A TAXING TIME: THE HIGH COURT AND THE TAX PROVISIONS OF THE CONSTITUTION

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Whether some levy, charge or exaction is a tax is significant for legal challenges based on sections 51(ii), 55 or 90 of the Commonwealth Constitution. Where the Commonwealth seeks to impose a tax, it relies on section 51(ii) — its power to make laws with respect to taxation. If the charge cannot be characterised as a tax, the law in the absence of any other power will be ultra vires. On the other hand, if a Commonwealth law does impose a tax, it must comply with section 55. This provides that a law imposing taxation shall deal only with the imposition of taxation; if it deals with any other matter it is invalid. Finally, so far as the States are concerned, section 90 declares that those special kinds of tax which fall within the description of customs and excise duties lie within the exclusive preserve of the Commonwealth. Hence a State law which purportedly imposes a tax upon the importation or production of goods will infringe the prohibition in that section.

For ordinary purposes, the definition of taxation proposed by Latham CJ in *Matthews v Chicory Marketing Board (Victoria)*[1] has proven a serviceable starting point. This states that 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". The definition is not exhaustive, however, and further exceptions, besides that of a fee for services, have been recognised.[2]

In two recent cases the High Court has revisited the concept of what constitutes a tax. This note explores the more contentious of the two:

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1. (1938) 60 CLR 263, 276.
2. *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462; *Harper v Minister for Sea Fisheries (Tas)* (1989) 168 CLR 314.

Australian Tape Manufacturers' Association Ltd v The Commonwealth.[3]

THE TAPE MANUFACTURERS' CASE

In this case, the Court divided 4:3, the various Justices taking fundamentally opposed views as to whether a levy on blank tapes, imposed by way of amendments to the Copyright Act 1968 (Cth), was a tax or not.

There was common ground among the Justices that the amendments to the Copyright Act had been made with a view to providing some form of remedy for a widespread abuse of the copyright laws resulting from the practice whereby persons purchase blank tapes and then privately copy materials subject to those laws. The problem is one of international scope. The practical reality is that once a blank tape is sold, the vendor effectively has no control over the ultimate use of the tape. Both in the UK[4] and in the US[5] the inability of existing copyright laws to come to grips with this problem has been exposed.

Under the amendments to the Copyright Act, a legislative scheme aimed at this problem was introduced, the elements of which are summarised in the majority judgment of the High Court (Mason CJ, Brennan, Deane and Gaudron JJ)[6] as follows:

> (1) A 'royalty' is payable for each blank tape first sold, let for hire or otherwise distributed in Australia, the royalty being payable by the vendor who first sells, lets for hire or otherwise distributes the tape in Australia.
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> (2) The amount of the royalty is determined by the application of a formula prescribed by s 135ZZN(2). One component in the formula is 'the amount per minute determined by the Copyright Tribunal under section 153E'. That section makes provision for the determination of the amount referred to in the formula by application to the Copyright Tribunal by any person who has a relevant interest in the determination, including the collecting society, a vendor or a relevant copyright owner. The Tribunal is to take into account all relevant

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3. (1993) 67 ALJR 315. The other decision, delivered the same day, was *Northern Suburbs General Cemetary Reserve Trust v The Commonwealth* (1993) 67 ALJR 290. The Court held that a training guarantee charge imposed by Commonwealth legislation upon employers who did not spend a specific minimum amount on work-force training for their employees was a tax and not a fee for services within the *Matthews* exception. It further held, applying *Osborne v The Commonwealth* (1911) 12 CLR 321 and *Fairfax v FCT* (1965) 114 CLR 1, that the levy was not deprived of the character of a tax for the purposes of s 51(ii) of the Constitution because, through it, the Commonwealth was seeking to achieve an objective beyond its constitutional powers, namely causing employers to contribute to work-force training.
4. *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013.
5. *Sony Corp of America v Universal City Studios Inc* (1984) 464 US 417.
6. *Tape Manufacturers* supra n 3, 316–317.

matters including 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.

(3) A vendor is bound to pay to the collecting society within 21 days at the end of each quarter an amount equal to the sum of the amounts of royalty payable on the tapes first sold, let for hire or otherwise distributed by the vendor in that quarter.

