Comments and Notes

Ejecting the Blank Tape Levy: *Australian Tape Manufacturers Association Ltd v Commonwealth of Australia*

In its decision in *Australian Tape Manufacturers Association Ltd v Commonwealth of Australia*[1] the High Court ruled invalid the Federal Parliament's attempt to solve the problem of home-taping of sound recordings. The decision also highlighted the concept of a tax, and the operation of section 55 of the Commonwealth Constitution.

1. *Facts*

In 1989 the Federal Parliament passed the *Copyright Amendment Act* 1989 (Cth), which introduced a blank tape levy scheme into Part VC of the *Copyright Act* 1968 (Cth). This was a legislative scheme that aimed to deal with the problem created by the prevalent practice of domestic taping of sound recordings. As McHugh J commented:

> Unauthorised recording of copyright works by the use of tape recordings has been a worldwide phenomenon which has reduced the sales of those works and the royalties which would otherwise be earned from them.[2]

The problem was that the copyright owners had no effective remedy. Although in theory they have a right of action against the copier for infringement, this right was impossible to enforce due to the difficulty of proving infringement and of recovering damages from the multitude of infringers.

The scheme conferred a statutory right to copy sound recordings for the private domestic use of the person who made them.[3] A levy, termed a "royalty", was to be collected from vendors for each blank tape with a playing time over 30 minutes sold, let for hire or otherwise distributed in Australia,[4] though there were some exceptions and exemptions. The exact amount of the royalty was to be determined by applying a formula prescribed in the Act.[5] A component of this formula was to be determined by the Copyright Tribunal.[6] A collecting society, as declared by the Attorney General, was to administer the payments derived from the levy to the copyright owners.[7]

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1 (1993) 112 ALR 53 (hereinafter *Tape Manufacturers*).
2 Id at 82. See also at 54–55 per Mason CJ, Brennan, Deane and Gaudron JJ, at 68 per Dawson and Toohey JJ; *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] AC 1013 at 1060 per Lord Templeman.
3 *Copyright Amendment Act* 1989 (Cth), section 135ZZM(1).
4 Id at sections 135ZZN(1), 135ZZP(1).
5 Id at section 135ZZN(2).
6 Id at section 153E.
7 Id at section 135ZZU.

The Australian Tape Manufacturers Association Ltd, BASF Australia Ltd and TDK (Australia) Pty Ltd[8] challenged the constitutional validity of Part VC of the *Copyright Act* on the principal grounds that the amendments:

(a) did not constitute a law with respect to copyrights within the meaning of section 51(xviii) of the Constitution;

(b) imposed taxation within the meaning of section 51(ii) and were thus invalid under section 55, as the Act dealt with the imposition of taxation as well as other matters; or

(c) effected an acquisition of property from copyright owners or vendors of blank tapes either on unjust terms or for a purpose in respect of which the Parliament does not have the power to make laws, and was thus contrary to section 51(xxxi).

2. *The Decision*

The High Court decided by four to three that the amendments were invalid.

The majority, Mason CJ, Brennan, Deane and Gaudron JJ in a single joint judgment, held that the amendments were unconstitutional based on ground (b) — the levy was a law imposing taxation and under section 55 of the Constitution, such laws "shall deal only with the imposition of taxation".

The minority consisted of two judgments: a joint judgment by Dawson and Toohey JJ and a separate, though generally concurring, decision by McHugh J. The minority upheld the constitutional validity of the amendments.

