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High Court upholds constitutional validity of the mining tax

The High Court has unanimously dismissed Fortescue Metals Group's constitutional challenge to the minerals resource rent tax (MRRT). The High Court's judgment confirms that a Commonwealth tax will not be invalid merely because different conditions in different States result in the tax operating differently between those States.

In **Fortescue Metals Group Ltd v Commonwealth [2013] HCA 34**, Fortescue Metals Group Ltd and related companies (Fortescue) claimed that parts of the legislative scheme creating and imposing the MRRT were not valid laws of the Commonwealth. They claimed that the laws offended a range of constitutional limitations because of the way that the calculation of the MRRT takes account of differing mining royalties payable to the States.

The High Court handed down its judgment on 7 August 2013. In 4 separate judgments (French CJ; Hayne, Bell and Keane JJ; Crennan J; and Kiefel J) the High Court unanimously dismissed Fortescue's challenge.

Background

The MRRT is created by the *Minerals Resource Rent Tax Act 2012* (Cth) (MRRT Act) and imposed by 3 associated Imposition Acts.

The MRRT Act seeks to tax the 'above normal profits' derived by miners from the extraction of, relevantly, iron ore. Where the miner's profit for the year is more than $75 million (after deductions for expenditure, allowances and applicable tax offsets), the amount of tax payable is the sum of its 'MRRT liabilities' for each of its 'mining project interests' in that year.

A miner's MRRT liability for a mining project interest is determined by:

— calculating a miner's 'mining profit' for the mining project interest

— calculating a miner's 'MRRT allowances' for that mining project interest

— subtracting those MRRT allowances from mining profit

— applying the 'MRRT rate' of 22.5 per cent to the remaining amount of profit.

Royalties paid by a miner to a State generate a 'royalty allowance', which is one of the allowances deducted from the miner's mining profit. The royalty allowance is 'grossed up': it reduces a miner's MRRT liability by the equivalent of the amount paid to the State in royalties. This has the effect that, generally, if the mining royalty payable to a State is reduced, a taxpayer's MRRT liability will rise by an equivalent amount, and vice versa.

The challenges

Fortescue argued that the MRRT Act and Imposition Acts are invalid because they:

- discriminate between States or parts of States, contrary to s 51(ii) of the Constitution (which gives the Commonwealth power to legislate with respect to 'taxation; but so as not to discriminate between States or parts of States')
- are 'law[s] or regulation of trade, commerce, or revenue' that give preference to one State over another State, contrary to the prohibition in s 99 of the Constitution
- control or hinder the States in the execution of their governmental functions, contrary to the constitutional implication associated with *Melbourne Corporation*
- are inconsistent with s 91 of the Constitution (which says that States are not prohibited 'from granting any aid to or bounty on mining for … other metals').

The Attorneys-General for Western Australia and Queensland intervened in support of Fortescue.

The High Court's reasons

No geographical discrimination contrary to the taxation power (section 51(ii))

Fortescue argued that a miner's actual liability to pay the MRRT will vary from State to State depending on the royalty rate applicable in that State and that the legislation also imposed an equalising burden of tax on mining operations in low royalty States. The High Court unanimously rejected these arguments.

The joint judgment held that the MRRT legislation itself does not provide for any difference in MRRT liability between the States. Rather, any variations are due to the different conditions in the different States, particularly the different legislative regimes of the States ([107], see also [117]). Section 51(ii) of the Constitution does not prevent the enactment of a law with respect to taxation that has different economic or other consequences in different States ([108]–[109]).

Further, the MRRT legislation did not impose a tax at a rate that differed between States: though miners in different States would have different outgoings for royalties, 'the rate at which the [MRRT] would be levied would remain 22.5 per cent regardless of the State in which the miner operated' ([at 99]; see also [107]).

Justices Crennan and Kiefel were in broad agreement that a tax law did not discriminate if the operation of the Act was not uniform due to different circumstances (that is, here, unequal mining royalties under State legislation) in the States (see Crennan J at [155], [162], [172] and Kiefel J at [224]–[225]).

