The Tax Institute's 27th National Convention
DG Hill Memorial Lecture

Tax and the Constitution

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Introduction

May I begin by acknowledging the life and work of the late Justice Graham Hill. This lecture is given in honour of his memory. We were colleagues on the Federal Court, to which he was appointed in 1989 and on which he served until his death in 2005. He was a master of taxation law and, perhaps, the leading jurist of his generation in that field. We worked together on Full Courts on a number of occasions. In 1993 we sat together on a case involving the question whether chairs produced by a manufacturer of office furniture could answer the description 'goods ... of a kind ordinarily used for household purposes' within the meaning of par (1) of Item 1 of the Third Schedule to the *Sales Tax (Exemptions and Classifications) Act 1935* (Cth). To pose the question might seem to some to bring the law into disrepute. The problem was nevertheless one of a kind, encountered in a variety of ways and at different levels in taxation law which is characterised by the absence of bright line rules and the phenomenon of overlapping categories. Some of the chairs were purchased by people for use in their own homes. Similar chairs were sold for domestic use by Ikea, Freedom and Harvey Norman. Case law invited us to undertake metaphysical inquiries into the 'essential character' of the chairs. Of that test Graham Hill observed, with masterful understatement, that in some cases '... the phrase "essential character" may be thought itself to suffer some lack of precision.'[1] In the event, the taxpayer failed on the rather pedestrian ground that it had not adduced enough evidence to show that chairs in issue in the proceedings were of a kind ordinarily used for household purposes.

[1] *Diethelm Manufacturing Pty Ltd v Commissioner of Taxation* (1993) 44 FCR 450, 470.

At a more elevated level of discourse, Graham Hill and I both shared and expressed, in different decisions on the Federal Court, concerns about the difficulties that can arise in determining whether a purported appeal from the Administrative Appeals Tribunal to the Federal Court raised a question of law as required by s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth).[2] The presiding judge on the Full Court of the Federal Court, in which Graham Hill expressed that shared concern, was not impressed. After stating his concurrence with Justice Hill's reasons on the merits of the case before the Full Court, the presiding judge said:

> Concerning his Honour's adoption of the observations by French J ... about the conceptual distinction upon which the administration of the common law has been based for centuries, and concerning his suggestion of amendment of s 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth), I say nothing.[3]

Overlaps and intersections

Like most categories in the law, the subjects and forms of taxation frequently overlap. They not only overlap, they are not closed. The definition of the term 'taxation law' in the Taxation Institute's Constitution includes income tax, goods and services tax, capital gains tax, payroll tax, customs and excise duties, stamp duty, land and other property taxes. The definition is wisely non-exhaustive. Even though minerals and petroleum resource rent taxes and carbon taxes are not mentioned, it is still possible to be a member of the Institute on the basis of an interest in those taxes. If history and the ingenuity of governments are any guide, the categories will never be closed.

Beyond the overlaps that exist between different subfields of taxation law, the whole field intersects with the general law, both private and public. It intersects with the law of contract, torts, property, corporations and partnerships, and with equity and the law of trusts. It intersects not only with the common law which governs those fields but also with the growing array of Acts and regulations, Commonwealth and State, which create, regulate, modify and destroy rights, powers, privileges and

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[2] *Commissioner of Taxation v Roberts* (1992) 37 FCR 246, 252 (Hill J); *Nizich v Commissioner of Taxation (Cth)* (1991) 91 ATC 4747, 4752 (French J).
[3] *Commissioner of Taxation v Roberts* (1992) 37 FCR 246, 247 (Jenkinson J).

obligations. It intersects with public law in relation to the exercise by the Commissioner and his officers of their statutory powers and discretions.

An important public law question with a constitutional dimension, which has been discussed in a number of decisions in the High Court, concerns the operation of ss 175 and 177 of the *Income Tax Assessment Act 1936* (Cth). Section 175 provides that:

> The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with.

Section 177 makes the production of a notice of assessment conclusive evidence of its due making and, except in statutory review or appeal proceedings under the *Taxation Administration Act 1953* (Cth), conclusive evidence that the amount and particulars of the assessment are correct.

These provisions were considered most recently in *Commissioner of Taxation v Futuris Corporation* Ltd.[4] The Court held that judicial review was available under s 39B of the *Judiciary Act 1903* (Cth) and its constitutional equivalent in s 75(v) of the *Constitution* in cases of jurisdictional error by the Commissioner arising from a 'deliberate failure to administer the law according to its terms.'[5] The decisions in the earlier cases of *FJ Bloemen Pty Ltd v Commissioner of Taxation*[6] and *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*[7] are to be read in the light of the joint judgment in *Futuris*.[8]

Relevant to the general thesis of overlap and cross fertilisation the decision in *Futuris* had regard to developments which had occurred, some years after *Richard Walter* was decided, in the law relating to the judicial review of decisions of officers of the Commonwealth where such decisions are affected by jurisdictional error. Those developments emerged, in part, from migration litigation, particularly litigation affecting asylum seekers. They arose out of debates about the validity and

[4] (2008) 237 CLR 146.
[5] (2008) 237 CLR 146, 165-165 [55]-[56].
[6] (1981) 147 CLR 360.
[7] (1995) 183 CLR 168.
[8] See, eg, (2008) 237 CLR 146, 165 [56].

interpretation of a privative clause in the *Migration Act 1958* (Cth) which purported to limit judicial review of decisions under that Act.[9]

Examples of intersections between taxation laws and other fields of law can be multiplied. One recent example, which is on your agenda at the Convention, was the decision of the High Court in *Federal Commissioner of Taxation v Bamford*.[10] There the term 'income of a trust estate', appearing in s 97(1) of the *Income Tax Assessment Act*, was held to have had 'a content found in the general law of trusts, upon which Div 6 then operates.'[11] *Bamford* illustrates an obvious proposition. There are very few areas of legal practice which can be quarantined from other areas of legal practice. That is particularly true of taxation law. That proposition calls into question what is meant by the concept of specialisation in, or within, taxation law. No practitioner in the field, however specialised, should be unaware of the existence and general nature of provisions of the *Constitution* relating to taxation law.

