CASE NOTES

AIR CALEDONIE INTERNATIONAL v. THE COMMONWEALTH[1]

Air Caledonie is the latest chapter written by the High Court in the perennial Australian quest for a definition of 'taxation'. It is a joint judgment by all seven members of the Court. It expands the definition of taxation, and provides a warning that the High Court may not look kindly upon attempts to impose taxes under the guise of 'fees for services'.

FACTS

The case concerned the constitutional validity of what was known as the 'immigration tax'. The Migration Amendment Act 1987 (Cth) purported to amend the Migration Act 1958 (Cth) by imposing a 'fee for immigration clearance'.[2] All persons other than prescribed passengers[3] arriving in Australia by airline were compelled to pay a prescribed fee.[4] This fee was to be collected by the airline operators, who were obliged to pay the fees to the Commonwealth on behalf of all those passengers whom they had carried, whether or not the passengers had paid the fee to the airlines.[5]

The charge was repealed after the proceedings had been instituted,[6] but it remained payable by the airlines for passengers whom they had flown into Australia between 1 January 1988 and 1 July 1988. The airline operators had collected five million dollars pursuant to the Act.[7] In order to resist Commonwealth claims for payment of the debt due under the Act,[8] they sought a declaration that s. 34A of the Migration Act was invalid.

The plaintiff airline operators' first submission was that s. 34A was a tax, and was thus invalidated by s. 55 of the Commonwealth Constitution. In the alternative, the plaintiffs submitted that the imposition of the charge could not be characterized as a law under any of the designated heads of Commonwealth Parliamentary power. However, the finding by the Court that s. 34A imposed a tax avoided consideration of this point, as it brought the law within Commonwealth Parliamentary competence as a law with respect to taxation under s. 51(2).[9]

DEFINITION OF TAXATION

The substantial question considered by the Court was whether s. 34A imposed a tax and, if so, what consequences followed. Section 55 of the Commonwealth Constitution provides that:

> laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.

The section normally operates by invalidating any provision not imposing taxation contained in a Commonwealth Act which includes other provisions which do impose taxation. The section was designed to protect the Senate which is unable to amend taxation laws.[10] As the Court pointed out, s. 55 prevents the House of Representatives from 'tacking' provisions which the Senate could

1 (1988) 82 A.L.R. 385. High Court, 24 November, Mason C.J., Wilson, Brennan, Deane, Dawson, Toohey, Gaudron JJ.

2 Migration Amendment Act 1987 (Cth) s. 7, inserting s. 34A into the Migration Act 1958 (Cth).

3 Passengers under 12 years were the only persons made 'prescribed passengers' by reg.30B of the Migration Regulations, inserted by Migration Regulations (Amendment) 1987 (Cth) No. 315 s. 3.

4 Set at five dollars by reg.30A of the Migration Regulations inserted by Migration Regulations (Amendment) 1987 (Cth) No. 315 s. 3.

5 Migration Act 1958 (Cth) s. 34A(3) as amended on 1 January 1988.

6 Migration Amendment Act 1988 (Cth) s. 5.

7 *Australian* (Sydney) 25 November 1988.

8 Migration Act 1958 (Cth) s. 34A(4).

9 *Air Caledonie International v. Cth* (1988) 82 A.L.R. 385, 388, 393.

10 Commonwealth Constitution s. 53.

normally amend onto taxation bills.[11] Section 55 serves another function not mentioned in the High Court's judgment. It prevents the House of Representatives from forcing laws which impose taxes upon the Senate by including those taxes in a special appropriation bill which the Senate is obliged to pass by a particular date, in order to provide continued funding for an institution.[12]

The Court approved the *locus classicus* of a tax as:

> A compulsory exaction of money
> by a public authority
> for public purposes,
> enforceable by law, and . . .
> not a payment for services rendered.[13]

However, of these elements, the Court qualified the first three, ignored previous qualifications of the fourth, and contracted the definition of the fifth. The Court countenanced a finding that a tax need not exact money. The Court may have envisaged burdens such as the requirement to buy back flour compulsorily acquired by the government,[14] or deductions from compensation payments for compulsory acquisition.[15] The Court indicated that the levy need not be made by a public authority, presumably referring to bounty-type schemes such as that in *Vacuum Oil Co. Pty Ltd v. Qld,*[16] where there was a legislative requirement to buy power alcohol from private suppliers.[17] Nor need the tax be for public purposes — another feature of the *Vacuum Oil* scheme.

