Impairment and Limited State Immunity

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The modern doctrine of limited State immunity allows the Commonwealth to make laws that affect a State’s functioning unless those laws impair the States. This article draws attention to a distinction that French CJ made in Clarke v Federal Commissioner of Taxation between the practical effects of a law as opposed to non-practical ones. His Honour asserted that non-practical effects must also be taken into account when considering impairment. It is argued that a prohibition against non-practical impairment cannot be derived using the High Court’s methodology for constitutional implications (including principles from Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers’ Case)). This has an important consequence for constitutional doctrine – the test of discrimination is not relevant to practical impairment.

In Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers’ Case), the High Court rejected a general notion of intergovernmental immunities, leaving open the possibility that the Commonwealth could legislate to interfere with the States.1 The High Court subsequently pulled back and developed a doctrine of “limited State immunity”, which allows the Commonwealth to make laws that affect a State’s functions unless those laws impair the independence of the State. This doctrine was first clearly expressed in Melbourne Corporation v Commonwealth2 and is tightly linked to a prohibition against State discrimination. More recently, Austin v Commonwealth clarified the relationship by explaining that discrimination falls under a general test of impairment.3

This article investigates the notion of impairment. Specifically, it focuses on French CJ’s insight in Clarke v Federal Commissioner of Taxation that there is a difference between the practical and non-practical effects of a law. Drawing upon this distinction, the article carves up two views of impairment – practical and non-practical impairment. One major difference between the two is that discrimination might be an instance of non-practical impairment but is irrelevant to an analysis of practical impairment. A State can continue to function in terms of its practical operations even if it is discriminated against. While French CJ used both practical and non-practical impairment in his “multifactorial approach”,5 it is argued that considering non-practical impairment would make limited State immunity inconsistent with orthodox principles of constitutional implications.

The article is divided into four parts. Part I summarises the current law on impairment. Part II discusses the notion of practical and non-practical impairment. Part III shows that discrimination is irrelevant to identifying practical impairment. Part IV argues that non-practical impairment should be abandoned.

I. LIMITED STATE IMMUNITY

The limited State immunity doctrine is not explicitly provided for in the Australian Constitution but is taken to be implied. This part summarises some of the key elements of the doctrine as currently held by the High Court.

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1 Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers’ Case) (1920) 28 CLR 129, 144–145.
A. The Impairment Justification

The implication of limited State immunity is founded on an assumption that States have to “function effectually as independent units”.6 In some cases, the High Court has relied on ss 106–107 as a basis for the assumption.7 Some academic commentators argue that the principle is derived from the Constitution as a whole.8 Regardless of the exact source of the assumption, the implication of limited State immunity is easily inferred once the continued existence of the States is accepted. Rich J explained the implication as follows:

[The] Constitution expressly provides for the continued existence of the States. Any action on the part of the Commonwealth, in purported exercise of its constitutional powers, which would prevent a State from continuing to exist and function as such is necessarily invalid.9

This article assumes that the various terms the High Court has used – “impair”,10 “curtail”,11 “destroy”12 or “interfere”13 – are interchangeable and, instead, the single term “impairment” is utilised herein.

To show impairment and invalidity, one does not have to go as far as showing that States no longer exist. There are two reasons for this. First, the established requirement, as stated above, is that States must exist and be independent.14 Hence, impairment occurs where the States are not independent of the Commonwealth, even if the States retain some of their functions. Secondly, if the threshold for invalidity was set so high, there could be States with very minor powers (eg being able to control local parks) but dependent on the Commonwealth for everything else. Conceptually it would be a stretch to call such a legal system a federal one.

B. Discrimination

In the early formation of this doctrine in Melbourne Corporation, discriminatory laws were considered constitutionally impermissible; however, the link between discrimination and impairment was unclear.15 Later, in Queensland Electricity Commission v Commonwealth (QEC), Mason J proposed that discrimination was a separate limb alongside impairment.16 The recent cases of Austin and Clarke, however, have emphasised that the underlying principle behind limited State immunity is impairment and that discrimination is a factor in that main test.17

7 For history of the use of ss 106–107 of the Constitution, see Sharpe, n 2.
8 James Stellios, Zines’ The High Court and the Constitution (Federation Press, 6th ed, 2015) 508.
11 Melbourne Corporation v Commonwealth (1947) 74 CLR 31, 75, 80.
12 Melbourne Corporation v Commonwealth (1947) 74 CLR 31, 80.
13 Melbourne Corporation v Commonwealth (1947) 74 CLR 31, 75, 80.
14 See n 6.
15 Melbourne Corporation v Commonwealth (1947) 74 CLR 31. Dixon J thought of discrimination and impairment as intrinsically linked (84), whereas Starke J did not take discrimination as a dominating factor (74–75). Both Latham CJ (61) and Williams J (99–100) thought that discrimination was an indication or showed that impairment was occurring rather than discrimination constituting impairment. Rich J did not seem to take into account discrimination in his judgment and only considered impairment. McTiernan J dissented, thinking no implication could be made regarding impairment.
To illustrate how impairment and discrimination interrelate, consider the cases of *Melbourne Corporation* and *Re Australian Education Union; Ex parte Victoria* (Melbourne Corporation). In *Melbourne Corporation*, the States were prevented from being able to bank with an institution of its choice without the federal Treasurer’s approval. The law was found to breach limited State immunity as it impaired the States’ ability to contract with banks. Additionally, this law was discriminatory because non-State entities (e.g., citizens and corporations) were free to select the bank of their choice. Hence, the Commonwealth had targeted the States with a disability, which is constitutionally impermissible.

On the other hand, *AEU* was a case that dealt with impairment and no discrimination. The law in question was a federal industrial award for State employees issued by a Commonwealth industrial relations commission. This award was issued under a Commonwealth statute that applied to all industrial disputes. Despite not being a law that specifically targeted the State, it was taken to have impaired Victoria’s functions as the law prevented the government from being able to hire and fire as it so chose.

The definition of discrimination was set out by the plurality in *Austin*: “The essence of the notion of discrimination is said to lie in the unequal treatment of equals or the equal treatment of those who are not equals, where the differential treatment and unequal outcome is not the product of a distinction which is appropriate and adapted to the attainment of a proper objective.”

There are three parts to this definition. The first is where equals are treated differently. The second is where there is equal treatment of those who are not equals. The third is an appropriate and adapted requirement. Gibbs CJ noted in *QEC* that impermissible discrimination was not one between States, but between States and other entities.

