-General of Western Australia* (1993) 178 CLR 249 at 279 per Dawson J; *Professional Engineers'* case at 233 per Dixon CJ; *R v Coldham* at 313.

84 See, eg, *R v Commonwealth Court of Conciliation and Arbitration; ex parte Jones* (1914) 18 CLR 224 at 232 per Griffith CJ.

85 (1995) 184 CLR 188 at 192–193, 224.

86 Ibid at 231.

87 Ibid at 232.

88 Ibid.

89 Ibid at 233.

obiter, the possibility that for some types of State employment matters, such as promotion and transfer, might be protected from Commonwealth regulation by the implied limitation.[90] On the other hand, they regarded the second limb as not precluding Commonwealth regulation of the minimum wages and conditions of lower- and middle-ranking public servants and other State government employees engaged in non-administrative work, at least where such regulation takes account of any 'special functions and responsibilities' of such employees.[91]

Regarding the first limb of the doctrine, the majority, with Dawson J agreeing, concluded that an amendment made to the *Industrial Relations Act* 1988 (Cth) did not 'discriminate' against Victoria in the relevant sense.[92] The joint judgment also considered whether a dispute between a State government and its administrative workers could form part of an 'interstate' dispute, as is required to invoke the Commonwealth's industrial relations jurisdiction. Their Honours concluded that this could indeed occur and, in this case, did occur.[93]

The majority rejected Victoria's argument that the implied limitation protects State 'government functions'. Their Honours cited several passages from *State Banking* and *Payroll Tax* indicating that the limitation only protects the States' *capacity* to function, in a procedural sense, and does not insulate them against Commonwealth interference with their substantive functions.[94] In making this assessment, the majority emphasised the doctrine's philosophical underpinnings, suggesting that the narrower interpretation is more easily reconciled with Dixon J's view, discussed earlier, and that the limitation arises out of a constitutional implication that Australia is to remain a properly functioning federation.[95]

Dawson J, dissenting, found that the disputes at issue did not exhibit the 'interstateness' necessary to enliven Commonwealth jurisdiction.[96] As to the implied limitation doctrine, his Honour gave a formulation much the same as that of the majority. He was, however, critical of the majority's application of that doctrine to the facts at hand. In an insightful critique, his Honour charges the majority with drawing artificial and arbitrary distinctions in the application of the doctrine, suggesting that:

> [i]f the determination of the number and identity of persons to be employed is critical to the functioning of a State, then so too will be the wages and conditions of employment, for the former cannot be determined in isolation from the latter.... [I]f ... a State is required to pay a substantial increase in wages to its teachers ... it may have as

90 Ibid at 232-233.

91 Ibid at 232.

92 Ibid at 240 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ and 262 per Dawson J.

93 Ibid at 235–238.

94 Ibid at 228–230.

95 Ibid at 229–230.

96 Ibid at 246–249.

> much impact on the State's budget and the implementation of its [public sector cost-cutting] policies as an award prohibiting redundancies in that workforce.[97]

His Honour's open advertence to the economic impact of Commonwealth regulation provides a stark contrast to the majority judgment, which arguably attempts to conceal such policy undercurrents. This theme is further explored later in this discussion.

Inconsistency with previous authority

The result in *AEU* is questionable in light of previous authority. In particular, and in contrast to *State Banking*, it appears irreconcilable with the decision in *Engineers*.

In *AEU*, most of the discussion regarding the types of Commonwealth regulation that would and would not be permissible, in relation to State public sector workers, constitutes mere obiter. The actual result on the facts comprised two main findings.[98] First, the majority found that the implied limitation did not preclude the AIRC finding a 'dispute' where the employer concerned was the Victorian Government. Secondly, their Honours found the Commission's interim awards dealing with teachers and nurses invalid in so far as they ordered the Victorian Government to stop processing redundancies. It is this second finding that raises doubts as to the decision's consistency with previous cases, especially *Engineers*.

It was contended earlier that the *State Banking* decision can be reconciled with *Engineers* only if one accepts that the majority in the latter would not, when rejecting previous cases based on the so-called 'implied immunity of instrumentalities' doctrine, have contemplated Commonwealth legislation posing a serious threat to the federal system. Yet it is doubtful whether the Commonwealth's efforts to prevent Victoria making redundant several thousand teachers and nurses would, if successful, have represented such a threat.