The *Constitution* - Interpretation

This lecture is about the *Constitution* of the Commonwealth and its significance for taxation law. It is not an occasion to lament horizontal or vertical fiscal imbalance nor to comment on the wisdom of current arrangements, nor to repeat oft voiced complaints about the complexities of taxation law. It is an opportunity to point to the provisions of the *Constitution* which are relevant to taxation law, how judges approach the interpretation of the *Constitution* generally, and how some key decisions have shaped its application in the field of taxation.

The *Constitution* defines our federation and the distribution of legislative powers within it. Under the authority conferred by the *Constitution*, the Parliament of the Commonwealth makes laws. By the authority conferred by the *Constitution* and laws made under the *Constitution*, the executive makes regulations and instruments and administers laws made by the Parliament. By the authority conferred by the *Constitution* and laws made under the *Constitution*, federal courts and courts exercising federal jurisdiction, hear and determine cases including cases about the

[9] See, eg, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
[10] (2010) 240 CLR 481.
[11] (2010) 240 CLR 48l, 505 [36].

interpretation of the *Constitution* and laws made under it. The common law, developed case-by-case by judges in the United Kingdom and in this country over centuries, supplies principles in aid of that interpretation.[12]

It should be no surprise to anyone that contested questions about the interpretation of the *Constitution* often have more than one reasonable answer. It is a fact of life that when competing interpretations of legal words are advanced in litigation and close scrutiny of the words is required, a degree of indeterminacy becomes apparent. That is so whether the contest is about the *Constitution* or a statute, a contract or some other form of legal text. There are ordinarily to be found in legal words nuances and shades of meaning. Interpretation frequently involves choices. If the choice is transparently identified and made according to rules which reflect the proper function of the judicial interpreter, the process is legitimate even though reasonable minds may differ as to the outcome. This is particularly so with a written constitution which is expressed in broad language that does not prescribe in a detailed way how its provisions are to be interpreted and applied and which not only leaves room for implications, but requires implications to make it work.

The *Constitution* was written by delegates of the Australian colonies at the end of the 19th century. It provided for the making of laws from the time of Federation into the unimaginable future. It necessarily had to be constructed for change. Some of the colonial delegates expressly recognised that fact. Sir John Downer, speaking at the 1898 session of the Conventions, looked to the judges of the future:

> With them rests the obligation of finding out principles which are in the minds of this Convention in framing this Bill and applying them to cases which have never occurred before, and which are very little thought of by any of us.[13]

There are many different approaches to constitutional interpretation, some of which attract labels and passionate advocates and detractors. Those approaches are sometimes glorified with the title of theories of interpretation. There is, however, no theory of everything for interpreting the *Constitution* any more than there is a theory

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[12] Sir Owen Dixon, 'Marshall and the Australian Constitution' (1955) 29 *Australian Law Journal* 420.
[13] *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 275.

of everything to explain the universe. Questions of constitutional construction will not be answered by adopting and applying 'any particular, all-embracing and revelatory theory or doctrine.'[14] That does not mean that interpretation is a matter of judicial whim. As Justice Gummow said in *SGH Ltd v Commissioner of Taxation*:

> [Q]uestions of constitutional interpretation are not determined simply by linguistic considerations which pertained a century ago. Nevertheless, those considerations are not irrelevant; it would be to pervert the purpose of the judicial power if ... the Constitution meant no more than what it appears to mean from time to time to successive judges ...[15]

SGH was a case about income tax. It concerned the application of s 114 of the *Constitution* which provides that the Commonwealth cannot impose any tax on property of any kind belonging to a State. Payments had been received by a building society in Queensland from the Consolidated Fund of the State of Queensland. The question was: were the payments assessable as income tax under the *Income Tax Assessment Act*. The building society had been formed under the *Building Societies Act 1886* (Qld). Half of its directors were appointed by a corporation representing the State of Queensland. Despite this, the High Court held that the building society was not a State for the purposes of s 114. In making decisions about the application of its property, it had to have regard to the interests of persons, namely depositors, other than the State.[16]

History and the *Constitution*

History plays its part in constitutional interpretation. This is illustrated in relation to taxation by the key provisions, s 51(ii) and ss 53 and 55 of the *Constitution*. Section 51(ii) confers upon the Commonwealth the power to make laws with respect to:

> taxation; but so as not to discriminate between States or parts of States.

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[14] *Wong v Commonwealth* (2009) 236 CLR 573, 582 [20].
[15] (2002) 210 CLR 51, 75 [44].
[16] (2002) 210 CLR 51, 73 [32] (Gleeson CJ, Gaudron, McHugh and Hayne JJ).

