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The Presiding Commissioner,
Review of Cost Recovery by Commonwealth Agencies,
Locked Bag 2
Collins St East
MELBOURNE VIC 8003
Dear Mrs Owens,

Re Submission to the Cost recovery Review

I have very recently become aware of the Review that your Commission is undertaking. The topic of your Review is something that I have taken a particular interest in for some time and I regret not having responded sooner. Please find below some brief comments I would like your Commission to consider in the light of the Draft Report it has released.

"The" definition of taxation

Chapter 3 of the Draft Report deals with the Legal and Fiscal Framework. Taxation is defined therein in the terms of the statement made by Latham CJ in the *Mathews v Chicory Marketing Board* (page 33). It has been a common error for commentators to refer to Latham's comments as the definitive definition of taxation. Latham's comments were made in the context of the facts of the particular case he was ruling on. There has been no overall fully encompassing definition of taxation provided by the Courts. Might I suggest that the Commission consider the contents of *Bessell, M., Burford, K. and Henderson, S., 1999, What Latham CJ Really Said About Taxation, Corporate and Business Law Journal, vol 11, no 2*. This refereed article puts, I believe, the position of Latham's comments in proper perspective. Furthermore, the carefully worded comments of McHugh J (at paragraph 295) of *Airservices Australia v Canadian Airlines International Ltd* infers this view.
The relevance of my comments here are that an over reliance on Latham's as the definition of taxation may well cause some to consider that a particular set of facts may not be taxation where they may indeed give rise to taxation. Certainly the application of Latham's statement to a scenario may well conclude that taxation does exist and, in that event, the conclusion is most likely to be correct. The reverse position, however, is unlikely to be the case. Latham's statement on taxation should be seen as one of a subset of the definition of taxation, if one definitive definition were ever to be
pronounced.

Fee for service

Taxation is unable to exist where a fee for service is paid. This is clearly evident in Section 53 of the Australian Constitution. Latham's statement also acknowledges this.

The Draft Report, inclusive of the response from the Australian Government Solicitor (AGS), also considers this issue.

Much weight was placed by the AGS in *Airservices Australia v Canadian Airlines International Ltd*, and rightly so. However, the judgments in that case, and previous cases, have left undefined as to what cost means. There seems to be an implicit understanding of what cost or expense or value is. However, accountants will inform you that this is not readily clear unless there is an overt central definition. A definition of cost in terms of a definition of taxation needs to be constructed in terms that is acceptable to the Australian Constitution. That is, there is not point in providing a definition of cost in establishing fee for service if it was later decided by the High Court that the definition gave rise to a fee regarded as taxation.

The AGS's response indicates that *Airservices Australia v Canadian Airlines International Ltd* made a significant contribution to the development of the understanding of the taxation concept by acknowledging that a government utility could obtain a rate of return, that a profit margin, on its costs. While it is useful that that Courts do clear this up, I think that was always the case. It as argued in *Airservices Australia v Canadian Airlines International Ltd* that a rate of return was necessary so as to allow development of infrastructure and assets of the government entity. In reality all the rate of return is doing is creating a timing difference of the revenue flow and probably smoothing out the fee levels. That is, if the fee for service was absolutely directly related to the "cost" of services then that fee could fluctuate significantly as assets are replaced and acquired.

However, as far as I can tell from the *Airservices Australia v Canadian Airlines International Ltd* there is still no central definition of cost. An examination of taxation case law as what the Courts might interpret cost to mean seems to indicate historical cost. I have attached a paper titled *User Pay Revenue or Disguised Taxation : An Exploratory Study* that I am presenting at the Hawaii Business Conference in June this year which, in part, addresses this issue and identifies some of those cases. Please note that this paper is being published in the Conference proceedings and, therefore, I assume that copyright may well flow to those Proceedings. In my reading of the *Airservices Australia v Canadian Airlines International Ltd* judgments I do not find anything that necessarily contradicts these previous cases. There is though reference to the differing terms of cost, expense and value without, I think, solution.

I think many commentators are likely to consider that the interpretation of cost to mean historical cost in taxation cases to be outdated. If it is not historical cost then it is going to be a level of cost that, in particular, permits revaluation or re-assessment of the amount that assets are carried at in the balance sheet and the related depreciation charge in the profit and loss statement. A careful analysis, though, of the effects of permitting a rate of return on costs based on revalued assets provides some interesting insight into the practical outcomes. This is best demonstrated through a work example.