Victoria conceded, and the Court accepted, that its reasons for wishing to shed employees in these areas were purely economic.[99] Indeed, as practising teachers and nurses typically have no involvement in policy formulation, it is difficult to envisage any other justification for the downsizing. Admittedly, the Commonwealth's efforts to prevent the redundancies would, if successful, have hampered Victoria's pursuit of its policy of deficit reduction. The State would, however, have remained free to achieve the same savings by reducing expenditure elsewhere.

In short, the award redundancy provisions at issue in *AEU* would allow the Commonwealth but a fraction of the control over the State's 'purse strings' that would have been possible under the legislation at issue in *State*

97 Ibid at 249–250.

98 Ibid at 241.

99 Ibid at 213–4 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ and 248, 252 per Dawson J.

Banking. As such, the provisions could not be seen as ultimately threatening Victoria's ability to fund the core 'constitutional' activities that are essential to its continued functioning as a State. Thus, the explanation earlier offered as to how *State Banking* might be reconciled with the principles set down in *Engineers* cannot realistically be stretched around the facts of *AEU*.

Indeed, earlier cases indicate that the essential facts of *AEU* represent precisely the type of situation to which the *Engineers* interpretive principles were directed. The majority in *Engineers* would, in rejecting the use of federal implications, undoubtedly have contemplated situations where the Commonwealth's exercise of its industrial power effectively forced a State to incur unwanted expenditure in its capacity as employer. Indeed, such use of that power was precisely the issue in both *Railway Servants*, expressly overruled in *Engineers*, and in *Engineers* itself. Both involved State challenges to the Commonwealth's power to force upon them improvements in the pay and conditions of certain of their employees. Whilst redundancy was not expressly an issue, these situations are nonetheless comparable to that in *AEU* as the majority in the latter viewed the relevant redundancies in essentially economic terms. Similarly, whilst these two decisions were made at a time when teachers and nurses were thought to fall outside the class of employee to which the Constitution's section 51(xxxv) power applied, it is submitted that the *Engineers* decision, at least, concerned similar employees — State-employed professionals not engaging in 'administrative' or policy-related work. Given these similarities, it is hard to imagine that the majority in *Engineers* would not have intended their interpretive principles to apply to a situation such as that raised in *AEU*.

The inconsistency between *AEU* and previous cases is well illustrated by a comparison with *Payroll Tax*. Arguably, the practical issue before the Court in *AEU* closely resembled that arising in *Payroll Tax*. In both, the relevant Commonwealth law effectively increased the cost to the Victorian Government of providing certain services by increasing the labour costs incurred within the relevant portfolios. Whilst the means of imposition of this increased cost was different in each case, the impact upon the Victorian Government in both instances was conceded to be fiscal only. In *Payroll Tax*, those judges basing their reasoning on the implied limitation doctrine considered that the tax, though significantly depleting the funds otherwise available to the State to spend in other areas, fell short of constituting an interference with the State's 'constitutional' functions. The redundancy issue in *AEU* lends itself to exactly the same analysis and conclusion. Requiring the Victorian Government to continue to employ the relevant teachers and nurses would substantially increase the cost of providing education and health services in the State and so would require a commensurate reduction in other expenditure or in intended budgetary savings. However, it would not impede the constitutional processes and activities that together allow the State to 'function as such'.

At least two arguments might be raised to explain the apparent inconsistency between *Payroll Tax* and *AEU* as to the application of the implied limitation. First, it might be assumed that the amount of money at issue in

AEU was greater than in *Payroll Tax*. If this were indeed so, it might have served as a basis for the Court's conclusion that the potential for impairment of Victoria's capacity to function as a State was greater on the facts of *AEU*. Closer scrutiny of the figures involved, however, rebuts any such suggestion. The amount in dispute in *Payroll Tax* was, in 1994 dollar terms, around $21 million per year,[100] a figure closely approximating the likely savings to the Victorian Government as a result of the redundancies at issue in *AEU*.[101] Moreover, the amount at issue in *Payroll Tax*, as compared to *AEU*, represented a much larger proportion of the government's total outlays for the same period.[102]

Secondly, it could be argued that the fiscal burden at issue in *Payroll Tax* was one that had been borne by Victoria, apparently with no dire consequences, for some 30 years prior to the bringing of the action and that this explains the High Court's conclusion that the tax did not threaten the State's continued existence or capacity to function as such. This situation might be contrasted with that arising in *AEU* where there was no 'evidence' as to how Victoria would cope.

