AUSTRALIAN FEDERAL GOVERNMENT

SERVICE REVENUES :

A TAXATION PERSPECTIVE

BY

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TABLE OF CONTENTS

Page

Chapter 1 Introduction

1.1 Introduction........ 1
1.2 Motivation........ 2
1.3 Significance........ 4
1.4 Hypothesis........ 5
1.5 The method........ 7
1.6 Chapter descriptions........ 12

Chapter 2 Taxation in Australia A Retrospective

2.1 Introduction........ 15
2.2 The power to tax in Australia........ 15
2.3 The origins of taxation in Australia........ 18
2.4 Conclusion........ 36

TABLE OF CONTENTS (continued)

Page

Chapter 3 The Definition of Taxation
A Review of the Literature

3.1 Introduction..38
3.2 Taxation..38
3.2.1 'a compulsory exaction of money'..40
3.2.2 'by a public authority for public purposes'..............................47
3.2.2.1 'public authority'..47
3.2.2.2 'for public purposes'...64
3.2.3 'enforceable by law'..71
3.2.4 'is not a payment for services rendered'.................................74
3.2.4.1 when a service is rendered..74
3.2.4.2 the payment...81
3.3 Apportionment of payments...85
3.4 Conclusions..88

Chapter 4 The Meaning of Cost
within the Definition of Taxation

4.1 Introduction..93
4.2 A review of Court decisions..96
4.3 Conclusion..119

TABLE OF CONTENTS (continued)

Page

Chapter 5 A Hypothetical Example

5.1 Introduction 123
5.2 The example 124
5.3 Conclusion 134

Chapter 6 Sources of Data

6.1 Introduction 136
6.2 Data Selection 136
6.3 Reason for the elimination of 22 PSE's 142
6.4 Conclusion 149

Chapter 7 An Analysis of Public Sector Entities

7.1 Introduction 151
7.2 Australian Maritime Safety Authority (AMSA) 153
7.3 Australia Post (AP) 169
7.4 Civil Aviation Authority (CAA) 183
7.5 Federal Airports Corporation (FAC) 197
7.6 Telstra 202
7.6.1 Telstra 204
7.6.2 Australian and Overseas Telecommunications Commission(AOTC) 212
7.6.3 Telecom 227

TABLE OF CONTENTS (continued)

Page

Chapter 7 An Analysis of Public Sector Entities (continued)

7.6.4 OTC Limited.......242
7.6.5 Overseas Telecommunications Commission (OTC).......250
7.7 Conclusions.......258

Chapter 8 Quantification of the amount of Taxation

8.1 Introduction.......261
8.2 Australian Maritime Safety Authority (AMSA).......262
8.3 Australia Post (AP).......268
8.4 Civil Aviation Authority (CAA).......275
8.5 Overseas Telecommunications Commission (OTC).......282
8.6 OTC Limited.......285
8.7 Australian Telecommunications Corporation (Telecom).......290
8.8 Australian and overseas Telecommunications293
Commission (AOTC).......294
8.9 Conclusion.......298

TABLE OF CONTENTS (continued)

Page

Chapter 9 Conclusions, Implications and Further Research

9.1 Introduction 302
9.2 Conclusions 302
9.3 Implications 308
9.3.1 The repercussions 308
9.3.2 The effects on Government financial and accounting reforms 312
9.4 Further research. 312

References 315

LIST OF TABLES

Table		Page
6.1	Results of a survey of the annual reports of PSEs	139
8.1	Dividends paid by AMSA	265
8.2	Allocation of AMSA's taxation to AMSA Act revenue	268
8.3	Monopoly and Non-monopoly information from the 1994 Annual Report of AP	269
8.4	Proportions of Monopoly and Non-monopoly Operating Profits of AP	271
8.5	Allocation of AP's dividends and income tax	272
8.6	Dividends and income tax paid by the CAA	278
8.7	Allocation of the CAA's taxation to CAA Act revenue	281
8.8	Income tax and dividend payments by OTC	283
8.9	Dividend and income tax payments by OTC Limited	286
8.10	Allocation of Telecom's revenue into Monopoly and Non-monopoly portions	292
8.11	Allocation of Telecom's dividends and income tax	293
8.12	Basis of allocation of AOTC's revenue	296
8.13	Allocation of dividends and income tax paid by AOTC	297
8.14	Summary of the amounts of PSE revenue that can properly be described as taxation	299
8.15	Summary of the amounts of PSE revenue that can properly be described as illegal taxation	300
9.1	Summary of the amounts of PSE revenue that can properly be described as taxation	306
9.2	Summary of the amounts of PSE revenue that can properly be described as illegal taxation	307

ABSTRACT

This thesis investigates an argument that some of the revenue of Australian Federal Government entities may be taxation that is not legally imposed. In particular it is concerned with the revenue of such entities that is used to fund the payment of dividends and income taxes to the government.

The Australian Constitution prescribes a stricter process for the legitimate imposition of taxation than other laws. This is the result of English history inherited by Australia. The Australian Constitution, however, does not define taxation and this has been left to the Courts. A definition of taxation is determined with respect to the argument in this thesis.

The thesis tests this definition of taxation to a hypothetical example to ascertain whether there is a possibility that taxation is occurring. The conclusion is that it can. The testing is then extended to the whole of the Australian Federal Government, using 1994 as a base. The result of the testing is that Australian Federal Government entities are receiving taxation in the disguise of revenue. The examination then takes this conclusion and addresses whether the taxation is illegal. It is then further concluded that some part of that taxation was received illegally.

DECLARATION

I hereby declare that this work contains no material which has been accepted for the award of any other degree or diploma in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text.

I give consent to this copy of my thesis, when deposited in the University of Adelaide Library, being available for loan and photocopying.

M.D.Bessell

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'Even the recommendations of authoritative accounting bodies should not be followed blindly. It is always appropriate and wise to seek to know why a procedure should be followed.' (Lorig, 1963, p.759)

CHAPTER 1

INTRODUCTION

1.1 Introduction

One of the most important powers of a government is its power to tax. This power is so important that disputes over it have led to wars, the overthrow of monarchs, the overthrow of governments and the loss of colonies. In Australia, the power to tax was important enough to warrant special consideration in the Constitution. In order to protect the electorate from 'hidden' taxation, the Constitution specifies certain procedures which must be followed before a government can levy a tax. If these procedures are not followed, money collected by the government in the form of taxation is illegally obtained. This thesis is concerned with an aspect of illegal taxation. It considers the possibility that money collected by public sector entities (PSEs) ostensibly as payment for services rendered or goods supplied may, in fact, be illegal taxation.

In recent times in Australia there have been calls on government to make its operations more commercial. These calls have been made as the result of governmental fiscal pressures, accountability and efficiency

concerns (Broadbent & Guthrie, 1992, pp.3-4; Hopwood, 1984, p.167) and a perceived need to subject government operations to market forces (Buchanan & Bowman, 1990, p.77).

In part, this has led government departments to adopt the accrual method of accounting as used by the private sector (Aiken & McCrae, 1992, p.13). This can include making government departments responsible for returning profits to government in the form of dividends and paying income tax.

1.2 Motivation

Aiken (1994, p.19), when commenting on the adoption of accrual accounting by government departments said that this:

> 'is a serious matter for auditors as hundreds of years of 'fairness' in evolution may be under threat, particularly with respect to proper sanctioning of the collection and payment of public monies' and that 'cost plus pricing ... can lead to secret indirect taxation which can be ... unsanctioned'.

Aiken is suggesting that the collection of monies, by a government department, over and above its costs, could be a form of taxation which has not been subjected to proper authorisation.

Ma & Mathews (1993) provided a dissenting view to the Exposure Draft 55[1] (ED55) which proposed that government departments adopt accrual accounting. They wrote that:

> 'there are other concerns, related to accountability, about the consequences of implementing the proposed standard. For example, massive wealth transfers, which have not been subject to parliamentary scrutiny, may flow from the community to government entities simply as a result of the application of accounting rules. It is time that the debate about accounting processes in the public sector took some account of the economic consequences of the proposed changes' (Ma & Mathews, 1993, p.83).

Walker (1992, p.38) had similar concerns. He reviewed the accounting practices of government water boards and commented that some:

> 'consumers might well regard some part of their water bills as being, in substance, a form of state taxes' (Walker, 1992, p.38).

Aiken & Capitanio (1995, p.564) said that a:

> 'government's capacity to spin straw into gold through taxation processes has been complemented recently by a more subtle procedure utilising new accounting standards for the public sector. Under cost plus pricing of essential services in imperfect markets, the use of "current cost" and "accrual" accounting principles, adopted in the modernisation

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1. ED55 preceded Australian Accounting Standard Number 29 (AAS29) which is titled "Financial Reporting by Government Departments" issued by the Australian Accounting Research Foundation (AARF) in December 1993.

> of government accounting, offers both state and federal treasuries an ingenious vehicle for increasing indirect forms of taxation, some of which may then be syphoned to treasury coffers.'

A literature survey found no earlier studies on this issue. While there was some speculation about the legality of fees for services associated with proposed departures from historical cost accounting systems, there was no analysis of actual PSE revenues. There was some literature dealing with the legal definition of taxation but this was not related to the issue under consideration in this thesis.

1.3 Significance

A central tenet of Australian society is that all members of that society are bound by the laws of the land. Nobody, including governments, is exempt from compliance. If governments can avoid compliance with the law then they are in a position to deny others their rights under the law. This is a matter of concern in the case of taxation. If the provisions of the Australian Constitution relating to the approval of tax laws are circumvented, then the rights of the public to be treated in accordance with the law are denied.

If the government has collected illegal taxation, thereby breaking the law, there is the issue of redress for those who have paid illegal taxes. This question, while interesting, is only considered as a potential consequence in the final chapter and is beyond the scope of this thesis. This thesis is concerned only with establishing the existence and

amount of illegal taxation disguised as fees for goods and services provided by PSEs.

1.4 Hypothesis

This thesis tests the hypothesis:

> **that part of the revenue of some public sector entities is illegal taxation.**

A 'public sector entity' (PSE) is any department, agency, corporation, statutory authority, board, tribunal or the like that is owned or controlled by the Australian Federal Government and which produces its own annual financial statements.

It will be noted that this hypothesis is a little imprecise. This thesis is not testing the hypothesis that <u>all</u> PSEs are collecting illegal taxes. Whether or not revenue received by a PSE is illegal taxation depends upon a number of considerations including the legislation governing its operations, the nature of the goods and services which it provides, and, in the context of this thesis, the amount of dividends and income tax paid to the government. It is likely that the revenue collected by some PSEs is a legitimate payment for goods and services legally collected under enabling legislation. A significant portion of this thesis is devoted to identifying those PSEs whose revenue could be illegal taxation.

Similarly, this thesis is not testing the hypothesis that all of the revenue of some PSEs is illegal taxation. It is concerned with the issue of whether some of the PSE revenue is illegal taxation. The amount of revenue that will be examined will be limited to the amount of dividends and income tax paid by a PSE. It seems likely that the bulk of the revenue of PSEs is a legal payment for services rendered or goods supplied. A significant part of this thesis is, therefore, concerned with identifying and measuring that part of PSE revenue which is illegal taxation.

This thesis is concerned only with PSEs of the Australian Federal Government. PSEs of State , Territory and local governments or overseas governments are not considered. The study was restricted to PSEs of the Australian Federal Government to keep the research to manageable proportions and because of the reasonable availability of data in the Federal sphere. No attempt is made to generalise the results beyond PSEs of the Australian Federal Government. However, it is possible that the conclusions reached in this thesis can be extended to include some PSEs operated by other governments within Australia.

This thesis relies upon an analysis of all the PSEs operated by the federal government in 1994. It is not based upon a sample but upon a consideration of the entire population. It is important to note that while only a small number of PSEs are subject to detailed analysis they were selected after an analysis of the entire population.

The year 1994 was used as a base year for testing the whole population because it was the most recent year when there was a complete set of annual reports when the data collection and analysis began. Initial

testing was based upon an examination of annual reports (including financial statements) and applicable legislation at that time. PSEs selected for further testing were then analysed over the period in which they paid dividends or income tax. It was assumed that the laws existing in 1994 applied to the other periods under consideration. In one case, there were a number of predecessor PSEs that no longer exist. With those PSEs it was not appropriate to use 1994 as the base year and the last year of their operation was used.

As 1995 data was available by the later stages of the research it was decided to include it in the analysis. The purpose of including the 1995 data was to make the conclusions more contemporary.

There are two types of PSEs that have not been included in the study. First there are those which existed prior to 1994 but were not represented by a PSE in 1994. Second there are PSEs that come into existence on or after 1995.

1.5 The method

This section considers two matters. First, it provides literature support for the method used in this thesis. Second, it discusses the relevance of the method to the research undertaken in this thesis.

This thesis uses the case study method of qualitative research[2].Qualitative research is 'any kind of research that produces

2. Note that not all case studies are qualitative research.

findings not arrived at by means of statistical or other means of quantification' (Strauss & Corbin, 1990, p.17). Case studies permit a multi-method approach to research and incorporate three basic methods of data collection. They are open-ended interviews, observation and document analysis' (Patton, 1987, p.7). In recent years, there has been increasing use of qualitative approaches to accounting research (Humphrey & Scapens, 1996, p.86; Covaleski & Dirsmith, 1990, p.543; Llewellyn, 1996, p.112) particularly in the public sector area (Humphrey & Scapens, 1996, p.87). Case studies allow the researcher 'the opportunity to select the most appropriate focus of inquiry, given the existing state of knowledge' (Parker & Roffey, 1997, p.213). It is useful where there is little previous research and where the issues are not fully understood, or are complex and inter-related (Ferreira & Merchant, 1992, p.24). These characteristics make the method particularly relevant for accounting research (Scapens, 1990, p.259).

This thesis is descriptive. That is, it is concerned with events that have transpired and uses those events for evidence in support of the hypothesis. As a result, there are numerous lengthy citations and quotations throughout the thesis. It is acknowledged that these can be burdensome in the reading and understanding of the contents. However, it is not appropriate to re-word or provide summations of those citations or quotations as it may be construed as damaging or biasing the original data.

This thesis is multi-disciplinary. It deals with historical, legal and accounting issues. It has been argued that accounting research should be widened to include multi-disciplinary approaches so as to achieve an understanding between accounting and the broader collectives

(Humphrey & Scapens, 1996, p.87; Hopper & Powell, 1985, p.450). The case study approach facilitates such a multi-disciplinary approach.

Yin (1984, p.23) defines a case study as:

> 'an empirical study that investigates a contemporary phenomenon within its real-life context when the boundaries between the phenomenon and context are not clearly evident and in which multiple sources of evidence are used.'

In this thesis the 'contemporary phenomenon' is the relatively recent commercialisation of the government sector. Some PSEs are now required to earn reasonable (and specified) rates of return and to make payments to the government in the form of dividends and income tax. Some argue[3] that such payments are appropriate so that the government can receive a return for its investment in PSEs. Others argue that the adoption of commercial principles by government entities may infringe upon the rights of individuals. This thesis pursues that concept. Evidence has been derived from historical records, document analysis and interviews.

Stake (1994, p.237) notes that the nature of 'a case' has been subject to debate. He argues that the object of the study is more important in determining whether there is a case study rather than the elements of

3. This was detected in interviews not otherwise reported in this thesis. Furthermore, the argument can be found in government literature. For example see Bureau of Industry Economics (1995, pp.x and 2).

the case itself. This thesis is a case study because it investigates the possibility that the government is obtaining illegal taxation.

Stake (1994, p.237) categorises case studies into 3 types. These are intrinsic case studies, instrumental case studies and collective case studies. This thesis is an intrinsic case study which Stake describes as:

> a 'study undertaken because one wants better understanding of this particular case. It is not undertaken primarily because the case represents other cases or because it illustrates a particular trait or problem, but because, in all its particularity and ordinariness, this case itself is of interest. The researcher temporarily subordinates other curiosities so that the case may reveal its story. The purpose is not to come to understand some abstract construct or generic phenomenon, such as literary or teenage drug use or what a school principal does. The purpose is not theory building - though at other times the researcher may do just that. Study is undertaken because of intrinsic interest ... .'

He further adds:

> 'They *(case study researchers)*[4] expect their readers to comprehend their interpretations but to arrive as well to their own. thus the methods for casework actually used are to learn enough about the case to encapsulate complex meanings into a descriptive narrative so that readers can vicariously experience these happenings, and draw their own conclusions' (Stake, 1994, p.243).

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4. Words in italics added.

Stake (1994, p.239) also says that:

> 'qualitative case researchers orient to complexities connecting ordinary practice in natural habitats to the abstractions and concerns of diverse academic disciplines.'

The study corresponds to this description.

Yin (1989, p.62) suggests that a case study researcher must be prepared for unexpected findings and should continually re-evaluate the data collected with the purpose of the study. This was particularly evident in this thesis. The original research question and hypothesis are not those presented in this thesis, although the literature that provided the motivation remains unchanged. The initial research question was pursued by document analysis and five structured interviews. As a result of that process the topic was amended and a further eleven interviews were conducted. It became apparent from these interviews that there was a broader, and more important, research question.

This thesis typifies Yin's categorisation of an 'explanatory' case study which is applicable when' the investigator has little control over events, and when the focus is on a contemporary phenomenon within some real life context' (Yin, 1989, p.13).

The literature supports case study research as a method of testing the issues covered in this thesis. Furthermore, the experiences encountered during the research are typical of those of a case study approach. It is

concluded that the case study approach is the appropriate method for this thesis.

1.6 Chapter descriptions

The following is an outline of the chapters and description of the chapters so that the reader has an appreciation of the structure of the thesis.

Chapter 1 Introduction

This provides an overview of the thesis.

Chapter 2 Taxation in Australia A Retrospective

The Australian Constitution treats taxation law differently from other laws. This chapter reviews the history of taxation in Australia to establish why that difference occurs. The review begins with the Egyptian Pharaohs, but primarily deals with English history. The purpose of the chapter is to show the importance of taxation and why any matter that is likely to have taxation implications should be carefully considered. Data was gathered from history based literature.

Chapter 3 The Definition of Taxation
A Review of the Literature

The Australian Constitution does not provide a definition of taxation. However, there have been a number of common law decisions that have considered this issue. This chapter reviews those cases. A framework for understanding of a definition of taxation is developed.

Chapter 4 The Meaning of Cost within the Definition of Taxation

The review in chapter 3 is incomplete because the definition of cost within the definition of taxation used has not been directly addressed by the Courts. This chapter reviews other areas of the law to obtain an understanding of what is a likely interpretation of the meaning of cost in relation to taxation.

Chapter 5 A Hypothetical Example

A hypothetical example is considered to determine whether it is possible that PSE revenue could be part taxation. The definition of taxation, as determined by chapters 3 and 4, is applied to the example.

Chapter 6 Sources of Data

This chapter surveys all Australian Federal PSEs to determine those which have characteristics that support the hypothesis. Effectively this is a 'sieving' process that eliminates PSEs that fail

to meet the definition of taxation, and examine further those that are not eliminated.

Chapter 7 An Analysis of Public Sector Entities

The revenues of the PSEs not eliminated in Chapter 6 are examined in detail for evidence that they meet the criteria of the definition of taxation.

Chapter 8 The Amount and the Legality of the Taxation

It was concluded that some of the revenues of the PSE which survived the testing criteria of Chapter 7 was taxation. This chapter examines each of these PSEs to determine the amount of taxation and whether it was collected illegally.

Chapter 9 Conclusions, Implications and Further Research

This chapter provides conclusions and some possible implications as a result. It also suggest areas of further research.

CHAPTER 2

TAXATION IN AUSTRALIA

A RETROSPECTIVE

2.1 Introduction

Taxation, and its legal imposition, are central issues of this thesis. The purpose of this chapter is to examine the legislative provisions relating to taxation and to survey the historical events leading to those statutory provisions.

2.2 The power to tax in Australia

The authority to tax in Australia at the federal level is contained in Section 51(ii) of the *Constitution of the Commonwealth of Australia Act 1900* (UK) (hereafter called 'the Constitution'). This sub-section provides that:

> 'The parliament shall, subject to the Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to :-
>
> ...
>
> (ii) Taxation;'

The Constitution does not, however, provide a definition of taxation[1].

Section 53 of the Constitution also makes reference to taxation. It provides that:

> 'Proposed laws, appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.
>
> The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.
>
> The Senate may not amend any proposed law so as to increase any proposed burden on the people.
>
> The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any

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1. This issue is dealt with in Chapter 3.

> items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.
>
> Except as provided by this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.'

This means that laws which propose the imposition of taxation must originate in the House of Representatives. This restriction follows the United States model[2], which was based upon the British Westminster system. In the United States today the restriction is largely ineffective (Caldwell & Lawrence, 1969, pp.420-421).

The Constitution contains a further reference to taxation. Section 55 provides that:

> 'Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.
>
> Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only,

---

2. See Galligan (1980, pp.5-9) who provides a brief summary of the matter. The dilemma for the Constitutional draftsmen was that they wanted to adopt the American bicameral governmental structure but still maintain the traditions and ideals of 'responsible' government of the United Kingdom.
The debates that led to the Federation of Australia are readily available and are called the Official Reports of the National Australasian Convention Debate. However, they are long and specific topics are difficult to locate. Of interest though are 2 papers that Sir Samuel Walker Griffith (a participant at the debates) presented in 1896 which, among other issues, refer to the issue of imposing taxation and the American system. The papers are called "Notes on Australian Federation: Its Nature and Probable Effects" and "Some Conditions of Australian Federation".

> and laws imposing duties of excise shall deal with duties of excise only.'

Therefore, it is clear that the Constitution's writers intentions were to treat laws dealing with taxation differently from other laws. The effect of the requirements is that the procedures for taxation laws are more stringent than for other laws. It could be argued, therefore, that any law which may involve taxation, should be carefully scrutinised to ensure compliance with the Constitution. A failure to follow these procedures could result in a situation where a 'non-taxation' law collected revenue for the government which was subsequently determined to be taxation. In that event, the legislation could be unconstitutional.

2.3 The origins of taxation in Australia[3]

Australia's parliamentary system was primarily based upon the English Westminster model (Snedden, 1979, pp.1-2) with some elements of the Federal system of the United States of America (Parkin & Summers, 1994, p.6). The Australian constitutional power to tax follows the Westminster model. Its origins can be traced to the English feudal system (Quick & Garron, 1901, p.550; Hulme, 1992, p.25). Therefore, Australia has inherited its philosophy and principles of taxation from England[4].

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3. The assistance of Mr. Jack Horrocks a Visiting Research Fellow of the Department of Commerce at the University of Adelaide, in the preparation of this chapter is acknowledged.

4. The following descriptions should not be taken as a complete history of all events dealing with taxation and/or parliament. The purpose is to provide an overview so that

One of the earliest records of the imposition of taxation was in Egypt around 1450BC. Tax returns from that period showing the payment of tax, and tax evasion have been found (Redford, 1987, p.4). Egypt was ruled by Pharaohs who were regarded as Gods who had divine rights to rule and impose laws, including taxation, at their discretion and pleasure. The taxes were paid *in specie* (money as a medium of exchange did not occur until approximately 1000BC) and were levied across vast areas of Asia and the Sudan (Redford, 1987, p.26). Taxes included poll taxes, livestock taxes, crop taxes, manufacturing and professional taxes (Pareti, 1965, p.204). References to the imposition of taxation can also be traced to the early days of Israel and the reigns of Saul (1050BC-1010BC), David (1010BC-970BC) and Solomon (970BC-930BC) (Cook, 1952, pp.629-630).

Britain's earliest taxation records are from the period of occupation by the Roman Empire. The Roman practice was to impose taxes on countries depending on their circumstances. The Britons did not have a large amount of cash and the Roman taxes were generally based on agricultural production and were payable in kind (Dowell, 1965, pp.3-5). The Romans withdrew from Britain in 420 leaving it weak and vulnerable.

Britain was then invaded by the Anglo-Saxons who settled over the next four centuries until 800 when recorded English history began (Hensman, 1860, p.17). The Anglo-Saxon tradition was to rule by a council called the 'witena-gemot' (wise men). When the need arose (eg a

---

the reader has an appreciation of why it is important to examine any government revenues that may be determined to be taxation.

war and an army commander was needed) the witena-gemot would elect one of its members to be king. Eventually the need for a king became permanent. On the death of the king the council had the right to elect a successor, but, they usually chose the natural heir of the dead king. The 'witena-gemot' is the first indication of the modern House of Commons. At this time the king was not the absolute ruler because he could make no law by himself (Hensman, 1860, pp.21-25).

In 1066, William of Normandy invaded and conquered England, and the 'witena-gemot' was replaced by the 'Curia-Regis'. The kings under the Normans had greater powers to enable them to keep the peace in a country inhabited by the unruly Anglo-Saxons. The 'Curia-Regis' was the king's 'assistant' (Hensman, 1860, p.40).

William the Conqueror ordered the preparation of the Domesday Book which was completed in 1086[5] (Ellis, 1973, p.4). The book is a meticulous record of all real property and possessions that resulted from the land (including livestock), in England at the time. This record was prepared because taxes being collected on property were not meeting expectations. William the Conqueror had reinstated a tax called the Danegeld. This was an occasional property based war-tax first introduced by Ethelred II in 991 and abandoned by Edward the Confessor in 1051. In 1085, the amount the Danegeld was returning was much less than anticipated because different parts of the country used different interpretations of value and property. The Domesday Book was compiled to give a solid base for calculation (Ballard, 1923, pp.6-8). The Domesday Book also allowed the Normans to identify the

---

5. Although there is some disagreement about the actual dates. See Ellis (1973, pp.3-4).

real property that belonged to Anglo Saxon leaders and barons. Some of these properties were confiscated and given to Norman knights as rewards for service in wars. It could, perhaps, be argued that this was also a form of taxation because it contributed to the cost of wars.

Other taxes were introduced during the reign of Henry II (1154-1189) including the payment of 'scutage'. Initially, this was a voluntary payment made in lieu of annual military service. Eventually, as more people exercised the option of paying scutage, its voluntary nature and the relationship between it and the non-performance of military service was forgotten. It became a form of raising revenue and was, therefore, a tax (Hensman, 1860, p.50).

The early 13th. Century saw changes to monarchical power that would be enduring. King John embarked on frequent foreign wars that cost vast sums. The King used taxation to fund the wars and 'the methods by which taxation was assessed and collected were arbitrary and extortionate; reprisals against defaulters were ruthless and brutal; for wrongs suffered there was no redress' (Davis, 1977, p.10). The King, like his predecessors, believed that he had unlimited divine power, similar to ancient Egyptian monarchs. A group of barons demanded that King John change his behaviour. The demands were rejected and the barons renounced their loyalty to the crown and effectively established their own regime. This forced the King's hand because without baronial support he was unable to collect sufficient taxes[6] to rule. The barons had control of the lands, which they either owned or which were owned by their supporters. This meant that the barons had control of the wealth.

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6. Some taxes were able to be collected. For example import or export taxes, but not taxes that affected the whole community.

King John began negotiations with them and the result was the *Magna Carta* which was sealed in June 1215[7] at Runnymeade. It marked the establishment of a new set of powers and relationships that would be used to govern England.

One of the provisions of the *Magna Carta* created a 'council' of barons. The translated[8] version reads as follows:

> 'SINCE WE HAVE GRANTED ALL THESE THINGS for God, for the better ordering of our kingdom, and to allay the discord that has arisen between us and our barons, and since we desire that they shall be enjoyed in their entirety, with lasting strength, for ever, we give and grant to the barons the following security:
> The barons shall elect twenty-five of their number to keep, and cause to be observed with all their might, the peace and liberties granted and confirmed to them by this charter.
> ...
> In the event of disagreement among the twenty-five barons on any matter referred to them for decision, the verdict of the majority present shall have the same validity as a unanimous verdict of the whole twenty-five, whether these were all present or some of those summoned were unwilling or unable to appear.' (Davis, 1977, pp.31-32)

This council was the beginning of the Westminster parliamentary system (Lyon, 1980, pp.8-7). The *Magna Carta* provided the first delegation of regal authority and power.

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7. There is some conjecture over the actual date. The 19th. and 15th. are both referred to.

