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What is a Tax? The Erosion of the "Latham Definition"

Abstract

As its title suggests, this article examines the fundamental, yet by no means basic question of what is a "tax"? The article focuses on recent judgments of the High Court which have, to some extent, eroded what many commentators have regarded as the classic definition of a tax expressed by Latham CJ in *Matthews v Chicory Marketing Board*.

Keywords

tax, definition, Australia, taxation

WHAT IS A TAX? THE EROSION OF THE "LATHAM DEFINITION"

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As its title suggests, this article examines the fundamental, yet by no means basic question of what is a "tax"? The article focuses on recent judgments of the High Court which have, to some extent, eroded what many commentators have regarded as the classic definition of a tax expressed by Latham CJ in *Matthews v Chicory Marketing Board*.¹

The power to tax is the one great power upon which the whole national fabric is based... It is not only the power to destroy, but it is also the power to keep alive.²

THE IMPORTANCE OF THE DEFINITION OF A "TAX"

There are three essential reasons why the definition of a "tax" is important:

Section 51(ii) of the Commonwealth Constitution

First, it is important because s 51(ii) of the Commonwealth Constitution confers upon the Commonwealth Parliament the power to make laws with respect to "taxation; but so as not to discriminate

¹ (1938) 60 CLR 263.

² *Nicol v Ames* (1899) 173 US 509 at 515.

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between States or parts of States".³ Consequently, where a Commonwealth law cannot be characterised as one with respect to taxation, the law will be invalid unless it falls within another constitutional head of power.

A Commonwealth Act of Parliament is *prima facie* authorised by the taxation power, as long as it imposes a legal obligation to pay a tax. As Brennan J observed in *MacCormick v FC of T*:⁴

As the taxation power extends to "any form of tax which ingenuity may devise", the Parliament may select such criteria as it chooses, subject to any express or implied limitations prescribed by the Constitution, irrespective of any connexion between them.⁵

The High Court has ruled that the practical effect of an Act of Parliament is irrelevant when determining whether or not the Act in question is "with respect to taxation". Barton J indicated in *Osborne v Commonwealth*:⁶

The arguments, in effect, predict certain results as consequences of the oppressive operation of the tax. These predictions are not for us to examine, because they are not relevant to the question of lawful authority... Questions of the abuse of power are for the people and Parliament. We can only determine whether the power exists, and if so, whether Parliament has in fact ... acted within it.

The ultimate purpose of the Act is also not a relevant consideration. In this respect, Mason CJ, Deane, Toohey and Gaudron JJ have recently indicated:⁷

³ As to the meaning of the expression "discriminate between States or parts of States" see *James v Commonwealth* (1928) 41 CLR 442; *Cameron v FC of T* (1923) 32 CLR 68; *Conroy v Carter* (1968) 118 CLR 90; *R v Barger* (1908) 6 CLR 41; *Elliott v Commonwealth* (1936) 54 CLR 657; and *C of T v Clyne* (1958) 100 CLR 246. A similar prohibition is found in s 99 of the Commonwealth Constitution, which provides that "the Commonwealth shall not by any law or regulation of trade, commerce, or revenue, give preference to a State or any part thereof over another State or any part thereof".

⁴ (1984) 158 CLR 622.

⁵ *Ibid* at 654.

⁶ (1911) 12 CLR 321 at 344. See also *Fairfax v FC of T* (1965) 114 CLR 1 at 17 per Menzies J ("whether or not a law is one with respect to taxation cannot be determined by looking at its economic consequences").

⁷ *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 569. See also *Osborne v Commonwealth* (1911) 12 CLR 321; *Fairfax v FC of T* (1965) 114 CLR 1; *Radio Corporation Pty*

But the fact that the revenue-raising burden is merely secondary to the attainment of some other object or objects is not a reason for treating the charge otherwise than as a tax... One might as well suggest that a protective customs duty is not a tax because its primary object is the protection of a particular local manufacturing industry from overseas competition.

If a law, on its face, is one with respect to taxation, the law does not cease to have that character simply because Parliament seeks to achieve, by its enactment, a purpose not within Commonwealth legislative power.

A clear illustration of this principle is found in *State Chamber of Commerce and Industry v Commonwealth*,⁸ where it was argued that the Fringe Benefits Tax Act 1986 (Cth), when read with the Fringe Benefits Tax Assessment Act 1986 (Cth), was designed to discourage the provision of fringe benefits and, as such, could not be properly described as laws with respect to taxation. In rejecting this argument, Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ said:⁹

In characterising a law the Court has regard to its operation to what the law does in the way of creating rights and obligations, and how it operates within the permitted area of power. It matters not that the provisions which so operate may be intended to achieve some other purpose...

Section 90 of the Commonwealth Constitution

Secondly, the definition of a tax is important because it plays a crucial role in the interpretation, and therefore operation, of s 90 of the Commonwealth Constitution. Section 90 provides that the Commonwealth Parliament shall have the exclusive power "to impose duties of customs and of excise".¹⁰ As is evident from the following passage from the judgment of Mason CJ, Brennan, Deane

12 CLR 321; *Fairfax v FC of T* (1965) 114 CLR 1; *Radio Corporation Pty Ltd v Commonwealth* (1938) 59 CLR 170 at 179-180 per Latham CJ; *Re F; Ex parte F* (1986) 161 CLR 376 at 387-388 per Mason and Deane JJ; and *Moore v Commonwealth* (1951) 82 CLR 547 at 578 per Fullagar J.