The exercise of that power is affected by ss 53 and 55 of the *Constitution*. Section 53 provides that proposed laws imposing taxation shall not originate in the Senate. It says also that the Senate may not amend proposed laws imposing taxation. Section 55 requires 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. It also requires that laws imposing taxation deal with one subject of taxation only.

Those provisions have their roots in British constitutional history. They take their place, along with s 54, which requires that a proposed law about appropriation for the ordinary annual services of government, shall deal only with such appropriation. Those provisions established for the House of Representatives the same financial primacy as the House of Commons has in the Parliament of the United Kingdom. They have their origins in resolutions which were adopted by the House of Commons and the House of Lords in the 17th and 18th centuries respectively. The House of Commons resolved on 3 July 1678:

> ... all Aids and Supplies, and Aids to his Majesty in Parliament, are the sole Gift of the Commons: And all Bills for the Granting of any such Aids and Supplies ought to begin with the Commons ...[17]

The resolution also provided that such Bills ought not to be altered by the House of Lords. The resolution was a constitutional ancestor of s 53.

On 9 December 1702, the House of Lords, which was concerned to prevent the House of Commons from abusing its privilege by tacking extraneous matters on to taxation and supply bills resolved:

> That the annexing any Clause or Clauses to a Bill of Aid or Supply, the Matter of which is foreign to, and different from, the Matter of the said Bill of Aid or Supply, is Unparliamentary, and tends to the Destruction of the Constitution of this Government.[18]

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[17] 'House of Commons Journal Volume 9: 3 July 1678', Journal of the House of Commons: volume 9: 1667-1687 (1802), pp 509.
URL: http://www.british-history.ac.uk/report.aspx?compid+27654&strquery= Date accessed: 14 March 2012.

[18] 'House of Lords Journal Volume 17: 9 December 1702', Journal of the House of Lords: volume 17: 1701-1705 (1767-1830), pp 184-186.

That resolution was a constitutional ancestor of s 55.

This history is not of merely antiquarian interest. It helps us to understand the purpose of our constitutional provisions. It was referred to in 1993 in the joint judgment in the High Court in *Northern Suburbs General Cemetery Reserve Trust v Commonwealth*.[19] That case was concerned with the validity of the training guarantee charge imposed on employers and whether the laws imposing the charge and providing for payment into a training guarantee fund, were laws with respect to taxation within s 51(ii) and whether they had to comply with s 54 of the *Constitution*. The High Court upheld the validity of the *Training Guarantee Act* and rejected an argument that the charge was not a tax.

History was also invoked in *Permanent Trustee Australia Ltd v Commissioner of State Revenue*.[20] The Court held that s 55 did not prevent the Commonwealth Parliament from enacting a law which not only imposed taxation, but also dealt with the assessment, collection and recovery of the tax. Five justices, in a joint judgment, explained the purpose of s 55 by reference to its history:

> ... the evident purpose of s 55, supported by its history, [is to restrain] abuse by the House of Representatives of its powers with respect to taxing measures by the tacking of other measures and so placing the Senate in [an] invidious position ...[21]

The provisions of s 53 of the *Constitution*, which prevent the Senate from amending proposed laws imposing taxation, would prevent it from amending the assessment, collection and recovery provisions found in the same law. The plurality in *Permanent Trustee* recognised that consequence and said:

> To accept these propositions means that a law containing added provisions of this nature is still a "law imposing taxation" to which there attaches the stipulation in s 53 of the Constitution denying to the Senate a power of

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[19] (1993) 176 CLR 555.

[20] (2004) 220 CLR 388, 419 [68]-[69].

[21] (2004) 220 CLR 388, 419 [69].

> amendment but enabling a return of Bills with a request, by message, for omission or amendment of any items or provisions therein.[22]

The Court distinguished between impermissibly tacking extraneous provisions onto a law imposing taxation and inserting in a taxing statute provisions for the assessment, collection and recovery of that tax.[23] A law containing provisions of that nature was still 'a law imposing taxation.'[24]

In *Permanent Trustee* the Court referred not only to British constitutional history but also to the Record of the Debates of the Constitutional Conventions of the 1890s, which drafted and settled the text of the *Constitution*.

It was not until 1988 that the High Court permitted resort to the Convention Debates of the 1890s in order to understand the meaning of words in the *Constitution*. The restriction dates back to a decision of the Court in 1904 in *Municipal Council of Sydney v Commonwealth*.[25] That was another tax case. It was about the rateability of land previously owned by the Government of New South Wales which had become vested in the Commonwealth. Section 114 of the *Constitution* applies not only to prohibit the imposition of taxes by the Commonwealth on State property, but also to prohibit the imposition of taxes by the States on Commonwealth property. The Commonwealth claimed its protection. The Attorney-General of New South Wales wanted to refer in argument before the High Court to a statement of opinion which had been expressed by a delegate at the Convention Debates about the operation of s 114. The Attorney himself had been a delegate. The members of the Court, Griffith CJ, Barton and O'Connor JJ, all of whom had also been delegates, would not allow him to do so. Justice O'Connor treated the terms of the *Constitution* like those of a written contract, and said:

> We are only concerned here with what was agreed to, not with what was said by the parties in the course of coming to an agreement.[26]

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[22] (2004) 220 CLR 388, 419 [70].
[23] (2004) 220 CLR 388, 419 [69].
[24] (2004) 220 CLR 388, 419 [70].
[25] (1904) 1 CLR 208.
[26] (1904) 1 CLR 208, 213.

