

## THE COMMONWEALTH’S TAXING POWER AND ITS LIMITS — ARE WE THERE YET?

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*[The Commonwealth’s use of its taxing power affects not only Commonwealth, state and territory governments, commerce and industry but Australia’s future. Consideration of the constitutionality of the exercise of that power by the Commonwealth is important; some would say essential. Given that there are limits on the exercise of the taxing power, such a review will often provoke the question — have the limits of the power been reached? To understand the complex issues raised by the Commonwealth’s use of its taxing power, it is necessary to identify the taxing power and to seek to identify its limits. Only then is it appropriate to review the Commonwealth’s use of the power and to ask if the limits of the power have been reached and, if so, in what respects.]*

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## I INTRODUCTION

The subject — the Commonwealth's taxing power and its limits — is broad and it is not limited to what the purists might call 'tax law'. I have never regarded myself as a 'tax lawyer'. My exposure to tax law was as a result of others.

One of those responsible for my being exposed to cases about taxation was Brian Shaw QC, an alumnus of Melbourne Law School and of the University of Oxford.<sup>1</sup> The prize in Corporate Taxation in the Melbourne Law Masters program is named in his honour. His contribution to the tax jurisprudence of this country from the 1960s was, and remains, significant. Shaw signed the roll of counsel on 3 April 1959.<sup>2</sup> His first appearance in the High Court was in October 1959.<sup>3</sup> His last appearance was in June 2006.<sup>4</sup> Over 45 years he appeared in more than 80 cases in the High Court that have been reported in the Commonwealth Law Reports.<sup>5</sup> His appearances in other courts are far too numerous to count. On the occasion of his last appearance in the High Court, the Court took the extraordinary but delightful step of referring not only to his length of practice but to 'acknowledg[e] with gratitude the assistance [he] provided over that period'.<sup>6</sup> That assistance extended to the areas of tax, constitutional law, trusts, equity, superannuation, and even criminal cases.<sup>7</sup> The list is as diverse as it is long. It was Shaw's intellectual grasp of these seemingly disparate areas of the law that ensured that he was, and remains, one of the leading intellectuals of this State and this nation. Shaw demonstrated that the areas in which he practised and appeared were not, in fact, distinct, or disparate, silos of law. It was his detailed understanding of, and

<sup>1</sup> He was awarded the Supreme Court Prize at The University of Melbourne in 1955 and the Vinerian Scholarship in the Bachelor of Civil Law at the University of Oxford.

<sup>2</sup> Transcript of Proceedings, *Federal Commissioner of Taxation v McNeil* [2006] HCATrans 300 (14 June 2006) 2967–8 (Gummow ACJ).

<sup>3</sup> *Ibid* 2968–70 (Gummow ACJ); *Ferrum Metal Exports Pty Ltd v Lang* (1960) 105 CLR 647, 649.

<sup>4</sup> Transcript of Proceedings, *Federal Commissioner of Taxation v McNeil* [2006] HCATrans 300 (14 June 2006) 2966–7 (Gummow ACJ).

<sup>5</sup> *Ibid* 2972–4.

<sup>6</sup> *Ibid* 2974–6.

<sup>7</sup> See, eg, *Tait v The Queen* (1962) 108 CLR 620.

reference to, other areas of the law and the wider world that marked his advice and advocacy. Advice and advocacy sought by government and by the corporate community. Advice and advocacy he provided to many groups and individuals, pro bono and without fanfare.<sup>8</sup> Brian Shaw was and remains an intellectual, mentor and friend. It is not possible to consider the Commonwealth's taxing powers and the implications of the exercise of that power without thinking of Brian Shaw.

The choice of subject was, of course, deliberate. The Commonwealth's use of its taxing power affects not only Commonwealth, state and territory governments, commerce and industry but Australia's future. Consideration of the constitutionality of the exercise of that power by the Commonwealth is important; some would say essential. Consideration of what are the limits to the exercise of the power is not some political exercise. Such a review (and any subsequent challenge) does no more than reflect a proper functioning democracy where one arm of the democracy — the judicial arm — acts as a check or balance on the political arm.

In the second decade of the 21<sup>st</sup> century, that process of checking and balancing the exercise of the taxing power will, I suspect, become more common, especially where, at times, the result of the purported exercise of the power has been, or at least has the potential to be, destabilising.

Given that there are limits on the exercise of the taxing power, such a review will often provoke the question — have the limits of the power been reached? Or as a young child on a dreadfully long car trip might ask — 'are we there yet?' It is some of these issues that this paper seeks to address.

To understand the complex issues raised by the Commonwealth's use of its taxing power, it is necessary to identify the taxing power and to seek to identify its limits. Only then is it appropriate to review the Commonwealth's use of the power and to ask if the limits of the power have been reached and, if so, in what respects.

## II THE TAXING POWER AND ITS LIMITS

It is the *Constitution* that confers, and limits, the Commonwealth's powers to make laws with respect to taxation. The question often posed is whether a law is a valid law with respect to 'taxation'. Section 51(ii) of the *Constitution*, in its terms, provides that:

<sup>8</sup> For example, Shaw provided unpublished advice to the National Union of Students in 1989 regarding the creation of HECS: Clem Newton-Brown, 'HECS: A Tax or Not a Tax?' (1991) 16 *Legal Service Bulletin* 23, 26 n 17.

The Parliament shall, subject to this *Constitution*, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... *taxation*; but so as not to discriminate between States or parts of States.<sup>9</sup>

Of course, the power in s 51(ii) cannot be considered in isolation. The *Constitution* creates a scheme,<sup>10</sup> all the elements of which together make up the 'taxing power'.

At the core of that scheme, however, lies that word, 'taxation'. What exactly is the constitutional concept of 'taxation' as that word appears in s 51(ii)? Three classic statements come to mind. In Quick and Garran's *The Annotated Constitution of the Australian Commonwealth*, the nature of the taxing power was described in various ways, including that:

Taxation may be ... defined as any exaction of money or revenue, by the authority of a State, from its subjects or citizens and others within its jurisdiction, for the purpose of defraying the cost of government [and] promoting the common welfare ... Taxation may assume various shapes, and be known by different names ...

The term taxation covers every conceivable exaction which it is possible for a government to make, whether under the name of a tax, or under such names as rates, assessments, duties, imposts ...<sup>11</sup>

In 1908, Isaacs J said that 'taxation' was 'a word so plain and comprehensive that it would be difficult to devise anything to surpass it in simplicity and amplitude.'<sup>12</sup> One wonders what Isaacs J would make of the 7000-odd pages that currently comprise the tax laws of this country.<sup>13</sup> Thirty years later, in *Matthews v Chicory Marketing Board (Vic)*, Latham CJ defined taxation as 'a compulsory exaction of money by a public authority for public purposes,

<sup>9</sup> Emphasis added.

<sup>10</sup> The scheme includes ss 51(ii), 53, 54, 55, 81, 90, 96, 99, 105A and 114 of the *Constitution*, as well as other provisions. For example, s 92 guarantees that interstate trade is 'absolutely free'. See also ss 51(iii) and 88, which respectively require that bounties on the production of goods, and duties of customs imposed by the Commonwealth, be uniform.

<sup>11</sup> John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Melville & Mullen, 1901) 550.

<sup>12</sup> *R v Barger* (1908) 6 CLR 41, 82.

<sup>13</sup> This figure is based on the pagination of the 2012 compendium of Australian income tax legislation prepared by CCH: see CCH Editors, *Australian Income Tax Legislation 2012* (CCH Australia, 2012) vols 1–3. If one were to include GST, superannuation and Minerals Resource Rent Tax legislation, that number would likely exceed 10 000 pages.

enforceable by law, and ... not a payment for services rendered'.<sup>14</sup> That has been the working definition for many years.<sup>15</sup> Is it still the position?