(4) The collecting society is a company limited by guarantee declared by the Attorney-General to be the collecting society. All the relevant copyright owners, or their agents, must be entitled to become members. The rules of the collecting society must be such as to prohibit the payment of dividends and to ensure that the interests of the members who are relevant copyright owners, or their agents, are protected adequately, including provisions about the collection of royalties from vendors, the payment of the administrative costs of the society out of amounts collected, the holding on trust of amounts for relevant copyright owners who are not members and access to society records by members.

(5) Copyright in a published sound recording, or in any work included in a published sound recording, is not infringed by making on private premises a copy of the sound recording if the copy is on a blank tape for the private and domestic use of the person who makes it.

ISSUES

The plaintiff's basic allegation was that the scheme imposed a levy in the form of the "royalty" which bore the characteristic of being a *tax* payable upon the sale of blank tapes by the vendors. Furthermore, since the provisions creating the liability to pay the levy, sections 135ZZN and 135ZZP, had been introduced into the body of the Copyright Act where they would operate in conjunction with many other provisions of a kind dealing with other matters besides the imposition of taxation, the inclusion was invalid as being a contravention of section 55 of the Constitution.[7]

WAS THE LEVY A TAX?

The Commonwealth's contention was that the levy was truly a royalty or something similar in nature and therefore not a tax. The argument that it was a royalty assumed it was a payment made in return for the exercise by a person of a right to copy material otherwise subject to copyright protection. The majority rejected this characterisation because the levy was payable by

7. A similar argument had been accepted in *Air Caledonie* supra n 2. One can query, however, why the addition of later amendments imposing taxation should matter. There is effectively no "tacking" of the pre-existing provisions in a way that would frustrate the object behind ss 53 & 55 of the Constitution to ensure the Senate is not compelled to accept non-imposition provisions or reject the whole Bill.

vendors who had a right to sell the blank tapes irrespective of how the purchasers or ultimate users might use the tapes, whether lawfully or unlawfully, once they had passed beyond the control of the vendors. They went on to hold that the blank tape levy imposed by section 135ZZP was a tax within the meaning of section 55 of the Constitution. In so holding they rejected a submission made by the Commonwealth that the levy fell outside the classic statement of Latham CJ in *Matthews*[8] in two respects. The first was that the levy, being payable to a non-government collecting agency, was *not* payable to a "public authority". The second was that the *purpose* for which the levy was being collected and distributed to copyright holders could not be described as a "public purpose".

The majority held that it was not essential to the concept of taxation that a levy be paid to a public authority.[9] Previously in *Air Caledonie* the Court had contemplated that possibility, commenting:[10]

> [T]here 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.

By confirming that possibility the Court has made a significant inroad into the classic *Matthews* formula.

In addressing the issue of whether, to be a tax, an impost had to be levied for a "public purpose", the majority first dealt with the Commonwealth's argument that the monies raised by means of the blank tape levy were not raised for public purposes because the monies were not required to be paid into the Consolidated Revenue Fund (CRF) established under section 81 of the Constitution. Whilst payment into the CRF was accepted by the majority as a conclusive indication that monies so paid were to be used for public purposes, they held that the converse proposition did not follow — namely, that if monies were *not* paid into the CRF they were not set aside for expenditure on public purposes.[11]

They then went on to hold that the scheme in question was one which did indeed serve a public purpose. They expressed this view as follows:[12]

> In one sense it may be said that the purpose is private in that it concerns the interests of the two groups only. But, in truth, the legislative solution of the problem proceeds on the footing that it is imposed in the public interest. Indeed, the purpose of directing

8. Supra n 1.
9. *Tape Manufacturers* supra n 3, 320.
10. Supra n 2, 467.
11. *Tape Manufacturers* supra n 3, 321.
12. Ibid.

> the payment of the levy to the collecting society for ultimate distribution of the net proceeds to the relevant copyright owners as a solution to a complex problem of public importance is of necessity a public purpose.

In the result they held that the levy, though received by an independent body, constituted a tax.