Logically the first two parts of discrimination—equal treatment of those who are not equals and unequal treatment of equals—require the presence of both a disadvantage and also a comparison to other entities. A law that creates inequality but does not disadvantage a State is not discriminatory in the relevant sense of impairment. Such inequality would instead leave the State better off. Discrimination also requires comparisons; it is not just the disadvantage that matters, but how disadvantaged a State is compared to others. For example, a Commonwealth law that equally burdened a State and its citizens would disadvantage the State, but it would not be discriminatory. As Latham CJ said, the object of investigation cannot be the State alone; instead, it must “involve differences in treatment of two or more persons.”

To show comparative disadvantage in concrete terms, take the discrimination that occurred in *Melbourne Corporation*. The disadvantage here was the limitation on States’ liberty to contract with banks. The comparative dimension takes into account other entities as well—that is, whether normal citizens and
corporations can bank with whoever they want. Thus, if there was a law that required everyone to seek consent from the federal Treasurer, this would not be discriminatory as there was no comparative disadvantage. Discrimination is thus a composite of comparison and disadvantage.

The third part of the Austin definition is that discrimination is permissible where appropriate and adapted to some proper objective. In Fortescue Metals Group v Commonwealth, French CJ applied the Austin test by identifying the range of proper objectives from the heads of power that supported the legislation. In that case, a tax that potentially had different effects across States had a proper objective as it did not undermine the purpose of ss 51(ii) and 99, which was to ensure the economic unity of the Commonwealth. Additionally, Deane J’s statement that rational discrimination is permissible might be conjectured to be an earlier formulation of this proper objective test.

C. Discrimination Without Impairment

There is some academic debate regarding the decision in Austin to place discrimination as a sub-test under impairment. Regardless of the resolution to this debate, discrimination cannot be a constitutional requirement independent of the concept of impairment even if it is a separate limb of the test. There are two reasons why discrimination must be linked to impairment. First, from the perspective of precedent even Mason J, who clearly split the two factors apart, stated that discrimination “involves the placing on the States of special burdens or disabilities”. Secondly, Sharpe notes that the test for constitutional implications is one of necessity; thus, a prohibition of impairment must be inferred before a prohibition against discrimination can be inferred. A prohibition against discrimination does not come from the Constitution itself. Nevertheless, as shown below, on one view of impairment, discrimination is an instance of non-practical impairment. Hence if non-practical impairment is prohibited, discrimination must be prohibited as well.

II. TWO TYPES OF IMPAIRMENT

The concept of impairment is stated to have “proved insusceptible of precise formulation”. While this article does not attempt to provide such a formula, an examination of French CJ’s statements in Clarke might help make the picture less fuzzy. His Honour makes a distinction between mere practical concerns and larger federal concerns when analysing impairment:

[The assumption that States exist as independent entities] implies recognition of the importance of their status as components of the federation. The “significance” of a Commonwealth law affecting the States’ functions is not solely to be determined by reference to its practical effects on those functions.

These two factors of impairment are not mutually exclusive. French CJ explicitly mentions that both “qualitative” and practical elements of impairment should be assessed even if practical concerns are not determinative.

28 Some claim that when discriminating against individuals because of features of individuals (eg race, sexual orientation) that having a comparison is unnecessary and the focus should be harms based on stereotypes. It is unclear if this applies to discrimination against States. See Suzanne Goldberg, “Discrimination by Comparison” (2011) 120 Yale Law Journal 728, 772–779.

29 Fortescue Metals Group Ltd v Commonwealth (2013) 250 CLR 548, 585 [49]; [2013] HCA 34. The plurality also looked at the purpose of s 51(ii) of the Constitution, although they did not think it was necessary to decide the matter (605 [115]).


34 Sharpe, n 2, 266–269.


This part explores the distinction between the practical and non-practical consequences of a law. It first introduces a hypothetical tax presented by French CJ to concretely illustrate the two concepts. It then attempts to prise apart these practical concerns from other concerns. The two aspects of impairment are termed “practical impairment” and “non-practical impairment”. Three possible types of non-practical impairment are considered: deep; symbolic; and discriminatory impairment.

A. The Gubernatorial Tax Hypothetical

In *Clarke*, French CJ introduced a hypothetical gubernatorial tax to show that impairment can occur even if the law produces few practical effects:

To take an extreme example, a law of the Commonwealth purporting to subject the Governor of each of the States to a special “gubernatorial privileges tax” might fix the tax at a level which, in a financial sense, *would be of little practical importance* to the States or to their Governors. It might be thought, nevertheless, that the nature of such a law would mark it as asserting an intrusive legislative authority with respect to the constitutional office of Governor that was inconsistent with the status of the States as independent entities under the Constitution.38

Besides the lack of any financial burden, the tax in this hypothetical would not limit the functions of the States in any significant matter. States would be able to carry out their usual governmental operations quite normally.

To explain the gubernatorial tax, Edelman J in *Spence v Queensland* posited an alternative distinction to the practical and non-practical terminology in this article.39 He distinguished between the “breadth” and “depth” of impairment.40 The *depth* of the impairment is a function of how “targeted” the law is at the State, and how “essential” the governmental function being affected is.41 Edelman J alleged that the gubernatorial tax is an example of deep impairment.42 Since increasing taxes on governors are not practically burdensome, “essential” here cannot mean operationally essential. Instead it must mean something like being a core institutional part of the State such as the Governor, legislature or judiciary. Any law that targets such core State branches causes a deep kind of impairment, even if lacking any practical consequences. In contrast, the *breadth* of impairment relates to the number of “operation[s] of the governmental functions” of the State that is affected.43 The higher the number of State agencies and branches affected, the broader the impairment.

This terminology of breadth and depth does not quite fit into the framework of practical and non-practical impairment. There are two reasons for this. First, while deep impairment is one of the candidate types of non-practical impairment considered below, there are other harms that could explain the impairment caused by the gubernatorial tax. Secondly, broad impairment sometimes might count as an instance of practical impairment and sometimes will not. In some cases, there might be broad impairment that causes very little practical impairment (eg the employees of all agencies have to wear a uniform). In other cases, there is just *one* type of State operations, thus is not broad, but still stops practical activities – for example, preventing a State from having a treasury department. Hence, Edelman J’s notion of deep and broad impairment does not quite track the distinction that this article investigates.