Chief Justice French took a different approach on this point. His Honour held that the purposes of the MRRT legislation are properly aspects of characterisation of those laws for the purposes of ss 51(ii) and 99. In assessing whether a Commonwealth law that allows for different outcomes depending on the existence or operation of a particular type of State law discriminates or gives a preference, an important criterion will be whether any distinction made by the law is 'appropriate and adapted to a proper objective' (at [48]–[49]). The Chief Justice held that the objectives of the MRRT Act are non-discriminatory and are 'proper objectives, to which the impugned provisions are appropriate and adapted'. The differences in the operation of the MRRT Act in different States arise from the MRRT Act's interaction with different State royalty regimes, which serve those objectives (at [50]).

No preference without discrimination (section 99)

It was accepted in this case that, to show a preference between States for the purposes of s 99, it is necessary to demonstrate discrimination or differentiation (see French CJ at [4], Hayne, Bell and Keane JJ at [124], Kiefel J at [183]). All judges held that it followed from their conclusion that the MRRT legislation does not discriminate between States contrary to s 51(ii) that the MRRT legislation does not give preference to one State over another

contrary to s 99 (see French CJ at [5], [30], [50]; Hayne, Bell and Keane JJ at [123]–[125]; Crennan J [175]–[176]; Kiefel J at [227]).

No impairment of capacity of States to function (Melbourne Corporation)

The *Melbourne Corporation* principle protects the continued existence of the States as independent entities with legislative, executive and judicial functions, and the capacity of the States to function as governments. It was argued that the MRRT legislation interfered with the States' management of the mineral resources under their control and so violated the *Melbourne Corporation* principle. It was also argued that the legislation had the potential to neutralise the positive effect on the mining activity of a State that might be expected to flow where a State exercises its ability to reduce its royalty rate.

The joint judgment (with which French CJ at [6], Crennan J at [145] and Kiefel J at [229] agreed) dismissed these arguments. Their Honours held that the MRRT legislation is not aimed at the States and does not impose any special disability or burden on the exercise of powers and functions of the States that curtails their capacity to function as governments. The legislation does not deny a State's capacity to fix royalty rates and does not burden a State's decision to raise or lower royalty rates. If the MRRT legislation did affect the States' ability to use a reduction in royalty rates as an incentive to attract mining investment, that was not a limit or burden on a State's exercise of its constitutional functions (Hayne, Bell and Keane JJ (at [137]).

Section 91 does not relevantly limit Commonwealth legislative power

Fortescue submitted that s 91 of the Constitution prevents the Commonwealth from passing a law that impedes the ability of a State to grant 'aid on mining' by reducing the rate of a State royalty or providing an exemption from liability to pay a royalty. Fortescue argued that this type of grant would be illusory: any grant of a royalty reduction or exemption by a State to a miner would result in an equivalent increase in the amount of MRRT payable by that miner.

The joint judgment (with which French CJ at [6] and Crennan J at [145] agreed) rejected Fortescue's submissions. Their Honours held that s 91 relevantly preserves State legislative powers (to provide for certain types of aid or bounty) but does not limit the legislative powers of the federal Parliament (at [141]). This conclusion followed from the text and structure of s 91 in the context of s 90, which grants the Commonwealth exclusive legislative powers in certain areas.

Justice Kiefel reached a similar conclusion to the joint judgment and also suggested that the incentives highlighted by Fortescue would not amount to 'aid' within the meaning of s 91 (at [233]).

AGS involvement

AGS (Andrew Buckland, Andrew Yuile, Megan Caristo and David Bennett QC) acted for the Commonwealth in the litigation with Solicitor-General Justin Gleeson SC, Neil Williams SC, David Thomas and Gim del Villar as counsel. AGS (Leo Hardiman and Sam Arnold) advised the Commonwealth on the development of the legislation.

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