HIGH COURT OF AUSTRALIA

Victoria

Vs.

Commonwealth

(Barwick C.J.(1), McTiernan(2), Menzies(3), Windeyer(4) Owen(5), Walsh(6) and Gibbs(7) JJ.)

14 May 1971

BARWICK C.J.

1. The Pay-roll Tax Act 1941 (Cth) (the tax Act) and the Pay-roll means of providing revenue to finance the provision of child endowment under the Child Endowment Act 1941 (Cth). Though the child endowment under the latter Act was to be universal, it was conceived primarily as a supplement to the salary or wages of persons in employment. Consequently, the burden of the endowment was cast on employers, the taxing Act imposing a tax upon all wages paid by an employer. The Crown in right of a State was in each State a considerable employer of labour and at least in some States of industrial labour. All its employees had the benefit of the child endowment along with employees generally. Consequently the Crown in right of a State was included in the definition of "employer" for the purposes of the Act. See.s. 3 of the Act. (at p362)

2. In the intervening years considerable modifications have been made to the Act principally by way of increasing the ambit and extent of exemption from the operation of its provisions. These changes no doubt have been dictated by policies unconnected with the basic policy prompting the passing of the tax Act and the Act in 1941. Notable in this connexion is the use of the Act as an instrument of policy in the promotion of the export trade of the country. See Div. 2 of Pt III of the Act as inserted by the Pay-roll Tax Assessment Act 1968 (Cth). (at p362)

3. But though I have thus briefly stated the origin and history of the Act in point of policy as known in historical fact, these circumstances, though illustrative of a situation in which the Crown in right of a State may stand in a like situation to the citizen vis-a-vis the Parliament, are in truth irrelevant to the resolution of the question raised in the proceeding now before the Court. That question is whether the Parliament has under the Constitution legislative power to include the Crown in right of a State in the operation of an Act which imposes a tax or provides for the assessment of a tax. Expressed in its narrowest form, the question is whether the inclusion of the Crown in right of a State in the definition of "employer" in s. 3 (1) of the Act is a valid exercise of legislative power of the Commonwealth under s. 51(ii) of the Constitution : stated in its broadest form it is whether the Commonwealth may by a law of taxation not confined in its operation to States, impose a tax upon a State. The question is a legal question. It is to be resolved by legal considerations alone, that is to say, by the construction of the Constitution according to legal principle. The principles of legal construction applicable to the Constitution will exclusively provide the answer to the problem posed by this suit. (at p363)

4. The State of Victoria has commenced a suit in this Court against the Commonwealth in which its statement of claim as amended seeks :

> "A. A declaration that it is beyond the power of the parliament of the Commonwealth of Australia to enact that the tax imposed by the Pay-roll Tax Act 1941 shall be levied on any of the wages referred to in paragraph 4 of the statement of claim paid or payable by the Crown in the right of the State of Victoria or that the Crown in the right of the State of Victoria shall pay the said tax to the Commonwealth in respect of any such wages.
> B. A declaration that in so far as the Pay-roll Tax Assessment Act 1941-1969 purports to enact that the tax imposed by the Pay-roll Tax Act 1941 shall be levied on any of the wages referred to in paragraph 4 of the statement of claim paid or payable by the Crown in the right of the State of Victoria and that the Crown in the right of the State of Victoria shall pay the said tax to the Commonwealth in respect of any such wages it is invalid and of no effect."

The wages referred to in par. 4 of the statement of claim are wages paid to officers and employees in the Premier's Department, the Audit Office, the Chief Secretary's Department, the Office of the Government Statist, the Social Welfare Department, the Victoria Police, the State Library of Victoria, the National Gallery of Victoria, the Department of Labour and Industry, the Education Department, the Crown Law Department, the Treasury, the Ministry of Transport, the State Taxation Office, the Stamps Office, the Government Printer, the Department of Crown Lands and Survey, the Public Works Department, the Mines Department, the Agriculture Department, the Department of Health, the Local Government Department, the Hospitals and Charities Commission, the Liquor Control Commission, the Workers' Compensation Board and the Council of Adult Education. (at p364)

5. The Commonwealth has demurred to the statement of claim generally as disclosing no cause of action. This raises for decision the constitutional validity of the Act in so far as it purports to impose upon the State of Victoria an obligation to pay "pay-roll tax" rated to the amount of salaries and wages paid to its public servants employed in the departments of State nominated in the statement of claim as amended. (at p364)

6. The basic principles of construction of the Constitution were definitively enunciated by the Court in Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. [1920] HCA 54; (1920) 28 CLR 129 (the Engineers' Case). Lord Selborne's language in R. v. Burah (1878) 3 App Cas 378, at pp 904-905 was accepted and applied as was that of Earl Loreburn in Attorney-General (Ontario) v. Attorney-General (Canada) (1912) AC 571, at p 583 . The former said :

> "The established courts of justice, when a question arises whether the prescribed limits have been exceeded, must of

> necessity determine that question ; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any court of justice to inquire further, or to enlarge constructively those conditions and restrictions."

And the latter :

"In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act, 1867, if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act." (at p364)

7. The Court unequivocally rejected the doctrine that there was an "implied prohibition" in the Constitution against the exercise in relation to a State of a legislative power of the Commonwealth once ascertained in accordance with the ordinary rules of construction, a doctrine which had theretofore been entertained and sought to be founded upon some supposed necessity of "protection", as it were, "against the aggression of some outside and possibly hostile body". The Court emphasized that if protection against an abuse of power were needed, it must be provided by the electorate and not by the judiciary.

> "The one clear line of judicial inquiry as to the meaning of the Constitution must be to read it naturally in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceeded it, and then lucet ipsa per se " : (1920) 28 CLR, at p 152 . (at p365)

8. The Act is referable to s. 51 (ii.) of the Constitution as its source of legislative power. The question therefore is whether the Act is a law within the ambit of the power given by that paragraph, that is to say, is it a law on the topic of taxation within the meaning of the Constitution. Consequently it becomes necessary to construe that paragraph of s. 51 in accordance with the principles to which I have referred. Clearly the Act is an Act with respect to taxation. It does not offend any limitation upon the legislative power expressed in the Constitution unless it is a tax upon the property of a State within the meaning and operation of s. 114, a matter to which I will advert a

little later. (at p365)

9. The plaintiff State however asserts that s. 3 (1) of the Act is outside the ambit of the Commonwealth legislative power in so far as it purports to include the Crown in right of a State in the category of employers liable to assessment for pay-roll tax. The principal ground taken by the plaintiff is that the granted power, "Taxation : but so as not to discriminate between States or parts of States", does not authorize the imposition of any tax upon the Crown in right of a State, because there is an implied constitutional limitation upon that Commonwealth power operating universally, that is to say, as to all activities of a State. Therefore it is said the Act may not validly operate with respect to the Crown in right of the State, no matter what the nature of the relevant activity of the State in which it has employees to whom it pays wages or salaries. A secondary ground, but the ground mostly pressed by the plaintiff, is that the legislative power with respect to taxation does not extend to authorize the imposition of any tax upon any essentially " governmental" activity of a State. Therefore at the least, the power granted by s. 51 (ii.) does not authorize the imposition of a tax upon the Crown in right of a State in respect of the wages paid to its civil servants and that s. 3 (1) is pro tanto invalid. Though the legal propositions submitted by the plaintiff would extend beyond these, the plaintiff in this suit limits its claim to invalidity of the Act in relation to wages paid by it to its employees in the named departments of government. The suggested limitation upon the legislative power of the Commonwealth, whether of universal or of limited operation, is said to be derived by implication from the "federal" nature of the Constitution. In this connexion it is said that to levy a tax upon a State at all, but in any case to levy a tax rated to the wages paid to its servants employed in departments of government, so trenches upon the governmental functions of the State as to burden, impair and threaten the independent exercise of those functions. It is also sought to reach the same result by construction of the legislative power itself. It is said that because of its particular, indeed unique nature, the legislative power with respect to taxation does not extend to authorize the levy of a tax upon a State ; and again, either at all, or at any rate, with respect to its "governmental" activities. (at p366)

10. It is as well that I should first express my view of the decision of the Court in the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 . The precise question there decided was that the Parliament of the Commonwealth has power to make laws binding on a State with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of one State. This meant that the definitions of "employer" and of "industrial dispute" in s. 4 of the Conciliation and Arbitration Act 1904-1918 (Cth) were valid as enacted and not subject to an exception in favour of a State. (at p366)

11. The Court reached this conclusion by applying the ordinary rules of statutory construction as appropriate to an organic instrument to which the Crown was a party.

> "The first step in the examination of the Constitution is to emphasize the primary legal axiom that the Crown is ubiquitous and indivisible in the King's dominions. Though the Crown is one and indivisible throughout the Empire, its legislative, executive and judicial power is exercisable by different agents in different localities, or in respect of different purposes in the same locality, in accordance with the common law, or the statute law there binding the Crown (Williams v. Howarth (1905) AC 551
> ;

Municipalities' Case
(1919) 26 CLR 508, at p 533
; Theodore v. Duncan
(1919) AC 696, at p 706 [1919] UKPCHCA 3; ; 26 CLR 276, at p 282
; The
Commonwealth v. Zachariassen and Blom
[1920] HCA 85; (1920) 27 CLR 552
. The Act 63 & 64
Vict. c. 12, establishing the Federal Constitution of Australia,
being passed by the Imperial Parliament for the express
purpose of regulating the royal exercise of legislative, executive
and judicial power throughout Australia, is by its own inherent
force binding on the Crown to the extent of its operation. It
may be that even if s. V. of the Act 63 & 64 Vict. c. 12 had not
been enacted, the force of s. 51 of the Constitution itself would
have bound the Crown in right of a State so far as any law
validly made under it purported to affect the Crown in that
right ; but, however that may be, it is clear to us that in
presence of both s. V. of the Act and s. 51 of the Constitution
that result must follow. The Commonwealth Constitution as
it exists for the time being, dealing expressly with sovereign
functions of the Crown in its relation to Commonwealth and
to States, necessarily so far binds the Crown, and laws validly
made by authority of the Constitution, bind, so far as they
purport to do so, the people of every State considered as
individuals or as political organisms called States - in other
words, bind both Crown and subjects."
(1920) 28 CLR, at pp 152, 153 (at p367)

12. In answer to the suggestion that there was an implied limitation upon Commonwealth legislative power excepting the Crown in right of a State from its control, the Court said:

" 'The nature and principles of legislation' (to employ the
words of Lord Selborne in Burah's Case
(1878) 3 App Cas 378, at p 904
), the nature of
dominion self-government and the decisions just cited entirely
preclude, in our opinion, an a priori contention that the grant
of legislative power to the Commonwealth Parliament as
representing the will of the whole of the people of all the
States of Australia should not bind within the geographical
area of the Commonwealth and within the limits of the
enumerated powers, ascertained by the ordinary process of
construction, the States and their agencies as representing
separate sections of the territory. These considerations
establish that the extent to which the Crown, considered in
relation to the Empire or to the Commonwealth or to the
States, is bound by any law within the granted authority of

> the Parliament, depends on the indication which the law gives of intention to bind the Crown."
> (1920) 28 CLR, at pp 153, 154

These principles were not only stated in universal terms but, in my opinion, are by their very nature of universal validity. According to these principles, the grant to the Parliament of legislative power with respect to each subject matter enumerated in the Constitution enables laws to be made within the ambit of the subject matter which, if so intended, will bind the Crown in right of a State in like manner that they bind individuals and corporations. (at p367)

13. It may be, of course, that the description of the subject matter properly construed excludes the Crown in right of a State either completely or to a defined extent from the ambit of the subject matter. Section 51 (xiii.) is an obvious example of such an express limitation of subject matter. But if there be no such express limitation, the legislative power to bind the Crown in right of a State by a valid law with respect to a subject matter within s. 51 (ii.) is, in my opinion unqualified. (at p368)

14. Sir Owen Dixon expressed his view of the principle of the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 in Australian Railways Union v. Victorian Railways Commissioners [1930] HCA 52; (1930) 44 CLR 319, at p 390 and in West v. Commissioner of Taxation (N.S.W.) [1937] HCA 26; (1937) 56 CLR 657, at p 682 . He said :

> ". . . the principle is that whenever the Constitution confers a power to make laws in respect of a specific subject matter prima facie it is to be understood as enabling the Parliament to make laws affecting the operations of the States and their agencies. The prima facie meaning may be displaced by considerations based on the nature or the subject matter of the power or the language in which it is conferred or on some other provision in the Constitution."

I do not regard this expression of the principle of the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 as differing in substance from my own expression of it. The erection of a prima facie meaning of a constitutional provision with provision for displacing considerations, though not an approach to construction which I would myself prefer, is after all but a form of expression and, as I understand it, not intended to depart from ordinary methods of construing constitutional provisions. Once construed the power extends to authorize legislation binding the Crown in right of a State. His Honour in the passages to which I have referred made two reservations to his statement of the basic principle of constitutional construction. To these I shall make reference later. However, I should mention at this point that Attorney-General (N.S.W.) v. Collector of Customs (N.S.W.) (the Steel Rails Case) [1908] HCA 28; (1908) 5 CLR 818 was upheld by the Court in the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 "upon the principles we have enunciated". In my opinion, though the exclusive nature of the power to impose duties of customs and excise is derived from s. 90 and the duty to impose uniform duties of customs and excise is derived from s. 88, the power which supported the exaction of the tax, the customs duty, in the Steel Rails Case, was s. 51 (ii.). "The principles we have enunciated" were that the Crown in right of a State was within the ambit of a law of the Commonwealth passed in pursuance of the power granted by s. 51 (ii.). The Steel Rails Case as so approved, in my opinion, is certainly fatal to the plaintiff's larger proposition ; and, depending on what precision can be given to the definition of "governmental" functions, also to its lesser submission. (at p369)

15. I find no need to refer to other cases decided before the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 . They are sufficiently discussed for present purposes in that case and in West v. Commissioner of Taxation (N.S.W.) [1937] HCA 26; (1937) 56 CLR 657 . (at p369)

16. Section 114 of the Constitution is in the following terms :

> "114. A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State."

Its very presence in the Constitution or at any rate the inclusion in it of the provision as to the property of a State might well be thought to militate against the plaintiff's submissions. But though weighty, for my part, I find no need to rely on any such consideration. It seems to me quite clear that a law requiring the payment of a tax rated to the amount of wages paid is not a tax upon property. It is neither a tax upon any property of the employers nor upon any property of a State. It is not, as submitted, a tax upon those "revenues" of the State out of which the State may choose to pay the amount of the tax any more than it is a tax upon that income or capital of an employer out of which he may pay the tax. In my opinion, s. 114 is not infringed by the imposition upon the State of the pay-roll tax. The Act therefore is not in breach of any express provision of the Constitution : to use Lord Selborne's words "it violates no express condition or restriction by which" the legislative power is limited. The Act is "within the general scope of the affirmative words which give the power", unless the plaintiff's submissions, directed to the construction of those words, are acceptable. (at p369)

17. It is necessary now to discuss the basis on which the plaintiff State sought to limit the scope of the legislative power granted by s. 51 (ii.). The plaintiff was bound to concede that the legislative power granted by some other paragraphs of s. 51 could extend to the making of laws binding upon the Crown in right of a State. But the plaintiff sought to distinguish the power granted by s. 51 (ii.). (at p369)

18. The ground of distinction was sought to be found in what was said to be the unique character of a power to tax and the supposed incongruity of one government being able by means of taxation to determine the use to be made by another government of its revenues. It was further said and as an independent point, though at times used cumulatively with the submission as to the unique nature of the power of taxation, that the federal structure of the Constitution required an implication that Commonwealth legislative power whatever its constitutional source might not be exerted so as to threaten the continued existence of a State as an independent element in the federation. The tax in the present case was said to constitute such a threat. (at p370)

19. In aid of its submission distinguishing the power to make laws with respect to taxation from the power to make laws on the other topics enumerated in s. 51 the plaintiff called attention to a passage in the judgment of four justices in the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 and to certain observations of Sir Owen Dixon in subsequent cases, namely in Australian Railways Union v. Victorian Railways Commissioner (1930) 44 CLR 319 and in West v. Commissioner of Taxation (N.S.W.) [1937] HCA 26; (1937) 56 CLR 657 . I shall need later on to set out this passage and these observations to facilitate my discussion of them. But meantime, I address myself to the submission

that a limitation upon the power of legislation granted to the Parliament by s. 51 is to be derived from the "federal" nature of the Constitution. In this connexion I shall need to make particular reference to the decision of the Court in Melbourne Corporation v. The Commonwealth [1947] HCA 26; (1947) 74 CLR 31 . (at p370)

20. I have observed elsewhere that the Constitution does not represent a treaty or union between sovereign and independent States. It was the result of the will and desire of the people of all the colonies expressed both through their representative institutions and directly through referenda to be united in one Commonwealth with an agreed distribution of governmental power. The whole "agreement" or as it is sometimes called "the compact" of the people of the colonies was to be and was expressed in an Act of the Imperial Parliament not in any sense as a treaty or an agreement of union, or as a confederation of States but as a statutory Constitution under the Crown.