WHETHER AMENDMENTS TO COPYRIGHT ACT INVALID

Having determined the levy to be a tax, the majority then went on to hold that the relevant provisions of the Copyright Act, introduced by way of amendment, were invalid. This was, first, because the scheme, by directing the monies to be received and distributed by the independent collecting agency, contravened the requirement in section 81 of the Constitution that monies raised by way of taxation should go into the CRF. This was to ensure that the purpose behind including sections 81, 82 and 83 in the Constitution, namely that Parliament should retain ultimate authority over how the executive government expends public revenue, was achieved.[13] They held, further, that the scheme was an infringement of section 55 of the Constitution[14] in that the provision introducing the levy was engrafted onto existing provisions not concerned with the imposition of taxation.[15]

DISSENTING OPINIONS

The case is remarkable for the diametrically opposite views expressed in the joint judgment of Dawson and Toohey JJ with whom, in a separate dissent, McHugh J agreed. Dawson and Toohey JJ put considerable store on the fact that the reason behind the blank tape levy scheme was the widespread unlawful copying of copyright material. They saw the scheme as a practical answer to the difficulties in enforcing compliance with the previous copyright

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13. The ways in which payment into the CRF can be effected in order to comply with s 81 were also addressed in *Northern Suburbs Cemetary Reserve Trust* supra n 3, 297–304, 307–314.
14. Applying *Air Caledonie* supra n 2. That case together with *Tape Manufacturers* supra n 3 and *Mutual Pools & Staff Pty Ltd v FCT* (1992) 173 CLR 450 (where contravention of s 55 arose because the relevant Commonwealth law was not restricted to dealing with duties of excise only) are among the rare instances in which a tax law has been held to infringe s 55.
15. Note that the majority (supra n 3, 318–319) were not prepared to hold the amendments invalid on the ground they constituted an "acquisition of property" contrary to s 51(xxxi) of the Constitution. This accords with the views of Dawson & Toohey JJ, 334–335 and McHugh J, 335.

laws. They regarded the principal object of the scheme as one of compensating the copyright holders for loss of revenue which would otherwise flow from continuing infringement of copyright by private copying of tapes. In return for making it lawful to make private tapes of copyright material, the scheme was devised to extract an amount of money which, though levied on vendors, would be indirectly paid by the purchasers themselves, thereby providing a fund for distribution to the copyright holders. As such, their Honours saw this as a legislative scheme authorised by section 51(xviii) of the Constitution, namely a law with respect to copyrights.[16]

As to whether the levy was a tax, their Honours accepted, first, that the levy could not truly be described as a royalty, in the strict sense, nor as a fee for services. They rejected the latter proposition because, although the levy doubtless was passed on to the purchaser, so that in one sense it could be said to be paid, indirectly, by the purchaser, and though the purchaser might use a blank tape to record copyright work in a way which the amended legislation permitted him or her to do, there was no sufficiently specific or necessary connection between the indirect payment of the levy and the use of the blank tape to record a particular copyrighted work.[17]

Referring to the statement in *Air Caledonie*,[18] upon which the majority had relied in concluding that a tax need not be paid to a public authority, they expressed the view that this statement should not be taken too far. They concluded:[19]

> The legislative scheme is such as to ensure that, within reasonable limits, the amount, the incidence, the collection and the distribution of the moneys exacted are all

16. Id, 329–331.
17. Id, 330–331. The requirement that there be a reasonably proximate relationship between the provision of a service or a right and the payment of the charge by a particular person is in line with the Court's decision in *Northern Suburbs Cemetary Reserve Trust* supra n 3. Although its recent decisions of *Air Caledonie* and *Harper v Minister for Sea Fisheries (Tas)* supra n 2 have encouraged constitutional lawyers to seek for further exceptions to engraft onto the *Matthews* formula, the High Court's rulings in *Northern Suburbs Cemetary Reserve Trust* and *Tape Manufacturers* suggest that the recognition of any new exceptions may be the exception rather than the rule. In particular, so far as exceptions similar to fees for services are concerned, the decisions, by emphasising the need for a close approximation between the benefit obtained by a person who pays a levy under compulsion and the amount of that levy, has threatening implications for State laws where heavy payments, such as "wharfage", are extracted ostensibly for the right to use government facilities, such as ports. See eg the Fremantle Port Authority Act 1902 (WA) s 41. Arguably, where the movement of goods is involved, these could amount to a tax in the nature of customs duties and hence contravene s 90.
18. Supra n 2, 467; quoted above.
19. *Tape Manufacturers* supra n 3, 333.