The High Court recently revisited that issue in *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* ('*Roy Morgan*').<sup>16</sup> In *Roy Morgan*, the superannuation guarantee charge,<sup>17</sup> a charge imposed on an employer who fails to provide a prescribed minimum level of superannuation, was challenged on the basis that it was not a tax because it was not imposed for public purposes.<sup>18</sup> The challenge failed, as '[t]he exaction represented by the Charge ... [was] not of a nature which [took] it outside the constitutional conception of "taxation"'.<sup>19</sup>

In a joint judgment of six of the Justices, their Honours 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 ... the Charge is a valid tax.<sup>20</sup>

Before turning to the 'other necessary criteria', particular aspects of the *Roy Morgan* decision are worth noting. First, the link between the charge and a benefit to employees did not 'indicate that the Charge [was] *not* imposed by the Parliament for "public purposes"'.<sup>21</sup> Secondly, the phrase 'public purposes'<sup>22</sup> is not without limitation. It is narrower than 'public interest'.<sup>23</sup> Thirdly, the charge did not cease to be a tax because it served some public purpose beyond the raising of revenue. This third point is not new. It has been the law

<sup>14</sup> (1938) 60 CLR 263, 276.

<sup>15</sup> Peter Hanks, Frances Gordon and Graeme Hill, *Constitutional Law in Australia* (LexisNexis Butterworths, 3<sup>rd</sup> ed, 2012) 315 [6.16]. Cf *Air Caledonie International v Commonwealth* (1988) 165 CLR 462, 467 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); *Luton v Lessels* (2002) 210 CLR 333, 352–3 [49]–[51] (Gaudron and Hayne JJ).

<sup>16</sup> (2011) 244 CLR 97.

<sup>17</sup> See *Superannuation Guarantee (Administration) Act 1992* (Cth) pt 3; *Superannuation Guarantee Charge Act 1992* (Cth).

<sup>18</sup> (2011) 244 CLR 97, 101 [2] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>19</sup> *Ibid* 112 [43].

<sup>20</sup> *Ibid* 113 [49] (emphasis added) (citations omitted).

<sup>21</sup> *Ibid* (emphasis added).

<sup>22</sup> *Ibid*.

<sup>23</sup> *Luton v Lessels* (2002) 210 CLR 333, 343 [12] (Gleeson CJ).

of this country for over 50 years.<sup>24</sup> It is also pragmatic. Life does not occur in silos. A law may bear multiple characters. As the United States Supreme Court said in *United States v Sanchez*:

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.<sup>25</sup>

Next, the importance of a legislative objective to raise revenue is not without some controversy. It has been the subject of differing views. Gleeson CJ and Kirby J thought its presence or absence 'will often be significant'<sup>26</sup> while the majority in *Roy Morgan* expressed the view that 'a legislative objective to raise revenue is *not* necessarily a determinant that the exaction in question bears the character of taxation.'<sup>27</sup>

Finally, the relevant legislation under consideration in *Roy Morgan* was enacted in two Acts, following the well-established procedure in order to comply with s 55 of the *Constitution*, which requires that laws imposing taxation should deal only with the imposition of taxation.<sup>28</sup> The *Superannuation Guarantee Charge Act 1992* (Cth) imposed what was said to be the tax and fixed the rate. The *Superannuation Guarantee (Administration) Act 1992* (Cth) dealt with the incidence, assessment and collection of the charge.

*Roy Morgan* demonstrates that limits to the taxing power (or at least some of them) are well-defined. Most may be simply stated. Application of those limits in a particular circumstance may, however, be more problematic.

What then are the *other necessary criteria* to which the Justices in *Roy Morgan* were referring? It is dangerous to simplify the list. As Gaudron and

<sup>24</sup> *Radio Corporation Pty Ltd v Commonwealth* (1938) 59 CLR 170, 179–80 (Latham CJ).

<sup>25</sup> 340 US 42, 44 (Clark J for Vinson CJ, Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark and Minton JJ) (1950) (citations omitted), quoted in *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1, 12 (Kitto J).

<sup>26</sup> *Luton v Lessels* (2002) 210 CLR 333, 343 [13] (Gleeson CJ), 372 [118] (Kirby J), citing *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133, 178 [90]–[91] (Gleeson CJ and Kirby J).

<sup>27</sup> (2011) 244 CLR 97, 104 [16] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (emphasis added).

<sup>28</sup> See *ibid* 101 [5] n 16, and corresponding text.

Hayne JJ said in *Luton v Lessels*, '[i]t is necessary, in every case, to consider all the features of the legislation which is said to impose a tax.'<sup>29</sup>

However, we know some other things. We know from what was said in *Matthews v Chicory Marketing Board (Vic)* that the charge cannot be a payment for services rendered.<sup>30</sup> A fee for services, although imposed by law, is not a tax. On the other hand, the mere fact that something is labelled a 'fee for services' does not necessarily preclude it from being a tax.<sup>31</sup> In other words, an imposition that must be paid, whether or not the relevant services are acquired and that has no discernible relationship to the value of the services, is unlikely to escape characterisation as a tax. So, for example, in *Air Caledonie International v Commonwealth*, an immigration clearance fee imposed on passengers entering Australia from overseas did not escape characterisation as a tax. The High Court held that for a 'charge' to be considered a 'fee for services', it must be 'exactd for particular identified services provided or rendered individually to, or at the request or direction of, the particular person required to make the payment.'<sup>32</sup> The High Court later said that there must be a 'sufficient relationship between the liability to pay the charge and the provision of [services] by the ultimate expenditure of the money collected'.<sup>33</sup>

Next, the imposition cannot be outside the rule of law. An imposition will not be within the taxing power if it is arbitrary. The liability must be imposed by reference to some ascertainable criteria, which have a sufficiently general application.<sup>34</sup> It will be necessary to return to this criterion later in the paper.<sup>35</sup>

<sup>29</sup> (2002) 210 CLR 333, 352 [49].

<sup>30</sup> (1938) 60 CLR 263, 276 (Latham CJ). See also *Harper v Victoria* (1966) 114 CLR 361; *Air Caledonie International v Commonwealth* (1988) 165 CLR 462, 466–7 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555, 567 (Mason CJ, Deane, Toohey and Gaudron JJ).

<sup>31</sup> *Air Caledonie International v Commonwealth* (1988) 165 CLR 462, 467 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

<sup>32</sup> *Ibid* 470.

<sup>33</sup> *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555, 568 (Mason CJ, Deane, Toohey and Gaudron JJ).

<sup>34</sup> *Federal Deputy Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678, 684 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ). See also *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365, 372–3 (Barwick CJ), 379 (Kitto J), 380–1 (Menzies J), 383–5 (Windeyer J).

<sup>35</sup> See below Part IVB3.

An imposition must not result from an administrative decision based on individual preferences unrelated to a test prescribed by law.<sup>36</sup> A tax must be contestable. It must be amenable to judicial review when the circumstances of the taxpayer do not attract a legal liability to pay the tax.<sup>37</sup>

Taxes are also to be distinguished from financial penalties, a distinction first drawn in *R v Barger*.<sup>38</sup> Justice Isaacs characterised a penalty as a payment for 'an unlawful act or omission, other than non-payment of or incidental to a tax'.<sup>39</sup> By way of contrast, a tax is a payment 'demanded as a contribution to revenue irrespective of any legality or illegality ... upon which the liability depends'.<sup>40</sup>

These limits or criteria are well-known and relatively simply stated. Are there other limits and questions which *may* arise when the Commonwealth exercises its taxing power?<sup>41</sup> Before turning to suggest some of them, I want to place this exercise in some context. Why even undertake it?