However, given the context of the Kennett Government's budgetary plans, this argument is not convincing. Compared to other deficit-reducing measures then being pursued, the money to be saved by implementing the

100 In 1969–70, relevant Departments' salaries budgets were: Premier's: $2,266,575; Attorney-General's: $6,638,132; Treasury: $3,680,469; and Education: $146,504,857: Government of Victoria (1969) *Estimates of the Receipts and Payments of the Consolidated Fund for the Year Ending 30 June 1970*, Victorian Government Printer, pp 17, 45, 48, 54. The *Payroll Tax Act* 1941 (Cth) taxed all salaries at 2.5% which, applied to the above figures, amounts to $3,977,251. Movements in the Australian Consumer Price Index indicate that $1 in 1970 was equivalent in value to $5.29 in 1994 terms: World Bank (1995) *World Tables 1995*, John Hopkins University Press, pp 112–13. Thus, the payroll tax incurred by the above mentioned departments in 1969–70 represents approximately $21 million in 1994 terms.

101 The precise level of anticipated savings is nowhere stated in the government's 1993–4 Budget Papers. However, it is possible to gain a rough estimate by examining aggregate figures. In 1992–3, the government issued 20,000 redundancies across all departments, achieving a net saving of $146 million or an average $7300 per redundancy: Government of Victoria (1993a) *1993–1994 Budget Paper No. 1*, Victorian Government Printer, p 4. The redundancies actually handed out to teachers and nurses in 1994–95, following the ruling in the *AEU* case, totaled 2500: Government of Victoria (1995b) *1995–1996 Budget Paper No. 2*, Victorian Government Printer, pp 2–11. These figures suggest that the net savings flowing from the redundancies at issue in the *AEU* case would have been around $18.25 million, representing 0.25% of the total projected outlays for both Departments in 1994–5: Government of Victoria (1993b) *1993–1994 Budget Paper No. 4*, Victorian Government Printer, pp 118, 183.

102 The approximately $4 million at issue in *Payroll Tax* represents about 0.55% of the Victorian Government's total budgeted outlays for 1969–70: Government of Victoria (1969) pp 7–8. Whereas the amount at issue in *AEU*, estimated above to be around $18.25 million, represents only 0.12% of total outlays for 1993–4: Government of Victoria (1993b) p 12.

relevant redundancies, although running to tens of millions of dollars, was insignificant. An annual 'State Deficit Levy', imposed on Victorian households, netted the government an average $175 million dollars per year between 1992 and 1996.[103] During the same period, the levying of 'charges' upon government agencies recouped around $800 million per year.[104] In 1994-5 alone, sales of government-owned enterprises and other assets produced over $1 billion in revenue[105] and the ongoing sell-off of the State Electricity Corporation is expected to raise around $8 billion.[106] Within the Education and Health Departments themselves, the amalgamation and closure of schools and hospitals has produced many times the level of savings sought through staff redundancies.[107]

Moreover, and in vindication of Dawson J's comments, the majority's finding in *AEU* that the AIRC can regulate the pay and conditions of most Victorian public sector workers effectively forced the Victorian Government to reintroduce previously abolished leave loadings and public holidays. This cost the government tens of millions of dollars, a cost almost as great as that which would have followed a successful blocking of the State's redundancy plans.[108] Yet, despite this, the joint judgment considered that 'the operation of ... [federal] awards in relation to school teachers, health workers and other categories of employees would not destroy or curtail the existence of the State or its capacity to function as a government'.[109]

The extended reach of the doctrine following AEU

In describing the scope and content of a State's 'constitutional' functions, the High Court has previously focused on those core activities undertaken by a State's Parliament, courts and administration in order to sustain the State's 'capacity' to function.[110] Moreover, the Court has clearly viewed the imposition of particular financial burdens on the States as, without more, falling short of an interference with those constitutional functions.[111] Where particular employees are involved in policy formulation or contribute to the

103 Government of Victoria (1995a) *1995-1996 Budget Paper No. 1*, Victorian Government Printer, p 9.

104 Government of Victoria (1993b) p A.84; Government of Victoria (1995c) *1995-1996 Budget Paper No. 3*, Victorian Government Printer, p 446.