8. The original version was in Latin.

One clause of the *Magna Carta* provides as follows:

> 'No 'scutage' or 'aid'[9] may be levied in our kingdom without its general consent...' (Davis, 1977, p.26)[10]

This meant that council consent was needed before a tax could be levied (Cook, 1952, p.633)[11]. It has been argued that the dominant reason for the Council, and the subsequent foundation of parliament, was financial and that their development was due to a desire to control the national purse (Pollard, 1920, 42).

The Church of Rome was used to getting a tenth of the taxes collected by the King. *Magna Carta* meant that the King had largely delegated his taxing powers to the Council which was much less amenable to tithing. The Pope immediately[12] excommunicated the King because his actions had serious implications for the church's finances. The excommunication caused the King to repudiate the *Magna Carta*. As a result, there was some confusion about the power to tax. This situation was resolved when King John died from dysentery in the following year.

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9. An 'aid' was also a tax the King could impose for one of three events. These were to raise money; 1) to pay for a ransom if he was captured during a war, 2) to pay for the expenses of knighting his eldest son, or 3) as a result of the marriage of his eldest daughter (Hindley, 1990, p.35).

10. This clause was not in subsequent versions and amendments.

11. The *Magna Carta* was not an unambiguous document. Debate still continues about its provisions regarding taxation. Others considered that the *Magna Carta* did not contain any provisions relating to taxation requiring council consent (Hindley, 1990, p.191; Lyon, 1980, pp.6-7). This debate, though, is unimportant here because it is the process that has led to the end result of the imposition of taxation that is of consequence to this thesis.

12. At that time information was able to be transmitted from England to Rome (and vice-versa) in a matter of days.

The next King, 9 year old Henry III, was under the baron's control and they redrafted another charter and had it executed. The new charter did not contain any reference to 'scutage' and 'aid' (Stacey, 1987, p.5) and, therefore, permitted the King to do what he pleased with taxation. However, as the King was a minor, the barons could take or use any of the royal rights (Stacey, 1987, p.251). The control by the barons ensured that the principles of the *Magna Carta* were followed, including, in particular, the involvement of the barons in decision making. When Henry III was old enough to rule he did not trust the barons, probably because he believed that they had misused their powers in the early years of his reign. The Council operated during Henry III's reign but it was frequently reformed under the King's direction. The King was often financially distressed because of wars, inherited debts and an extravagant lifestyle, which included promising generous dowries. To address these financial problems the King raised revenue from various sources, including taxation, generally with council consultation.

The title 'council' evolved into 'parliament' without proclamation (Richardson & Sayles, 1981, p.I/152), and by 1236 the term was established (Holt, 1981,p. 22). Parliament is derived from 'parlement' which is a Norman word meaning 'place of debate'.

Under Henry III's reign the development of parliament had been 'spontaneous and unconsidered' (Treharne, 1970, p.70). The composition of early parliaments, and their functions and powers, varied widely (Prestwich, 1980, p.115). However, after 1258 Henry III began to act outside the terms of the *Magna Carta* (Richardson & Sayle, 1981, p.I/172). The barons, with their appointed leader Simon de Montfort,

the Earl of Leicester, moved to reform the council. A structure, resembling Parliament today, was created. The barons wanted parliament to meet three times a year and they viewed it as a medium for dispensing justice[13] (Pollard, 1920, p.43).

The King's power had been significantly curtailed and Simon de Montfort effectively ruled the kingdom (Hensman, 1860, p.56). Eventually war broke out between the King and the barons in 1264. The Barons were victorious and Henry III lost his remaining power. During 1265, the first parliament containing representatives from cities and boroughs was called[14] and, as a result, Simon de Montfort is known as the founder of the House of Commons (Wilding & Laundy, 1961, p.575). However, on de Montfort's death in 1265, Henry III regained some power. But England had enjoyed a form of representative parliament that would prove to be enduring (Harding, 1993, p.294).

Edward I came to the throne in 1272 to begin a century of rule by the Edwards at the end of which parliament would authoritatively represent the political community (Harriss, 1981, p.29).

From 1265 to 1295 parliament met irregularly and infrequently when Edward I called it. He saw parliament as a device to meet his needs, and by the end of his reign (1272-1307) he had little regard for it (Harriss, 1981, p.30). In 1295 Edward I called a parliament, because he

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13. Justice in the sense of a laws and conditions fair and equitable to the community at large.

14. In 1254 the first representatives were 2 knights from each shire who were summoned to parliament. In 1265 they were joined by 2 citizens from each city and 2 burgesses from each borough. These representatives were elected by the communities they represented (Wilding & Laundy, 1961, p.533).

needed money (Wilding & Laundy, 1961, p.440). It met at the palace of Westminster, and this led to the use of the term the 'Westminster system of parliament'. Parliament was now fully representative of the people. This parliament was the first 'House of Commons', although it was not known by that term until 1304 (Wilding & Laundy, 1961, 441).

In 1297, the final revision of the *Magna Carta* was agreed and confirmed by Edward 1 and was placed on the Statute Rolls (Davis, 1977, p.19). The Edward I confirmation is known as the *Confirmatio Cartarum* and one of the issues in it related to taxation. The *Confirmatio Cartarum* was a result of the King arbitrarily taxing powerful citizens without referring the matter to parliament (Lyon, 1990, p.10). There was disquiet with the practice and the King agreed to the *Confirmatio Cartarum* which provided that he 'would take no aids or taxes "except by the common consent of the whole kingdom"' (Hindley, 1990, p.181). The 'whole kingdom' was interpreted as parliament and the 'common consent' was interpreted as what was later known as the House of Commons (Wilding & Laundy, 1961, p.501). However, Edward I was not content with the revision because the consequences of the clause were not what he had intended (Jennings, 1965, p.19)[15]. The *Confirmatio Cartarum* did not stop Edward's I attempts to raise revenue without parliamentary consent. He circumvented the provisions of the *Confirmatio Cartarum* by making direct arrangements with the church, individual landowners, boroughs and merchants (Jennings, 1965, p.19). But it was widely accepted that

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15. Lyon (1980, p.10) believes that this clause was not as it read in that it was restricted to mean 'no extraordinary taxation'. The inference being that extraordinary taxation could be decreed by the King and this understanding may have been a factor in the events surrounding the beginnings of the English Civil War discussed later.

parliament now had control of taxation (Wilding & Laundy, 1961, p.441).

The death of Edward I in 1307 brought Edward II to the throne for the period 1307-1327. He was generally considered to be incompetent (Prestwich, 1980, p.79). During his reign parliament expanded its control over the King (Harriss, 1981, p.31). In 1309, the Commons presented a list of grievances to the King that needed to be resolved before it would grant supply. This practice became institutionalised within the first half of that century (Wilding & Laundy, 1961, p.441). In the latter part of the King's reign, parliament became a place to voice dissatisfaction with his rule (Harriss, 1981, p.31). Finally, in 1327 parliament dismissed Edward II on numerous grounds, including breaking his coronation oath. Parliament had become very powerful.

In contrast to Edward II, Edward III was one of England's great war leaders (Prestwich, 1980, p.165). However, during Edward III's reign (1327-1377), in which there was potential and actual conflict with the French (the Hundred Years War beginning in 1337), parliament took a firm grip on power largely because the King co-operated with and relied on it.

In 1341, the parliament split into the House of Lords and the House of Commons. In 1348, the House of Commons blocked supply until its grievances had been addressed. This practice also became institutionalised (Wilding & Laundy, 1961, pp.294-295). The House of Commons, therefore, 'gradually became the initiators of legislation instead of mere petitioners' (Wilding & Laundy, 1961, p.295). Parliament was no longer an occasional forum. It was giving counsel,

attending to grievances, meeting frequently, recording its actions and, more importantly, authorising taxation and levies (Harriss, 1981, p.33). By the end of the 1300s it was accepted that parliamentary consent for taxation was necessary (Holt, 1993, p.40).

Richard II came to the throne on Edward III's death in 1377. He believed in the divinity of the monarch (Pollard, 1920, p.224) and, as a consequence, his relationship with parliament was not harmonious. He did recognise that the Commons needed to be managed (see Miller, 1970, pp. 24-26). In 1377 a Speaker was appointed for the first time (Wilding & Laundy, 1961, p.593). The role of the Speaker was as a communicator between the Commons and the monarch (Wilding & Laundy, 1961, p.591), a function that, at times, entailed a degree of risk. Richard II ruled until 1399, when parliament deposed him and asserted its power.

Henry IV was installed as King by the parliament. He ruled until 1413 and upheld the principles of parliament that had been previously determined (Wilding & Laundy, 1961, p.289). His successors maintained the principles of parliament, but it experienced more strife (Wilding & Laundy, 1961, p.289), because of a power struggle between the Lords and the Commons (see Fryde, 1970, pp.5-10).

In Edward IV's reign (1461-1483) parliament sat infrequently but it 'was universally recognised as part of the machinery of government, with definite powers, composition and procedure' (Myers, 1981, p.144). Edward IV evaded parliament's power over taxation by seeking money in the form of benevolences and gifts from his subjects. In a sense this

was an admission of parliaments control over taxation (Myers, 1981, pp.146 & 147).

In the time of the Tudors (1485-1603) the Commons initiated only a small amount of legislation (Cam, 1970, p.182), suggesting that it had lost some of its power. Henry VII increased the security of the monarchy (Wilding & Laundy, 1961, p.289) and found ways of raising revenue without parliament's approval (Myers, 1981, p.146). Furthermore, he called parliament only once in the last 10 years of his reign which was not helpful in ensuring an enduring parliament (Pennington, 1981, pp.187-188). Parliament granted significant lifelong revenues to the Tudor monarchs at the commencement of their reigns, and this reduced their reliance on Parliament (Roskell, 1970, p.318).In addition, Henry VII and his successor Henry VIII were both thrifty. This austerity together with the lifelong revenues granted by parliament, were sufficient for them to rule.

The transfer of powers from parliament back to the monarchy reached its climax under Henry VIII. While he operated through parliament, it was his puppet. In fact, it was probably only the Commons' taxation power that allowed parliament to survive (Graves, 1985, p.54). A number of important issues arose during Henry VIII's reign, one of which was the emergence of the House of Commons as the stronger of the two Houses (Wilding & Laundy, 1961, p.289). In 1407 a dispute had arisen between the Lords and the Commons and the King's advice was sought. The effect of his ruling was that it was the Commons who would have the last say on taxation matters, although they were required to seek the advice of the Lords. It has been suggested that the reason for Henry VIII's ruling was that he believed that he would find it easier to

control taxation if he only had to deal with the Commons. However, this did not eventuate and the Commons' taxation control remained a fundamental feature of the parliamentary system (Butt, 1989, pp.478-479)[16]. In essence the Lords had ceased to be the leaders of England, and the Commons, under the control of the King, had taken its place (Skottowe, 1895, p.36).

Another important event occurred during the reign of Henry VIII. He wanted to break from the Roman Catholic Church because it would not recognise the annulment of his marriage to Katherine of Aragon. After being refused recognition from the Lutheran Church, Henry VIII established the Church of England. It is interesting to note that the King felt the need to obtain parliamentary approval for a change. This could be viewed as casting doubt on the divinity of the monarch. Furthermore, the abolition of Catholicism prompted Henry VIII to sell the monasteries. This supplemented his income and also meant that he could continue to avoid parliament.

Mary I (Bloody Mary) reigned for a short time (1553-1558) and left a legacy of financial distress, poverty, gloom and terror for her successor (Wilding & Laundy, 1961, p.193).

Elizabeth I (1558-1603) immediately began to improve the pitiful state of England that she inherited. The Commons was an independent and forceful body and it jealously protected its privileges. Parliament's main role at this stage was the imposition of taxation. There were numerous disputes between the Commons and the Queen. However, she took a

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16. There were other challenges by the Lords over the taxation powers, but the Common's authority was never really in jeopardy (Cannon, 1994, p.98).

CHAPTER 3

THE DEFINITION OF TAXATION:

A REVIEW OF THE LITERATURE

3.1 Introduction

In Chapter 2 it was noted that there is no Constitutional definition of taxation. The purpose of this chapter is to review the literature to determine a definition of taxation for use in this thesis. This review primarily involves an examination of relevant High Court decisions.

3.2 Taxation

The definition of taxation by Latham CJ in *Matthews v Chicory Marketing Board*[1] is now widely accepted as a reasonable interpretation

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1. (1938) 60 CLR 263.

(Hanks, 1990, p.475). According to Latham CJ 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.'[2]

It should be noted, however, that in *Air Caledonie International and Others v Commonwealth of Australia*[3] the High Court suggested that this definition should not be seen as 'exhaustive'[4]. This has been reaffirmed by the Court[5].

Latham's definition contains four criteria, all of which must be satisfied for a payment to the government to constitute a tax. The four criteria are;

1) a compulsory exaction of money;

2) by a public authority for public purposes;

3) enforceable by law; and

4) is not a payment for services rendered.

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2. Ibid at 276. This definition of taxation will often be referred to as 'Latham's definition' in this thesis.

3. (1988) 82 ALR 385.

4. Ibid at 389.

5. For example see *Australian Tape Manufacturers Association Ltd and Others v Commonwealth of Australia* (1993) 112 ALR 53 at 58.

There are complex relationships between some of the criteria and they will be examined in this chapter.

3.2.1 'a compulsory exaction of money'

The first criterion for a payment to government to be taxation is that it must be 'a compulsory exaction of money'. A literal interpretation of this criterion is that in a given situation, a taxpayer has no option but to pay the money. If there is no compulsion, then there is no tax.

The case of *Attorney-General for New South Wales v Homebush Flour Mills Limited*[6] elaborates this simple interpretation. The case concerned New South Wales legislation that required **all** milled flour to be sold to that State government for £8\10\00 per ton. The miller then had the first option to repurchase the flour from the Government for £10\00\00 per ton. The flour, at all times, remained in the possession of and at the risk and expense of the miller. The defendants[7], who were flour millers, argued that the difference in price, namely £1\10\00 per ton, was a tax and not a levy as the government called it. Counsel for the government argued that there was no compulsion to pay the difference as the miller did not have to repurchase the flour from the government. Dixon J

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6. (1937) 56 CLR 390.

7. 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. plaintiff) and *Homebush Flour Mills Limited* is the defendant.

considered the options of the flour miller after the flour was vested in the government. He suggested that they were:

1) to accept the government requirements and to repurchase the flour at the higher price;

2) to stop milling and retire from the business; or

3) to keep milling, but not repurchase flour from the government. The difficulty with this option was that the miller would need sufficient storage facilities for the milled flour, together with finance to fund the storage. This option would also suspend the miller's ordinary business of trading in flour and flour products.

Dixon J stated:

> 'It is reasonably clear, therefore, that the desired end is sale by the miller and payment of the subvention. Thus, although it is true that the statute does not impose an ordinary legal duty to pay enforceable by judicial process, 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.'[8]

Dixon J further stated:

> 'When the desired contributions are obtained not by direct command but by exposing the intended contributor, if he does not pay, to worse

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8. Ibid at 412.

> burdens or consequences which he will naturally seek to avoid, the payment becomes an exaction.'[9]

The millers' argument that the price differential was a tax was successful because, whilst the company did have options, they were so unpalatable or detrimental that they were unrealistic. The only reasonable course of action open to a miller was to repurchase the flour from the government. As the repurchase price was higher than that originally received, the difference was a 'compulsory exaction of money'. Therefore, it is concluded that 'a compulsory exaction of money' means that a payee has no choice other than to pay. It follows that the price charged by a government monopoly for an essential service is also a 'compulsory exaction of money'. The consumer has no option but to pay the price. It also means that government cannot raise revenue which is a tax under the guise of pricing.

In *The Commonwealth and The Central Wool Committee v The Colonial Combing, Spinning and Weaving Company Limited*[10], a case prior to Latham's definition, the High Court looked beyond the legal terms of an arrangement. Regulations required that any business dealing with the manufacture and trading of sheepskin and wool products must enter into one of three agreements with the government. These arrangements were:

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9. Ibid at 413.

10. (1922) 31 CLR 421.

1) that the government would allow the business to produce and trade in those commodities, but that a licence fee based upon a share of the businesses profits would be paid to the government;

2) that the business produce and trade in those commodities as an agent of the government for which it would receive annual compensation; and

3) a combination of the above two agreements.

The Defendant company was in the business of manufacturing and selling wool tops. It argued that the agreements were a tax.

Isaacs J agreed:

> '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 *Buckmaster* 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.

It was an early expedient on the part of the Crown in its claim to regulate trade to assert a prerogative "to make agreements, apart from Parliament, with the merchants" as a device to cover what was really taxation (*Anson on the Law and Custom of the Constitution*, 4th ed., vol.i., "Parliament," at pp. 334-335). It was also an early expedient to endeavour to escape from the illegality of a direct levy forced "gifts, loans and benevolences," all of which were prayed against by the *Petition of Right* and are included in the broad prohibitory declaration of the *Bill of Rights*. A "loan" implies an agreement to repay, and the term is therefore a "spacious appellation" (*Taswell-Langmead's Constitutional History*, 8th ed., p. 340). A "voluntary benevolence" is still more a spacious demand (*ibid.*, p. 357). The Wilts Case (1) was a case of "agreement"; and, as the House of Lords definitely decides, under whatever name or by whatever device it is claimed, the proper name of the compulsive demand is, as Lord *Buckmaster* says, a "tax," and, as Lord *Wrenbury* says, "taxation".'[11]

Accordingly, it was decided that the arrangements imposed by the Commonwealth were taxation because the payment was compelled. The High Court went behind the facade of the arrangements and the semantics to determine the reality of the situation. As Isaccs J commented, it does not matter what you call it, it will not change its nature.

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11. Ibid at 444-445.

A more recent case also addressed this criterion. In *The General Practitioners Society in Australia and Others v The Commonwealth of Australia and Others*[12] the plaintiffs brought an action in respect of the introduction of a $10 government fee for medical practitioners who also wanted to practice as pathology practitioners. One of the plaintiffs arguments was that the fee was a tax because medical practitioners were effectively forced to register as pathology practitioners so that they could properly attend to their patients' needs. The Court rejected the argument that the fee was a tax on the grounds other than 'compulsory exaction'. Although, in his judgment Gibbs J said:

> '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 '[13]

The Court, therefore, reaffirmed its previous findings that the compulsion does not necessarily have to be legal, but may be one of necessity or practicality.

In relation to PSEs, it can be concluded that the term 'a compulsory exaction of money' has a number of related aspects. The first relates to

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12. (1980) 145 CLR 532.

13 Ibid at 561

the word 'compulsory' which means that the activities[14] being provided to the consumer in exchange for the payment of money are essential. They must be acquired. In addition, these activities must be supplied by a government monopoly. Without a monopoly there would be choice and a consumer would not then be compelled to utilise the activities of the PSE. Therefore, if the activities are essential and they are only available from the PSE, then the payment cannot be avoided. It is 'a compulsory exaction of money'.

Therefore, in the case of a PSE there are three conditions that need to be satisfied to prove that a payment is 'a compulsory exaction of money'. They are;

1) that the activities provided by a PSE are essential to the community; and

2) that the PSE operates a monopoly; and

3) that the PSE receives revenue from the provision of those activities.

Examples where these conditions may be present include payments to PSEs that provide electricity, water, telephone and public transport activities.

14. The use of the word 'activity' is intentional. A preferable word is the general term 'service', however, in the context of the definition of taxation, 'service' takes on a specific meaning (as is shown later).

It is concluded that if these three conditions are satisfied then the first criterion of taxation is met and the payments are 'a compulsory exaction of money'.

3.2.2 'by a public authority for public purposes'

This is the second criterion of the definition of taxation. It can be divided into two parts - 'public authority' and 'for public purposes'.

3.2.2.1 'public authority'

In *The Vacuum Oil Company Proprietary Limited v The State of Queensland and Others*[15] the plaintiffs argued that a law introduced by the Queensland government was invalid. The Queensland government wanted to encourage the manufacture of power alcohol. It required all suppliers of petrol to purchase power alcohol from the manufacturers. The required quantities were based on the amount of petrol supplied. The government determined the price of the power alcohol. In arriving at a decision Dixon J considered whether the imposition was a tax. He said:

> 'It is not a liability to the State, or to any public authority, or to any definite body or person authorised by law to demand or receive it. The liability to make the payment is not imposed by the enactment itself, but arises only when the suppliers of petrol proceed to fulfil

15. (1934) 51 CLR 108.

> the requirements of the enactment and purchase power alcohol; and then liability arises exclusively out of the contract for sale.'[16]

Even though a government may require a payment, the Court decided that the money must go to a public authority for it to be considered a tax. In this case the money went to the supplier of power alcohol, which was not considered to be a 'public authority', and the payment was not, therefore, a tax.

The phrase 'public authority' is often used in Australian statutes[17] but is seldom defined. One of the first cases to consider the general definition of 'public authority' was *Renmark Hotel Incorporated v Federal Commissioner of Taxation*[18]. The appellant was a country hotel which operated for the benefit of the community rather than for the profit of private owners. It argued that it was a public authority and was exempt from income tax pursuant to Section 23(d) of the *Income Tax Assessment Act 1936* (Cth). That section provides that revenue is exempt from income tax if it is 'the revenue of ... a public authority constituted under any Act or State Act'. The High Court held that the Hotel was not a public authority.

Rich J said:

> 'The words 'public authority' are in frequent use, but they do not appear to have been the subject of any clear definition. It is an expression used

16. Ibid at 125.

17. See pp.169-171 of Butterworths *Australian Legal Words and Phrases* (1993) for a list of those statutes.

18. (1949) 79 CLR 10.

> as a very general designation of a diversified class of bodies concerned in carrying out public functions. We speak of a highway authority, a sanitary authority, a water supply authority, a lighting authority, a harbour authority, a tramway authority, a transport authority or a railway authority, and in relation to railways or tramways where a different body is charged with construction we speak of construction authority. Without much consideration of what common characteristics all these possess or how much further the expression will go, we speak of public authorities to embrace these and many other bodies carrying on public functions.'[19]

He continued that:

> 'The characteristics of a public authority seem to be that it should carry on some undertaking of a public nature for the benefit of the community or of some section or geographical division of the community and that it should have some governmental authority to do so. In s. 23(*d*) it is made clear that it must be constituted under a State Act. Coercive powers over the individual are given to many governmental authorities which could be called public authorities, but it is not an essential part of a conception of a public authority that it should have coercive powers, whether of an administrative or a legislative character. It may, however, be an essential characteristic of the conception that it should have exceptional powers of authority, for instance a tramway board or trust has exceptional authority of taking its trams down a public street. A water authority may lay its water mains, a lighting authority may do the like. Some exceptional powers of doing what an ordinary private individual

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19. Ibid at 16.

may not do are generally found in any body which we would describe as a public authority. The words "public utility" have a wider significance, embracing public utilities carried on for profit by private enterprise. No one would describe as a public authority an electric lighting company which had obtained statutory powers but possessed a share capital issued to shareholders and which carried on for profit, but we might call it a public utility.'[20]

Rich's J comments indicate two conditions that need to be satisfied for an organisation to be a 'public authority'. The first is that it is owned by the government, and the second that it has powers to do what an individual cannot do. He determined that an organisation that has private shareholders[21] cannot be a 'public authority'. This suggests that a partly privatised PSE would not be a 'public authority'.

There are number of other cases that help determine what are 'public authorities'.

In *Bryce v Curtis*[22] the appellant had been convicted of obtaining improper credit from the Commonwealth Trading Bank, which at the time was not listed on the Stock Exchange. The section of legislation, under which the appellant was convicted, related to an offence against 'public authorities'. The appellant argued that the bank was not a public authority, and that the conviction was in error. The appeal was

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20. Ibid at 18.

21 His Honour did not intimate a level of private ownership.

22. (1983) 51 ALR 73.

dismissed and it was held that the Bank was a public authority because it was carrying on the business of government.[23]

In *The Queen v Humby Ex parte Rooney*[24], the Master of The Supreme Court of South Australia required the applicant to make maintenance payments for his children to the Children's Welfare and Public Relief Board in Adelaide. The legislation empowering the Order was a Commonwealth Act that allowed a Court to direct payments to such persons or a public authority as the Court specified. It was argued that the Board was not a public authority because it was a State Board, whereas the enabling legislation was Federal. The application was dismissed. Stephen J said:

> 'As a matter of construction "public authority" ... does, I think, aptly describe both the original Board and its successor, the Department of Community Welfare. That each is a public authority in the ordinary sense of the word is not, I think, disputed: what is said is that ...(it)... should be interpreted as referring only to Commonwealth public authorities and not to public authorities of a State. It was said by counsel for the applicant that the matter was essentially one of first impression; my first and remaining impression is that "public authority" ... includes public authorities of a State. The ordinary meaning of the term in itself justifies no limitation to Commonwealth instrumentalities.'[25]

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23. *R v Lockett* (1979) 27 ALR 444 is a similar case.

24. (1973) 129 CLR 231.

25. Ibid at 245.

This means that government Boards are 'public authorities' and that there is no distinction between those of the Commonwealth and those of the States.

A case similar to that of the *Renmark Hotel Incorporated* is *The West Australia Turf Club v The Commissioner of Taxation of The Commonwealth of Australia*[26]. The plaintiff was an unincorporated members' club which effectively had control of horse racing meetings in Western Australia under the *Western Australia Turf Club Act 1892*. This allowed the club to operate race meetings, to provide betting facilities and to make by-laws. Crown land was vested in the club on condition that it held race meetings on it and admitted spectators for a fee. Further legislation in *The Racing Restriction Act 1917* provided that no horse race for prize money could be held without the club's consent. The club derived no income from such consents or its law making powers. Income was derived from gate takings, on course facilities etc.. Members were not entitled to any profits and the profits were channelled back into the club.

The club believed that it was not liable to pay income tax because it was a public authority and its revenue was therefore exempted under Section 23(d) of the *Income Tax Assessment Act 1936* (Cth)[27].

The High Court decided that the club was not a 'public authority', but it did not do so unanimously, and the majority did not use the same reasoning.

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26. (1978) 19 ALR 167.

27. The same exemption sought by the *Renmark Hotel Incorporated*.

Stephen J said:

> 'In the case of s 23(d), the possession of some statutory duties or powers is not, I think, enough to attract the income of a body the exemption from tax which the paragraph confers unless, upon examination of all its characteristics, the body can be seen in general to conform to the common understanding of a public authority.'[28]

Barwick CJ and Jacobs J agreed with Stephen J.

Aicken J agreed with the majority but with a different perspective. He said:

> 'It is thus apparent that the club does have certain exceptional powers to do what an ordinary private individual, or group of individuals, may not do, some of which at least, if not all, may properly be described as statutory duties and the exercise of public functions. It does, however, have other powers and it exercises other functions, in that it is a members' club and is an unincorporated association such as is commonly the mode of organization of members' clubs.'[29]

> 'The situation is accordingly one in which the club has a number of functions and activities which are properly described as being those of a public authority and it acts as such in exercising those powers performing those functions. In addition it is an ordinary members' club

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28. Ibid at 173.

29. Ibid at 186.

established as such and carrying on what may be properly described as the ordinary functions and activities of a racing club and in the capacity the club and its individual members are not performing any function appropriate to a public authority.'[30]

'The present case, however, the public functions of the club are neither the principal nor substantially the principal functions of the club. They are incidental to the private functions rather than the reverse. For that reason the club itself cannot be regarded as a public authority ...'[31]

Aicken J is suggesting that if an unincorporated body had the appropriate principal functions, then it could be classified as a 'public authority'. Murphy J, the dissenting Judge, had similar views. He said:

'Parliament has chosen the club as a public instrument (even if not the only instrument) for the conduct of racing on a public racecourse, to carry out the other public functions mentioned in the 1892 Act, and to carry out the public administrative functions referred to in the Racing Restriction Act. ... Its legislative authority is, of course, delegated to it; its quasi-judicial authority derives from its by-laws and its exercise is crucial to the livelihood and reputation of those involved in the racing industry. In each case, the authority is in respect of matters affecting the public and exercisable not only against its members but against the public. As many members of the public wish to participate in the sport or industry of racing, the club enjoys considerable authority over the public.