Over the years this court-imposed restriction led to a rather artificial approach to interpretation of the *Constitution*. It also led to some absurdities and amusing moments. In the course of argument in the *Concrete Pipes Case*,[27] which concerned the scope of the corporations power of the Commonwealth conferred by s 51(xx), counsel Mr Lyons, responding to a question from the Bench, acknowledged that he was not permitted to refer to the Convention Debates but went on to say what they showed. Mr Ellicott who was on the other side, described Mr Lyons' reference as 'not permissible' and added:

> But all I want to say is that if they were looked at, one would find the contrary.

Justice Menzies said, 'that too is impermissible'. Mr Ellicott answered: 'no doubt your Honours will not look at them.' The restriction was lifted in 1988 in *Cole v Whitfield*.[28] The whole Court referred to the drafting history of s 92 of the Constitution and contributions to the Debate upon the draft clause which had been made by Sir Samuel Griffith, Sir Edmund Barton and O'Connor, among others. The reference to the history of s 92 was made:

> ... for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged.[29]

All of this adds up to the proposition that the *Constitution* did not emerge out of a vacuum. Whether dealing with taxation or any other topic, it is embedded in the history and understandings which informed both the British tradition of responsible government, which we adopted, and provisions of the Constitution of the United States, which inspired its provisions relating to the distribution of legislative powers in the Federation and limitations upon the exercise of those powers.

That is not to say, of course, that the way in which taxing and spending powers are exercised today would have been imagined or imaginable to the framers of

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[27] *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.
[28] (1988) 165 CLR 360.
[29] (1988) 165 CLR 360, 385.

our *Constitution* in the 1890s. What was in their minds was formed by existing arrangements for raising revenue in the colonies.

Taxation before Federation

Prior to Federation, the main instrument of colonial fiscal policy was indirect taxation.[30] The principle sources of colonial revenue came from sales of Crown land, tariffs and excise. Taxation through the imposition of customs and excise duties was described in the 1891 Convention Debates at Sydney as 'the sheet-anchor of all our colonial finance'.[31]

As Professor Saunders has observed, when it came to the framing of the *Constitution*, the drafters mainly had duties of customs and excise in mind.[32] Customs and excise duties were still the principal features of colonial fiscal policy. Questions about the relationship between Commonwealth and State power to impose other kinds of taxation were discussed only briefly in Sydney in 1891.[33] There were two questions which pervaded the discussion on taxation during the 1891 Convention Debates. The first was whether the Commonwealth Parliament ought to have a general power of taxation at all. The second question was to what extent State powers to levy taxation would be impaired. The framers of the *Constitution* were concerned that if future State Parliaments lacked sufficient revenue raising powers they would be unable to service existing debts.

From the early stages of the Convention Debates, the drafters had in mind that the Commonwealth Parliament would be given power to impose some form of taxation. In the 1891 draft *Constitution* the proposed Commonwealth legislative power to enact laws with respect to taxation was divided into two parts. The first part was the power to make laws with respect to customs and excise, but so that duties of customs and excise would be uniform throughout the Commonwealth, and so that no

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[30] Ian Driesen and Richard Fayle, 'History of Income Tax in Australia' in Richard Krever (ed) *Australian Taxation: Principles and Practice* (Longman Cheshire, 1987) 27.
[31] *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 3 April 1891, 678 (William Burgess).
[32] Cheryl Saunders, 'The Hardest Nut to Crack: The Financial Settlement in the Commonwealth Constitution' in Gregory Craven (ed) *The Convention Debates1891-1898: Commentaries, Indices and Guide* (Legal Books Pty Ltd, 1986) 149, 160.
[33] Saunders, above fn 32, 160.

tax or duty would be imposed on any goods exported from one State to another. The second component authorised the Commonwealth Parliament to raise money 'by any other mode or system of taxation; but so that all such taxation shall be uniform throughout the Commonwealth ...' This draft evolved into s 51(ii) of the *Constitution* which emerged during the final 1898 Melbourne Convention.

Although it was understood that the Commonwealth would be given some taxing power, there was, at the 1891 Convention, a degree of opposition to granting the Commonwealth wide ranging fiscal powers. The argument was made that to grant a wide ranging general power of taxation in addition to power to impose customs and excise duties was unnecessary and premature. The principal argument was that the Commonwealth would raise more than enough revenue for its needs in exercising its exclusive power to impose customs and excise duties. It is interesting, in the light of Commonwealth fiscal power today, to look back to the elements of that Debate in 1891. So one delegate, Sir John Bray, said:

> Personally, I feel that we ought not to give the [Commonwealth] parliament this power unless we know to a greater extent than we do at the present time the purposes to which the revenue is to be applied.[34]

Mr McMillan who argued that the taxation power should be broad, observed that:

> ... a federal body with sovereign power ... cannot be limited in its power of taxation. It is part and parcel of the case that you cannot dictate in any sense or particular the class of taxation that shall take place in the future.[35]

Another argument advanced was that if the Commonwealth's taxation power were limited to customs and excise duties, it would be impossible to give effect to a free trade policy.[36] The defence of the Commonwealth was also given as a reason for including in the Constitution a general power of taxation.[37] Alfred Deakin made the point that:

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[34] *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 3 April 1891, 671.
[35] *Official Record of the Debates of the Australasian Federal Conventions*, Sydney, 3 April 1891, 671.
[36] *Official Record of the Debates of the Australasian Federal Conventions*, Sydney, 3 April 1891, 672.
[37] *Official Record of the Debates of the Australasian Federal Conventions*, Sydney, 3 April 1891, 672.