Worked Example

Year 1
Assume an entity starts with $1000 equity and uses that to purchase $1000 worth of Plant and depreciates this at 20% prime cost. It knows that it will incur $2000 worth of costs in operating its activities for the year and decides that it will earn a profit based on a rate of return of 7.5% on its opening assets amount in addition to

a full cost recovery principle, The profit will be used to support future development. The profit and loss account for Year 1 is likely to resemble the following:

Revenue		2275
Expenses		
Depreciation	200	
Other	2000	2200
Net Profit		75

The Balance Sheet at the end of Year 1 will become:

Assets		
Cash		275
Plant	1000	
Less Accumulated Depreciation	200	800
Total Assets		1075
Owners Equity		1075

In Year 2 assume that the asset is revalued to $1600. The effect is greater depreciation and greater return on assets and, thus, greater fee recovery. The financial statement would resemble the following:

Revenue		2440
Expenses		
Depreciation	320	
Other	2000	2320
Net Profit		120

The Balance Sheet at the end of Year 1 will become:

Assets		
Cash		715
Plant	1600	
Less Accumulated Depreciation	320	1280
Total Assets		1995
Asset Revaluation Reserve		800
Owners Equity		1195
Total Owners Equity		1995

The effect of combining a cost definition based on asset revaluation (by whatever measurement) and the rate of return principle has an effective compounding effect on the fee base. In the simplified example the only difference between Year 1 and 2 has been the revaluation of assets. The level of service to the customer has remained unchanged, however, Year 2 has resulted in a $165 increase in fee revenue. I think there might be room for the development of an argument that such cost definitions can give rise to unexpected revenues that could be classified as taxation. It needs to be remembered that the extra revenue created by the recovery of the increased depreciation through the asset revaluation is not

intended to provide for the assets replacement. The increased depreciation represents the theoretical "cost" of the provision of the asset at that time. Consequently, the argument that could be put forward that this process gives rise to taxation might be based around that there is no identifiable service being delivered through the increased fee recovery of the revalued asset given that the same level of service is being offered as in the previous year. I am fully aware that there will be some who might find issue with this line of argument. However, my point is that, as far as I can ascertain, such practical accounting complexities have not being considered.

It should be noted that this compounding effect of the asset revaluation and the rate of return principle will not occur of historical cost is used as the definition of cost.

What costs are to be included in understanding fee for service

I would, again, like to refer you to the paper I have attached. This paper considers flows of money to the government that are sourced from the fee revenue, viz-a-viz dividends and income tax. The costs considered in the case law generally relate to costs of actual operation. In the attached paper other flows are considered and, in the case of government entities, are compulsory.

I understand that your Commission is considering only a review of costs. The pertinent question is whether these compulsory extractions of entity funds are costs? If not then the issue still remains but perhaps in another forum.

It is also interesting to note the effect on dividends and income tax that is likely to occur in the worked example shown above. It is quite likely that the amounts of dividends and income tax would increase and that this is a further compounding issue that, I believe, has never been considered.

The concentration in the attached paper is on dividends and income tax. Other compulsory, or even non-compulsory flows, to government might also be considered; eg GST.

I trust my above comments, albeit quite late and brief, might raise some issues not previously considered. It is my intention to attend the Melbourne public hearing on June 4th Naturally I would make myself available if any members of your Commission wished to discuss matters have raised herein.

Yours faithfully,

(signature)

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USER PAY REVENUE OR DISGUISED TAXATION: AN EXPLORATORY STUDY

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Abstract

Over the last 15 years Australia has seen the emergence of Government Business Enterprises (GBEs). GBEs seem to behave like private sector businesses in that they appear to provide goods and services for a fee, pay income tax to the government, and pay dividends to their owners (le the government). There seems to be an assumption that because GBEs behave like private sector businesses that the payment of income tax and dividends by them is acceptable.

This paper takes an alternative approach to these payments. It considers, in an exploratory sense, whether there is the possibility that the revenue of GBEs, which is used to fund the payment of income tax and dividends to the government, is taxation of the customers of GBEs.

A common law definition of taxation is used and considered, in an exploratory sense, against information available for Australia Post. It Is concluded that it is entirely possible, and indeed likely, that the revenue of GIBES which is used to pay income tax and dividends to the government is taxation.

USER PAY REVENUE OR DISGUISED TAXATION: AN EXPLORATORY STUDY

Introduction

Many governments seem to face the dilemma of meeting increasing demands for services from their societies while attempting a level of fiscal responsibility in a minimal taxation environment. Of course these issues all pull in different directions. Over the last 15 years this has led some governments to re-think the way they operate. In the UK, for example, many traditional governmental activities have been privatised. In Australia, one reaction has been the creation of Government Business Enterprises (DBEs). These GBEs behave like private sector entities in that they sell goods and services, pay income tax to the government, and pay dividends to their owners (ie the government). The apparent similarity of GBEs to private sector entities has led to an assumption that the income tax and dividends are paid by GBEs in the same way that they are paid by private sector entities.