Lastly, there are a few reasons to take French CJ’s distinction seriously despite not being explicitly mentioned elsewhere in case law. First, his Honour’s decision was cited approvingly by the majority in *Spence*, which is the most recent High Court case that touched on limited State immunity.44 Secondly, French CJ did not claim that he was making a new distinction but rather saw himself as elaborating on

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44 *Spence v Queensland* (2019) 93 ALJR 643, 671 [100]; [2019] HCA 15, with the gubernatorial tax explicitly being mentioned by Edelman J (717 [314]).
the existing doctrine from \textit{Austin}.\footnote{Clarke \textit{v} Federal Commissioner of Taxation (2009) 240 CLR 272, 298 [32]; [2009] HCA 33.} That being the case, his Honour believed this distinction already existed in the case law.

\section*{B. Practical Impairment}

The notion of practical impairment is fairly straightforward – a State is impaired as an independent unit when it cannot run its normal governmental activities due to Commonwealth interference. The focus is on whether a State can do its job.

This notion of impairment can be found in the decision of Starke J in \textit{Melbourne Corporation}:\footnote{Melbourne Corporation \textit{v} Commonwealth (1947) 74 CLR 31, 74–75 (emphasis added and citations omitted).}

\begin{quote}
It is a \textit{practical question}, whether legislation or executive action thereunder on the part of a Commonwealth or of a State destroys, curtails or interferes with the \textit{operations} of the other \ldots{} in the end the question must be whether the legislation or the executive action curtails or interferes in a \textit{substantial manner} with the exercise of constitutional power by the other.\footnote{Melbourne Corporation \textit{v} Commonwealth (1947) 74 CLR 31, 75.}
\end{quote}

Ultimately, Starke J decided that the law in question did impair the States in a practical sense as their independent operations depended on control over their “revenues and funds”.\footnote{Clarke \textit{v} Federal Commissioner of Taxation (2009) 240 CLR 272, 297–298 [31]–[32]; [2009] HCA 33.} In fact, French CJ was responding to this passage when elaborating on the non-practical effects of a law.\footnote{Re Australian Education Union; \textit{Ex parte Victoria} (1995) 184 CLR 188, 232–233.}

It should be emphasised that the notion of independence still plays a role here. The level at which a State is impaired, even from a practical perspective, is not simply where the State ceases to function. If that were so, then there has never been an existing case where States have been practically impaired. Instead, practical impairment occurs at some level where the State is limited in being able to engage in an effective number of governmental activities independently. Matters that support or are incidental to the State’s ability to carry out its functions and governmental activities are also relevant. Thus, a State’s ability to remunerate and retain its employees\footnote{Melbourne Corporation \textit{v} Commonwealth (1947) 74 CLR 31.} and the ability to control its finance through banking is important.\footnote{Austin \textit{v} Commonwealth (2003) 215 CLR 185, 305 [292]; [2003] HCA 3.}

The plurality in \textit{Austin} did consider this practical view, among other things, when they explicitly turned to Starke J’s “practical question” in the decision.\footnote{Austin \textit{v} Commonwealth (2003) 215 CLR 185, 265 [168]; [2003] HCA 3.} The plurality noted a dilemma that the superannuation scheme creates. Either a judge is disincentivised from serving a full term or the State is forced to provide additional remuneration to counteract the superannuation surcharge. The first limb of the dilemma relates to a State’s ability to retain judges. The second limb relates to a State’s inability to choose how to remunerate its judges, which is an element of the “working of its governmental structure”.\footnote{Austin \textit{v} Commonwealth (2003) 215 CLR 185, 265 [170]; [2003] HCA 3.} These are issues with the practical running of the State.

Kirby J’s judgment can be seen as an attack on how the plurality dealt with this practical question. While his Honour was in the dissent, his observations help illustrate the distinction between practical and non-practical concerns. His Honour argued that there was no evidence that the superannuation surcharge would affect the retention and remuneration of judges in any serious way.\footnote{Austin \textit{v} Commonwealth (2003) 215 CLR 185, 304 [291]; [2003] HCA 3.} There are many other non-financial features of the judicial role that influence a person’s decision to join the judiciary.\footnote{Austin \textit{v} Commonwealth (2003) 215 CLR 185, 305 [292]; [2003] HCA 3.} Therefore, there was no impairment. If Kirby J’s factual arguments were true, then the plurality in \textit{Austin} answered
the practical question wrongly (although the plurality did consider non-practical concerns). However, the truth of Kirby J’s claims would not affect an application of French CJ’s test, since French CJ could say that practical concerns are not determinative anyway.

C. Non-Practical Impairment

A theory of non-practical impairment needs to explain why the gubernatorial tax does impair States and should be able to distinguish itself from practical impairment. This article investigates three types of impairment that could do this job. It is possible that a combination or mix of all three could play a role as well. The first is a deep impairment as proposed by Edelman J, the second is a symbolic impairment as proposed by Simpson, and the third is a discriminatory impairment.

While these specific cases of impairment might not be exhaustive of non-practical impairment, they cover a wide range of theories, including two that are recognised by the High Court. Additionally, they are non-practical in the sense that they do not necessarily cause or lead to practical impairment. However, there can be cases where practical and non-practical impairment overlap. For example, a law that removes the legislature of a State would result in a deep impairment, as Edelman J defines it (see above), but such a law would also have large practical effects.

Edelman J’s notion of deep impairment was canvassed above – targeting essential State machinery is a constitutionally impermissible harm. The closer one gets to the core of the State, the deeper the impairment. This is the case even if no practical impairment occurs. The gubernatorial tax hypothetical thus is impermissible impairment because it is a core State branch that has been affected despite the State being able to function as normal. On this view, the relevance of practical impairment in the multifactorial test would likely depend on the depth of impairment. The deeper the burden of the law – for example, targeting key executive positions – the less likely practical impairment is relevant. The shallower the burden of the law – for example, only affecting peripheral State agencies – the more likely practical impairment is also required.

For another candidate, some academics have suggested that Simpson’s symbolic view of impairment can explain the gubernatorial tax hypothetical: the breakdown of the appearance of independence from the Commonwealth is a harm that impairs the State. Simpson argues that protecting the appearance of independence is important for “projecting a message about the status and dignity of the States as partners in the federation, aside from protecting the substantive reality of their independence”. Hence, States could be practically running, but if they do not appear to do so then there is still some kind of non-practical impairment that has occurred.