30. Ibid at 186.

31. Ibid at 187.

> Thus, the operations of the club fall within the sphere of State action. The club is an example of governmental functions being exercised by private persons vested with public authority.'[32]

Murphy J thus argues that if a body performs a role of government, then it may be a 'public authority'. Support for this notion can also be found in *Air Caledonie International and Others v Commonwealth of Australia*[33]. This case concerned an amendment to *the Migration Act 1958* (Cth) in 1987. The Federal Government required all persons over 11 years of age entering Australia to pay a $5 fee, to cover passenger processing expenses. The fee was to be paid by the passenger to the carrying airline operator, who then remitted the money to the Commonwealth. The amendment also required the airline operator to remit the fee to the Government whether or not it was collected from the passenger. The plaintiffs claimed that the fee was a tax.

The High Court concluded that the fee was a tax and in doing so also considered if there were any circumstances that may cause it not to be a tax.

In its judgment the High Court acknowledged that the Commonwealth was a 'public authority' and further said:

> 'Thus there is no reason in principle a tax should not take a form other than the exaction of money or why the compulsory exaction of money

32. Ibid at 179-180.

33. (1988) 82 ALR 385.

> under statutory powers could not be properly seen as taxation notwithstanding that it was by a non-public authority'.[34]

The High Court argued that if money is initially received by a non-public authority, but is then compulsorily remitted to a public authority, then the payment is to a public authority.

In a later case, *Re Anti-Cancer Council of Victoria and Others: Ex parte State Public Services Federation*[35], the High Court followed the precedent in *The West Australian Turf* case. It argued that;

> 'The question whether a body is a public authority is one of fact and degree which often requires a balancing of the various features of the body concerned. In that process, it may be decisive that private individuals have a financial interest in its profits or assets, or that its public functions are merely incidental to its private pursuits. Or it may be important that its powers derive from a private or non-statutory source, although that consideration is not necessarily decisive.'[36]

Further support for the broadening of what is a 'public authority' can also be found in *Australian Tape Manufacturers Association Ltd and Others v Commonwealth of Australia*[37]. In this case, the defendant government had introduced legislation that required a vendor to pay a "royalty" on each blank tape when it is first sold, let for hire or

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34. Ibid at 389.

35. (1992) 109 ALR 240.

36. Ibid at 244.

37. (1993) 112 ALR 53.

otherwise distributed in Australia. The money raised was paid to a collecting society approved by the Attorney-General and was then to be distributed to artists who had registered under the scheme. The purpose of the legislation was to reimburse artists for illegal (backyard) copying of tapes for which they received no remuneration. Mason CJ, Brennan, Deane and Gaudron JJ delivered a joint judgment, part of which said:

> 'It would seem to be a remarkable consequence if a pecuniary levy imposed for public purposes by a non-public authority acting pursuant to a statutory authority falls outside the concept of a tax simply because the authority which imposes the levy is not a public authority, when the amount of the levy is to be expended on public purposes, more particularly, if those purposes are Commonwealth purposes. It is scarcely to be contemplated that the character of the impost as a tax depends upon whether the authority is a public authority, unless it be a case in which the character of the authority will be relevant and influential in deciding whether the purposes on which the moneys raised are to be expended are themselves public. Of course, it is a misnomer to describe an authority as non-public when one of its functions is to levy, demand or receive exactions to be expended on public purposes. To that extent, at least, the authority should be regarded as a public authority. But the better view is that it is not essential to the concept of a tax that the exaction should be by a public authority.'[38]

This judgement has relied upon Latham's definition and concluded that the authority was a 'public authority'. It does question the requirement

38. Ibid at 59

that 'the exaction should be by a public authority' for the payment to be a tax. It does not, however, reject the criterion. Of more importance, the judgement does not follow the precedent set by Rich J in *Renmark Hotel Incorporated v Federal Commissioner of Taxation*. In that judgement, Rich J specified public ownership as a crucial characteristic of a public authority. The judgment of Mason CJ, *et al* includes no such limitation. Public ownership is not essential for the existence of a public authority.

It should be noted that the rejection of a requirement for public ownership and the suggestion that the exactment of money by a public authority may not be essential, significantly widens the range of payments which may be classified as taxation. This thesis will follow a conservative approach and require that the exaction be by a public authority for a payment to government to be classified as taxation.

The rejection of a requirement for public ownership raises some interesting issues. In Australia, water supplies, electricity supplies, public transport services, telecommunication activities and many other activities have operated directly under the auspices of government owned entities and are clearly 'public authorities'. However, some governments are now privatising entities (eg the Victorian government and Melbourne Water, South Australia and the Engineering and Water Supply Department). The judgement of Mason CJ *et al* in *Australian Tape Manufacturers Association Ltd and Others v Commonwealth of Australia* suggest that these privatised entities remain 'public authorities' notwithstanding their non-government ownership.

These cases address particular situations and do not provide a general definition or a set of guidelines to assist in identifying a public

authority. However, in *FC of T v Bank of Western Australia; FC of T v State Bank of New South Wales Limited*[39] this issue was addressed. This case relates to sales tax legislation. The law provides, *inter-alia*, that an 'authority' is exempt from certain sales taxes. The defendants were claiming that they were exempt 'authorities'. Hill J said the following:

> 'Most of the cases have considered the meaning of the word "authority" in the context of the expression "public authority". It is difficult, however, to see that the addition of the word "public" significantly alters the meaning of the word "authority", particularly where it is used, as in the present context, in relation to governmental authorities. To the extent that the word "public" does effect the meaning of the word "authority" it can only be in the emphasis upon the public character of the body, or the public nature of the activity with which the body is concerned rather than the intrinsic characteristics of the body itself.
>
> 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.'[40]

Hill J then briefly considered the decisions of some other cases. His Honour said:

> 'A number of propositions can be derived from the cases.
>
> 1. A question whether a particular entity is an authority will be a question of fact and degree dependant upon all the circumstances of

39. 96 ATC 4009.

40. Ibid at 4026.

the case: *Western Australian Turf Club* per Stephen J with whom Barwick CJ agreed at ATC 4134; CLR 290. No one factor will be determinative, rather there will be a "range of considerations": the *Fruit Marketing* case at 580.

2. A private body, corporate or unincorporated, established for profit will not be an authority: *Renmark Hotel* at ATD 429; CLR 17 per Rich, *Silverton Tramway* per Dixon CJ at ATD 297; CLR 566.

3. Incorporation by legislation is not necessary before a body may be classified as an authority: *Renmark Hotel* per Rich J at ATD 430; CLR 19, *Western Australian Turf Club* at ATC 4135; CLR 293.

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: the *Fruit Marketing* case at 580.

5. The body in question must perform a traditional or inalienable function of government and have governmental authority for so doing: *Renmark Hotel* at ATD 428; CLR 16 per Rich J, *General Steel* per Barwick CJ at 134, *Anti-Cancer Council* case at 450-451 per Mason CJ, Brennan and Gaudron JJ.

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: *Renmark Hotel* per Rich J at ATD 430, CLR 18. 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: *Western Australia Turf Club* per Stephen J at ATC 4137, CLR 297.

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: *Silverton Tramway* per Dixon CJ at ATD 297 and 298: CLR 565 and 567. The central concept is the ability to exercise power or command: the *Fruit Marketing* case per Gibbs J at 580.

Left open by Rich in the *Renmark Hotel* case is the question whether it is necessary before a person or body be found to be an authority that he, she or it have exceptional powers or authority. The proposition that possession of exceptional power will not necessitate the conclusion that a body is an authority can be seen to have been decided in the *Silverton Tramway* case. In *Renmark Hotels*, Rich J said (at ATD 430, CLR 18):

> "... for instance, a tramway board or trust has the exceptional authority of taking its trams down a public street. A water authority may lay its water mains, a lighting authority may do the like.. Some exceptional powers of doing what an ordinary private individual may not are generally found in any body which we could escribe as a public authority."

The view of Latham CJ in the Full Court in *Renmark Hotels* that :

> "the appellant company is not given any power or authority by law in the form of a State statute to do any acts in relation to the public which otherwise would be beyond its power or unauthorised"

is clearly to the same effect (at ATD 108, CLR 23). Aicken J was of the view in *Western Australian Turf Club* (at ATC 4145; CLR 311) that there was a need for "exceptional power or authority" and suggested that this was in accord with the cases. It must be said that there is not much discussion of the matter in the cases, but I am of the view that there is

such a requirement and that it flows out of the word "authority" itself, which suggests that the body is able to exercise command or authority, something which a mere member of the public can not do in a public sense.

This view finds support as well in the *Fruit Marketing* case, where the exceptional powers conferred upon the body in that case led to the conclusion that it was an :"authority" and in the joint judgment of Mason CJ, Brennan and Gaudron JJ in the *Anti-Cancer Council* case at 450 where the question of exceptional power or authority is mentioned in the context of a test which would need to be applied if it had been necessary to decide whether the Anti-Cancer council was a public authority.'[41]

The *Anti-Cancer Council* case referred to is *Re Anti-Cancer Council of Victoria and Others; Ex Parte The State Public Services Federation*[42].

'The Anti-Cancer Council of Victoria was established by the Cancer Act 1958 (Vict.). Its objects included the co-ordination of activities relating to research with respect to cancer and allied conditions, the promotion and subsidizing of that research, the provision of educational programmes relating to the preservation, detection, treatment and management of cancer and allied conditions, and the provision of services for those suffering from those conditions. The act established various committees of the Council, specified the manner in which they were to be constituted, and provided for them to exercise various powers and

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41. Ibid 4026-4027.

42. (1992) 175 CLR 442.

> functions with respect to the Council's affairs. Through the committees the Council engaged in various activities including the organization of the Victorian anti-smoking Programme. The Council also maintained the Victorian Cancer Register.'[43]

In determining that The Anti-Cancer Council was a 'public authority' the joint judgment of Mason CJ, Brennan and Gaudron JJ provided as follows:

> 'Notwithstanding that the maintenance of the Cancer Register does not constitute the Council a State instrumentality, its activities in that regard may fairly be viewed as a public service. that and other activities, such as the anti-smoking programme, are directed to important aspects of public health. The Council's objects are designed to promote the interests of the public. And the act governs its affairs in a way that ensures a large measure of public accountability. Its existence and powers derive from an Act of Parliament which governs its membership and the composition of its committees. Some members of the Council and some members of its committees are members ex officio because of the public positions which they hold (s. (91)(a)) and others are appointed by the Governor in Council as representatives of particular sections of the public (s. 6(1)(b)) or on the nomination (s. 6(1)(d)) or recommendation of the Minister of Health (s. 6(1)(d)). In our view, these features indicate that the Council has a public aspect sufficient to constitute it a corporation of the kind referred to in r. 3(G).'[44]

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43. Ibid 442.

44. Ibid 451.

There is, as yet, no general or universal set of conditions which must be satisfied for an organisation to be classified as a 'public authority'. The Court has said that whether an organisation is a 'public authority' is a matter of fact and degree. In this thesis, therefore, to conclude that a PSE is a 'public authority' it must satisfy all the requirements which have, in various cases, been determined by the Courts. There must be an affirmative answer to all of the following questions:

1) Is the PSE wholly owned by the government?

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

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

4) Does the PSE perform a traditional function of government.

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

3.2.2.2 'for public purposes'

The second part of the second criterion of tax relates to the use made of money received. To be a tax, a payment to the government must be used 'for public purposes'.

In *Harper v The State of Victoria*[45], the plaintiffs argued that a fee imposed by the government for the grading, testing and marking of all eggs was a tax. McTiernan J. said that the:

> 'fees are not devoted to building up consolidated revenue.'[46]

and that they were, therefore, not taxes. The inference is that, if money is paid into consolidated revenue it is 'for public purposes', and may satisfy one of the characteristics of a tax.

In *Air Caledonie International and Others v Commonwealth of Australia*[47] the defendants argued that a fee was to cover the costs of services provided in the processing of passengers and that it was not, therefore, 'for public purposes'. The High Court said 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**[48], 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

45. (1966) 114 CLR 361.

46. Ibid at 377.

47. (1988) 82 ALR 385.

48. Emphasis added.

> facilities for the issue of visas in overseas countries and "general administrative overheads".[49]

The High Court concluded that for a fee <u>not</u> to be regarded as 'for public purposes' it must be recorded as revenue earned from the provision of a particular service.

Although the term 'for public purposes' is not precisely defined, it is clear that it includes payments made into consolidated revenue. In *Australian Tape Manufacturers Ltd and Others v Commonwealth of Australia*[50], Mason CJ, Brennan, Deane and Gaudron JJ, whose joint judgment represented a majority decision, considered this issue and used overseas precedents in reaching their conclusions.

> 'The next question is whether it is necessary that the exaction should be for public purposes if the exaction is to be characterised as a tax. In the United States, it has been held that a tax is an exaction for the support of government. In *United States v Butler*[51], Roberts J, writing for the majority said:
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>> A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the government. The word has never been thought to connote the expropriation of money from one group for the benefit of another. We may concede that the latter sort of imposition is constitutional when imposed to effectuate regulation of a

49. Ibid at 391-392.

50. (1993) 112 ALR 53

51. (1936) 297 US 1, at 61.

> matter in which both groups are interested and in respect of which there is a power of legislative regulation. But manifestly no justification for it can be found unless as an integral part of such regulation.

Applying this principle, the majority held that the "processing and floor-stock taxes" sought to be imposed upon processors of farm products by the Agricultural Adjustment Act 1933 (US) to be expended by making payments to farmers who reduced acreage and crops were not taxes.'[52]

'Likewise, in *Massey-Ferguson Industries Ltd v Government of Saskatchewan*,[53] the Supreme Court of Canada held that levies imposed to create and maintain a compensation fund to support a limited form of insurance for farmers who purchased agricultural implements were not taxes. Laskin CJ, writing for the court, said:

> The levies, as monetary exactions, are liquidating premiums to satisfy farmers' claims ... and the policy of the Act is to relate the assessments to the compensation awards and to administrative expenses ... There is here no collection of money to go into consolidated revenue fund which is then chargeable with satisfying awards of compensation. Although the scheme is a public one, created under a public statute, its beneficiaries and obligors are circumscribed by the particular activity or enterprise in which they are engaged[54].

52. Ibid at 59.

53. (1981) 127 DLR (3d) 513.

54. Ibid at 528.

In this passage, Laskin CJ identifies two factors as indicative of absence of public purpose. One is the imposition of a levy to provide compensation for a circumscribed category of farmers. The other is that the levy was not paid into a consolidated revenue fund.

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. But neither principle nor Australian authority provides any support for the converse proposition that an exaction is not a tax if it is not to be paid into the Consolidated Revenue. The requirement imposed by s 81 of the Constitution that all revenue or moneys raised or received by the Executive Government form one Consolidated revenue fund is not, like that of its Imperial ancestor 27 Geo III c 13 (1787), was to ensure that the revenues of the Crown, including taxes, were brought together in one Consolidated revenue fund under the control of parliament. To hold that revenues or moneys that are not treated in accordance with the requirement of s 81 cannot be taxes to which s 81 applies is circuitous reasoning and deprives s 81 of any affective content.'[55]

The latter part of these comments have been interpreted to mean payment of money into Consolidated Revenue is conclusive evidence of 'for public purposes', but that money not paid into Consolidated Revenue may still be 'for public purposes' (Challis, 1994, p.541; Johnston, 1993, p.365).

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55. Ibid at 60-61.
See also *Moore and Another v The Commonwealth of Australia* (1951) 82 CLR 547 at 561 and *Dunning and Others v The Commonwealth* (1960) 104 CLR 517 at 548 for further comments in support of this conclusion.

The Court has, therefore, considered that payment of money into the consolidated revenue fund is sufficient evidence that the payment is 'for public purposes'. However, it is not exclusive. Payments which are not paid into consolidated revenue may still be 'for public purposes'. This thesis adopts a conservative approach and considers only payments into consolidated revenue as satisfying the criterion of being 'for public purposes'.

There are a number of relationships that can exist between PSEs and consolidated revenue. They are as follows.

1) Some PSEs do not charge for their services and are wholly funded from consolidated revenue. These entities make no payments into consolidated revenue and, therefore, there are no payments which could be considered as being 'for public purposes'.

2) Some PSEs have no financial transactions with consolidated revenue. They are solely dependant on fees and charges for services. As these entities make no payments into consolidated revenue, there are no payments 'for public purposes'.

3) Some PSEs receive no funding from consolidated revenue but pay money to it. These entities receive revenue from consumers external to the government. If some of that revenue is ultimately paid into consolidated revenue, then that part is 'for public purposes'.

4) Some PSEs relied, either wholly or partly, upon funds from consolidated revenue but had that funding withdrawn or reduced. The PSEs were forced to increase prices to consumers. There may be an argument that the price increases are 'for public purposes' because they allow a reduction in payments from consolidated revenue.

The situations referred in 3) and 4) above have not yet been considered by the Courts. Nevertheless, we have seen in *The Commonwealth and The Central Wool Committee v The Colonial Combing, Spinning and Weaving Company Limited*[56] that the Courts are prepared to examine the substance of transactions and events and not simply their legal form. Furthermore, the judgement in *Air Caledonie International and Others v Commonwealth of Australia*[57] suggests that a 'public authority' exists if the money finally ends up with a public authority, even though it was initially collected by a non-public authority. It would, therefore, seem reasonable to assume that moneys are 'for public purposes' if they are eventually paid into consolidated revenue, regardless of where they were initially directed.

It is concluded that the term 'public authorities' has been given a broader interpretation than Latham CJ originally intended. In general, it has been determined that a PSE is a 'public authority' if there is an affirmative answer to all of the following questions:

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56. (1922) 31 CLR 421.

57. (1988) 82 ALR 385.

1) Is the PSE wholly owned by the government?

2) Is the PSE able to exercise command or authority which an individual cannot?

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

4) Does the PSE perform a traditional function of government?

5) Does the PSE have government authority to carrying on its activities?

While there is a strong presumption that privatised former PSEs are likely to be public authorities, this thesis takes a conservative approach and will consider as public authorities only PSEs owned by the government. Furthermore, it is considered that where a public authority remits monies into consolidated revenue then that part of its revenue used to fund that remittance is 'for public purposes'.

3.2.3 'enforceable by law'

The third criterion of taxation is that the payment must be 'enforceable by law'.

This criterion has not been the subject of a considered interpretation by the Courts. This is because the cases that have been brought before the Courts, relate to specific laws which incorporate provisions that fees are legally collectable.

Where legislation does not specifically make fees of particular PSEs legally collectable it becomes necessary to interpret what 'enforceable by law' means and whether such a power exists.

Burton (1992, p.785) notes that 'triable' is a euphemism for 'legally enforceable'. He defines 'triable' (p. 497) as:

> 'actionable, cognizable, justiciable, legally enforceable.'

He defines 'justiciable' (p. 306) as:

> 'actionable, amenable to law, arguable, capable of being decided by a court, cognizable, disputable, jurisdictional, liable to prosecution, litigable, proper for judicial examination, proper for judicial review, proper to be examined in courts of justice, ripe to submit for judicial review, subject to action of court of justice, triable.'

Therefore 'enforceable by law' means that in the event of a dispute, the matter can be brought before the Courts for resolution.

A matter cannot be brought before the Courts if it is illegal in itself[58]. For example, it is not possible to sue for the non-payment of a debt if the consideration was from the sale of illegal drugs (see Graw, 1993, p.273 & p.277). On the other hand, not all matters that have a legal basis can be taken to Court. The principle of *locus standi* prevents

58. This is a general rule, although care needs to be taken when there is a mixture of legal and illegal activities. For example see *Theunnissen v Filippini (1967) vR 7.*

parties starting an action for no other reason than causing annoyance (Bowen, 1987, p.778).

The collection of fees can be brought before the Courts as a result of either statute law or common law. Statute law has precedence over common law. An action under statute law is brought as a result of the specific provisions of a particular statute. With regard to the collectability of fees the relevant statutes establishing PSEs must be examined. Common law actions arise where one party feels aggrieved as a result of the actions of another and wishes to have the matter redressed. Common law actions apply when there are no relevant statutory provisions. A common law action arising from non-payment of fees is, usually, for a breach of an implicit contract. When a PSE provides services to a consumer for a fee there is a contract, usually implied, between the two parties. If such fees remain unpaid, then the PSE could sue the consumer for non-payment.

'Enforceable by law' relates to the legal collectability of fees. If statute law applies then it is likely that the fees will be 'enforceable by law' but each case will need to be considered on its merits and facts. If statute law does not apply then common law does and an implied contract would usually exist which would allow a PSE to sue for recovery of its fees through the Courts. It is concluded, therefore, that fees and charges of PSEs are 'enforceable by law'.

3.2.4 'is not a payment for services rendered'

The fourth criterion of the definition of taxation is that the payment 'is not a payment for services rendered'. It will be noted that the first three criteria have positive attributes whereas this one is a negative.
This criterion has two components which are related. The first relates to whether a service is rendered. The second relates to the payment. There are few Court decisions on these issues and caution is needed in drawing conclusions.

3.2.4.1 whether a service is rendered

In 1933 the Victorian government enacted legislation that established a Board that controlled the milk supply. The expenses of the Board were to be met by a levy imposed on dairymen, calculated at a rate per gallon of milk. 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*[59] that the levy was an excise. The High Court argued that as an excise is a tax, it must, therefore, first consider if this levy was a tax.

Dixon J. concluded that the levy was a tax:

> '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

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59. (1949) 80 CLR 229.

> or the owner of a milk depot for which his contribution may be considered a fee or recompense.'[60]

These comments suggest that a distinct direct service must be provided to the fee-payer for the associated fee not to be considered a tax.

This issue was also considered in *Harper v The State of Victoria*[61]. 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 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.**'[62]

The Court has again emphasised that a real and tangible service must be rendered for there not to be a tax.

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60. Ibid at 258.

61. (1966) 114 CLR 361.

62. Emphasis added.
Ibid at 377.

In *Air Caledonie International and Others v Commonwealth of Australia*[63] the defendants argued that the passenger processing charge was a fee for service because it was used to cover the costs of immigration clearance and therefore was not a tax.

The High Court concluded:

> 'If the fee had been exacted only in those cases where the arriving passenger was not an Australian citizen, it would have been arguable that, regardless of whether it was a "fee for services", it was not a tax. In that event, and notwithstanding the countervailing analogy of a customs duty which is clearly a tax, there might have been some force in an argument to the effect that it was to be seen as a charge imposed upon the passenger for the privilege that the airline operator collect the fee (and pay the amount of it to the Commonwealth if it was not collected from the passenger) could convert it into a tax. However as has been seen, the fee was payable by, and in respect of, both citizens and non-citizens arriving on an international airline flight. ... The right of the Australian citizen to enter the country is not qualified by any law imposing the need to obtain a licence or "clearance" from the Executive.'[64]

> '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

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63. (1988) 82 ALR 385.

64. Ibid at 390.

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. 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'.[65]

The High Court's determination is that there must be a direct and identifiable benefit to the party making the payment for it to be a fee for service.

In *General Practitioners Society in Australia and Others v The Commonwealth of Australia and Others*[66] Gibbs J determined that there was an identifiable service being rendered for the $10 fee.

'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. The fact that it is paid into Consolidated Revenue does not prevent it from being a fee for services. The nature of such a payment is not determined by what is done after its receipt. Further, the fact that the

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65. Ibid at 391.

66. (1980) 145 CLR 532.

> service for which the fee is charged is one which the practitioner is in effect compelled to obtain does not in my opinion alter the character of the fee or convert it into a tax. An exaction may properly be characterized as a licence fee notwithstanding that the licence is one that must necessarily be obtained and the same is in my opinion true of a fee for services; fees charged for compulsory licences, or for holding plants or animals in quarantine, might provide examples.'[67]

Gibbs J concluded that an actual service was provided for the payment of the fee and that the fee was not, therefore, a tax. He also argued that in Latham's definition:

> '... the word "rendered" in this passage must have been intended to include "to be rendered".'[68]

Thus if the service is provided after the fee has been paid, the fee would not be tax.

In the case of *Northern Suburbs General Cemetery Reserve Trust v Commonwealth of Australia*[69] reference was also made to 'fee for services'. In this case the plaintiffs argued that a charge was **not** a tax. The case related to the Training Guarantee levy that was introduced by legislation in 1990. The purpose of the legislation was to require specified classes of employers to expend a certain amount of money on the training of their employees. If the amount was not spent, then the

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67. Ibid at 561-562.

68. Ibid at 561.

69. (1993) 112 ALR 87.

employer was to pay a levy to the Commonwealth equal to the amount that should have been spent in training. The legislation requiring the levy to be paid to the Commonwealth was constructed in the manner consistent with taxation legislation. After the Commonwealth received the levies they would be passed to the States who could, but were not obliged to, spend the money on employee training. Mason CJ, Deane, Toohey and Gaudron JJ delivered a joint judgment. They said:

> *'Fee for services*
> The plaintiff submits that the statutory imposition of the liability to pay the charge is not law with respect to taxation because the charge is a fee for services or at least akin to a fee for services. 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?
>
> As stated earlier , s 34(1) of the Administration Act provides that money in the fund (which may include money paid to the Commonwealth in discharge of an obligation to pay the charge) "may be applied for the purposes of ... (b) making payments under training guarantee agreements". Section 35 provides for the making of training guarantee agreements. They are "agreements ... about making payments out of the fund to [a] State or Territory and the expenditure of those payments, or amounts attributable to those payments, in relation to eligible training programs". An agreement is of no effect unless the State or Territory agrees "to ensure that the payments [under the agreement], or amounts attributable to the payments, are expended only in relation to eligible

training programs". But the Administration Act imposes no requirement that the State or Territory agree to expend the money paid under an agreement on eligible training programs for those employers who have paid money to the Commonwealth in discharge of an obligation to pay the charge. True it is that the State or Territory must agree that it "supports the Training Guarantee Scheme" and agree to distribute payments made to it under the agreement on the advice of a body containing representatives of the State or Territory, employers and trade unions. But these requirement fall a long way short of requiring either that the money received be expended on the provision of eligible training programs or that the money received be expended in relation to eligible training programs for those employers who have incurred a liability to pay the charge. 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.'[70]

Again the Court determined that there must be a direct link between the payment of money and the provision of an identifiable service for the payment not to be a tax.

70 Ibid at 92-93.

3.2.4.2 the payment

The second issue, in the fourth criterion, is the nature of the payment.

In *Harper v The State of Victoria*[71] 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...'[72]

Taylor J is referring to sub-section 41c of the *Marketing of Primary Products Act 1958* (Vict.) as amended by the *Marketing of Primary Products (Egg Marketing) Act 1965* (Vict.):

> '41c. (1) Any person who owns or is entitled to sell or dispose of any eggs may present the same to the Board or a person authorized in that behalf by the Board at a place and in such manner as the Board by notice in the *Government Gazette* directs for grading and testing and for marking and stamping so as to indicate grade and quality.
>
> ...
>
> to the Egg and Egg Pulp Marketing Board for grading testing &c. and to pay a fee determined by the Board to defray its expenses, do not in relation to eggs imported by a retailer into Victoria for sale therein from another State infringe the freedom of inter-State trade guarantee by s.92 of the Constitution of the Commonwealth.'[73]

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71. (1966) 114 CLR 361.

72. Ibid at 378.

73. Ibid at 361-362.

McTiernan J also 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.'[74]

These decisions appear to link the amount of the payment by the consumer to the specific costs, in this case determined as the historical costs, incurred by the provider.

In *General Practitioners Society in Australia and Others v The Commonwealth of Australia and Others*[75] 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. My brother Aicken, in his judgment in the present case, draws attention to the difficulties that may arise under s.55 of the Constitution when a Senate gives power to make regulations prescribing the amount of a fee but does not expressly impose any limit on the amount that may be prescribed.'[76]

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74. Ibid at 377.
75. (1980) 145 CLR 532.
76. Ibid at 562.