An alternative view is that these payments to the government are made by the purchasers of the GBE's goods and services and that the GBE is merely a conduit between those purchasers (or taxpayers) and the government. That is, CBEs collect taxes on behalf of and remits them to the government. If this alternative view of payments by GBEs to government is sustained, then it is apparent that there is hidden taxation levied upon the purchasers of GBE goods and services.

Given this alternative view, there are three questions which should be considered.

1. Is that portion of monies paid by customers to GBEs and used to fund payments to the government exhibit the nature of taxation?
2. If the payments are taxation, how much has been collected by the government from this source?
3. If the payments by GBEs to the government are a tax on the purchasers of goods and services from the GBEs, then is the tax levied in accordance with the Australian Constitution?

This paper is an exploratory study[1] of the first question from an Australian perspective. It is concerned with the possibility that the revenue of GBEs, which is used to fund the payment of income tax and dividends to the government, is taxation of the customers of the GBEs. The purpose of this study is to determine whether there is a basis for further research (Dane,1990, p.5).

The issue considered in this paper is illustrated by the following abridged operating statement[2] for Australia Post for the year ended 30''' June 2000.

	$m
Revenue	3,743.1
Expense (incl. Abnormals)	(,3,351.2)
Operating Profit	391.9
Income Tax	(134.7)
Dividends	(155.7)

Australia Post received revenue of $3,743.1m from the sale of goods and services to consumers. $290.4m of that revenue Is used to pay income tax and dividends to the government. The issue under consideration in this paper is the nature of this $290.4m. Could it be a tax levied on those consumers? In other words, if Australia Post was not required to pay the $290.4m would not that justify a decrease in its pricing? This would impact on consumers being required to pay less for the same level of service.

The nature of taxation

To determine whether these payments by GBEs to governments are taxation of the customers of GBEs, we must first compare the characteristics of those payments with that of taxation. In Matthews v Chicory Marketing Board (1938) 60 CLR 263, Latham CJ provided a definition of taxation (Hanks, 1990, p.475)[3]. He suggested that taxation is:

Latham's definition has four criteria, all of which must be satisfied before it can be concluded that a cash flow to the government is a tax. The four criteria are that the cash flow must be;
1) 'a compulsory exaction of money';
2) to 'a public authority for public purposes';
3) 'enforceable by law'; and
4) 'is not a payment for services rendered.'

These criteria are considered in turn.

'a compulsory exaction of money'

The first criterion for a cash flow to the government to be taxation is that it must be 'a compulsory exaction of money'. In the context of this paper this means that the payment by the consumer to the GBE must not be optional, voluntary or avoidable. This issue has been considered by the courts.

The case of *Attorney-General for New South Wales v Homebush Flour Mills Limited* (1937) 56 CLR 390 concerned New South Wales legislation which required the sale of all milled flour to the state government for £8\10\00 per ton. The miller then had the first option to repurchase the flour for £10\00\00 per ton. The flour, at all times, remained in the possession and at the risk and expense of the miller. The defendants[4], who were flour millers, argued that the £1\10\00 difference between the selling and the buying prices of the flour was a tax. The plaintiff argued that it was not a tax as the miller was not compelled to repurchase the flour from the government. Dixon J considered the options facing the miller after the flour was "sold" to the government. He suggested that the miller could:
1) repurchase the flour for £10\00\00 per ton and continue in the business of selling flour and flour products;
2) stop milling and retire from the business; or
3) keep milling, but not repurchase the flour from the government.
The third option required the miller to have sufficient storage for the milled flour and the ability to pay for its storage in perpetuity. This option would end the miller's ordinary business of trading in flour and flour products because it

had no inventory and storage would eventually become impractical. The second option deprived the miller of his livelihood and, in most cases, would not be an acceptable outcome. The only realistic choice for a miller was the first option.

Dixon J stated:

> 'It is reasonably clear, therefore, that the desired end is sale by the miller and payment of the subvention.... it makes the raising of money its purpose and seeks to secure fulfilment of that purpose by imposing a clear detriment upon the miller who refrains from paying.' (1937) 56 CLR 390 at 412

and

> 'When the desired contributions are obtained not by direct command but by exposing the intended contributor, if he does not pay, to worse burdens or consequences which he will naturally seek to avoid, the payment becomes an exaction.' (1937) 56 CLR 390 at 413

The miller's argument that the price differential was a tax succeeded because repurchasing the flour was the only realistic alternative. The payment was a compulsory exaction of money because the miller had no reasonable option but to pay it.