A third candidate for non-practical impairment is a law that discriminates against States. This would explain why the gubernatorial tax was impermissible since the law specifically targeted the office of Governor for additional taxation. This explanation would also be analogous to French CJ’s analysis of the actual facts of Clarke where a superannuation surcharge was imposed on parliamentarians. To explain why the State is impaired when discriminated against, consider the following passage from Dixon J:

> At bottom the principle upon which the States become subject to Commonwealth laws is that when a State avails itself of any part of the established organization of the Australian community it must take it as it finds it. …

> But it is the contrary of this principle to attempt to isolate the State from the general system, deny it the choice of the machinery the system provides and so place it under a particular disability. Whether the

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55 Their Honours also seemed to consider non-practical matters, as at one point they stated that “views may vary” about the remuneration needed for judges and how it affects retention but “these are matters … for determination by State legislatures”. This seems to indicate that, even if remuneration is not necessary to retain an independent judiciary (and hence no practical impairment), it is up to a State to decide: Austin v Commonwealth (2003) 215 CLR 185, 263 [161]; [2003] HCA 3.


57 Simpson, n 32, 52.

right to exercise such a choice is of great or of small importance to the States is not a material matter for inquiry.\textsuperscript{59}

Since States have to take the general law as they find it, then reciprocally States should not be isolated from that general law either. To do so would be to place the State under a particular disability that would be in conflict with the basic principle that the State is part of the “Australian community”. Discrimination is a form of isolation since a State does not have equal access to the general laws of the federal system. In this sense, there is something about the States’ role and participation in the Australian community and federation that is impaired when discrimination occurs.

The task of explaining why discriminatory impairment is categorised as a form of non-practical rather than practical impairment is complex and so Part III is dedicated to this endeavour.

III. DISCRIMINATION AND PRACTICALITY

To differentiate discriminatory from practical impairment, this part shows that discrimination is irrelevant to identifying practical impairment. A government that is discriminated against could run effectively as long as the disadvantage from the discrimination is not overly onerous. This distinction is particularly important as the prohibition against practical impairment is justifiable, whereas a prohibition against non-practical impairment is not. Thus, if this argument is correct, then discrimination will not be a relevant test for limited State immunity.

There is one possible exception where substantive discrimination (at least in terms of high levels of comparative disadvantage) might be intrinsically linked to practical impairment – where the State is in strict competition with other entities.\textsuperscript{60} For example, in some cases of business competition, discrimination against a State in favour of its competitors would necessarily lead to losses for the State. This would, in turn, affect the State business’ finances and profits, which are important elements of any business enterprise. Thus, practical impairment would occur. Nevertheless, in non-competitive circumstances where the State governs other entities, Commonwealth discrimination might not necessarily affect the practical running of the State. Thus, when this article mentions discrimination being irrelevant to practicalities, it applies to non-competitive cases.

This part first shows that discrimination does not constitute practical impairment – that is, discrimination itself is not an instance of practical impairment.\textsuperscript{61} Subsequently, it goes on to show that there is no reason to think discrimination is good evidence of practical impairment either.

A. Discrimination Does Not Constitute Practical Impairment

Discrimination, in and of itself, does not constitute or amount to practical impairment.\textsuperscript{62} Discrimination only seems to constitute practical impairment because of the disadvantage incurred. However, as indicated in Part I, discrimination also comprises a comparative limb, and an adapted and appropriate limb (the “appropriateness limb”). It is argued that the comparative dimension is either redundant or does not track practical impairment. Since discrimination consists of a disadvantage, comparison and an appropriateness limb, to abandon one of the limbs is to abandon discrimination. Further, removing the comparative factor would be to remove an essential element of what it is to discriminate.\textsuperscript{63}

\begin{footnotesize}
\textsuperscript{59} Melbourne Corporation v Commonwealth (1947) 74 CLR 31, 84.

\textsuperscript{60} Strict competition is defined in game theory as a game where for any joint strategies for players one and two, the interests of one player are diametrically opposed to the other. A standard example of a strictly competitive game is a zero-sum game where the pay-offs sum to 0 (eg if player A gets 1 pay off, player B gets −1). See Ken Binmore, Playing for Real: A Text on Game Theory (OUP, 2012) 42, 147.

\textsuperscript{61} For a more detailed elaboration of when some x constitutes y, see John Searle, The Construction of Social Reality (Free Press, 1995) 27–28, 38–40.

\textsuperscript{62} Dawson, Toohey and Gaudron JJ stated that a “Commonwealth law which discriminates against a State and imposes a disability upon it will constitute an interference with State executive capacities”: Re Residential Tenancies Tribunal (NSW) and Henderson; Ex parte Defence Housing Authority (1997) 190 CLR 410, 443 (emphasis added).

\textsuperscript{63} Melbourne Corporation v Commonwealth (1947) 74 CLR 31, 60.
\end{footnotesize}
In some cases, comparisons are redundant to determining practical impairment. If it is established that a law disadvantages a State such that it cannot function independently, there is no reason to compare how much better non-State actors are doing. Additionally, even in cases with high inequality and an improper objective, disadvantage is still likely to be a controlling factor. To show this, suppose the High Court rules are changed so that States are charged a fee of $12,000 for constitutional writs, which is only slightly higher than the current rate. Everyone else is charged a much lower fee of $1,200. Thus, States must pay fees that are 10 times higher than non-States.

The definition of discrimination in *Austin* is met here. The comparative disadvantage limb only applies where equals are treated unequally or those who are not equals are treated equally. While ordinary citizens are not the equals of States, hence equality is not required, non-State entities such as private corporations are in a similar position to the States (well-funded and well-advised). Thus, the comparative disadvantage limb is met since private corporations are charged the lower fee. The law is also unlikely to be adapted and appropriate. Given the similar financial and legal expertise of States and large corporations, there is no reason why the latter pay such low fees. Rich multinational corporations do not need aid in the form of lower fees. Hence, there is comparative disadvantage that is not adapted and appropriate for any proper purpose.

Nevertheless, this is a case where the States are barely impaired in a practical sense. The fee of $12,000 is only slightly higher than the current rate for States and is affordable for large organisations. If discrimination is an instance of practical impairment, then substantive discrimination would correspondingly mean significant practical impairment. Conversely, little practical impairment entails that little discrimination occurred, assuming they are intrinsically related concepts. Since it is clear that there is minimal practical impairment in this situation, it follows that little discrimination occurred with the change in fees. Nonetheless, this means there was only minor discrimination despite the high comparative disadvantage (the fees are 10 times higher for States) and the improper objective (no rational justification for treating private corporations and States differently). The only way to make sense of this would be to conclude that the low absolute disadvantage of $12,000 was the key factor that trumped the other limbs of discrimination. Hence, the comparison (and perhaps appropriateness) limbs are redundant. Disadvantage was what made the difference. This example can be generalised to any case where a law with an improper purpose creates minimal disadvantage to the States, but there is much less disadvantage to non-States.