⁸ (1987) 163 CLR 329.

⁹ Ibid at 354.

¹⁰ By providing that only the Commonwealth Parliament can impose customs and excise duties, s 90 represents a constitutional restriction on the legislative power of State Parliaments. Another important point to note about duties of customs and of excise is that the source of the legislative power of the Commonwealth Parliament to exact such taxes is to be found in the taxation power and not in s 90.

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and McHugh JJ in *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)*,¹¹ these duties are special categories of taxes.¹²

the distinction between duties of customs and duties of excise... [is] dependent on the step which attracts the tax: importation or exportation in the case of customs duties; production, manufacture, sale or distribution - inland taxes - in the case of excise duties.

Consequently, an impost which cannot be characterised as a tax can also not be a customs or excise duty and could, prima facie, be validly enacted by a State legislature.

Section 55 of the Commonwealth Constitution

Thirdly, the definition of a tax is also crucial in assessing whether Commonwealth law has violated the prohibitions contained in s 55 of the Commonwealth Constitution. This provision imposes, inter alia, the requirement that "laws imposing taxation shall deal only with the imposition of taxation".¹³ The courts have interpreted the phrase "imposition of tax" narrowly. The practical effect of this is that legislation imposing a tax cannot contain provisions which, for instance, also impose penalties.¹⁴ In the words of Fullagar J in *Re Dymond*:¹⁵

Provisions for ... the collection and recovery of tax, the punishment of offences... "deal with" matters which must be dealt with if the imposition of the tax is to be effective. But they cannot be said to deal with the imposition of taxation, because their subject matter is not comprehended within the meaning of the term "imposition of taxation".

Consequently, an Act of Parliament, which imposes a tax but also contains provisions imposing penalties for failure to pay the tax by

¹¹ (1993) 178 CLR 561 at 590.

¹² Ibid.

¹³ It also provides that "any provision therein dealing with any other matter shall be of no effect" and further that "laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only".

¹⁴ It has been observed that s 55 "forbids the inclusion in one law of provisions dealing with the imposition of taxation together with provisions exacting penalties": Lane PH, *Lane's Commentary on the Australian Constitution* (1986 Law Book Company) 107. See also *Re Dymond* (1959) 101 CLR 11. The same conclusion would apply in relation to provisions imposing fees for services rendered.

¹⁵ (1959) 101 CLR 11 at 20-21.

the due date, would be in breach of s 55, as it contains provisions imposing taxation together with provisions dealing with matters other than the imposition of taxation.¹⁶

THE "LATHAM DEFINITION" OF A TAX

The courts and commentators have regarded the classic definition of a tax as being that enunciated by Latham CJ in *Matthews v Chicory Marketing Board*, where the Chief Justice said:¹⁷

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

EROSION OF THE POSITIVE ATTRIBUTES OF THE "LATHAM DEFINITION"

This definition has, however, been the subject of extensive scrutiny by the High Court in recent times. In *Air Caledonie International v Commonwealth*, for instance, the High Court, in its unanimous judgment, expressed the following comments in relation to Latham CJ's formula:¹⁸

The [Latham formula] ... should not be seen as providing an exhaustive definition of a tax. Thus, there is no reason in principle why a tax should not take a form other than the exaction of money or why the compulsory exaction of money under statutory powers could not be properly seen as taxation notwithstanding that it was by a non-public authority or for purposes which could not properly be described as public.

¹⁶ This is why "it has been the invariable practice since the establishment of the Commonwealth, when Parliament has proposed to levy a tax on any subject of taxation, to pursue that object by means of two separate Acts, the one of which actually imposes the tax and fixes the rate of tax, and the other of which provides for the incidence, assessment and collection, of the tax and for a variety of incidental matters": *ibid* 18. See also *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 594-596 per Dawson J for a discussion of the "generally accepted scheme of incorporating an assessment Act with a taxing Act in order to avoid falling foul of s 55".

¹⁷ (1938) 60 CLR 263 at 276. This definition was based on the definition enunciated by the Privy Council in *Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd* [1933] AC 168 at 175.

¹⁸ (1988) 165 CLR 462 at 467 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ.

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Despite this warning, the Court applied the Latham formula to determine whether a fee which was payable by passengers arriving in Australia, as part of their "immigration clearance", was a tax. The Court concluded that the fee in question:¹⁹

possessed all of the positive attributes which have been accepted in this Court as prima facie sufficient to stamp an exaction of money with the character of a tax: it was compulsory; it was exacted by a public authority (the Commonwealth itself) for public purposes (consolidated revenue...); it (or its 'amount') was enforceable by law.

Since the High Court concluded that the fee in question satisfied the Latham formula, this meant that the Justices were not required to shed any light as to the circumstances in which they would be prepared to rule that a levy was a tax despite its failure to satisfy all of the requirements of the formula. What was needed was a challenge to a levy which did not comply with one or more of the elements of the Latham formula. Such a scenario was provided by the recent case of *Australian Tape Manufacturers Association Ltd v Commonwealth*.²⁰ This case concerned the constitutional validity of Part VC of the Copyright Act 1968 (Cth), which imposed a levy, described as a "royalty", on blank tapes. The operation of the legislative scheme was described by Dawson and Toohey JJ:²¹

the scheme allows the home copying of a sound recording on a blank tape for private and domestic use without infringement of copyright. However a levy, described as a royalty, is imposed upon certain vendors of blank tapes in Australia. This royalty is to be paid to an authorised collecting society of which copyright owners may be members and the collecting society is to distribute the funds raised by way of royalty to its members.