'The Parliament cannot possibly have intended such a result, and the maxim ut res magis valeat quam pereat[77] should be applied. In my opinion the intention that can be gleaned from the provisions of s. 16c(2) is that the amount to be prescribed shall be such that the amount payable remains a fee. In the present case no amount has been prescribed, and the amount of $10 is not so large as to give the exaction the character of a tax.'[78]

Aicken's J comments on this point are:

'The fee of $10 may perhaps in present times be regarded as almost nominal, but it may be altered by regulation, there being no expressed limit on the power to increase it.'[79]

'The absence of any limit to the fee which may be so prescribed would appear to make such an exaction possible though presumably not probable.'[80]

The Court was considering the size of the fee in relation to the service being rendered. The justices decided that the fee of $10 was minimal and, therefore, that it was less than the cost of providing the service. The Court did not consider the situation if the fee recovered was greater

77. 'ut res magis valeat quam pereat' means that the object of particular legislation, or in this case the Constitution, is achieved regardless of technicalities that might arise in an attempt to defeat its purpose. See Pearce and Geddes (1988, pp. 27-28) for a fuller interpretation.

78. Ibid at 562.

79. Ibid at 569.

80. Ibid at 569

than the cost of providing the service. It seems likely that the excess of the fee over the cost of providing the service would be a tax. Such a conclusion would, of course, require a consideration of the nature of the cost of providing the service.

The size of the fee was also considered in *Air Caledonie International and Others v Commonwealth of Australia*[81]. The joint judgment said:

> '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.'[82]

The question of what is "cost", or "value", was not considered. But the judgment suggests that "fees" should only recover the cost of the service that has been rendered.

The question of the definition of "cost" in a general sense has not been addressed by the Courts in a taxation based case and is considered in Chapter 4.

The fourth criterion of the definition of taxation is that the payment 'is not a payment for services rendered'. This is a negative criterion and can be divided into two related issues. 'For services rendered' means

81. (1988) 82 ALR 385.

82. Ibid at 389.

that a consumer must receive a specified identifiable service from the government provider, in consideration for the payment not to be a tax. The second issue relates to the 'payment'. This refers to the size of the payment and the definition of the 'cost' of providing the service. The size of the payment cannot exceed the 'cost' of providing the service for the whole payment not to be a tax. A general definition of 'cost' has not been determined by the Courts[83] although it has been suggested that cost means historical cost. There is a relationship between the 'service rendered' and the 'cost'. It is necessary to determine if an identifiable service is being rendered, and if so, what is the cost of that service.

3.3 Apportionment of payments

The cases referred to in this chapter, deal with claims that a whole payment is or is not a tax. In some circumstances, the issue may be whether a part of a payment is or is not a tax.

There are three cases that provide some assistance in this area. One is *McLaurin v Federal Commissioner of Taxation*[84] which relates to income tax legislation. The plaintiff (a taxpayer) received a valuer assessed lump sum of £12350 in settlement of a damages claim. The tax office initially assessed the taxpayer on £10640 of the settled amount. On hearing the matter, the tax commissioner submitted that the whole £12350 was income under ordinary concepts. The High Court held that none of the £12350 was assessable because it was not apportionable.

83. Chapter 4 looks at this issue.

84. (1961) 104 CLR 381.

In relation to the settlement the High Court said:

> '...it cannot be appropriate where the payment or receipt is in respect of a claim or claims for unliquidated damages only is made or accepted under a compromise which treats it as a single, undissected amount of damages. In such a case the amount must be considered as a whole:...'[85]

This case identifies the considerations in determining if monies are apportionable. In this decision, because the damages settlement could not be apportioned, it was impossible to determine the amount that represented assessable income and, therefore, no income was assessable. However, the decision did not rule out apportionment where there was a basis to do so.

The second case was *Attorney-General for New South Wales v Homebush Flour Mills Limited*[86] (already referred to in 3.2.1). The High Court decided that a certain portion of a price was a tax. In that case the tax component was easily identifiable and separable from the non-tax component. The price was, in this case, apportionable.

National Mutual Life Association of Australasia Ltd. v. Federal Commissioner of Taxation[87], also addressed the issue of apportionment. The taxpayer issued whole of life and endowment insurance policies but provided supplementary cover on those policies for premium waiver

85. Ibid at 393.

86. (1937) 56 CLR 390.

87. (1959) 7 AITR 368.

during disability, accidental death, disability payments and death cover for superannuants of other funds. The premium payable on these supplementary benefits was added to the base policy premium and the insured was billed for a single unapportioned premium.

Premiums for whole of life and endowment policies were exempt from income tax under the legislation. The taxpayer contended that the total premium, including that for the supplementary benefits, was exempt because it was a single sum. The tax office argued that the difference between the total premium and the base premium was not covered by the exemption and was therefore assessable.

In a majority decision the High Court agreed with the tax office. Windeyer J looked at the substance of the premium that was being paid.

> 'What they contended was that each of the policies in question effected not two insurances by the same instrument, but one insurance only, and that a life insurance. The presence of the special terms, it was argued, did not change the essential nature of the policies or render a description of them as life insurances inapt.
>
> Nevertheless the solution of the present question does, in my view, depend upon ascertaining what may be regarded as the characteristics of life insurance distinguishing it from other types of insurances.'[88]

88. Ibid at 377-378.

Windeyer J concluded that it was reasonable to isolate the elements of the total premium and not to regard it as one unapportionable amount. The judgment was based upon an ability to apportion the premium into components that represented the particular benefits.

It is concluded that, apportionment is possible, if there is a clear logical basis for making the apportionment. If a payment cannot be sensibly divided into component parts, then apportioning will not be approved by the Courts.

3.4 Conclusions

This chapter has reviewed the literature on a definition of taxation.

A common law definition of taxation was provided by Latham CJ in *Matthews v Chicory Marketing Board*[89]. 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'[90]. The definition comprises four criteria that must **all** be satisfied for taxation to exist. These are:

89. (1938) 60 CLR 263.

90. Ibid at 276.

1) **'a compulsory exaction of money'**

It is concluded that where a PSE operates a monopoly whose activities are essential to the community, then the fees paid for those activities are 'a compulsory exaction of money'.

2) **'by a public authority for public purposes'**

It is concluded that a PSE is a 'public authority' if there is an affirmative answer to all of the following questions:

1) Is the PSE wholly owned by the government?

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

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

4) Does the PSE perform a traditional function of government?

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

It is also concluded that for a payment to be 'for public purposes' PSE revenue must eventually be paid into consolidated revenue. The Courts have not yet considered whether revenue which is initially received by an entity and then in part passed on to consolidated revenue satisfies the 'for public purposes' criterion.

The evidence suggests that the Courts would conclude that where there is a link between the payment into consolidated revenue and the receipt of revenue by an entity, then the payment to the entity is 'for public purposes'.

3) **'enforceable by law'**

This criterion relates to the legal capacity to collect a debt. The primary evidence to support this criterion is whether there are legislative provisions for PSEs to collect the fees they have charged. If such provisions are not available then PSEs would be able to rely upon contract law to recover revenue that it has earned.

4) **'is not a payment for services rendered'**

The Courts have determined that there must be an identifiable service provided to a consumer, in exchange for the fee, for there not to be a tax. Determining whether a service is rendered is relatively straight-forward. However, in taxation based cases to date, the Courts have not been asked to determine a general definition of the "cost" of the provision of a service by a PSE.

Latham's definition has been widened by subsequent decisions. In *Air Caledonie International and Others v Commonwealth of Australia*[91] the Court said that Latham's definition should not be seen as 'exhaustive'[92].

91. (1988) 82 ALR 385.

92. Ibid at 389.

This means that Latham's definition should not be assumed to readily apply to all situations. It does not mean that his definition is obsolete, irrelevant or superseded and that it is not an appropriate definition in its own right.

Some commentators have cast aspersions at Latham's definition.

> '... so many feathers have now been plucked out of it that not much survives. Its significance now seems to be as a list of attributes which, if present, may indicate the existence of a tax. But the absence of all of the elements mentioned in the definition (apart from the need for statutory authority) do not seem to disqualify an exaction from being a tax' (Witynski, 1993, p.11).

Morabito & Barkoczy (1996, p.62) commented:

> 'The constitutional concept of a tax is clearly in a state of flux. The "classic" definition of a tax, enunciated by Latham CJ in *Chicory Marketing Board*, of a compulsory exaction of money by a public authority for public purposes, enforceable by law, is no longer regarded by the High Court as entirely satisfactory.'

These comments about the current acceptance of Latham's decision suggest that it maybe too narrow and ,therefore, losing relevance. However, the Courts have not yet rejected or replaced it. The Courts still refer to Latham's definition and use it as the most important precedent in the area. While there may be some dissatisfaction with

Latham's definition, it is still the only cohesive definition of taxation provided by the Courts.

This thesis adopts a conservative approach and will, therefore, use Latham's' definition of taxation.

CHAPTER 4

THE MEANING OF COST WITHIN THE DEFINITION OF TAXATION

4.1 Introduction

Latham's definition of taxation includes a condition that the payment to the government must not be a 'payment for services rendered'. In discussing this condition the Courts have suggested that a payment to the government is a payment for services only to the extent that it covers the cost of providing that service. Payments in excess of the cost of providing the service are not a payment for services and, providing they satisfy the other criteria of the definition of taxation, are a tax.

It is necessary, therefore, to establish what is meant by 'the cost of providing a service' and how that cost should be measured before any tax component of a payment to government can be determined. The Courts have not directly addressed this issue with respect to taxation.

The nature of cost has been widely discussed in the accounting literature[1]. In very general terms, cost is understood to mean the revenues sacrificed in order to acquire a service or an asset. The cost of providing a service is, therefore, the resources sacrificed to provide the service. This approach causes little difficulty where the sacrificed resources are cash paid contemporaneously with the service provision. For example, wages paid, the amounts paid for material embodied in goods, the amounts paid for other items such as power or water can all be measured with little difficulty and a reasonable level of objectivity.

There are differences of opinion when previously incurred cash outflows or future cash outflows are allocated to the provision of particular services. For example, interest may be paid for the finance used to operate the entity as a whole and rent may be paid for premises occupied by the entity providing the service. The cost of providing a service should include a component of the interest and rent allocated to that particular service. In many cases, this allocation procedure is arbitrary.

The cost of 'consuming' assets other than cash in the provision of services is also a matter of some disagreement in the accounting literature. The assets used in the provision of goods and services are either goods carried as inventory which are physically included in the provision of goods and services or non-current assets which are used in the provision of the goods and services. These non-current assets could include plant and equipment, furniture and fixtures and owned

1. A more detailed account of the following discussion can be obtained from Chapters 6-10 (inclusive) of Henderson, Peirson & Brown, 1992.

accommodation. In some cases it is argued that the cost of the assets consumed in providing the goods and services is the money amount actually paid when the asset was acquired. According to this view, for example, if 10 per cent of the original service potential of an asset acquired some time ago for $100 was consumed in the provision of the service, then the allocated cost of providing the service would be $10. This is the traditional approach and is usually called the 'historical cost' assumption. An alternative view is that the cost should include a portion of the current replacement cost of the asset. For example, if it would cost $120 to replace the asset referred to earlier, the allocated cost of providing the service would be $12. This approach is known as the replacement or current cost approach.

Another interpretation is that the cost of providing the service is the consequential reduction in the asset's net selling price. For example, if the asset could have been sold for $70 before providing the service and $65 after providing the service, then the cost of providing the service is $5. This approach is known as the current cash equivalent method.

Others believe that the cost of providing a service is the historical cost multiplied by an index of price level changes since the asset was acquired. This is called the current purchasing power approach.

Yet another approach is the deprival value of an asset. The deprival value of an asset is the minimum amount which would be paid to an asset's owner to compensate them for being deprived of the asset. In most cases this will be the asset's replacement cost, in a few cases it will be the asset's net selling price and in rare cases it will be the present value of the services promised by the asset if deprivation had not

occurred. Using this approach, if 10 per cent of the original service potential of an asset with a deprival value of $130 was used to provide a service. then the cost of that service would be $13,

It is fair to say that contemporary accounting uses all these different interpretations of cost. The choice may depend upon the asset, the industry or the sector. For example, the accounting standards for the public sector urge the use of deprival value while there is no such pressure in the private sector. In some cases, several interpretations are used at the same time by a single entity.

It should be noted, however, that the interpretation of cost used for accounting purposes may not be relevant for measuring the cost of providing a service from a taxation point of view. For example, suppose that the Courts determine that cost means historical cost. If in a particular case, an entity measures and reports a current cost of providing a service as $15, but the historical cost is $12, then $3 of the accounting cost would not be part of the cost of providing the service. The accounting measurement of cost is relevant only to the extent that it influences the Court's interpretation.

It is the purpose of this chapter to review court decisions where the definition of cost has been considered.

4.2 A review of court decisions

There are two types of cases which consider the nature of cost. The first is actions arising under a particular statute and the second is actions

arising under common law (eg a contract or some other relationship between two or more parties). A wide search found no Australian cases of the second type.

Actions that arise from statutes provide definitions of cost which relate exclusively to that particular statute. Latham's definition of taxation arises from a common law case and a statute based decision is not directly relevant. This does not mean that statute based definitions are not useful. There may be general comments in judgements and it may be possible to reach inferences about how a Court may decide in taxation based litigation. It may be possible to determine a Court's mood or method of analysis[2]. Six relevant cases were found[3]. They are discussed in chronological order.

Bendixen v Coleman, Scott, Croft and Others[4]

This 1943 case relates to the *National Security (Prices) Regulation* under the *National Security Act 1939-1940 (Cth)*. The plaintiff Bendixen was an officer of the Queensland Prices Branch of the Commonwealth Department of Trade and Customs who brought an action against the defendants claiming that they were charging more than the statutory price for liquor. This case was received into the High Court.

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2. For further reading on this see Chapter 1 of Vermeesch and Lindgren (1990) or Chapter 2 of Gillies (1992).

3. There are many other cases where 'cost' has been raised, but they did not provide any assistance in arriving at a definition of 'cost'.

4. (1943) 68 CLR 401.

The legislation set maximum resale prices for alcoholic beverages depending on geographical locations. These prices were set by the Commonwealth Prices Commissioner pursuant to Prices Regulation Order No. 896. Some alcoholic beverages (referred to as 'listed liquors') were given an absolute monetary resale price. For example a bottle of imported whisky could not be sold for more than 24 shillings. Other prices were set by reference to Clause 4 of the above Order which provided as follows:

> 'I [*the Commissioner of Prices*][5] fix and declare the maximum price at which spiritous liquors not specified in the aforesaid price list (hereinafter referred to as 'non-listed liquors) may be sold by retail in the Rockhampton area to be the cost of such non-listed liquors or the ingredients thereof plus 25 per cent of that cost.'[6]

The defendants argued that the term 'cost' was so 'vague or uncertain' that it was incapable of being defined. If their argument was successful, then it would mean that the clause had no effect and they could avoid a conviction. It was left to the High Court to determine what was meant by cost in that circumstance.

Starke J agreed with the defendants. He said:

> '...the question is whether an order which fixes the maximum price at which unlisted liquors might be sold by retail in the Rockhampton area at the cost of such non-listed liquors or the ingredients thereof plus

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5. Inserted.

6. At 406.

twenty-five per cent of that cost is valid. The word cost, as I said in *Vardon's Case*[7], is an equivocal word. But here it is used in connection with the sale by retail of spirituous liquors in the Rockhampton area. It was conceded during the argument that cost must include not only the invoice price (which I may observe is not necessarily constant) but also the cost of transporting the liquor if not included in the invoice price. But, if so, why not all expenditure to which the retailer is put in making the liquor available for sale, e.g., interest on money borrowed to acquire the liquor or a special charge for a booth or stand on a race or other day and so forth? However, I pass this by, for the order fixes the price at "the cost of such non-listed liquors or the ingredients thereof."'[8]

The Judge referred to *Vardon's Case*, the facts of which were not dissimilar to the *Bendixen Case*. His Honour commented in *Vardon's Case*[9] as follows:

'Cost is an equivocal word and differs in meaning according to the circumstances. Thus cost to an importer is one thing, to a manufacturer another, and to a purchaser still another. Cost to the plaintiff might, I suppose, cover the cost of materials, expenditure in the course of manufacture, duties, expenses and charges of all sorts including, I should think, those charges and expenses often referred to as "overhead charges," but the notification affords no principle, standard, rule or guide whereby those who have to obey it can estimate or fix their costs,

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7. (1943) 67 CLR 434 at 448.

8. (1943) 68 CLR 401 at 421.

9. *Vardon V The Commonwealth and Others* (1943) 67 CLR 434.

> and expenditures such as wages and other charges vary from time to time, especially in time of war.'[10]

In both cases Starke J considered that the use of the word 'cost' without a specific definition was of little use. He did not attempt to define it and was uncertain what items should be included in it.

However, the remaining four judges in the *Bendixen Case* did not agree with his determination.

Latham CJ commented as follows:

> 'In the present case the term "cost" must be read in relation to the subject matter to which it applied. The terms of clause 4 show that the order is dealing with sales of liquor by retail. It provides that the price is to be the cost of the liquor plus twenty-five per cent of that cost. Is there any difficulty in ascertaining the cost of liquor to a retailer? In my opinion there is no difficulty. The only thing that has to be ascertained is what he has paid, or is liable to pay, for the liquor to the person from who he buys it. When he becomes the owner of the liquor he may transport it to a hotel in one place or to a hotel in another place. But the expenses of transport are not, in my opinion, part of the cost of the liquor - they are costs incurred after he has acquired the liquor and for the purpose of carrying on a business. The costs of carrying on the business, of handling the liquor, selling it, and providing premises in which to sell it, are not part of the cost of the liquor to the retailer. Accordingly, in my

10. Ibid at 448.

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opinion, there is no ambiguity in the word "cost" where it is used in this order.'[11]

Latham CJ has put a very narrow definition on cost while the remaining 3 judges took a wider view. Rich J said:

'In the present case "cost" is used in relation to the sale of liquor by publicans. And in this connection it means the cost of the liquor to the retailer as received by him at a place where he sells it - including price, insurance and all freight.'[12]

Rich J has included more in the definition than Latham CJ. McTiernan J commented:

'The meaning of the word "cost" may vary with the subject matter to which it relates. The question is what does the word mean in this context. In my opinion it means the sum (including of course the price) which it costs the hotelkeeper to get the liquors described in the Prices Regulation Order, including such liquors as he may use as the ingredients of a drink, into his hotel.'[13]

Furthermore, Williams J said:

'It is unfortunate that "landed cost" was not specified, as this cost is defined in the National Security (Prices) Regulations, but it is clear, to my mind, that "cost" in the order means landed cost, that is, the cost to

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11. *Bendixen V Coleman, Scott, Croft, and Others* (1943) 68 CLR 401 at 417-418.

12. At 419.

13. At 424.

> the publican, or in other words the wholesale price of the liquor plus the additional out-of-pocket expenses, if any, incurred in causing it to be transported to the licensed premises.'[14]

These judgements (except that of Starke J) agree that, in this context, cost means actual or incurred costs, which in an accounting framework is historical cost. The disagreement in these judgements is not about the definition of cost but about what items should be included in it. Williams and Rich JJ would include all costs incurred in getting the liquor to the point of sale. Latham CJ argues that these are not the costs of the liquor but expenses of running the business.

The judgement of Starke J also seems to be not concerned with the definition of cost but with what should be included in it. There is nothing in his judgement which contradicts the view that cost means historical cost in this context.

Trief and Another v Charles Parsons & Co. Pty. Ltd.[15]

This matter was heard before the Full Court of the Supreme Court of New South Wales in 1946. It also arose from the *National Security (Prices) Regulations*. It relates to clauses of Order No.1015. The relevant clauses are as follows:

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14. At 425.

15. (1946) 46 NSWSR 265.

'(2) Cost, in relation to goods sold by a manufacturer, is defined to mean "all expenses directly incurred in the manufacture of those goods, except any tax imposed by the Pay Roll Tax Act, 1941, and when any payment is specified to be made, or is made in a currency other than Australian currency, exchange at the rate current on the date on which the payment is made."

(4) "I [*the Commissioner of Prices*][16] fix and declare the maximum price or rate, as the case may be, at which any person may sell or supply any goods or services which are not substantially identical with any goods or services which he sold or supplied prior to the twelfth day of April, 1943, to be the cost of the goods or services to that person:

Provided that on application by any person the maximum price or rate at which those goods or services may be sold or supplied by that person, shall be such price or rate as is fixed by notice by the Commissioner in writing to that person."

(8) "Notwithstanding anything contained in this Order, I fix and declare the maximum price or rate at which any goods or services specified in a notice given in pursuance of this paragraph may be sold or supplied by any person to be such price or rate as is fixed by me by notice in writing to that person."'[17]

The plaintiff manufactured goods that the defendant had contracted to buy. After the goods were delivered, the defendant alleged that the

16. Inserted.

17. At 266-267.

goods were not 'substantially identical' with those that had been ordered and, as a result, no price had been fixed for them by the Prices Commissioner. Both parties looked to the above clauses to support their position. The defendants argued that the law was valid and that the plaintiff had breached the law and the contract was voidable. The plaintiffs argued that the law was not valid and that the contract for sale would stand. A part of the plaintiff's argument was that the term 'all expenses directly incurred in the manufacturing of those goods' was so vague and uncertain as to be indeterminable. Jordan CJ delivered the judgment and on this point he said:

> 'I come now to the next point, the validity of clause 4 of the order as applicable to goods sold by a manufacturer. Unless and until a price has been duly fixed for him specially he must sell them, if he sells them at all, at cost; and cost is defined to mean "all expenses directly incurred in the manufacture of those goods." It is contended that this term is too uncertain to enable those to whom it is addressed to ascertain the legal duty which it imposes upon them.
>
> All that the regulation authorises the Commissioner to do is to fix a price; and it has been pointed out that the powers which it gives "cannot be duly exercised unless a definite criterion or standard is stated, or a process of calculation is prescribed proceeding from some certain basis, and avoiding in its course all standards which are solely subjective": per *Rich* J. in *King Gee Clothing Co. Pty. Ltd. v. The Commonwealth*[18]. In the case of manufactured goods, the order gives the manufacturer no other guide to the expenses incurred in the manufacture which may be

18. (1945) ALR 397.

> included in the price than is supplied by the adverb "directly". As is pointed out by *Dixon* J. in the case just cited, the adoption in such a connection of criteria such as "direct" and "indirect" "requires dissection, allocation, estimation and perhaps apportionment, involving judgment, estimation and opinion, matters about which there can be no exactness, certainty or common agreement in result. In other words, it deserts clear objective standards capable of producing a result about which every man must agree if he knows the facts and figures, and has made his calculations correctly": *ibid*.(1)
> Applying these considerations, I am of the opinion that clause 4 of the order is invalid so far as it purports to be applicable to goods sold by a manufacturer.'[19]

A review of Rich's J determination in the *King Gee Case*, referred to by Jordan CJ. in the previous citation, reveals the following comment:

> 'But the word "cost" is not defined[20], and, as the decisions of this Court show, "cost" is a flexible conception, and the word has no fixed denotation.'[21]

The case is concerned with 'expenses' rather than 'costs'. While accountants make a careful distinction between these terms it appears as if the legislation and the judgement of Jordan CJ use the terms as if they are synonymous. For example, Jordan CJ in his judgement about 'expenses' relies upon Dixon J whose judgement is about 'cost'. Leaving

19. At 267-268.

20. This relates to the specific matter the Court was considering, the details of which are unimportant.

21. (1945) ALR 397 at 398.

aside this question of semantics, no relevant conclusions can be drawn from this case. It is concerned with 'direct expenses'. It is not clear from the judgement whether his Honour is saying that costs and/or expenses are not defined, or what should be included in them is unclear or that the measurement is subjective. However, Jordan CJ has not, apparently, overturned the clear inference in the *Bendixen Case* that cost means historical cost.

R v Hunt; Ex parte Sean Investments Pty. Ltd.[22]

This 1979 case relates to Sean Investments Pty. Ltd., an approved nursing home, which applied for an increase in the fees it charged its patients. The *National Health Act 1953* (Cth) controlled nursing homes. Section 40AA(6)(c)(i) of that Act provided as follows:

> '(i) the gross fees in respect of nursing home care of a qualified nursing home patient in the nursing home will not exceed such fees as are from time to time applicable in respect of nursing home care of the patient in accordance with such scale of fees as is determined by the Permanent Head in relation to the nursing home;'

In other words nursing homes were only able to charge fees that did not exceed those that were from time to time approved. Section 40AA(7) dealt with the approval of fees and provided as follows;

22. (1979) 25 ALR 497.

'(7) The Permanent Head shall, in determining the scale of fees in relation to a nursing home for the purposes of subparagraph (i) of paragraph (c) of the last preceding subsection, have regard to costs necessarily incurred in providing nursing home care in the nursing home.'

The nursing home applied for an increase in fees because of a rent increase imposed on it by its lessor. It argued that rent was a 'cost necessarily incurred in providing nursing home care in the nursing home'. The fee increase was refused by the authorities and the nursing home looked towards the High Court for remedy. The interest in this case relates to the phrase 'costs necessarily incurred'.

In a joint judgment, Mason J said:

'The words "costs necessarily incurred in providing nursing home care in the nursing home" mean costs which the proprietor incurs, and is obliged to incur, in the provision of the nursing home care which he is providing in his nursing home. "Necessarily" indicates a distinction between costs which are incurred voluntarily and those which are incurred compulsively because one is obliged to incur them in order to carry on the activity in question. **The payment of rent at a level higher than the prevailing rate does not of itself indicate that it is a cost unnecessarily incurred.**[23] A lessor may insist on a rent higher that the prevailing rate and, unless the lessee is willing to pay it, he will not secure possession of the premises for use as a nursing home. The liability to pay rent is then a cost necessarily incurred,

23. Emphasis added.

> notwithstanding that it may be described as excessive. But if the lessee voluntarily agrees to pay rent at a level higher than the prevailing rate because he wishes to benefit the lessor, the lessor being a relation of the lessee or a company in which he has an interest, the whole of the rent is not a cost necessarily incurred. This is because the expenditure has been incurred voluntarily and, in consequence, it lacks the required connection with the provision of nursing home care in the nursing home.'[24]

The result was that the High Court decided that Sean Investments Pty. Ltd. was entitled to a fee increase as a result of its increased rental payments. Mason J draws a distinction between costs that are compulsory, and, therefore, necessarily incurred (assuming they are *bona-fide*), and those that are voluntary or non-compulsory and are therefore not necessarily incurred.

The case throws no particular light on the issue of the general definition of cost. It is concerned with 'costs necessarily incurred' and is probably only marginally relevant to the question of taxation. It is noted, however, that there is no hint that costs are anything other than costs actually incurred or historical cost.

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24. Ibid at 503.

Maritime Services Board of New South Wales v Posiden Navigation Incorporated
Maritime Services Board of New South Wales v Liberian Cross Transport Incorporated[25]

These 1982 cases proceeded under the same action in the common-law division of the Supreme Court of New South Wales. The actions arose from work that the Maritime Board of New South Wales (the Board) performed in cleaning up water pollution caused by the defendants. The relevant legislation allowed the Board to recover the following:

> '"the total amount of ... expenses and liabilities" incurred in relation thereto from any tanker owner and, under s 8(2), may recover "all costs and expenses incurred" from any other shipowner.'[26]

In calculating the amount payable by the defendants, the Board included the amounts that it had paid to external parties and an amount which it calculated was the cost and expense of using its own personnel and equipment. The defendants argued that the Board could only claim the amounts paid to external parties because internal costs and expenses were incurred, regardless of whether there was oil pollution or not.

The Court first needed to consider the definition of 'costs and expenses'.

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25. (1982) 1 NSWLR 72.

26. Ibid at 72.

Yeldham J said:

> 'In *Simpson v Inland Revenue Commissioner* [1914] 2 KB 842, at p 845, Scrutton J described the word "expenses" as "not a term of art; it is a vague and general term". In *R v Governor and Guardians of the Poor of Kingston-on-Hull* (1953) 22 LJCL (NS) 324, where a statute concerning voting was under consideration, the words "expenses incurred" were held to be confined to moneys actually expended and not to extend to the cost of time and labour of the town clerk of the local authority which had sought recovery of such charges as "expenses incurred". So also in *Chandris v Union of India* [1956] 1 WLR 147; [1956] 1 All ER 358, where the Court of Appeal, construing the word "expense" in a charterparty, confined it to actual disbursements (contrary to the view of Devlin J: see [1955] 2 Lloyd's Rep 212 at pp 216, 217).'[27]

Yeldham J further commented that:

> 'A number of the cases cited deal with the expression "costs". In *Vardon v The Commonwealth* (1943) 67 CLR 434, at p444, Latham CJ (speaking of the term "cost") said that "it is necessarily uncertain in meaning". Rich J (at p445) said the "'Cost", not being defined, is an ambiguous and uncertain term".[28]

His Honour, therefore, dealt with 'expenses' and 'costs' as separate issues.