In other cases, adding comparisons to the mix will produce the wrong results. Suppose that the High Court rules discussed above are further modified so that non-States only pay $120 when applying for constitutional writs. States still pay the same amount. Assuming a lack of a proper objective, there is more comparative disadvantage (now 100 times different), which constitutes more discrimination. If discrimination is an instance of practical impairment, then the increased discrimination means increased practical impairment (even if the practical impairment is not sufficient to be constitutionally impermissible). This is counterintuitive. In this scenario, practical impairment increases although the law does not affect the States at all and citizens are better off. However, the ability of the States to run their governmental activities has not changed. From the perspective of practical impairment, this makes little sense. Adding the comparative aspect predicts added practical impairment even when there is no change to the operational activities of the State. Given this strangeness, it is proposed that comparative disadvantage measures something different to practical impairment. This example can be generalised to any cases where the disadvantage to the States stays fixed, but the disadvantage to other entities is lessened.

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64 The fee for a constitutional writ for a public authority that is defined as a corporation is currently $10,015: *High Court of Australia (Fees) Regulation 2012* (Cth) s 4, Sch 1, Pt 1, 101.

65 *High Court of Australia (Fees) Regulation 2012* (Cth) s 4, Sch 1, Pt 1, 101.

66 This outcome can be seen as a breach of a special case of pareto optimality. In economics, a state of affairs is pareto superior to another state of affairs, where at least one person is better off and no one is worse off. Translating this to a constitutional context, we might say that a law is pareto-impairment optimal where at least one person is better off and no one is worse off and so no one is impaired. Amarta Sen, *Collective Choice and Social Welfare* (Penguin Books, 2nd ed, 2017) 67–70.
In summary, using comparisons either is redundant or leads to counterintuitive outcomes. The appropriateness limb does not prevent these outcomes. As indicated above, these specific hypotheticals can be generalised to other cases. This provides good reason to think that discrimination is not necessarily an instance of practical impairment.

B. Discrimination Is Not Good Evidence of Practical Impairment

A response might be that discrimination is still good evidence of practical impairment even if the former does not always constitute the latter (e.g. smoke is not fire, but it is evidence of fire).67 The usefulness of discrimination as evidence seems dubious for a few reasons. First, the comparative and appropriateness limbs of the test are very different to a test of whether a government can achieve its functions. Secondly, discrimination has a disadvantage limb anyway, so adding a comparison and appropriateness limb merely sounds like practical impairment with extra steps. Thirdly, there is no reason to look for discrimination, which is at best an indirect test, when judges can directly identify practical impairment by observing the effects of a statute.

Simpson and Hill indirectly object to this response by arguing that discrimination provides a simpler, more structured test for impairment.68 Hill cites the plurality from Austin who said that the constitutional inquiry of impairment is one of “evaluation and degree” that is not “readily established by objective methods”.69 The three limbed Austin discrimination test allegedly gives us a more precise line of inquiry.

There are several reasons why this is not convincing. First, the test of discrimination is not that simple. The discrimination test itself also requires matters of “evaluation and degree”. What level of comparative disadvantage would provide enough evidence that impairment has occurred? It is unclear that any objective fact can answer this question. The test in Austin itself introduces an adapted and appropriate limb that is hardly an objective test.70 Further, given that discrimination requires both disadvantage, comparison and appropriateness, the discrimination test is more complicated than a practical impairment test that only looks at disadvantage.

Secondly, it would be incoherent to say that the thing we are trying to prove (i.e. impairment) is too subjective, but the evidence of that thing is still worth obtaining.71 The evidence of an event is only as good as the event sought to be proven. Thirdly, if legal doctrines were only acceptable when they resulted in objective and quantifiable methodology, then many legal principles would be at risk. The concept of reasonableness at play in tort and criminal law, for example, is highly evaluative and contextual.72 In constitutional law, tests of “reasonable necessity” and what is “adapted and appropriate” would suffer from the same problem.73

In summary, there is no good reason to think that the presence of discrimination is good evidence for practical impairment. When concerned with practical matters alone, the presence of disadvantage is the primary factor. If the court takes into account non-practical impairment, however, discrimination may be relevant.

67 The plurality in Austin seems to take this view: Austin v Commonwealth (2003) 215 CLR 185, 264 [164]; [2003] HCA 3. This also seems to be how Simpson views the test since she characterises discrimination as being a factor of “fluid evidentiary significance” or as an onus shifting device: Simpson, n 32, 51.


71 On the author’s reading of Simpson, n 32, and Hill, n 68, they do not deny that impairment is in fact what is prohibited by the Constitution. They simply doubt the ability of a court to fact-find actual impairment, whereas they propose it is easier to identify discrimination.

72 Similar points were made by the High Court in Thomas v Mowbray (2007) 233 CLR 307, 352–353; [2007] HCA 33.

73 See Nationwide News Pty Ltd v Wills (1992) 177 CLR 1, 30.
IV. DENYING NON-PRACTICAL IMPAIRMENT

This article has so far shown that the court considers both practical and non-practical concerns when analysing impairment. In this part, it is argued that factoring in non-practical impairment devoid of any practical concerns is at odds with the orthodox view of constitutional implications. Admittedly, in many cases non-practical impairment overlaps with practical impairment; the limitations on State banking in Melbourne Corporation was a case of overlapping discriminatory and practical impairment. However, non-practical impairment by itself cannot be justified by current constitutional methodology. If it is the case that non-practical impairment is only relevant where it overlaps with practical impairment, then factoring in non-practical impairment becomes redundant.

If these arguments succeed, it would result in a very different test of impairment. For example, consider QEC where Queensland was found to be impaired. If discrimination is eliminated from the test, the High Court likely came to the wrong decision. QEC dealt with special rules of conciliation and arbitration that applied to disputes about electricity supply in Queensland. Discrimination was the main reason for which the law was found to be invalid. By Gibbs CJ’s own admission, the Court might have been purely concerned with non-practical matters:

It may be thought that the effect of s. 9 on the parties to an industrial dispute to which the Act applies is not particularly serious. … But whatever may be thought of the practical effect of these provisions, there can be no doubt that they are aimed directly at the electricity authorities of Queensland.