Previous judgments of the High Court have cast doubt upon the requirement that a tax must be enforceable by law. In *General Practitioners Society in Australia v. Cth*, three judges were prepared to assume that 'practical, as distinct from legal, compulsion is enough to constitute a charge a tax'.[18] Latham C.J., the judge who provided the definition of 'taxation' used in *Air Caledonie*, was less circumspect in another case:

> When such transactions [as 'voluntary loans' and 'gracious offerings' and 'forced benevolences'] amount to the exaction of money by a government in obedience to what is really a compulsive demand, the money paid is paid as a tax'.[19]

The Court did not advert to either of these cases in its judgment, presumably because the issue was not raised by the facts. It is submitted that the principle is correct: a scheme which coerces payment and leaves no commercial alternative collects revenue just as effectively as a legal sanction. There are, however, problems of fact in defining when an incentive becomes practical compulsion. This, then, is yet another possible limitation to Latham C.J.'s definition.

If so, the only parts of the definition which remain are that a tax is 'a compulsory exaction of some financial disadvantage . . . which is not a payment for services rendered'.

However, the High Court noted that there are other exactions which appear to have the attributes of taxes, but which are 'unlikely to be properly characterised as [taxes]'.[20] It included 'a charge for the acquisition of property, a fee for a privilege and a fine or penalty imposed for criminal conduct or breach of statutory obligation'. The Court did not consider this list to be closed.[21] It was prepared to

11 *Air Caledonie International v. Cth* (1988) 82 A.L.R. 385, 392.

12 *E.g.* Higher Education Funding Act 1988 (Cth) which contains appropriations for the recurrent funding of most of Australia's higher education funding institutions (ss 15-25) and which also implements the Higher Education Contribution Scheme (ss 34-89) — although this Scheme may well impose a fee for service rather than a tax.

13 *Matthews v. Chicory Marketing Board* (Vic.) (1938) 60 C.L.R. 263, 276 *per* Latham C.J., cited in *Air Caledonie International v. Cth* (1988) 82 A.L.R. 385, 388-9.

14 Held to be a tax in *A.-G. for N.S.W. v. Homebush Flour Mills Ltd* (1937) 56 C.L.R. 390.

15 Held not to be a tax in *Crothers v. Sheil* (1933) 49 C.L.R. 399; followed *Parton v. Milk Board (Vic.)* (1949) 80 C.L.R. 229.

16 (1934) 51 C.L.R. 108.

17 Which was found not to be a tax, although it was a discriminatory burden infringing the Commonwealth Constitution s. 92.

18 *General Practitioners Society in Australia v. Cth* (1980) 145 C.L.R. 532, 561 *per* Gibbs J. with whom Barwick C.J. agreed at 538 and Wilson J. at 571-2. See also *per* Aickin J. at 568: 'I see no reason why it [the exaction] should be deprived of that character [of a tax] by virtue of the fact that the sanction for failure to pay is practical compulsion rather than legal compulsion.'

19 *A.-G. (N.S.W.) v. Homebush Flour Mills Ltd* (1937) 56 C.L.R. 390, 400 *per* Latham C.J.

20 *Air Caledonie International v. Cth* (1988) 82 A.L.R. 385, 389.