### III WHY IS THIS IMPORTANT?

It is the political branches in our federation that foreshadow, and decide, policy.<sup>42</sup> At a federal level, those policy choices are, to some extent, limited by the powers enumerated in the *Constitution*. It is therefore unsurprising that the announcement of a new or changed policy, the invocation of one or more of the powers in the *Constitution* in seeking to implement that policy, and the

<sup>36</sup> *Federal Deputy Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678, 684 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ).

<sup>37</sup> *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622, 640–1 (Gibbs CJ, Wilson, Deane and Dawson JJ), quoted in *W R Carpenter Holdings Pty Ltd v Federal Commissioner of Taxation* (2008) 237 CLR 198, 204 [9] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ); *Deputy Commissioner of Taxation (NSW) v Brown* (1958) 100 CLR 32, 40–1 (Dixon CJ).

<sup>38</sup> (1908) 6 CLR 41. See also *Air Caledonie International v Commonwealth* (1988) 165 CLR 462, 467 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

<sup>39</sup> *R v Barger* (1908) 6 CLR 41, 99. See also *Re DPP (Cth); Ex parte Lawler* (1994) 179 CLR 270; *Re Dymond* (1959) 101 CLR 11, 22 (Fullagar J).

<sup>40</sup> *R v Barger* (1908) 6 CLR 41, 99.

<sup>41</sup> Does the tax 'discriminate between States or parts of States' within the meaning of s 51(ii)? Does the tax 'give preference to one State or any part thereof over another State or any part thereof' within the meaning of s 99? These are issues beyond the scope of this paper.

<sup>42</sup> For a United States perspective, see *National Federation of Independent Business v Sebelius*, 132 S Ct 2566, 2579 (Roberts CJ for Roberts CJ, Ginsberg, Breyer, Sotomayor and Kagan JJ) (2012).

resulting laws purportedly made under one or more of the powers in the *Constitution*, are all widely scrutinised.

As I have said, that scrutiny is, in fact, essential. It is especially important when the Commonwealth exercises its taxing power because the resulting laws are central not only to our federation but also to our national economy. Australia is dependent on foreign direct investment ('FDI'). The World Investment Report for 2012, published by the United Nations Conference on Trade and Development, reported FDI inflows for Australia to be US\$41.3 billion in 2011.<sup>43</sup> Australia's FDI inward stock rose from US\$119 billion in 2000 to almost US\$500 billion in 2011<sup>44</sup> (or 36.2 per cent of GDP).<sup>45</sup> Since 2006, the top four source countries of FDI into Australia have been the United States, the United Kingdom, Japan and the Netherlands.<sup>46</sup> Australia's economic growth is reliant on FDI. These facts, and their significance, are referred to daily in the financial press.

The reason why these facts are important is because economic growth and political stability are interconnected.<sup>47</sup> Political instability includes uncertainty about policy and property rights. Political instability has the potential to make economic decisions risky and therefore less attractive.<sup>48</sup> What a number of fiscal studies have revealed is that complexity and uncertainty in tax laws deters FDI and has a significant negative impact on inward FDI.<sup>49</sup> Of course, that uncertainty does not stem solely from the *enactment* of laws. Uncertainty may arise from the use of imprecise language, the frequent making of changes in taxation laws and from perceived difficulties in interpreting existing laws.<sup>50</sup> Some academics and commentators have gone so far as to suggest that

<sup>43</sup> United Nations Conference on Trade and Development, *World Investment Report for 2012: Towards a New Generation of Investment Policies* (5 July 2012) 169 <[http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/WIR2012\\_WebFlyer.aspx](http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/WIR2012_WebFlyer.aspx)>.

<sup>44</sup> *Ibid* 173.

<sup>45</sup> See World Bank, *Data: Australia* (2013) <<http://data.worldbank.org/country/australia>>.

<sup>46</sup> Australian Trade Commission, 'Australia — One of the World's Leading Investment Destinations' (9 May 2012) <<http://www.austrade.gov.au/Invest/Investor-Updates/120514-Data-Alert-Australia-is-one-of-the-worlds-leading-investment-destinations>>.

<sup>47</sup> Alberto Alesina et al, 'Political Instability and Economic Growth' (1996) 1 *Journal of Economic Growth* 189.

<sup>48</sup> James Alm, 'Uncertain Tax Policies, Individual Behavior, and Welfare' (1988) 78(1) *American Economic Review* 237, 237.

<sup>49</sup> See, eg, Kelly Edmiston, Shannon Mudd and Neven Valev, 'Tax Structures and FDI: The Deterrent Effects of Complexity and Uncertainty' (2003) 24 *Fiscal Studies* 341.

<sup>50</sup> See Alm, above n 48, 237.

uncertainty may arise merely from the discussion of potential tax changes which introduce some element of additional risk.<sup>51</sup>

It is against that background that I then turn to other considerations which might be relevant to a challenge to the exercise, or threatened exercise, by the Commonwealth of its taxing power. The considerations I mention are not, and are not intended to be, exhaustive. And many are not new. Many were identified at Federation.<sup>52</sup>

#### IV SOME OF THE CONSIDERATIONS RELEVANT TO A CHALLENGE TO THE EXERCISE OF THE COMMONWEALTH'S TAXING POWER

##### *A Either/Or Classification Appropriate?*

First, the question about the constitutional validity of the exercise by the Commonwealth of its taxing power is not answered by first erecting some either/or classification and trying to put the particular case at hand into some artificially constructed taxonomy. Consideration of the constitutional validity of the exercise of the Commonwealth's taxing power will in *each* case require consideration of some more fundamental principles. It is convenient to begin examination of the kinds of issues that can arise by looking outside Australia at the result of the constitutional challenge that was made to what is colloquially known as 'Obamacare' but more properly called the *Patient Protection and Affordable Care Act*.<sup>53</sup>

In 2010, the United States Congress passed legislation designed to extend the operation of Medicaid, the federally funded healthcare scheme. The previous scope of Medicaid was quite narrow. Only particular groups of disadvantaged people were covered. People who were not covered by Medicaid could either seek private cover or run the risk of not being covered at all. Part of President Obama's election platform was a promise to reduce the number of people in that latter category. The legislation sought to achieve this in a number of ways, one of which was described as the 'individual mandate'. The individual mandate required most Americans to maintain a certain standard of private health cover.<sup>54</sup>

<sup>51</sup> See, eg, *ibid.*

<sup>52</sup> Quick and Garran, above n 11, 550–6.

<sup>53</sup> Pub L No 111-148, 124 Stat 119 (2010).

<sup>54</sup> 26 USC § 5000A(a) (2010), as amended by the *Patient Protection and Affordable Care Act*, Pub L No 111-148, § 1501(b), 124 Stat 119, 244 (2010), is entitled 'Requirement to maintain minimum essential coverage' and provides: 'An applicable individual shall for each month

For those who did not maintain a specified minimum standard, they would be required to make what was called a 'shared responsibility payment', described as a 'penalty', to the Internal Revenue Service as part of their taxes.<sup>55</sup>

It is instructive to observe the way in which the minority opinion in the Supreme Court of the United States dealt with the issue of validity of the individual mandate by seeking to classify the impugned provision as either a 'tax' or a 'penalty', the former valid, the latter invalid. This classification was greatly assisted by Congress describing the exaction for failing to comply with the individual mandate (that an American maintain 'minimum essential' health insurance coverage) as a penalty.<sup>56</sup>

It is useful to contrast that either/or mode of analysis first with the United States' acceptance that penalty taxation, of the kind familiar to Australian lawyers, is (despite the language of penalty) to be treated as a species of tax. The recognition that a label is *not* determinative of the more basic constitutional question suggests that the classification reflected by the label may itself be suspect or, at least, may not be a classification that is useful as a tool for deciding the question of validity.<sup>57</sup>

The second contrast to be drawn is with the High Court decision in 1965 in *Fairfax v Federal Commissioner of Taxation* ('*Fairfax*').<sup>58</sup> The issue in *Fairfax* was the validity of an amendment that denied certain exemptions from income tax to a superannuation fund unless the Commissioner was satisfied that the fund had an identified level of investment in Commonwealth and other public securities. There could be little doubt that the political motive for the amendment was to encourage investment in Commonwealth and other public securities. And the taxation consequences for which the amendment provided came about only if the fund in question did *not* maintain the necessary level of investment in public debt securities.