Thus, if non-practical impairment is excluded, then it might be that QEC was wrongly decided. It should be noted that Mason J thought it was “particularly significant” that the specific rules in the case of Queensland prohibited the Commissioner from dismissing cases that were not in the public interest. Perhaps in the absence of this discrimination the Commissioner could have dismissed some challenges against Queensland electric authorities. Nevertheless, even if such a possibility eventuated, its practical effects on Queensland would have been minimal. The mere possibility that some cases might be dismissed more easily would not substantially affect the operations of the Queensland electric authority, much less the State.

A. Constitutional Implications and the Test of Necessity

This article acknowledges the various academic debates on constitutional implications, but takes the orthodox view of the High Court as being correct. This orthodox view comprises two propositions. The first comes from the Engineers’ Case: implications must come from the language of the Constitution, otherwise the Commonwealth can intrude into State powers. The second proposition is that the test for implications is some necessity criterion: the implication needs to be practically or logically necessary based on the language of the Constitution.

Mason CJ pointed out an exception to the second proposition: necessity might not need to be met if it is manifest that the implication is intended from the text. It is proposed that non-practical impairment is

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75 Queensland Electricity Commission v Commonwealth (1985) 159 CLR 192, 203 (emphasis added).
78 Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers’ Case) (1920) 28 CLR 129, 149.
not manifestly evident, and so this alternative test is not appropriate. Dixon J did think that a prohibition against impairment is “plainly seen” in the frame of the Constitution.81 That might be true as far as a general doctrine of limited State immunity goes; however, it is not obvious that the prohibition was intended against non-practical as opposed to practical impairment. In any case, the arguments presented below, although directed at necessity, cast doubt on the existence of manifest intention.

To make the notion of necessity more fine-grained, one can ask what implications are necessary for. Goldsworthy posits that when the High Court uses necessity, it identifies implications necessary for achieving the purposes of the Constitution.82 This can be contrasted with a different inquiry: what implications are necessary for enforcing what the text says. What the text says is supplied by some theory of language regarding the linguistic content of the provision.83 In this regard, we can distinguish between a purposive assessment and a textual assessment of necessity – the former identifies implications necessary for the purposes of the Constitution and the latter identifies implications necessary for what the text says.84

To illustrate the difference, in Lange v Australian Broadcasting Corp the implied freedom of political communication was necessary to give effect to the purpose of various constitutional provisions to “enlarge the powers of self-government of the people”85 and “the advancement of representative government”.86 It is quite plausible that one cannot have a truly representative and self-governing polity without a constitutionally guaranteed freedom of political communication.87 However, the implication is unnecessary on a textual assessment. The text of the Constitution does not require a people that self-govern, have a “free election” or a “true choice”.88 It simply requires a direct choice. While one way, and perhaps a good way, of facilitating direct choice might be to guarantee freedom of political communication, that is not a necessary way. Necessity on a textual assessment means the text cannot be upheld without the implication; there is no other possible way for the text to be obeyed.89 To show that direct choice can occur without political communication, one merely has to observe that Australians had a direct choice since 1901 before the implied freedom cases were decided.90 The implied freedom of

81 Melbourne Corporation v Commonwealth (1947) 74 CLR 31, 83.
82 Goldsworthy, n 77, 19; BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266, 283.
83 The term “what is said” has a technical meaning in philosophy of language. See Francois Recanati, “What Is Said” (2001) 129 (1–2) Synthese 75; Francois Recanati, Literal Meaning (CUP, 2003) Ch 2. There is another category of linguistic content beyond what is said, which is “what is implicated”. For simplicity, this article does not distinguish between the two. See Paul Grice, Studies in the Way with Words (Harvard University Press, 1989) Ch 2.
85 Lange v Australian Broadcasting Corp (1997) 189 CLR 520, 557.
86 Lange v Australian Broadcasting Corp (1997) 189 CLR 520, 557. The Court also explicitly mentions the need to make purposes effective in relation to the freedom applying outside election periods (561). See also Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106, 139.
89 The author treats “it is logically necessary that if p then q” as implying “q logically follows from p”. Ian Rumfitt, “Logical Necessity” in Bob Hale and Aviv Hoffman (eds), Modality: Metaphysics, Logic, and Epistemology (OUP, 2010). The statement “q logically follows from p” can be then interpreted as the more familiar “p entails q”. One simple way of understanding entailment is that there is no possible world where p is true and q is false. GE Hughes and MJ Cresswell, A New Introduction to Modal Logic (Routledge, 1996) 202–203. Hence, an implication i is necessary for the content of a text c if c cannot be true without i being true. Note that practical necessity might be a weaker form of logical necessity, just as physical necessity is weaker than logical necessity: Kit Fine, “Varieties of Necessity” in Tamar Szabo Gendler and John Hawthorne (eds), Conceivability and Possibility (OUP, 2002).
90 Goldsworthy, n 77, 27.
political communication might therefore be necessary to implement the purposes of ss 7 and 24 but not to implement what is said by the text.

For the purposes of this article, it is assumed that both textual and purposive assessments are legitimate methods for determining valid constitutional implications.

**B. Non-Practical Impairment Is Unnecessary**

This article shows that a prohibition against non-practical impairment is unnecessary either on a purposive or textual assessment. The article also deals with possible objections based on Simpson’s symbolic view and various observations from French CJ.

1. **Purposive Assessment**

There are a few reasons to think that a purposive assessment of necessity will not be successful.

First, the kind of purpose required to establish necessity would be a strong federal vision of Australia. Even if States exist in a practical sense, their constitutional powers must still be protected from the Commonwealth regardless. As Sharpe rightly comments, the *Austin and Clarke* cases are an “affirmation of [a] … federal design … which requires … that they [the States] be free from *significant interference*”.

There is no evidence, however, that a strong form of independence was intended. Aroney argues that some framers saw the Australian federation in a more *compactual* sense, which entailed the coming together of sovereign equals. Others saw the federation in a *nationalist* sense, where what was being created was a new united nation under a single locus of control. The reality, he argues, is not categorised easily under either camp since Australia is a political community made up of other political communities with “multiple loci of authority bound together”. Strong independence is not the only possible federal vision for the Australian Constitution.

Secondly, inferring that the purpose of the Constitution is to establish strong federalism would conflict with the *Engineers’ Case*. As stated in the *Engineers’ Case*, interpretations of the Constitution cannot be based “on a vague, individual conception of the spirit of the [federal] compact which is not the result of interpreting any specific language to be quoted.” Positing strong visions of federalism for which non-practical impairment becomes necessary seems to commit the very sin elaborated in the above quotations.