105 Government of Victoria (1995c) p 457.

106 M Magazanik (1994) 'Kennett makes power promise', *The Age*, 1 September, p 6.

107 B Birnbauer (1994) 'Tough times ahead for hospitals, but more money for psychiatric care', *The Age*, 8 September, p 5; J Painter, 'No initiatives in education expenditure' (1994) *The Age*, 8 September, p 6.

108 S Green (1995) 'The end of the holy grail', *The Age*, 13 April, p 15.

109 *AEU* at 230.

110 *Second Fringe Benefits Tax* (1987) 163 CLR 329 at 356 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ and 362 per Brennan J; *Tasmanian Dam* (1983) 158 CLR 1 at 214 per Brennan J.

111 *Payroll Tax* (1971) 122 CLR 353; *Second Fringe Benefits Tax* (1987) 163 CLR 329.

functioning of Parliament or the courts, allowing the Commonwealth to dictate who a State may employ in such positions could, as the majority in *AEU* points out, interfere with the State's ability to carry out its constitutional functions. However, the employees targeted for redundancy in Victoria were not involved in any tasks that might make their employment a matter of 'constitutional' concern.

A question arises, then, as to *why* the majority in *AEU* would regard the redundancy provisions as infringing the implied limitation. The finding becomes even more perplexing when one considers the majority's express advertence to the doctrine's philosophical grounding in the need to preserve a properly functioning federation.[112] Maybe the majority simply became confused and lost sight of the distinction between persons *involved* in policy formulation (ministers, advisers, bureaucrats etc) and persons the *subject of* policy formulation (teachers and nurses affected by budget cuts). It seems unlikely, however, that six of Australia's most eminent judges would together make such a basic conceptual error. Accordingly, one is inclined to seek a more involved explanation.

One explanation might be that the majority judgment reflects a conscious decision to expand the scope of the implied limitation. This could be inferred from the majority's endorsement of the terms 'integrity' and 'autonomy' as useful conceptual aids in explaining the scope of the doctrine's second limb.[113] The adoption of these terms suggests a subtle redefinition of that limb's scope, in that they seem to admit of a wider range of considerations than did the previously favoured, and now apparently displaced, touchstone of 'constitutional' functions.

Although conceding the opacity of the terms, the majority did give some concrete examples of powers it regarded as 'critical' to a State's 'autonomy' and 'integrity', among them being the power to determine the number and identity of persons to be dismissed on redundancy grounds.[114] Crucially, the majority did not qualify this example by reference to the nature of the work performed by such persons; indeed, the result in *AEU* reveals that the power to issue redundancies is not confined to those employees involved in the upkeep of constitutional institutions and processes. Redundancies of the type at issue in *AEU*, that is, those unconnected to constitutional activity and motivated purely by budgetary considerations, are clearly within the High Court's conception of matters critical to State autonomy and integrity. Thus 'autonomy' and 'integrity' must incorporate some notion of *fiscal* self-determination, a consideration that was conspicuously absent from the formulation of the implied limitation employed in earlier cases.

The significance of this expansion becomes evident on re-examining some of the cases decided during the currency of the previous formulation centred on 'constitutional' functioning. As explained earlier, the legislation

112 *AEU* at 229.

113 Ibid at 232.

114 Ibid.

at issue in *Payroll Tax* and *Second Fringe Benefits Tax* fettered the relevant States' budgetary discretion, raising the labour costs incurred in carrying out particular functions and thereby deflecting resources from other areas. Application of the 'autonomy' and 'integrity' test might suggest that, as these Commonwealth statutes caused significant disruption to the States' spending priorities and thereby impaired their fiscal self-determination, they infringed the implied limitation. The 'autonomy' and 'integrity' test also suggests a different result on the facts of *Tasmanian Dam*. In seeking to construct a dam and hydro-electric plant, Tasmania's ultimate objectives were to lessen electricity generation costs and provide employment in the State.[115] The Commonwealth's remedial legislation thus impaired a major budgetary initiative of the Tasmanian Government, again raising issues of fiscal self-determination.