The trustees of a superannuation fund contended that no head of federal legislative power supported the amendment. Why? Because they submitted it was a law with respect to the investment of the moneys of superannuation funds, a subject that is not one upon which the Commonwealth Parliament

beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.'

<sup>55</sup> 26 USC § 5000A(b) (2010).

<sup>56</sup> *Ibid.* See also *National Federation of Independent Business v Sebelius*, 132 S Ct 2566, 2651–3 (Scalia, Kennedy, Thomas and Alito JJ) (2012). Cf at 2598 (Roberts CJ for Roberts CJ, Ginsberg, Breyer, Sotomayor and Kagan JJ).

<sup>57</sup> See, eg, *National Federation of Independent Business v Sebelius*, 132 S Ct 2566, 2598 (Roberts CJ for Roberts CJ, Ginsberg, Breyer, Sotomayor and Kagan JJ) (2012).

<sup>58</sup> (1965) 114 CLR 1.

had any power to make laws. The Commissioner contended that the amendment was a law with respect to taxation, whatever else it was, and was therefore to be upheld as an exercise of the power conferred on the Parliament by s 51(ii) of the *Constitution*.

Justice Kitto disposed of the argument as to invalidity in the following terms:

The argument for invalidity not unnaturally began with the proposition that the question to be decided is a question of substance and not of mere form; but the danger quickly became evident that the proposition may be misunderstood as inviting a speculative inquiry as to which of the topics touched by the legislation seems most likely to have been the *main* preoccupation of those who enacted it. Such an inquiry has nothing to do with the question of constitutional validity under s 51 of the *Constitution*. *Under that section the question is always one of subject matter, to be determined by reference solely to the operation which the enactment has if it be valid, that is to say by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes; it is a question as to the true nature and character of the legislation: is it in its real substance a law upon, 'with respect to', one or more of the enumerated subjects, or is there no more in it in relation to any of those subjects than an interference so incidental as not in truth to affect its character?*<sup>59</sup>

In this, and in later judgments of the High Court,<sup>60</sup> there is to be seen a total rejection of arguments that depend upon assigning a single characterisation to a law. It is received doctrine that a law may bear more than one character and that, so long as one of those characterisations is within power, the law will be a law with respect to that subject matter and valid.

But the decision in *Fairfax* also shows that there was, and remains, a need to distinguish between form and substance. It has been recognised both here<sup>61</sup> and in the United States<sup>62</sup> that in the exercise of one or more of the powers enumerated in s 51, the Parliament may in fact seek to establish objectives in

<sup>59</sup> *Ibid* 6–7 (emphasis added) (citations omitted).

<sup>60</sup> See, eg, *Re F; Ex parte F* (1986) 161 CLR 376, 387–8 (Mason and Deane JJ), quoted in *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

<sup>61</sup> *Fairfax* (1965) 114 CLR 1, 7 (Kitto J); *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 187 (Latham CJ); *Waterhouse v Deputy Federal Commissioner of Land Tax (SA)* (1914) 17 CLR 665, 673 (Barton J).

<sup>62</sup> *McCulloch v Maryland*, 17 US (4 Wheat) 316, 423 (Marshall CJ for Marshall CJ, Washington, Johnson, Livingston, Todd, Duvall and Story JJ) (1819), a case that, according to Lexis, has been cited 3265 times.

areas that are beyond those expressly prescribed. That does not mean the resulting legislation is invalid. Why? Because the task of characterising laws according to subject matter is a task that is much more principled. At the outset, a court is not bound by the name of the Act.<sup>63</sup> It is necessary to consider the substance of the Act — ‘what it does, what it commands or prescribes.’<sup>64</sup> As the Court pointed out in *Grain Pool of Western Australia v Commonwealth*:

the character of the law in question must be determined by reference to the rights, powers, liabilities, duties and privileges which it creates [and] the practical as well as the legal operation of the law must be examined to determine if there is a sufficient connection between the law and the head of power.<sup>65</sup>

There are two well-known examples of the differing approaches that can be adopted to these questions: *Bailey v Drexel Furniture Co* (‘*Child Labor Tax Case*’)<sup>66</sup> in the United States and *Fairfax* in Australia. In each case, the argument proceeded from the premise that though the provisions in issue were couched in terms of taxation and prominently wore the badge of a tax law, each really operated to address some other subject matter with the result that, in substance, each was not a law upon taxation but some other subject matter. As Kitto J put it in *Fairfax*:

the argument endeavours to lift the section out of its formal surroundings in an *Income Tax Assessment Act*, to treat the use it makes of the terminology and machinery of taxation legislation as a veil to be removed, and to exhibit it as in truth but an attempt to regulate, with sanctions, the investment of superannuation fund moneys.<sup>67</sup>

This method of attack worked in the *Child Labor Tax Case*. It failed in *Fairfax*. In the *Child Labor Tax Case*, the legislation purported to impose a tax of 10 per cent on the net profits received from the sale of the products of any mine, quarry, mill, cannery, workshop or factory in which, during any portion of the taxable year, children were employed in certain conditions. The Supreme Court of the United States held that Congress, ‘in the name of a tax

<sup>63</sup> *R v Barger* (1908) 6 CLR 41, 118 (Higgins J).

<sup>64</sup> *Ibid.*

<sup>65</sup> (2000) 202 CLR 479, 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) (citations omitted).

<sup>66</sup> 259 US 20 (1922).

<sup>67</sup> *Fairfax* (1965) 114 CLR 1, 7–8.

which on the face of the Act is a penalty<sup>68</sup> was seeking to regulate the hours of labour of children, a matter beyond its constitutional authority, and that the Act was therefore void.

In *Fairfax*, Kitto J analysed some of the matters that the Supreme Court in the *Child Labor Tax Case* treated as decisive of the true character of the Act.<sup>69</sup> That analysis deserves careful reading. First, the Supreme Court expressly refrained from treating the heaviness of the burden as conclusive. But the extent of the burden was not irrelevant. The Supreme Court referred to the fact that the Act imposed a heavy exaction upon a departure from a detailed and specified course of conduct in business — one tenth of the entire net income in a business for a full year.

Secondly, the terms of the imposition of the burden were considered. In the *Child Labor Tax Case*, two aspects were relevant. The amount imposed was not proportional to the extent or frequency of the departures from the specified course of conduct. The amount to be paid by the employer was the same whether 500 children were employed for a year or only one child for a day. Next, an employer was liable to pay only where that employer knowingly departed from the prescribed course. As the Supreme Court said:

Scienter is associated with penalties not with taxes. ... In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?<sup>70</sup>

How then did the High Court deal with the legislation in issue in *Fairfax*? After carefully analysing the provision in issue and, in particular, the role it played in the general scheme of the Act, Kitto J stated (using the language of the US Supreme Court) that ‘a court must be blind not to see that the “tax” is imposed to stop trustees of superannuation funds from failing to invest sufficiently in Commonwealth and other public securities.’<sup>71</sup>

Justice Kitto did not stop there. He then posed the question:

<sup>68</sup> *Child Labor Tax Case*, 259 US 20, 39 (Taft CJ for Taft CJ, McKenna, Holmes, Day, Devanter, Pitney, McReynolds and Brandeis JJ) (1922).