Thirdly, even assuming a compactual federation, as Aroney uses the term, does not prove much. There can be a spectrum of compactual theories that draw different lines on where the Commonwealth can intervene. Some theories might take deep, symbolic and discriminatory impairment to be impermissible. Others might only require some of these impairments to be impermissible. It is even possible that none of these specific types of impairment are impermissible in a compactual system. For example, it is perfectly consistent to have a compactual theory that emphasises strong independent States and yet requires that federal disputes be settled politically rather than legally in courts. The mere fact that a compactual view is preferred tells us little.

On the other hand, both compactual and nationalistic views require that States be able to practically function. Otherwise, a federal system of any form does not truly exist. A federal system by any definition involves several governments that coexist in the same location with distributed governmental functions.

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91 Sharpe, n 2, 272 (emphasis added).
93 Aroney, n 92, 342–343.
94 Aroney, n 92, 342–343.
95 Aroney, n 92, 345.
96 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers’ Case)* (1920) 28 CLR 129, 145.
97 See an analogous argument by Goldsworthy in the freedom of political communication cases: Goldsworthy, n 77, 24–25.
An entity that cannot practically function as an independent government does not fit the description of a government in this sense.

2. Textual Assessment

Given that we cannot rely on some vague purposive notion of a strong federal system, we must rely on what the text of the Constitution says. However, nothing that the Constitution says prohibits deep, symbolic or discriminatory impairment.

More concretely, let us return to the basic assumption that States are constitutionally guaranteed to continue existing as independent entities. Further, assume that this is what the text of the Constitution says; although, as noted above it is unclear whether this content comes solely from ss 106–107 or a more holistic reading of the Constitution. At the very least, on both views, ss 106–107 are involved. The relevant parts of ss 106–107 of the Constitution read as follows:

**Section 106**
The Constitution of each State … shall … continue as at the establishment of the Commonwealth.

**Section 107**
Every power of the Parliament of a … State, shall, … continue as at the establishment of the Commonwealth.

The only thing required by the linguistic content of ss 106–107 is that States continue to exist as they were at Federation. It can be seen how practical impairment is necessary. States that are heavily reliant on Commonwealth assistance and thus cannot independently carry out their functions are States by name only. Hence, such “States” would not be the type of States envisioned by the Constitution.

Conversely, why non-practical impairment would be necessary is unclear. There can be a federal system where States practically operate and yet are sometimes discriminated against, or where their core agencies are targeted. It is also far from proven that a working federal system could not exist if States did not seem to appear independent (discussed further below). Sections 106–107 do not guarantee that all powers of the State at Federation will stay intact post-1901. That was the point of the Engineers’ Case – to show that intergovernmental immunities are not constitutionally guaranteed.98 To some extent, Commonwealth law can intrude on the States. In fact, the Engineers’ Case and its successor cases have shown that the Commonwealth can legislate in a way that intrudes on large swaths of State legislative powers.99 Given that some State powers may be limited, ss 106–107 do not explain where the line should be drawn (except in the case of practical impairment as explained above). Perhaps an ideal federal system is one where a State should not be discriminated against or one where the core agencies of States are never deeply targeted. But those are not necessarily required by what ss 106–107 say.

Expanding the focus from ss 106–107 to other parts of the Constitution will not help.100 Nothing else in the text of the Constitution clarifies the extent to which constitutional powers of the State can be isolated or targeted (in a deep sense) by Commonwealth legislation. There is also nothing that requires any appearance of independence to be upheld. In essence, the Constitution sets up a federal system but does not flesh out every specific detail. Since the test for implications is necessity, it is not up to judges to choose between the possible variations of federal systems that could fit within the Constitution.

It might be argued that States having to exist as “independent” entities incorporates a notion of non-practical impairment; moving the emphasis to independence rather than impairment. But this will not work – the two different views of practical and non-practical impairment also engender corresponding views on independence. To take the gubernatorial tax hypothetical, there was a lack of non-practical independence, but practical independence was maintained. The same arguments above apply once more: practical independence is required by the Constitution, otherwise there is no real federation. However,

98 Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers’ Case) (1920) 28 CLR 129, 144–145.


100 For examples of other sources for the assumption, Starke J refers to the preamble and covering cl 3 of the Constitution as being a source of the assumption: Melbourne Corporation v Commonwealth (1947) 74 CLR 31, 74.
the Constitution says no more about the type of federal system required in Australia once practical independence is met.

C. Potential Objections

This section deals with three potential objections to the arguments raised above. The first comes from the work of Simpson and her view of symbolic impairment, the second comes from French CJ’s emphasis on normative evaluation in Clarke, and the third comes from French CJ’s comments about the cumulative effects of minor interferences.

1. An Objection from Symbolism

Simpson, in arguing for symbolic impairment, states:

>[T]he image of States as possessing dignity and status as federal partners is not without substantive importance in our constitutional system. Rather, its projection is essential to securing the goodwill between governments that is necessary to the cohesion and stability of a federal system of government.101

Thus, maintaining an appearance of independence is still necessary in some practical sense. Otherwise, the goodwill and cohesion between the different levels of government will be reduced. There are a few responses to this.

First, Kirby J in Fardon v Attorney-General (Qld) made several persuasive attacks on constitutional tests that rely heavily on appearances.102 His Honour argued that what the public might think is desirable might be the opposite of what is constitutionally mandated.103 Additionally, there is the worry that a clever draftsperson could manipulate the validity of law by writing it in such a way that it is accepted by the relevant audience.104 While Kirby J was in the minority in Fardon, his point of disagreement was on the application of the Kable doctrine.105 The Court, however, has generally followed his Honour in moving away from the test of appearances, stating that “public confidence is an indicator, but not the touchstone of invalidity”.106

Secondly, consider the audience to whom appearances are important. If the relevant audience is the public, then it is unlikely that they pay enough attention to federal relationships such that the existence of the federal system depends on their understanding of it. Even if the public does take note of federal relationships, it is even more unlikely that non-practical impairments such as a gubernatorial tax would undermine their faith in the federal system. If the relevant audiences are governments themselves, there is little reason that appearance should play such a major role. As entities with expert constitutional advice, they should be able to recognise when their independence is actually impaired as opposed to impaired by appearance alone.

Thirdly, Simpson’s premise that there is a need for cohesion in a federal system is controversial. Riker and Schaps emphasise the need for disharmony between governments in a federal system to ensure independence.107 They claim that in “effectively operating federal systems, one should thus expect a fair amount of intergovernmental bickering”.108 One could have a formal federal system, but if the governments never challenged each other, then this would not be a federation in substance.109
Impairment and Limited State Immunity

Schaps were not referring to the use of law-making as an instance of disharmony, but one could see how that could be a tool in negotiating intergovernmental disputes. A constitutional rule that smooths out any disharmony would in their view be a disservice to a working federal system.