Possible wider ramifications of the decision in AEU

Although the majority in *AEU* did not ponder other possible aspects of a State's 'autonomy' and 'integrity', these terms may prove malleable enough to encompass further types of interference that would on the previous formulation have fallen outside the scope of the implied limitation. Particularly, the notions of autonomy and integrity in the context of governmental powers might attach to certain State prerogatives, such as the power to conduct Royal Commissions. In 1982, the High Court held in *BLF* that a Federal Court order, made under a Commonwealth Act, restraining a proposed Victorian Royal Commission did not infringe the implied limitation despite effectively overruling the State prerogative.[116] Arguably, such a right *would* now fall within the implied limitation, by virtue of the new touchstones of State 'autonomy' and 'integrity'. South Australia's Solicitor-General, when introducing these concepts in *AEU*, suggested they should incorporate, among other things, 'policy formulation, reporting to Parliament ... and the provision of services to Parliament'.[117] Assuming, then, that the Court's acceptance of the Solicitor-General's conceptual framework went beyond its mere terminology, State powers such as that raised in *BLF* might receive newfound protection.

Should these speculations prove correct, the implications for the current constitutional status quo are momentous. Decisions that have been pivotal in the evolution of Australian federalism could become vulnerable under a court mindful of economic considerations. For instance, the prevailing interpretation of the Constitution's section 96 'grants' power, permitting the Commonwealth to impose 'conditions' upon financial grants to the States,[118] would be difficult to sustain under an implied immunities

115 *Tasmanian Dam* (1983) 158 CLR 1 at 60.

116 *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25.

117 *AEU* at 231.

118 See generally C Saunders, 'Towards a Theory for Section 96: Part I' (1987) 16(1) *Melb ULR* 1 and 'Towards a Theory for Section 96: Part II' (1988) 16(4) *Melb*

doctrine that valued State fiscal self-determination. Admittedly, the most notorious product of this interpretation, the centralised income tax regime upheld in the *Uniform Tax* cases,[119] would now, in practical terms, prove difficult to dismantle. Nonetheless, the Commonwealth's increasing use of 'tied' grants could be curbed by a Court prepared to concede, and act upon, the importance of federal fiscal balance. Moreover, an awareness of the financial needs of the States might also spark an overhaul of the interpretation given to the Constitution's section 90 excise power, currently notable for its illogicality and harsh impact upon the States.[120]

One might object that such overhaul is unlikely, as these interpretations are now firmly embedded in the matrix of norms and expectations according to which the Australian federal system operates. Observers have indeed viewed an unwillingness to disturb such established norms as a consistent theme running through the Court's decisions.[121] It is submitted, however, that this judicial stance is no longer a forgone conclusion, for at least three reasons.

First, the Court has, relatively recently, been willing to make decisions disruptive of the existing federal status quo, one oft-cited example being *Tasmanian Dam.* Following earlier decisions, the decision in that case interpreted the section 51(xxix) 'external affairs' power in a way that greatly expanded the Commonwealth's potential legislative reach.[122] Undoubtedly, the majority would have realised that their decision would alter the traditional federal division of powers. The reordering that would follow a departure from past precedents on sections 90 and 96 would, it is submitted, cause no more confusion and controversy within the federal system than did the decision in *Tasmanian Dam.*

Secondly, judicial discontent has for some time been mounting over the prevailing interpretation of some of the Constitution's 'economic' provisions. As the section 92 case of *Cole v Whitfield* demonstrated,[123] the Court is willing to overturn long-held precedents relating to such provisions where these are judged illogical and economically unsustainable. Significant for the present discussion is the ongoing tension within the Court regarding interpretation of the Constitution's section 90 excise power. In the most recent

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ULR 699.

119 *South Australia v Commonwealth* (*First Uniform Tax*) (1942) 65 CLR 373; *Victoria v Commonwealth* (*Second Uniform Tax*) (1957) 99 CLR 575.

120 B Opeskin, 'Section 90 of the Constitution and the Problem of Precedent' (1986) 16 *FLR* 170; M Coper, 'The High Court and Section 90 of the Constitution' (1976) 7 *FLR* 1.