<sup>69</sup> *Fairfax* (1965) 114 CLR 1, 8 (Kitto J).

<sup>70</sup> *Child Labor Tax Case*, 259 US 20, 37 (Taft CJ for Taft CJ, McKenna, Holmes, Day, Devanter, Pitney, McReynolds and Brandeis JJ) (1922), quoted in *Fairfax* (1965) 114 CLR 1, 8–9 (Kitto J).

<sup>71</sup> *Fairfax* (1965) 114 CLR 1, 9.

But is this enough to justify the conclusion that what purports to be a set of provisions for imposing a tax upon the investment income of superannuation funds is in reality not a law with respect to taxation at all, but only a law with respect to the investment of such funds?<sup>72</sup>

Justice Kitto's answer to that question is instructive. His Honour stated that 'in deciding whether a law is supported by the taxation power, it is *irrelevant* to inquire into the ultimate indirect consequences of the operation of the law.'<sup>73</sup> The question to be asked and answered is 'whether the substantial purpose [of the law is] to raise revenue or ... to regulate the conduct of persons by providing for a sanction in the form of a pecuniary impost to be incurred by departure from a specified course.'<sup>74</sup>

The sources for the answer to that question are not straightforward. One source, of course, is what appears on the face of the law. However, it is not sufficient or correct to proceed from some unstated premise that

a law which purports to provide for a tax upon behaviour is in substance not a law with respect to taxation if it exhibits on its face a purpose of suppressing or discouraging the behaviour and is to be explained more convincingly as a means to that end than as a means to provide the Government with revenue.<sup>75</sup>

Why? Because '[i]t 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.'<sup>76</sup> That principle applies even where the revenue raised is negligible or the revenue purpose of the tax is secondary.<sup>77</sup>

Is there a premise or principle from which consideration of the exercise of the Commonwealth's taxing powers might proceed? I suspect the premise rises no higher than that adopted by the minority in *R v Barger*: subject only to the limitations expressed in the *Constitution*, the power with respect to taxation is 'plenary and absolute; unlimited as to amount, as to subjects, as to objects, as to conditions, as to machinery'<sup>78</sup> so that 'the Parliament has, prima facie, power to tax whom it chooses, power to exempt whom it chooses,

<sup>72</sup> Ibid 9–10.

<sup>73</sup> Ibid 10–11 (emphasis added).

<sup>74</sup> Ibid 11.

<sup>75</sup> Ibid 11.

<sup>76</sup> *United States v Sanchez*, 340 US 42, 44 (Clark J for Vinson CJ, Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark and Minton JJ) (1950) (citations omitted), quoted in *ibid* 12.

<sup>77</sup> *Ibid*.

<sup>78</sup> (1908) 6 CLR 41, 114 (Higgins J).

power to impose such conditions as to liability or as to exemption as it chooses.<sup>79</sup> Or, as Dixon J stated in *Melbourne Corporation v Commonwealth*:

Speaking generally, once it appears that a federal law has an actual and immediate operation within a field assigned to the Commonwealth as a subject of legislative power, that is enough. It will be held to fall within the power *unless some further reason appears for excluding it*. That it discloses another purpose and that the purpose lies outside the area of federal power are considerations which will not in such a case suffice to invalidate the law.<sup>80</sup>

Despite the breadth of the power, the power is subject to some implied, as well as express, limitations. In *Fairfax*, the provision in issue did not fall foul of those limitations. There were, to adopt the language of Dixon J, ‘no other reasons for excluding it’ from the taxing power. The provision operated to replace a total exemption from income tax with a conditional special liability to income tax on ‘investment income’. The legislative policy was self-evident — to provide trustees of superannuation funds with a strong incentive to invest sufficiently in Commonwealth and other public securities. The raising of revenue was arguably of secondary concern. But the provision did not prescribe or forbid conduct. As Kitto J stated, ‘the substance of the enactment is the obligation which it imposes, and the only obligation imposed is to pay income tax. In substance as in form ... the section is a law with respect to taxation.’<sup>81</sup>

The approach revealed in *Fairfax* may be contrasted with the approach followed by the minority in the *Obamacare* case.<sup>82</sup> I mention *Obamacare* not just because it is current and politically interesting. I mention it because it exposes some of the difficulties of beginning any analysis having first adopted an either/or classification of a law. Something more is required.

### B *Other Limitations?*

What then are the other possible reasons for excluding a law from the reach of the taxing power? What are some of the implied, if not express, limitations?<sup>83</sup> It is to some of those other limitations, or reasons for excluding a law from the

<sup>79</sup> *Ibid.*

<sup>80</sup> (1947) 74 CLR 31, 79 (emphasis added).

<sup>81</sup> *Fairfax* (1965) 114 CLR 1, 13, citing *R v Barger* (1908) 6 CLR 41, 119 (Higgins J).

<sup>82</sup> *National Federation of Independent Business v Sebelius*, 132 S Ct 2566 (2012).

<sup>83</sup> See *Fairfax* (1965) 114 CLR 1, 13 (Kitto J).

taxing power,<sup>84</sup> that I now turn. The context in which I seek to raise these limitations is retrospective taxation legislation.

1 *Acquisition of Property within the Meaning of Section 51(xxxi)?*

First, consider s 51(xxxi) of the *Constitution*. It is generally accepted that a law with respect to taxation is not properly characterised as a law with respect to the acquisition of property within the meaning of s 51(xxxi).<sup>85</sup> This proposition has been explained on the ground that laws made under the taxation power 'necessarily encompass' an acquisition of property that is not restricted by a just terms requirement.<sup>86</sup> That is, it would be incongruous for the *Constitution* to allow the making of a law 'acquiring' your property by taxing you but then require the provision of just terms for the acquisition.

But however the principle is properly identified, the retrospective alteration of taxation liabilities *may* (I do not say *must*) reach a point where some question of the acquisition of property arises. Here, I am not referring to the application of extant taxation laws to extant facts some years later. The possibility of that kind of application of extant taxation laws has existed since Federation and is subject to specified time limits in the relevant taxing laws. Instead, I am referring to laws that, on enactment, apply retrospectively and, on one view, apply differently to different taxpayers. Additional questions may be thought to arise from retrospective legislation of that kind — not least the questions that may arise from what can be seen to be the potential destruction, or degradation, of longstanding rights.

If issues of this kind arise at all, they are issues that would require close attention to whether the law imposes a form of taxation. That question may not be straightforward. It may direct attention to such matters as whether the law that is enacted (however it is expressed) is a law of general application or is better seen as a law directed at particular individuals (the class of which is closed), identified according to defined criteria that, if satisfied, lead to the liability of those persons to make certain payments, in respect of periods or transactions or events that, by the time the law is made, have passed and are complete. Not only in respect of transactions or events that by the time the law is made have passed and are complete but which were entered into consistent with the legislation that was in force at the time of the relevant

<sup>84</sup> *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 79 (Dixon J).

<sup>85</sup> *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622, 649 (Brennan J); *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 170–1 (Mason CJ).

<sup>86</sup> *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 187 (Deane and Gaudron JJ).

transactions or events. And whether there may be some administrative discretion to be exercised before the exaction contained in the retrospective legislation is made is itself a point of no little interest and difficulty.