21 *Ibid.* 389.

countenance a finding that a fee charged to a non-citizen for the privilege of entering Australia might not be a tax.[22]

THE FEE FOR SERVICE EXCEPTION

Having loosened the definition of a tax, the Court tightened the 'fee for service' exception. Where a 'person required to pay the exaction is given no choice about whether or not he acquires the services and the amount of the exaction has no discernible relationship with the value of what is acquired' then the imposition is possibly not a fee for service.[23] The phraseology of the second half of this test is crucial. The word 'value' and the reference to 'what is acquired' imply that the Court will look at the value of the service as perceived by the recipient, rather than looking at the cost to the Government of providing the service. The proposition that a fee must bear some relation to the cost of the service is not new.[24] What is novel is a statement that the service must be 'of value' to the recipient rather than a reflection of the cost to the Government of providing the service. It may cast doubt on decisions such as *Harper v. Vic.*[25] The new test suggests that taxation is imposed by a fee for a service which is accepted only because of legislative requirements, and which is of minimal value to the 'person required to pay the exaction'. It may present serious problems for government bodies which have become accustomed to testing the legality of a fee for service by reference to the cost of supporting the service, rather than by questioning the actual value of the service to the recipient.[26] This new criterion involves difficult questions of proof: what is the 'value' of a government service when that service is unavailable elsewhere, and necessary for a person to carry on their trade? If the courts adopt a test of practical compulsion, how little choice may the legislation leave before a person has 'no choice about whether or not he acquires the services'? The courts may adopt a concept of a 'reasonable fee' which carries echoes of the 'reasonable regulation' concept which confused so much of the interpretation of s. 92.[27]

There are also implications for organizations such as municipal water boards which have power granted to them by regulations to charge fees for service, but which, according to common law presumptions, have no power to impose taxation unless this power is granted specifically by statute.[28] Thus there may be legal redress for groups compelled by a public authority to pay very high fees which reflect the cost of previous negligence actions taken against the authority rather than the value of the service provided.[29]

The Court also required that the legislation indicate the *precise* service for which the fee is paid. As the Court pointed out, 'all taxes exacted by a national government and paid into national revenue can be described as "fees for service"' as they are a '*quid pro quo* for the totality of benefits and services [received] from governmental sources'.[30] Rather, the fee must be paid in respect of 'particular identified services provided or rendered individually to, or at the request or direction of, the particular person required to make the payment'.[31]

22 *Ibid.* 390.

23 *Ibid.* 389.

24 *Harper v. Vic.* (1966) 114 C.L.R. 361, 378 *per* Taylor J.; *Marsh v. Shire of Serpentine-Jarrahdale* (1966) 120 C.L.R. 572, 581 *per* Barwick C.J.: a charge would not be a fee for service if the fees 'bore no relation to the expenditure incurred with respect to the service provided'.

25 (1966) 114 C.L.R. 361, 379 *per* Menzies J.; 382 *per* Owen J.; 378 *per* Taylor J.

26 *E.g.* the justification provided to the Senate Standing Committee on Regulations for charging a $1,000 fee to applicants for a permanent entry visa under the Business Migration Program: Cth, *Parliamentary Debates*, Senate, 20 April 1989, 1705-6.

27 The reasonable regulation test has been described recently by the High Court as 'a somewhat ill-defined notion of what is legitimate regulation in an ordered society': *Cole v. Whitfield* (1988) 78 A.L.R. 42, 63.

28 *E.g. Marsh v. Shire of Serpentine-Jarrahdale* (1966) 120 C.L.R. 572 and the other cases cited in Sykes, E. I., Lanham, D. J., and Tracey, R. R. S., *General Principles of Administrative Law* (2nd ed. 1984) 24.

29 The problem is not entirely academic — The Woodend Water Board may charge residents a 'once off' water rate of $11,000 in order to pay off a potential $15 million liability for negligence in causing the 'Ash Wednesday' fires: *Australian* (Sydney) 1 April 1989. The water authority's action may be validated by a specific power allowing it to charge 'rates' which probably includes taxes: Water Act 1958 (Vic.) s. 332(1).

30 *Air Caledonie International v. Cth* (1988) 82 A.L.R. 385, 391.