> "The Constitution was established by the Imperial Act 63 & 64 Vict. c. 12. The Act recited the agreement of the people of the various colonies, as they then were, 'to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established'. 'The Crown', as that recital recognizes, is one and indivisible throughout the Empire. Elementary as that statement appears, it is essential to recall it, because its truth and its force have been overlooked,
> not merely during the argument of this case, but also on previous occasions."
> (1920) 28 CLR, at p 152 (at p371)

21. The Constitution granted by the Imperial Act was "federal", not in the sense of a union of previously existing States surrendering powers to that union but in the sense that the powers of government were distributed, some by nomination of subject matter and others as residues. Therefore analogies drawn from situations in the United States of America and from judicial conclusions and observations upon the Constitution of that country must, in my opinion, be used, if at all, only with a clear realization of the basic distinction between the constitutional position of the two countries. Thus, though by their union in one Commonwealth, the colonists became Australians, the territorial boundaries of the former colonies were retained for purposes of the distribution of governmental power and function. The constitutional arrangements of the colonies were retained by, and subject to, the Constitution as the constitutional arrangements for the government of those portions of the Commonwealth to be known as States. These, though coterminous in geographical area with the former colonies, derived their existence as States from the Constitution itself : and being parts of the Commonwealth became constituent States. This background must be in mind in considering whether any implication of a limitation upon Commonwealth power may be drawn from the terms of the Constitution itself. Whatever the antecedent history of the passing by the Imperial Parliament of the Constitution Act (63 & 64 Vict. c. 12) it and it alone expresses the will of the Imperial Parliament which alone had legislative power to alter the colonial status. Of course, that Act must be construed in the light of its antecedent history or as it was said in the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129, at p 152 , "it must be read naturally in the light of the circumstances in which it was made . . .". But the outstanding fact that the Act created the Commonwealth as the embodiment of the people of

Australia and gave it, amongst other things, legislative power over the enumerated subject matters cannot be gainsaid. The extent to which the former colonial constitutions and powers of government were transmuted into and continued by the Constitution as the constitutional and governmental powers of the States is fully expressed in s. 106 and s. 107 which are both subject to the Constitution. There is no room, in my opinion, for an implication of a kind which might be appropriate in the construction of a treaty of union between States, some unexpressed contractual term of a fundamental nature. Indeed, in my opinion, the approach of the Court in the Engineers' Case [1920] HCA 54[1920] HCA 54; ; (1920) 28 CLR 129 to the construction of the Constitution as an Act of the Imperial legislature in reality denies the possibility of any such implication. (at p372)

22. However, it is to my mind clear that the Constitution in providing for the States did not give the Commonwealth legislative power over them, or their powers and functions of government, as subject matters of legislation. That the Government cannot "aim" its legislation against a State, its powers or functions of government is both true and fundamental to our constitutional arrangements. But, in my opinion, this does not derive from any implied limitation upon any legislative power granted to the Commonwealth. It is true simply because the topics of legislation allotted to the Commonwealth by the Constitution do not include the States themselves nor their governmental powers or functions as a subject matter of legislative power. As will appear from my understanding of the judgments in Melbourne Corporation v. The Commonwealth (2), a law of the Commonwealth which in substance takes a State or its powers or functions of government as its subject matter is invalid because it cannot be supported upon any granted legislative power. If the subject matter of the law is in substance the States or their powers or functions of government, there is no room, in my opinion, for holding it to be at the same time and in the same respects a law upon one of the enumerated topics in s. 51. Sir Owen Dixon in Melbourne Corporation v. The Commonwealth [1947] HCA 26; (1947) 74 CLR 31 , having concluded that s. 48 of the Banking Act "singled out and taxed the States in respect of some exercise of their functions", and that it was "effective to deny to the States the use of the banks", said that "this . . . is not justified by the power to make laws with respect to banking". That followed, in my opinion, because such a law was not in substance a law with respect to banking: but on the contrary, had the States and the banking of their funds as its subject. Of course, a law may be at the same time thought to be a law with respect to either of two of the topics enumerated in s. 51 and it may be satisfactory in such a case not to trouble to say with respect to which of the two subject matters the law should preferably be referred. But when a law may possibly be regarded as having either of two subjects as its substance, one of which is within Commonwealth power and the other is not, a decision must be made as to that which is in truth the subject matter of the law. Although usually not an appropriate course in determining whether a law is a law on an enumerated topic, in such a case, the decision of what is the subject matter of the law may be approached somewhat in the manner the validity of a law claimed to be within one of the two mutually exclusive lists in the Canadian Constitution is determined. The law must be upon one or other of the subjects. It cannot be on both. Thus, in my opinion, to decide that the law in question is a law having the States or their powers or functions of government for its subject matter, is to decide that it cannot be a law "justified by the power to make laws with respect to" one of the topics enumerated in s. 51. In other words, it seems to me to follow necessarily from the decision of the Court in the Engineers' Case [1920] HCA 54[1920] HCA 54; ; (1920) 28 CLR 129 , and from the reasons given for that decision, that the validity of a Commonwealth law will be determined by its relation to a granted subject matter of legislative power construed as a provision of an act of the Imperial Parliament, "read naturally in the light of the circumstances in which it was made". By that direct approach no warrant will, in my opinion, be found in the Constitution for a law of which the powers or functions of a State is or are in truth the subject matter. It is for lack of an appropriate

subject matter rather than the presence of an implied limitation upon some granted power that such a law, in my opinion, would fail. That, in my opinion, is the real ground of and, in any case, the only acceptable ground for, the decision in Melbourne Corporation v. The Commonwealth [1947] HCA 26; (1947) 74 CLR 31 . (at p373)

23. The reason for the inability of a State to make a law binding on the Commonwealth is a completely unrelated circumstance. It derives from the fact that the Crown has not by the Constitution submitted itself to the legislatures of the States. The endeavour to found the inability of a State to bind the Commonwealth upon a doctrine of mutual immunity derived from necessity was clearly and convincingly exploded by the Court in the Engineers' Case (1). (at p373)

24. But though the powers and functions of a State may not be the subject matter of a Commonwealth law yet because laws of the Commonwealth, if so intended, bind the Crown in right of a State, the exercise of those powers and functions may be affected and indeed controlled by a valid Commonwealth law, the validity of the law depending solely upon its relationship to a granted topic of legislation. This is not to deny that the extent of the impact upon, or control of, a State or the exercise of its powers and functions by the Commonwealth Act may not induce the conclusion that that Act is in substance a law with respect to the State, its powers or functions and so invalid for want of a granted subject matter. (at p374)

25. The plaintiff's submissions did not in terms go so far as to say that the inroad made by the Act upon the governmental functions of the State was so great that the State and those functions became in substance the subject matter of the Act, that it became an Act with respect to the State rather than an Act with respect to taxation. The submission was that, though an Act with respect to taxation, it transgressed a limitation upon the legislative power because by imposing the tax upon the State it impaired the exercise by the State of its governmental functions and thus impinged upon its independence as a State. (at p374)

26. In the first place I am unable to see how this submission can be accepted consistently with the decision of this Court in the Steel Rails Case [1908] HCA 28; (1908) 5 CLR 818 , bearing in mind that it was accepted in the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 upon the basis of the principles there laid down. But in any case, in my opinion, the statement that the imposition of this tax threatens or impairs the independence of the State is, as a statement of a legal conclusion, unwarranted. In some ways, though of course significantly different, it is reminiscent of the earlier view that the taxation of the personal income of a public servant, albeit, including his salary as such, compromised the independence of the government which employed him. No doubt to the extent that the State pays the amount of the tax, it may have less money at its disposal for the pursuit of its own policies. But that, in my opinion, does not mean either that the law is a law with respect to a State or its functions, or that its independence as a State is threatened. So far as the submission depends on the alleged distinction between governmental and other functions of a State, as I point out later, in my opinion, this supposed distinction cannot afford any criterion of validity. (at p374)

27. It will be convenient at this point to notice an argument founded on the statement to be found in the reported cases that the Commonwealth may not by its law "discriminate" against a State. In the case of a law made under s. 51 (ii.) there may be no discrimination between States or parts of States. No case for invalidity based on this express provision was sought to be made. Nor could it be said that the Act "singled out" the State for special or separate treatment. But it was said that the Act did "discriminate" against the State in so far as it excluded the wages paid by a State to teachers and staff employed in a school conducted by or on behalf of a State from the exempting provisions of s.

15 of the Act. That the Act treats such wages differently from the way it treats wages paid by a denominational or independent school and in that sense discriminates may be accepted. But it is almost of the nature of a law of taxation that it selects those who are to be subject to the tax it imposes. Frequently there are exemptions of which only some may have the advantage. In this case, a State is not given the benefit of an exemption. But does the presence in the statute of such "discrimination" render the statute even pro tanto invalid? (at p375)

28. Although, as a convenient, though perhaps with great respect not always an exact form of expression, it is said in various judgments of Justices of this Court that a law "discriminating" against a State would be invalid, in my opinion, the discriminating nature of a legislative provision will not itself be definitive of invalidity. If I might borrow what, with respect, seems to me, an apt expression from the argument of Fullagar K.C., as Mr. Justice Fullagar then was, in Riverina Transport Pty. Ltd. v. Victoria [1937] HCA 33; (1937) 57 CLR 327, at p 337 "discrimination is merely a means to a conclusion", the conclusion being that the legislation is not upon the granted subject matter but upon some other subject matter not within legislative competence. Sir John Latham, who discussed discrimination as a basis of invalidity in Riverina Transport Pty. Ltd. v. Victoria [1937] HCA 33; (1937) 57 CLR 327 and in West v. Commissioner of Taxation (N.S.W.) [1937] HCA 26; (1937) 56 CLR 657 , said in Melbourne Corporation v. The Commonwealth [1947] HCA 26; (1947) 74 CLR 31 as to legislation discriminating against a State :

> "In my opinion, the reason why such legislation is invalid
> is that what is called 'discrimination' shows that the
> legislation
> is really legislation by the Commonwealth with respect
> to a State or State function as such and not with respect to
> the subject in respect of which it is sought to bind the State.
> . . . "

With due respect I agree with this analysis. To be definitive of validity the "discrimination" must be of that kind which leads to a relevant conclusion as to the substantial subject matter of the law. (at p375)

29. In the present case even if it be supposed that the provisions to which I have called attention are truly discriminating, their presence in the legislation, in my opinion, does not afford any reason to conclude that the Act is not upon a granted subject matter. The mere existence of the different provisions in the Act affecting the State does not, in my opinion, invalidate the Act or any part of it. (at p376)

30. I should now deal with the submission that the subject matter of taxation, because of the extensive effect a law on that topic may have, has an inherent limitation which excludes a State from its ambit. I am unable to accept such a submission. The argument offered in support of it seems to me little, if anything, more than an attempt to construct a legal safeguard against an apprehended abuse of a power to make a law of taxation binding the Crown in right of a State. But the fallacy of attempting to erect such a limitation is clearly disposed of by the Court in the Engineers' Case (1920) 28 CLR, at p 151 . The language of s. 51 (ii.) and its ascertained meaning by construction, in my opinion, gives no warrant for any limitation upon the legislative topic of taxation beyond those expressly made in s. 51 (ii.) itself and by s. 114 of the Constitution. (at p376)

31. From a passage in the judgment of the majority justices in the Engineers' Case [1920] HCA 54;

(1920) 28 CLR 129 the plaintiff sought to get some support for the proposition that there was something so special about the power to tax that of necessity there was within the grant of the legislative power a limitation excepting the Crown in right of the State from the ambit of the power. So much weight was put upon this passage and such comments have been made upon it in subsequent dicta that I think it worthwhile to set out the passage in full :

> "It is proper, at the outset, to observe that this case does not involve any prerogative 'in the sense of the word', to use the phrase employed by the Privy Council in Theodore v. Duncan (1919) AC 696, at p 706 , 'in which it signifies the power of the Crown apart from statutory authority'. Though much of the argument addressed to us on behalf of the States rested on the prerogative, this distinction was not observed, but it exists, and, so far as concerns prerogative in the sense indicated, it is unnecessary to consider it. In several recent cases the Judicial Committee has had the broader question under consideration, as in Canadian Pacific Railway Co. v. Toronto Corporation (1911) AC 461 and Bonanza Creek Gold Mining Co. v. The King (1916) 1 AC 566 , but in none of these was it found necessary to determine it. It is manifest that when such a question is involved in a decision, the nature of the prerogative, its relation to the Government concerned, and its connection with the power under which it is sought to be affected, may all have to be considered. In the Bonanza Creek Case (1916) 1 AC, at p 587 Lord Haldane, speaking for the Privy Council, after favouring an interpretation of the British North America Act by which certain rights and privileges of the Crown would be reserved from Canadian legislative power, proceeded to say : - 'It is quite consistent with it' (that interpretation) 'to hold that executive power is in many situations which arise under the statutory Constitution of Canada conferred by implication in the grant of legislative power, so that where such situations arise the two kinds of authority are correlative. It follows that to this extent the Crown is bound and the prerogative affected.' In this case we have to consider the effect of certain statutory authority of the States, but in relation to pl. xxxv. only, and it is necessary to insert a word of caution. If in any future case concerning the prerogative in the broader sense, or arising under some other Commonwealth power - for instance, taxation,

- the extent of that power should come under consideration
so as to involve the effect of the principle stated in the passage just quoted from the Bonanza Creek Case, and its application to the prerogative or to the legislative or executive power of the States in relation to the specific Commonwealth power concerned, the special nature of the power may have to be taken into account. That this must be so is patent from the circumstance that the legislative powers given to the Commonwealth Parliament are all prefaced with one general express limitation, namely, 'subject to this Constitution', and consequently those words, which have to be applied seriatim to each placitum, require the Court to consider with respect to each separate placitum, over and beyond the general fundamental considerations applying to all the placita, whether there is anything in the Constitution which falls within the express limitation referred to in the governing words of s. 51. That inquiry, however, must proceed consistently with the principles upon which we determine this case, for they apply generally to all powers contained in that section."
(1920) 28 CLR, at pp 143, 144

Two dicta of Sir Owen Dixon ought also to be quoted. In Australian Railways Union v. Victorian Railways Commissioners (1930) 44 CLR, at p 390 , Sir Owen said :

"We ought not to examine the correctness of the rule adopted by the majority of the Court in the Engineers' Case, for the interpretation of the legislative powers of the Parliament.
This rule I understand to be that, unless, and save in so far as, the contrary appears from some other provision of the Constitution or from the nature or the subject matter of the power or from the terms in which it is conferred, every grant of legislative power to the Commonwealth should be interpreted as authorizing the Parliament to make laws affecting
the operations of the States and their agencies, at any rate if the State is not acting in the exercise of the Crown's prerogative
and if the Parliament confines itself to laws which do not discriminate against the States or their agencies."