Section 51(xxxi) has been described as ‘an important limitation on power’, and an ‘implied guarantee’.<sup>87</sup> The guarantee is a guarantee of property rights. The guarantee has been variously described as a ‘constitutional guarantee of just terms to be given the liberal construction appropriate to such a constitutional provision’<sup>88</sup> and a ‘very great constitutional safeguard’.<sup>89</sup>

It is beyond the scope of this paper to examine how and why a law that, on enactment, applies retrospectively and, on one view, applies differently to different taxpayers, may fall foul of s 51(xxxi). For present purposes it is enough to note that statutory rights may be described as property, or as having proprietary characteristics to be regarded as ‘property’, for the purposes of s 51(xxxi). Indeed, the position was most succinctly stated by the High Court in its unanimous decision in 2008 in *Telstra Corporation Ltd v Commonwealth* when it said:

it is necessary to begin by recognising the force of the observation by Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ in *Victoria v Commonwealth* that:

It is well established that the guarantee effected by s 51(xxxi) of the *Constitution* extends to protect against the acquisition, other than on just terms, of ‘every species of valuable right and interest including ... choses in action.’<sup>90</sup>

Further, references to statutory rights as being ‘inherently susceptible of change’ must not be permitted to mask the fact that ‘[i]t is too broad a proposition ... that the contingency of subsequent legislative modification or extinguishment removes all statutory rights and interests from the scope of s 51(xxxi).’ Instead,

<sup>87</sup> *Theophanous v Commonwealth* (2006) 225 CLR 101, 113 [5] (Gleeson CJ).

<sup>88</sup> *Clunies-Ross v Commonwealth* (1984) 155 CLR 193, 202 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ) (citations omitted).

<sup>89</sup> *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397, 403 (Barwick CJ). See also *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 509 (Mason CJ, Brennan, Deane and Gaudron JJ).

<sup>90</sup> (2008) 234 CLR 210, 232 [49] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ) (emphasis added by the 2008 Court) (citations omitted), quoting *Victoria v Commonwealth* (1996) 187 CLR 416, 559, quoting *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 290 (Starke J).

analysis of the constitutional issues must begin from an understanding of the practical and legal operation of the legislative provisions that are in issue.<sup>91</sup>

What is evident is that not only are statutory rights capable of being regarded as 'property' for the purposes of s 51(xxxi), but there may be an 'acquisition' of that property where there is a substantial impairment of rights.<sup>92</sup>

Of course, extinction or impairment of the right, on its own, may not be sufficient. More is required. As Mason J said in *Commonwealth v Tasmania* ('*Tasmanian Dams Case*'):

The emphasis in s 51(xxxi) is not on a 'taking' of private property but on the *acquisition* of property for purposes of the Commonwealth. 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 property; *there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be.* The effect of s 51(xxxi) was correctly stated by Dixon J in *Bank of New South Wales v Commonwealth* ... :

I take *Minister of State for the Army v Dalziel* to mean that s 51(xxxi) is not to be confined pedantically to the taking of title by the Commonwealth to some specific estate or interest in land recognized at law or in equity and to some specific form of property in a chattel or chose in action similarly recognized, but that it extends to innominate and anomalous interests and includes the assumption and indefinite continuance of exclusive possession and control for the purposes of the Commonwealth of any subject of property. *Section 51(xxxi) serves a double purpose. It provides the Commonwealth Parliament with a legislative power of acquiring property: at the same time as a condition upon the exercise of the power it provides the individual or the State, affected with a protection against governmental interferences with his proprietary rights without just recompense. In both aspects consistency with the principles upon which constitutional provisions are inter-*

<sup>91</sup> (2008) 234 CLR 210, 232 [49] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ) (citations omitted), quoting *A-G (NT) v Chaffey* (2007) 231 CLR 651, 664 [24] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

<sup>92</sup> See, eg, *Smith v ANL Ltd* (2000) 204 CLR 493, 504–5 [20]–[23] (Gaudron and Gummow JJ).

*preted and applied demands that the paragraph should be given as full and flexible an operation as will cover the objects it was designed to effect.*<sup>93</sup>

How may those issues arise in the context of retrospective tax legislation? What is the ‘acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be?’<sup>94</sup>

Where, on enactment, laws apply retrospectively and, on one view, apply differently to different taxpayers, it may be open to a taxpayer to contend not only that the retrospective legislation adversely affects or terminates a pre-existing right but that the Commonwealth has acquired an interest in that property. The pre-existing right that the taxpayer enjoyed may arguably be constituted by the taxpayer entering into transactions and events based on, and consistent with, the legislation in force at the time of those transactions and events. The interest that the Commonwealth acquires in that property is arguably constituted or represented by the amount assessed as a result of the application of the retrospective laws to those same transactions and events. Or, put in terms that tax practitioners understand, the difference in result caused by the application of retrospective legislation to the same or sometimes different ‘taxable facts’. The only reason for the different taxable facts being the existence and terms of the retrospective legislation.

One should not forget what Gleeson CJ said in *Theophanous v Commonwealth*.<sup>95</sup> First, the modification or extinguishment of a statutory right could effect an acquisition of property. Secondly, ‘whether or not s 51(xxxi) has potential application to such modification or extinguishment may depend upon the legislative context in which such modification or extinguishment occurs.’<sup>96</sup> And thirdly, if Parliament’s purpose for the modification or extinguishment was to save money, or at a policy level it thought the rights were too generous, then the case may fall within s 51(xxxi). These categories are not closed.

## 2 Retrospectivity — Length and Purpose?

Section 51(xxxi) may not be the only problem. Or at least it may not be the only way in which to look at the issues.

<sup>93</sup> (1983) 158 CLR 1, 145 (emphasis in original) (citations omitted), quoting *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 349 (Dixon J) (emphasis added).

<sup>94</sup> *Tasmanian Dams Case* (1983) 158 CLR 1, 145 (Mason J).

<sup>95</sup> (2006) 225 CLR 101, 113–14 [7].

<sup>96</sup> *Ibid* 113 [7].

Retrospective legislation that removes substantive rights is not on that account alone to be classed as unlawful. Legislation of that kind has long been recognised as 'moving the goal posts after the kick was taken.' Courts have traditionally been reluctant to construe legislation to have retrospective operation without the clearest parliamentary direction. As Dixon CJ stated in *Maxwell v Murphy*:

a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events.<sup>97</sup>

That issue was revisited by the High Court in 2011 in *Haskins v Commonwealth*.<sup>98</sup> The plaintiff argued that, by enacting retrospective legislation,<sup>99</sup> the Commonwealth had, contrary to s 51(xxxi) of the *Constitution*, acquired property — namely his right of action for false imprisonment against the Commonwealth — otherwise than on just terms. Mr Haskins failed at the first hurdle. He was found to have had no action for false imprisonment. Accordingly, there was no 'property' that the 'retroactive operation' of the Act could be said to have acquired, and thus s 51(xxxi) of the *Constitution* was not engaged. The application of s 51(xxxi) to retrospective legislation was considered, and considered possible, but it failed on the facts.

There is another possible approach to retrospective legislation — that adopted by the United States. Its approach is instructive. In contrast to s 51(xxxi) of the *Australian Constitution*, the Fifth Amendment to the *United States Constitution* relevantly reads: 'no person shall ... be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.' While the Fifth Amendment differs materially from s 51(xxxi) of the *Australian Constitution* in the sense that the former *limits* plenary power, whereas the latter *confers* power,<sup>100</sup> the last words of the Fifth Amendment — 'without just compensation' — are similar to Australia's constitutional guarantee in s 51(xxxi).