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27. At 84.

28. At 85.

Yeldham J found for the plaintiff and in his concluding remarks said that:

> 'The conclusions does not mean that, as Mr Rayment[29] submitted, that the Board is entitled to make a profit from its clean-up operations or to make a "commercial charge" for the work done. But it does mean that it is entitled to calculate the actual cost to it of using its own employees, including overheads and administration charges, as well as the actual cost to it of using its own plant, and any necessary overheads involved in the latter.'[30]

Yeldham's J referral to "actual" would not seem to be unintentional. There is a clear implication that he interpreted costs and expenses as actual or historical amounts paid.

Trade Practices Commission v Orlane Australia Pty. Ltd.[31]

In this 1983 case the defendant was accused of violating the *Trade Practices Act* 1974 by price fixing. Section 98(2) of the Act referred to the sale of goods at less than their cost. The Act was silent about a definition of cost. Most of the Court's conclusions in relation to the definition of cost were directly related to the *Trade Practices Act*, but one part was of a general nature and is of some assistance. Northrop J. said:

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29. Mr. Rayment represented the defendants.

30. At 91.

31. (1983) ALR 169.

> 'The act does not contain a definition of the word "cost". In the *Shorter Oxford Dictionary* the relevant meaning is stated as "That which must be given in order to acquire produce, or effect something, the price paid for a thing". In the *Macquarie Dictionary* , it is stated as "the price paid to acquire, produce, accomplish or maintain anything".'[32]

Both of the definitions referred to by his Honour, apparently with approval, suggest that cost is 'price paid'. The past tense means that it has already been paid. It is not a price which may be paid, which could be paid, or the amount which would be lost if the owner of an asset were deprived of it. Northrop J is giving strong support for the idea that, in general, cost means historical cost.

Allsands Pty. Ltd. v Shoalhaven City Council[33]

This 1993 appeal case relates to a dispute between a development company (the plaintiff) and a local government authority (ie a council) with respect to a real estate development.

A judge in an lower Court had decided that the plaintiff was to pay the following monies to the Council in respect of a proposed development:

> '21. Payment to the Council of the contributions as set out hereunder, imposed under Section 94 of the Environmental Planning and

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32. At 181.

33. (1993) 29 NSWLR 596.

Assessment Act for each newly created lot. Such contributions are to be adjusted annually, from 25 November 1991, in accordance with movements in the Sydney: All Groups: Consumer Price Index.
The contributions for January 1991 are:
(a) Sewerage Headworks Contribution $1,950 per new lot
(b) Water Headworks Contribution $1,470 per new lot
(c) Community Services $883 per new lot
(d) Upgrading of Intersection Greenwell Point Road and Old Southern Road $20 per new lot'.[34]

The Order was made pursuant to section 94 of the *Environmental Planning and Assessment Act* an abridged version of which was provided by the Court.

'(1) Subject to subsection (2), where a consent authority *(the Council)*[35] is satisfied that a development, the subject of a development application, will or is likely to require the provision of or increase the demand for public amenities and public services within the area, the consent authority may grant consent to that application subject to a condition requiring;
(a) the dedication of land free of cost;
(b) the payment of a monetary contribution, or both.

(2) A condition referred to in subsection (1) shall be imposed only -
(a) ...

34. At 599.

35. Inserted

(b) to require a reasonable dedication or contribution for the provision, extension or augmentation of the public amenities and public services mentioned in that subsection.

(2A) Subject to subsection (2B), where -

(a) a consent authority has, at any time, whether before or after the date of commencement of this subsection, provided public amenities, or public services within the area of preparation for or to facilitate the carrying out of development in the area: and

(b) development, the subject of a development application, will, if carried out, benefit from the provision of those public amenities or public services,

the consent authority may grant consent to the application subject to a condition requiring the payment of a monetary contribution towards **recoupment of the cost**[36] of providing the public amenities or public services.

(2B) A condition referred to in subsection (2A) shall, subject to any direction of the Minister under section 94A(1), be imposed only to require a reasonable contribution towards **recoupment of the cost**[37] referred to in subsection (2A).

(2C) The consent authority may accept -

(a) the dedication of land in part or full satisfaction of a condition imposed in accordance with subsection (2A); or

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36. Emphasis added.

37. Emphasis added.

(b) the provision of a material public benefit (other than the dedication of land or the payment of a monetary contribution) in part or full satisfaction of a condition imposed in accordance with subsection (1) or (2A).

(3) The consent authority shall hold any monetary contribution paid in accordance with a condition referred to in subsection (1) in trust for the purpose for which the payment was required and apply the money towards providing public amenities or public services or both within a reasonable time and in such a manner as will meet the increased demand for those amenities or services or both.

(3A) The consent authority shall apply any monetary contribution paid in accordance with a condition referred to in subsection (2A), where the whole or any part of the cost incurred in providing the public amenities or public services with respect to which the contribution is paid remains unpaid, towards repayment of that cost.

(4) Land dedicated in accordance with a condition imposed under subsection (1) or in part or full satisfaction of a condition imposed under subsection (2A) shall be made available by the consent authority for the purposes of providing public amenities or public services or both within reasonable time.

(5) Where a consent authority proposes to impose a condition in accordance with subsection (1) or (2A) in respect of development, the consent authority shall take into consideration any land or other sum of money that the applicant has elsewhere dedicated free of cost within the area or previously paid to the consent authority other than as a condition of the grant of consent under this Act or approval, consent or permission under Part 12 or Part 12A of the Local Government Act 1919 as in force at any time.

(6) Where -

(a) a condition imposed under subsection (1) or (2A) in relation to development the subject of a development application has been complied with; and

(b) a public authority would, but for this subsection, be entitled under any other Act to require, in relation to or in connection with that development, a dedication of land or payment of money in respect of the provision of public amenities or public services or both,

then, notwithstanding that other Act, compliance with the condition referred to in paragraph (a) shall be deemed to have satisfied the requirement referred to in paragraph (b) to the extent of the value (determined, if the regulations so provide, in accordance with the regulations) of the land dedicated or the amount of money paid in compliance with the condition.'[38]

The Order made by the earlier Court put a monetary amount on the term 'recoupment of cost' referred to in subsection 94(2B). The Order was to reimburse the council for the cost of the amenities that it had built many years earlier. The developer was unhappy with the Order and appealed to the Supreme Court of New South Wales. Priestley JA, who delivered the appeal judgment[39], identified as part of the problem:

'Amongst matters not spelt out by s94 as it stood after the 1985 amendments was how the term "recoupment of cost" was to be turned into cash figures in particular cases.'[40]

38. At 600-601.

39. The other 2 judges agreeing with him.

40. At 602.

In arriving at a decision on this issue His Honour said:

> 'On turning to consider the meaning of the words "cost" in the phrase "recoupment of the cost" it seems to me reasonably clear that the word must be referring to actual cost. To the practical problem objection that in regard to physical assets constructed so long ago as, for example, 1962, it may sometimes not be possible for a consent authority, in fixing contribution figures, to have access to the actual cost figures of the construction of the physical asset, I think the answer is that such a difficulty may quite properly be met by estimating the cost in 1962; I do not think the statutory language authorises estimating its current cost and depreciating it. Even if all records have disappeared, some data must exist, even if only of a fairly general kind, from which a reasonable estimation of the 1962 cost may be made.
>
> The reason for thinking that actual cost at the time of construction is referred to in the statutory phrase rather than estimated cost at some later time is that the words in s94(2A) seem to be directed towards actual cash amounts. The monetary contribution to be made by the applicant for consent is a cash amount; this of course is a fairly neutral consideration, but fits in with the cash notions carried by the words that follow it. The first of these is "recoupment", which in its context carries a strong idea of getting back something paid out. The other word, "cost" also usually carries the meaning of an amount paid out. Other meanings of the words are available in particular contexts, but there is nothing in the relevant context of the section which to me plausibly suggests anything other than the requirement of a contribution to be made by an applicant for consent "towards" (which in its context I take as meaning

> calculated by reference) the amount paid out in providing the public amenities or services. This view seems to me to be strongly supported by the way the word "cost" is used in s94(3A). The meaning of "actual cost" seems to me to be there very plain, and in my view of the relationship between subs (2A) and subs (3A), and the way they are written, I think the word "cost" should be read as having the same meaning in each subsection.
>
> ...
>
> But it is historical cost, that is, what the Council actually paid out, that the subsection is in my opinion referring to. Any estimating must be done with a view to arriving at that "cost", and it is towards that cost that payment of a monetary contribution may be required as a condition of consent.'[41]

His Honour was quite explicit that, in this case, cost meant historical cost. So emphatic was this view that he would not contemplate the use of surrogates but insisted that if the precise cost was not arrivable, then it should be estimated. His Honour found support for the historical cost interpretation of cost in the wording of the statute. He did, however, say that the word '"cost" also usually carries the meaning of an amount paid out'. This is a general statement which suggests that historical cost would likely be the preferred option in any general discussion of the definition of 'cost'.

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41. Ibid 606-607.

4.3 Conclusion

No judgement in this chapter defined cost (or expense) in a way other than 'price paid' or historical cost. In the majority of cases, this interpretation was explicit. In the other cases, the judgement was more concerned with what should be included in cost. The definition of cost did not seem to be an issue. It could perhaps be concluded that it never occurred to the judges that cost could mean anything other than the price paid. However, the *Bendixen Case*[42], Latham CJ wrote:

> 'Is there any difficulty in ascertaining cost of liquor to the retailer? In my opinion there is no difficulty. The only thing that has to be ascertained is what he has paid, or is liable to pay, for the liquor to the person from who he buys it.'[43]

The clear implication is that the definition of cost is self evident. It is the price paid (or the price which must be paid).

It may be argued that these cases were decided when, from an accounting viewpoint, historical cost was unchallenged as the asset valuation method and that other interpretations of cost did not exist. This argument cannot be sustained for the 1982, 1983 and the 1993 cases. At these dates alternative measurements were widely known, widely discussed and occasionally used in accounting practice in the private sector.

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42. *Bendixen V Coleman, Scott, Croft and Others* (1943) 68 CLR 401.

43. Ibid at 418.

It is reasonable to conclude, therefore, that the judicial interpretation of cost is historical cost.

The relevant question, of course, is whether or not the historical cost interpretation of cost is applicable in relation to taxation. Can it be concluded that the cost of providing a service is the historical cost or the price actually paid? It seems reasonable to reach that conclusion that it is historical cost for two reasons.

First, that cases considered in this chapter provide a precedent for any subsequent cases involving the definition of cost. The cases suggest that the Courts have had some difficulty in grappling with this issue. They are unlikely to depart from convenient precedents. It is possible that a Court may conclude that these cases are not relevant precedents because they were concerned with specific issues arising under specific statutes. They are not concerned with a general definition or with a specific taxation related issue. It should be noted, however, that the same conclusion about the nature of cost was reached whatever the statute being considered. There were no circumstantial variables in the definition of cost. It, therefore, seems reasonable to conclude that the Courts will follow the precedents regardless of the legislation under consideration.

The second reason is that the income tax legislation only allows the historical cost of expenses as deductions. Even where depreciation for accounting purposes is based upon something other than historical cost, only depreciation based upon historical cost is allowed for income tax purposes. The income tax authorities have resisted any attempts to depart from historical cost in calculating allowable deductions. It seems

unlikely that the authorities would relax that stance in measuring the cost of providing a service. Wherever possible, taxable income should be measured objectively. The use of a measure other than historical cost would reduce that objectivity.

Let us briefly explore the implications of these conclusions.

Suppose a PSE provides a service and sets a price to break even. Its accounts are prepared with depreciation based upon revalued assets. The situation is illustrated in the following example.

	Accounting Reports based on	
	Revalued Assets	Historical Cost
Revenue	$ 100,000	$ 100,000
Operating expenses	70,000	70,000
Depreciation	30,000[a]	20,000[b]
Profit	$ 0	$ 10,000

(a) 10% of the assets' 'value' of $300,000.

(b) 10% of the assets' historical cost of $200,000.

If the cost of providing a service is interpreted as historical cost, then the cost of providing the service is $90,000. Provided that it satisfies the other characteristics of taxation, $10,000 would not be a payment for the provision of services and would be taxation paid to the government by the consumer of the services.

It would seem commonsense to accept the most objective definition of cost, that is historical cost, for Latham's definition of taxation. This is because the criterion of 'is not a payment for services rendered' is the only aspect of the definition of taxation that controls the quantum of taxation. The other criteria do not relate to the amount of taxation that can be collected. Consequently, it would seem reasonable that the Court would accept a definition of cost that would produce a consistent interpretation and result. If the definition of cost was one that allowed the government to introduce its own quantum, for example by the application of replacement cost or current cost equivalent asset valuation methods, then it would be in a position to collect more and variable revenue and thereby circumventing the process of imposing legitimate taxation. It is likely, therefore, that the Court would use historical cost, in determining cost, within the definition of taxation.

CHAPTER 5

A HYPOTHETICAL EXAMPLE

5.1 Introduction

In earlier chapters it was established that for a payment to the government to be a tax it must satisfy Latham's definition of taxation.

In addition, it has been suggested that the cost of providing a service is the historical cost of the resources sacrificed in the provision of that service. Only payments to the government in excess of the historical cost of providing that service will satisfy the criteria that it 'is not a payment for services rendered'.

This chapter explores the possibility that payments to the government, ostensibly for the provision of services, may be taxation. The chapter will rely upon a hypothetical example.

5.2 The example

A wholly government owned PSE is the sole producer and deliverer of electricity to a community. For the year 19X1 its financial reports are as follows:

Profit & Loss Account of PSE for 19X1

Revenue from electricity sales	$1,000,000
Less Expenses	750,000
Operating profit pre tax	$ 250,000
Less income tax (30%)	75,000
Operating profit	$ 175,000
Less dividend paid	70,000
To Retained Profits	$ 105,000

Balance Sheet of PSE at 19X1 year end

Assets		
Trade Debtors		100,000
Cash		275,000
Non-Current Assets	$1,500,000	
Less Accumulated Depreciation	150,000	$1,350,000
Total Assets		$1,725,000

Liabilities	
Provision for Dividend	$ 70,000
Provision for Income Tax	75,000
Capital	
Retained Profits	105,000
Capital	1,475,000
Total Liabilities and Capital	$1,725,000

It can be seen that the PSE received revenue of $1,000,000 from the community. Of this amount $75,000 was paid to the government as income tax and another $70,000 was paid as a dividend. We are concerned with determining how much of the $1,000,000 revenue satisfies Latham's definition of taxation.

Is there a 'a compulsory exaction of money'?

The first criterion for a payment to the government to be taxation is that it must be 'a compulsory exaction of money'.

In Chapter 3 it was determined that there were three aspects to satisfying this criterion. They are as follows.

a) Does the PSE operate a monopoly?
b) Are the monopoly services that the PSE provide essential to the community?
c) Does the PSE receive revenue from those services?

These are now considered seriatim.

a) **Does the PSE operate a monopoly?**

As the PSE is the sole producer and deliverer of electricity to the community it is reasonable to conclude that it is a monopoly. There is nothing to indicate that the PSE's monopoly is protected by law, but at present, it has no competition. It could be argued that the barriers to entry to the industry are so high that the PSE is likely to be the sole supplier of electricity in the foreseeable future.

It is concluded, therefore, that the PSE is a monopoly.

b) **Are the monopoly services that the PSE provide essential to the community?**

It is possible that an individual may eschew the use of electricity, but it seems unlikely that the whole community could survive for long without a reliable source of electricity. Electricity is an integral part of modern business and society and it would generally be regarded as an essential commodity.

It is concluded, therefore, that the services provided by the PSE are essential to the community. In the short run, at least, there is no substitute.

c) **Does the PSE receive revenue from those services?**

The electricity is sold to the consumers who are billed regularly and revenue is recognised at that time. The subsequent payment of those bills by the consumers provides the PSE with cash.

As the payment to the government satisfies each issue of the criterion it is concluded that there is 'a compulsory exaction of money'.

Is the PSE 'a public authority' and can the revenue from consumers be described, in whole or in part, as being for 'for public purposes' ?

This criterion is comprised of two parts. The first is a requirement that the PSE be a 'public authority' and the second is that the payment to the PSE be for 'public purposes'. In an earlier chapter it was concluded that the existence of a public authority was indicated if:

1) the PSE was wholly owned by the government;

2) the PSE could exercise command or authority which an individual cannot;

3) the PSE provided a function or power in the public interest;

4) the PSE performed a traditional function of government; and

5) the PSE had government authority to carry on its activities?

These issues will be considered in turn.

a) **Is the PSE wholly owned by the government?**

The information provided indicates that the PSE is wholly owned by the government.

b) **Can the PSE exercise command or authority which an individual cannot?**

If it is assumed that the PSE has the normal statutory powers of a government owned electricity supplier then it would have authority which an individual would not. Examples include the erecting of electricity poles, trenching and the right of way over private property.

c) **Does the PSE provide a function in the public interest?**

It is not unreasonable to conclude that it is in the interest of the public that it is provided with an electrical supply. The production of electricity at a centralised location is probably the most efficient and economical method of supply. The electricity produced is not only essential for domestic, commercial and industrial use but is also vital for a safe community (eg hospitals and health centres, lighting, traffic management etc).

d) **Does the PSE perform a traditional function of government?**

In Australia it has been traditional for government entities to produce and supply electricity. Consequently, it can be argued that the PSE performs a traditional function of government.

e) **Does the PSE have government authority to carry on its activities?**

It is usual for governments to create PSEs that supply electricity under some form of enabling legislation. For example the *Electricity Trust of South Australia Act 1946* provides the Electricity Trust of South Australia with

statutory powers to carry on its business. It is concluded that, in this case, the requirement would be satisfied.

It is concluded, therefore, that the PSE is a 'public authority'.

The second component of the second criterion is that the payment to the PSE must be for a public purpose.

f) **Are the monies paid for public purposes?**

Of the $1,000,000 received by the PSE from the public, $145,000 is eventually paid to the government, either as income tax or as dividends. As a general rule, these payments to the government are included in consolidated revenue which means that they are for 'public purposes'. It should be noted that not all of the money received by the PSE is for 'public purposes'. Only that portion that is eventually paid into consolidated revenue is for public purposes in the context of this thesis.

The two issues relevant to the second criterion of the definition of taxation have been satisfied and, therefore, it is satisfied.

Are the revenues of the PSE 'enforceable by law'?

The existence of trade debtors on the balance sheet suggests that the PSE allows its customers to purchase electricity on credit. This would be expected because the amount of electricity purchased by a consumer can only be determined after consumption[1]. These credit transactions give rise to implicit contracts which would allow the PSE legally to pursue consumers who have not to paid their accounts. It is also possible that there is legislation which allows the PSE to pursue debtors.

It is concluded, therefore, that the collection of fees is enforceable by law and that the third criterion of the definition of taxation is satisfied.

Are any of the fees paid to the PSE 'not a payment for services rendered'?

In chapter 3 it was concluded that revenue was not a 'payment for services' if there was no clearly identifiable service provided by the PSE. It was also concluded in chapter 4, that revenue in excess of the historical cost of providing the service was not a 'payment for services'. In this example there is no doubt that the PSE provides a service. The issue is rather, how much of the revenue is a payment for the electricity and how much is in excess of the cost of providing the service.

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1. It is acknowledged that a prepayment system could operate, but the Balance Sheet shows no liability for unused portions.

There are two circumstances where prices are not set to merely recover historical costs. The first is where prices are set to cover historical cost and to provide a profit. In some cases PSEs are required by government to set prices at a level which allows the PSE to pay a dividend of x% to the government. In other words, prices are set with the intention that a profit will be made and a dividend paid to the government.

In the example if it is assumed that the expenses of $750,000 are historical costs, then the profit before tax of $250,000 represents revenue received by the PSE which is not a payment for services rendered. In these circumstances, although the $250,000 is not a payment for services rendered and, therefore, satisfies this criterion for the amount to be a tax, it may not satisfy the other criteria. If the profit of $250,000 is retained in the enterprise and is not remitted to the government, then it will not be 'for public purposes' and will not be taxation. In the example, only $145,000 of the $250,000 profit also satisfies the second criterion of being 'for public purposes'. The remaining $105,000 is retained by the PSE and does not satisfy the criterion of being 'for public purposes' and is not taxation.

The second possibility is that the reported expenses are not based on historical cost but, for example, are partly based on replacement cost. Assume that historical cost expenses were $700,000 and the reported expenses included $50,000 depreciation arising from asset revaluation. In these circumstances, revenue of $700,000 would be

sufficient to recover historical costs and $300,000 would be a payment 'not for services rendered'.

It is possible that expenses equal revenue so that no profit is reported. However, if expenses are greater than historical cost, then that excess reported expense over historical cost would satisfy the requirement that the payment be 'not for services rendered'. It cannot be concluded, therefore, that the absence of a reported profit means that all revenue is a payment of services rendered. Of course, if the payment which is 'not for services rendered' is retained in the PSE, then it will fail the criterion of being for the public purposes and not be classified as taxation.

Generally profits are necessary for the payment of income tax and dividends. While no relationship necessarily exists between operating profit and taxable income, it is not unreasonable to suggest that an organisation needs to earn revenue in excess of historical cost to pay income tax. Furthermore, dividends are only payable from profits. It is possible in a particular year that a dividend may be demanded by government in excess of reported profits to satisfy a budget consideration. The dividends in excess of profits would ordinarily come from profits retained from previous periods. This is only a timing difference. The dividends are still paid from profits.

It is concluded, therefore, that where a PSE pays income tax and/or dividends to the government, then this part of the payment to the PSE satisfies the fourth criterion of being a payment 'not for services rendered'. In the example, the PSE pays both dividends

and income tax. It can be concluded that these amounts are payments to the PSE which are 'not for services rendered'.

5.3 Conclusion

This chapter considered each of Latham's criteria for a payment to be a tax. Each criterion must be satisfied. It is concluded from this hypothetical example that it is possible for the definition of taxation to be satisfied when a monopoly PSE receives revenue from consumers for delivering a service and then remitting money to the government in the form of income tax and/or dividends. In the context of this thesis, the amount of PSE revenue that is taxation cannot exceed the amount of income tax and/or dividends that are paid to government. If the PSE pays no income tax or dividends to the government, then the revenue it receives is not 'for public purposes' and is not taxation.

The payment of a dividend or income tax to the government is a useful criteria for the initial identification of PSEs which may be collecting taxation. If no dividends or income tax are paid, then the revenues collected by the PSE cannot be taxation as they are not used for a public purpose. Of course, the payment of dividends or income tax to the government does not necessarily mean that tax has been collected by the PSE, as the revenue may fail one or more of the other criteria. The payment of dividends or income tax to the government is a necessary but not sufficient indication that revenue received by a PSE is, at least in part, taxation. Accordingly, the payment of dividends or income tax is used in the next chapter as a convenient initial sieve to identify those

PSEs which could be collecting illegal taxation and which warrant further investigation.

CHAPTER 6

SOURCES OF DATA

6.1 Introduction

This thesis has utilised and considered Latham's definition of taxation and applied it to a hypothetical PSE. It was concluded in Chapter 5 that, hypothetically at least, that some of a PSE's revenue could be classified as taxation. A testing process now begins which considers all Australian Federal government PSEs to determine whether some of their revenue is taxation and, if so, whether that tax was levied legally. The testing is a sieving process in that certain characteristics of PSEs are continually matched against specific criteria for evidence that taxation exists. PSEs who do not satisfy these criteria are progressively eliminated from further testing.

At the end of this chapter five PSEs remain and these are subjected to further and significantly more detailed testing in Chapter 7. As

discussed in Chapter 1, 1994 is used as the base year. This year is extended to 1995 and also to previous years where PSEs paid income tax and dividends. An assumption was made for practical purposes that the laws in place in 1994 applied to those other periods. Chapter 7 testing revealed that one 1994 PSE had several precursor PSEs that were no longer in existence. It was, therefore, necessary to include those PSE in the Chapter 7 testing and subsequent analysis.

6.2 Data Selection

It was ascertained that the only comprehensive collection of annual reports of Federal Government PSEs was in the library of the Australian National Audit Office (ANAO) in Canberra. Permission was obtained to use these resources and two trips were made to Canberra to gather the necessary data to test the hypothesis. The staff at the ANAO library were very helpful.

It was established that 1994 was the latest year where there was the most complete collection of annual report of PSEs and this year was therefore used as a base. After an exhaustive search 191 1994 annual reports of PSEs were located in the ANAO library.

In Chapter 3 it was shown that a critical component of taxation was that a payment to a PSE must ultimately be for 'public purposes'.

Money paid by a PSE to the government in the form of income tax or dividends is indicative that some of the PSE's revenues are for 'public purposes'. It was decided, therefore, that the payment of dividends or income tax to the government would be the initial method of choosing which PSEs were worthy of further examination. The following aspects of the Annual Reports of each of the PSEs were examined for evidence of payments of dividends and income tax to the government:

a) the profit and loss or other operating statement;
b) accounting policy notes;
c) cash flow statements; and
d) the liabilities and provisions in the balance sheet.

The results of this initial survey of the 1994 PSE Annual Reports in the ANAO library are summarised in Table 6.1.

Those PSEs that are shown in bold type are those that pay income tax and/or dividends to the government. An "N" indicates that either it was stated explicitly that there was no liability to pay income tax and/or dividends, or that there was no evidence of a liability to pay income tax and/or dividends.

Table 6.1 Results of a survey of the annual reports of PSEs

Column 1 = PSE
Column 2 = Does the PSE pay income tax? Yes or No.
Column 3 = The dollar amount of income tax payable.
Column 4 = Does the PSE pay dividends? Yes or No.
Column 5 = The dollar amount of dividends paid.

COLUMN 1	2	3	4	5
ABC	N		N	
Aboriginal Hostels Ltd.	N		N	
Abor's Benefits Trust A/c 92	N		N	
Admin Appeal Tribunal	N		N	
Dept Administrative Services				
- The Department itself	N		N	
- Asset Services	**N**		**Y**	**1,000,000**
- Aust. Construction Service	**N**		**Y**	**0**
- Aust. Govt. Analytic Labs	**N**		**Y**	**0**
- Govt. Publishing Service	**N**		**Y**	**0**
- Aust. Property Group	**N**		**Y**	**0**
- Aust. Surv. & Land Info.	**N**		**Y**	**0**
- Aust. Valuation Office	**N**		**Y**	**0**
- Comcar	**N**		**Y**	**0**
- DAS Distribution	N		N	
- DAS Fleet	**N**		**Y**	**0**
- DAS Removals	**N**		**Y**	**0**
- Interiors Australia	**N**		**Y**	**0**
Advance Australia Found 91	N		N	
AeroSpace Tech. of Aust. Ltd.	**Y**	**4,176,215**	**Y**	**0**
Affirmative Action Agency	N		N	
Anglo-Australian Observatory	N		N	
Anindilyakwa Land Council	N		N	
Army & Airforce Canteen Service	N		N	
ATSIC	N		N	
Attorney General	N		N	
Auscript	N		N	
Aussat	N		N	
Austel	N		N	
Austrade	N		N	
Aust. Accounting Standards Board	N		N	
Australia Council	N		N	
Australian Archives	N		N	
Aust. Bureau of Statistics	N		N	
Aust. Centre Internat. Agric. Res.	N		N	
Aust. Children's Television Found.	N		N	
Australian Customs Service	N		N	
Australian Dairy Corporation	N		N	
Aust. Defence Industries Ltd	**Y**	**4,662,000**	**Y**	**0**

TABLE 6.1 CONTINUED...