In West v. Commissioner of Taxation (N.S.W.) (1937) 56 CLR, at p 682 , Sir Owen said:

"The principle" i.e. established by the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129
"is
that whenever the Constitution confers a power to make laws in respect of a specific subject matter, prima facie it is to be

understood as enabling the Parliament to make laws affecting the operations of the States and their agencies. The prima facie meaning may be displaced by considerations based on the nature or the subject matter of the power or the language in which it is conferred or on some other provision in the Constitution. But, unless the contrary thus appears, then, subject to two reservations, the power must be construed as extending to the States. The first reservation is that in the Engineers' Case the question was left open whether the principle would warrant legislation affecting the exercise of a prerogative of the Crown in right of the States. The second is that the decision does not appear to deal with or affect the question whether the Parliament is authorized to enact legislation discriminating against the States or their agencies." (at p378)

32. What is sought to be said by the plaintiff is that the Court in the passage quoted from the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 excepted the legislative power with respect to taxation from the generality of its judgment as expressed in the other passages which I have already quoted from that case. But, in my opinion, the submission is founded on a misconception of what the Court there said. (at p378)

33. Perhaps in this connexion it is well to remind ourselves that we are not construing judgments. Our task is to construe the Constitution which is always the text. However in so far as it is said that the Court has established by decision a constitutional doctrine it is proper to examine closely the decisions both to ascertain precisely what was decided and on appropriate occasions to determine whether what was decided is currently acceptable. It is of course what the court as a court says and not the opinion of single justices unless adopted by a majority of the justices of the court, which establishes doctrine. Further, what Isaacs J. said in Australian Agricultural Company v. Federated Engine Drivers and Firemen's Association [1913] HCA 41; (1913) 17 CLR 261, AT P 278 is, in my respectful opinion, pre-eminently true in relation to the construction of the Constitution. (at p378)

34. In considering the passage from the Engineers' Case (1920) 28 CLR, at pp 143, 144 which I have set out, the first observation that should be made is that in truth the justices did not single out the power with respect to taxation as an exception but merely used it as an instance of those legislative powers whose exercise might be thought likely to give rise to a conflict between the prerogative of the Crown and legislation based on a granted power. Secondly, it is of paramount importance to understand what was the reservation which their Honours were minded to make. This is best understood, it seems to me, by examining the two cases to which reference is made in the judgment from which I have quoted, namely Canadian Pacific Railway Co. v. Toronto Corporation (1911) AC 461 and Bonanza Creek Gold Mining Co. v. The King (1916) 1 AC 566 . These cases arose under the Canadian Constitution. In the case of Canada, Lieutenant Governors of the Provinces as well as the Governor-General are viceroys of the Crown through whom the prerogatives of the Crown in general may be exercised ; they are not as are the Governors of the Australian States merely exercising local functions for the Crown including the prerogative in relation to local matters. In the case of a Constitution such as that of Canada with a distribution of legislative power between legislatures and the maintenance of the Crown's prerogative in more than one representative, a question might arise whether a law made by the Canadian House of Representatives is in conflict with an exercise of the prerogative of the Crown through the viceroy

Lieutenant Governor of the Province. However, Lord Haldane in the Bonanza Creek Gold Mining Co. v. The King (1916) 1 AC 566 was at pains to point to the radical distinction in relation to the prerogative of the Crown between the situation under the Canadian Constitution and that which arises under the Australian Constitution. He said :

> "There is no provision in the British North America Act corresponding even to s. 61 of the Australian Commonwealth Act, which, subject to the declaration of the discretionary right of delegation by the Sovereign in ch. 1, s. 2, provides that the executive power, though declared to be in the Sovereign, is yet to be exercisable by the Governor-General."
> (1916) 1 AC, at pp 586, 587

This observation of his Lordship is very much in line with what I have called the basic reason for the Court's decision in the Engineers' Case [1920] HCA 54[1920] HCA 54; ; (1920) 28 CLR 129 . which was that the Crown had submitted itself to the legislative powers of the Commonwealth to the full extent of each granted power and that therefore the extent to which the Crown in right of the Commonwealth or in right of a State is bound by any law within the granted authority of the Parliament depends solely on the indication which the law itself gives of an intention to bind the Crown. The only question is one of statutory construction, the Crown being a party to the Commonwealth law. (at p379)

35. In any case it is clear that their Honours did not examine in any depth the question of any possible collision between Commonwealth law and an exercise of the Crown's prerogative because as they said the case before them did not involve any question as to the prerogative. Having closely studied the two cases on appeal from Canada the most it seems to me that can be taken from their Honours' reservation is that the question whether a Commonwealth law made under a granted power can affect an exercise of the Crown's prerogative might need some time to be examined. In my opinion, however, on such examination it will be found that the possibility against which their Honours thought fit to enter a caveat is really not one that can occur under the Australian Constitution. That their Honours did not intend in the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 to depart from the generality of their decision can be seen in the last sentence of the passage which I have quoted. They were at pains to point out that the inquiry as to whether there was any limitation as to the prerogative "must be ascertained consistently with the principles upon which we determine this case for they apply generally to all the powers contained in that section, that is to say, s. 51". (at p380)

36. I have already touched upon portion of the quotations from the judgment of Sir Owen Dixon in Australian Railways Union v. Victorian Railways Commissioners [1930] HCA 52; (1930) 44 CLR 319 and in West v. Commissioner of Taxation (N.S.W.) [1937] HCA 26; (1937) 56 CLR 657 . I have also indicated my view as to the concept of a prima facie nature of the meaning of a granted legislative power. I should now wish to observe that whereas in the passage firstly quoted by me, Sir Owen referred to the "Crown's prerogative", in the passage quoted from West's Case (3) he refers to "the exercise of a prerogative of the Crown in right of the States". In my most respectful opinion this is an unwarranted extension of what was the subject of reservation in the Engineers' Case (1). Indeed, it was the distinction between the prerogative of the Crown regarded as an indivisible entity and the exercise of local functions by an agency of the Crown which was fundamental to the decision of the Engineers' Case (1). I have already sufficiently expressed myself with respect to the "reservation" in the Engineers' Case (1) to indicate why I am respectfully unable to accept the latter

statement of Sir Owen as to the extent of that reservation. (at p380)

37. I ought at this point to notice a submission that in some way the opening words of s. 51 "subject to this Constitution" opened the way for an implication limiting the granted powers of the Parliament. With every respect to the judicial source of this submission, I am unable to accept it. See West v. Commissioner of Taxation (N.S.W.) [1937] HCA 26; (1937) 56 CLR 657 . It may be granted that the quoted words import limitations upon the legislative power given by s. 51. For example, they introduce the prohibition of s. 92 and s. 99 of the Constitution. But for reasons I have already expressed, I find no warrant in the Constitution for an implication of the kind submitted by the plaintiff. It would indeed be strange in my opinion that in so fundamental a matter as that to which this case relates, a limitation upon Commonwealth power was to be extracted from such prefatory words : or for that matter by implication at all. (at p381)

38. To restate my conclusions, the principle to be derived from the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 is that the Commonwealth Parliament in exercising its legislative power as to any of the enumerated topics is able by its law to bind the Crown in right of a State except in relation to those topics which contain and express exception or limitation in that respect and except in so far as s. 114 extends. Instances of subject matter with respect to which there could be no occasion to bind the Crown in right of a State are obvious and do not need to be mentioned. Whether or not a Commonwealth law purporting to bind the Crown in right of the State is a valid law depends, in my opinion, entirely upon whether or not it is a law on a stated subject matter. If it singles out a State for particular treatment (and such singling out is the form of discrimination which in my opinion may be relevant), it may be concluded that the law is not a law on a stated subject matter but is a law the subject matter of which is the State or a power or function of the State. Again the nature of the provisions of the Act may lead to the conclusion that it is in substance a law with respect to a State or its powers or functions. That subject matter is not vouchsafed to the Commonwealth. (at p381)

39. I turn now to Melbourne Corporation v. The Commonwealth [1947] HCA 26; (1947) 74 CLR 31 . Reliance was placed by the Solicitor-General for Victoria upon some of the opinions expressed by the justices in that case. The section of the Commonwealth law there in question, namely s. 48 of the Banking Act 1945 (Cth) though cast in the form of a direction to banks was in reality an endeavour to compel the States and its authorities including their local government authorities to bank with the Commonwealth Bank. Rich J. says :

> "In my opinion, the pith and substance of s. 48, however ingeniously expressed, is that a State or an authority of a State, including a local governing authority, must have the consent of the Treasurer in order to become the customer of a bank."
> (1947) 74 CLR, at p 67

The section only applied to States and their authorities. They were thus singled out and a legislative provision made as to them and them alone. The legislative provision was as to the manner in which they might hold their funds. That the subject matter of the section was the State in relation to the custody of the funds could plainly be seen. That that subject matter was not granted to the Commonwealth was plain enough. Of course, a reason why such a subject matter was not available to the Commonwealth was that the continued integrity of the States was just not possible if laws could be validly made by the Commonwealth on that subject matter. Consequently frequent

reference is to be found in the reasons of the participating justices to the undoubted truth that the Constitution contemplates the continued existence of the States. This is expressed by saying that the Commonwealth may not "aim" its legislation against the States ; or, that the States cannot be singled out and taxed as States in respect of some exercise of their functions. But these in my respectful opinion are merely forms of expressing the legal principle that legislation of the kind described is in substance legislation upon or with respect to the States themselves and their functions as such. Such a law is "not justified by the power to make laws with respect to banking". There is however no ratio decidendi common to those justices who formed the majority of the participating justices in Melbourne Corporation v. The Commonwealth [1947] HCA 26; (1947) 74 CLR 31 . It is not permissible to construct such a ratio by the aggregation of various elements from separate reasons given by their Honours (see Great Western Railway Company v. Owners of S.S. Mostyn per Viscount Dunedin (1928) AC 57, at pp 73, 74). But, in my opinion, the real ground of the decision and, in any case, the only acceptable ground, is that s. 48 of the Banking Act lacked an appropriate subject matter. (at p382)

40. Any other view must, in my respectful opinion, involve concepts incapable of exact expression and certainly of practical application. For example, the concept of an "undue" interference with State functions attracting invalidity provides but a question begging formula. And to attempt to use a distinction between governmental and other functions of a State in the modern world as a legal criterion of validity is, in my opinion, without promise. New York v. United States [1946] USSC 13; (1946) 326 US 572 (90 Law Ed 326) , to my mind, illustrates the difficulties without affording any sure guide to their resolution. In my opinion, the only satisfactory principle is that which the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 adopts, namely, that to be valid the Commonwealth law must be on a granted subject matter. Being in substance on such a matter, it may bind the Crown in right of a State. But States and their functions are not matters committed to the Parliament. In my opinion, application of these principles, and the determination of the subject matter of a law, as with all its difficulties, we are accustomed to do, will ensure the continuance of States as such, according to the Constitution. I respectfully agree with Sir John Latham when he says in Melbourne Corporation v. The Commonwealth (1947) 74 CLR, at p 61 that "the Commonwealth Parliament has no power to make laws with respect to State governmental functions as such. . . . It is upon this ground, in my opinion, that what is called 'discriminatory' legislation may properly be held to be invalid". On the other hand, I am unable to agree that there is a separate ground of invalidity namely "undue interference with the performance of what are clearly functions of government". If, as I have already said, the provisions of an Act because of the nature and extent of their application to the State or its functions can be said to be in substance a law with respect to the State or its functions, the provisions will be beyond the competence of the Parliament. But such "interference" with the exercise of the powers or functions by a Commonwealth Act which otherwise would be within power will not invalidate that Act unless the nature and extent of such interference requires the conclusion that those powers or functions are in reality the subject matter of the Act. (at p383)

41. In my opinion, the power of the Parliament with respect to taxation is not in any wise excepted from the basic principle that a valid law made by the Parliament may bind the Crown in right of a State according to its terms. (at p383)

42. Therefore, the accepted principles of construction of the Constitution as expounded in Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. (2) clearly, in my opinion, require the allowance of the demurrer to the statement of claim. (at p383)

McTIERNAN J. The State of Victoria claims, as the Crown in right of that State, a declaration that it is not liable to pay pay-roll tax to the Commonwealth, notwithstanding that, according to the Pay-roll Tax Assessment Act 1941-1969 (Cth), the Crown in right of a State is liable to pay such tax to the Commonwealth. The claim is made particularly in respect of pay rolls of government departments. Liability to pay the tax is laid on an employer who pays wages. The tax is levied on the wages and is payable in respect of the wages. The long title of the Pay-roll Tax Act 1941 (Cth) declares that the subject matter of the tax is the "payment of wages". This is repeated by the long title of the Pay-roll Tax Assessment Act 1941-1969 (Cth). The taxpayers under the Acts are employers. Some belong to the private sector of the economy, others to the part of the public sector marked out by the statutory definition of "employer". A State is included under the name of the Crown in the right of a State, in the definition. The term "wages" is also the subject of a statutory definition. This applies generally to wages, salary etc. payable to any employee as such whether the employer is a government or a private employer. (at p384)

2. The first question is whether the Act is beyond the power which s. 51 (ii.) of the Constitution grants to the Commonwealth Parliament. The statement of claim alleges, as an example of the unconstitutional operation of the Act, that it purports to make the Crown in right of the State of Victoria liable to pay the tax, which the Pay-roll Tax Act 1941 (Cth) imposes, in respect of the remuneration of the staff of the State departments concerned with governmental functions. (at p384)

3. A question, raised by the argument put forward on behalf of the State, is whether the Parliament is able to make a law under s. 51 (ii.) binding on the Crown in the right of a State. Section 51 (ii.) is, of course, the taxation power of the Commonwealth. The term "taxation" does not mean in the Constitution only tax paid by a subject. The Commonwealth Constitution Act establishes the supremacy throughout the Commonwealth of all laws validly made under the Constitution. The Act obviously applies to any law validly made under s. 51 (ii.) of the Constitution. The Crown in right of a State is subordinate to the Crown in right of the Commonwealth to the extent of legislative power granted by the Constitution to the Commonwealth Parliament. The Crown is a single juristic person but it has these two capacities respectively. It is clearly consistent with the federal system under the Constitution that the Crown in right of a State should be bound by a law made pursuant to s. 51 (ii.) of the Constitution to pay tax to the Crown in right of the Commonwealth (See the Steel Rails Case [1908] HCA 28; (1908) 5 CLR 818 and Sutton's Case [1908] HCA 26[1908] HCA 26; ; (1908) 5 CLR 789). The suggestion that the word "taxation" in s. 51 (ii.) means taxation of subjects only and imposes a limitation on that basis upon the power granted by the placitum to the Commonwealth Parliament, has no force. It is implicit in the judgment of the majority in the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 , that the Parliament has power to make a law under s. 51 (ii.) which is binding on the several States. If not, the relevance of the reference in the judgment to the taxation power is not apparent. That judgment contains the following passage[1920] HCA 54; , (1920) 28 CLR 129, at p 144 "the legislative powers given to the Commonwealth Parliament are all prefaced with one general express limitation, namely, 'subject to this Constitution', and consequently those words, which have to be applied seriatim to each placitum, require the Court to consider with respect to each separate placitum, over and beyond the general fundamental considerations applying to all the placita, whether there is anything in the Constitution which falls within the express limitation referred to in the governing words of s. 51. That inquiry, however, must proceed consistently with the principles upon which we determine this case, for they apply generally to all powers contained in that section". The powers are those granted by s. 51 of the Constitution - and include the taxation power. The question which the Court had to consider in the Engineers' Case was whether the States were bound by a law made under s. 51 (xxxv.). (at p385)

4. The pay of a person in the employment of a State government is not beyond the reach of s. 51 (ii.). The person who received the pay can be obliged by a law made under s. 51 (ii.) to pay to the Commonwealth income tax levied on the pay. The present tax is not of the nature of income tax. In my opinion a law of the Commonwealth levying pay-roll tax on the pay of persons in private employment and in the employment of the Crown in right of a State, and providing that the tax be paid by their employers to the Commonwealth, is wholly a law with respect to taxation. The inclusion of the Crown in the right of a State, amongst others, in the definition of "employer" is not contrary to any restriction or limitation imposed by the Constitution upon s. 51 (ii.). The payment by the Crown in right of the State of the remuneration of its officers and employees who work in the State departments of government ought not to be declared immune from the tax here in question. The tax is not laid on the appropriation of revenue to pay for services. If it were, the question would arise whether the tax, so far as it burdened that activity, was, in substance, a law with respect to the States. The Constitution does not grant power to the Commonwealth Parliament to make a law of that kind. Conceding that the functions of the departments mentioned in the statement of claim pertain to affairs which are distinctive of government, the question which then arises is whether upon the true construction of the Constitution there is a necessary implication by which the Commonwealth is restrained from making a law under s. 51 (ii.) levying a tax on the pay of persons employed in the departments and making the State liable to pay the tax. In considering this question it should be borne in mind that the employment of a person to perform services, where the Crown is the employer, is an ordinary transaction such as is engaged in between subject and subject and that payment for services is an activity common to employment by governments and employers in the private sector. It is not unconstitutional to tax equally payment of salaries or wages or other remuneration by private employers and State governments as such. (at p386)

5. In my judgment the demurrer should be allowed. (at p386)

MENZIES J. The State of Victoria has, by action in this Court, challenged the power of the Parliament of the Commonwealth to require the State to pay pay-roll tax upon wages paid by it to its Crown servants, claiming that the imposition is contrary to implications to be derived from the federal nature of the Australian Constitution. The Commonwealth has demurred. (at p386)

2. That the Constitution is of a federal nature is beyond question. The Constitution not only establishes the Commonwealth ; it continues the constitution of the federating colonies as States of the Commonwealth : s. 106. The preamble to the Constitution Act recites that the people have agreed "to unite in one indissoluble Federal Commonwealth under the Crown . . . and under the Constitution". (at p386)