> It is impossible to cast the duty of defence on the government of the commonwealth without giving them unlimited taxing power.[38]

Deakin's observations would prove to be prophetic as the Commonwealth Parliament's entry into the field of income tax and uniform acquisition of income taxation corresponded with World Wars I and II respectively.

Both Alfred Deakin and Sir Samuel Griffith assured the 1891 Convention that the taxation power would be exercised concurrently with and would not 'take away' from existing colonial powers. Sir Samuel asserted:

> There is no doubt that all the parliaments of the [S]tates will have precisely the same powers of [direct] taxation as they have at present...[39]

In statements which turned out to be distinctly non-prophetic, Sir Samuel expressed his belief that the Commonwealth Parliament 'would never impose direct taxation excepting in a case of great national urgency'.[40] Mr McMillan said that the Commonwealth Parliament 'will never go beyond customs; nobody dreams of such a thing.'[41]

The Commonwealth taxation power and the States

The general power to make laws with respect to taxation conferred by s 51(ii) of the *Constitution* is a concurrent power. The States also have power to make laws with respect to taxation apart from those powers reserved exclusively to the Commonwealth by s 90 and, in respect of Commonwealth places, by s 52 of the *Constitution*.

The power to tax is a fundamental power of government. In a federal system, the distribution and exercise of the power to tax may affect the balance of power between the components of the federation.

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[38] *Official Record of the Debates of the Australasian Federal Conventions*, Sydney, 3 April 1891, 675.
[39] *Official Record of the Debates of the Australasian Federal Conventions*, Sydney, 9 April 1891, 907.
[40] *Official Record of the Debates of the Australasian Federal Conventions*, Sydney, 9 April 1891, 907.
[41] *Official Record of the Debates of the Australasian Federal Conventions*, Sydney, 11 February 1898, 1165.

There is a judicially developed doctrine and there are constitutional provisions which protect, to some degree, against misuse of legislative powers and particularly taxing powers in a way that is inconsistent with the federal system for which the *Constitution* provides. The High Court decided in the *Engineers' case* and cases that followed after it, that the parliaments of the Commonwealth and the States each have the power to enact laws within their legislative competency binding on the Commonwealth, the States and the people.[42] There was an implied limitation expounded by the Court in later cases. It was drawn from the federal structure of the *Constitution*. It was a limitation upon the legislative power of the Commonwealth to enact laws affecting the States and vice versa.[43] The Commonwealth could not make laws to destroy the States or weaken their capacity to govern.

In that context, Sir Owen Dixon, in 1940, identified the taxation power as one which might require special consideration in relation to the States.[44] He described the extent of that power as subject to a reservation on the *Engineer's Case* doctrine.[45] The reservation did not immunise the States from the taxation power of the Commonwealth. State officials, ministers and judges pay income tax on their salaries and are required to pay fringe benefits tax in respect of benefits provided to them by the State. Those taxes are imposed by laws of general application which have been held not to inhibit the capacity of the States to appoint and remunerate public officers.[46]

Nevertheless, taxation laws affecting the States attract particular scrutiny because of 'the lack of ingenuity needed to burden the exercise of State functions by use of the taxation power...'[47] As Gleeson CJ said in *Austin v Commonwealth*:

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[42] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 153-155 (Knox CJ, Isaacs, Rich and Starke JJ) (*Engineers' Case)*; *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319, 390; *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 682; *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278, 316-317 (*Farley's Case)*.
[43] *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297, 313.
[44] (1940) 63 CLR 278, 316.
[45] *Essendon Corporation v Criterion Theatres Ltd* (1947) 74 CLR 1, 23.
[46] *State Chamber of Commerce and Industry v Commonwealth (Second Fringe Benefits Tax case)* (1987) 163 CLR 329. 356.
[47] (2003) 215 CLR 185, 257 [142].

> It is the impairment of constitutional status, and interference with capacity to function as a government, rather than the imposition of a financial burden, that is at the heart of the matter, although there may be cases where the imposition of a financial burden has a broader significance.[48]

That passage was quoted with approval in the joint judgment in *Clarke v Commissioner of Taxation*.[49] The joint judgment said:

> The question presented ... in any given case requires assessment of the impact of particular laws by such criteria as 'special burden' and 'curtailment' of 'capacity' of the States 'to function as governments'. These criteria are to be applied by consideration not only of the form but also 'the substance and actual operation' of the federal law.[50]

In *Clarke*, the Court held that Commonwealth legislation imposing a superannuation contribution surcharge in respect of the entitlements of a member of the South Australian Parliament under parliamentary superannuation schemes were invalid.

Express limitations on Commonwealth taxing power

Apart from the implied limitation most recently applied in *Clarke*, there is an express limitation imposed on the Commonwealth taxation power by the condition found in s 51(ii) which prevents discrimination between States or parts of States in the exercise of the taxation power. Section 99 prohibits giving preference by any law of revenue to one State or any part thereof over another State or any part thereof. Section 114 prohibits the Commonwealth from imposing any tax on property of any kind belonging to a State. It also prohibits a State from imposing any tax on property of any kind belonging to the Commonwealth. Despite the importance of these protections, the Commonwealth dominates the field of taxation. It does so through its practical dominance in the exercise of its concurrent taxation powers and the practical exclusion of States from the income tax field. The position is also much strengthened by the exclusivity of its powers to impose duties of customs and excise conferred by s 90 of the *Constitution*.