The legislation tried to deal with the problem of widespread and unauthorised copying of copyright sound recordings by the use of blank tapes.²² The collection and distribution of the levy by a

¹⁹ Ibid at 468.

²⁰ (1993) 176 CLR 480.

²¹ Ibid at 513-514. The amount of royalty payable was "calculated, at least in part, by reference to the extent to which blank tapes are used for the purpose of making copies of eligible sound recordings and eligible works for private and domestic use": ibid at 497 per Mason CJ, Brennan, Deane and Gaudron JJ.

²² This problem was depicted in a colourful manner by Lord Templeman in *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] AC 1013 at 1060, where his Lordship said: "From the point of view of society the present position is lamentable. Millions of breaches of the law must be

private collecting society enabled the taxpayer to put forward the argument that the levy was not a tax within the Latham formulation, because "it [was] ... not exacted by a public authority, nor [was] ... it exacted for public purposes".²³

By a slim majority (Mason CJ, Brennan, Deane and Gaudron JJ; Dawson, Toohey and McHugh JJ dissenting), the High Court held that the levy was a tax. In relation to the "public authority" argument of the taxpayer, Mason CJ, Brennan, Deane and Gaudron JJ remarked that:²⁴

It would seem to be a remarkable consequence if a pecuniary levy imposed for public purposes by a non-public authority acting pursuant to a statutory authority falls outside the concept of a tax simply because the authority which imposes the levy is not a public authority, when the amount of the levy is to be expended on public purposes... Of course, it is a misnomer to describe an authority as non-public when one of its functions is to levy, demand or receive exactions to be expended on public purposes. To that extent, at least, the authority should be regarded as a public authority. *But the better view is that it is not essential to the concept of a tax that the exaction should be by a public authority.* (Emphasis added)

The comments above are significant in two respects. In the first place, they constitute an endorsement, and application, of the *Air Caledonie* dicta that an exaction may be a tax in spite of the fact that it was not exacted by a public authority. Secondly, the requirement of "public authority" appears to have been absorbed into the concept of "public purposes". This is in the sense that a judicial finding that the levy in question is to be expended on public purposes will ensure that the requirement of "public authority" will not prevent the characterisation of the levy as a tax. In light of the broad meaning attached to the concept of public purposes by the majority Justices, it appears that the non-public nature of the entity

committed by home copiers every year... Some home copiers may break the law because they estimate that the chances of detection are non-existent.... Whatever the reason for home copying, the beat of Sergeant Pepper and the soaring sounds of the Miserere from unlawful copies are more powerful than law-abiding instincts or twinges of conscience".

²³ (1993) 176 CLR 480 at 500 per Mason CJ, Brennan, Deane and Gaudron JJ.

²⁴ Ibid at 501.

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imposing the impost will not, in most cases, be a relevant factor in the judicial characterisation of the impost in question.²⁵

In relation to the taxpayer's other argument, that the levy should be for public purposes if it is to be characterised as a tax, the majority acknowledged that payment of a levy "into the Consolidated Revenue Fund has been regarded as a conclusive indication that the levy is exacted for public purposes".²⁶ But, as their Honours went on to indicate, this proposition did not mean that the "public purposes" requirement could only be satisfied by proof that the relevant levy had been paid into the Consolidated Revenue Fund.²⁷

The requirement imposed by s 81 of the Constitution that all revenue or moneys raised or received by the Executive Government form one Consolidated Revenue Fund is not, and cannot constitute, a criterion for what is a tax. The purpose of s 81 ... was to ensure that the revenues of the Crown, including taxes, were brought together in one Consolidated Revenue Fund under the control of Parliament. To hold that revenues or moneys that are not treated in accordance with the requirements of s 81 cannot be taxes to which s 81 applies is circuitous reasoning and deprives s 81 of any effective content.

The majority also rejected the proposition that the expression "public purposes" is synonymous with "governmental purposes".²⁸

if that proposition be correct, then an exaction not raised or received by the Executive Government, for example, an exaction raised and received by an independent statutory authority pursuant to a power conferred by statute, could not constitute a tax. As Parliament has power to authorise a statutory authority to levy and receive a tax, that general proposition must be rejected.

Furthermore, it is inconsistent with the passage earlier quoted from the judgment in *Air Caledonie* to the effect that an exaction for non-public purposes may be a tax.

The majority did not find persuasive the argument that the relevant levy was not an exaction for public purposes, as it involved the transfer of moneys from one group of persons (the vendors of blank

²⁵ An exception would exist in cases where "the character of the authority will be relevant and influential in deciding whether the purposes on which the moneys raised are to be expended are themselves public": *ibid*.

²⁶ *Ibid* at 503. See also *Moore v Commonwealth* (1951) 82 CLR 547 at 561 per Latham CJ; *R v Barger* (1908) 6 CLR 41 at 68 per Griffith CJ, Barton and Connor JJ; and *Parton v Milk Board (Vic)* (1949) 80 CLR 229 at 258 per Dixon J.