3. Does the fact that the Constitution is "federal" carry with it implications limiting the law-making powers of the Parliament of the Commonwealth with regard to the States ? (at p386)

4. To this question I have no doubt, both on principle and on authority, that an affirmative answer must be given. A constitution providing for an indissoluble Federal Commonwealth must protect both Commonwealth and States. The States are not outside the Constitution. They are States of the Commonwealth : s. 106. Accordingly, although the Constitution does, clearly enough, subject the States to laws made by the Parliament, it does so with some limitation. (at p386)

5. Authority supports what principle dictates: Melbourne Corporation v. The Commonwealth [1947] HCA 26; (1947) 74 CLR 31 . This decision, both accepting and taking into full account the authority of the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 - which both destroyed the

doctrine of the immunity of instrumentalities and established the ruling principles of constitutional interpretation - leaves it in no doubt that implications limiting Commonwealth legislative power over States do arise from the federal nature of the Constitution. There it was decided that a Commonwealth law, i.e. s. 48 of the Banking Act 1945, prohibiting banks from conducting banking business for a State and for any authority of the State, including a local government authority, was invalid. It had been argued that the law in question was not a law within s. 51 (xiii.) because it was not a law with respect to banking, and the extent to which this contention was accepted may be open to argument notwithstanding its expressed rejection by Rich J. [1947] HCA 26; (1947) 74 CLR 31, at p 64 and by Starke J. (1947) 74 CLR 31, at pp 69, 70 . It was, however, also argued that the grant of power in s. 51 (xiii.) must be read subject to limitations in favour of the State because it appears in a federal Constitution, so that, even if s. 48 could be treated as a law with respect to banking, it was nevertheless invalid because its operation interfered with the States in the exercise of their governmental functions. This second contention was clearly accepted by a majority of the court: see Rich J. (1947) 74 CLR, at p 67 , Starke J. (1947) 74 CLR, at pp 74, 75 , and Dixon J. (1947) 74 CLR, at pp 83, 84 . It appears also to have been accepted by Latham C.J. (1947) 74 CLR, at pp 55, 56, 60 . Williams J. said (1947) 74 CLR, at pp 99, 100 :

> "Section 48 is legislation which clearly discriminates against the States and their agencies. We were not asked, and I would not be prepared to hold that legislation which conforms to the language of a placitum is necessarily invalid if it discriminate against a State or States. Many emergencies could arise which would justify the Commonwealth enacting legislation under the defence power during hostilities which would discriminate against a State or States. But the presence of discrimination points strongly to the law being aimed at the States, and if the law is in pith and substance a law which seeks to give directions to the States as to the manner in which they shall exercise their executive, legislative or judicial governmental functions it is not a law for the peace, order and good government
> of the Commonwealth, but an unlawful intervention in the constitutional affairs of the States."

This statement of the learned judge which, while not denying that the law was a law with respect to banking, did virtually accept the second contention made on behalf of the Corporation asserting the existence of some limitation upon Commonwealth legislative power arising from the federal nature of the Constitution. (at p388)

6. That it was this second contention which prevailed, can, I think, be demonstrated by recalling the issue as it arose in the case. The action was not an action by a State; it was an action by a municipality - the Melbourne Corporation. If a law prohibiting a bank from conducting banking business for specified persons was not in itself a law with respect to banking, then it would not have been necessary to be concerned with the position of the States vis-a-vis the Commonwealth Parliament. The whole thrust of the case for the Corporation depended, however, upon the circumstance that it was governed by a section which prevented banks from conducting business for States in circumstances where the prohibition against banking for municipalities could not be severed from the prohibition against banking for States: see Starke J. (1947) 74 CLR, at p 70 . The decision, however it may be explained, depended entirely upon the special position of the States

under the Constitution. (at p388)

7. Although I am not in doubt that a majority of the Court held the section invalid upon a more fundamental ground than that s. 48 was not a law with respect to banking, it is difficult to state the ratio decidendi of the Court's decision. Two bases appear and in the judgments they seem to coalesce. They are first that s. 48 imposed a special burden on the States; secondly that the operation of s. 48 was to interfere with the States carrying on their functions of government. (at p388)

8. It was, I think, part of the decision of Latham C.J. that the law was invalid because laws which discriminate against States or which unduly interfere with States in the exercise of their functions of government are not laws authorized by the Constitution, even if they are laws with respect to a subject matter within the legislative power of the Parliament of the Commonwealth. After discussing the American authorities, the learned Chief Justice said (1947) 74 CLR, at p 60 :

> "The relevant result which emerges is the same as that which is suggested by the more recent cases in this Court to which reference has been made - namely that federal laws expressed in general terms may apply to the States (as was shown in the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129) but that federal laws which 'discriminate' against the States are not laws authorized by the Constitution. Laws 'discriminate' against the States if they single out the States for taxation or some other form of control and they will also be invalid if they 'unduly interfere' with the performance of what are clearly State functions of government."

Later in his judgment the Chief Justice explained that Commonwealth laws discriminating against States fail because "the legislation is really legislation by the Commonwealth with respect to a State or State functions as such and not with respect to the subject in respect of which it is sought to bind the State". Similarly, the Chief Justice explained why it was, in his opinion, that laws unduly interfering with the performance by the States of the functions of government were invalid. He said (1947) 74 CLR, at p 62 :

"In my opinion the invalidity of a federal law which seeks to control a State governmental function is brought about by the fact that it is in substance a law with respect to a subject as to which the Commonwealth Parliament has no power to make laws."

Rich J. was more explicit. He said (1947) 74 CLR, at p 66 :

"There is no general implication in the framework of the Commonwealth Constitution that the Commonwealth is restricted from exercising its defined constitutional powers to their fullest extent by a supposed reservation to the States of an undefined field of reserved powers beyond the scope of

Commonwealth interference. But this is always subject to the provisions of the Commonwealth Constitution itself. That 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 because inconsistent with the express provisions of the Constitution, and it is to be noted that all the powers conferred by s. 51 are conferred 'subject to this Constitution'. Such action on the part of the Commonwealth may be invalid in two classes of case, one, where the Commonwealth
singles out the States or agencies to which they have delegated some of the normal and essential functions of government,
and imposes on them restrictions which prevent them from performing those functions or impede them in doing so ; another, where, although the States or their essential agencies are not singled out, they are subjected to some provision of general application, which, in its application to them, would so prevent or impede them. Action of the former type would be invalid because there is nothing in the Commonwealth Constitution to authorize such action by the Commonwealth. A general income tax Act which purported to include within its scope the general revenues of the States derived from State taxation would be an instance of the latter."

Starke J. was of a like opinion. He said (1947) 74 CLR, at p 70 :

"The federal character of the Australian Constitution carries implications of its own. As I have said before, 'the government of Australia is a dual system based upon a separation
of organs and of powers. The maintenance of the States and their powers is as much the object of the Constitution as the maintenance of the Commonwealth and its powers. Therefore
it is beyond the power of either to abolish or destroy the other' (South Australia v. The Commonwealth [1942] HCA 14; (1942) 65 CLR 373, at p 442 ; R. v. Commonwealth Court of Conciliation and Arbitration ; Ex parte Victoria [1942] HCA 39; (1942) 66 CLR 488, at p 515). The same principle was applied to the dual system of government under the Constitution of the United States of America. 'Neither Gvoernment may destroy the other nor curtail in any substantial manner the exercise of its powers' (Metcalf v. Mitchell

[1926] USSC 17; (1926) 269 US 514, at p 523 (70 Law Ed 384, at p 392)
)."

Dixon J. took narrower ground and based his judgment upon the circumstance that the section imposed a special burden on the States. After referring to the dual aspect of laws with respect to a subject within the powers of the Parliament which affect the functions of the States, his Honour said (1947) 74 CLR, at pp 79-81 :

"Conceivably that connexion (i.e. with the subject of legislative power) may be made so insubstantial, tenuous or distant by the character of the control or restriction the law seeks to impose upon State action that it ought not to be regarded as enacted with respect to the specified matter falling within the Commonwealth power. If so, the law fails simply because it cannot be described as made with respect to the requisite subject matter. But, if in its second aspect the law operates directly upon a matter forming an actual part of a subject enumerated among the federal legislative powers, its validity could hardly be denied on the simple ground of irrelevance to a head of power.
. . . .
In the case of most legislative powers assigned to the Commonwealth
some ingenuity would be needed to base a law squarely upon the subject matter of the power and at the same time effect by it a restriction or control of the State in respect of some exercise of its executive authority or for that matter in respect of the working of the judiciary or of the legislature of a State. The difficulty of using most federal powers in that way arises from the character of the subjects of the powers. It is, for instance, difficult to see how any law based on the power with respect to lighthouses, astronomical observations, fisheries, weights and measures, bills of exchange or marriage could be aimed at controlling States in the execution
of their functions. But to attempt to burden the exercise of State functions by means of the power to tax needs no ingenuity. . . .
. . . .
What is important is the firm adherence to the principle that the federal power of taxation will not support a law which places a special burden upon the States. They cannot be singled out and taxed as States in respect of some exercise of their functions. Such a tax is aimed at the States and is an attempt to use federal power to burden or, may be, to control State action. The objection to the use of federal power to single out States and place upon them special burdens or disabilities does not spring from the nature of the power of taxation. The character of the power lends point to the

objection but it does not give rise to it. The federal system itself is the foundation of the restraint upon the use of the power to control the States. The same constitutional objection applies to other powers, if under them the States are made the objects of special burdens or disabilities." (at p391)

9. The basis of the judgment of Williams J. has already been stated. (at p391)

10. McTiernan J. dissented. (at p391)

11. It is apparent that the decision in Melbourne Corporation v. The Commonwealth [1947] HCA 26; (1947) 74 CLR 31 , although of far-reaching effect, makes no inroad upon the rule established by the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 that a power to make laws with respect to the subject matter prima facie enables the Parliament, by a general law, to bind the States, nor does it require any reconsideration of the cases which establish that a Commonwealth law with respect to taxation may validly extend to the States : R. v. Sutton (1908) 5 CLR 789 and Attorney-General (N.S.W.) v. Collector of Customs (N.S.W.) [1908] HCA 28; (1908) 5 CLR 818 . (at p391)

12. It follows, therefore, that, if the Pay-roll Tax Assessment Act 1941-1969 (Cth) and the Pay-roll Tax Act 1941-1969 (Cth) cannot, as they purport to do, bind the State of Victoria, it must be because of some special consideration which puts the State beyond the exercise of the Commonwealth taxation power which is to be found in the two Acts. (at p391)

13. With the possible exception, with regard to s. 15 (bb) of the Pay-roll Tax Assessment Act, it was not contended that there was discrimination against the States in the sense that there were imposed upon the States obligations which did not fall upon other taxpayers. Tax is levied on all wages paid by any employer including the Crown in the right of the State, ss. 3 and 12, but no special obligation is imposed upon an employer who is a State. It is apparent, therefore, that so much of the decision in Melbourne Corporation v. The Commonwealth (1), which protects a State from Commonwealth laws imposing special burdens, cannot assist the State here. It follows, therefore, that, if the Acts now in question do not apply to the State of Victoria, it can only be upon the ground that their operation does interfere with the performance by the State of its functions of government. (at p392)

14. The difficult and important task of formulating a limitation of the kind for which the State here contends is not, I think, to be undertaken except in a case where the law impugned does operate to interfere with a State carrying out its constitutional functions of government. In Melbourne Corporation v. The Commonwealth [1947] HCA 26; (1947) 74 CLR 31 the Court was dealing with such a law and the justices said sufficient to dispose of that case. What was said, as has already appeared, was not uniform and there is not to be found in that case an authoritative formulation by the Court of a limitation that can be applied in all circumstances. I do not propose to offer an exhaustive formulation here because I am satisfied that the requirement to pay pay-roll tax does not constitute an interference with the States of the sort which could result in the invalidity of the laws which impose it. Of course the payment of the tax by an employer upon wages paid is a burden, whether or not the employer is a State. Every tax is a burden. This tax could not, however, be described as an interference with the function of employers who are not States. Such employers remain free to carry on their businesses as they choose. All that is required is that they pay the tax. Similarly, the payment of the tax by a State does not interfere with the performance of its functions.

Crown servants may still be employed at the will of the State. It was argued that, because the State needs Crown servants to carry out its functions of government, the payment of tax upon wages paid to such servants interfered with the performance of those functions. This I do not accept. At this point, I think, the argument for the State moved from the operation of the laws to their economic consequence, an entirely different matter. The most that can be said is that, because the State pays the tax to the Commonwealth, it has so much less money with which to carry out the functions of government. Such a consequence does not spell invalidity. The same sort of consequence follows, if, by reason of the imposition of a customs duty, a State has to pay the Commonwealth tax upon imports which it needs to carry out its functions, or if, by reason of an award of the Commonwealth Conciliation and Arbitration Commission, a State has to pay its railway employees higher salaries. None of such laws operate to interfere with the performance by the State of its constitutional functions. A Commonwealth tax upon State tax revenues would be an instance of a very different kind. (at p393)

15. For the foregoing reasons I have found no circumstance to take the tax here imposed outside the prima facie rule that a State may be bound by general laws made by the Commonwealth Parliament under the taxation power (s. 51 (ii.)). (at p393)

16. I should add that I do not find in s. 15 (bb) sufficient to warrant any conclusion that the Act does impose a special burden on the States. (at p393)

17. In the course of argument reference was made to s. 114 of the Constitution. In my opinion pay-roll tax is not a tax on property belonging to a State and s. 114 is not an exhaustive statement of the protection of the Commonwealth or of a State from the taxation laws of the other. (at p393)

18. In my opinion the demurrer should be allowed. (at p393)

WINDEYER J. The arguments in this case aroused questions that lie, ordinarily dormant, behind the words of the Constitution. (at p393)

2. How is the scope of a power expressly granted to the Commonwealth Parliament to be measured ? Are the words of the grant to be qualified in any way by tacit assumptions ? Is the Parliament, in its exercise of a power expressly given, controlled by any tacit limitations ? Varying judicial decisions and dicta bearing on these questions can be assembled, and with them can be put criticism and commentary, some of it distinctly polemic. As the questions are important in themselves, and bear directly upon the arguments that were advanced in this case, I shall presume and venture to state my own view of them, rather than merely repeat or adopt what has been said heretofore by others. (at p393)

3. Pay-roll tax, levied by the Commonwealth in accordance with the Pay-roll Tax Act 1941 (Cth) and the Pay-roll Tax Assessment Act 1941-1969 (Cth), is expressly levied upon the Crown in right of a State along with other employers. For thirty years State governments accepted the obligation thus imposed. Now the validity of the tax is challenged so far as it affects the States. It is said that it is beyond the power of the Commonwealth Parliament to subject the States to a tax calculated by reference to wages paid from a State treasury to State servants. The question, thus belatedly raised, is an offshoot of recent disagreements between State and Commonwealth governments as to the way in which revenue should be raised by, and apportioned between them. The matter comes to the Court as a purely legal question of the extent of the power of the Commonwealth Parliament under s. 51 (ii.) of the Constitution "to make laws for the peace, order, and good government of the

Commonwealth with respect to . . . Taxation ; but so as not to discriminate between States or parts of States". Nevertheless there were in the arguments for the States some distant echoes and muffled undertones of a conflict, of politics and policy, between assertions of State "sovereignty" and so-called "State rights" on one side and federal power and Commonwealth supremacy on the other - a controversy that is sometimes described as an issue between "federalists" and "centralists", each term being used as praise or abuse according to taste and persuasion. In federations of all kinds this has been a perennial controversy. That is well brought out in a passage from the paper "The Tyranny of Doctrine" that Professor Helen Shirley Thomas contributed to Essays in Legal History in Honour of Felix Frankfurter (1966), p. 531 :

> "It is common knowledge that federalism is a central feature of the American system of government. It is well known that the system is one of divided powers, and that the power distribution is made in a special way. The historical record of federalism the world over also makes it perfectly clear that where powers are divided according to the federal formula, conflicts over the exercise of power are absolutely inevitable. Anguished cries about the alarming growth of national power were heard throughout the land during the first administration of President George Washington, and they have been filling the air ever since. There has never been a time when serious claims were not being made regarding the alleged undue or dangerous expansion of national power at the expense of the states. Nor has there ever been a time when charges were not being made to the effect that the states were invading the legitimate sphere of national activity. Where two power systems exist side by side, disputes over jurisdiction are bound to arise.
> All branches of government, state and national, have a hand in resolving these disputes. Since we have a written constitution, however, and judicial review, the Supreme Court is not only involved in dealing with these disputes over power, but plays a prominent part in acting as an umpire of the system." (at p394)