121 Sawer (1967) pp 197, 205; Galligan (1987) pp 119, 148, 215, 250–1; L Zines, quoted in K Middleton (1996) 'Challenge to free speech judgment', *The Age*, 7 August, p 3.

122 G Lindell (1994) 'Recent Developments in the Judicial Interpretation of the Australian Constitution' in G Lindell (ed) *Future Directions in Australian Constitutional Law*, Federation Press, pp 1–3; L Zines (1997) *The High Court and the Constitution*, 4th edn, Butterworths, pp 280–1.

123 (1988) 165 CLR 360.

section 90 case of *Ha v New South Wales*,[124] a four-member majority upheld the previously expounded 'broad view' of that power.[125] However, a powerful dissent by Dawson, Toohey and Gaudron JJ[126] favoured a narrow interpretation of section 90 which, if adopted, would greatly expand the States' potential taxing powers thereby helping to redress Australia's vertical fiscal imbalance.[127] The minority's conviction on this issue is deep-rooted, their Honours having maintained a dissenting stance despite their interpretation having been rejected by a majority of the Court on past occasions.[128] With the dissenters seemingly determined not to cede the issue, and with the recent departure of one of the members of the *Ha* majority,[129] a possible resurgence of the narrow view of section 90 cannot be discounted.

Thirdly, departure from past doctrine is becoming increasingly acceptable given changing judicial attitudes to law-making. Many judges now concede that their decisions are inevitably influenced by policy considerations.[130] Accordingly, some are advocating open judicial consideration of and reliance upon social, economic and political evidence and arguments, particularly in constitutional cases. One proponent of this view is Justice Michael Kirby.[131] Should he remain a vocal advocate of this approach, Kirby J may

124 (1997) 189 CLR 465.

125 Ibid at 485–505 per Brennan CJ, McHugh, Gummow and Kirby JJ.

126 Ibid at 505–519.

127 Constitutional Commission (1988) *Final Report of the Constitutional Commission - Summary*, Australian Governement Publishing Service, p 71; R Mathews (1986) 'Changing the Tax Mix: Federalism Aspects' in J Head (ed) *Changing the Tax Mix*, Australian Tax Research Foundation, pp 218–20.

128 The narrow view of section 90 was expressly rejected by a majority in *Philip Morris Ltd v Commissioner of Business Franchises (Vic)* (1989) 167 CLR 399 and in *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* (1993) 178 CLR 561. Though the High Court has never regarded itself as bound by the principle of stare decisis, the general practice of members of the Court has been to refrain from repeated dissent on points for which a well-established line of authority is in place: see *Hughes and Vale Pty Ltd v New South Wales (No 1)* (1953) 87 CLR 49 at 70 per Dixon CJ.

129 Brennan CJ left the High Court in early 1998. On the other hand, the departure of Dawson and Toohey JJ from the Court may lead to a strengthening of the broad interpretation of section 90.

130 See, eg, Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation' (1986) 16 *FLR* 1, pp 5, 28.

131 See, eg, *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 386, 398 (economic and social policy considerations in the development of landlords' duty of care); *Telstra Corporation Limited v Australasian Performing Right Association Ltd* (1997) 146 ALR 649 at 681, 695 (social and economic policy considerations in the interpretation of copyright laws); *CES v Superclinics (Aust) Pty Ltd* (1995) 38 NSWLR 47 at 63, 73–5 (social and economic considerations in the interpretation of abortion laws); and *DPP (NSW) v Toro-Martinez* (1993) 33 NSWLR 82 at 94–95 (social and economic arguments in interpreting the scope of the incidental aspect of section 51(i) of the Constitution).

contribute to the Court's willingness to deal head on with issues such as federal fiscal imbalance.[132]

Unfortunately, these promising developments may, at least as to section 96, count for very little. Any overhaul of the Court's approach to section 96 could well have no practical impact on State financial dependence. Restrictive conditions could nonetheless continue to be imposed informally, the Commonwealth's ability to cease support effectively compelling State compliance. That such a practical outcome is likely may even dissuade the Court from reconsidering the legal framework.

