

# *Revenue Law Journal*

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*Volume 18, Issue 1*

2008

*Article 8*

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## Because Parliament Can

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# Because Parliament Can

Jim Corkery, Anthea Gerrard, and Damien Lockie

## **Abstract**

Comment on the drafting of arbitrary taxation and the large variety of taxes levied in Australia at various levels of government. A carbon tax may be preferred to a 'cap and trade' emissions trading system.

**KEYWORDS:** legislation, arbitrary taxation, types of taxes, carbon tax, cap and trade, emissions trading system

## EDITORIAL

### BECAUSE PARLIAMENT CAN

Where exactly are we to draw the bounds around the parliament's ability to tax its citizens?

The breadth of the power of the Australian Parliament to tax was considered last year. Lindgren J in *Fowler v Commissioner of Taxation* [2008] FCA 528 (21 April 2008), in upholding the interplay of the personal services income provisions of the *Income Tax Assessment Act 1997* (Cth) with the general liability provisions of that Act, accepted the contention of the Commissioner that:

subject to any constitutional constraints, it is open to the legislature to tax as a person's assessable income any amounts it may choose to identify, and that it has unambiguously specified the amounts in question in the present case as included in the statutory income of Mr Fowler.

The Commissioner relies on *R v Barger* [1908] HCA 43; (1908) 6 CLR 41 at 114, adopted in *Fairfax v Federal Commissioner of Taxation* [1965] HCA 64; (1965) 114 CLR 1 at 12-13, for the proposition that subject only to the limitations expressed in the Constitution, the Parliament's power to levy taxation:

was plenary and absolute; unlimited as to amount, as to subjects, as to objects, as to conditions, as to machinery...

with the result that: the Parliament has, prima facie, power to tax whom it chooses, power to exempt whom it chooses, [and] power to impose such conditions as to liability or as to exemption as it chooses.

Taxation cannot be 'arbitrary', ie, it must be capable of objective reference and cannot be at the complete discretion of the Commissioner: *DFCT v Truhold Benefit Pty Ltd* (1985) 158 CLR 678, 684 and *MacCormick v FCT* (1984) 158 CLR 622, 640-1. Two recent examples of the flexing of the tax power are of concern.

1. The Royal Assent of the *Temporary Residents' Superannuation Legislation Amendment Act 2008* (Cth) and the *Superannuation (Departing Australia Superannuation Payments Tax) Amendment Act 2008* (Cth) on 11 December 2008, introduced new Part 3A into the *Superannuation (Unclaimed Money and Lost Members Act) 1999* (Cth) ('SUMLMA'). At stake here are unclaimed superannuation benefits in excess of \$12b.

Under Part 3A, the Commissioner can, from 30 April 2009, commence a process to require trustees of superannuation funds to pay to consolidated revenue moneys representing a notional calculation of the 'superannuation interest in the fund' of persons who worked in Australia under temporary

resident visas, but who are no longer here, and most significantly, without those persons having the benefit of earnings that may accumulate on their account balances to the usual vesting date.

Ought the issue by the Commissioner of a s 20C notice under Part 3A be a sufficient trigger for this claim?

2. On 10 March 2009 a package of draft bills for the introduction of the Carbon Pollution Reduction Scheme were released. Included in the package were three bills to 'bootstrap' the revenue to be raised from the auction of Australian emissions units.

Section 91 of the Carbon Pollution Reduction Scheme Bill provides:

If a charge payable for the issue of an Australian emissions unit is taxation within the meaning of section 55 of the Constitution:

- (a) the charge is not imposed in this Act; and
- (b) the charge is imposed by whichever of the following Acts is applicable
  - i. the Carbon Pollution Reduction Scheme (Charges – Customs) Act 2009
  - ii. the Carbon Pollution Reduction Scheme (Charges – Excise) Act 2009
  - iii. the Carbon Pollution Reduction Scheme (Charges – General) Act 2009.

Where is the legislative precision that we should expect from tax legislation?

## SO MANY TAXES

There are over 75 different taxes levied in Australia at various levels of government.