> referable to the copying of copyright material. Whilst the imposition cannot, strictly speaking, be regarded as a royalty, it is exacted in lieu thereof and for the same ultimate purpose, namely, the payment to copyright owners for the use of their copyright material. Accordingly, the essential similarities are with fees for licences rather than with a tax and we would not regard the legislation as a law imposing taxation within the meaning of s 55 of the Constitution.

In upholding the legislation as valid, the minority dismissed two further objections raised by the plaintiff, namely that the scheme was "arbitrary" and that it gave rise to an "incontestable" liability. These arguments were based on the fact that the calculation of the levy was left, in part, to the Copyright Tribunal. That tribunal was empowered by the Copyright Act to determine a figure, which when multiplied by the number of minutes available on a blank tape for recording, established the amount to be paid by way of levy for that tape. Their Honours rejected the contention that the calculation of the levy depended on an administrative discretion which could be exercised "at large".[20] They concluded, to the contrary, that the exercise of discretion was limited by reference to the relevant criteria which were sufficiently ascertainable under the Copyright Act, so that the scheme was neither arbitrary nor beyond contestable challenge.[21]

McHugh J also dissented, substantially agreeing with the reasons of Dawson and Toohey JJ that the amendments to the Copyright Act were a valid exercise of Commonwealth power. His view was also influenced by the practical need to devise a legislative scheme to overcome the widespread evasion of copyright restrictions.[22] In his view the purpose of the payment exacted under section 135ZZP was not to raise revenue to meet expenses of government or of any public authority, but to compensate the owners of copyright for the loss of revenue which they suffered as a result of the widespread use of blank tapes to record copyright material. As such the end for which the payment was imposed was private, not public. He went on to say:

> Furthermore, the scheme enacted by Pt VC is a private scheme controlled, administered and enforced by a private collecting society. The 'royalty' exacted by section 135ZZB is a debt payable to the collecting society which is recoverable from the vendor by the

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20. Ibid.

21. Applying *MacCormick v FCT* (1984) 158 CLR 622 and *FCT v Truhold Benefit Pty Ltd* (1985) 158 CLR 678. In *Northern Suburbs Cemetary Reserve Trust* supra n 3, Dawson J, 304, rejected a similar contention that where legislation left the criteria of exemption from tax to be determined by regulations, the legislation was "arbitrary" and therefore invalid. He upheld the legislation on the basis that it clearly envisaged that ascertainable criteria would be established under the regulations.

22. *Tape Manufacturers* supra n 3, 337.

> society... The 'royalty' forms no part of the revenues of the Commonwealth. Nor, after collection, is it paid to or at the direction of the Commonwealth. Amounts payable to the society in accordance with revisions of Pt VC are the property of the society, which holds or distributes those amounts in accordance with its rules.

After pointing out that the government's role in the scheme was essentially supervisory, McHugh J went on to concede that it was true that Part VC of the Act had been enacted in the public interest to make lawful the previously unlawful activities of domestic copiers and to raise funds to compensate the owners of copyright works for the loss of revenue brought about by domestic copying. In that way the scheme under the amended Act served a "public purpose". But, as he saw it, the money exacted under the scheme was not "raised" for a 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.[23]

DISCUSSION AND CONCLUSIONS

At a time when major activities of governments are increasingly being "privatised", the attempt by the Commonwealth to create a simple scheme for extracting money from one group engaged in commerce (tape vendors) and through the agency of a private organisation to redistribute monies to another group engaged in commerce (the producers and artists involved in copyright performances) was struck down by the majority. They sought to uphold the traditional and classical constitutional arrangements, particularly sections 81 and 83 of the Constitution.[24] In that respect they focused attention on an aspect of the public finance scheme incorporated into the Constitution which had previously been unexplored.