In *The Commonwealth and The Central Wool Committee v The Colonial Combing, Spinning and Weaving Company Limited (1922) 31 CLR 421*, the High Court looked beyond the legal form of an arrangement to its substance. Regulations required that any business processing and trading in sheepskin and wool products must enter into one of three agreements with the government. These alternative arrangements were that:

1) the government allowed the business to process and trade in those commodities, but that a licence fee, based upon profits, must be paid to the government;
2) the business could process and trade in those commodities as an agent of the government for which it would receive an annual compensation; or
3) a combination of the above two arrangements.

The defendant argued that the result of the regulations was a tax. Isaacs J concluded:

> 'As to the nature of the condition made that the Company should pay over a proportion of its profits as consideration for consent, the words of Lord Buckmester in the Wilts Case are exactly applicable. His Lordship said (1) :-"However the character of this payment may be clothed, by asking your Lordships to consider the necessity for its imposition, in the end it must remain a payment which certain classes of people were called upon to make for the purpose of exercising certain privileges, and the result is that the money so raised can only be described as a tax the levying of which can never be imposed upon subjects of this country by anything except plain and direct statutory means."
>
> It was vigorously urged for the Crown that there was not a "levy" but an "agreement" for consideration. But that is only a recrudescence of the old struggle between the prerogative and the right of parliamentary control which is often thought to have ended long ago, but which finds its re-appearance even to-day, and the ideas by which the supremacy of Parliament was sought to be evaded and curiously found repeated in the Wilts Case, and even in the present case.' (1922) 31 CLR 421 at 444

The Court determined that the payments to the government were taxation because they were a compulsory exaction of money. The defendant had no reasonable option but to pay the licence fee or a share of profits to the government. The High Court went beyond the legal form of the arrangement to its reality or substance and concluded that there was compulsion.

In *The General Practitioners Society in Australia and Others V The Commonwealth of Australia and Others (1980)* 145 CLR 532 the plaintiffs brought an action relating to the introduction by the government of a $10 fee payable by general medical practitioners who also wished to practice as pathology practitioners. The plaintiffs argued that some doctors had to provide pathology services in order to satisfy patient needs. The legislation, therefore, forced some general practitioners to pay the fee, which they argued was a tax. In his judgment Gibbs J said[5]:

> 'I have already held that the Act exerts a practical compulsion upon some medical practitioners to be approved pathology practitioners, and this of course means that those persons are practically compelled to pay the fee ... . I shall assume, without deciding, that practical, as distinct from legal, compulsion is enough to constitute a charge a tax... . I therefore may accept that the fee is a compulsory exaction' (1980) 145 CLR 532 at 561

The Court, therefore, reaffirmed its earlier decisions that compulsion was not necessarily a legal requirement, but that it could be a matter of necessity or practicality.

In these cases the Courts regarded money flows to GBEs as 'a compulsory exaction of money' if the payments were 'practically compelled'. Legal compulsion was not required. Where there is no practical alternative to paying the money, the Court has concluded that it is a 'compulsory exaction'.

A cash flow to a GBE would be 'practically compelled' if it was for essential goods and services which were only available from the GBE. Under these circumstances, the consumer must have the goods and services and must buy them from the GBE. Practical necessity makes the payment by the consumer a compulsory exaction. This satisfies the first criterion for the payment to be a tax. If a GBE provides essential goods and services and has a monopoly on the provision of those goods and services, then it is concluded that the payments by consumers for those goods and services are a compulsory exaction. It is likely that many GBEs would satisfy these conditions.

to 'a public authority for public purposes'

The second criterion for a cash flow to be taxation is that it must be paid to 'a public authority' and be 'for public purposes'. The nature of a 'public authority' and 'for public purposes' are considered separately. a public authority

Guidelines for identifying a public authority were provided in FC of T v Bank of Western Australia; FC of T v State Bank of New South Wales Limited (96 ATC 4009). This case related to sales tax legislation. The law provided, interalia, that an 'authority' is exempt from certain sales taxes. The defendants claimed that they were exempt 'authorities'. Hill J commented that:

> 'Although a number of cases have determined whether particular bodies were or were not authorities or public authorities, it is fair to say that no test of universal applicability has emerged.' (96 ATC 4009 at 4026)

He reviewed the decisions in these cases and concluded that:

> '1. A question whether a particular entity is an authority will be a question of fact and degree dependent upon all the circumstances of the case:.. No one factor will be determinative, ratherthere will be a "range of considerations":...