31 *Ibid.*

CHARGES ON RIGHTS

The Court found that a charge for a 'privilege' or a 'service' would be a tax where the government was in fact providing a 'right' rather than a 'privilege'. A charge cannot be rationalized as a 'fee for service' where the 'service' is in fact the provision of a 'right'. Thus in *Air Caledonie*, the provision of immigration clearance to an Australian citizen was a right rather than a government service.[32]

However, distinguishing between 'rights' and 'privileges' is not always easy. In *Air Caledonie* 'The right of the Australian citizen to enter the country'[33] was asserted without the citation of any authority to support the proposition. This illustrates the nebulous and often undefined nature of common law rights. Their extent may be surprising. Rights such as access to superior courts have been recognized.[34] Pearce has identified[35] a whole grab-bag of rights such as the right to take part in processions,[36] the right to do something by means of an agent,[37] the right to navigate a navigable river,[38] the right to be heard before being dismissed from office,[39] the right to sublease land,[40] the right to dispose of an interest under a lease,[41] the right to enter into a legal contract,[42] the right to carry on one's own business,[43] the right to prepare goods for sale and to sell them,[44] and the right to determine the manner of carrying on one's trade.[45]

The last four rights seem to lead to some important consequences for licence fees. If an area of trade and commerce has not previously been regulated, and new legislation requires a licence to practice in the trade, then any fee charged for that licence might be characterized as a tax. There would be a pre-existing common law right to engage in that business, and a statute abrogating that right subject to dispensation by licence. The charge made for what was previously a right would be characterized as a tax unless it could be argued that the statute abrogated the right, then created a new system of statutory privileges, for which a fee was charged. There is little difference between this situation and that of *Air Caledonie* where there was a right (to enter the country), restricted (if not abrogated) by the requirement to pay a five dollar fee. *Air Caledonie* might be distinguishable because the fee operated on immigration clearance rather than on the actual right of admission to Australia. It is submitted that this distinction is a matter of form rather than of substance. In order to prevent the characterisation of the charge as a tax, the legislature is merely required to identify the right correctly in the legislation, and to attach the charge to it.

It might be possible to analyse the provision of a licence as a 'privilege' or 'service'. Even if a licensing system did not impinge on a right, the courts might still find it difficult to characterise the charge as a fee for service or privilege rather than a tax. If the trader had no choice whether to acquire the service, and the fee was not related to the value of the service, it might still be a tax.[46] The important question as to what constitutes 'choice' was left unexplored by the Court in *Air Caledonie*. On the one hand, a trader has a 'choice' to acquire or pass up a licence. On the other hand, if a licence is essential to maintaining an established business, the 'choice' offered to the trader begins to look very like the 'practical compulsion' of which the courts have been so wary in the past.[47] The value of the licence system *to the individual trader* would then be crucial. In many cases, whilst the cost to government of administering the scheme would be substantial, the value of the licensing scheme to the licensee might be difficult to establish, even if the benefit of the scheme *to the community as a whole* were more obvious.

32 *Ibid.* 390-1.
33 *Ibid.* 390.
34 *Chester v. Bateson* [1920] 1 K.B. 829.
35 Pearce, D. C., *Statutory Interpretation in Australia* (3rd ed. 1988) 107.
36 *Melbourne Corporation v. Barry* (1922) 31 C.L.R. 174, 206.
37 *Christie v. Permewan, Wright & Co. Ltd* (1904) 1 C.L.R. 693.
38 *Fergusson v. The Union Steamship Co. of New Zealand, Ltd* (1884) 10 V.L.R. 279.
39 *Gladstone v. Armstrong* [1908] V.L.R. 454.
40 *Re Shearer* (1891) 12 L.R.(N.S.W.) 24.
41 *American Dairy Queen (Qld) Pty Ltd v. Blue Rio Pty Ltd* (1981) 37 A.L.R. 613.
42 *Hayes v. Cable* (1961) 78 W.N.(N.S.W.) 735.
43 *Cth v. Progress Advertising and Press Agency Co. Pty Ltd* (1909) 10 C.L.R. 457.
44 *Mudginberri Station Pty Ltd v. Langhorne* (1985) 68 A.L.R. 613, 621.
45 *Committee of Direction of Fruit Marketing v. Collins* (1925) 36 C.L.R. 410.
46 *Air Caledonie International v. Cth* (1988) 82 A.L.R. 385, 389.
47 *Supra* n.18.