Equally, the various tax decisions involving the implied limitation doctrine are in practice unlikely to be overruled. The result in *Payroll Tax* is quite irrelevant nowadays, the Commonwealth and States having since 1971 adhered to an agreement under which the States alone levy payroll tax.[133] The problems involved in reviewing the *Uniform Tax* cases were mentioned earlier; the centralised income taxation regime has become so entrenched that its dismantling would present enormous difficulties. Indeed, the High Court is undoubtedly aware that to strip the Commonwealth of this monopoly would invite serious social and political upheaval, such as could rupture the very fabric of the federation. On this basis, *Second Fringe Benefits Tax* also becomes an unlikely candidate for overthrow. As that tax exists principally to discourage income tax evasion, it can be considered part of the Commonwealth's wider income tax regime. More generally, the High Court may be unwilling to regard Commonwealth laws of truly 'general' application, such as the fringe benefits tax provisions, as infringing the limitation, if only because it seems intuitively reasonable that the States should engage in ordinary activities, such as employment, subject to the same legal constraints that apply to everyone else in society. Dixon J expressed this very sentiment in *State Banking*, insisting that 'when a State avails itself of any part of the established organisation of the Australian community it must take it as it finds it'.[134]

It has been argued that the majority in *AEU* made assumptions and reached conclusions that are inconsistent with those implicit in earlier cases. Whilst it may be unlikely that the Court will expressly overrule some of its earlier decisions involving the implied limitation, it will at least need to formulate some plausible constraint on the 'autonomy' and 'integrity' test so as to maintain a reasonable degree of consistency with those earlier decisions. As that test stands, it is likely to lead the Court toward conclusions that sit very uncomfortably with established principles and precedents.

A new policy emphasis?

It has been seen that the outcome in *AEU* is not supported by established precedents on the implied limitation doctrine and departs from the orthodox

132 Although early indications have not favoured this view, his Honour having joined in the majority in *Ha's* case.

133 K Wiltshire (1989) 'Federal State/Provincial Financial Relations' in BW Hodgins et al (eds) *Federalism in Canada and Australia: Historical Perspectives 1920–88*, Frost Centre, p 191.

134 (1947) 74 CLR 31 at 84.

interpretive approach mandated in *Engineers*. There thus being no adequate legal explanation for the decision, an explanation might be sought in policy terms. It is submitted that the result in *AEU* suggests the Court is taking a new direction in its approach to issues of federalism. In pondering the motives for this shift, at least two possible contributing factors emerge.

The first relates to the High Court's own interpretation of the Constitution's section 51(xxix) external affairs power. In amending the *Industrial Relations Act* 1988 (Cth) to ensure employees under State awards could access industrial arbitration, the Commonwealth relied partly upon its legislative capacity, sourced in section 51(xxix), to fulfil its obligations under various International Labour Organisation Conventions. Although the judgments in *AEU* make no mention of this, it might be that the majority's findings reflect a perceived need to bolster the States' position, to redress partially the erosion of State autonomy flowing from the relatively recent expansion in the scope of section 51(xxix).[135] As that expanded interpretation played a part in generating the dispute at issue, the majority may have viewed *AEU* as an appropriate one in which to redress some of its effects.

Secondly, the policy shift evident in *AEU* may reflect an increasing judicial sensitivity to the worsening problem of vertical fiscal imbalance. Economists and political scientists, not to mention State governments, have long been critical of the prevailing distribution of taxing powers in the Australian federation.[136] Even judges of the High Court occasionally advert to the problem.[137] Nonetheless, they have generally been reluctant to act upon such concerns in deciding cases, reasoning, at least ostensibly, that adherence to *Engineers* interpretive principles rules out consideration of economic policy matters. In departing from this pattern and attributing greater significance to economic considerations, the members of *AEU* majority might perhaps have been influenced by increased academic discussion and media comment about the worsening economic health of the States, or by their own opinions as to the most appropriate mix of taxing and spending powers within the federation.

Notably, the apparent shift in the Court's approach to questions of fiscal federalism is in fact consistent with other recent shifts in its interpretive approach. Two such developments are of particular interest in this context. First, the 1988 decision in *Cole v Whitfield* gave tentative approval to the use of external material, there the Convention Debates, as

135 See, eg, *Tasmanian Dam* (1983) 158 CLR 1; *Richardson v Forestry Commission* (1988) 164 CLR 261; and *Queensland v Commonwealth* (1989) 167 CLR 232.