3. *Law with Respect to Copyrights*

The plaintiffs submitted that the vendors of blank tapes, who would be responsible to pay the levy, had no control over the use of the tapes after distribution and thus the law was:

> no more a law with respect to copyrights than would be a law which sought to impose an exaction on the first sale of paper upon the basis that it could be employed to reproduce a literary work in breach of copyright.[9]

Dawson and Toohey JJ admitted there was not an exact correlation between the copying that occurs and the levies collected. They highlighted the exceptions and exemptions provided by the statute and decided that the likely use of the tapes was a sufficient connection so that the amendments were a law having a clear relevance to, or connection with, the subject of copyrights within the meaning of section 51(xviii).[10] The remainder of the court expressly agreed with Dawson and Toohey JJ.[11]

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8 In an earlier application reported at (1990) AIPC 90–696, Dawson J dismissed the application by the Australian Record Industry Association Ltd (ARIA) and Australasian Mechanical Copyright Owners' Society Ltd (AMCOS) who sought to be joined as defendants with the Commonwealth. During the main hearing ARIA and AMCOS were granted leave to intervene.

9 Above n1 at 72 per Dawson and Toohey JJ.

10 Id at 72–74.

11 Id at 54 per Mason CJ, Brennan, Deane and Gaudron JJ, at 80 per McHugh J.

4. *Characterising the Levy*

Much of the decision turned around the characterisation of the "royalty" imposed under section 135ZZN of the amendments.

The plaintiffs argued that the levy was not a royalty properly so-called as there was no "relevant relationship between the levy and the use of the blank tapes upon the distribution of which the levy is imposed."[12]

The entire court declared that the term "royalty" was incorrectly used,[13] although Dawson and Toohey JJ claim "it is not difficult to discern why the draftsman [sic] of the legislation chose the term 'royalty'".[14]

The majority distinguished the blank tape royalty from mineral, patent and copyright royalties, and royalties in respect of rights to cut and remove timber.[15] They stated that the essence of a true royalty is:

> that the payments should be made in respect of the exercise of a right granted and should be calculated in respect of the quantity or value of things taken, produced or copied or the occasions upon which the right is exercised.[16]

The reason that the blank tape levy did not fit this conception was that the vendor, who initially pays the levy (as opposed to the home taper), received no right, benefit nor advantage.

The Commonwealth argued that the consideration for the vendor's payment of the levy was that the vendor was permitted to do something that would otherwise amount to an infringement of copyright. The majority thought this argument had little weight as the sale of a blank tape has never constituted an authorisation to infringe copyright.[17] Unlike the photocopying situation in *University of New South Wales v Moorhouse*,[18] there is an absence of control with home taping.

A further reason maintained by the majority that the levy was not a royalty was that, as the Act provides that home copying is not an infringement of copyright, the payment is not consideration for the right to copy.[19]

Dawson and Toohey JJ emphasised section 53 of the Constitution, which lists impositions that are not to be taken as taxes. One such imposition is a fee for a licence, which they maintained is one form of royalty.[20] However, using a similar argument to the majority, Dawson and Toohey JJ affirmed that the levy was not a fee for a licence as the owners of the copyright in the recordings

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12 Id at 72 per Dawson and Toohey JJ.
13 Id at 56 per Mason CJ, Brennan, Deane and Gaudron JJ, at 74 per Dawson and Toohey JJ, at 82 per McHugh J.
14 Id at 72.
15 Id at 56.
16 Ibid. See *Stanton v FCT* (1955) 92 CLR 630 at 642; *FCT v Sherritt Gordon Mines Ltd* (1977) 137 CLR 612 at 626.
17 Above n1 at 56. See *RCA Corp v John Fairfax & Sons Ltd* [1981] 1 NSWLR 251 at 257–9; *Sony Corporation of America v Universal City Studios Inc* 464 US 417 (1984); *WEA International Inc v Hanimex Corp Ltd* (1987) 77 ALR 456; *CBS Songs Ltd v Amstrad Consumer Electronics Plc* above n2 at 1052–5.
18 (1975) 133 CLR 1.
19 Above n1 at 57.
20 Id at 74.

do not grant a licence under the statute as "s135ZZM(1) renders a licence unnecessary".[21] The levy imposed by the legislation was thus not a "royalty".