### Commonwealth

Income Tax	ITAA36 and ITAA97
Capital Gains Tax	ITAA36 and ITAA97
Fringe Benefits Tax	<i>Fringe Benefits Tax Act 1986</i>
Goods and Services Tax	<i>A New Tax System (Goods and Services Tax) Act 1999</i>
Customs Duty	Customs Act 1901
Customs Depot Licensing Charge	<i>Customs Depot Licensing Charge Act 1997</i>
Alcohol, Tobacco & Fuel Tax	<i>Excise Tariff Act 1901</i>
Wine equalisation tax	<i>A New Tax System (Wine Equalisation Tax) Act 1999</i>
Excise Duty	<i>Excise Tariff Act 1901</i>
Passenger Movement Charge	<i>Passenger Movement Charge Act 1978 (Cth)</i>
Petroleum Resource Rent Tax (PRRT)	<i>Petroleum Resource Rent Tax Assessment Act 1987</i>

(the PRRTAA) [a person is liable to pay on the taxable profit from a petroleum project worked out under that Act.]

Medicare Levy  
Medicare Levy Surcharge  
Luxury Car Tax  
Withholding taxes

*A New Tax System (Luxury Car Tax) Act 1999*  
Various Double Tax Agreements

**Levies** (The Levies Revenue Service collect over 60 levies and charges)<sup>1</sup>

Diary (All Milk) levy  
Dairy Adjustment levy

Grain levies

(7) coarse grains, cotton, grain legumes, oilseeds, pasture seeds, rice and wheat

Horticulture levies

over 20 horticulture commodities with a levy and/or an export charge. These levies/charges provide funding for marketing, research and development, plant health and residue testing programs for the horticulture industry.

Livestock levies

over 10 livestock commodities

Wines / Grapes

three levies/charges on wine/grapes; the grape research levy, the wine export charge and the wine grapes levy.

Other levies

in addition there are a number of other levies covering items such as chickens, eggs, prawns, queen bees, sugar and wool.

**States**

Land Tax  
Stamp Duty  
Payroll Tax

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**A CARBON TAX RATHER THAN 'CAP AND TRADE'?**

The draft law for emission trading is a monster at over 400 pages long.<sup>2</sup> It does not contain all the regulations required to implement the scheme. The trading scheme

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<sup>1</sup> <http://www.daff.gov.au/agriculture-food/levies>.

<sup>2</sup> Penny Wong at a press conference on 10 March 2009 <<http://news.theage.com.au/breaking-news-national/wong-defends-emissions-trading-scheme-20090310>>.

will be far from simple and efficient. Nor will it achieve its objectives, it seems. A 'cap and trade' system will not provide greater certainty of carbon reductions.

The European Union Emissions Trading System (EU ETS) struggled to effectively allocate emissions permits. Allocation of permits through National Allocation Plans and a partly auctioning system resulted in an overabundance of permits in the cap and trade market, and removed any incentive to reduce emissions. The National Allocation Plans allowed member states to recommend to the Commission an amount of permits necessary to meet their respective targets. This experience resulted in over allocation of emission permits, volatility in the price of permits, and a minimal reduction in emissions throughout the EU.<sup>3</sup> The vested uncertainty in the EU ETS achieved minimal results, which leads commentators to suggest carbon taxes are the appropriate means of reducing our global emissions.<sup>4</sup>

A conventional carbon tax would be a far simpler and more efficient way to reduce carbon emissions and would provide certainty for the business community.<sup>5</sup>

Jim Hanson, of Columbia University, suggests a better scheme.<sup>6</sup> He favours a tax with a 100% dividend. The revenue raised through the carbon tax would be used to reimburse consumers. Since companies would increase prices to account for the extra taxes payable, the consumer would be helped by an equal tax refund for all. It is a simple but effective system where the poorest benefit the most. A positive spin-off will be that innovation will increase, as taxpayers innovate to reduce emissions and reduce their tax liability.

The Editors<sup>7</sup>

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<sup>3</sup> A Denny Ellerman and Barbara K Buchner, 'The European Union Emissions Trading Scheme: Origins, Allocation, and Early Results' (2007) 1(1) *Review of Environmental Economics and Policy* 66, 67.

<sup>4</sup> William D Nordhaus, 'To Tax or not to Tax: Alternate Approaches to Slowing Global Warming' (2007) 1(1) *Review of Environmental Economics and Policy* 26.

<sup>5</sup> *Washington Post Sunday*, April 1 2007 Article by Juliet Eilperin and Steven Mufson as cited at [http://www.washingtonpost.com/wp-dyn/content/article/2007/03/31/AR2007033101040\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/03/31/AR2007033101040_pf.html)

<sup>6</sup> Jim Hanson at [http://www.columbia.edu/~jeh1/mailings/2008/20080604\\_TaxAndDividend.pdf](http://www.columbia.edu/~jeh1/mailings/2008/20080604_TaxAndDividend.pdf).

<sup>7</sup> Jim Corkery, Anthea Gerrard, Damien Lockie.