In *Brushaber v Union Pacific Railroad Co*, White CJ in the Supreme Court described the taxing power of the United States Congress as embracing 'every

<sup>97</sup> (1957) 96 CLR 261, 267.

<sup>98</sup> (2011) 244 CLR 22.

<sup>99</sup> *Military Justice (Interim Measures) Act (No 2) 2009* (Cth) sch 1 item 5.

<sup>100</sup> See *Grace Brothers Pty Ltd v Commonwealth* (1946) 72 CLR 269, 290 (Dixon J).

conceivable power of taxation,<sup>101</sup> and declined to accept the view that the Fifth Amendment placed any limitation upon the taxing power conferred upon Congress by the *United States Constitution*. However, his Honour did not foreclose the possibility of a purported exercise of the taxing power being so arbitrary as to amount to a confiscation of property within the Fifth Amendment, and therefore not taxation.<sup>102</sup>

In subsequent cases, the validity of a retrospective tax provision has been held to depend upon whether the 'retroactive application is so harsh and oppressive as to transgress the constitutional limitation.'<sup>103</sup>

More recently in 1994 in *United States v Carlton* ('*Carlton*'), in respect of an amendment to the Internal Revenue Code that was given retrospective application to 1986, the Supreme Court held that the 'harsh and oppressive formulation [did] not differ from the prohibition against arbitrary and irrational legislation.'<sup>104</sup> The Court quoted an earlier Supreme Court case, which stated: 'Provided that the retrospective application ... is supported by a legitimate legislative purpose furthered by *rational means*,<sup>105</sup> the provision will be valid. One question that arises is where to draw the line? What is 'harsh and oppressive' or 'arbitrary and irrational legislation'? What characteristics does it have? So, for example, can a government rationally exercise such a power and pass legislation when the effect is retrospective for 20 or 25 years? And does a different result follow if the retrospective legislation destroys or degrades longstanding rights?

In *Carlton*, the legislative amendment effectively withdrew a tax benefit and cost the relevant estate more than \$2 million in deductions and several hundred thousand dollars in transaction costs. The period of retroactivity was only about a year. Despite the size of the cost to the litigant, the Court held that the executor of the estate's reasonable reliance did not foreclose Con-

<sup>101</sup> 240 US 1, 12 (White CJ for White CJ, McKenna, Holmes, Day, Hughes, Devanter, Lamar, Pitney and McReynolds JJ) (1916).

<sup>102</sup> *Ibid* 24–5.

<sup>103</sup> See, eg, *Welch v Henry*, 305 US 134, 147 (Stone J for Hughes CJ, Brandeis, Stone, Black and Reed JJ) (1938).

<sup>104</sup> 512 US 26, 30 (Blackmun J for Rehnquist CJ, Blackmun, Stevens, Kennedy, Souter and Ginsburg JJ) (1994), quoting *Pension Benefit Guaranty Corporation v R A Gray & Co*, 467 US 717, 733 (Brennan J for Burger CJ, Brennan, White, Marshall, Blackmun, Powell, Rehnquist, Stevens and O'Connor JJ) (1984).

<sup>105</sup> *Carlton*, 512 US 26, 30–1 (Blackmun J for Rehnquist CJ, Blackmun, Stevens, Kennedy, Souter and Ginsburg JJ) (1994), quoting *Pension Benefit Guaranty Corporation v R A Gray & Co*, 467 US 717, 729 (Brennan J for Burger CJ, Brennan, White, Marshall, Blackmun, Powell, Rehnquist, Stevens and O'Connor JJ) (1984) (emphasis added).

gress's ability to make a *prompt* retroactive adjustment to the law. But there was a kicker. Justice O'Connor in *Carlton*, in a concurring opinion, expressed a concern that retroactivity periods longer than a year would raise 'serious constitutional questions'.<sup>106</sup>

It was in this context that O'Connor J commented:

But 'the Court has never intimated that Congress possesses unlimited power to "readjust rights and burdens ... and upset otherwise settled expectations."' The governmental interest in revising the tax laws must at some point give way to the taxpayer's interest in finality and repose.<sup>107</sup>

Where the line might be drawn has been considered in the United States since *Carlton*. In *King v Campbell County*, the Kentucky Court of Appeals considered that the relevant amendment did not *withdraw* a provision upon which taxpayers relied, but sought to *clarify* a provision in the wake of a Kentucky Supreme Court decision.<sup>108</sup> It was upheld.

The issue was considered in *Tesoro Refining & Marketing Co v Department of Revenue (Wash)*.<sup>109</sup> That case concerned a legislative amendment with retrospective application of 24 years. The applicant argued that the purported amendment violated 'due process' under the Fifth Amendment. The tax authority contended that the amendment did not violate 'due process' because the amendment, enacted to 'clarify' the 1985 statute, made no change to the meaning of the former provision.<sup>110</sup> The Court agreed with the taxpayer; the 24-year retroactivity clause violated due process. The Court stated that 'the legislature may not apply a "clarification" retrospectively for 24 years when it is in direct conflict with the reasonable expectations of qualifying taxpayers.'<sup>111</sup>

The Fifth Amendment jurisprudence has been rejected in Australia.<sup>112</sup> One of the reasons given for this is our inherited concept of the Diceyan suprema-

<sup>106</sup> *Carlton*, 512 US 26, 38 (O'Connor J for O'Connor, Scalia and Thomas JJ) (1994).

<sup>107</sup> *Ibid* 37–8 (citations omitted), quoting *Connolly v Pension Benefit Guaranty Corporation*, 475 US 211, 229 (O'Connor J for O'Connor and Powell JJ) (1986), quoting *Usery v Turner Elkhorn Mining Co*, 428 US 1, 16 (Marshall J for Marshall, Brennan, White and Blackmun JJ) (1976).

<sup>108</sup> 217 SW 3d 862, 870 (Judge Abramson for Judges Abramson and Vanmeter and Knopf SJ) (Ky Ct App, 2006) (emphasis added). That Supreme Court decision was *City of Covington v Kenton County*, 149 SW 3d 358 (Ky, 2004).

<sup>109</sup> 246 P 3d 211 (Wash Ct App, 2010).

<sup>110</sup> *Ibid* 217 [21] (Quinn-Brintnall J).

<sup>111</sup> *Ibid* 217–18 [21]–[28].

<sup>112</sup> *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v Commonwealth* (1943) 67 CLR 314, 318–19 (Latham CJ); *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 291

cy of Parliament.<sup>113</sup> That is, it is the overall sovereignty of Parliament that permits retrospective legislation. That concept — finally formulated in the 19<sup>th</sup> century — has never been a feature of United States constitutionalism. There are many who now take the view that the concept has ceased to exist — both here<sup>114</sup> and in the United Kingdom<sup>115</sup> — where both Parliaments are subject to a superior law. In Australia, that superior law is the *Constitution*.

The question is: can, or should, the position adopted in the United States be adopted in Australia in relation to retrospective legislation purportedly passed in the exercise of ch I power and, in particular, the Commonwealth's taxing power? Perhaps a line may be drawn between legislative amendments that *withdraw* taxation benefits and provisions that simply seek to *clarify* an existing position, or between *long* and *short* periods of retrospectivity. Indeed, it may be possible to contend that the latter (the period of retrospectivity) is more significant than the former (the nature or purpose of the provision). There is arguably scope for such an approach. And if not, why not?

### 3 *Arbitrariness?*

There is, of course, another limitation on the exercise of the taxing power that may be a potential, if not real, issue when the Commonwealth enacts retrospective legislation — arbitrariness. I stated earlier that I would return to develop this criterion.