Dawson and Toohey JJ held that the fact the levy is not strictly a royalty "does not ... lead to the conclusion that the levy is a tax".[22] They considered whether the levy was a tax[23] and ultimately decided that it had more essential similarities with a fee for a licence than a tax.[24] Despite having ruled that the levy was not strictly speaking a royalty, Dawson and Toohey JJ confusingly reverted to the proposition that the levy is exacted in lieu of a royalty "and for the same ultimate purpose, namely, the payment to copyright owners for the use of their copyright material".[25] Later in their judgment, they refer to the levy as a "debt due to the collecting society".[26]

McHugh J defined a royalty in a similar way to the majority — it is a payment "made in consideration of the grant of a right".[27] Like the other members of the minority, he decided that the blank tape levy does not fit into this concept, but it was rather a "debt payable to the collecting society".[28]

A. Majority: The Levy is a Tax

The court split four to three on the question of whether the levy was a tax. All members of the court[29] referred to the classic statement, originally from *Matthews v Chicory Marketing Board*[30] 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 split was as to whether the levy was exacted by a public authority for public purposes or indeed whether these are necessary requirements for a tax.

Though the statement in *Matthews* has been influential, the High Court remarked in a unanimous judgment in *Air Caledonie International v Commonwealth*[31] that these features are not an exhaustive definition of a tax. They proposed that:

> 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.[32]

Despite these comments, the court in *Air Caledonie* followed the *Matthews* statement.

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21 Ibid.
22 Ibid.
23 See B. below.
24 Above n1 at 78.
25 Ibid.
26 Id at 79.
27 Id at 82, quoting *FCT v Sherritt Gordon Mines Ltd* above n16 at 626.
28 Above n1 at 82.
29 Id at 58 per Mason CJ, Brennan, Deane and Gaudron JJ, at 75 per Dawson and Toohey JJ, at 80 per McHugh J.
30 (1938) 60 CLR 263 at 276 per Latham CJ (hereinafter *Matthews*).
31 (1988) 165 CLR 462 at 467 (hereinafter *Air Caledonie*).
32 Ibid.

The majority in *Tape Manufacturers* placed great emphasis on the *Air Caledonie* dicta and it distinctly influenced their decision.

The majority asserted that "it is not essential to the concept of a tax that the exaction should be by a public authority".[33] Even if they would have decided that a public authority was a requirement of a tax, they would have characterised the collecting society as a public authority as "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".[34]

The entire court accepted that the fact that a levy is paid into Consolidated Revenue is a conclusive indication that the levy is exacted for public purposes.[35] But here the levy was directed to the collecting society and not into Consolidated Revenue. The issue was whether this stopped the levy from being for public purposes and thus also from being a tax.

The majority believed this did not stop the levy from being for public purposes, on the basis that parliament has the power to authorise a statutory authority to levy and receive a tax.[36] The majority also considered whether the tax was more generally for public purposes. The argument against was that the levy was an expropriation from one group for the benefit of another and thus not a tax. As it concerned the interests of two groups only, it might have been contended that the purpose was private. The majority rejected this on the grounds that the purpose of the levy was "a solution to a complex problem of public importance"[37] and was "of necessity a public purpose".[38]

In any event, the majority appeared to agree with the *Air Caledonie* proposition that an exaction for non-public purposes may be a tax.[39]

B. Minority: The Levy is Not a Tax

Dawson and Toohey JJ stressed that the observation in *Air Caledonie* cannot be taken too far,[40] and in fact "may be too wide"[41] as it suggests that the "exaction enforceable by law" requirement is the sole requirement for a tax.