The Bill of Rights of 1689 purported to be declaratory of certain common law rights. These common law rights have been inherited by Australians except where specifically abrogated by statute.[48] Thus, presumably, any charge for the exercise of 'the Right of the Subjects to petition the King'[49] (or the Crown's modern manifestation in the Minister[50]) cannot represent a 'fee for service' unless the right has at least been abrogated by statute. This analysis is particularly interesting in light of the collection by the Department of Immigration, Local Government and Ethnic Affairs of a non-refundable deposit of two hundred and forty dollars. This deposit was required from any person who wished to appeal to the Minister (acting on the advice of the Immigration Review Panel) against a Departmental decision. The Commonwealth Ombudsman recommended the refund of these fees, amounting to over two million dollars.[51]

The protection of common law rights in this way may provide a middle ground between binding the Commonwealth Parliament with old British Constitutional Law statutes and allowing unfettered parliamentary and executive power. In *Re Cusack*,[52] Wilson J. held that a nomination fee required by s. 170(c)(ii) of the Commonwealth Electoral Act 1918 (Cth) was not invalidated by the Bill of Rights which declares 'that election of members of parliament ought to be free'. His Honour observed that 'It is not open to base an argument for invalidity by reference to alleged inconsistencies between laws of the Commonwealth and either Magna Carta or the Bill of Rights.'[53] It might now be argued that an inconsistency between the laws of the Commonwealth and the Bill of Rights is evidence of an inconsistency between the laws of the Commonwealth and the rights protected by the common law. Under *Air Caledonie*, a Commonwealth Act may restrict or abrogate a common law right, but if it imposes a charge on that right, the charge may be characterized as a tax.

The High Court's policing of rights such as the citizen's right to enter Australia may indicate a move by the High Court to protect common law rights in other contexts. It might, for example, invalidate executive action depriving people of appeal avenues.[54] This is in keeping with the whispered suggestion by the High Court in *Union Steamship Co. of Australia Pty Ltd v. King*[55] that even legislative action might be 'subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law.'

RAMIFICATIONS OF DEFINITION OF 'TAX'

The High Court's definition of 'a tax' is important because Commonwealth taxation laws must originate in the House of Representatives, must not be amended by the Senate,[56] must deal with only

48 Judiciary Act 1903 (Cth) s. 80.

49 Bill of Rights, 1688, 1 W. & M. (sess. 2) Ch.2.

50 *E.g. F.A.I. Insurances Ltd v. Winneke* (1982) 151 C.L.R. 342 in which the Governor in Council had a statutory power to renew approvals of insurers as insurers for workers compensation. The common law obligations of natural justice placed upon the Governor in Council were imposed upon the Minister or his delegate.

51 Crock, M., 'A taxing problem for migrants: running a test case' (1988) 62 *Law Institute Journal* 515; *Canberra Times* (Canberra) 20 March 1989; Cth, *Parliamentary Debates*, Senate, 7 March 1989, 534.

52 (1986) 66 A.L.R. 93.

53 *Ibid.* 95; following *Chia Gee v. Martin* (1905) 3 C.L.R. 649, 653. *Quare* whether a charge for nominating as a candidate restricts the freedom of 'election of members of parliament'.