> 2. A private body, corporate or unincorporated, established for profit will not be an authority....
> 3. Incorporation by legislation is not necessary before a body may be classified as an authority:...
> 4. For a body to be an authority of a State or of the Commonwealth, the body in question must be an agency or instrument of government set up to exercise control or execute a function in the public interest. It must be an instrument of government existing to achieve a government purpose:...
> 5. The body in question must perform a traditional or inalienable function of government and have governmental authority for so doing:...
> 6. It is not necessary for a person or body to be an authority that he, she or it have coercive powers, whether of an administrative or legislative character:... Conversely the fact that a person or body has statutory duties or powers will not of itself suffice to characterise that person or body as an authority:...
> 7. At least where the question is whether a body is a "public authority" the body must exercise control power or command for the public advantage or execute a function in the public interest:... The central concept is the ability to exercise power or command:... (96 ATC 4009 at 4026-4027)

Hill's J comments suggest that a body is a public authority if there is a positive response to all of the following questions.

1) Is it wholly owned by the government?

2) Can it exercise command or authority which an individual cannot?

3) Does it provide a function in the public interest?

4) Does it perform a traditional function of government?

5) Does it have government authority to carry on its activities?

Hill J noted that it is a matter of fact and degree in each case to determine whether a 'public authority' exists[6] It seems likely that most GBEs are 'public authorities".

for public purposes

The Courts have also considered the meaning of 'for public purposes'.. In *Harper v The State of Victoria (1966)* 114 CLR 361, the plaintiffs argued that a fee imposed by the government for the grading, testing andmarking of eggs was a tax. McTiernan J concluded that the:

'fees are not devoted to building up consolidated revenue.' (1966 114 CLR 361 at 377)

and that they were, therefore, not taxes. The inference is that, if fees are paid into consolidated revenue, then they are 'for public purposes'.

In *Air Caledonie International and Others v Commonwealth of Australia* (1988) 82 ALR 385 the defendants argued that a fee to cover the costs of services provided in the processing of passengers was not 'for public purposes'. The High Court concluded that the fee was a tax and commented that:

> 'Indeed, one need do no more than refer to the second reading speech of the responsible Minister, to which both sides referred the court, to confirm that the moneys intended to be raised by the purported impost were not related to particular services to be supplied to particular passengers but were intended to provide, **when paid into consolidated revenue**, a general off-setting of the administrative costs of certain areas of the relevant Commonwealth Department, Including, for example, the administrative costs involved in maintaining facilities for the issue of visas in overseas countries and "general administrative overheads"[7] (1988) 82 ALR 385 at 391-392 (Emphasis added)

In *Australian Tape Manufacturers Ltd and Others v Commonwealth of Australia* (1993) 112 ALR 53 the Court concluded:

> 'In Australia, the fact that a levy is directed to be paid into the Consolidated Revenue Fund has been regarded as a conclusive indication that the levy is exacted for public purposes.' (1993 112 ALR 53 at 60)

These judgments establish the principle that payments into consolidated revenue are 'for public purposes'.

The cited cases involved payments directly to the government. In this paper, however, we are concerned with revenue received by a GBE which is subsequently remitted to the government as income tax or dividends. In other words, the GBE is a conduit between the customer and the government. We noted in The Commonwealth and The Central Wool Committee v The Colonial Combing, Spinning and Weaving Company Limited (1922) 31 CLR 421 that the Court examined the substance of transactions and events and did not necessarily rely upon their legal form. In Air Caledonie International and Others v Commonwealth of Australia (1988) 82 ALR 385 monies were collected by airlines and subsequently remitted to the government. The airlines were a conduit between the payer and the government. It was held that the payments were for a public purpose. It would, therefore, be reasonable to conclude that monies are 'for public purposes' if they are eventually paid into consolidated revenue, regardless of by whom they are initially collected. When the government receives income tax and dividends from GBEs those receipts are routinely paid into consolidated revenue.

It is concluded that the part of the revenue of a GBE which is paid to the government as income tax or dividends is `for public purposes'. For example, Australia Post in 1998 paid $336.1m to the government. This payment is 'for public purposes'.

'enforceable by law'

Latham's third criterion is that the payment should be 'enforceable by law'.