²⁷ (1993) 176 CLR 480 at 503-504.

²⁸ *Ibid* at 504.

tapes) to another group of persons (the copyright owners). The majority rejected this proposition on the basis that, since the scheme concerning the levy constituted the legislature's solution to a problem of public importance, then the purpose of the levy was "of necessity a public purpose".²⁹

Dawson and Toohey JJ, in their dissenting judgments, expressed the view that the *Air Caledonie* dicta "may be too wide", as it treats "as dispensable that feature of a tax which is, in truth, indispensable, namely, that the moneys raised be government revenue".³⁰ Consequently, the importance of the requirements of public authority and public purposes needed to be viewed, according to their Honours, in light of this notion that taxes involve the raising of revenue by government:³¹

those characteristics of a tax which require it to be levied by a public authority for public purposes are important in that they reflect the general conception of a tax as a means of raising revenue for government.

In light of these comments, it is not surprising that Dawson and Toohey JJ regarded the failure to pay an exaction into the Consolidated Revenue Fund as strong evidence that the exaction is not a tax. Applying these principles to Part VC, Dawson and Toohey JJ concluded that:³²

the actual purpose of the royalty shows that it is part of a scheme, designed to compensate copyright owners for the use of their copyright material, which does not involve the raising of government revenue. Rights and obligations are imposed by statute as part of the scheme and in that sense the scheme is a public one. But it is not sufficient in our view to constitute the moneys raised by way of royalty under the legislation public moneys, which they would of necessity be if the royalty were a tax.

Their Honours also concluded that the statutory powers conferred upon the collecting society did not render it a public authority for the purposes of the Latham formula.³³

The other dissenting Justice, McHugh J, was of the view that:³⁴

²⁹ Ibid at 505.

³⁰ Ibid at 522.

³¹ Ibid.

³² Ibid at 524.

³³ Ibid.

³⁴ Ibid at 530.

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before a compulsory exaction of money under statutory authority can constitute a tax, it must ... be raised for some public, that is, governmental, purpose. In the setting of the Constitution, it must be raised for the purposes of the Commonwealth to be "applied to the payment of the expenditure of the Commonwealth".

From McHugh J's perspective, the fact that Part VC served "a public purpose" was not sufficient to satisfy the concept of public purpose, "as that concept is understood in the context of determining whether or not a compulsory exaction of money is a tax for the purpose of the Constitution".³⁵ According to McHugh J in that context, "public purpose is synonymous with the 'purposes of the Commonwealth'".³⁶

Critique

It cannot be denied that the majority's approach in *Australian Tape Manufacturers* has removed some of the rigidity which can result from the "mechanical" application of the Latham formula. But this new flexibility has generated considerable uncertainty as to the circumstances in which an exaction, which has not met one or more of the elements of the formula, will be found by the Court to constitute a tax for the purposes of the Constitution.

Equally troubling is the sudden and unexpected divergence of views on this issue among the High Court Justices. The High Court in *Air Caledonie* included Dawson and Toohey JJ. Five years later, these Justices (together with McHugh J) in *Australian Tape Manufacturers* were of the view that the judgment in *Air Caledonie* "may be too wide".³⁷ The divergence of views among the members of the High Court is, of course, not limited to the issue of what are the essential attributes of a tax, but also extends to other crucial issues such as the important concept of "public purposes". While the minority Justices equated public purposes to governmental purposes, the majority Justices adopted a far broader approach pursuant to which they saw legislative solutions to problems of public importance as satisfying the requirement of public purposes. This latter approach may be criticised on the basis that, "by effectively reducing 'public purpose' to 'public interest' the majority have stripped the former notion of any distinguishing content and force. ... A public purpose then

³⁵ Ibid at 532.

³⁶ Ibid.

³⁷ (1993) 176 CLR 480 at 522.

becomes whatever the Parliament determines to be in the public interest".³⁸

Consequently, the practical effect of *Australian Tape Manufacturers* is that, as highlighted by Challis, "it holds the potential to encompass many exactions not previously considered as taxes".³⁹ Whether or not this constitutes a desirable state of affairs from a taxpayer's perspective depends on the constitutional provision under scrutiny.

If the constitutional issue before the Court is whether the Commonwealth legislation, imposing the relevant levy, is authorised by the taxation power, then the expanded notion of taxation will not, of course, be beneficial to the taxpayers in question. In scenarios similar to the one in *Australian Tape Manufacturers* the taxpayers may, however, place reliance on s 81 and s 83 of the Constitution. In fact, there was agreement among the High Court Justices in *Australian Tape Manufacturers* that the conclusion that the blank tape levy was a tax would inevitably lead to a further conclusion, namely, that Part VC would be invalid as a result of its failure to comply with the requirements of s 81 and s 83 of the Constitution. As Dawson and Toohey JJ indicated:⁴⁰

under s 81 of the Constitution all revenues or moneys raised or received by the Executive Government of the Commonwealth form one Consolidated Revenue Fund to be appropriated for the purposes of the Commonwealth. If an exaction is a tax, the moneys which it raises are revenue and must form part of the Consolidated Revenue Fund by reason of s 81. That is to say, if in the present case the royalty constitutes a tax, the legislative provisions which make it payable to the collecting society to be distributed by it fail ... because the moneys raised must form part of the Consolidated Revenue Fund and can only, under ss 81 and 83 of the Constitution, be received by the collecting society after appropriation by law for the purpose of payment to it.