The entire minority differed with the majority and the dicta in *Air Caledonie* and maintained that the exaction must be by a public authority. In the present case, according to the minority, the levy was not exacted by a public authority, as under the amendments, the moneys were to be collected by the collecting society.[42] The minority did not consider the collecting society to be

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33 Above n1 at 59.
34 Ibid.
35 Id at 60 per Mason CJ, Brennan, Deane and Gaudron JJ, at 75 per Dawson and Toohey JJ, at 81 impliedly per McHugh J. See also *R v Barger; Commonwealth v McKay* (1908) 6 CLR 41 at 82 per Isaacs J; *Parton v Milk Board (Vic)* (1949) 80 CLR 229 at 258 per Dixon J; *Moore v Commonwealth* (1951) 82 CLR 547 at 561 per Latham CJ, at 572 per McTiernan J.
36 Above n1 at 61.
37 Id at 62.
38 Ibid. See *Attorney-General (NSW) v Homebush Flour Mills Ltd* (1937) 56 CLR 390.
39 Above n1 at 61.
40 Id at 75.
41 Id at 76.
42 Id at 77 per Dawson and Toohey JJ, at 80–81 per McHugh J.

a public authority, "but a private organisation, albeit endowed with certain statutory powers".[43]

McHugh J seemed to imply that a tax must be "for the benefit of the Consolidated Revenue".[44] Dawson and Toohey JJ stood somewhere between the majority and McHugh J — they suggested that a tax might not need to be collected into Consolidated Revenue, but that "the strongest indication that an exaction does not constitute a tax is that the moneys raised do not form part of"[45] Consolidated Revenue. The complete minority used the direction of the moneys, not only to show that the levy was not exacted by a public authority, but also to show that it was not for public purposes.

In addition to any arguments concerning Consolidated Revenue, the minority held that the levy was not exacted for public purposes for other reasons. The minority equated public purposes with governmental purposes — Dawson and Toohey JJ do so impliedly[46] and McHugh J expressly.[47] They stressed that the actual purpose of the levy was part of the scheme that compensated copyright owners for the use of their copyright material — this did not involve the raising of government revenue. Dawson and Toohey JJ do admit that the scheme was a public one in that "rights and obligations are imposed by the statute as part of the scheme".[48] However, this was not sufficient to characterise the moneys as public moneys which was to them a necessary requirement of a tax.[49] McHugh J similarly maintained that as the levy was not exacted for a governmental purpose, it was not a tax.[50]

5. *Taxation and Section 55*

Section 55 of the 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 purpose of section 55 is to protect the Senate against exploitation of its inability to amend a proposed law imposing taxation.

There are three distinguishable situations. The first, and most straightforward, is where a new Act deals with both the imposition of taxation and other matters — section 55 will operate to confine validity to the imposition of taxation provisions. In the second situation an amending Act inserts tax imposition provisions into an existing Act. The third situation is where an amending Act includes both tax imposition and other provisions.

Air Caledonie[51] was in the second category of case. Historically, the position was that, in order to achieve the purpose behind section 55, the court should merely require that the amending Act deal solely with the imposition

43 Id at 77 per Dawson and Toohey JJ. See also at 80–81 per McHugh J.
44 Id at 81, quoting *R v Barger* (1908) above n35 at 82.
45 Id at 75.
46 Id at 77.
47 Id at 81.
48 Id at 77.
49 Ibid.
50 Id at 82.
51 Above n31.

of tax. However, in *Air Caledonie*[52] the High Court, in a unanimous joint decision, went further. The court invalidated the *Migration Amendment Act* 1987 (Cth) which sought to insert an "arrival fee" that the court characterised as a tax. The court held that: "the requirement of s55 should be construed ... to laws in the form in which they stand from time to time after enactment, that is to say, as extending to Acts of the Parliament on the statute book".[53]

As a result the High Court extended the effect of section 55 — the amending Act that imposed the taxation was held invalid on the grounds that it sought to bring about something that the Constitution forbids.[54]

It has been argued that the *Air Caledonie* approach involves flawed reasoning and an interpretation that was "never intended by the Founding Fathers".[55]