This criterion has not been specifically considered by the Courts, however, it seems likely that charges by GBEs are legally collectable. In some cases the enabling legislation of a GBE specifically provides that amounts are legally collectable. Where there is no specific provision in the enabling legislation, transactions between the GBE and its customers would be subject to common law. Where a customer purchases goods and services from a GBE there is an implied contract that the customer will pay for those goods and services and that amounts owing are legally collectible. It is inconceivable that amounts owing to GBEs would be subject to voluntary settlement. It is concluded, therefore, that GBEs can legally enforce the collection of amounts owing to them by customers.

'is not a payment for services rendered'

Latham's fourth criterion is that a cash flow to government must not be a payment for services rendered. This criterion has two components. The first is the identity of the person to whom the service has been rendered by the GBE. The second is the reasonableness of the charge by the GBE for that service.

‘to whom the service is rendered'

There are three possibilities. First, the service may be rendered only to the person paying the money; for example, a person may purchase a nontransferable licence to perform a particular task. Second, the service may be rendered to a specific group of people to which the person paying the money belongs; for example, a wool grower may pay a sum which is used to market wool in general. Third, the service may be rendered to the community at large;

for example, a person may pay taxes which are used for general government purposes.

A number of cases have considered this issue.

In 1933, Victorian legislation established a Board to control the supply of milk. The expenses of the Board were to be covered by a levy on dairymen based upon the amount of milk sold or distributed by the supplier. The operations of the Board included issuing licenses, administration, milk promotion and advertising. It was argued in *Parton and Another v Milk Board (Victoria) and Another* (1949) 80 CLR 229 that the levy was an excise. The High Court argued that as an excise is a tax, the issue was whether the levy was a tax. Dixon J concluded that the levy was a tax because it was not a payment for services rendered:

> 'It is not a charge for services, No doubt administration of the Board is regarded as beneficial to what may loosely be described as the milk industry. But the Board performs no particular service for the dairymen or the owner of a milk depot for which his contribution may be considered a fee or recompense.' (1949) 80 CLR 229 at 258

The judgment suggests that an identifiable, direct service must be rendered to the individual paying the money for the payment not to be a tax. It was not sufficient that the services were rendered to a group to which the individual belonged.

This issue was also considered in *Harper v The State of Victoria* (1966) 114 CLR 361. McTiernan J said:

> 'This sub-section says : "Every person presenting eggs under this section shall pay to the Board for the grading, testing, marking and stamping of such eggs such a fee or fees as may be fixed by the Board to defray the expenses incurred therefore". The issue raised is whether a fee for which this subsection provides is a tax and, if so, whether it is a duty of excise. The payment of the fee is compulsory if the person concerned has taken advantage of the facilities provided by the Board for grading &c. **In my opinion the fee is nevertheless not a tax for the reason that it is a charge for services rendered. The purpose for which the fee is exacted is to defray the cost of those services.**' (1966) 114 CLR 361 at 377. (Emphasis added)

In this case, it was decided that the payment was not a tax because it **was** a charge for services rendered. The Court again suggested that a real and

tangible service must be rendered to the party actually paying the money for there not to be a tax.

In *Air Caledonie International and Others v Commonwealth of Australia* (1988) 82 ALR 385 the defendants argued that a passenger processing charge was a fee for service because it covered the costs of immigration clearance and that it was not a tax. The High Court concluded:

> 'In one sense, all taxes exacted by a national government and paid into national revenue can be described as "fee for services". They are the fees which the resident or visitor is required to pay as the quid pro quo for the totality of benefits and services which he receives from governmental sources. It is, however, clear that the phrase "fees for services" in s 53 of the Constitution cannot be read in that general impersonal sense. Read in context, the reference to "payment for services rendered" in the above quoted extract from the judgment of Latham CJ in Matthews v Chicory Marketing Board, be read as referring to a fee or charge exacted for particular identified services provided or rendered individually to, or at the request or direction of, the particular person required to make the payment'. (1988) 82 ALR 385 at 391

The High Court again determined that there must be a direct and identifiable benefit to the party actually making the payment for it not to be considered a tax.

In *General Practitioners Society in Australia and Others v The Commonwealth of Australia and Others* (1980) 145 CLR 532 Gibbs J determined that there was an identifiable service being rendered to the person paying the $10 fee and that it was not, therefore, a tax:

> 'However, in my opinion, it is a fee for services. It is the price which a medical practitioner, who seeks to become an approved pathology practitioner, must pay for the purpose of having his undertaking considered by the Minister, and either accepted or referred for inquiry and report to a Medical Services Committee of Inquiry. In other words, it is a charge for the services performed in dealing with the application.' (1980) 145 CLR 532 at 561

Gibbs J concluded that an actual, identifiable service was provided to the medical practitioner paying the money and that the payment was not, therefore, a tax.