COLUMN 1	2	3	4	5
Aust. Dried Fruits Board	N		N	
Aust. Electoral Commission	N		N	
Australian Federal Police	N		N	
Australian Film Commission	N		N	
Aust. Film Finance Corporation	N		N	
Aust. Film, TV & Radio School	N		N	
Aust. Fisheries Mangement Auth.	N		N	
Australian Hearing Services	N		N	
Aust. Heritage Commission	N		N	
Australian Honey Board 92	N		N	
Aust. Horticultural Corporation	N		N	
Aust. Industrial Property Organ.	N		N	
Aust. Industrial Relation Comm.	N		N	
Aust. Industry Devel. Corp. Ltd.	**Y**	**1,540,000**	**Y**	**24,844,000**
Aust. Inst. of ATSI Studies	N		N	
Aust. Inst. of Criminology 92	N		N	
Aust. Inst. of Family Studies	N		N	
Aust. Inst. of Health & Welfare	N		N	
Aust. Inst. of Marine Science 95	N		N	
Aust. Maritime Safety Auth.	**N**		**Y**	**3,065,000**
Aust. Meat & Livestock Corp.	N		N	
Australian National Gallery	N		N	
Australian National Line	**Y**	**131,000**	**see note 1) at end**	
Aust. National Maritime Museum	N		N	
Aust. Nat. Parks & Wild Service 92	N		N	
Aust, National Railways Comm.	**N**		**Y**	**0**
Aust. National University	N		N	
Aust. Nature Conservation Society	N		N	
Aust. Nuclear Science & Tech.	N		N	
Aust. Patents T/Mark & Design 92	N		N	
Aust. Plague Locust Commission	N		N	
Australian Pork Corporation	N		N	
Australia Post	**Y**	**61.8mill.**	**Y**	**90.1mill.**
Aust. Science & Tech. Council	N		N	
Aust. Securities Commission	N		N	
Aust. Security Intelligence Organ.	N		N	
Australian Sports Commission	N		N	
Aust. Sports Drug Agency	N		N	
Australian Taxation Office	N		N	
Aust. Tobacco Market Advisory	N		N	
Aust. Tourist Commission	N		N	
Australian War Memorial	N		N	
Australian Wheat Board	N		N	
Aust. Wine & Brandy Corporation	N		N	
Australian Wool Corporation 95	N		N	
Aust. Wool R & D Corporation	N		N	
Automotive Industry Authority	N		N	
Bureau of Meteorology	N		N	
Chicken Meat R & D Council	N		N	
Civil Aviation Authority	**Y**	**22,721,000**	**Y**	**27,500,000**
C/W Defence Forces Ombuds. 93	N		N	
Comcare	**N**		**Y**	**0**
Commissioner Superannuation	N		N	
C/W Director Public Prosecutions	N		N	

TABLE 6.1 CONTINUED...

COLUMN 1	2	3	4	5
Commonwealth Ombudsman	N		N	
Commonwealth Fire Board	N		N	
C/W Funds Management Ltd.	**Y**	**4,867,000**	**Y**	**3,374,000**
CSIRO	N		N	
C/W War Graves Commission	N		N	
Dept. of Communication & Arts	N		N	
- Artbank Trust A/c	N		N	
Co's. & Securities Advisory Comm.	N		N	
Cotton R & D Corporation	N		N	
Dairy R & D Corporation	N		N	
Defence Housing Authority	N		N	
Department of Defence	N		N	
Defence Science & Tech. Organ.	N		N	
Egg Industry R & D Council	N		N	
Dept. Employ., Edu. & Training	N		N	
Energy R & D Corporation	N		N	
Dept. Envir., Sport & Terr's.	N		N	
Exotic Animal Disease Council	N		N	
Export Finance & Insurance Corp.	N		N	
Family Court of Australia	N		N	
Federal Airports Corporation	**Y**	**49,804,000**	**Y**	**8,000,000**
Federal Court of Australia	N		N	
Department of Finance	N		N	
Fisheries R & D Corp	N		N	
Dept. Foreign Affairs & Trade	N		N	
Grain R & D Corporation	N		N	
Grape Wine R & D Corporation	N		N	
G/Barrier Reef Marine Park	N		N	
Dept. Human Services & Health 95	N		N	
Health Insurance Commission	N		N	
High Court of Australia	N		N	
Honeybee R & D Council	N		N	
Horticultural R & D Corporation	N		N	
Dept. House of Representatives	N		N	
Dept. Housing & Regional Devel.	N		N	
Housing Loans Insurance Corp.	**Y**	**8,538,000**	**Y**	**8,315,000**
Human Right & Equal Opp. Comm.	N		N	
Dept. Immig. & Ethnic Affairs	N		N	
Industry Commission	N		N	
Dept. Industrial Relations	N		N	
Dept. Industry Science & Tech.	N		N	
Insp-Gen. Intelligence & Security	N		N	
Insurance & Superannuation Com.	N		N	
International Air Serv. Comm.	N		N	
Department of Joint Houses	N		N	
Landcare Australia Ltd. 93	**N**		**Y**	**0**
Land & Water Resource R & D	N		N	
Law Reform Commission	N		N	
Meat Research Corporation	N		N	
Merit Protect/n. & Review Agency	N		N	
Murray-Darling Basin Comm.	N		N	
National Capital Planning Auth.	N		N	
National Common Police Serv.	N		N	
National Crime Authority	N		N	

TABLE 6.1 CONTINUED...

COLUMN 1	2	3	4	5
National Film & Sound Archive	N		N	
National Food Authority	N		N	
National Library of Australia	N		N	
National Museum of Australia	N		N	
National Native Title Tribunal	N		N	
National O. H. & S. Commission	N		N	
National Road Transport Comm.	N		N	
National Registration Authority	N		N	
Nat. Science & Tech. Centre 93	N		N	
National Standards Commission	N		N	
Northern Land Council	N		N	
Nuclear Safety Bureau	N		N	
Director Public Prosecutions	N		N	
Office Parliamentary Coun. 93	N		N	
Pipeline Authority	**N**		**Y**	**4,000,000**
Dept. Parliamentary Library	N		N	
Dept. Parl. Reporting Staff	N		N	
Pig R & D Corporation	N		N	
Prices Surveillance Authority	N		N	
Dept Primary Ind & Energy	N		N	
- Aust. Quar. & Inspect. Svce.	N		N	
- National Residue Survey	N		N	
Dept. Prime Minister & Cabinet	N		N	
Public Service Commissioner	N		N	
QANTAS	**Y**	**800,000**	**Y**	**3,000,000**
Reserve Bank of Australia	N		N	
Royal Australian Mint	N		N	
Rural Industry R & D Corporation	N		N	
Rural Adj. Scheme Adv. Council	N		N	
SBS Corporation	N		N	
Department of the Senate	N		N	
Snowy Mountains Hydro Auth.	N		N	
Dept. of Social Security	N		N	
Spectrum Management Agency	N		N	
Sugar R & D Corporation	N		N	
Telstra	**Y**	**626.6mill.**	**Y**	**738.0mill.**
Tex. Cloth. & F/Wear Dev. Auth.	N		N	
Tiwi Land Council	N		N	
Tobacco R & D Council	N		N	
Department of Tourism	N		N	
- Bureau Tourism Research	N		N	
Trade Practices Commission	N		N	
Dept of Transport	N		N	
The Treasury	N		N	
Wool International	N		N	

Notes

1) There was no indication in the Annual Report whether dividends were paid. Further investigation was not needed as this PSE is eliminated from further examination in 6.2.
2) If the 1994 annual report was not available then the most recent report was used. In those cases the year of the report used has been indicated in Column 1. In some cases the 1995 annual report has been used.
3) Some PSEs have the ability to pay dividends but did not do so in 1994 and this sometimes gave rise to a $0 figure in column 5.

Twenty seven PSEs were identified either as paying income tax and/or dividends to the government or as having an obligation to do so. Of these 27 PSEs, 22 were able to be eliminated, as described in the next section, with minor further examination.

6.3 Reasons for the elimination of 22 PSEs.

1) **Department of Administrative Services**
Asset Services
This PSE provides maintenance, repair and operational services for the assets of its customers. While its customers include other PSEs, there is no requirement that PSEs must use Asset Services. PSEs are free to employ the services of private sector organisations. Therefore, Asset Services does not operate a monopoly and is eliminated from further consideration.

2) **Department of Administrative Services**
Australian Construction Services (ACS)
ACS provides construction design and management consultancy services for national and international projects. It operates in a fully competitive environment. Accordingly, it is not a monopoly and is eliminated from further testing.

3) **Department of Administrative Services**
Australian Government Analytical Laboratories (AGAL)
AGAL provides chemical and microbiological analytical services. Its principal customer is the Federal Government (ie other

PSEs). However, AGAL does provide services to the private sector, and in a few cases there may be a monopoly, although the amount raised from those services is trivial.
AGAL made a loss of $2,585,000 in 1994 after a loss of $728,000 in 1993 and was addressing these losses by future cost reductions. It was decided to eliminate AGAL from further testing because it, at best, had very little monopoly power which was difficult to quantify, and because it was unable to pay a dividend.

4) **Department of Administrative Services**
Australian Government Publishing Service (AGPS)
The AGPS is the monopoly provider of Commonwealth Government printed material. However, it does have some non-government customers. It was eliminated from further testing for a number of reasons. First, it is questionable whether any or all of its services to non-governmental clients are 'essential'. Second, it is not possible to separate user pay operations from government funded operations. Third, it did not pay a dividend to government.

5) **Department of Administrative Services**
Australian Property Group (APG)
The APG provides property management and accommodation services. Its customers are either lessees/tenants or property owners. It operates only in the government sector, although it was considering expanding into the private sector. The APG has been eliminated from further testing because in 1994 it operated only in the public sector and earned no revenue from the private

sector. Taxation can be raised only from outside government. Intra-governmental payments cannot be taxation.

6) Department of Administrative Services
Australian Surveying & Land Information Group (AUSLIG)

AUSLIG provides 'geographic information management services' consisting of surveying, mapping, information systems and consultancy services. Its core activities are government based, but it does have some customers in the private sector. However, these private sector operations are in a competitive environment. Accordingly, AUSLIG's activities are either government based or a non-monopoly. Both of these circumstances allow AUSLIG to be eliminated from further testing.

7) Department of Administrative Services
Australian Valuation Office (AVO)

The AVO operates solely in the government sector. Accordingly, it has been eliminated from further testing as it earns no revenue in the private sector.

8) Department of Administrative Services
Comcar

In 1994 Comcar provided car-with-driver services for government leaders, officials and dignitaries. Its revenue was earned wholly from government. Accordingly, Comcar was eliminated from further testing. Since 1994, Comcar has entered the private sector and competes with private hire car and taxi

services. In this environment, it would still be eliminated as it is not a monopoly.

9) Department of Administrative Services
DASFleet

DASFleet provides vehicle leasing, rental and management services to the Commonwealth government. In some situations, it competes with the private sector for the government business. Therefore, as DASFleet deals with the government and faces some competition, it is eliminated from further testing.

10) Department of Administrative Services
DASRemovals

DASRemovals is the Commonwealth government's household removal entity. It arranges removals within and outside Australia for federal public servants. It does not offer its services to the private sector although it uses private sector services. DASRemovals has therefore been eliminated from further testing as it only deals with the Commonwealth government.

11) Department of Administrative Services
Interiors Australia

Interiors Australia is the Commonwealth government's interior design and fitout business. It offers its services to both the public and private sectors. In the private sector it operates in a competitive environment. Accordingly, Interiors Australia has

been eliminated from further consideration as it does not operate a monopoly.

12) AeroSpace Technologies of Australia Ltd. (ASTA)

ASTA's mission statement provides that it 'will develop and sustain a commercially successful and internationally competitive business in the aerospace, transport, guided weapons, defence related and associated specialist engineering and materials market' (ASTA Annual Report 1994, p.4). This is clearly a non-monopoly business and ASTA has been eliminated from further testing.

13) Australian Defence Industries Ltd. (ADI)

ADI provides a broad range of products for both the defence and civil markets and operates in a competitive environment. As ADI is not a monopoly it has been eliminated from further testing.

14) Australian Industry Development Corporation Ltd. (AIDC)

AIDC is a wholly government owned investment company that provides domestic and Asian finance and advice, equity investments and related services. It operates in a competitive environment and was, therefore, eliminated from further testing.

15) Australian National Line (ANL)

ANL provides shipping and transport services within Australia and overseas. It operates in a competitive environment and is therefore eliminated from further testing.

16) Australian National Railways Commission (AN)

AN provides rail passenger and freight transport within Australia. It operates in the competitive environment of passenger and freight transportation and is, therefore, eliminated from further testing.

17) Comcare

Comcare is the Commonwealth government's workers' compensation insurer. During 1994 it received a total of $763,376,000 in revenue (including abnormals). Of this amount $758,630,00 came from the government. Accordingly. Comcare has been eliminated from further testing because it receives virtually all of its funding from the Commonwealth government.

18) Commonwealth Funds Management Ltd. (CFM)

The CFM is an investment house and operates in a competitive environment. The CFM has therefore been eliminated from further testing because it does not operate a monopoly.

19) Housing Loans Insurance Corporation (HLIC)

HLIC offers mortgagee insurance and enters into reinsurance contracts. It operates in a competitive environment and is, therefore, eliminated from further consideration.

20) Landcare Australia Ltd. (LAL)

LAL's aim is to encourage and finance an environment that achieves sustainable land management in Australia. It relies on voluntary donations and subscriptions for the performance of its activities. Accordingly, there is no compulsion to use its services and it is, therefore, eliminated from further testing.

21) Pipeline Authority

The Pipeline Authority was established to construct and maintain pipelines in Australia for the transmission of natural gas and other hydrocarbons. It could be argued that the Pipeline Authority was a monopoly as it was the only provider of this service in some areas of Australia. On the other hand, it could also be argued that the use of natural gas is not 'essential' as there are other energy sources (eg electricity and other liquid fuels). This thesis takes a conservative approach and has, therefore, accepted the second argument and eliminated the Pipelines Authority from further consideration.

22) QANTAS

QANTAS is a major supplier of domestic and international passenger and freight air transport. It operates in a competitive environment and is, therefore, eliminated from further testing.

6.4 Conclusion

This chapter began a process of identifying PSEs whose revenue may be part taxation. The 1994 annual reports of federal government PSEs were examined to identify if any had paid income tax and/or dividends during the year. Twenty seven PSEs were identified, however, twenty two could be eliminated after some minor further inquiry. The five remaining PSEs which are subject to further consideration are:

- Australian Maritime Safety Authority
- Australia Post
- Civil Aviation Authority
- Federal Airports Corporation
- Telstra.

The operations of these PSEs are considered in the next chapter.

CHAPTER 7

AN ANALYSIS OF PUBLIC SECTOR ENTITIES

7.1 Introduction

In this chapter the five PSEs selected for further analysis in Chapter 6 are examined for evidence that their revenue satisfies the criteria of Latham's definition of taxation. The following questions are asked for each PSE:

1) Is there 'a compulsory exaction of money'?

   a) Is the PSE a monopoly?
   b) Are the monopoly services that the PSE provide essential to the community?
   c) Does the PSE receive revenue from those services?

2) Is there a payment to 'a public authority for public purposes'?

a) Is the PSE wholly owned by the government?
b) Can the PSE exercise command or authority which an individual cannot?
c) Does the PSE provide a function in the public interest?
d) Does the PSE perform a traditional function of government.
e) Does the PSE have government authority to carry on its activities?
f) Is the PSE paying income tax?[1]
g) Is the PSE paying a dividend?

3) Is collection of the payment 'enforceable by law'?

a) Are there legislative provisions for the collection of fees charged by the PSE? and if not, then
b) Is the PSE able to rely upon contract law?

If a PSE fails to satisfy any of the these criteria then it will be excluded from any further analysis or discussion.

The fourth criterion of the definition of taxation that the payment 'is not a payment for services rendered' is not considered. In Chapter 5 it was shown that where a PSE has paid income tax and/or dividends, then the revenue used to make those payments satisfies the fourth criterion. This criterion was used in Chapter 6 to select the five PSEs analysed in this Chapter.

1. While it has already been shown that the PSEs under examination in this chapter pay income tax and/or dividends it is felt necessary to consider the basis for doing so.

The analysis in this Chapter relies upon evidence gathered from legislation, annual reports and, where necessary, interviews with PSE personnel.

The PSEs to be further considered are:

- Australian Maritime Safety Authority
- Australia Post
- Civil Aviation Authority
- Federal Airports Corporation
- Telstra.

7.2 Australian Maritime Safety Authority (AMSA)

AMSA was established under the *Australian Maritime Safety Authority Act 1990* (AMSA Act).

> 'Its charter is to enhance efficiency in the delivery of safety and other services to the Australian maritime industry' (AMSA Annual Report, 1994, p.8).

7.2.1 Is there 'a compulsory exaction of money'?

(a) Is AMSA a monopoly?

Section 6 of the AMSA Act deals with the functions of AMSA.

'**6. (1)** The functions of the Authority are:

(a) to combat pollution in the marine environment; and

(b) to provide a search and rescue service; and

(c) to provide, on request, services to the maritime industry on a commercial basis; and

(d) to perform such other functions as are conferred on it by or under any other Act; and

(e) to provide consultancy and management services relating to any of the matters referred to in this subsection; and

(f) to perform any other prescribed functions relating to any of the matters referred to in this subsection; and

(g) to perform functions incidental to any of the previously described functions.

(2) The Authority may provide its services both within and outside Australia.

(3) Subject to section 8, the functions to provide services may be performed at the discretion of the Authority.'

Section 8 of the AMSA Act refers to directions given by the Minister or other legislation in relation to the functions of AMSA.

The Act does not specify that AMSA has exclusivity in its functions or detail the services it provides. However, AMSA's literature identifies the following as some of its services.

1) It provides 'a network of navigational aids including both traditional and advanced technology electronic navigation of ships in Australian waters.' (AMSA Publication, c.1994, p.10)

2) It provides 'the seaworthiness and safe operation of vessels in Australian waters and the enhancement of national and international maritime safety standards.' (AMSA Publication, c.1994, p.13)

3) The 'Marine Environment Protection Services (MEPS), is responsible for the protection of Australia's marine environment through coordination of a national pollution prevention and response capability appropriate to threats of pollution from shipping in the Australian region.' (AMSA Publication, c.1994, p.16)

AMSA's literature also reveals that it:

> 'is empowered by the Commonwealth to cover all relevant aspects of ship safety at sea and in port including navigational aids, numbers and qualifications of ships' crew and officers, the prevention of collisions, construction of ships and the equipment they must carry, cargo handling, emergency procedures, position reporting and pollution prevention and control' (AMSA Publication, c.1994, p.4).

The 1994 Annual Report (p.85) lists the statutes for which it is responsible. In discussions, an AMSA officer confirmed that it primarily operated in a 'regulated environment' but that there was a small area of commercial activity relating to a seaman's employment service which operated on a cost recovery basis with little profit. When asked directly whether AMSA was a monopoly the officer's response was that AMSA is not faced with any competition policy issues. It is concluded, therefore, that because AMSA is the only provider of its services in Australia, it is a monopoly.

(b) Are the monopoly services that AMSA provide essential to the community?

In an interview an AMSA officer advised that AMSA's services were 'essential'. It is a reasonable assumption that services undertaken by AMSA would be considered essential by the Australian community in general and the shipping industry in particular. It is concluded that AMSA's services are essential.

(c) Does AMSA receive revenue from those services?

Section 47 (1) of the AMSA Act gives it the power to receive revenue for its services.

> '**47. (1)** Subject to this section, the Authority may make determinations:
> (a) fixing charges and specifying the persons by whom, and the times when, the charges are payable; and
> (b) fixing the penalty for the purposes of subsection (14)[2].'

AMSA's total revenue for 1994 was $70,551,000. The 1994 Profit & Loss Statement is reproduced below:

2. Note that subsection (14) is dealt with later.

Revenues from the Profit & Loss Statement of AMSA for the year ended the 30th. June 1994

	$'000
Marine navigation levy	33,486
Regulatory functions levy	10,957
Protection of the sea levy	3,231
Services provided on behalf of government	14,480
Other receipts from government	935
Marine services	2,973
Crew services	1,522
Interest	1,147
Recovery of incident costs	37
Ship registration	567
Net (loss) gain on sale of non-current assets	(84)
Other revenue	1,301
Total	70,551[3]

The revenues received from marine navigation, regulatory functions and protection of the seas are collected by the Bureau of Customs which pays them into consolidated revenue for fortnightly remittance to AMSA. Section 48 of the AMSA Act deals with this procedure.

> '**48. (1)** There are to be paid to the Authority amounts equal to amounts of levy, and amounts by way of penalty, received by the

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3. It is noted that the sum of the individual revenue items is $70,552. However, AMSA's profit and loss statement revealed $70,551. It could be assumed that the difference of $1 is a rounding effect.

Commonwealth under the *Marine Navigation Levy Act 1989 Marine Navigation (Regulatory Functions) Levy Act 1989* or the *Protection of the Sea (Levy) Act 1983.*

(2) Amounts payable under subsection (1) are to be paid out of the Consolidated Revenue Fund, which is appropriated accordingly.'

The sole purpose of the *Marine Navigation Levy Act 1989* is to impose a levy on specified sea-going ships. Subsection 7(2) sets out the rates applicable at the inception of the Act. Subsection 8(1) permits rate changes to be made by regulation, but subject to maximum increases pursuant to subsection 8(2). The *Marine Navigation Levy Act 1989* works in tandem with the *Marine Navigation Levy Collection Act 1989* which provides for the collection of levies by the Bureau of Customs.

The sole purpose of the *Marine Navigation (Regulatory Functions) Levy Act 1991* is to impose a levy on certain sea-going ships to fund some marine regulations and related functions of AMSA. Subsection 7(2) sets out the rates applicable at the inception of the Act. Subsection 8(1) permits rate changes to be made by regulation, but subject to maximum increases pursuant to subsection 8(2). The *Marine Navigation (Regulatory Functions) Levy Act 1991* works in tandem with the *Marine Navigation (Regulatory Functions) Levy Collection Act 1991.* The latter Act provides for the collection of levies by the Bureau of Customs.

The sole purpose of the *Protection of the Sea (Shipping Levy) Act 1981* is to impose a levy on certain ships in Australian ports with oil on board. This Act repealed the *Pollution of the Sea by Oil (Shipping Levy) Act 1972* and has been subject to two amendments since its inception. Sections 6 and 7 set out the applicable rates. Subsection 9 permits rate

changes to be made by regulation. The *Protection of the Sea (Shipping Levy) Act 1981* works in tandem with the *Protection of the Sea (Shipping Levy Collection) Act 1981* which provides for the collection of levies by the Bureau of Customs.

Revenue received under the heading 'Services provided on behalf of government' primarily refer to search and rescue operations. When such an activity occurs AMSA calculates the cost and the Commonwealth government reimburses it for that amount.

It is clear that AMSA is receiving revenue for the essential services that it provides. The fact that much of the revenue is authorised by other legislation is immaterial. Furthermore, the fact that the money is collected by another organisation, processed through another account, and then remitted to AMSA is also immaterial. The end result is that the money or revenue finishes in the hands of AMSA and is acknowledged by them in their financial statements as revenue.

It is concluded, therefore, that the fees levied by AMSA are a "compulsory exaction of money". AMSA enjoys a monopoly and consumers are obliged to purchase its services for which AMSA receives revenue. In addition, it receives levies under the *Marine Navigation Levy Act 1989,* the *Marine Navigation (Regulatory Functions) Levy Act 1991* and *Protection of the Sea (Shipping Levy) Act 1981*.

7.2.2 Is there a payment to 'a public authority for public purposes'?

There are no references in the AMSA Act to 'public authority'.

(a) Is AMSA wholly owned by the government?

AMSA is a government business enterprise (AMSA Annual Report 1994, p.8) wholly owned by the Federal Government.

(b) Can AMSA exercise command or authority which an individual cannot?

Subsection 10(1) contains the general provision of AMSA's powers.

> 'In addition to any other powers conferred on it by this or any other Act, the Authority has, subject to this Act, power to do all things necessary or convenient to be done for or in connection with the performance of its functions.'

The functions of AMSA under its Act have been provided in Section (6) at 7.2.1(a) above. Subsection 10(1) provides AMSA with an authority which an individual does not have.

(c) Does AMSA provide a function in the public interest?

AMSA's charter 'to enhance efficiency in the delivery of safety and other services to the Australian maritime industry' (see 7.2. above) is a

function that is considered to be in the public interest. This is more the case given that AMSA is the only provider of those services in Australia.

(d) Does AMSA perform at traditional function of government?

AMSA was established in 1990 to continue to carry on functions which the government had always provided. It can be concluded that it is a traditional function of government.

(e) Does AMSA have government authority to carry on its activities?

As already mentioned AMSA receives authority from the government to carry on its activities under the AMSA Act.

(f) Is AMSA paying income tax?

Section 37 of the AMSA Act provides that:

> '**37. (1)** The Authority is not liable to pay tax under the laws of the Commonwealth or of a State or Territory.
>
> **(2)** Subsection (1) does not apply to:
>
> (a) customs duties; or
>
> (b) a law of the Commonwealth relating to sales tax; or
>
> (c) a law of a State or Territory relating to payroll tax.'

This means that AMSA is not liable to pay income tax. Confirmation of this conclusion is found in the AMSA Annual Report 1994 (p.95).

(g) Is AMSA paying dividends?

The payment of dividends is dealt with in section 38 of the AMSA Act. It provides that:

> '**38. (1)** The Authority must, within 4 months after the end of each financial year, by notice in writing given to the Minister, recommend that it:
>
> (a) pay to the Commonwealth, in relation to its operations in the financial year, a dividend of an amount specified in the notice; or
>
> (b) not pay a dividend to the Commonwealth for the financial year.
>
> **(2)** In making a recommendation, the Authority must have regard to:
>
> (a) the matters specified in section 27; and
>
> (b) the extent of the Commonwealth's equity in the Authority.
>
> **(3)** Subject to subsection (6), the Minister must, within 60 days after receiving the recommendation, give notice in writing to the Authority:
>
> (a) where the recommendation is that a dividend be paid:
>
> (i) approving the recommendation; or
>
> (ii) directing the Authority to pay a dividend of a different specified amount; or
>
> (b) where the recommendation is that a dividend not be paid:

(i) approving the recommendation; or

(ii) directing the Authority to pay a dividend of a specified amount.

(4) The Minister must, in deciding whether to give such a notice, have regard to:

(a) the matters specified in section 27 (other than paragraph (c)); and

(b) the objectives and policies of the Commonwealth Government; and

(c) the extent of the Commonwealth's equity in the Authority; and

(d) any other commercial considerations the Minister thinks appropriate.

(5) Where a dividend for a financial year is approved or directed under subsection (3), the Authority must pay the dividend to the Commonwealth within 8 months after the end of that year.

(6) A payment under this section may be made:

(a) out of the profits of the Authority for the financial year to which the payment relates; or

(b) out of the profits of the authority for a preceding financial year; or

(c) partly out of the profits of the Authority for the financial year referred to in paragraph (a) and partly out of the profits of the Authority for any preceding year.'

Section 27 provides that:

'**27.** When preparing the financial plan, the Authority must consider:

(a) the need for high standards of maritime safety; and

(b) the need for a high standard of protection for the marine environment; and

(c) the objectives and policies of the Commonwealth Government known to the Authority; and

(d) any directions given by the Minister under section 8; and

(e) any payments by the Commonwealth to the Authority to fund functions referred to in paragraph (h); and

(f) the need to maintain a reasonable level of reserves, having regard to estimated future infrastructure requirements; and

(g) the need to maintain the extent of the Commonwealth's equity in the Authority; and

(h) the need to earn a reasonable rate of return on the Authority's assets (other than assets wholly or principally used in the performance of functions that are directly funded by the Commonwealth); and

(j) the expectation of the Commonwealth that the Authority will pay a reasonable dividend; and

(k) any other commercial consideration the Authority thinks appropriate.'