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[48] (2003) 215 CLR 185, 217 [24].
[49] (2009) 240 CLR 272, 306.
[50] (2003) 215 CLR 185, 249 [124]

The broader the field of the exclusivity conferred by s 90, the narrower the tax raising options available to the States. Decisions of the Court which have had the effect of narrowing the options available to the States have focussed upon the practical operation of State taxes as significant in determining whether they were invalid as excises.[51]

The growth of Commonwealth taxing power

Despite the focus at the Convention Debates on the ability of the Commonwealth to raise revenue through the imposition of customs and excise duties, only 15 years elapsed from Federation to the enactment of the first Commonwealth Income Tax Assessment Act. It was initially predicated on funding the war effort. The Labour Attorney-General, Hughes, in his Second Reading Speech said:

> That additional revenue is necessary to meet the great and growing liabilities of the War is amply apparent.

However, he went on:

> ... I have always regarded this form of direct taxation as peculiarly appropriate to the circumstances of a moderate community ... not only an effective means for raising money for the conduct of government, but serving as an instrument of social reform.[52]

As one commentary has noted, the speech did 'provide a hint of potentially deeper motives.'[53]

The imposition of a Commonwealth income tax in 1915 resulted in the existence of concurrent State and Commonwealth regimes imposing separate and distinct income taxes.[54] There were obvious difficulties in implementation.

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[51] See for example: *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599; *Ha v New South Wales* (1997) 189 CLR 465.
[52] Commonwealth, *Parliamentary Debates*, Senate, 18 August 1915, 5844.
[53] Rodney Fisher and Jacqueline McManus, 'The Long and Winding Road: A Century of Centralisation in Australian Tax' in John Tiley (ed) *Studies in the History of Tax Law* (Hart Publishing, 2004) 313, 318.
[54] See Fisher and McManus, above fn 52.

Following the Great Depression and with the onset of World War II, there were discussions between the Commonwealth and the States about the possibility of a political arrangement under which the States would vacate the field of income taxation in favour of the Commonwealth, subject to receiving compensation for lost revenues. Agreement was not forthcoming at the 1942 Premiers' Conference. There was no support from any State for Commonwealth proposals to take over income taxation.[55]

The importance of Commonwealth income tax to wartime revenue is illustrated by its growth from 16% of total tax revenues in 1938-1939, to 44% in 1941-1942.[56] In the event, on 7 June 1942, the Commonwealth Parliament passed four Acts the effect of which was to take over the levying and collection of income tax from the States. These Acts gave rise to Australia's first uniform income tax scheme.

The scheme had four statutory components. The first of those was the *Income Tax Act 1942*. It imposed income tax at a level which would raise the same amount of revenue as was being raised by Commonwealth and State Governments collectively. The second component was the *Grants (Income Tax Reimbursement) Act 1942* (Cth). That Act provided for grants to be made to each State in any year in which the treasurer was satisfied that the State had not itself imposed a tax on incomes. That Act relied upon the power conferred upon the Parliament by s 96 of the Constitution to ' ... grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.' The third component was a provision introduced into the *Income Tax Assessment Act* which made it an offence for a taxpayer to pay a State income tax until Commonwealth tax was paid. This was a priority provision. The fourth component was the *Income Tax (Wartime Arrangements) Act 1942* (Cth). That Act provided for the transfer to the Commonwealth of State staff involved in the collection of income tax and of office accommodation, furniture and equipment, if the Treasurer gave notice that such transfer was 'necessary for the efficient collection of

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[55] Peter Hanks, 'Constitutional Issues of Australian Taxation' in Richard Krever (ed) *Australian Taxation*, (Longman, 1987) 37, 51-53.
[56] Russel Mathews and Robert Jay, *Federal Finance: Intergovernmental Financial Relations in Australia since Federation* (NAP, 1972) 171.

revenue required for the prosecution of the War, for the effective use of manpower, or otherwise for the defence of the Commonwealth.'[57]

The impact of these measures upon State revenues was reflected in the fact that in 1942 income tax made up between 67.8 and 46.8 per cent of their revenues. As Professor Saunders has written:

> The introduction of the uniform tax scheme thus re-established the fiscal imbalance, with a vengeance.[58]

South Australia, Victoria, Queensland and Western Australia challenged the validity of this legislative scheme. The challenge was heard by five Justices of the High Court in July 1942. Sir Owen Dixon who was then a member of the Court, was absent in the United States as Australia's Ambassador to that country. As Professor Saunders writes, the challenge was made at a critical phase in the war. It attracted 'political vituperation, of a kind familiar today'.[59] Senator Keane then Minister for Trade and Customs, said:

> ... if the day came in this country when the High Court interfered with the considered decisions of the elected representatives of the people its position might have to be examined.[60]

The Minister for Aircraft Production, Senator Cameron, threatened to abolish the States.[61]

The challenge failed.[62] The Income Tax Act was held to fall within the scope of s 51(ii) of the Constitution. The fact that it became politically impossible for the States to impose their own taxes did not affect the validity of the Commonwealth law. The Chief Justice said:

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[57] Cheryl Saunders, 'The Uniform Income Tax Cases' in HP Lee and G Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 62, 66.
[58] Saunders, above fn 57, 67.
[59] Saunders, above fn 57, 68.
[60] Saunders, above fn 57, 68, fn 68.
[61] Saunders, above fn 57, 68, fn 69.
[62] *South Australia v Commonwealth (The First Uniform Tax Case)* (1942) 65 CLR 373.