The nature of 'fee for services' was also considered in the case of *Northern Suburbs General Cemetery Reserve Trust v Commonwealth of*

Australia (1993) 112 ALR 87. The case related to the Training Guarantee levy which was introduced by legislation in 1990. The legislation required certain employers to spend a specified amount on the training of employees. If the amount was not spent, then the employer had to pay a levy to the Commonwealth equal to the amount that should have been spent on training. The Commonwealth was to pass the levies to the States which could spend it on employee training. The plaintiff's argued that the levy was not a tax. Mason CJ, Deane, Toohey and Gaudron JJ delivered a joint judgment. They said:

> 'The amount of the charge an employer is liable to pay is an amount which bears a direct relation to the employer's expenditure on employment related training. And the Administration Act permits the charge paid to the Commonwealth to be expended on employment related training. But is the charge so paid a fee for the training on which it is so expended?
>
> There is no statutory warrant for concluding that the charge paid is a fee for services. The Administration Act does not by its terms establish any sufficient relationship between the liability to pay the charge and the provision of employment related training by the ultimate expenditure of the money collected to regard the liability to pay the charge as a fee for the services or
> as something akin to a fee for services.' (1993) 112 ALR 87 at 92-93

The Court concluded that the fee was not a fee for service and reaffirmed that there must be a direct link between the payment of money and the provision of an identifiable service for the cash flow not to be a tax.

The Courts have consistently held that for a payment not to be a tax it must be for an identifiable service rendered only to the person paying the money. It was not sufficient for the service to be rendered to the community at large or to a group of which the person paying the money was a member.

'the amount of the payment'

The second aspect of the fourth criterion is the amount of the payment. *In Harper v The State of Victoria* (1966) 114 CLR 361 Taylor J said:

> 'It would, of course, be an abuse of the power vested in the Board by that sub-section if fees were fixed which bore no relation to the expenditure incurred by it with respect to the grading, testing, marking and stamping of eggs delivered and presented to it...' (1966) 114 CLR 361 at 378

In the same case McTiernan J said:

> ‘The issue raised is whether a fee for which this sub-section provides is a tax and, if so, whether it is a duty of excise. The payment of the fee is

> compulsory if the person concerned has taken advantage of the facilities provided by the Board for grading &c. In my opinion the fee is nevertheless not a tax for the reason that it is a charge for services rendered. The purpose for which the fee is exacted is to defray the cost of those services.' (1966) 114 CLR 361 at 377

These decisions suggest that payments in excess of the cost of providing the goods and services are not payments for those goods and services.

The size of the fee was also considered in Air Caledonie International and Others v Commonwealth of Australia (1988) 82 ALR 385. It was held that:

> 'If the person required to pay the exaction is given no choice about whether or not he acquires the services and the amount of the exaction has no discernible relationship with the value of what is acquired, the circumstances may be such that the exaction is, at least to the extent that it exceeds the value, properly to be seen as a tax.' (1988 82 ALR 385 at 389)

In General Practitioners Society in Australia and Others v The Commonwealth of Australia and Others (1980) 145 CLR 532 the amount of the exaction was also considered. Gibbs J said:

> 'The amount of an exaction may, I think, be relevant to the question whether it is a fee for services, since an exaction may be so large that it could not reasonably be regarded as a fee.' (1980) 145 CLR 532 at 562

The Courts have consistently held that a payment for services rendered must have a discernible relationship with the cost or the value of the services rendered, Payments in excess of the cost of providing the service or its value are not payments for services rendered.

The question of determining the 'cost' or the 'value' of a service has not been specifically considered, but the judgments suggest that 'fees for services' should recover the actual cost of the service that has been rendered. In accounting terms that is the historical cost of the service. Payments in excess of the cost of the service are not payments for those services and would satisfy the criterion for the payment to be a tax.

The Courts have determined that for a cash flow to the government to be a payment for services it must be directly related to the provision of clearly identifiable goods and services to the person making the payment, and that it

must not exceed the cost of providing the goods or services. Where there is no clearly identifiable benefit for the individual paying the amount, then the payment is not a payment for services and could be a tax. Where the payment exceeds the cost of providing the service, then the excess is not a payment for services and could be a tax.

Consider the example of Australia Post. If we assume that the expenses are recognised at the actual or historical cost, we can conclude that the operating profit of $335.2m is revenue received in excess of the cost of providing the services. In other words, this amount is not a payment for services rendered and could be taxation, provided that the other criteria are satisfied.

Conclusion

This paper has examined the issue of whether GBE revenue which is subsequently paid to the government as income tax and dividends could be taxation of the consumers of services provided by the GBE.