4. But, unlike the Supreme Court of the United States, this Court, the Federal Supreme Court as the Constitution calls it, is not the umpire in conflicts arising from the terms of an agreement or treaty. Our task is simply to interpret and apply the provisions of the Constitution as a statute of the Imperial Parliament. That does not mean that it is not a statute of a special kind. It is. It is the instrument of government for Australia. It was enacted because, as the preamble to the Constitution Act states, the peoples of the Australian Colonies had agreed to unite in one indissoluble Federal Commonwealth under the British Crown and under the Constitution that the Act established. In 1908 Higgins J. used words that have not withered or grown sterile with the years. Nor is their vitality diminished by their having been said in the course of a dissenting judgment. His Honour said - in the Brewery Labels Case (Attorney-General (N.S.W.) v. Brewery Employ'es Union of N.S.W.) [1908] HCA 94[1908] HCA 94; ; (1908) 6 CLR 469, at pp 611, 612 :

> ". . . although we are to interpret the words of the

> Constitution
> on the same principles of interpretation as we apply
> to any ordinary law, these very principles of interpretation
> compel us to take into account the nature and scope of the
> Act that we are interpreting - to remember that it is a
> Constitution,
> a mechanism under which laws are to be made,
> and not a mere Act which declares what the law is to be." (at p395)

5. I have on other occasions adverted to differing legal consequences that flow from the different origins, historically and juristically, of our Constitution from that of the United States. I shall allude to that again here. I do so because to my mind the phrase "dual sovereignty", which we sometimes hear, is for law a misleading misnomer when applied to the Commonwealth of Australia. There is dual authority but only one sovereignty. The Commonwealth Constitution was enacted at Westminster in 1900 as a product of the assent and agreement of the peoples of the Australian Colonies. It was sought by Australians, not imposed upon them. The Constitution Act itself was carefully worded so as not to be coercive. Section 3 provided that Western Australia should not become part of the new Commonwealth unless Her Majesty was satisfied that the people of that Colony had agreed thereto. As an agreement of peoples, British subjects in British Colonies, and the enactment thereafter by the sovereign legislature of the British Empire of a law to give effect to their wishes, the Australian federation can be described as springing from an agreement or compact. But agreement became merged in law. The word "compact" is still appropriate but strictly only if used in a different sense - not as meaning a pact between independent parties, but as describing a compaction, a putting of separate things firmly together by force of law. The Colonies which in 1901 became States in the new Commonwealth were not before then sovereign bodies in any strict legal sense ; and certainly the Constitution did not make them so. They were self-governing colonies which, when the Commonwealth came into existence as a new Dominion of the Crown, lost some of their former powers and gained no new powers. They became components of a federation, the Commonwealth of Australia. It became a nation. Its nationhood was in the course of time to be consolidated in war, by economic and commercial integration, by the unifying influence of federal law, by the decline of dependence upon British naval and military power and by a recognition and acceptance of external interests and obligations. With these developments the position of the Commonwealth, the federal government, has waxed ; and that of the States has waned. In law that is a result of the paramount position of the Commonwealth Parliament in matters of concurrent power. And this legal supremacy has been reinforced in fact by financial dominance. That the Commonwealth would, as time went on, enter progressively, directly or indirectly, into fields that had formerly been occupied by the States, was from an early date seen as likely to occur. This was greatly aided after the decision in the Engineers' Case (1920) 28 CLR 129 , which diverted the flow of constitutional law into new channels. I have never thought it right to regard the discarding of the doctrine of the implied immunity of the States and other results of the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 as the correction of antecedent errors or as the uprooting of heresy. To return today to the discarded theories would indeed be an error and the adoption of a heresy. But that is because in 1920 the Constitution was read in a new light, a light reflected from events that had, over twenty years, led to a growing realization that Australians were now one people and Australia one country and that national laws might meet national needs. For lawyers the abandonment of old interpretations of the limits of constitutional powers was readily acceptable. It meant only insistence on rules of statutory interpretation to which they were well accustomed. But reading the instrument in this light does not to my mind mean that the original judges of the High

Court were wrong in their understanding of what at the time of federation was believed to be the effect of the Constitution and in reading it accordingly. As I see it the Engineers' Case (1), looked at as an event in legal and constitutional history, was a consequence of developments that had occurred outside the law courts as well as a cause of further developments there. That is not surprising for the Constitution is not an ordinary statute : it is a fundamental law. In any country where the spirit of the common law holds sway the enunciation by courts of constitutional principles based on the interpretation of a written constitution may vary and develop in response to changing circumstances. This does not mean that courts have transgressed lawful boundaries : or that they may do so. (at p397)

6. The course of constitutional interpretation in Canada has been different from here. There provincial powers have, by decisions of the Privy Council, tended to increase and federal powers to be restricted : see Halsbury's Laws of England, 3rd ed., vol. 5, pp. 499, 500 ; and I add to the cases there mentioned Attorney-General (Ontario) v. Winner (1954) AC 541 , a judgment that is indirectly illuminating for us. The different courses that the constitutional law of Australia and Canada have taken is not only the result of differing philosophies of a federal system reflected in the predilections of particular individuals. That may have had an influence, as, for Canada, is pointed out in an interesting article : Robinson, "Lord Haldane and the British North America Act", University of Toronto Law Journal, vol. 20, pp. 55-69 (1970). But the different consequences of judicial interpretation flow mainly from radical differences in the terms of the two instruments to be interpreted, our Constitution and the British North America Act. (at p397)

7. Clearly the Constitution assumes the continued existence of the States as constituent elements in a federation. Rhetorical assertions that the Commonwealth Parliament cannot destroy the States can thus stand without question. But that does not justify, as legal propositions, some unqualified and question begging, assertions that were made in the course of the argument in this case - such as that one government does not tax another government, that any Commonwealth taxation law is invalid which unduly as it was said affects State governments. (at p397)

8. The apophthegm, "the power to tax involves the power to destroy" is not a valid criterion for measuring the scope of a power of taxation that is expressly conferred by statute. In saying that I do not mean to underrate, in its own context, the eloquent judgment of John Marshall C.J. in M'Culloch v. Maryland (1819) 4 Wheat 316 (4 Law Ed 579) . It can always be read with undiminished pleasure. But constitutional doctrine in the United States has come a long way since that case and since Collector v. Day [1870] USSC 24; (1871) 11 Wall 113 (20 Law Ed 122) . If I felt that any sure guidance for us in the case that is now before us could be found in the law of the United States, I would be more inclined to seek it today in the judgment of Stone J., later Chief Justice of the Supreme Court of the United States, in Helvering v. Gerhardt [2008] USSC 14; (1938) 304 US 405 (82 Law Ed 1427) . (at p397)

9. As to the proposition that a Commonwealth law cannot impede or frustrate the exercise by a State government of its governmental functions : this seems an expression, in reverse, of the Canadian doctrine which forbids a Province to control completely a corporation created by the Dominion. In Attorney-General (Ontario) v. Winner (1954) AC 541 that was stated by the Privy Council (1954) AC, at p 578 as follows :

> ". . . legislation (scil. of a Province) will be invalid if a Dominion company is sterilized in all its functions and activities or its status and essential capacities are impaired

> in a substantial degree. What provisions have the effect of sterilizing all the functions and activities of a company or impair its status and capacities in an essential degree will, of course, depend on the circumstances of each case."

I would find no difficulty in applying those words to a Commonwealth tax in its impact upon a State government in some hypothetical case. But they certainly cannot apply to the present case. The payment by the States of pay-roll tax for many years past has not destroyed them or sterilized them. (at p398)

10. I am not satisfied that there is, for present purposes, any sure line of distinction between what were called in the argument essential functions of government, or "those things which only a government can do", and commercial activities which governments today commonly undertake. Moreover, I am not sure whether, in the postulated distinction, commercial activities were to be confined to trading undertakings conducted in competition with private enterprise as distinct from government monopolies, or whether they extended from undertakings which might produce a commercial profit, such as transport services, to those which ordinarily would not do so but for the enjoyment of which the subject must pay a fee, as for example to enter a government-controlled art gallery. I considered the validity of the distinction between various functions that governments in fact undertake in what I wrote in Ex parte Professional Engineers' Association [1959] HCA 47; (1959) 107 CLR 208, at pp 272-276 . I shall not repeat that. The difficulties that beset the topic are not for me alleviated by the Saratoga Springs Case (New York v. United States of America [1946] USSC 13; (1946) 326 US 572 (90 Law Ed 326)), although I acknowledge that the judgments in that case are incidentally relevant to the present case. (at p398)

11. I turn now from exotic doctrines from America to the provisions of our Constitution. We must always remember that the Constitution was, as this Court has said, intended to endure and to be applied in changing circumstances. Doubtless, like all statutes, it must be read "naturally in the light of the circumstances in which it was made" (the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129, at p 152). But it is necessary to remember too that, as Higgins J. said in the Brewery Labels Case [1908] HCA 94; (1908) 6 CLR 469, at p 610 - he was speaking there of trade marks - "The usage in 1900 gives us the central type; it does not give us the circumference of the power". In other words, the subjects on which the Commonwealth Parliament may legislate are generically described. Their denotation is not fixed. When the validity of a law made by the Parliament is questioned, the first consideration is always whether it is a law with respect to one of the subject-matters expressly listed in s. 51, or is a matter incidental within the meaning of s. 51 (xxxix.). (at p399)

12. The power to make laws with respect to a particular subject matter means that the validity of any questioned law depends on what it commands and to whom its command is addressed. "With respect to" is a compound preposition. It does not differ in effect from the corresponding phrase "in relation to" in the British North America Act 1867. Each is a periphrasis for such single words as "of", "about", "on", "concerning", "touching". I may say that I have not chosen those just at random. They, with the phrases "referring to", "relating to" and "treating of", happen to be the headings under which the laws of Athens on various topics were mentioned in Potter's Antiquities of Greece, Ch. 26. I do not think that much is to be gained by either elaboration or paraphrase of the phrase "with respect to". "Characterization" is the now common jargon. And in some cases it may for some people be helpful to translate this by asking what is the pith and substance of a law. That phrase, "pith and substance", became common currency in the Privy Council in cases under the British

North America Act. Examples are Attorney-General (British Columbia) v. Attorney-General (Canada) (1937) AC 368, at p 389 ; and Canadian Federation of Agriculture v. Attorney-General (Quebec) (1951) AC 179, at p 195 . In that context the expression was first used, so far as I have noticed, by Lord Watson in Union Colliery Co. of British Columbia Ltd. v. Bryden (1899) AC 580, at p 587 . It was perhaps then a modification of "pith and marrow", a natural old English metaphor, which became well known in patent law. It was there commonly used to describe the essence, or quintessence, of an invention from the time Bowen L.J. so used it in Wenham Gas Co. Ltd. v. Champion Gas Lamp Co. (1891) 9 RPC 49, at p 56 . It can be readily understood and applied as the test of infringement of a patented invention. And it has been useful in cases under the Canadian Constitution for determining whether a law of the Dominion or a Province encroaches upon a field reserved for the other. That too is readily understandable. But, unless we were to revert again to the discarded view of mutual immunities, no question of encroachment upon a forbidden State field, or of infringement of State rights, can arise in the same way under our Constitution. The question under s. 51 is always whether a particular enactment is within Commonwealth power. It is never whether it invades a State's domain. The question is one of sub-sumption under a particular description. It is not one of classification into categories mutually exclusive; for a law may be quite properly described as with respect to more than one subject, one perhaps within and another without Commonwealth power. I shall return later to this aspect. (at p400)

13. That the Pay-roll Tax Act and the Assessment Act are laws with respect to taxation imposed on employers generally is beyond question. The only question is whether the express inclusion of the Crown in right of a State among the employers liable to tax is for some reason beyond Commonwealth legislative power. Every power mentioned in s. 51 is by the terms of the section exercisable "subject to this Constitution". That was pointed out in the course of the argument. But the phrase, I consider, means subject to any express general provision of the Constitution, such as s. 92 or s. 116, or to any express special provision relating to one of the listed subject matters. The only relevant provision relating to the power of taxation is s. 114. I go again to Canada to notice what was said in Abbott v. City of St. John (1908) 40 SCR 597, at pp 609, 613 , and approved by the Privy Council in Caron v. The King (1924) AC 999 , of the effect of a provision of the British North America Act similar to s. 114 of our Constitution. I am unable to see that the pay-roll tax involves any contravention of s. 114. If it is invalid in its application to State government pay-rolls, this must arise from some implied exemption. (at p400)

14. On some great occasions in history taxes have provoked great questions. A kind of race-memory of this may have lingered - especially in the United States because of the place that the Stamp Act of 1765 had as midwife of American independence. Lecky wrote, in his History of England in the Eighteenth Century, Ch. IX, that: "The Stamp Act, when its ultimate consequences are considered, must be deemed one of the most momentous legislative Acts in the history of mankind." And he said:

> "The principle which led Hampden to refuse twenty shillings of ship money was substantially the same as that which inspired the resistance to the Stamp Act. It might be impossible to show by the letter of the law that there was any generical distinction between taxing and other legislative Acts; but in the constitutional traditions of the English people a broad line did undoubtedly exist."

A tax law is thus peculiarly likely to attract suppositions of inherent reservations and limitations. Yet

one result of the Engineers' Case (1920) 28 CLR 129 is often said to be a denial of any room for implications in the Constitution. But that I think is too sweeping a statement. (at p401)

15. The word "implication" is sometimes loosely used. It is not now an acceptable view that the rule in The Moorcock (1889) 14 PD 64 can govern the interpretation of the Constitution, notwithstanding that in Attorney-General (Q.) v. Attorney-General (Cth) [1915] HCA 39; (1915) 20 CLR 148, at pp 162, 163 , Griffith C.J. so used it. Nevertheless I do not think that in reading the Constitution we must shy away from the word "implication" and disavow every concept that it connotes. Implications of The Moorcock kind give content and consequences to written contracts. Implications of a different kind may aid the interpretation of statutory provisions. That is because these must always be read as parts of a whole and with due regard to the subject with which the statute deals. In each case an implication means that something not expressed is to be understood. But in the one case this involves an addition to what is expressed: in the other it explains, perhaps limits, the effect of what is expressed. It is in the latter sense that, in my view of the matter, implications have a place in the interpretation of the Constitution: and I consider it is the sense that Dixon J. intended when in Australian National Airways Pty. Ltd. v. The Commonwealth [1945] HCA 41; (1945) 71 CLR 29, at p 85 he said: "We should avoid pedantic and narrow constructions in dealing with an instrument of government and I do not see why we should be fearful about making implications." His Honour, when Chief Justice, repeated this observation in Lamshed v. Lake [1958] HCA 14; (1958) 99 CLR 132, at p 144 . I said, in Spratt v. Hermes (1965) 114 CLR 226, at p 272 , that it is well to remember it. I still think so. The only emendation that I would venture is that I would prefer not to say "making implications", because our avowed task is simply the revealing or uncovering of implications that are already there. (at p402)

16. In Melbourne Corporation v. The Commonwealth (1947) 74 CLR, at p 70 Starke J. said: "The federal character of the Australian Constitution carries implications of its own." That I respectfully endorse. I think that it is the firm ground on which the judgments in that case must stand. The decision might I think have been put in another way: that, eschewing any kind of implication, the enactment in question, although couched as a command to bankers, could be regarded as in substance not a law with respect to banking, but simply as a command to States and State authorities as to the way they must carry on their affairs. It might therefore perhaps have been treated as being with respect to a subject not within the competence of the Commonwealth Parliament, and not with respect to one that was. Latham C.J. got close to deciding the case in that way. But when his judgment is read as a whole I think he did not. He said that legislation by the Commonwealth would be invalid if it were "really with respect to a State or State functions as such and not with respect to the subject in respect of which it is sought to bind the State" (1947) 74 CLR, at p 61 . But he had already rejected the argument that the enactment in question was not a law with respect to banking (1947) 74 CLR, at p 50 . He had, however, left open the question of its validity having regard to its impact on the governmental functions of the States: and that I take it was the dominant influence in his conclusion. As I read the judgments of other members of the Court it seems to me that they too did not say that the law was not with respect to banking. Rather they said that it was: but in varying terms they condemned it because it was directed against the States. Latham C.J. acknowledged in Uther's Case (In re Richard Foreman & Sons Pty. Ltd.; Uther v. Federal Commissioner of Taxation) [1947] HCA 45; (1947) 74 CLR 508, at p 519 that this was the basis of the decision. The law thus contravened assumptions or implications arising from the federal nature of the Constitution and the position of the States. I shall not set out passages in the judgments, the verbiage of which had so much detailed scrutiny in the arguments that we heard. I accept the decision and the ground on which I think it stands. But to suppose that the words used in judgments must be taken as binding pronouncements of received doctrine is I think to take a path that can lead one astray. I have said

elsewhere, especially in Damjanovic's Case (Damjanovic & Sons Pty. Ltd. v. The Commonwealth) [1968] HCA 42; (1968) 117 CLR 390, at pp 407-409 , that I distrust taking the words of judicial exposition of the language of the Constitution as if they were themselves the language that they seek to explain and expound. Exegesis must not be substituted for the text. I can now add, to what I have previously said of this, a respectful reference to Lord Upjohn's pertinent remarks when delivering the judgment of the Privy Council in Ogden Industries Pty. Ltd. v. Lucas [1968] UKPCHCA 1; (1968) 118 CLR 32, at p 39: (1970) AC 113, at p 127 . (at p403)