Unlike *Air Caledonie*, *Tape Manufacturers* was a case of the third type. The position in *Air Caledonie* was followed by the majority in *Tape Manufacturers* so that section 55 precluded an amending Act from introducing tax imposition provisions into an existing Act. As the amending Act also contained non-tax provisions, the majority suggested in dicta that section 55 would require the entire amending Act to fail.[56] This statement was dicta as they concluded that the levy provisions were, in any event, inseverable from those that dealt with the copying of blank tapes and the collection society: "It would make no sense at all to retain the taxing provisions and give them an operation in isolation from the other provisions with which the taxing provisions were intended to operate".[57] As a result, the majority invalidated the whole amending Act.[58]

It is submitted that this decision is correct even if one does not accept the *Air Caledonie* decision. As long as the levy is characterised as a tax, then the fact that the amending Act contains non-tax provisions means that the entire amendments ought to fail.

6. *Acquisition of Property*

The plaintiffs argued that the levy was contrary to section 51(xxxi) in that it effected an acquisition of property from owners of copyright or the vendors of blank tapes either on unjust terms or for a purpose in respect of which the Parliament does not have the power to make laws.

The entire court agreed the amendments did not amount to an acquisition of property from owners of copyright in the sound recordings. The basis of the decision was that section 135ZZM(1), which permitted home-taping, did not effect an acquisition of property — it merely reduced the content of the

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52 Ibid.
53 Id at 471.
54 Id at 472.
55 Starke, J G, "Current Topics: The High Court and the First Paragraph of s55 of the Commonwealth Constitution" (1989) 63 *ALJ* 232.
56 Above n1 at 64.
57 Ibid.
58 Ibid. See *R v Barger* above n35 at 78.

exclusive rights of ownership conferred by section 31(1)(a) of the *Copyright Act* 1968 (Cth).[59] Following Mason J in the *Tasmanian Dam* case:[60]

> To bring the constitutional provision into play it is not enough that legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his [sic] property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be.[61]

Similarly, the court rejected the plaintiffs' submission that the amendments effected an unconstitutional acquisition of property from the vendors of blank tapes. The ratio for the majority was that since the levy was a tax, it escaped the requirement of section 51(xxxi).[62] For the minority, the levy was a debt due to the collecting society and "payment of money in discharge of the debt by the vendor to the collecting society does not amount to the acquisition of property by the collecting society".[63]

7. *Conclusion*

The decision in *Tape Manufacturers* has some problems and leaves a number of questions unanswered. The differences of opinion centred around the characterisation of the blank tape levy. The majority characterised it as a tax, despite the fact that it is quite dissimilar to what is normally considered a tax. The minority began by ruling out the levy from being a royalty, then continued their process of elimination and ultimately decided that the levy was a debt due, something exacted in lieu of a royalty.

The most notable division between majority and minority concerns the requirements as to a tax — *Tape Manufacturers* questions the often repeated statement of Latham J in *Matthews*. The majority of the High Court, following the dicta in *Air Caledonie*, confirmed that a tax need not be exacted by a public authority, nor for public purposes. Thus the only requirements for a tax appear to be that it is a compulsory exaction of money, enforceable by law, and is not a payment for services rendered. This definition holds the potential to encompass many exactions not previously considered as taxes.

The *Copyright Amendment Act* 1989 sought to remedy the widespread problem of home-taping of sound recordings. With its invalidation by the High Court the status quo remains until parliament attempts another legislative solution.

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59 Above n1 at 57–58 per Mason CJ, Brennan, Deane and Gaudron JJ, at 79–80 per Dawson and Toohey JJ, at 80 per McHugh J, who expressly agreed with the conclusion of Dawson and Toohey JJ.

60 *Commonwealth v Tasmania* (1983) 158 CLR 1.

61 Id at 145; see also at 247–8 per Brennan J, at 282 per Deane J.

62 Above n1 at 65. See also *FCT v Barnes* (1975) 133 CLR 483 at 494–5; *MacCormick v FCT* (1984) 158 CLR 622 at 638, 649.

63 Above n1 at 79. See also at 80 per McHugh J, who expressly agreed with the conclusion of Dawson and Toohey JJ.

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