54 In response to overtures from the Commonwealth Ombudsman, the Department abandoned the previous internal appeal to the Immigration Review Panel, but allowed a second application, for which a fee of $240 was applicable, and which it undertook to refer to the Immigration Review Panel: Commonwealth, *Parliamentary Debates*, Senate, 3 March 1989, 414. See also the report of the Commonwealth Ombudsman pursuant to s. 15 of the Ombudsman Act 1976 (Cth) to the Department of Immigration, Local Government and Ethnic Affairs on 'A complaint from Ms Mary Crock on behalf of Ms Manjit Kaur concerning the unlawfulness of Immigration Review Panel fees and the Department's attempts to recover about $4,500 in Commonwealth legal costs from Ms Kaur', released 17 March 1989. The Department eventually decided to abandon attempts to recover their legal fees from Ms Kaur, and to refund all appeal fees collected after the Department had received advice from the Attorney-General's Department that the fee was illegal: *Age* (Melbourne) 7 April 1989.

55 (1988) 82 A.L.R. 43, 48.

56 Commonwealth Constitution s. 53, although this requirement is not justiciable by the Courts because the reference to 'proposed laws' indicates that the clause is merely a direction to Parliament

one subject of taxation,[57] and by virtue of being taxation laws, are valid laws of the Commonwealth Parliament.[58] State Government imposts which are characterized as fees for service rather than taxes avoid the Constitutional prohibition on State Parliaments imposing duties of customs and excise.[59] The definition of a tax also affects the Constitutional Law rule that a tax may not be levied (whether by proclamation or regulation) without the authority of Parliament.[60]

The High Court clearly envisaged its definition of a 'law imposing taxation' extending to the interpretation of sections of the Constitution other than s. 55. It observed that 'references in ss 53 and 55 to a law or laws "imposing taxation" must be given a constant meaning.'[61] The classic exposition of 'a duty of excise' in s. 90 was cited in *Air Caledonie* from the judgment of Latham C.J. in *Matthews v. Chicory Marketing Board*.[62] It excluded imposts which were 'a payment for services rendered'.[63] The High Court explicitly defined this exception in the same way as it defined the 'fee for service' exception of s. 53, now imported into s. 55.[64]

After deciding that the 'fee for immigration clearance' was a tax, the Court examined the operation of s. 55 of the Commonwealth Constitution in a situation where the 'laws imposing taxation' were contained in the amending act rather than the principal act.

Clearly provisions of the Migration Amendment Act 1987 (Cth) other than s. 7 (which inserted s. 34A into the Migration Act 1958 (Cth)) could be struck down by s. 55, as they deal with matters other than taxation.[65] (The Court did not make any ruling about these other provisions, presumably because the plaintiffs only sought declarations as to the validity of s. 34A.) However, the Court was asked to consider the amended Migration Act, dealing with a large number of other matters, and now containing a section imposing taxation. The Court rejected the argument, not in fact put by the Commonwealth,[66] that s. 55 only affects Acts as they are passed by the Commonwealth Parliament. It held that s. 55 extended 'to laws in the form in which they stand from time to time after enactment'[67], *i.e.* as amended. The Court relied on the contrast between 'proposed law(s)' in ss 53 and 54, and 'laws' in s. 55. Presumably, 'proposed laws' refers to bills as they are debated by the Houses of Parliament, whereas 'laws' refers to standing Acts. The Court also relied on practices of statutory interpretation which interpret amending acts as part of their principal acts. The Court pointed to the practice of considering amending Acts as 'exhausted' after they have been passed.[68] It also mentioned s. 15 of the Acts Interpretation Act 1901 (Cth) which states that amending acts are to be construed with their principal acts. This statute was used not as a rule of interpretation for the Constitution (ordinary Acts of the Commonwealth Parliament cannot affect the meaning of the Constitution) but as an example of customary practice.

The Court then examined the effect of the second limb of s. 55 that 'any provision dealing with any other matter shall be of no effect.' If this had been applied to the amended Migration Act, containing a provision (s. 34A) which imposed taxation, then all of the Migration Act *except* s. 34A would have been invalidated. The effect of the Migration Amendment Act 1987 (Cth) would have been to repeal the whole of the Migration Act 1958 (Cth).