A dividend of $3,065,000 was declared and paid in 1994 in respect of the 1993 financial year. In 1993 it declared and paid a dividend of $4,500,000 in respect of the 1992 financial year (AMSA Annual Report, 1994, p.98). It would appear that AMSA is a year behind in its dividend declarations. However, it is clear that dividends are paid to the Government.

It is concluded, therefore, that AMSA's fees are collected 'by a public authority for public purposes'. AMSA satisfies the five requirements for a PSE to be designated a public authority. It receives revenue resulting in dividends being paid to the government which are subsequently deposited in consolidated revenue and thereby satisfies the public purposes condition. In 1994 this amounted to $3,065,000 (1993 - $4,500,000). The second criterion for a payment to a PSE to be classified as tax is, therefore, satisfied.

7.2.3 Is collection of the payment 'enforceable by law'?

The third criterion for a payment to a PSE to be classified as taxation is that its collection must be 'enforceable by law'.

(a) Are there legislative provisions for the collection of fees charged by AMSA?

Subsections 47 (14) to (17) of the AMSA Act specifically address this issue.

> '**47. (14)** Subject to subsection (15), where a charge is not paid within the period determined by the Authority, being a period beginning on the day on which the charge became due and payable, the person liable for the charge is liable to pay to the Authority, in addition to the charge, a penalty calculated upon the unpaid amount of the charge from the day on which the charge became due and payable, and compounded.

(15) The penalty must not exceed a penalty equivalent to 1.5%, or such other percentage as is prescribed, of the unpaid amount of the charge for each month or part of a month during which it is unpaid, calculated from the day on which the charge became due and payable, and compounded.

(16) Subsection (15) does not require the penalty to be calculated on a monthly basis.

(17) Charges and penalties may be recovered as debts due to the Authority.'

These provisions refer only to revenue received under the AMSA Act. They are a relatively minor component of total revenue. Other Acts allow the collection of levies.

Section 9 of the *Marine Navigation Levy Collection Act 1989* provides as follows:

'**9.** Levy payable in respect of a ship may be recovered in any court of summary jurisdiction by proceedings in the name of the Collector[4].'

Subsection 10(1) of the *Protection of the Sea (Shipping Levy Collection) Act 1981* provides as follows:

'**10. (1)** Levy that has become payable, or an amount that, under section 8, is payable on account of levy, is a debt due to the Commonwealth by the person or persons by who, the levy or amount is payable.'

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4. In these sections the 'Collector' is effectively the Bureau of Customs

Section 11 of that Act further provides as follows:

> '**11. (1)** Where levy payable in respect of a ship has not been paid, a Collector may, without prejudice to any other remedy for the recovery of the levy, enter upon the ship and distrain goods or equipment belonging to the ship, and detain them until the levy is paid.
>
> **(2)** If payment of the levy is not made before the expiration of the period of 3 days after the distress, the Collector may, at any time while the levy remains unpaid, sell by public auction the goods or equipment distrained and, out of the proceeds of the sale, may, to the extent that the amount of those proceeds allows, recover the levy and all reasonable expense incurred by him under this section.
>
> **(3)** For the purposes of a sale under sub-section (2), the Commonwealth shall be deemed to be the absolute owner of the goods or equipment the subject of the sale.
>
> **(4)** Where, after deducting from the proceeds of the sale the amount of the levy and the expenses of the Collector, a surplus remains, the Collector shall, on demand, pay that surplus to the owner or master of the ship.
>
> **(5)** A reference in this section to levy payable in respect of a ship shall be read as including a reference to an amount that, under section 8, is payable on account of levy that may become payable in respect of the ship.'

Section 8 of the *Marine Navigation (Regulatory Functions) Levy Collection Act 1991* provides as follows:

> '**8.** Levy payable in respect of a ship may be recovered in any court of summary jurisdiction by proceedings in the name of a Collector.'

It is clear that there are legislative provisions which allow the legal collection of the fees that AMSA receives as revenue. It is concluded, therefore, that AMSA, or some other authority acting on its behalf, has the legal capacity to enforce collection of charges due to it. The third criterion for a payment to a PSE to be classified as taxation is, therefore, satisfied.

7.2.4 Conclusion for AMSA

The following conclusions in relation to AMSA for the 1994 year have been reached.

1) AMSA operates a monopoly which provides essential services. Furthermore AMSA earns revenue from the provision of those services.

2) AMSA is a public authority which received revenue that was used to pay dividends.

3) AMSA's revenues are legally collectable.

It is, therefore, concluded that AMSA received revenue that can properly be described as taxation.

Accordingly AMSA will undergo further testing in Chapter 8 to quantify the amount and the legality of the taxation.

7.3 Australia Post (AP)

AP is constituted under the *Australian Postal Corporation Act 1989* (AP Act).

AP describes its functions as follows:

> AP 'offers letter and parcel delivery services within Australia and internationally. It also provides a range of related services including: electronic bulk mail handling; advertising mail; bill payment; money order and banking services; express delivery services; and philatelic products and services' (AP Annual Report, 1994, p.1).

7.3.1 Is there 'a compulsory exaction of money'

(a) Is AP a monopoly?

Discussions were held with an AP officer in Melbourne who advised that AP has a legal monopoly over only some of the services which it provides. These are described in Section 29 and 30 of the AP Act.

'29. (1) Subject to section 30, Australia Post has the exclusive right to carry letters within Australia, whether the letters originated within or outside Australia.

(2) The reservation of services to Australia Post under subsection (1) extends to:

(a) the collection, within Australia, of letters for delivery within Australia; and

(b) the delivery of letters within Australia.

(3) Australia Post also has the exclusive right to issue postage stamps within Australia.

30. (1) The reserved services do not include any of the following:

(a) the carriage of a letter weighing more than 250 grams unless the letter consists of an envelope, packet, parcel, container or wrapper containing 2 or more separate letters;

(b) the carriage of a letter relating to goods that is sent and delivered with the goods,

(c) the carriage of a newspaper, magazine, book, catalogue or leaflet, whether or not directed to a particular person or address and whether or not enclosed in any sort of cover;

(d) that carriage of a letter otherwise than for reward;

(e) the carriage of a letter within Australia for a charge or fee that is at least 4 times the then rate of postage for the carriage within Australia of a standard postal article by ordinary post;

(f) *has been omitted*

(g) the carriage of a letter by the sender or an officer or employee of the sender;

(ga) the carriage of a letter from an office of the individual or organisation sending the letter to another office of that individual or organisation;

(h) the carriage of a letter to or from:

(i) the nearest office of Australia Post; or

(ii) another office of Australia Post authorised by it;

(ha) the carriage of a letter to an office of Australia Post where it is then lodged for delivery under a bulk interconnection service (within the meaning of section 32A);

(i) *has been omitted*

(j) the carriage of a letter on behalf of Australia Post under an agreement with it;

(k) the carriage of a letter that, under the terms and conditions on which Australia Post supplies postal services, is not a postal article;

(l) *has been omitted*

(m) the carriage of writs, warrants or other documents required or permitted to be served, given or sent under the practice and procedure of any court or tribunal;

(ma) the carriage of a letter, in the course of a document exchange service:

(i) from one service centre of the service to another service centre of the service; or

(ii) within a service centre of a service;

(n) the carriage of a letter solely by any electromagnetic or other non-physical means;

(o) *has been omitted*

(p) the carriage of letters by or on behalf of a foreign country under a convention;'

The effects of section 29 and 30 of the Act are that AP's monopoly extends only to the standard 45cent letter service and packages, parcels etc. where the charge is not greater than 4 times the letter rate; ie. $1.80.

It is concluded, therefore, that AP is a partial monopoly.

(b) Are the monopoly services that AP provide essential to the community?

It is unlikely that Australian businesses and households could operate effectively without the services in which AP has a monopoly. The revenue generated from those services in 1994 was $1,579,500,000. This suggests a high degree essentiality. AP's 1994 annual report reveals that AP handles more than 17million articles per day and in peak periods volumes can more than double.

It is concluded, therefore, that the monopoly services provided by AP are essential.

(c) Does AP receive revenue from those services?

The AP annual report classifies the revenue earned into that from the monopoly or 'reserved areas' and that from the non-monopoly 'non-reserved areas'.

Breakdown of Monopoly and Non-monopoly revenues for AP for the year ended the 30th. June 1994

	$m	%
Reserved	1,579.5	61.5
Non-reserved	988.9	38.5
Total	2,568.4	100.0

This total revenue figure of $2,568.2million is reclassified in the corporation's profit and loss statement as follows:

Operating Revenue of AP from the Profit & Loss Statement for the year ended the 30th. June 1994

Operating Revenue

	$m
Mail services	2,321.7
Philatelic services	45.1
Commission and agency services	115.5
Postal money order service	25.3
Other	60.8
Total	2,568.4

The officer advised that AP used a comprehensive activity based costing system with full cost recovery pricing in determining AP's prices. The

AP officer also advised that there is no cross-subsidisation between any of the divisional operations. Thus each operation is responsible for its share of allocated costs and the determination of a price that will satisfy the full recovery of costs and earn the 'economic rate of return' required by the Government. Accordingly, the monopoly operations are autonomous profit making concerns. It cannot be argued that the non-monopoly operations fund the monopoly operations.

It is concluded that AP receives revenue from its monopoly services.

It is concluded, therefore, that AP's revenue from reserved services is 'a compulsory exaction of money'. AP has a legislated monopoly that provides essential services for which it receives revenue from the provision of those monopoly services.

7.3.2 Is there a payment to 'a public authority for public purposes'

There is a reference to 'public authority' in the AP Act. Section 63(2) states that:

> '**63. (2)** Australia Post is not a public authority for the purposes of paragraph 23(d) of the *Income Tax Assessment Act 1936*.'

Paragraph 23(d) of the *Income Tax Assessment Act 1936* exempts public authorities from liability for income tax[5]. The effect of Section 63(2) of

5. It was this subsection that the Renmark Hotel Incorporated and The West Australia Turf Club tried to rely upon in obtaining an exemption from income tax. See 3.2.2.1 'public authority'.

the AP Act is, therefore, only to make AP liable for income tax. There is no suggestion that AP is not a public authority for any other purpose other than to make it liable for income tax.

(a) Is AMSA wholly owned by the government?

It is a government business enterprise which is wholly owned by the Government (AP Annual Report, 1994, p.1).

(b) Can AP exercise command or authority which an individual cannot?

It has already been determined that the AP Act provides AP with a legislated monopoly. Consequently, it can be concluded that AP is able to exercise authority which an individual cannot.

(c) Does AP provide a function in the public interest?

It is reasonable to conclude that the provision of the basic letter service to the Australian business and domestic community is in the public interest. The volume of items handled, as revealed at 7.3.1(b) above, supports this conclusion.

(d) Does AP perform a traditional function of government?

The monopoly service that AP provides is a function that has always been performed by a government owned operation.

(e) Does AP have government authority to carry on its activities?

As already mentioned AP receives authority from the government to carry on its activities under the AP Act.

(f) Is AP paying income tax?

Section 63(1) of the AP Act provides that:

> '**63. (1)** Australia Post is subject to taxation under the laws of the Commonwealth and the States and Territories.'

In 1994 the income tax provision in the corporation's balance sheet[6] was $60.3million (1993 - $88.8million).

It is concluded, therefore, that AP is liable for and pays income tax to the Federal Government.

(g) Is AP paying a dividend?

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6. The Provision account in the balance sheet is used because that provides the figure that is intended to be paid to the Commissioner of Taxation in the following year. The income tax expense item in the profit and loss statement does not necessarily convert to a cash flow because of the adoption of tax effect accounting.

A requirement for AP to pay dividends to the government is contained in the legislation.

> '**54. (1)** The Board shall, within 4 months after the end of each financial year, by written notice to the Minister, recommend that Australia Post pay a specified dividend, or not pay a dividend, to the Commonwealth for the financial year.
>
> **(2)** In making the recommendations, the Board shall have regard to the matters referred to in section 38 (other than the matter referred to in paragraph (a)).
>
> **(3)** The Minister shall, within 45 days after receiving the recommendation, by written notice to the Board, either:
>
> (a) approve the recommendation; or
>
> (b) direct the payment of a dividend or a different specified dividend, as the case requires.
>
> **(4)** In exercising powers under subsection (3), the Minister shall have regard to:
>
> (a) the matters referred to in section 38 (other than the matters referred to in paragraphs (a) and (f)); and
>
> (b) any other matters the Minister considers appropriate.
>
> **(4A)** If the Minister gives a direction under paragraph (3)(b), the Minister must cause a copy of the direction to be laid before each House of Parliament within 15 sitting days of that House after giving the direction.
>
> **(5)** Australia Post's dividend for a financial year shall not exceed its profit for the year, after provision has been made for income tax.
>
> **(6)** Subject to section 55, the dividend payable for a financial year shall be paid within 6 months after the end of the financial year

or such further period as the Minister directs after consultation with the Board.

(7) In exercising powers under subsection (6), the Minister shall have regard to any recommendation of the Board in relation to the time of payment of the dividend.

(8) A direction under subsection (6) shall be given in writing.

'55. (1) The Board must, within 60 days after 31 December in each financial year, by written notice to the Minister, recommend that Australia Post pay a specified amount, or not pay any amount, to the Commonwealth on account of the dividend that may become payable under section 54 for the financial year.

(2) *has been omitted*

(3) The Minister shall, within 45 days after receiving the recommendation, by written notice to the Board, either:

(a) approve the recommendation; or

(b) give directions to the Board in relation to the payment of amounts to the Commonwealth on account of the final dividend that may become payable under section 54 for the financial year.

(4) In exercising powers under subsection (3), the Minister shall have regard to:

(a) the matters referred to in section 38 (other than the matters referred to in paragraphs (a) and (f)); and

(b) any other matters the Minister considers appropriate.

(5) If the Minister gives a direction under paragraph (3)(b), the Minister must cause a copy of the direction to be laid before each House of parliament within 15 sitting days of that House after giving the direction.'

The relevant provisions of Section 38 provide;

> **'38.** In preparing or revising a financial target, the Board shall have regard to:
>
> (a) the need to earn a reasonable rate of return on Australia Post's assets;
>
> (b) the need to maintain the extent of the Commonwealth's equity in Australia Post;
>
> (c) the expectation of the Commonwealth that Australia Post will pay a reasonable dividend;
>
> (d) the need to maintain Australia Post's financial viability;
>
> (e) the need to maintain a reasonable level of reserves, especially to make provision for:
>
> (i) any estimated future demand for postal services; and
>
> (ii) any need to improve the accessibility of, and performance standards for, the letter service;
>
> (f) any other commercial matters the Board considers appropriate;
>
> ...
>
> (h) the cost of performing Australia Post's functions in a manner consistent with the general policies of the Commonwealth Government notified by the Minister under Section 48;
>
> ...
>
> (k) the cost of any other obligations of Australia Post under this or any other Act that require it to act otherwise than in accordance with normal commercial practice.'

Section 48 provides:

'**48. (1)** The Minister may notify the Board of general policies of the Commonwealth Government that are to apply in relation to Australia Post.

(2) the Board shall ensure that the policies are carried out in relation to Australia Post and shall, as far as practicable, ensure that the policies are carried out in relation to its subsidiaries.

(3) A notification under subsection (1) shall be given in writing.'

The Government has, therefore, legislative control over the amount of dividends.

The corporation's profit and loss statement shows that dividends of $90.0million (1993 - $62.0million) was provided for and paid in 1994. This represents '50 per cent of profit after tax and abnormals' (AP Annual Report, 1994, p.67).

It is concluded that AP is a 'public authority' within the definition of taxation. Furthermore, it is concluded that AP was required to and did pay income tax and dividends in 1994.

The second criterion for a payment to a PSE to be classified as taxation is therefore satisfied.

7.3.3 Is collection of the payment 'enforceable by law'?

(a) Are there legislative provisions for the collection of fees by AP?

There are no specific provisions in the AP Act which give AP power to collect its fees and charges.

(b) Is AP able to rely on contract law?

Subsection 32(1) of the AP Act provides as follows:

> '**32. (1)** Subject to any express provision of this or any other Act, the terms and conditions of a service supplied by Australia Post for a person are:
>
> (a) so far as Australia Post and the person agree on terms and conditions for the supply of the service - the agreed terms and conditions; and
>
> (b) so far as Australia Post and the person do not agree on terms and conditions - the terms and conditions determined by the Board that are applicable to the supply of the service.'

Most of AP's monopoly services are paid for in advance. The customer buys the stamp prior to AP providing the delivery service. Section 32 of the AP Act, permits other arrangements to be made. This could be interpreted as meaning that services can be paid for in arrears, as they are, for example, when franking machines are used.

Where payment is made in arrears, AP and the customer usually enter into a formal agreement which sets down the terms and conditions for payment. Where there is no formal agreement, it is reasonable to

assume that there is an implicit contract and that AP could enforce collection of amounts due under the contract.

AP's fees can, therefore, be divided into two types. The first are paid in arrears in which event contract law would apply. The second are those that are prepaid and, where the issue of enforcement does not arise.

It is concluded, therefore, that the third criterion for a payment to a PSE to be classified as taxation is satisfied.

7.3.4 Conclusion for AP

The following conclusions are made in relation to AP.

1) AP operates a monopoly which provides essential services. Whilst the monopoly does not cover all the services that AP provides, it provides the majority of revenues that AP receives.

2) AP is a public authority which receives revenue that is used to pay income tax and dividends.

3) AP's charges are legally collectable because it can rely on contract law for the collection of fees that are paid in arrears.

It is therefore concluded that AP received revenue that can be properly described as taxation.

Accordingly, AP will undergo further testing in Chapter 8 to quantify the amount and the legality of the taxation.

7.4 Civil Aviation Authority (CAA)

The CAA is constituted under the *Civil Aviation Act 1988* (CAA Act).

Its mission is:

> 'Serving Australia and international aviation by pursuing high standards of aviation safety, through effective and efficient safety regulation and provision of world class aviation traffic services' (CAA Annual Report, 1994, p.3).

7.4.1 Is there 'a compulsory exaction of money'

(a) Is the CAA a monopoly?

Section 9 of the CAA Act lists the general functions of the CAA. It reads:

> '**9. (1)** The functions of the Authority are:
>
> (a) as provided by this Act and the regulations, to conduct safety regulation of:
>
> (i) civil air operations in Australian territory; and

(ii) Australian aircraft operating outside Australian territory;

(b) to provide air route and airway facilities,

(c) to provide air traffic control services, and flight service services, for, in either case, surface traffic of aircraft and vehicles on the manoeuvring area of aerodromes;

(d) to provide rescue and fire fighting service;

(e) to provide a search and rescue service;

(f) to provide an aeronautical information service;

(g) to provide consultancy and management services relating to any of the matters referred to in this subsection;

(h) to provide services to the Bureau of Air Safety Investigation in relation to the investigation of aircraft accidents and incidents;[7]

(j) any functions conferred on the Authority under the *Air Navigation Act 1920*;

(k) any other prescribed functions, being functions relating to any of the matters referred to in this subsection; and

(l) any functions incidental to any of the foregoing functions.

(2) The functions do not include responsibility for aviation security, but this subsection does not prevent the Authority from participating in arrangements to prevent or deal with hijack or other acts of unlawful interference with civil aviation.

(3) The Authority may provide its services and facilities both within and outside Australia territory.

(4) Subject to section 12, the functions to provide services and facilities may be performed at the discretion of the Authority.'

---

7. Note that there is no subsection 9(1)(i).

This section does not provide exclusivity to the CAA, which is an essential criteria for a monopoly. However, the necessity to use the CAA is listed in other sections. The relevant sections are:

> '**20AA. (1)** A person must not fly an aircraft within Australian territory unless:
>
> (a) the aircraft is registered under the Civil Aviation regulations; or
>
> (b) the aircraft is, under this Act or those regulations, not required to be registered under those regulations; or
>
> (c) the aircraft:
>
> (i) is employed in private operations; and
>
> (ii) possesses the nationality of a Contracting State.
>
> ...
>
> **(3)** An Australian aircraft is not to commence a flight unless:
>
> (a) a certificate of airworthiness under the Civil Aviation Regulations is in force in respect of the aircraft; or
>
> (b) the Civil Aviation Regulations authorise the flight without the certificate.
>
> **(4)** An Australian aircraft is not to commence a flight unless:
>
> (a) a maintenance release under the Civil Aviation Regulations that covers the duration of the flight is in force in respect of the aircraft; or
>
> (b) the Civil Aviation regulations authorise the flight without the release.'

'20AB. (1) A person must not perform any duty that essential to the operation of an Australian aircraft during flight time unless:

(a) the person holds a civil aviation authorisation that is in force and authorises the person to perform that duty; or

(b) the person is authorised by or under the Civil Aviation regulations to perform that duty without the civil aviation authorisation concerned.

...

(2) A person must not carry out maintenance on:

(a) an Australian aircraft in Australian territory; or

(b) an aircraft component for such an aircraft; or

(c) aircraft material for such an aircraft;

unless the person is permitted by the Civil Aviation Regulations to carry out that maintenance.'

'26. (1) An aircraft shall not, except with the permission of the Authority and in accordance with any conditions specified in the permission:

(a) arrive in Australian territory from a place outside Australian territory; or

(b) depart from Australian territory for a place outside Australian territory.'

(Note: that there are minor exceptions to Section 26)

'27. (1) The Authority may issue Air Operators' Certificates for the purposes of its functions.

(2) Except as authorised by a Certificate:

(a) an aircraft shall not fly into or out of Australian territory;

(b) and aircraft shall not operate in Australian territory; and

(c) an Australian aircraft shall not operate outside Australian territory.

...

(3A) A Certificate has effect subject to its conditions, being:

(a) the conditions specified in the regulations; and

(b) any other conditions specified by the Authority in the Certificate or in a written notice given to the holder.

(4) The authority may, at any time, by notice in writing served on the holder, vary the conditions of a Certificate that have been imposed by the Authority or impose further conditions.

...

(7) The term of a Certificate shall be as determined by the Authority.'

These sections indicate that the CAA has exclusive and absolute control of aircraft registrations, aircraft airworthiness and maintenance, pilot licensing, aircraft mechanic licensing, international air traffic and airline operator activities. Furthermore, any other activities that the CAA provides, and are not covered by these sections, are generally not subject to any competition. Therefore, given the CAA's exclusivity in these areas, it is reasonable to conclude that it is a monopoly.

(b) Are the monopoly services that the CAA provide essential to the community?

It is clear that the services that the CAA provides are essential to the airline industry. It is unlikely that a safe airline industry is possible without using the monopoly services of the CAA. It is assumed that safe, reliable air services and operations are integral and essential to

Australia's business and domestic activities. It is unlikely that a convincing argument could be made that such activities are not 'essential'.

It is, therefore, concluded that the services provided by the CAA are essential because they facilitate safe and reliable air services in Australia.

(c) Does the CAA receive revenue from those services?

The CAA's 1994 annual report provided the following information:

Revenue of the CAA from the Profit & Loss Statement for the year ended the 30th. June 1994

Revenue	**1994**	**1993**
	$'000	**$'000**
Airways Revenue	470,506	565,545
Excises	24,265	23,863
Safety Services	55,500	59,260
Regulatory Services	3,675	4,488
Navigational Instrument Testing	3,457	3,079*
Sundry Commercial Work	2,554	2,102*
Interest Received	3,840	1,892*
Sale of Publications	4,773	4,758*
Rental of Property	3,163	2,099*
Miscellaneous	1,498	2,091*
Profit on Sale of Assets	1,241	608*
Total	$574,472	$669,785

* denotes information obtained from the Notes to the financial statements.

Airways revenue, safety services, regulatory services and navigational instrument testing are all earned as a result of monopoly operations. In 1994, they totalled $533,138,000 which was 92.8% of the CAA's overall revenue.

It is concluded, therefore, that the CAA's monopoly is a major component of its operations. The competitive aspects of the CAA's operations are not material.

It is concluded that the CAA has a monopoly in relation to the control of air services and operations in Australia, and that it receives revenue from those areas. It is further concluded that the provision of safe and reliable air services in Australia is essential. It, therefore, follows that the CAA's services are essential because airline and aircraft operators must subscribe to the CAA's services.

The first criterion for a payment to a PSE to be classified as taxation is, therefore, satisfied.

7.4.2 Is there a payment to a 'public authority for public purposes'?

Reference to 'public authority' is made in Section 55(2A) of the CAA Act. It provides:

> **'55. (2A)** The authority is not a public authority for the purposes of paragraph 23(d) of the *Income Tax Assessment Act 1936*.'

This is the same wording used in AP's legislation (see 7.3.2). It does not make the CAA a non-public authority other than for income tax purposes.

(a) Is the CAA wholly owned by the government?

The CAA is a government business enterprise (CAA Annual Report, 1994, inside front cover) which means that it is owned by the Government. All shares in the CAA are owned by the Australian Government.

(b) Can the CAA exercise command or authority which an individual cannot?

As revealed at 7.4.1(a), the CAA has a legislative monopoly. Consequently, it is concluded that the CAA can exercise authority which an individual cannot.

(c) Does the CAA provide a function in the public interest?

It is reasonable to conclude that the provision of safe and reliable air services in Australia is in the public interest.

(d) Does the CAA perform a traditional function of government?

The monopoly services that the CAA provides are functions that have in the past been performed by a government owned operation. It is reasonable to conclude that they are now a traditional function of government.

(e) Does the CAA have government authority to carry on its activities?

As already mentioned the CAA receives authority from the government to carry on its activities under the CAA Act.

(f) Is the CAA paying income tax?

Subsections 55(1), (2) and (3) of the CAA Act provide:

> '**55. (1)** The Authority is not liable to pay tax under any law of the Commonwealth or of a State or territory.
>
> **(2)** Subsection (1) does not apply to income tax, to customs duties or to a law of the Commonwealth relating to sales tax.
>
> **(2A)** *(see above)*
>
> **(3)** Subsection (1) does not apply to a law of a State or territory relating to pay-roll tax.'

The legislation does not, therefore, excuse the CAA from paying income tax. The Annual Report shows a provision for income tax in the 1994 of $22,721,000 (1993 - $29,064,000).

(g) Is the CAA paying a dividend?

The requirement to pay dividends to the Commonwealth is contained in the legislation. Section 56 reads as follows:

> **'56. (1)** The Board shall, within 4 months after the end of each financial year, by notice in writing given to the Minister, recommend that the Authority:
>
> (a) pay to the Commonwealth, in relation to the Authority's operations in the financial year, a dividend of an amount specified in the notice; or
>
> (b) not pay a dividend to the Commonwealth for the financial year.
>
> **(2)** In making a recommendation, the Board shall have regard to:
>
> (a) the matters specified in section 45; and
>
> (b) the extent of the Commonwealth's equity in the Authority.
>
> **(3)** Subject to subsection (6), the Minister shall, within 30 days after the receipt of the recommendation, give notice in writing to the Board:
>
> (a) where the recommendation is that a dividend be paid:
>
> (i) approving the recommendation; or
>
> (ii) directing the Authority to pay a dividend of a different specified amount.
>
> **(4)** The Minister shall have regard to:

(a) the matters specified in section 45 (other than paragraph (b));

(b) the objectives and policies of the Commonwealth Government;

(c) the extent of the Commonwealth's equity in the Authority; and

(d) any other commercial considerations the Minister thinks appropriate.

(5) Where a dividend for a financial year is approved or directed under subsection (3), the Authority shall pay it to the Commonwealth within 8 months after the end of that year.

(6) A payment under this section may be made:

(a) out of profits of the Authority for the financial year to which the payments relates;

(b) out of the profits of the authority for any preceding financial year or years; or

(c) partly out of profits of the Authority for the financial year referred to in paragraph (a) and partly out of profits of the Authority for any preceding financial year or years.'

The relevant provision of section 45 are:

'**45.** When preparing the financial plan, the Board shall consider:

...

(b) the objectives and policies of the Commonwealth Government known to the Board;

(c) any directions given by the Minister under section 12;

...

(e) the need to maintain a reasonable level of reserves, having regard to estimated future infrastructure requirements;

(f) the need to maintain the extent of the Commonwealth's equity in the Authority;

(g) the need to earn a reasonable rate of return on the Authority's assets (other than assets wholly or principally used in the performance or regulatory functions or the provision of search and rescue services);

(h) the expectation of the Commonwealth that the Authority will pay a reasonable dividend;

(j) any other commercial considerations the Board thinks appropriate.'