³⁸ Johnston P, "A Taxing Time: The High Court and The Tax Provisions of The Constitution" (1993) 23 *University of Western Australia Law Review* 362 at 369 n 25.

³⁹ Challis D, "Ejecting the Blank Tape Levy: *Australian Tape Manufacturers Association Ltd v Commonwealth of Australia*" (1994) 16 *Sydney Law Review* 537 at 544.

⁴⁰ (1993) 176 CLR 480 at 522. Similar views were expressed, at 506, by the majority: "in order to comply with the relevant provisions in Ch IV of the Constitution, however, it is necessary that the moneys raised by the imposition of the tax form part of the Fund from which they must be appropriated by law".

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Alternatively, if the taxpayer argues, as was the case in *Australian Tape Manufacturers*,⁴¹ that the relevant Commonwealth Act breached the s 55 prohibition, then a judicial finding that one of the provisions of the legislation under scrutiny imposed a tax will be crucial to the success of the taxpayer's case. The wider concept of tax will also be beneficial to those taxpayers who wish to challenge the validity of State legislation on the basis that such legislation is inconsistent with s 90 of the Commonwealth Constitution, as it imposes "a tax directly related to goods imposed as some stage in their production or distribution before they reach the hands of the consumer",⁴² that is, an excise duty.

SPECIAL TYPES OF EXACTIONS

Even though a levy satisfies the positive attributes of the Latham definition (as modified by *Australian Tape Manufacturers*), a levy will clearly not be a tax within that formulation if it is a fee for services rendered. Subsequent cases have indicated that other exactions, not just fees for services rendered, may also not be characterised as taxes, notwithstanding that these exactions meet the positive attributes of the Chief Justice's formulation. So much is evident from the following comments in *Air Caledonie*:⁴³

⁴¹ Part VC was inserted into the Copyright Act 1968 (Cth) by the Copyright Amendment Act 1989 (Cth). The consequence of the conclusion that the levy was a tax, was that the 1989 Act was "an Amending Act which sought to introduce a law imposing taxation into an existing Act not dealing with the imposition of taxation": (1993) 176 CLR 480 at 522 per Dawson and Toohey JJ. Consequently the 1989 Act contravened s 55 of the Constitution. The legislation which imposed the immigration clearance fee in *Air Caledonie* was also held to be in contravention of s 55: (1988) 165 CLR 462 at 471-472.

⁴² *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 615 per Gibbs CJ.

⁴³ (1988) 165 CLR 462 at 467. See also *Australian Tape Manufacturers* (1993) 176 CLR 480 at 507 per Mason CJ, Deane, Toohey and Gaudron JJ; s 53 of the Commonwealth Constitution which provides that "a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law"; and *Northern Suburbs* (1993) 176 CLR 555 at 566-567 per Mason CJ, Deane, Toohey and Gaudron JJ.

the negative attribute [of the Latham formula] - "not a payment for services rendered" - should be seen as intended to be but an example of various special types of exactions which may not be taxes even though the positive attributes mentioned by Latham CJ are all present. Thus, a charge for the acquisition or use of property, a fee for a privilege and a fine or penalty imposed for criminal conduct or breach of statutory obligation are other examples of special types of exactions of money which are unlikely to be properly characterised as a tax notwithstanding that they exhibit those positive attributes.

The main examples of these special types of exactions are discussed below.

Fees for services rendered

In *Air Caledonie* the full High Court enunciated the following definition of "fees for services rendered":⁴⁴

a fee or charge exacted for particular identified services provided or rendered individually to, or at the request or direction of, the particular person required to make the payment.

Applying this definition to the impost under challenge, the Court held that it could not be regarded as a fee for services. Australian citizens returning by air from overseas were legally entitled to come back to Australia without the need for any "clearance". The imposition of such administrative procedures could not:⁴⁵

properly be seen as the provision or rendering of "services" to, or at the request or direction of, the citizen concerned. Nor is it possible to find in ... [the relevant legislation] any identification of particular services provided or rendered to the individual passenger for which the impost could relevantly be regarded as a fee or quid pro quo.

More recently, in *Northern Suburbs General Cemetery Reserve Trust v Commonwealth*,⁴⁶ the High Court was asked to determine, inter alia, whether a levy (the "training guarantee charge") payable by

⁴⁴ (1988) 165 CLR 462 at 470. See also *Harper v Victoria* (1966) 114 CLR 361; *Matthews v Chicory Marketing Board* (1938) 60 CLR 263; *Parton v Milk Board (Vic)* (1949) 80 CLR 229; *Hartley v Walsh* (1937) 57 CLR 372; and *General Practitioners Society of Australia v Commonwealth* (1980) 145 CLR 532.

⁴⁵ (1988) 165 CLR 462 at 470.

⁴⁶ (1993) 176 CLR 555.