In rejecting the requirements that, to be identified as a tax, a levy must be paid to a public authority and raised for a public purpose the majority has virtually collapsed the test for a tax into a single general notion, namely that a levy be a compulsory exaction of money under law.[25]

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23. Ibid.
24. In defence of the majority it can be said that the infringements of ss 55, 81 & 83 which they identified did not pose an insurmountable barrier to the Commonwealth legislating to achieve the objectives of the scheme. They simply required the Commonwealth to comply with the formalities dictated by the provisions.
25. By effectively reducing "public purpose" to "public interest" the majority have stripped the former notion of any distinguishing content and force. This consequence was recognised by Dawson & Toohey JJ, 331. A public purpose then becomes whatever the Parliament determines to be in the public interest. Such a view parallels that of what constitutes an appropriation within s 81 enunciated by Latham CJ in *A-G (Vic); Ex rel Dale*

It is predicted that 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.

It is the latter facet of the majority opinion that is the least logically satisfying. Their Honours spent considerable effort in reactively rejecting the need to satisfy the public authority and public purpose criteria set forth as positive elements in the *Matthews* test. But having avoided falling into a ritualistic submission to a formulistic approach, they failed to accept the substantive merits of the tape levy as an incidental aspect of a regulatory scheme to protect the commercial rights of the copyright holders. In that respect the minority opinions represent a more realistic approach to the problem.

Whether intentionally or not, the result may be that the strict observance of constitutional requirements could indirectly add to the cost burden of similar schemes designed to effect redistribution of monies within a single industry, through increased involvement of government in the administration of such schemes. The views of the minority are more consonant with the notion that where payments are incidentally raised, collected and distributed as part of a regulatory exercise for the public benefit, involving commercial interests of a segment of the community, the older concepts of taxation become less relevant.

The views of the minority are in fact in line with the contemporary approach of the Canadian Supreme Court. The Canadian and Australian decisions on what is a tax have a common root in that the *Matthews* definition was derived from earlier comments by the Privy Council in *Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd*, on appeal from Canada.[26] The latter case has often been disregarded, or been held not to be authoritative in later Canadian decisions.[27] Two streams of thought have been evident in those cases. The first is that a more generous approach has been taken to the notion of a "fee for services", conceding a reasonable leeway in imposing service charges to offset expenditures incidental to a scheme.[28] The second is not to treat imposts as a tax where they are adjuncts

v The Commonwealth ("the *Pharmaceutical Benefits* case") (1945) 71 CLR 237, 253, 256.

26. [1933] AC 168, 175–176.

27. See particularly *Shannon v Lower Mainland Dairy Products Board* [1938] AC 708; *Re Farm Products Marketing Act Reference* [1957] SCR 198 and *Re Agricultural Products Marketing Act* [1978] 2 SCR 1198.

28. See P W Hogg *Constitutional Law of Canada* 2nd edn (Toronto: Carswell Co Ltd, 1985)

or incidental elements of an essentially regulatory or licensing scheme. The disinclination of the majority to follow a similar path[29] suggests the prospects of widening or adding to the existing exceptions to what is regarded as taxation are unpromising, at least for Commonwealth purposes.[30]

612–614.

29. The majority, supra n 3, 320–321, did address Canadian authority but in commenting on *Massey-Ferguson Ind Ltd v Govt of Saskatchewan* (1982) 127 DLR (3d) 513 took a severely restrictive view of the exception to tax where money is raised from purchasers of a kind of goods to compensate a discrete group of primary industry beneficiaries.

30. Where monies are raised as part of State schemes to support administrative bodies, the Court may take a different view concerning whether such schemes entail an element of taxation in such a way as to infringe s 90 of the Constitution. Whether the defraying of administrative costs of a State marketing authority by resort to artificial differential pricing methods, such as is provided for in ss 16–22 of the Marketing of Meat Act 1971 (WA) would be taken to constitute the imposition of a duty of excise is an open question. S 90 of the Constitution involves different considerations from ss 51 (ii) & 55 so the High Court may well scrutinize such schemes strictly and regard them as invalid taxes in the nature of excise duties.