

Constitutional Validity - Importance of Policing

Tax and Litigation Update

In *Albrecht v Commissioner of Taxation* [2013] FCA1248, Jackson McDonald acted for several commissioned police officers who were challenging the constitutional validity of Commonwealth legislation which provided for the imposition of a superannuation surcharge on contributions they had made to constitutionally protected funds established under State legislation.

All ranks of commissioned police officers were represented in the Federal Court litigation other than the Commissioner of Police who did not receive a superannuation contribution surcharge tax assessment and was not party to the litigation.

The police officers contended that the Commonwealth legislation was invalid according to the principle in *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31, an important case in Australian constitutional law. It stands for the proposition that there are limits on the scope of express Commonwealth legislative powers which can be implied from the federal character of the Constitution.

They argued that the legislation infringed the implied constitutional limitation because it impaired the capacity of the State of Western Australia to function as a government by seeking to regulate the means by which the State sought to remunerate its commissioned police officers.

The Attorney General for Western Australia intervened and made submissions which supported the contentions advanced by the police officers.

The police officers relied on *Austin v The Commonwealth* (2003) 215 CLR 185 and *Clarke v Commissioner of Taxation* (2009) 240 CLR 272.

In *Austin*, the High Court held that the Commonwealth legislation was

Article Highlights

- The decision is the most recent judicial pronouncement on the *Melbourne Corporation* case which stands for the proposition that there are limits on the scope of express Commonwealth legislative powers which can be implied from the federal character of the Constitution.
- In considering whether the Commonwealth legislation infringed the implied constitutional limitation, the Court emphasised the importance of distinguishing between the effect of the legislation on the State's exercise of its constitutional function as opposed to its governmental function.



invalid by reason of the *Melbourne Corporation* principle insofar as the legislation sought to impose liability for the payment of the superannuation contribution surcharge on a judge of the Supreme Court of New South Wales.

In *Clarke*, the High Court also held that the legislation was invalid insofar as it sought to impose liability for the surcharge on a member of the South Australian legislature.

The police officers contended that “*policing is a core and essential function of government*” which is protected by the *Melbourne Corporation* principle “*at all levels*”.

They argued that the important constitutional role and function of commissioned police officers attracted the operation of the *Melbourne Corporation* principle so as to invalidate the operation of the legislation in respect of each level of commissioned officers.

The officers’ alternative contention was that the reasoning in *Austin* was applicable to them because they operated at “*the higher levels of government*” having regard to their function and role in State governmental operations.

The ATO contended that none of the officers held a position which was so critical to the discharge of the constitutional functions by the State as to be characterised as a person employed at the higher levels of government.

It followed, argued the ATO, that the Commonwealth legislation did not significantly impair or interfere with the State’s capacity to exercise its constitutional functions and that when regard was had to the structural mechanisms by which the State exercised its constitutional powers and functions in the area of policing, it was only the Commissioner of Police who was at the higher levels of government.

The Federal Court accepted the ATO’s argument that the fact that the maintenance of a police force was a core function of government did not in itself mean that the *Melbourne Corporation* principle operated to invalidate the Commonwealth legislation which sought to impact upon the arrangements made by the State for the remuneration of the commissioned officers of the police force.

The Court also noted that a majority of the High Court in *Re: Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 did not find that there was a special quality inherent in the role of policing to the functioning of a State such as to cause policing to be treated differently from other government functions insofar as the application of the *Melbourne Corporation* principle was concerned.

In considering whether the Commonwealth legislation infringed the implied constitutional limitation, the Court emphasised the importance of

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distinguishing between the effect of the legislation on the State's exercise of its constitutional function as opposed to its governmental function.

The Court considered that the test proposed by the police officers founded on the “*importance*” of the functions performed by the office holder or employee in question had the virtue of flexibility but suffered from “*the vice of imprecision*” because it entailed “*the inherently complex and invidious task of trying to access the relative importance of a particular office holder's or employee's function to the State.*”

For further information regarding the decision or constitutional law issues, please contact Peter Walton or Matthew Reid.

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