> ... the controversy before the Court is a legal controversy, not a political controversy. It is not for this or any court to prescribe policy or to seek to give effect to any views or opinions upon policy. We have nothing to do with the wisdom or expediency of legislation. Such questions are for Parliaments and the people.[63]

The priority provision was upheld under s 51(ii) and the grants legislation was upheld as an exercise of the power conferred upon the Parliament by s 96 of the *Constitution*. The majority held that the Act did not command the States not to levy income taxes. It provided a financial inducement which they could accept or reject. The provisions for the transfer of staff, office equipment and records, was upheld by the majority as an exercise of the power conferred on the Parliament by s 51(vi) of the *Constitution* to make laws with respect to the naval and military defence of the Commonwealth and of the several States.

The important elements of the Court's decision on the validity of the legislation did not depend upon the defence power of the Commonwealth. The judgments provided a constitutional basis upon which the Commonwealth could continue to impose uniform income taxation after the war.[64]

After the election of the Menzies government in 1949, some consideration was given to the return of income taxation to the States. There was examination by an intergovernmental working party of issues that arose out of different polities in the Federation imposing income tax. These did not lead anywhere.[65]

In 1955, Victoria commenced proceedings to again challenge the constitutional validity of the scheme. New South Wales issued its own proceedings in 1956. The case was heard in April 1957 by seven Justices of the Court. In the so-called *'Second Uniform Tax Case'*[66] the High Court, by majority, declared the priority provision of the *Income Tax Assessment Act* to be invalid.

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[63] (1942) 65 CLR 373, 409 (Latham CJ).
[64] Hanks, above fn 53, 51-53.
[65] Saunders, above fn 57, 69.
[66] *Victoria v Commonwealth* (1957) 99 CLR 575.

Sir Owen Dixon, who was by then Chief Justice of the High Court, made the point that the power to make laws with respect to taxation could not be construed as a power over the whole subject of taxation throughout Australia.[67] The State power to tax was distinct and did not legally compete with the Commonwealth power. The Chief Justice then asked the question whether the priority provision was incidental to the main taxation power of the Commonwealth. He identified the purpose of the provision as making it more difficult for the States to impose an income tax. He said:

> To support s 221(1)(a) it must be said to be incidental to the federal power of taxation to forbid the subjects of a State to pay the tax imposed by the State until that imposed upon them by the Commonwealth is paid and, moreover, to do that as a measure assisting to exclude the States from the same field of taxation. This appears to me to go beyond any true conception of what is incidental to a legislative power and, under colour of recourse to the incidents of a power expressly granted, to attempt to advance or extend the substantive power actually granted to the Commonwealth until it reaches into the exercise of the constitutional powers of the States.[68]

That rationale is redolent of the constitutional implication discussed earlier in this paper which prevents the Commonwealth from making laws which destroy or weaken the capacity of the States to govern. The decision of the Court with respect to the priority provision was a departure from its previous decision in the *First Uniform Tax Case*. The whole Court reaffirmed the validity of the grants legislation as supported by s 96 of the *Constitution*. Section 221 was struck down by majority of four to three.

Professor Cheryl Saunders has written that the *Second Uniform Tax Case* did not attract the same level of interest as the First, from press or public:

> Halfway through the hearing, an observer from the *Sydney Morning Herald* noted the presence of only six visitors, half of whom left midway through the morning session as "the first yawn hit the Judges' bench", running "like a small forest fire from one end to the other". "Could this", the reporter wondered, "be a 'great constitutional battle'?"[69]

The great battle was undoubtedly lost with the *First Uniform Tax Case*. The *Second Uniform Tax Case* confirmed the dominance of the Commonwealth. The

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[67] (1957) 99 CLR 575, 614.
[68] (1957) 99 CLR 575, 614.
[69] Saunders, above fn 57, 70 fn 92.

underpinning of that fiscal dominance could be seen in the coupling of the taxation power with the grants power under s 96. To that could be added the exclusive power of the Commonwealth with respect to excise duties.

Constitutional questions about taxes

The provisions of the *Constitution* conferring and limiting the powers of the Commonwealth to make laws with respect to taxation give rise to a number of questions which may need to be considered in determining whether a law is a valid law with respect to taxation.

In 1908 in *Barger's* case, Isaacs J said that the term 'taxation' was:

> a word so plain and comprehensive that it would be difficult to devise anything to surpass it in simplicity and amplitude.[70]

Classically, taxation has been defined in the terms used by Chief Justice Latham in *Mathews v Chicory Marketing Board*:

> A compulsory exaction of money by a public authority for public purposes enforceable by law which is not a payment for services rendered. [71]

Although not accepted as exhaustive of the concept, that description has often been used as a working definition.

The concept of a tax was considered in September last year when the Court dismissed a challenge to the validity of the superannuation guarantee legislation. That challenge was brought on the basis that the superannuation guarantee charge was not a tax as it was not imposed for public purposes, but for the private benefit of employees. In a joint judgment of six of the Justices in *Roy Morgan Research Pty Ltd v Commissioner of Taxation*[72], their Honours said:

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[70] *R v Barger* (1908) 6 CLR 41, 82.
[71] (1938) 60 CLR 263, 276.
[72] (2011) 281 ALR 205.