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employers, under the Training Guarantee (Administration) Act 1990 (Cth), was a tax or a fee for services. The liability to pay this levy arose whenever employers incurred a "training guarantee shortfall". In simple terms, this occurred where an employer spent less than the minimum amount required under the Act on "eligible training activities". The moneys received by the Commonwealth were to be paid to the States and Territories, who were required to expend these moneys in relation to "eligible training programs".⁴⁷ In doing so, they were to act on the advice of a body which included representatives of employers and trade unions.⁴⁸ The Court ruled that:⁴⁹

these requirements fall a long way short of requiring ... that the money received be expended in relation to eligible training programs for those employers who have incurred a liability to pay the charge. There is therefore no statutory warrant for concluding that the charge paid is a fee for services. The Administration Act does not by its terms establish any sufficient relationship between the liability to pay the charge and the provision of employment related training... to regard the liability to pay the charge as a fee for services.

Charge for the acquisition or use of property

In *Air Caledonie*, it was specifically mentioned that "a charge for the acquisition or use of property" is not a tax. As Goldsworthy and Hanks note,⁵⁰ an illustration of this principle is found in *Harper v Minister for Sea Fisheries*.⁵¹ In that case, the High Court rejected the taxpayer's argument that a fee payable for a licence which conferred the right to fish for abalone was an excise duty, as it amounted to a tax on the taking of abalone. The Court unanimously held that the fee could not constitute an excise duty, since it was not a tax. Mason CJ, Deane and Gaudron JJ regarded the fee "as the price exacted by the public, through its laws, for the appropriation of a limited public natural resource to the commercial exploitation of those who ... acquire or retain commercial licences".⁵² Similarly, Brennan J viewed the fee as "analogous to the price of a profit à

⁴⁷ Section 35(2)(b)(ii).

⁴⁸ Section 35(2)(b)(i).

⁴⁹ (1993) 176 CLR 555 at 568 per Mason CJ, Deane, Toohey and Gaudron JJ. Similar views were expressed, at 588, by Dawson J.

⁵⁰ Goldsworthy J and Hanks P, "Constitutional Law" in Baxt R and Kewley G (eds), *An Annual Survey of Australian Law 1989* (1990 The Adelaide Law Review Association) 164 at 170.

⁵¹ (1989) 168 CLR 314.

⁵² *Ibid* at 325.

prendre; it is a charge for the acquisition of a right akin to property",⁵³ whilst Dawson, Toohey and McHugh JJ drew a distinction between "a price paid for the right to appropriate a public natural resource and a tax upon the activity of appropriating it".⁵⁴

Penalties

The distinction between a penalty, on the one hand, and a tax, on the other, was first drawn by Isaacs J in the 1908 case of *R v Barger*.⁵⁵ He distinguished "a penalty for an unlawful act or omission" from "a contribution to revenue irrespective of any legality or illegality in the circumstances upon which the liability depends".⁵⁶

A well-known instance of a penalty was provided by the statutory provision which was challenged in *Re Dymond*.⁵⁷ Section 46 of the Sales Tax Assessment Act (No 1) 1930 (Cth) imposed a liability to pay "additional tax" on those who failed to furnish the relevant sales tax return. The High Court held that s 46 imposed a penalty, and not a tax, as the liability was "imposed by the Act not as a consequence of a sale of goods but as a consequence of an attempt to evade payment of a tax on a sale of goods".⁵⁸

The distinction between a tax and a penalty also arose in the *Northern Suburbs* case. The Court held that the training guarantee charge, which was in issue in that case, did not constitute a penalty. Mason CJ, Deane, Toohey and Gaudron JJ held that:⁵⁹

the considerations pointing to a tax rather than a penalty are decisive. Neither the Act nor the Administration Act mandates or proscribes conduct of any kind. The

⁵³ Ibid at 335.

⁵⁴ Ibid at 337. Dawson, Toohey and McHugh JJ also endorsed the following comment made in *Air Caledonie*: "[if the exaction in question] has no discernible relationship with the value of what is acquired, the circumstances may be such that the exaction is, at least to the extent that it exceeds that value, properly to be seen as a tax": (1988) 165 CLR 462 at 467.

⁵⁵ (1908) 6 CLR 41.

⁵⁶ Ibid at 99.

⁵⁷ (1959) 101 CLR 11.

⁵⁸ Ibid at 22 per Fullagar J. See also *Moore v Commonwealth* (1951) 82 CLR 547; *Collector of Customs (NSW) v Southern Shipping Co Ltd* (1962) 107 CLR 279; and *MacCormick v FC of T* (1984) 158 CLR 622 at 639 per Gibbs CJ, Wilson, Deane and Dawson JJ.

⁵⁹ (1993) 176 CLR 555 at 571.

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legislative provisions do not make it an offence to fail to spend the minimum training requirement; nor do they provide for the recovery of civil penalties for such a failure. Consequently, the charge is not a penalty because the liability to pay does not arise from any failure to discharge antecedent obligations on the part of the person on whom the exaction falls. The fact that the legislature has singled out those who do not spend the minimum training requirement as the class to bear the burden of the charge and to quantify the amount of the liability by reference to the shortfall does not deprive the charge of the character of a tax.