The High Court avoided this inconvenient result by holding that the first limb of s. 55 prevented the Parliament from amending the Migration Act to impose a tax. It held that there was then no room for

rather than an enforceable manner and form provision: *Osborne v. Cth* (1911) 12 C.L.R. 321, 336 and also Pearce, D., 'The Legislative Power of the Senate' in Zines, L. (ed.), *Commentaries on the Australian Constitution* (1977) 121-2.

57 Commonwealth Constitution s. 55.

58 *Ibid.* s. 51(ii).

59 *Ibid.* s. 90 and see *Harper v. Victoria* (1966) 114 C.L.R. 361.

60 Sykes, Lanham, and Tracey, *loc. cit.* n.28.

61 *Air Caledonie International v. Cth* (1988) 82 A.L.R. 385, 390.

62 (1938) 60 C.L.R. 263, 276; cited in *Air Caledonie International v. Cth* (1988) 82 A.L.R. 385, 389.

63 *Ibid.*

64 *Air Caledonie International v. Cth* (1988) 82 A.L.R. 385, 391.

65 *Cadbury-Fry-Pascall Pty Ltd v. Federal Commissioner of Taxation* (1944) 70 C.L.R. 362.

66 *Air Caledonie International v. Cth* (1988) 82 A.L.R. 385, 392.

67 *Ibid.*

68 *E.g.* the Victorian practice by which the principal act remains as amended by a repealed amending act: Interpretation of Legislation Act 1984 (Vic.) s. 15(1).

the operation of the validating limb of s. 55[69] which strikes out provisions dealing with matters other than taxation — and by implication saves taxation provisions. The result which struck down s. 34A and saved the previous Migration Act was convenient, although the reasoning used by the Court is open to question.

The Court's argument that there was no room for the second limb to operate because the first limb had already invalidated the amending Act ignored the invariable operation of the second limb. Applying the analysis of s. 55 used in *Air Caledonie*, *any* act which contains both taxation and other provisions contravenes s. 55's restriction on legislative power. The second limb's effect is always to validate the provisions imposing taxation. It is unclear why the second limb failed to operate in the same way upon the Principal Act. It should have acted to strike down 'any provision therein dealing with any other matter'. 'Therein' can only refer to 'laws imposing taxation', and this phrase had already been defined by the Court to include the Principal Act. The result, of course, would have been unusual: it would have saved s. 34A and invalidated the remainder of the Migration Act.

The Court drew an analogy to *Attorney-General (N.S.W.): Ex rel. McKellar v. Cth*,[70] where the effect of an invalid amendment was not to invalidate the offending section of the Principal Act as amended, but to invalidate the Amending Act and retain the Principal Act unamended. It is submitted that the case is clearly distinguishable: it concerned an unqualified legislative injunction to the Commonwealth Parliament while the s. 55 injunction contains a severance clause which (by implication) saves the provisions with respect to taxation.

The Court's argument also rests on the division of s. 55 into two limbs: the first, 'laws imposing taxation shall deal only with the imposition of taxation', a 'restriction on legislative power';[71] and the second, 'any provision therein dealing with any other matter shall be of no effect', a validation by severance clause. Alternative analyses are possible. If the provisions are read conjunctively as a single idea, they could be rephrased as 'in a law imposing taxation, any provision dealing with any matter other than the imposition of taxation shall be of no effect'. If this reading of s. 55 is adopted, then the High Court's technique of separating the two clauses of s. 55 would be erroneous.

CONCLUSION

Air Caledonie represents a new point of departure for defining a tax. There are indications that the High Court will be less sympathetic towards elaborate legislative schemes which impose non-monetary burdens. The shift in emphasis by the High Court from the cost of providing a service to the value of a service, at least where rights are at stake, may throw up difficult questions of fact to be adjudicated by the courts. It may also require a greater awareness in government of the constitutional implications of imposing fees and charges. The Court's insistence on constitutional proprieties in the imposition of taxes and charges may result in a greater parliamentary interest in charges which lack any legislative basis. Alternatively, the next chapter may bring new judicially-imposed restrictions on the circumstances in which governments may impose fees and charges without the express authority of parliament.