> The exaction represented by the charge, contrary to the appellant's submission, is not of a nature which takes it outside the constitutional conception of 'taxation'.

The linkage between the charge and a benefit to employees did not indicate that the charge was not imposed by the Parliament for public purposes. The joint judgment said:

> It is settled that the imposition of a tax for the benefit of the consolidated revenue fund is made for public purposes. That is not to say that the receipt of funds into the consolidated revenue fund conclusively establishes their character as the proceeds of a tax. But it does establish in the present case that the charge is imposed for "public purposes" and thus, if other necessary criteria are met, as they are in this case, the charge is a valid tax.[73]

It is important to bear in mind that an impost does not cease to be a tax because it serves some public purpose beyond the raising of revenue. As was pointed out in *Roy Morgan* the objective of a customs tariff at a particular level may be to protect domestic industry by providing a disincentive to the importation of competing products. The joint judgment quoted a passage from the judgment of Kitto J in *Fairfax v Federal Commissioner of Taxation*, which was made by reference to United States authority:

> It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed ... The principle applies even though the revenue obtained is obviously negligible ... or the revenue purpose of the tax may be secondary ... Nor does a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate.[74] (citations omitted)

In October last year in *Queanbeyan City Council v ACTEW Corporation Ltd*[75] the question arose whether an impost charged by the Australian Capital Territory was an excise and therefore within the exclusive legislative power of the Commonwealth. The Court had previously held in *Capital Duplicators Pty Ltd v Australian Capital Territory*[76] that although the Territory had power, under s 22 of the *Self-Government Act* to make laws for its peace, order and good government, it was not able to be given

[73] (2011) 281 ALR 205, 217 [49].
[74] (1965) 114 CLR 1, 12.
[75] (2011) 281 ALR 671.
[76] (1992) 177 CLR 248.

power to impose duties of excise within the meaning of s 90 of the *Constitution*. In that respect, the Territory legislature was in the same position as a State legislature.

The question arose whether certain water charges imposed by the Territory on the water utility ACTEW Corporation and passed on to the Queanbeyan City Council, were invalid as excise duties. The threshold question in the case was whether the imposition, said to be an excise, was a tax. The Court held that the particular charges were not taxes because ACTEW itself was so closely identified with the Territory. Relevant to that conclusion was the extensive control which was exercised by the Executive Government of the Territory and the Chief Minister over the affairs of ACTEW. Putting it simply, a payment from one government pocket to another, is not ordinarily a tax.

Relevant to the characterisation of an imposition as a tax, is that it is not a fee for services. A fee for services, although imposed by law, is not a tax. On the other hand, just because something is called a 'fee for services' does not take it out of the category of a tax. An imposition which must be paid, whether or not the relevant services are acquired and has no discernible relationship to the value of the services, is unlikely to escape characterisation as a tax. In *Air Caledonie International v Commonwealth*[77], an immigration clearance fee imposed on passengers entering Australia from overseas did not escape characterisation as a tax.

The taxation power does not authorise impositions which are outside the rule of law. An imposition will not fall within the taxation power if it is arbitrary. The liability must be imposed by reference to some ascertainable criteria which has a sufficiently general application. The imposition must not be the result of an administrative decision based on individual preferences not related to a test prescribed by law.[78] A tax must also be contestable in the sense of amenable to judicial review when the circumstances of the taxpayer do not attract a legal liability to pay the tax.[79] Taxes are also to be distinguished from financial penalties.

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[77] (1988) 165 CLR 462.
[78] *Deputy Commissioner of Taxation v Truhold Benefits Pty Ltd* (1985) 158 CLR 678.
[79] *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622; *WR Carpenter Holdings Pty Ltd v Commissioner of Taxation* (2008) 237 CLR 198, 204 [9].

Beyond characterisation of a law as a law with respect to taxation, other questions which may arise in relation to the exercise of the Commonwealth power include:

1. Whether the tax discriminates between States or parts of States within the meaning of s 51(ii).

2. Whether the tax gives preference to a State or any part thereof over another State or any part thereof within the meaning of s 99.

These provisions contribute to the general constitutional scheme for a single national economy, also reflected in s 90. Also relevant in this context, is s 92 which guarantees that interstate trade is 'absolutely free'. Other components of the scheme are the requirements that duties of customs imposed by the Commonwealth be uniform (s 88) and that bounties on the production of goods be uniform (s 51(iii)).

Each of the provisions to which I have referred is expressed in terms which have required interpretation by the High Court over the years since Federation. Each of them plays its part in establishing the centrality of the taxation power and taxation laws to the working of our Federation and to the national economy. It is not surprising that political choices about the invocation of these powers and the laws to be made under them is the subject of ongoing and vigorous debate involving Commonwealth, State and Territory governments, commerce and industry, and the wider Australian community.

It has not been my purpose in making this presentation to comment upon that debate in any way. But because of the importance of the issues and what is at stake, we can expect that the *Constitution* will continue to play an important part in the law of taxation for many years to come. The Taxation Institute of Australia is well placed, in pursuing its objectives of education of its members and of the public, to ensure that that debate, whatever direction it takes, is an informed one.