The passage above illustrates rather clearly the ease with which the drafters of Commonwealth legislation can avoid a judicial finding that a given exaction is a penalty. As was indicated by Professor Zines, "instead of creating an offence or imposing a sanction, the Commonwealth could achieve the same result by imposing a tax on certain classes of conduct or imposing a tax with an exemption for those who act or refrain from acting in a manner desired by the Commonwealth".⁶⁰

Arbitrary exactions

The difference between a tax and an arbitrary exaction was explained in the following manner by Gibbs CJ, Wilson, Deane and Dawson JJ in *MacCormick v FC of T*:⁶¹

For an impost to satisfy the description of a tax it must be possible to differentiate it from an arbitrary exaction and this can only be done by reference to the criteria by which liability to pay the tax is imposed. Not only must it be possible to point to the criteria themselves, but it must be possible to show that the way in which they are applied does not involve the imposition of liability in an arbitrary or capricious manner.

The concept of arbitrary exactions was further explained by the High Court in the subsequent case of *DFC of T v Truhold Benefit Pty Ltd*.⁶² Gibbs CJ, Mason, Wilson, Deane and Dawson JJ stressed that a

⁶⁰ Zines L, *The High Court and the Constitution* (3rd ed Butterworths 1992) 31. The practical significance of the taxation power becomes even more evident when one bears in mind that the Commonwealth "Parliament may impose taxation absolutely or conditionally. It may select not merely its subjects of taxation but also the condition, if any, upon which the liability shall arise": *Nott Brothers & Co Ltd v Barkley* (1925) 36 CLR 20 at 25-26 per Isaacs J. See also *Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 183-184 per Latham CJ.

⁶¹ (1984) 158 CLR 622 at 640.

⁶² (1985) 158 CLR 678.

tax will not be held to be arbitrary, as long as the liability to pay the tax is,⁶³

imposed by reference to ascertainable criteria with a sufficiently general application and ... the tax ... [is not] imposed as a result of some administrative decision based upon individual preference unrelated to any test laid down by the legislation.

The statutory provision which was under challenge in *Truhold*, s 6 of the Taxation (Unpaid Company Tax) Assessment Act 1982 (Cth),⁶⁴ was regarded by the Court as imposing a tax rather than an arbitrary exaction as "the legislation [did] ... not contemplate the formation of an opinion by the Commissioner in an arbitrary manner".⁶⁵

A novel constitutional argument, based on the concept of arbitrary exactions, was put forward in *Northern Suburbs*.⁶⁶ The novelty lies in the fact that the argument that the training guarantee charge was an arbitrary exaction was grounded, not on the provisions which imposed the liability, but rather on the provision that empowered the relevant decision-maker to confer the status of "eligible outstanding trainers" on employers. The levy was not payable by those employers who enjoyed this status. That is to say, the general nature of the taxpayer's argument was that, where exemption from liability to pay an impost is arbitrarily granted, then the impost itself is arbitrary, as "liability to pay it is as much dependent upon the absence of exemption as upon satisfaction of those criteria by reference to which the liability to pay is imposed".⁶⁷ Dawson J accepted that such a scenario was conceivable, but concluded that

⁶³ Ibid at 684.

⁶⁴ The effect of this provision was that, "if recovery from a company otherwise liable to pay is not possible because it has ceased to exist, or because it is insolvent, or if it is unreasonable by reason of a sale of its shares into different hands, then liability may be passed further along the chain which commences with the transaction which resulted in the stripping of the target company": (1985) 158 CLR 678 at 687 per Gibbs CJ, Mason, Wilson, Deane and Dawson JJ.

⁶⁵ Ibid.

⁶⁶ See also *Giris Pty Ltd v FC of T* (1969) 119 CLR 365 where the taxpayer unsuccessfully disputed the validity of s 99A of the *Income Tax Assessment Act 1936* (Cth). This provision confers upon the Commissioner the discretion to tax the income of trust estates to which no beneficiary is presently entitled under s 99 rather than under s 99A.

⁶⁷ (1993) 176 CLR 555 at 590 per Dawson J.

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the provision in question did not authorise the conferral of exemptions upon arbitrary or capricious grounds.⁶⁸

In practice, the concept of arbitrary exactions constitutes a very minor restriction on the scope of the taxation power. Constitutional challenges to Commonwealth levies, based on the notion of arbitrary exactions, have generally failed.⁶⁹ Indeed, it has been said that the only type of pecuniary liability which would appear to satisfy the description of an arbitrary exaction is a "liability imposed by *ad hominem* legislation directed at specified individuals".⁷⁰

Incontestable taxes

Incontestable taxes would appear to be a form of arbitrary exaction. Support for this view is found in the comments of Dawson and Toohey JJ in *Tape Manufacturers* where their Honours indicated that:⁷¹

the plaintiff also submitted that the royalty *was incontestable and hence arbitrary* and beyond the taxation power of the legislature. (Emphasis added)

However, in this article these two concepts are discussed separately, as they are sufficiently unique to warrant such treatment.

In *DFC of T v Brown*,⁷² Dixon CJ expressed the view that:⁷³

⁶⁸ Ibid. A similar conclusion was reached by Brennan J who added, at 596, that "this is not a case where the exemption and the imposition are so interdependent that the failure to specify the criteria for determining the exemption necessarily means that the criteria for determining the liability to pay the tax is unascertainable".

⁶⁹ See, for instance, *Vale Press Ltd v DC of T* (1992) 34 FCR 238; and *Australian Tape Manufacturers* (1993) 176 CLR 480 at 525 per Dawson and Toohey JJ. It has been indicated that, "It is not likely that exactions will lack the character of taxation because they are arbitrary in the sense identified in the *MacCormick* and *Truhold* cases. In those two cases there were wide discretions vested in an administrative official by the laws at issue yet the payments required by those laws were taxes and not arbitrary exactions". K Booker, A Glass and R Watt, *Federal Constitutional Law - An Introduction* (1994) 106.