JOHN DALEY*

69 *Air Caledonie International v. Cth* (1988) 82 A.L.R. 385, 392-3.

70 (1977) 139 C.L.R. 527, 550; cited in *Air Caledonie International v. Cth* (1988) 82 A.L.R. 385, 392.

71 *Air Caledonie International v. Cth* (1988) 82 A.L.R. 385, 393.

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MABO v. QUEENSLAND[1]

INTRODUCTION

This is the first stage in litigation which will eventually confront the High Court with an explosive question: does Australian law recognize traditional native title?

The plaintiffs argued their case on three grounds. Their submission that the Queensland Coast Islands Declaratory Act 1985 (Qld) ('the State Act') failed to extinguish the native title claimed by the plaintiffs was accepted only by Deane J.. Secondly, the plaintiffs submitted that the State Act was beyond the power of the State Parliament on a variety of grounds. The majority joint judgment (Brennan, Toohey, Gaudron JJ.), Deane J. (also in the majority), and Mason C.J. gave scant recognition to these arguments. But the case is chiefly interesting for the division of opinion over the plaintiffs' third submission. On their interpretation, s. 10 of the Racial Discrimination Act 1975 (Cth) ('the Commonwealth Act') was inconsistent with the State Act. Contrasting views were expressed by Wilson J. (dissenting) and the majority. No concluded opinions were expressed by the other members of the minority, Mason C.J. and Dawson J., who refused to decide the case because questions of fact about the nature and extent of the claimed rights were unanswered.

FACTS

The plaintiffs were Murray Islanders and members of the Miriam people. On their own behalf, and on behalf of their family groups, they claimed declarations that they were the owners by custom of, the holders of traditional native title in, and the holders of usufructuary rights over the Murray Islands in the Torres Strait. They also claimed damages and injunctions against the State of Queensland.

The Murray Islands became part of the Colony of Queensland on 1 August 1879. When the action was instituted in 1982, Queensland contested the existence of the various rights and interests asserted by the plaintiffs. To buttress its defence, the Queensland Parliament later enacted the Queensland Coast Islands Declaratory Act 1985 (Qld). The Act provides:

> 3. For the purpose of removing any doubt that may exist as to the application to the islands of certain legislation upon their becoming part of Queensland, it is hereby declared that upon the islands being annexed to and becoming part of Queensland and subject to the laws in force in Queensland—
> (a) the islands were vested in the Crown in right of Queensland freed from all other rights, interests and claims of any kind whatsoever and became waste lands of the Crown in Queensland for the purposes of sections 30 and 40 of the Constitution Act;
> (b) the laws to which the islands became subject included the Crown lands legislation then and from time to time in force;
> (c) the islands could thereafter be dealt with as Crown lands for the purposes of Crown lands legislation then and from time to time in force in Queensland.
> 4. Every disposal of the islands or part thereof purporting to be in pursuance of Crown lands legislation after the islands were annexed to and became part of Queensland shall be taken to have been validly made and to have had effect in law according to its tenor.
> 5. No compensation was or is payable to any person —
> (a) by reason of the annexation of the islands to Queensland;
> (b) in respect of any right, interest or claim alleged to have existed prior to the annexation of the islands to Queensland or in respect of any right, interest or claim alleged to derive from such a right, interest or claim; or
> (c) by reason of any provision of this Act.

After the Act was passed, Queensland amended its defence to rely on the Act. The plaintiffs demurred to the amended defence in so far as it relied upon the State Act.

By consent of the parties, the hearing proceeded on an important assumption. The traditional legal rights claimed by the plaintiffs were presumed to exist unless they had been validly extinguished by the State Act. The propriety of this assumption was questioned by two of the dissenting judges. Dawson J. considered that until questions of fact about the precise character and extent of the rights claimed by the plaintiff were determined, 'it is not possible to say whether the defences impugned by

[1] (1988) 83 A.L.R. 14.