136 Constitutional Commission (1988) pp 70–1; Mathews (1986) pp 216–8; H Emy and O Hughes (1991) *Australian Politics: Realities in Conflict*, 2nd edn, Macmillan, pp 323–6; J Freebairn et al (1987) *Spending and Taxing: Australian Reform Options*, Allen & Unwin.

137 See, eg, *First Uniform Tax* (1942) 65 CLR 373 at 429 per Latham CJ; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 638 per Murphy J; *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368 at 411 per Dawson J; and *Philip Morris Ltd v Commissioner of Business Franchises* (1989) 167 CLR 399 at 438 per Mason CJ and Deane J.

aids to constitutional interpretation.[138] Secondly, the 1992 decision in *Political Advertising* uncovered an implied freedom of political communication in the Constitution, implicitly rejecting the view that such implication-drawing is illegitimate.[139] With these developments, and others, indicating a diminishing judicial regard for literalist principles, *AEU* might represent a further step toward a new post-literalist orthodoxy.[140]

Conclusion

The decision in *AEU* is inconsistent with past cases on two distinct levels. On a legal level, it departs from established principles concerning the implied limitation doctrine and also from the more general interpretive principles laid down in *Engineers*. On a policy level, it reveals a concern for State autonomy and fiscal independence that stands in direct contrast to the policy preferences seemingly motivating the majority in *Engineers*. Moreover, that concern appears qualitatively different from the concerns underpinning those post-*Engineers* decisions reviving the notion of federalism-based implied limitations.

There is, however, an important similarity between the majority judgments in *Engineers* and *AEU*. Both demonstrate how a change in judicial opinion on key policy issues can be reflected in strategic alterations to legal doctrine. In *Engineers*, the majority gave effect to its (or at least Isaacs J's) centralist views by instigating a major shift in the Court's interpretive approach. In *AEU*, the majority initiated a subtle change in terminology to expand the reach of an existing doctrine and thereby shelter the States, to some extent, from an ever-encroaching Commonwealth. Thus, whilst the magnitude of the change effected by *AEU* is unlikely to prove comparable to that flowing from *Engineers*, the cases nonetheless have something in common by virtue of their policy undercurrents.

What lessons might be learned from *AEU*? As to legal doctrine, it has been seen that the decision in that case is irreconcilable with that in the landmark *Engineers*. Ultimately, the significance of this revelation lies not in the fact that the High Court has abandoned *Engineers* — arguably, it had already done so in another context[141] — but in the fact that this abandonment is nowhere conceded. It is surely reasonable to expect that any departure from such a long-standing and fundamental authority be made express and be accompanied by coherent reasons.[142] Such transparency would aid in

138 (1988) 165 CLR 360.

139 *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106.

140 *Contra*, recent developments concerning the implied freedom of political speech suggesting that, at least there, the Court may be reverting to a more literal approach: G Williams, 'Sounding the Core of Representative Democracy: Implied Freedoms and Electoral Reform' (1996) 20 *Melb ULR* 848. Whilst this may eventually have ramifications for federalism-based implications, that possibility is beyond this article's scope.

141 G Williams, '*Engineers* is Dead, Long Live the Engineers!' (1995) 17 *Sydney LR* 62.

142 Mason (1986) p 28.

clarifying the status of preceding cases, thereby promoting the virtues of certainty, predictability and accessibility to which common law legal systems supposedly aspire. *AEU* is also instructive on a policy level. There has long been debate over the extent to which policy considerations influence the judicial process and whether such influence is inevitable, or desirable. This discussion has not grappled with these complex issues. Nonetheless, the material discussed does highlight the High Court's ongoing reluctance to rely openly upon policy considerations in sensitive areas such as federal fiscal relations. Whilst such intellectual honesty would, in the context of *AEU*, have exposed the Court to criticism, it would have signposted the Court's new approach to the implied limitation and removed the uncertainty which, unfortunately, now seems inevitable. Hopefully, the Court will display more courage when next presented with an opportunity to discuss the doctrine's policy foundations.

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