⁷⁰ Hanks P, *Constitutional Law in Australia* (2nd ed Butterworths 1996) 290. See also Booker, Glass and Watt, above n 69 at 106: "a law which compelled a citizen to make payments of money to a government of amounts and at times determined by the whim of a governmental official would be a law requiring arbitrary payments rather than taxation".

⁷¹ (1993) 176 CLR 480 at 525. See also *MacCormick* (1984) 158 CLR 622 at 640-641 per Gibbs CJ, Wilson, Deane and Dawson JJ; and Hanks, above n 70 at 290-291.

Under the Constitution liability for tax cannot be imposed upon the subject without leaving open to him some judicial process by which he may show that in truth he was not taxable or not taxable in the sum assessed, that is to say that an administrative assessment could not be made absolutely conclusive upon him if no recourse to the judicial power were allowed.

In *MacCormick*, Gibbs CJ, Wilson, Deane and Dawson JJ endorsed Dixon CJ's comment above and expressed their understanding of the concept of "incontestable tax" in the following terms:⁷⁴

In *Giris Pty Ltd v Federal Commissioner of Taxation*, Kitto J pointed out that the expression "incontestable tax"... "refers to a tax provided for by a law which, while making the taxpayer's liability depend upon specified criteria, purports to deny him all right to resist an assessment by proving in the courts that the criteria of liability were not satisfied in his case."⁷⁵... Such an incontestable impost is not a tax in the constitutional sense and a law imposing such an impost is not a law with respect to taxation within s 51(ii). It is in this sense that an incontestable tax is invalid.

An example of an incontestable tax is provided by one of the statutory provisions under challenge in *MacCormick*. The provision in question, s 23(1) of the Taxation (Unpaid Company Tax) Assessment Act 1982 (Cth), provided that a certificate signed by the Commissioner "stating that an amount of company tax specified in the certificate is due and payable by a company and that, on a date specified in the certificate, that company tax remained unpaid, is conclusive evidence of the matters stated in the certificate." The practical effect of a certificate issued under s 23(1) was, of course, to preclude the companies to which a certificate was issued from challenging the Commissioner's claims that company tax was due and payable and that it was unpaid at the relevant date. Consequently, it was not difficult for the High Court to reach the conclusion that s 23(1) was invalid, as it had the effect of rendering the tax in question an "incontestable tax". As was highlighted by Brennan J, "the jurisdiction of the courts cannot be wholly excluded by a provision which makes the Commissioner's certificate conclusive

⁷² (1958) 100 CLR 32.

⁷³ Ibid at 40. See also Williams J's comment, at 52, that Parliament could not validly exact taxes from a taxpayer "who is given no legal right to contest the correctness of the assessment in a court of law".

⁷⁴ (1984) 158 CLR 622 at 640-641. See also *Re Hutchins; Jarlas Pty Ltd v FC of T* (1987) 74 ALR 455.

⁷⁵ (1969) 119 CLR 365 at 378-379.

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as to the existence of a fact when the Parliament has prescribed the existence of the fact to be a criterion of the taxpayer's liability".⁷⁶

CONCLUSION

The constitutional concept of a tax is clearly in a state of flux. The "classic" definition of a tax, enunciated by Latham CJ in *Chicory Marketing Board*, of a compulsory exaction of money by a public authority for public purposes, enforceable by law, is no longer regarded by the High Court as entirely satisfactory. Only time will tell whether the Latham definition will be rejected altogether, or whether the qualifications placed on it by *Air Caledonie* and *Australian Tape Manufacturers* will be swept away.⁷⁷ Johnston predicts that:⁷⁸

instead of pursuing enquiries about whether payment is made to a public authority for a public purpose, debate will now shift to the issue of whether any exaction falls into a particular exception, either of a recognised kind or one yet to emerge.

What can be stated with some confidence is that, as the law currently stands, "any compulsory exaction of money under statutory power",⁷⁹ including the "transfer of money from one person to another",⁸⁰ would constitute a tax.

The new approach of the High Court in relation to the concept of tax is by no means limited to the "core" question of what are the "positive attributes" of a tax. When asked to distinguish taxes from "special kinds of exactions", the High Court has, over the last eight years or so, displayed a willingness to place importance on considerations which had not, in the past, been regarded as relevant when exploring the concept of a tax. An excellent illustration is provided by the so-called "*Harper* principle", pursuant to which a levy imposed for the purpose of conserving a finite and public natural resource was held not to be a tax. This decision "saw the emergence

⁷⁶ (1984) 158 CLR 622 at 658-659.

⁷⁷ This latter state of affairs would be consistent with the views of the minority in *Australian Tape Manufacturers*.

⁷⁸ Johnston, above n 38 at 370.

⁷⁹ *Australian Tape Manufacturers* (1993) 176 CLR 480 at 523 per Dawson and Toohey JJ.

⁸⁰ *Ibid* at 529 per McHugh J.

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of conservation as a significant factor in constitutional adjudication".⁸¹

⁸¹ Goldsworthy and Hanks, above n 50 at 170.