17. The position that I take is this: The several subject matters with respect to which the Commonwealth is empowered by the Constitution to make laws for the peace, order and good government of the Commonwealth are not to be narrowed or limited by implications. Their scope and amplitude depend simply on the words by which they are expressed. But implications arising from the existence of the States as parts of the Commonwealth and as constituents of the federation may restrict the manner in which the Parliament can lawfully exercise its power to make laws with respect to a particular subject matter. These implications, or perhaps it were better to say underlying assumptions of the Constitution, relate to the use of a power not to the inherent nature of the subject matter of the law. Of course whether or not a law promotes peace, order and good government is for the Parliament, not for a court, to decide. But a law, although it be with respect to a designated subject matter, cannot be for the peace, order and good government of the Commonwealth if it be directed to the States to prevent their carrying out their functions as parts of the Commonwealth. (at p403)

18. Applying that to the present case, I cannot see that the pay-roll tax is invalid in its incidence upon the States. It is not aimed at them otherwise than as employers along with other employers. We cannot say that the Crown in right of the States is exempt from the operation of Commonwealth law. Since 1908 it has been established that this is not so, and in respect of taxation no less than of other matters : R. v. Sutton [1908] HCA 26; (1908) 5 CLR 789 ; Attorney-General (N.S.W.) v. Collector of Customs (N.S.W.) [1908] HCA 28[1908] HCA 28; ; (1908) 5 CLR 818 . (at p403)

19. A Commonwealth Act that levied a tax upon the States alone would, I consider, be beyond Commonwealth power ; but not because it was not a law with respect to taxation. I cannot conceive of a law imposing a tax, or regulating the assessment and collection of a tax, that would not be properly called a law with respect to taxation. It might be equally well called a law with respect to some other subject : but, as I have said, the Constitution does not require that every law be catalogued under one heading only. A law may be with respect to more than one subject matter. To take two or three examples : A law imposing land tax is properly called a law with respect to taxation and landowners. The wool tax considered by this Court in Logan Downs Pty. Ltd. v. Federal Commissioner of Taxation [1965] HCA 16; (1965) 112 CLR 177 was a law with respect to taxation and not the less so because it could also be properly called a law with respect to wool, wool marketing, wool brokers and wool growers. Gift duty is imposed by a law with respect to taxation which is also a law with respect to gifts. A Commonwealth law simply imposing a tax upon the revenues of the States would be a law with respect to taxation. But I consider that it would be an illegitimate use by Parliament of its power to make laws because of the principles and limitations, call them implications or what you will, recognized in the Melbourne Corporation Case [1947] HCA 26; (1947) 74 CLR 31 . However, the pay-roll tax is far removed from that. There is in it no "discrimination against" the States, to use that awkward but much used phrase, which I take it connotes an adverse distinction with regard to something or somebody. The pay-roll tax applies without any discriminations between employers generally including the States. Some reference was made to the exemption that the Act allows to independent schools, as distinct from government

schools, in respect of salaries and wages paid. This, it was said, was a discrimination against the States. But it seems to me a far-fetched proposition that a special exoneration of some persons within a State from a general obligation results in the exoneration of the State itself from the liability expressly imposed on it and otherwise valid. (at p404)

20. In conclusion I would say that the financial relations between the Commonwealth and the States do, I have no doubt, create serious problems for governments. But they are political not legal problems. They are better resolved I feel by co-operation in council and conference than by conflicts in court. I cannot forbear from quoting two sentences of Edmund Burke that I recently came across in his Observations on a Late Publication intituled The Present State of the Nation, written in 1769:

> "It is easy to parade with an high talk of parliamentary rights, of the universality of legislative powers, and of uniform taxation. Men of sense when new projects come before them, always think a discourse proving the mere right or mere power of acting in the manner proposed, to be no more than a very unpleasant way of mis-spending time."

That may well be the conclusion of any man of sense who reads this lengthy discourse. It only comes to this, that I would allow the demurrer. (at p405)

OWEN J. I have had the advantage of reading the judgment of the Chief Justice. I agree with it and it follows that in my opinion the demurrer to the statement of claim should be allowed. (at p405)

WALSH J. The State of Victoria has challenged the validity of the imposition upon it of a liability to pay pay-roll tax on wages paid by it to certain officers and employees. The statement of claim, as amended, has confined the claim to the seeking of declarations to the effect that it is beyond the power of the Commonwealth Parliament to render the plaintiff liable to pay the tax in respect of the wages paid by it to those of its officers and servants who are employed in certain specified departments of government. But the submissions made on its behalf include submissions which, if accepted, would deny validity to legislation imposing any tax on the plaintiff in respect of wages paid to any of its employees in any of its activities. (at p405)

2. I think it is clear that the laws which are challenged can be properly described as laws with respect to taxation. If the argument for the plaintiff is to be upheld, either in its broader aspect or in its more limited aspect, it must be upheld, in my opinion, upon the ground that although the legislation is concerned with a subject matter which is within Commonwealth power, that power is limited, by means of an implication derived from the nature and the structure of the federal system embodied in the Constitution, in such a way that it does not authorize the imposition of a tax upon the wages paid by a State to its employees or at any rate upon the wages paid to some of its employees. It would not be possible, in my opinion, to support a conclusion that the legislation in so far as it is expressed to bind the Crown in the right of a State, is not a law with respect to taxation and is for that reason beyond power. The defendant contends that once it appears that a law can be properly described as a law with respect to taxation, it follows that it is within power, notwithstanding that the Crown in right of a State is subjected to it, unless it can be shown that the law contravenes some specific provision of the Constitution, such as s. 114, and this cannot be shown. It was said that the principles laid down in Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. [1920] HCA 54; (1920) 28 CLR 129 require that those contentions be accepted.

It was submitted that it is inconsistent with those principles that the ambit of the power to legislate with respect to an enumerated subject matter should be restricted in any way otherwise than by an express provision specifically imposing some defined limitation upon it. (at p406)

3. The plaintiff contends however that the foregoing submissions on behalf of the defendant are not in accordance either with the principal judgment in the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 itself or with the interpretations given to that judgment in subsequent cases. It is clear that the general rule of interpretation adopted in the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 has been declared repeatedly to be subject to reservations or qualifications, additional to those which are imposed expressly in relation to particular powers by provisions of the Constitution other than s. 51 or are imposed specifically by the terms of a paragraph in s. 51, for example, the words in s. 51 (ii.) itself - "but so as not to discriminate between States or parts of States". It has been argued in the present case that in some respects those judicial declarations go beyond what was said in the Engineers' Case (1920) 28 CLR 129 and beyond what is consistent with its basic principles. But whether that be so or not, there is a substantial body of authority for the proposition that the federal nature of the Constitution does give rise to implications by which some limitations are imposed upon the extent of the power of the Commonwealth Parliament to subject the States to its legislation. That proposition has not been regarded as inconsistent with the principles enunciated in the Engineers' Case [1920] HCA 54[1920] HCA 54; ; (1920) 28 CLR 129 . It has been affirmed by members of this Court who were authors of the leading judgment in that case as well as by others who were not. It is supported not only by dicta but also by the decision in Melbourne Corporation v. The Commonwealth [1947] HCA 26; (1947) 74 CLR 31 , unless that case should be regarded as having been decided upon the ground that the law which was declared to be invalid was not a law "with respect to" banking, within the meaning of s. 51 (xiii.). But, in my opinion, the majority of those members of the Court who held the law to be invalid decided that it was invalid because the effect of the law upon the States was such that, although it might be a law with respect to banking, it was beyond the power of the Commonwealth Parliament to enact it. The judgments in the Melbourne Corporation Case [1947] HCA 26; (1947) 74 CLR 31 have been discussed by Menzies J. in his judgment in the present case, and I agree, with respect, with what his Honour has written about it. Therefore, my further references to it will be less extensive than otherwise they would have been. But in relation to the question whether the decision was based upon the view that the law was outside the subject matter described in s. 51 (xiii.), I refer to what was said in another case in which argument was heard almost immediately after judgment was given in the Melbourne Corporation Case. In In re Richard Foreman & Sons Pty. Ltd. ; Uther v. Federal Commissioner of Taxation [1947] HCA 45; (1947) 74 CLR 508, at p 519 Latham C.J. said :

> "In the recent case of Melbourne Corporation v. The Commonwealth
> [1947] HCA 26; (1947) 74 CLR 31
> it was held by this Court that the Commonwealth
> Parliament had no power to make laws which were directed against and impaired the exercise of an essential governmental function of the State."

I refer also to the observations of Starke J. (1947) 74 CLR, at p 525 and of Williams J. (1947) 74 CLR, at p 539 . The decision was afterwards held in The Commonwealth v. Cigamatic Pty. Ltd. (in liq.) [1962] HCA 40[1962] HCA 40; ; (1962) 108 CLR 372 to have been in part erroneous. My purpose here is not to support the correctness of the statements to which I have referred but merely

to show what was the effect of the decision in the Melbourne Corporation Case [1947] HCA 26; (1947) 74 CLR 31 in the opinion of Justices who had taken part in it. (at p407)

4. On several occasions, both before and after the Melbourne Corporation Case [1947] HCA 26; (1947) 74 CLR 31 was decided and in that case itself, Sir Owen Dixon formulated what was in his opinion the basic principle laid down in the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 and he made observations relating to reservations or qualifications which he thought had been made, concerning the prima facie rule of interpretation which it established. On the first and second of those occasions, that is to say, in Australian Railways Union v. Victorian Railways Commissioners [1930] HCA 52; (1930) 44 CLR 319, at p 390 and in West v. The Commissioner of Taxation (N.S.W.) [1937] HCA 26; (1937) 56 CLR 657, at pp 682, 683 , his Honour did not refer specifically to the taxation power. But in Federal Commissioner of Taxation v. Official Liquidator of E. O. Farley Ltd. [1940] HCA 13; (1940) 63 CLR 278, at p 316 , his Honour said, in the course of discussing a question as to what could be regarded as incidental to the taxation power, that in the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 "the taxation power was singled out as an instance of a legislative power the extent of which in relation to the States might in the future come up for special consideration". Again in Essendon Corporation v. Criterion Theatres Ltd. [1947] HCA 15; (1947) 74 CLR 1, at p 19 . Dixon J. said that in the Engineers' Case [1920] HCA 54[1920] HCA 54; ; (1920) 28 CLR 129 an express reservation had been made covering the power of taxation. He added : "The reservation is expressed in a somewhat indefinite manner." In the Melbourne Corporation Case [1947] HCA 26; (1947) 74 CLR 31 , Dixon J. made observations relating to the taxation power, which have been quoted in part by Menzies J., and to which I shall make some further reference later. In Ex parte Professional Engineers' Association [1959] HCA 47; (1959) 107 CLR 208, at p 239 Dixon C.J. again adverted to the Engineers' Case [1920] HCA 54[1920] HCA 54; ; (1920) 28 CLR 129 and suggested that perhaps "the reservations and qualifications therein expressed concerning the federal power of taxation and laws directed specially to the States and also perhaps the prerogative of the Crown received too little attention". (at p408)

5. The plaintiff sought to rely on the foregoing statements as warnings against a ready acceptance of the view that once it is seen that a law may be described as a law with respect to taxation, no further question can arise concerning its validity in so far as it affects the States, other than a question relating to some specific provision, such as s. 114. But it is not enough for the plaintiff to assert that a further question may arise for consideration. Nor is it enough for it to maintain that some taxation laws could have such an effect upon the independence or upon the functions of the States that their enactment would be beyond power. In order to succeed, the plaintiff must establish that in the enactment of the laws which have been challenged the legislative power of the Parliament to bind the States has been exceeded. It must obtain the acceptance by the Court of a principle by which a limitation upon power is imposed by reference to some criterion or test which is seen to be satisfied when it is applied to the particular laws with which the case is concerned. (at p408)

6. It could not be and it was not maintained that every Commonwealth law which purports to bind the States is to that extent invalid. It was contended, however, that every law which purports to impose any tax (other than customs duties) upon a State is beyond power. The exception of customs duties was made because of the decision in Attorney-General (N.S.W.) v. Collector of Customs (N.S.W.) (Steel Rails Case) [1908] HCA 28; (1908) 5 CLR 818 . But once an exception is made of any tax, it must be difficult to maintain that, subject to that exception, all taxation laws binding a State are beyond power. Counsel for the plaintiff advanced reasons for maintaining the general proposition whilst admitting an exception to it. But I have not found them convincing. It is true that, as counsel pointed out, some attention was given in the Steel Rails Case to the exclusive nature of

the customs power and of other Commonwealth powers which were thought to be relevant. But it is not acceptable, in my opinion, to regard either the exclusive nature of those powers or the supposed necessity of treating the States as bound in order that the customs power might be effectively exercised, as a sufficient reason for regarding the levy of customs duties on the States as being compatible with their continued existence and independence preserved to them by the Constitution with which, according to the argument, the imposition of any other tax would be incompatible. The States would be affected no more and no less by a law made under, or connected with, an exclusive power, than by a law made under a concurrent power. In the Engineers' Case (1920) 28 CLR, at p 159 it was said of the distinction between exclusive and concurrent powers : "That distinction affects the legislative power of the States, but not the effect of Commonwealth Acts once made." The distinction was there regarded as not one on which the validity of the Commonwealth law depended. (at p409)

7. In my opinion, the general proposition that (leaving aside customs duties) the States have a constitutional protection against the exercise by the Commonwealth Parliament of the taxation power cannot be accepted. It has never been decided that they have nor has this been definitely affirmed in any of the dicta referring to the taxation power as a power which requires, or may require, special consideration. An assertion that a question may require examination is not tantamount to an assertion that the question ought to be answered in a particular way. If it be accepted that in the Engineers' Case [1920] HCA 54[1920] HCA 54; ; (1920) 28 CLR 129 the question of the scope of the taxation power in relation to the States was the subject of a "reservation", that case still does not provide support for the proposition that no tax (apart from customs duties) can be lawfully levied on a State. Nor is that general proposition supported by the Melbourne Corporation Case [1947] HCA 26; (1947) 74 CLR 31 . In that case when Rich J. referred (1947) 74 CLR, at p 66 to taxation by way of illustration of actions on the part of the Commonwealth which would be, in his opinion, invalid, his reference was not to all taxes imposed by a Commonwealth law on the States but to a particular taxing Act of the kind which he specified. Starke J., in his discussion of the matter in the same case (1947) 74 CLR, at pp 70-72 , did not assert that there was a general rule by which the States were protected against taxation laws, nor was that asserted by Dixon J. in any of the cases to which I have referred above. (at p409)

8. When it has been stated that there are limitations derived from the structure of the federal system upon the legislative power of the Commonwealth Parliament to enact laws which affect the States, the limitations have been described in various ways, but have not been completely and precisely formulated. Taxation laws have been mentioned as illustrations of laws which might be, in their effect upon the States, laws of a kind the enactment of which would be beyond power. If a general rule were adopted that a law imposing a tax upon States is invalid for the reason that the taxation power is, because of its special nature, a power which cannot be exercised so as to bind the States, there could not be any need or any justification for saying that such a law may sometimes be invalid for the reason that it falls within a wider class of laws which affect the independence of the States in a manner regarded as being beyond power. The distinction, to which I am seeking to draw attention, between a limitation said to be based on the nature of the taxation power and a constitutional limitation said to be derived from broader and more far-reaching principles which may be applicable to some taxation laws, was made by Dixon J. in the Melbourne Corporation Case (1947) 74 CLR, at p 81 where his Honour said :

> "The objection to the use of federal power to single out
> States and place upon them special burdens or disabilities
> does not spring from the nature of the power of taxation.