2. An Objection from Normativity

A second potential objection comes from French CJ who mentioned in Clarke that there has always been a ‘normative element’ when considering the adverse effects of Commonwealth laws. So far, this article has used the traditional terminology of logical and practical necessity. It might be objected that this is too narrow; instead, we should use a test of normative necessity. With respect, it is not clear exactly what “normative” means in this case. Did French CJ intend a full-blown morality to be incorporated into constitutional interpretation? Or perhaps his Honour meant normative in the context of an ideal federal system (ie that implications are derived from what is necessary to obtain some optimal federal system). If the former moralistic approach is intended, then this is an approach to constitutional interpretation inconsistent with the Engineers’ Case. As mentioned above, the Engineers’ Case focused on the language of constitutional text; moral and policy considerations are not to be taken into account. If the latter federal approach was proposed, then we are back to the question of theorising an ideal federal system. It would be antithetical with the Engineers’ Case to give an answer in the abstract and posit an ideal federation based on political philosophy and theory, devoid of reference to constitutional text. Instead, the lesson learnt from the Engineers’ Case is that the only federal requirements that may be constitutionally mandated are those necessitated from the text of the Constitution itself. This brings us back full circle to the points above – the only federal vision necessitated by the Constitution is one where States have to be practically operating.

3. An Objection Based on Cumulative Effect

Another objection might be drawn from French CJ’s comments on institutional integrity:

> An accumulation of such intrusions, each “minor” in practical terms, could amount over time to death of the judicial function by a thousand cuts.

It is not hard to see that a similar logic might play a role in limited State immunity. Minor levels of practical impairment cannot be ignored because they might have a damaging cumulative effect. Even if the cumulative effects of minor laws can lead to practical impairment, it does not follow that these minor practical impairments must be stopped even before such cumulative effects are established. Accepting such a proposition would lead to a very different test to that discussed here. The current test is that the Commonwealth cannot impair the States. The test is not that the Commonwealth is prohibited from passing any laws that might potentially cause impairment.

This test of potential impairment is problematic. First, it is not within the powers of a court to stop potential invalidities. Menzies J made this point in Cormack v Cope: “It is no part of the authority of this court … to restrain Parliament from making unconstitutional laws.” Further, it has been long established that it is not part of the judicial power to answer legal questions in the abstract but only in the concrete cases brought before it. Secondly, almost any law could potentially be argued to cause an impairment on States. Consider a law that stipulated that non-judicial, non-parliamentarian and non-executive State employees had to wear red shirts. This in and of itself does not seem like practical impairment, nor like something that limited State immunity would prohibit. Nonetheless, if the Commonwealth is already

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112 Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers’ Case) (1920) 28 CLR 129, 148–149.
113 Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers’ Case) (1920) 28 CLR 129, 162.
114 For an overview of the various debates, see Aroney, n 92, Ch 1; Riker, n 107.
regulating red shirts, then they might in future regulate footwear; they might regulate overtime pay, they
might start regulating means of transportation. Hence, a law requiring the wearing of red shirts is invalid
simply because all these potentialities exist in the abstract.

Instead, if cumulative effects really do amount to practical impairment, the test should only be applied
where the cumulative effects are already present. For example, in the first uniform tax case the cumulative
effects of various statutes made it difficult (but not impossible) for States to impose income tax.118 While
the effects were lessened in the second uniform tax case, the Commonwealth taxes were still extremely
high coupled with State grants, which the States could only access if the State did not collect income
tax.119 Counsel for New South Wales said this high rate of tax had “the practical effect of precluding the
States from entering the income tax field”.120

Despite those facts, Latham CJ in the first uniform tax case insisted that the statutes be read individually,121
while Dixon CJ in the second uniform tax case explicitly rejected the application of the limited State
immunity doctrine.122 In those cases, it is submitted that the High Court did not take into account the
consideration of cumulative effects. If French CJ is correct that cumulative effects are damaging, then
the first and second tax cases were probably decided incorrectly. Nevertheless, only actual cumulative
effects, not potential, should be taken into account.

V. CONCLUDING REMARKS

Given this article has focused on constitutional methodology derived from the Engineers’ Case, some
might comment that it misses the point of Melbourne Corporation – that the case was quite explicitly a
loosening of the Engineers’ Case doctrine. Hence, it should not be expected that limited State immunity
fits perfectly into the Engineers’ Case paradigm.

This overstates the extent to which the Melbourne Corporation line of cases claim to depart from the
Engineers’ Case. First, while limited State immunity might be seen as a movement away from the strict
rejection of the intergovernmental immunities doctrine, the Court has never rejected the test of necessary
implications in the relevant cases.123 Secondly, it is one thing to add qualifications and exceptions to
a doctrine, and it is another to entirely reject it. The High Court still accepts the Engineers’ Case
as binding.124 The whole point of the Engineers’ Case is to move away from theories of federalism
untethered to text, to ones grounded in the language of the Constitution.125 The concept of non-practical
impairment can find no such anchor.

Now it might be possible to reject the Engineers’ Case and the test of necessity altogether,126 and it
would be an interesting hypothetical exercise to consider the consequences of that. This, however, would
be a radical departure from orthodoxy. If the High Court wishes to keep to established principles of
constitutional implications, then considerations of non-practical impairment devoid of practical concerns
should be abandoned.

118 South Australia v Commonwealth (1942) 65 CLR 373.
119 Victoria v Commonwealth (1957) 99 CLR 575. The Income Tax (Wartime Arrangements) Act 1942 (Cth) had been repealed, and
the Court did not think Income Tax Assessment Act 1936 (Cth) s 221 was valid (see Dixon CJ at 615–616).
120 Victoria v Commonwealth (1957) 99 CLR 575, 588.
121 South Australia v Commonwealth (1942) 65 CLR 373, 411.
HCA 15.
125 Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers’ Case) (1920) 28 CLR 129, 148–149.
126 For reasons to reject Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers’ Case) (1920) 28 CLR 129,
see James Allan and Nicholas Aroney, “An Uncommon Court: How the High Court of Australia Has Undermined Australian
Federalism” (2008) 30(2) Sydney Law Review 245, 288–289. For reasons to reject the current test for implications, see Goldsworthy,
n 77.