We have relied upon a definition of taxation suggested by Latham CJ in *Matthews v Chicory Marketing Board* (1938) 60 CLR 263. He determined that a tax is 'a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered' (1938 60 CLR 263 at 276). This definition has four criteria which must all be satisfied for a payment to the government to be taxation. The following conclusions have been reached in relation to the four criteria.

1) **'a compulsory exaction of money'**
If a GBE is a monopoly and its products are essential to those consuming them, then the revenue generated from the sale of those products is 'a compulsory exaction of money'.

2) **'by a public authority for public purposes'**
A GBE is a 'public authority' if it:

- is wholly owned by the government

- performs a traditional function of government
- has government authority to carry on its activities

Where GBEs pay income tax and dividends to the government, those monies are not usually earmarked for specific purposes but
are paid into consolidated revenue. In other words the money is used 'for public purposes'.

3) **'enforceable by law'**
GBEs have the legal capacity to enforce collection of their revenues.

4) **'is not a payment for services rendered'**
If a GBE pays income tax or dividends to the government this is evidence that these amounts are in excess of the cost or value of the services and are not a payment for services rendered.

It is concluded, therefore, that it is entirely possible, and indeed likely, that the revenue of GBEs which is used to pay income tax and dividends to the government is taxation as defined by Latham CJ. This is an important issue because what is to stop a government from imposing other cash outflows from DBEs? Arguments of acting commercially are insufficient because the Constitution is silent on governments acting commercially.

This paper has not been concerned with the number and identity of GBEs that meet these circumstances, but it seems likely that many which pay income tax and dividends would be in that category. This paper has not considered whether such tax collection by the government is legal. These are matters for further research.

Furthermore, this paper is necessarily focussed on an Australian perspective, However, given that Australia is based upon English traditions it may well be that similar arguments may be able to be sustained for other countries. At the very least, the question is worthy of addressing in other countries.

REFERENCES

Australian Postal Corporation Act. 1989.

Bessell, M, Burford, K. and Henderson, S. 1999, `What Latham CJ Really Said About Taxation', Corporate and Business Law Journal, Voll 1 Not, pp143-164.

Dane, Francis C. 1990, Research Methods, BrookslCole Publishing Company, California,

Hanks, Peter. 1990, Australian Constitutional Law Materials and Commentary, 4th edition, Butterworths, Sydney.

Sekaran, Uma. 1992, Research Methods For Business A Skill Building Approach, 2"d. edition, John Wiley & Sons, Singapore.

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[1] An exploratory study is undertaken when we do not know much about the situation at hand, or when we have no information on how similar problems or research issues have been solved in the past.' (Sekaran, 1992, p.95)

[2] The amount of income tax figure has been adjusted to represent the intended cash flow. The original amount of income tax expense only includes the amount of prima-facie tax on operating profit adjusted for permanent differences under AASB1020. The amount of $134.7m represents the tax payable on taxable income according to Note 5 "Income Tax" in the 2000 Annual Report of Australia Post.

[3] Some critics query the value or applicability of Latham's definition, However, there is no evidence to suggest that the Courts will not continue to apply his definition. Also see Bessell, Burford and Henderson (1999) which puts Latham's definition in perspective and refutes these critics.

[4] This action was originally started by the Attorney-General for New South Wales in the Supreme Court for a debt due to the government_ Homebush Flour Mills Limited applied the federal constitutional tax argument as a defence. The Supreme Court had no place to decide on such constitutional matters, so that Court referred the whole matter to the High Court. Because it is the original action, the Attorney-General of New South Wales is the Informant (ie. plaintift) and Homebush Flour Mills Limited is the defendant.

[5] It should he noted that the Court ruled that the fee was not a tax, but on other grounds.

[6] It is also worth noting that Hill J took the literal interpretation of these factors and did not find it necessary to question the semantics.

[7] It should be noted that in Air Caledonie international and Others v Commonwealth of Australia (1988) 82 ALR 385 and Australian Tape Manufacturers Association Ltd and Others v Commonwealth of Australia (1993) 112 ALR 53 it was suggested that a payment could be a tax notwithstanding that the money was not paid to a public authority. These decisions do not bring into question whether a payment to a 'public authority' can be a tax. They simply widen the number of payments that can be held to be a tax by providing that a payment that is to a non-public authority can also be held to be a tax.
It is also worth noting that the Courts, generally, seem to take a liberal view of what is a 'public authority'. For example, see Bryce v Curtis (1983) 51 ALR 73 where the Court held that the Commonwealth Trading Bank (when it was wholly owned by the government) was a 'public authority'.