> The character of the power lends point to the objection but it does not give rise to it. The federal system itself is the foundation of the restraint upon the use of the power to control the States. The same constitutional objection applies to other powers, if under them the States are made the objects of special burdens or disabilities."

The restraint upon the use of power to which his Honour there referred is not an absolute restraint. It is not of the same character or extent and it has not the same basis as the inability of a State to make laws binding upon the Commonwealth. It is a limited restraint. I have said above that the limitations have been described in various ways. Some of these descriptions have been in terms which, in my opinion, do not provide satisfactory tests for determining whether or not a law is valid. For example, a statement that a law is invalid if it subjects the governmental functions of a State to "undue interference" provides no satisfactory means for determining what is "undue". Again there are difficulties in a test which makes the decision of a legal question depend upon a distinction made by the Court between functions of governments which are "normal" or are "essential" and those which are not. A recognition that there are difficulties in formulating a single test in precise and comprehensive terms does not provide, in my opinion, a reason for denying that there can be any limitation by implication upon the power to affect the States. But if it be accepted that such a limitation exists, what must be decided is whether the laws which are here under challenge are of such a kind or operate in such a way in relation to the States that they are thereby invalidated. At this point I think it is necessary to refer to the question whether any such limitation can be applicable only to laws which "single out" the States or may be applicable also to some general laws. (at p411)

9. The statement of principle by Dixon J. in the Melbourne Corporation Case (1947) 74 CLR, at p 81 which refers to the use of federal power "to single out States and place upon them special burdens or disabilities" was not intended, in my opinion, to be an exhaustive statement. It is not necessarily in conflict with the statement by Rich J. (1947) 74 CLR, at p 66 to the effect that in addition to cases where the law singles out the States there may be invalidity in a law by which the States are subjected to some provision of general application which in its application to them would prevent them from performing their essential functions or would impede them in so doing. Dixon J., himself, said in Bank of N.S.W. v. The Commonwealth (1948) 76 CLR 1, at p 338 :

> "No doubt without discrimination laws applying to States may operate against them in such a way that it must be beyond Federal power to enact them."

Nevertheless, although it may be that some laws of general application may be invalid in so far as they apply to the States, I am of opinion that the laws which are here challenged, and which in my opinion are general laws, cannot be brought within the principle stated by Rich J. concerning the invalidity of general laws. Clearly the laws do not prevent the States from performing their functions and, in my opinion, they do not, in any relevant sense, impede them in doing so. There is not, in my opinion, any ground upon which it could be asserted that the challenged laws in so far as they bind the States bring about any such destruction or curtailment of the right of the States to continue in existence or to exercise their functions, as could require the power of the Parliament to enact them to be denied. Since the challenged laws are, in my opinion, laws of general application and are not laws which "single out" the States or place "special burdens or disabilities" upon them then the plaintiff cannot rely on any restraint to which the power to enact laws of the latter

description may be subject. In my opinion they are not laws which in any relevant sense discriminate against the States or single them out. (at p412)

10. Section 15 (bb) of the Pay-roll Tax Assessment Act provides for exemptions from tax and these include an exemption in respect of wages paid by a school or college which is carried on by a body corporate, society or association otherwise than for the purpose of profit or gain to the individual members of the body corporate, society or association and which is not carried on by or on behalf of a State. In my opinion the exclusion of the States from the benefit of the exemption which is allowed to the schools or colleges described in s. 15 (bb) does not have the effect that the Act should be regarded as singling out the States and placing a special burden upon them. The laws remain general laws, notwithstanding that there are specified exceptions from their operation. The Acts cannot be regarded as if they enacted or included the enactment of a separate and distinct law which imposed a special discriminatory tax upon the employment by States of teachers. (at p412)

11. In support of the submissions that the laws are beyond power in so far as they apply to the wages paid to the civil servants specified in the statement of claim two propositions were advanced which were said to be overlapping but distinct. One was that the tax was invalid because it selects a criterion of a kind which impinges directly upon the States in that the employment of civil servants is something without which a State cannot continue to exist as a unit of government. The second proposition was that the tax was invalid because it is beyond power to tax the States in respect of functions which are unique to government in the sense that they can be performed only by governments. Assuming that it would be beyond power for the Commonwealth Parliament to make a law which would prevent the States from continuing to exist as independent units of government and from continuing to exercise those functions which governments alone can perform or which are necessary for the continued existence of the States the propositions which I have set out cannot be sustained except upon the assumption that any law by which a tax is imposed directly upon the States in consequence of acts done by them in the exercise of those functions is a law which prevents or controls the exercise of those functions. In my opinion that assumption is not a valid one. The plaintiff must assert that a tax law which affects the States either in relation to the exercise by it of activities in which it is necessarily engaged or in relation to activities of a kind in which no one else engages is beyond power. But unless the reason for the invalidity lies in the nature of the power, the submissions under consideration if accepted ought to lead to the conclusion that other laws which impinge directly upon the carrying out by the State of such activities must likewise be invalid. I have already stated reasons for rejecting the view that a taxation law affecting the States is invalidated simply on the ground that the taxation power is of a special nature which cannot be used so as to bind the States. Once that is rejected, the argument for the plaintiff must be that the placing of any obligation upon it, by a Commonwealth law, in relation to the exercise of functions of the kind under consideration, must be beyond power. (at p413)

12. It may be that a taxation law affecting the States would be beyond power if it were of the kind indicated by Dixon J. in the Melbourne Corporation Case [1947] HCA 26; (1947) 74 CLR 31 in the passage to which I have already referred, or of the kind to which Rich J. referred. These are questions which do not arise and need not be decided in this case, since the laws which are challenged are not, in my opinion, laws of the kind to which their Honours referred. In my opinion the submissions that the continued existence or the independence of the States or their capacity to carry out their functions are destroyed or threatened in a way which is beyond power by any tax law which applies to a State in relation to the carrying out by it of its functions, or of particular functions of the kind to which the submissions for the plaintiff in their more limited form referred, cannot be accepted. (at p413)

13. It was put on behalf of the plaintiff in a subsidiary argument that as a matter of construction of s. 51 (ii.) the word "Taxation" should be taken to refer only to the taxing of those who are subjects and not to extend to States or their governments. In my opinion, there is no basis for that construction either in the language of the Constitution or in authority and it should not be accepted. It may be that the word is commonly used to indicate the obtaining of revenue from citizens but there is no sound reason, in my opinion, to confine its meaning in that way and it has not been regarded in any of the authorities as being so confined. (at p413)

14. In my opinion, s. 114 of the Constitution has no application to the pay-roll tax. It is not a tax on property of any kind belonging to a State. (at p413)

15. In my opinion the demurrer should be allowed. (at p413)

GIBBS J. By the Pay-roll Tax Act 1941-1966 (Cth) a tax at the rate of 2 1/2% is imposed on all wages paid or payable by any employer. The tax, which is known as pay-roll tax, is levied in accordance with the provisions of the Pay-roll Tax Assessment Act 1941-1969 (Cth) ("the Assessment Act"). The employer who pays, or is liable to pay, the wages is required to pay the tax (s. 4 of the Pay-roll Tax Act 1941-1966 ; s. 13 of the Assessment Act). Section 3 (1) of the Assessment Act provides that in that Act, unless the contrary intention appears, "employer" means any person who pays or is liable to pay any wages and includes (inter alia) the Crown in the right of a State. Returns to enable the tax to be assessed are normally furnished monthly (s. 18) and for the purposes of determining the tax payable an amount of $1,733.33 is deducted from the amount of an employer's wages in any month (s. 14). If the wages paid or payable by an employer in any year do not exceed $20,800 the tax is refunded or rebated (s. 16). Certain exemptions, to which later reference will be made, are allowed by s. 15. By Div. 2 of Pt III rebates of tax are allowable by reference to the exports of the employer for the year in question and s. 16V, which forms part of Div. 2, provides :

> "Where a trade or business, or more than one trade or business, is carried on by the Crown in right of a State, this Division applies as if -
> (a) the Crown were, in respect of each trade or business, a separate employer ; and
> (b) the Crown were not, as such an employer, entitled to any deduction under section fourteen of this Act."

Section 64 of the Assessment Act provides that each State shall, for the purposes of that Act, be represented by such officer or officers as the State appoints and that nothing in that Act imposing any penalty on an employer shall be construed as imposing a penalty on a State or any officer representing that State. (at p414)

2. By this legislation, if it is valid, the Commonwealth has obliged the States, in common with other employers, to pay a tax on all wages paid or payable to their employees. The State of Victoria challenges the validity of this tax so far as it is imposed on the wages of certain of its officers and employees who may, speaking imprecisely, be described as public servants employed to carry out the ordinary functions of government. (at p414)

3. It may at first sight appear somewhat surprising that the Commonwealth, which each year makes large payments to the States, should at the same time seek to raise money from the States by a tax

on the wages paid or payable to State public servants, and thus with one hand take money from the treasury into which the other hand pays it. The history of the tax, which was originally designed to provide funds for the payment of child endowment, the burden of which it was thought should properly fall upon employers, of which each State was one, may reveal the reason why the tax was first imposed on the States, whether or not it also discloses a reason for the continuance of the imposition upon them. However, we are not concerned to inquire into the wisdom, merit, expediency or economic or political justification for the legislation ; those are questions for the Parliament if the tax is within its legislative competency. We are solely concerned with a strictly legal question ; whether it is within the constitutional power of the Parliament to impose the tax in question. (at p415)

4. By s. 51 (ii.) of the Constitution, the Parliament is given power, subject to the Constitution, to make laws for the peace, order, and good government of the Commonwealth with respect to taxation, but so as not to discriminate between States or parts of States. There is no doubt that a law imposing a pay-roll tax is a law with respect to taxation. However, the State of Victoria contends that in so far as the legislation imposes this tax on the States it is invalid. First, the State advances the general proposition that the power given by s. 51 (ii.) does not enable the Parliament to make laws taxing the States, although it is conceded that there may be exceptions to this general rule, for example in the case of duties of customs and excise. In support of this proposition it is said that the ordinary meaning of the term "taxation" is the raising of money for the purposes of government by exaction from subjects and that the States are not subjects of the Commonwealth. Further, it is submitted that the Commonwealth's power to make laws with respect to taxation is subject to the Constitution, which recognizes and protects the coexistence of the Commonwealth and the States as separate independent governments, and in consequence impliedly forbids the Commonwealth to tax the States, or a State to tax the Commonwealth. If this proposition is not accepted in its generality, it is submitted that at least the Commonwealth has no power to impose on a State a tax on the employment of civil servants who are employed in activities that can only be carried on by a government and whose employment is essential to the very existence of the State. In reply to these arguments it is urged by the Solicitor-General for the Commonwealth that it is settled by Amalgamated Society of Engineers v. Adelaide Steamship Company Ltd. (the Engineers' Case) (1920) 28 CLR 129 that the Parliament of the Commonwealth has power to make laws binding on the States with respect to the matters set forth in s. 51 of the Constitution, subject only to the limitations arising from the words used in s. 51 to describe the various topics upon which the Parliament may legislate and to such other limitations as are expressly imposed by the Constitution ; no further limitations, he says, are to be implied. He submits that there is nothing in the words of s. 51 (ii.) themselves which gives rise to an implication that a tax should not be imposed on the States, and that the Commonwealth Parliament accordingly has power to impose a tax on the States, provided that the express limitations contained in the Constitution, particularly in s. 51 (ii.) itself and in ss. 55, 99 and 114, are not infringed. (at p416)

5. Although it is true that the word "taxation" is sometimes thought to connote the levying of revenue by a sovereign from its subjects, in my opinion its meaning is not limited in that way. Compulsion is an essential feature of taxation (Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd. (1933) AC 168, at p 175) but it is not necessary that the authority which imposes the tax and the person who is compelled to pay it should stand in the relation of sovereign and subject. Obvious examples of taxation imposed on persons who are not subjects of the power levying the tax are customs duties exacted from foreign traders and land taxes payable by absentee landowners. In Matthews v. Chicory Marketing Board (Vict.) (1938) 60 CLR 263, at p 276 , Latham C.J. described a tax in the following words, which were later adopted by the Court in

Browns Transport Pty. Ltd. v. Kropp [1958] HCA 49; (1958) 100 CLR 117, at p 129 :

> "It is a compulsory exaction of money by a publci authority
> for public purposes, enforceable by law, and is not a payment
> for services rendered."

A compulsory contribution levied on the States by the Commonwealth, for the purposes of the government of the Commonwealth, may be taxation, notwithstanding that the States are not subjects of the Commonwealth. (at p416)

6. The important question that arises is, therefore, whether the words of s. 51 (ii.) must be read subject to an implied restriction which prevents the Commonwealth from taxing the States, either at all, or in circumstances which would include the present case. (at p416)

7. In the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 the Court rejected the doctrine of the immunity of instrumentalities which had been based on implications thought to be rendered necessary by a federal system of government and laid down the rule that "laws validly made by authority of the Constitution, bind, so far as they purport to do so, the people of every State considered as individuals or as political organisms called States - in other words, bind both Crown and subjects" (1920) 28 CLR, at p 153 . The majority of the Court said (1920) 28 CLR, at p 154 that "where the affirmative terms of a stated power" (granted by the Constitution to the Commonwealth Parliament) "would justify an enactment, it rests upon those who rely on some limitation or restriction upon the power, to indicate it in the Constitution", and that "it is a fundamental and fatal error to read s. 107 as reserving any power from the Commonwealth that falls fairly within the explicit terms of an express grant in s. 51, as that grant is reasonably construed, unless that reservation is an explicitly stated". Although the judgments of the majority laid stress on the need to turn to the language of the Constitution itself, to read it naturally and to permit it "to speak with its own voice", the case did not decide that in the interpretation of the Constitution no implications whatever are to be made. On the contrary, it was said (1920) 28 CLR, at p 155 :

> "The doctrine of 'implied prohibition'" (as their Honours
> called the doctrine of the immunity of instrumentalities)
> "finds no place where the ordinary principles of construction
> are applied so as to discover in the actual terms of the
> instrument
> their expressed or necessarily implied meaning." (at p417)

8. The ordinary principles of statutory construction do not preclude the making of implications when these are necessary to give effect to the intention of the legislature as revealed in the statute as a whole. The intention of the Imperial legislature in enacting the Constitution Act was to give effect to the wish of the Australian people to join in a federal union and the purpose of the Constitution was to establish a federal, and not a unitary, system for the government of Australia and accordingly to provide for the distribution of the powers of government between the Commonwealth and the States who were to be the constituent members of the federation. In some respects the Commonwealth was placed in a position of supremacy, as the national interest required, but it would be inconsistent with the very basis of the federation that the Commonwealth's powers should extend to reduce the States to such a position of subordination that their very existence, or at least their capacity to function effectually as independent units, would be dependent upon the manner in which

the Commonwealth exercised its powers, rather than on the legal limits of the powers themselves. Thus, the purpose of the Constitution, and the scheme by which it is intended to be given effect, necessarily give rise to implications as to the manner in which the Commonwealth and the States respectively may exercise their powers, vis-a-vis each other. (at p418)

9. The necessity to make implications in construing the Constitution has been recognized in a number of judgments of this Court. In West v. Commissioner of Taxation (N.S.W.) [1937] HCA 26; (1937) 56 CLR 657, at pp 681, 682 Dixon J. said :

> "Since the Engineers' Case
> [1920] HCA 54; (1920) 28 CLR 129
> a notion seems to have
> gained currency that in interpreting the Constitution no
> implications
> can be made. Such a method of construction would
> defeat the intention of any instrument, but of all instruments
> a written constitution seems the last to which it could be
> applied. I do not think that the judgment of the majority
> of the Court in the Engineers' Case meant to propound such a
> doctrine. It is inconsistent with many of the reasons
> afterwards
> advanced by Isaacs J. himself for his dissent in Pirrie
> v. McFarlane
> [1925] HCA 30[1925] HCA 30; ; (1925) 36 CLR 170, at p 191
> ."