The Commonwealth's taxing power does not permit the Commonwealth to impose 'arbitrary exactions'.<sup>116</sup> In this context, I am not dealing with contesta-

(Starke J), 294–5 (McTiernan J); *Grace Brothers Pty Ltd v Commonwealth* (1946) 72 CLR 269, 285 (Starke J), 289–91 (Dixon J).

<sup>113</sup> See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 276 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Kable v DPP (NSW)* (1996) 189 CLR 51, 76 (Dawson J); *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 644 [120] (Kirby J). But see *A-G (WA) v Marquet* (2003) 217 CLR 545, 570 [66] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

<sup>114</sup> See, eg, *Momcilovic v The Queen* (2011) 245 CLR 1, 89–90 [156]–[157] (Gummow J), quoting *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 276 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) and citing *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 152–3 [43] (Gleeson CJ, Gummow, Kirby and Hayne JJ). In Australia, it is possible for retrospective criminal legislation to be characterised as an invalid usurpation of ch III power: *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 536 (Mason CJ), 613 (Deane J).

<sup>115</sup> See *R (Jackson) v A-G (UK)* [2006] 1 AC 262, 303–5 [104]–[109], 308 [120] (Lord Hope), 318 [159] (Baroness Hale).

<sup>116</sup> *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622, 640 (Gibbs CJ, Wilson, Deane and Dawson JJ).

ble and incontestable taxes.<sup>117</sup> Rather, to satisfy the requirement that the exaction not be arbitrary, not only must it 'be possible to point to the criteria by which the Parliament imposes the liability to pay the tax',<sup>118</sup> but also, arguably, the exaction must have 'a sufficiently general application'.<sup>119</sup>

Or, as Gibbs CJ, Wilson, Deane and Dawson JJ said in *MacCormick v Federal Commissioner of Taxation*:

For an impost to satisfy the description of a tax it must be possible to differentiate it from an arbitrary exaction and this can only be done by reference to the criteria by which liability to pay the tax is imposed. Not only must it be possible to point to the criteria themselves, *but it must be possible to show that the way in which they are applied does not involve the imposition of liability in an arbitrary or capricious manner.*<sup>120</sup>

The last limb, that the law must not involve the imposition of liability in an arbitrary or capricious manner, is not surprising. There are, I think, two related but distinct concepts. First, regularity as opposed to arbitrariness is central to the rule of law: 'laws as rules of general application, capable of being known in advance by citizens who may exercise choice, and order their affairs, accordingly'.<sup>121</sup> On one view, a retrospective law may offend that central concept and be held to apply arbitrarily or irregularly. A taxpayer entering into a transaction does not know how it will be taxed; the criteria are incapable of being known in advance by a citizen who then exercises a choice and orders its affairs accordingly. Why? Because the rules — the retrospective legislation — come after the taxpayer has legitimately ordered its affairs. At the time of ordering its affairs the taxpayer does not know and cannot know that the rules will change and, if so, how and when.

If the Commonwealth's position is that taxpayers should order their affairs subject to the Commonwealth's overriding right to subsequently enact

<sup>117</sup> Cf *ibid* 639–41. See also *W R Carpenter Holdings Pty Ltd v Federal Commissioner of Taxation* (2008) 237 CLR 198, 204 [9] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ).

<sup>118</sup> *W R Carpenter Holdings Pty Ltd v Federal Commissioner of Taxation* (2008) 237 CLR 198, 204 [9] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ).

<sup>119</sup> *Federal Deputy Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678, 684 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ).

<sup>120</sup> (1984) 158 CLR 622, 640 (emphasis added), quoted in *Roy Morgan* (2011) 244 CLR 97, 110–11 [38] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>121</sup> Chief Justice Murray Gleeson, 'Courts and the Rule of Law' (Speech delivered at the Rule of Law Series, The University of Melbourne, 7 November 2001) <[http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj\\_ruleoflaw.htm](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_ruleoflaw.htm)>.

retrospective legislation at a time and of a kind of its choosing, then it will inevitably face scrutiny. And if that is not the stated position of the Commonwealth, but the practical outcome of it, in passing retrospective legislation, the resulting legislation will inevitably face scrutiny. The consequences (legal, economic and otherwise) of such an outcome are simply too important to the future of this country. And those consequences, in my view, are not avoided, but possibly exacerbated, by that 'new' category of retrospective legislation — commencement from the date of the media release without any indication of its terms or how it will operate.<sup>122</sup>

Second, the three 'dominant' tests for a tax system identified by the Taxation Review Committee in 1975 were equity, simplicity and efficiency.<sup>123</sup> 'Equity' extends, at the very least, to include two propositions — taxpayers in the same position should be treated equally and taxpayers in materially different positions should be treated differently.<sup>124</sup> In *Bellinz v Federal Commissioner of Taxation*, the Court accepted without qualification that '[in]equality of treatment of taxpayers is an aspect of unreasonableness of decision making.'<sup>125</sup> So much is beyond argument. Why then is a law, a retrospective law, which by its express terms treats taxpayers unequally, a law with respect to taxation?

'Imposition of liability in an arbitrary or capricious manner'<sup>126</sup> (in the context of the differential treatment of taxpayers) has not been the subject of extensive consideration by the courts. That is not surprising given the substance and form of the legislation that has been enacted in the past. That position may have changed. Retrospective laws that treat particular taxpayers in a different way depending on the way in which they legitimately ordered their affairs in the past may directly raise an element of arbitrariness. Taxpayers in the same position — namely, taxpayers who ordered their affairs legitimately in accordance with the existing laws at the time of the relevant events — are now treated differently *solely* because of the change in the

<sup>122</sup> See, eg, David Bradbury, 'Maintaining the Effectiveness of the General Anti Avoidance Rule — Exposure Draft' (Media Release, No 143, 16 November 2012) <<http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/143.htm&pageID=003&min=djba&Year=&DocType=>>.

<sup>123</sup> Taxation Review Committee, *Full Report* (1975) 17 [3.27].

<sup>124</sup> *Ibid* 12 [3.7].

<sup>125</sup> (1998) 84 FCR 154, 167 (Hill, Sundberg and Goldberg JJ).

<sup>126</sup> *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622, 640 (Gibbs CJ, Wilson, Deane and Dawson JJ).

applicable criteria as a result of the retrospective legislation. The question is whether that is legitimate.

Finally, it must be understood that the risk that retrospective laws treat taxpayers unequally, arbitrarily or irregularly, is not a risk *simpliciter*; it is a risk that substantially increases the greater the period of retrospectivity.

#### V APPLICATION IN AUSTRALIA?

You will notice that I have refrained from referring to, or commenting on, any legislation passed by the Commonwealth Parliament or even foreshadowed by government. That is deliberate. Any contrary position would be inappropriate.

Instead, what I have sought to do is to provoke thought and debate. Thought and debate about the way in which legislation purportedly enacted using the taxing power might be scrutinised. As I said at the outset, that scrutiny is essential. It is essential because the effects of the exercise by the Commonwealth of its taxing power are wide-reaching; it affects Commonwealth, state and territory governments, commerce and industry, and the economic future of this country.

Retrospective legislation as a result of the purported exercise of the Commonwealth's taxing power may very well satisfy the 'traditional' aspects of the 'other necessary criteria' that I suspect the six Justices in *Roy Morgan* may have had in mind. The question though is whether it also satisfies other criteria or, put another way, whether *some further reason appears for excluding it*. Does it infringe the central elements of the rule of law? Does it infringe the constitutional guarantee of s 51(xxxi)? Is it arbitrary, irregular and unequal?

In assessing whether the limits of the Commonwealth's taxing power have been reached, I suspect, like a mother responding to a child on a long car trip, my answer would be 'what do you think is around the next corner?' What I would like to say to the driver is 'where are we going again and why?'