It may be added that it is also inconsistent with reasons that have since been advanced by Rich and Starke JJ., who were also members of the majority in the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 , (see South Australia v. The Commonwealth [1942] HCA 14; (1942) 65 CLR 373, at p 447 , R. v. Commonwealth Court of Conciliation and Arbitration ; Ex parte Victoria [1942] HCA 39; (1942) 66 CLR 488, at pp 515, 516 , and Melbourne Corporation v. The Commonwealth [1947] HCA 26; (1947) 74 CLR 31, at pp 65, 66, 70-75). (at p418)

10. The question what limitations may be implied on the power of the Commonwealth to make laws affecting the operations of the States was considered by Dixon J. in a number of cases before the matter finally fell for decision in Melbourne Corporation v. The Commonwealth [1947] HCA 26; (1947) 74 CLR 31 . In Australian Railways Union v. Victorian Railways Commissioners [1930] HCA 52; (1930) 44 CLR 319, at p 390 and West v. Commissioner of Taxation (N.S.W.) (1937) 56 CLR, at p 682 that learned Judge suggested that the principle that prima facie a grant of legislative power to the Commonwealth enables it to make laws affecting the operations of the States or their agencies may be subject to two reservations, the first relating to cases where the State is acting in the exercise of the Crown's prerogative and the second to laws discriminating against the States or their agencies. In Essendon Corporation v. Criterion Theatres Ltd. [1947] HCA 15; (1947) 74 CLR 1, at pp 19, 22, 23 , he suggested a third reservation, viz. that the taxation power might by reason of its special nature be subject to implied restraints. In the same case, Latham C.J. tentatively expressed a similar view. He said:

> "The Commonwealth can impose customs duties upon
> importation of goods by a State . . . but it has never been

> held that the general Commonwealth power of taxation extends to a State or that a State can tax the Commonwealth. This question was not fully argued. As at present advised I am of opinion that it seems to be necessarily involved in the very conception of a federal Constitution that the Commonwealth or Dominion cannot, except within some limits which would need very careful definition, tax the States or Provinces and that the States or Provinces cannot tax the Commonwealth or Dominion."
> (1947) 74 CLR, at p 14

In Melbourne Corporation v. The Commonwealth [1947] HCA 26; (1947) 74 CLR 31 the Court held, by a majority, that s. 48 of the Banking Act 1945 (Cth), which provided that "Except 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", was not a valid exercise of Commonwealth power. Although different reasons were given by the various members of the majority to support their decision, in my opinion all of them held or recognized that implications must be made in the Constitution because of its federal nature. Rich J. (1947) 74 CLR, at p 67 held that the section was invalid because it impaired the power of the States freely to use the facilities provided by banks, a power which is essential to the efficient working of the business of government. In his opinion, 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 invalid. He went on to say :

> "Such action on the part of the Commonwealth may be invalid in two classes of case, one, where the Commonwealth singles out the States or agencies to which they have delegated some of the normal and essential functions of government, and imposes on them restrictions which prevent them from performing those functions or impede them in doing so ; another, where, although the States or their essential agencies are not singled out, they are subjected to some provision of general application, which, in its application to them, would so prevent or impede them. Action of the former type would be invalid because there is nothing in the Commonwealth Constitution to authorize such action by the Commonwealth. A general income tax Act which purported to include within its scope the general revenues of the States derived from State taxation would be an instance of the latter."
> (1947) 74 CLR, at p 66

Starke J. rejected the notion that any distinction should be drawn between governmental, or primary and inalienable, and trading functions, and did not agree that the presence or absence of discrimination was a decisive test. He held that the question is "whether the legislation or the executive action curtails or interferes in a substantial manner with the exercise of constitutional power by the other." (1947) 74 CLR, at pp 74-75 Dixon J. applied the principle that he had previously enunciated, and held the section bad as a law which discriminated against the States

(1947) 74 CLR, at p 84 . He explained his notion of discriminatory legislation as follows (1947) 74 CLR, at pp 78-79 :

"The reservation relates to the use of federal legislative power to make, not a general law which governs all alike who come within the area of its operation whether they are subjects of the Crown or the agents of the Crown in right of a State, 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, and more especially upon the execution of its constitutional powers. . . . Legislation of that nature discloses an immediate object of controlling the State in the course which otherwise the Executive Government of the State might adopt, if that Government were left free to exercise its authority."

In other words, the Commonwealth cannot make "a law aimed at the restriction or control of a State in the exercise of its executive authority." (1947) 74 CLR, at p 83 He remarked that it was unnecessary to say anything about the possible reservation relating to the taxation power, which did not enter into the determination of the case before him (1947) 74 CLR, at p 78 , but he did say (1947) 74 CLR, at p 81 :

"What is important is the firm adherence to the principle that the federal power of taxation will not support a law which places a special burden upon the States. They cannot be singled out and taxed as States in respect of some exercise of their functions. Such a tax is aimed at the States and is an attempt to use federal power to burden or, may be, to control State action."

The judgments of the other two members of the majority reveal a somewhat different approach. Latham C.J. commenced by holding (1947) 74 CLR, at p 50 that "the argument that s. 48 is not legislation with respect to banking should not be accepted" and further held that the section was not legislation with respect to State banking, but upheld the challenge to its validity because it was a law which singled out and was aimed at or directed against the States. He held (1947) 74 CLR, at p 60 that federal laws which "discriminate" against the States, in the sense that they single out the States for taxation or some other form of control, and laws which "unduly interfere" with the performance of what are clearly State functions of government, are invalid. The reason why discriminatory laws are invalid is, he said (1947) 74 CLR, at p 61 :

". . . that what is called 'discrimination' shows that the legislation is really legislation by the Commonwealth with respect to a State or State functions as such and not with respect to the subject in respect of which it is sought to bind the State."

He added (1947) 74 CLR, at pp 61, 62 :

"Similarly, federal legislation which, though referring to

a subject of federal power, is really legislation about what is clearly a State governmental function, may be said to 'interfere unduly' with that function and therefore to be invalid. . . . In my opinion the invalidity of a federal law which seeks to control a State governmental function is brought about by the fact that it is in substance a law with respect to a subject as to which the Commonwealth Parliament has no power to make laws."

I find this reasoning rather difficult to reconcile with his finding that the law which he held invalid in the case before him was a law with respect to banking. Williams J. said (1947) 74 CLR, at p 99 that :

". . . there arises from the very nature of the federal compact, which contemplates two independent political organisms, each supreme within its own sphere, existing side by side and exerting divided authority over the same persons and in the same territory, a necessary implication that neither the Commonwealth nor the States may exercise their respective constitutional powers for the purpose of affecting the capacity of the other to perform its essential governmental functions. Therefore a federal law which purports to bind the States must be examined to ascertain whether it is really a law for the peace, order and good government of the Commonwealth with respect to one of the enumerated subjects, or a law which, under colour of such a purpose, is really a law the purpose of which is to interfere with such functions."

In his opinion, a discriminatory law is not necessarily bad, although the presence of discrimination points strongly to the law being aimed at the States (1947) 74 CLR, at p 99 . He held (1947) 74 CLR, at p 100 that s. 48 was in pith and substance a law aimed at giving directions to the States as to the manner in which they should exercise part of their sovereign powers and was invalid. (at p421)

11. The reasons given for the decision in Melbourne Corporation v. The Commonwealth [1947] HCA 26; (1947) 74 CLR 31 do not reveal one ground common to all of the judgments upon which the decision of the majority rested. In my opinion, however, it is not right to regard the case simply as a decision that s. 48 of the Banking Act, properly understood, was not a law for the peace, order and good government of the Commonwealth with respect to banking. In my opinion the decision is authority for the view that although s. 48 was such a law it was invalid because it infringed an implied restriction on the power of the Commonwealth. In two later cases Latham C.J. expressed the ratio of the decision in words which in my opinion show that, whatever his earlier view, he understood the width of the principle for which it is authority. In Bank of New South Wales v. The Commonwealth [1948] HCA 7; (1948) 76 CLR 1, at pp 242, 243 he said :

> "In the Melbourne Corporation Case

[1947] HCA 26; (1947) 74 CLR 31
it was held that a
system of federal government, involving the co-existence of
Commonwealth and States, involved the continuance of the
existence of the States as political entities not subject to any
form of Commonwealth control in respect of the discharge of
their own lawful functions. The States may be bound by
some Commonwealth laws (Engineers' Case
[1920] HCA 54; (1920) 28 CLR 129
) but, as
governments,
the States are independent of the Commonwealth and
are not subjects of the Commonwealth ; and in respect of the
functions which are left to the States the Commonwealth has
no power by means of legislation of restricting the States in
the performance of the normal and essential functions of
government : per Rich J.
(1947) 74 CLR, at p 66
. Thus the Commonwealth
Parliament cannot destroy, curtail or interfere with the
exercise of constitutional power by a State, and the
management
and control by the States of their revenues and funds
is a constitutional power of vital importance to them : per
Starke J.
(1947) 74 CLR, at p 75
. The Constitution should not be understood as
authorizing the Commonwealth to make a law 'aimed at the
restriction or control of a State in the exercise of its executive
authority' : per Dixon J.
(1947) 74 CLR, at p 83
. Williams J.
(1947) 74 CLR, at p 99
held that s. 48
of the Banking Act 1945 was a law which discriminated against
the States and their agencies and was in substance a law
which sought to give direction to the States as to the manner
in which they should exercise their executive, legislative,
judicial or governmental functions and that it was therefore
invalid."

In Wenn v. Attorney-General (Vict.) (1948) 77 CLR 84, at p 113 . he said that in Melbourne Corporation v. The Commonwealth [1947] HCA 26[1947] HCA 26; ; (1947) 74 CLR 31 :

". . . it was held that federal legislation was invalid if it
curtailed or interfered in a substantial manner with the exercise
of State constitutional power - if federal power was used for a
purpose of restricting or burdening the State in the exercise
of its constitutional powers - or if the law was aimed at

restriction or control of a State in the exercise of its executive authority." (at p423)

12. The questions raised by these authorities, so far as they are relevant to the present case, have not been settled by subsequent decisions. In Ex parte Professional Engineers' Association [1959] HCA 47; (1959) 107 CLR 208, at p 239 , Dixon C.J. suggested that in the Engineers' Case [1920] HCA 54; (1920) 28 CLR 129 "the reservations and qualifications therein expressed concerning the federal power of taxation and laws directed specially to the States and also perhaps the prerogative of the Crown received too little attention" but he did not amplify his discussion of this question. (at p423)

13. In my opinion these authorities do not support the proposition that the power of the Commonwealth Parliament to make laws with respect to taxation is subject to an implied limitation that excepts from the scope of the power any law that imposes taxation on the States. There is, on the contrary, authority that the Commonwealth Parliament may validly pass such a law. R. v. Sutton [1908] HCA 26; (1908) 5 CLR 789 and Attorney-General (N.S.W.) v. Collector of Customs (N.S.W.) (Steel Rails Case) [1908] HCA 28; (1908) 5 CLR 818 establish that Commonwealth laws imposing duties of customs are binding on the States. It is true that in those cases the Court attached some significance to the fact that the Commonwealth's power to impose duties of customs and excise is exclusive and to the unfortunate consequences that might result if the States were not subject to the customs legislation of the Commonwealth. Nevertheless, the duties were clearly taxes imposed by the Commonwealth Parliament by virtue of the power conferred by s. 51 (ii.) and these decisions, which have remained authoritative for over sixty years, could not have been correct if the taxation power were subject to a prohibition against its exercise so as to affect the States. Moreover, the inclusion in the Constitution of s. 114, which expressly forbids the Commonwealth to impose any tax upon property of any kind belonging to a State, would hardly have been necessary if the Commonwealth had lacked power to impose any tax upon the States. In any case, it seems to me that the federal nature of the Constitution, and its scheme and purpose, do not give rise to any implication that no general law imposing taxation may validly be extended to the States. Such an implication goes beyond what is required to preserve and protect the position of the States as independent members of the federation, and would, on the other hand, lead to complexities and difficulties in many cases. I hold that there should not be implied in the Constitution a limitation upon the legislative powers of the Commonwealth that would render invalid any law to the extent to which it purports to impose a tax upon the States. No doubt, however, laws imposing taxation upon the States will be more likely than many other laws to offend against the limitations that apply generally to Commonwealth powers. (at p424)

14. It then becomes necessary to determine whether the legislation in the present case is rendered invalid by any such general limitation on Commonwealth power. It is unnecessary to discuss fully the subject of the implied limitations on the power of the Commonwealth to make laws binding on the States. Such matters as the extent of the Commonwealth power to affect the prerogative, or whether the Commonwealth can compel the States to make appropriations of money in satisfaction of liabilities imposed on them, or can impair or affect the Constitution of a State, do not fall for consideration. Still less is it necessary to discuss the implications that may be made as to the immunity of the Commonwealth from action by the States. In my respectful opinion, the view of Sir Owen Dixon, that a Commonwealth law is bad if it discriminates against States, in the sense that it imposes some special burden or disability upon them, so that it may be described as a law aimed at their restriction or control, should be accepted. With all respect, however, I am not disposed to agree that a law which is not discriminatory in this sense is necessarily valid if made within one of the

enumerated powers of the Commonwealth. A general law of the Commonwealth which would prevent a State from continuing to exist and function as such would in my opinion be invalid. It is true that in many cases a law which offended in this way would prove to be discriminatory, and I am conscious of the imprecision of the test so far as it applies to general and nondiscriminatory laws. The further formulations of the test by Rich and Starke JJ. in the Melbourne Corporation Case [1947] HCA 26; (1947) 74 CLR 31 are not free from difficulty. To say that what the Constitution impliedly forbids is a law which would prevent the States from performing the normal and essential functions of government or impede them in doing so is to draw a distinction between essential and inessential functions of government which is inappropriate to modern conditions and has probably never been valid (cf. per Windeyer J. in Ex parte Professional Engineers' Association (1959) 107 CLR, at pp 274-276). To inquire whether a law curtails or interferes in a subsantial manner with the exercise of constitutional power by the States leads only to the further question what is the constitutional power of the States that is protected. For the purposes of the present case it is, however, unnecessary to attempt to resolve these difficulties because the pay-roll tax in its present form would not be invalid on any view of the question. 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. The tax has now been imposed upon and paid by the States for nearly thirty years, and it has not been shown to have prevented the States from discharging their functions or to have impeded them in so doing. 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. (at p425)

15. The question that remains is whether the legislation discriminates against the States. Section 15 of the Assessment Act provides that the provisions of Pt III (which deals generally with the liability to the tax) shall not apply to wages paid by certain employers. These exemptions are not so extensive that it can be said that the tax is aimed at the States, but one particular exemption, granted by par. (bb) of s. 15 is in favour of wages paid -

> ". . . by a school or college (other than a technical school or a technical college) which -
> (i) is carried on by a body corporate, society or association otherwise than for the purpose of profit or gain to the individual members of the body corporate, society or association and is not carried on by or behalf of a State ; and
> (ii) provides education at or below, but not above, the secondary level of education".

The provision exempts from the tax the wages paid to the employees of most private schools in Australia but it does not exempt wages paid by the States to teachers whom they employ. The wages paid to teachers in State schools amount in total to a large sum and their inclusion for the purpose of the assessment of pay-roll tax is far from being insignificant. It might, therefore, be said that the State is under a substantial burden which is not placed generally on other persons who employ school teachers. Although I do not regard this as altogether an easy question, I have reached the conclusion that it is not right to look at the matter in that way. It was understandable that the legislature should have wished to assist the advancement of education by exempting the wages paid

by schools which were not conducted for profit or gain. Most taxing statutes contain provision for exemptions and exceptions, and it is of the nature of such statutes that not all taxpayers are treated with absolute equality. The fact that certain private employers are given an exemption which is denied to the States does not necessarily mean that the statute discriminates against the States in the sense defined by Sir Owen Dixon. The question is, to some extent, one of degree. The most that can be said is that in respect of one field of employment the State is taxed although certain private employers escape. If the position of the States is compared with that of private employers generally, it is not possible to say that the States are under such a special burden or disability that the legislation is aimed at the restriction or control of the States. The provisions of s. 16V of the Assessment Act, which I have already quoted, seem to place the States in a special position, but we were informed by the Solicitor-General for the Commonwealth that the real aim and apparent effect of the section is to give an advantage to the States in the collection of rebates, and those who attacked the validity of the legislation did not challenge this statement or place any reliance upon the provisions of the section in their submissions. I, therefore, conclude that the legislation does not discriminate against the States in the sense to which I have referred. (at p426)

16. For the reasons I have given I have reached the conclusion that the legislation in question does not infringe any implied prohibition to which the Commonwealth's power to make laws with respect to taxation is subject. It is clear that the legislation does not offend against any express constitutional prohibition ; in particular, it is not a tax on the property of a State within s. 114. The challenge to the validity of the legislation therefore fails. (at p426)

17. I would allow the demurrer. (at p426)

ORDER

Demurrer allowed with costs. Action dismissed with costs.

</html</htm