Section 12 provides:

'**12. (1)** The Minister may give the Authority written directions as to the performance of its functions or the exercise of its powers.

(2) Directions as to the performance of the regulatory functions shall be only of a general nature.

(3) Particulars of any directions given in a financial year shall be included in the annual report of the Authority for that year.

(4) The Authority must comply with a direction given under subsection (1).'

The Government has ultimate control over the dividend it receives from the CAA.

The profit and loss statement shows a provision of $27,500,000 for dividends in 1994 (1993 - $15,800,000).

There has been a reduction in safety regulation funding to the CAA by the Government. CAA officers advised that the safety regulation aspect of operations is run on a non-profit basis and represents about 10% of total operations. In the past the Government has covered safety regulation costs under a 'safety contract' which effectively meant that it provided funding for the entire service. The CAA advised that in the early 1990's the Government decided that the industry should pay for its own safety regulation, and reduced its contribution. These reductions have been met by an increase in the fuel excise, which is paid by the airlines. It could, perhaps, be argued that there is another flow of money 'for public purposes'. There has been a reduction in 'traditional' Government funding, which has resulted in subsequent compensatory price increases by the CAA. The consumers of the services provided by the CAA have, in effect, been forced to pay more to the Government so that it could reduce its expenditure. This results in a positive net cash flow to the Government. This issue is not pursued in this thesis.

It is concluded that the CAA is a 'public authority' within the definition of taxation. Furthermore, it is concluded that the CAA has paid income tax and dividends.

The second criterion for a payment to a PSE to be classified as taxation is, therefore, satisfied.

7.4.3 Is collection of the payment 'enforceable by law'?

(a) Are there legislative provisions for the collection of fees charged by the CAA?

Section 66(11) of the CAA Act provides:

> '**66.(11)** Charges and penalties may be recovered as debts due to the Authority.'

The section provides CAA with the legal power to collect revenue from consumers.

It is, therefore, concluded that the CAA has the legal power to recover fees for the services which it has provided.

The third criterion for a payment to a PSE to be classified as taxation is, therefore, satisfied.

7.4 Conclusion for the CAA

The following has been concluded in relation to the CAA for the 1994 year.

1) The CAA operates a monopoly which provides essential services for which the CAA earns revenue.

2) The CAA is a public authority which received revenue which was used to pay income tax and dividends.

3) The CAA's charges are legally collectable.

It is concluded, therefore, that the CAA received revenue that can properly be described as taxation.

Accordingly, the CAA will undergo further testing in Chapter 8 to quantify the amount and the legality of the taxation.

7.5 Federal Airports Corporation (FAC)

The FAC is constituted under the *Federal Airports Corporation Act 1986* (FAC Act).

It describes its activities as follows:

> 'The mission of the Federal Airports Corporation is to help create a better future for Australia through provision of world class airport services' (FAC Annual Report, 1994, p.1).

7.5.1 Is there 'a compulsory exaction of money'?

(a) Is the FAC a monopoly?

A FAC officer advised that the only area of revenue where the FAC has a monopoly is in relation to aeronautical charges. However, the existence of a monopoly is not explicitly supported in the legislation. Section 6 of the FAC Act provides:

> '**6.** The functions of the Corporation are:
>
> (a) to operate Federal airports, and participate in the operation of jointly used areas, in Australia;
>
> (aa) to establish airports as Federal airport development sites;
>
> (b) to provide the Commonwealth, governments, local government bodies, and other persons, who operate, or propose to operate, airports or facilities relating to airports (including airports and facilities outside Australia) with consultancy and management services relating to the development and operation of those airports or facilities; and
>
> (c) other functions that:
>
> (i) relate to airports or Federal airport development sites; and
>
> (ii) are not specified in subsection 8(2); and
>
> (iii) are declared by the regulations to be functions of the Corporation.'

This section implicitly acknowledges the possibility of non-FAC airports in Australia. However, the Schedule to the Act shows that the FAC owns and operates Sydney (Kingsford-Smith), Bankstown, Hoxton Park, Camden, Melbourne (Tullamarine), Essendon, Moorabin, Brisbane (Eagle Farm), Archerfield, Coolangatta, Adelaide, Parafield, Perth, Jandakot, Hobart, Cambridge and Launceston airports. These are all major airports in Australia and all major domestic and/or international air services operate out of them. It seems unlikely that another operator

could operate airports in competition with the FAC. In fact, there are no significant competitors and, for all intents and purposes, the FAC is, at present, a monopoly. This situation may change as airports are sold but in 1994, it is concluded that the FAC was a monopoly.

(b) Are the monopoly services that the FAC provides essential to the community?

The FAC's monopoly operations are essential for the operation of the airline industry. Given that we have already concluded that such an industry is essential (see the CAA's at 7.4.1.2), it follows that the FAC's services are also essential.

(c) Does the FAC receive revenue from those services?

Section 56 of the FAC Act provides the power for the FAC to charge for aeronautical services. It provides:

> **'56. (1)** In this section:
>
> "aeronautical charges" means a charge for, or in respect of:
>
> (a) the use by an aircraft of a Federal airport; or
>
> (b) services or facilities provided by the Corporation;
>
> and without limiting the generality of the foregoing, includes:
>
> (c) a charge for the landing or parking of an aircraft at a Federal airport;
>
> (d) a charge relating to the embarkation or disembarkation of aircraft passengers at a Federal airport; and

(e) a charge relating to the handling of cargo carried on an aircraft;

but does not include any charge made under, or because of, a contract, a lease, a licence, or an authority, in writing under the common seal of the Corporation;

"Federal airport" includes a jointly used area.

(2) Subject to this section, the Corporation may, from time to time, make determinations fixing or varying aeronautical charges and specifying the persons by whom the charges are payable and the times when the charges are due and payable.'

The FAC's 1994 Annual Report was then examined to determine if the FAC received revenue from its monopoly.

Operating Revenue of the FAC from the Profit & Loss Statement for the year ended the 30th. June 1994

Operating Revenues	**1994**	**1993**
	$'000	**$'000**
Aeronautical charges	178,347	169,971
Commercial trading	164,503	149,649
Property	98,904	94,087
Recharge property service costs	7,166	7,030
Other	8,323	9,019
Total	457,243	429,756

"Aeronautical charges" are revenue from the FAC's monopoly.

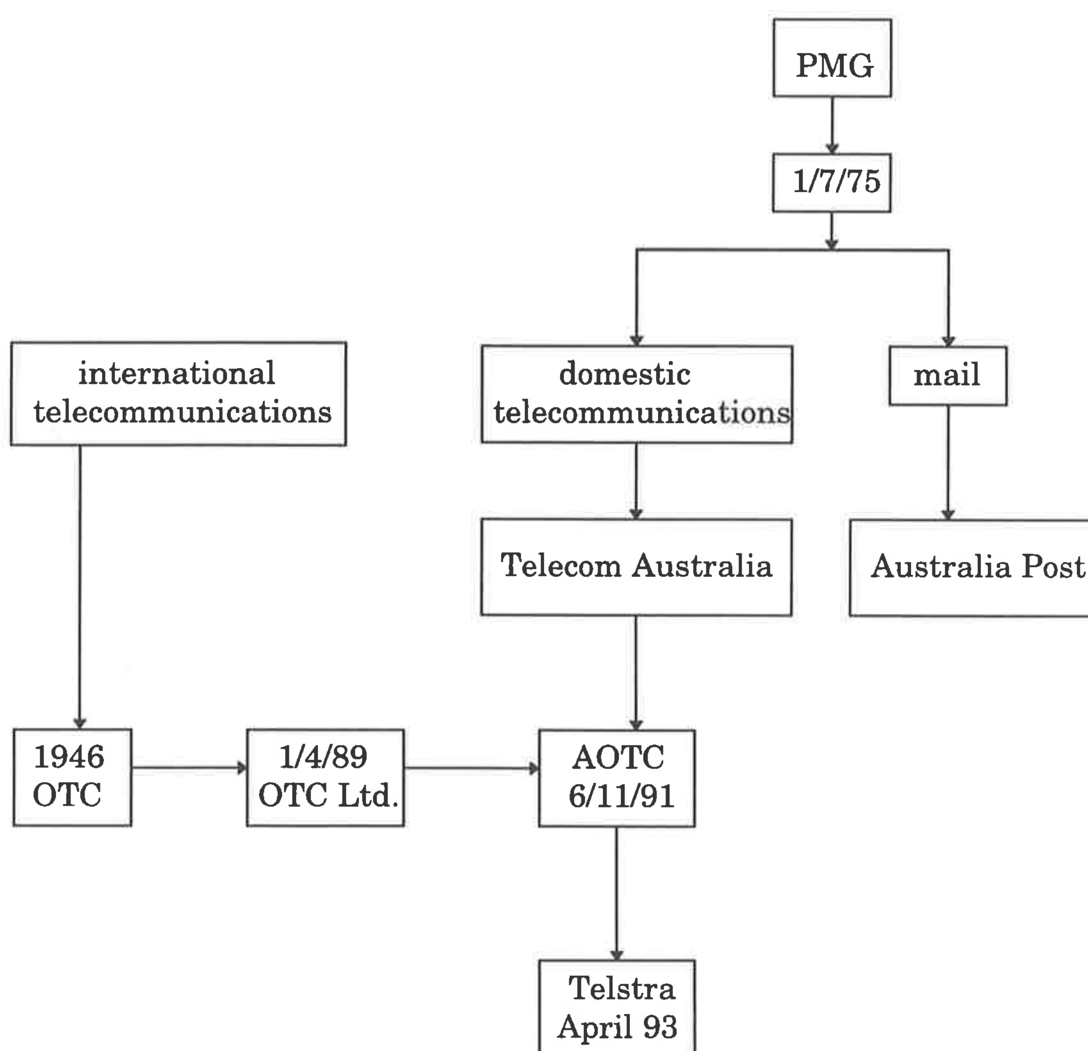
A FAC officer revealed that the FAC's monopoly based services are cross-subsidised by commercial (non-monopoly) competitive activities. The officer estimated that the aeronautical charges recover only about 58% to 60% of costs of providing the service. The remaining monopoly based costs are funded from competitive activities. It is, therefore, difficult to argue that any part of the FAC's monopoly based revenue could be taxation because any income tax or dividends that the FAC might pay would be from revenues received from competitive activities.

Accordingly, there will be no further analysis of the FAC in this thesis.

7.6 Telstra

The organisation that is now Telstra emerged from a number of governmental induced structural changes over a significant period of time. These changes are illustrated in Diagram 7.1.

Diagram 7.1



Until the 1st. July 1975 the Post Master General (PMG), a Commonwealth government department, controlled the domestic

mail/postal and telecommunications services in Australia. On that date it was split into two, each taking one of those services. The mail/postal services was taken over by what is now called Australia Post. The domestic telecommunication services were controlled by the Australian Telecommunications Corporation and was commonly known as Telecom Australia (Telecom).

International telecommunication services were controlled by a Commonwealth government organisation established in 1946. It was called the Overseas Telecommunications Commission (Australia) and commonly known as OTC. On the 1st. April 1989 this Commission was corporatised into OTC Limited.

On the 6th. November 1991 the Commonwealth government merged Telecom and OTC Limited into one organisation and called it the Australian and Overseas Telecommunications Corporation (AOTC). In April 1993 AOTC changed its name to Telstra.

The evolution of Telstra is different from the other PSEs examined in this chapter. It is necessary to examine each of Telstra's predecessors, which were also PSEs, to determine if any of their revenues could be defined as taxation. The PSEs will be examined in the following order:

1) Telstra
2) AOTC
3) Telecom
4) OTC Limited
5) OTC.

The date under examination for each of these PSEs is the balance date of their last annual report, with the exception of Telstra which will be examined as at the 30th. June 1994.

7.6.1 Telstra

Telstra was established under the *Telstra Corporation Act 1991* (Telstra Act). It describes its activities as follows:

> 'Telstra Corporation Limited provides a full range of the telecommunications products and services throughout Australia and overseas, particularly in the Asia-Pacific region' (Telstra Annual Report, 1994, inside front cover).

7.6.1.1 Is there 'a compulsory exaction of money'?

(a) Is Telstra a monopoly?

Telstra operates under a licence issued under Division 2 of Part 5 of the *Telecommunications Act 1991*. Section 5 defines a licence.

> ' "licence, in Parts 5, 6, 7, 8 and 16, means a general telecommunications licence, or a public mobile licence, in force under Part 5;'

A 'telecommunications service' is defined in Section 5.

'a service for carrying communications by means of guided or unguided electromagnetic energy or both;'

Section 5 also defines 'communications'.

'...any communication:

a) whether between persons and persons, things and things or persons and things; and

b) whether:

(i) in the form of:

(A) speech, music or other sounds; or

(B) data; or

(C) text; or

(D) visual images, whether or not animated; or

(E) signals; or

(ii) in any other form or in any combination of both forms;'

A 'public mobile telecommunications service' is defined in Section 25 as:

25.(1) A telecommunications service is a public mobile telecommunications service if:

(a) it is not a public access cordless telecommunications service (as defined by section 26); and

(b) it is offered to the public generally; and

(c) a person can use it while moving continuously between places; and

(d) customer equipment used for in relation to the supply of the service is not in physical contact with any part of the

telecommunications network by means of which the service is supplied; and

(e) a facility that is used for or in relation to supplying the service is connected to a telecommunications network operated by a general carrier; and

(f) neither of subsections (2) and (3) prevents the service from being a public mobile telecommunications service.

(2) A telecommunications service is not a public mobile service if:

(a) it is supplied by means of a telecommunications network (in this subsection called the **"primary network"**) that is connected to:

(i) a telecommunications network (in this subsection called a **"general network"**) operated by a general carrier; or

(ii) each of 2 or more general networks; and

(b) the principal function of the primary network is to supply telecommunications services between equipment connected to the primary network and other such equipment; and

(c) the supply of the telecommunications services between such equipment and equipment connected to a general network is at most an ancillary function of the primary network; and

(d) despite the connection or connections referred to in paragraph (a), the primary network cannot be used in carrying a communication, as a single transaction, between equipment connected to a general network and other such equipment.

(3) A telecommunications service is not a public mobile telecommunications service if it is:

(a) a one-way only, store-and-forward communications service; or

(b) a service that performs the same functions as such a service.'

The objects of the licence are set out in Section 55, which is in Part 5 of the Telecommunications Act.

> '**55.** The objects of this Part are to help the objects of this Act by:
>
> (a) establishing a system for licensing general carriers, on the basis that they are to be:
>
> (i) the primary providers of Australia's line-based and satellite-based public telecommunications capacity; and
>
> (ii) the primary suppliers of telecommunications services by the use of line links and satellite-based facilities; and
>
> (b) establishing a system for licensing mobile carriers, on the basis that they are to be the primary suppliers of public mobile telecommunications services; and
>
> (c) providing for a Code of Practice that:
>
> (i) relates to dealings by carriers with international telecommunications operators and with other persons; and
>
> (ii) is to operate, together with the class licence system established by Part 10, to prevent the misuse of market power by international telecommunications operators; and
>
> (d) providing for accounting separation of the various business activities of each carrier, in order to:
>
> (i) identify cross-subsidisation between business activities that do not face strong competition and those that do; and
>
> (ii) encourage each carrier to improve each of the main parts of its business.'

The objects of the Telecommunications Act are set out in Section 3.

> **3.** The objects of this Act include:

(a) ensuring that the standard telephone service:

(i) is supplied efficiently and economically as practicable; and

(ii) is, in view of the social importance of the service, reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business; and

(iii) is supplied at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community; and

(b) maximising the efficiency of the carriers, as the primary providers of Australia's telecommunications networks and the primary suppliers of Australia's telecommunications services; and

(c) enabling the carriers to meet their commercial obligations and their obligations under this Act and other laws of the Commonwealth; and

(d) ensuring that the carriers achieve the highest possible levels of accountability and responsiveness to customer and community needs; and

(e) achieving optimal rates of expansion and modernisation for Australia's telecommunications infrastructure and networks; and

(f) promoting the introduction of new and diverse telecommunications services; and

(g) enabling all sectors of the Australian telecommunications industry to participate effectively in Australian and overseas telecommunications markets on a commercial basis and making Australia more attractive as an international telecommunications centre; and

(h) promoting the development of other sectors of the Australian economy through the commercial supply of a full range of modern telecommunications services at the lowest possible prices; and

(i) creating a regulatory environment for the supply of telecommunications services which promotes competition and fair efficient market conduct; and

(j) promoting the development of Australia's telecommunication capabilities, industries and skills, for use in Australia and overseas; and

(k) promoting research and development within Australia in relation to new and diverse telecommunications facilities and services for use in Australia and overseas; and

(l) ensuring that all parts of the community benefit from lower prices for telecommunications facilities and services and from the future development of telecommunications networks.'

It is clear from the legislation that licensees under the Telecommunications Act will provide the primary telephone (including mobile telephones) and telecommunications facilities in Australia. The licence, among other things, allows access to the Australian telecommunications infrastructure which is essential for an organisation to provide telecommunications services. The Telecommunications Act does not prohibit other organisations from providing telecommunications services. It simply provides a licence which is needed before organisations can use the existing infrastructure. Other organisations could install their own telecommunications infrastructure, but it is reasonable to assume that

the costs of setting up a competing telecommunications infrastructure is, at present, an effective barrier to entry.

As at the 30th. June 1994 at least one other operator, Optus Communications Limited (Optus), held a licence. At that time Optus offered long distance and mobile telephone services in Australia. An Optus officer advised that Optus won the tender for a second licence on the 19th. November 1991 and began offering mobile telephone services on the 15th. June 1992. Optus progressively introduced long distance services from the 15th. November 1992 (Optus Communications, n.d, p.6).

Therefore, when Telstra came into existence in April 1993 it did not have a monopoly on long distance and mobile telecommunication services. It did not, however, have any competitors for the domestic telecommunications services. While Telstra offers more than telecommunications services within Australia (eg advertising via Yellow Pages), these other domestic non-telecommunications services are not a monopoly.

It is concluded, therefore, that Telstra had a monopoly in domestic telecommunications services in Australia in 1994.

(b) Are the monopoly services that Telstra provide essential to the community?

It is unlikely that Australian business and household could have operated effectively without the domestic telecommunications services

that Telstra provided. Subsection 3(a)(ii) of the Telecommunications Act (see 7.6.1.1(a)) suggests a degree of essentiality.

It is concluded, therefore, that the monopoly services that Telstra provided are essential.

(c) Did Telstra receive revenue from those services?

Telstra's total operating revenue shown in its 1994 Profit and Loss Statement was $13,362.5million (1993 - $12,656.0million). The Note to that item provided the following information.

Operating Revenue	**$M**
Included in the operating profit are the following items of operating revenue:	
Sales revenue	12,787.7
Other revenue	
Dividends received/receivable from:	
-attributable to related corporations	0
-attributable to other persons	23.0
Interest received/receivable from:	
-attributable to related corporations	0
-attributable to other persons	69.2
Proceeds from the sale of property, plant and equipment	348.8
Other	133.8
Total operating revenue	**13,362.5**

Accounting policy note 1.3 dealt with operating revenue and provides;

> 'Sales revenue represents revenue earned from the sale of products and services net of returns, trade allowances, duties and taxes paid.
> Sales revenue is recognised at the time of the provision of the product or service
> Other revenue includes interest income, dividends received and proceeds from the sale of property, plant and equipment.'(Telstra Annual Report, 1994, p.54)

The annual report does not provide any indication of the amount of revenue that Telstra earned from its domestic telecommunications services. In discussions held with Telstra officers it was revealed that Telstra did not receive sufficient revenue to cover all the costs of providing domestic telecommunications. Those costs were supported by non-monopoly service based revenue, but it is clear that 'cost' was not historical cost. It would, therefore, be difficult to argue that any part of Telstra's domestic telecommunications monopoly operations could be taxation when those operations were subsidised with revenue from non-monopoly operations. As a result it has been decided not to further examine Telstra.

7.6.2 Australian and Overseas Telecommunications Corporation (AOTC)

AOTC was established under the *Australian and Overseas Telecommunications Corporations Act 1991* (AOTC Act). It ceased

operations on the 30th. April 1993 and its last annual report was for the 30th. June 1992[8].

AOTC's objectives were to:

'☐ to provide ever increasing value to our customers in Australia by introducing a very competitively priced and an increasingly robust array of telecommunications product and service options in the market;

☐ to deliver those products and services in a manner and tone that places AOTC among the best in the world in cost efficiency and in quality of personal service;

☐ to create increased levels of growth in telecommunications and the information technology industry generally in Australia by innovation in the development, introduction and delivery of product/service applications for our various markets;

☐ to increasingly develop the information technology industry in Australia so that AOTC's skill, expertise, and technology applications can be leveraged offshore in the Asia-Pacific region and beyond; and finally

☐ to assist all of business and industry in Australia in their drive to become world-class by providing them with leading edge information technology solutions to their business problems and opportunities.' (AOTC Annual Report, 1992, p.6)

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8. Note that the Annual Report and the Financial statements are for the period from the 6th. November 1991 to the 30th. June 1992. Financial statement information for the period 1st. July 1991 tp 5th. November 1991 was requested but was not made available.

7.6.2.1 Was there 'a compulsory exaction of money'?

(a) Was AOTC a monopoly?

AOTC operated under the same licence as Telstra that was issued pursuant to the *Telecommunications Act 1991*. When Telstra came into existence there was simply a change of name from AOTC to Telstra. Consequently, the sections of the Telecommunications Act discussed earlier are relevant. The conclusion is that AOTC held a monopoly in telecommunications services in Australia. The monopoly was absolute until Optus entered the mobile telephone market on the 15th. June 1992 and long distance services on the 15th. November 1992.

There were two other types of services that AOTC provided that were not monopoly based and for which AOTC received revenue. The first were services offered outside Australia. The second was non-telecommunications services (eg Yellow Pages) which were offered within Australia.

It is concluded, therefore, that AOTC held a monopoly on telecommunications services within Australia until the 15th. June 1992, when Optus began operations.

(b) Were the monopoly services that AOTC provided essential to the community?

It is unlikely that Australian businesses and households could have operated effectively without the international and domestic telecommunication services that AOTC provided.

It is concluded, therefore, that the monopoly services that AOTC provided were essential.

(b) Did AOTC receive revenue from those services?

AOTC's total operating revenue shown in its 1992 Profit and Loss Statement was $5,042.6million. The Note to that item provided the following information.

Operating Revenue	**$M**
Included in the operating profit are the following items of operating revenue:	
Sales revenue	4,716.3
Other revenue	
Dividends received/receivable from:	
-attributable to related corporations	0
-attributable to other persons	4.5
Interest received/receivable from:	
-attributable to related corporations	0.3
-attributable to other persons	54.0
Proceeds from the sale of property, plant and equipment	103.4
Other	164.1
Total operating revenue	**5,042.6**

Accounting policy note 1.12 dealt with operating revenue and provides;

> 'Sales revenue represents revenue earned from the sale of products and services net of returns, trade allowances, duties and taxes paid.
> Other revenue includes interest income and dividends received. Sales revenue is recognised at the time of the provision of the product or service' (AOTC Annual Report, 1992, p.32).

While there is no breakdown of the sales revenue, it is reasonable to conclude that this amount included revenue received by AOTC as a result of its monopoly.

It is concluded, therefore, that some part of the revenue received by AOTC was 'a compulsory exaction of money'. AOTC enjoyed a monopoly for a period of time, consumers were obliged to purchase its services for that time and AOTC received revenue as a result. Accordingly the first criterion of the definition taxation is satisfied.

7.6.2.2 Was there a payment to a 'public authority for public purposes'?

There is a reference to 'public authority' and 'public purposes' in Section 26 of the AOTC Act.

> '**26.** AOTC is taken for the purposes of the law of the Commonwealth, of a State or of a Territory:
>
> (a) not to have been incorporated or established for a public purpose or for a purpose of the Commonwealth; and
>
> (b) not to be a public authority or an instrumentality or agency of the Crown; and
>
> (c) not to be entitled to any immunity or privilege of the Commonwealth;
>
> except so far as express provision is made by this Act or any other law of the Commonwealth, or by a law of a State or of a Territory, as the case may be.'

There are two views about the reason for the references to 'public purposes' and 'public authority' in the Act and the effect of the insertions.

One view is that it was inserted so that revenues received by AOTC would not be regarded as taxation. It can be argued on two grounds, that if this was the intention, then it has failed.

The first ground is that the federal government is unable to pass legislation that contravenes the Australian Constitution. Section 51 of the Australian Constitution provides as follows:

> 'The parliament shall, subject to the Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to :-
>
> ...
>
> (ii) Taxation;'

The words 'subject to the Constitution' are quite unambiguous and mean, in the context of section 51, that the federal government can make laws pursuant to, but not in contravention of, the Constitution. It was detailed in Chapter 3 that the Constitution does not provide a definition of taxation and that Court decisions need to be relied upon in determining a definition. Court decisions that specifically interpret the Constitution effectively attach themselves to the Constitution. Latham's definition of taxation and subsequent judgments are a product of that process. Furthermore, if the definition of taxation is to be altered then it can only be done through another Court decision or a change of the Constitution via the proper referendum process.

The second ground deals with the initial sentence of Section 26 of the AOTC Act which reads 'AOTC is taken for the purposes of the law of the Commonwealth, of a State or of a Territory'. This wording has no effect on the Australian Constitution because it is not a law of any of these governments. The Australian Constitution is a law of the United Kingdom. Therefore, Section 26 has no effect as regards Constitutional matters.

The second and better view is that Section 26 was not inserted to effect the definition of taxation or any other Constitutional matter. Consequently, it is *ultra vires* any Constitutional issues (Johnston, 1993, p.362). It can therefore be deduced that it was inserted to address Commonwealth, State or Territory matters, the object of which is of no interest to this thesis.

(a) Was AOTC wholly owned by the government?

There are provisions in the AOTC Act which deal with the ownership.

Commonwealth to retain ownership and control of AOTC

'**8. (1)** The Commonwealth must not transfer any of its shares in AOTC.

(2) Neither the Commonwealth nor AOTC is allowed to do anything to cause or contribute to either of the following results:

(a) that the Commonwealth no longer holds all the voting shares in AOTC;

(b) that the Commonwealth no longer controls the exercise of the total voting rights attached to the voting shares in AOTC.

(3) The following are examples of things that could give rise to a breach of subsection (2):

(a) the issue by AOTC of voting shares in AOTC to a person other than the Commonwealth;

(b) the Commonwealth agreeing to:

(i) hold voting shares in AOTC on trust for another person; or

(ii) exercise voting rights attached to voting shares in AOTC in accordance with the directions, instructions or wishes of another person.'

It is concluded that AOTC is owned and controlled by the Commonwealth Government.

(b) Could AOTC exercise command or authority which an individual could not?

It was concluded that AOTC held an absolute monopoly in telecommunications services in Australia until Optus entered the mobile telephone market on the 15th. June 1992 and long distance services on the 15th. November 1992. The *Telecommunications Act 1991,* therefore, provided the AOTC with authority which an individual could not exercise.

(c) Did AOTC provide a function in the public interest?

It is reasonable to conclude that the provision of telecommunications services for Australia was in the public interests. Among other things, it gave Australians access to a communication system for police, health and emergency services.

(d) Did AOTC perform a traditional function of government?

The monopoly services that AOTC provided, prior to the entry of Optus, were functions that had always been performed by a government owned operation.

(e) Did AOTC have government authority to carry on its activities?

AOTC received authority from the government to carry on its activities under the AOTC Act and the *Telecommunications Act 1991.*

(f) Was AOTC paying income tax?

Section 27 of the AOTC Act deals with taxes.

'**27.** **(1)** No tax is payable under a law of the Commonwealth, of a State or of a Territory in respect of:

(a) an exempt matter; or

(b) anything done (including a transaction entered into or an instrument made executed, lodged or given) because of, or for a purpose connected with or arising out of an exempt matter.

(2) An authorised person may by signed writing certify that:

(a) a specified matter or thing is an exempt matter; or

(b) a specified thing was done (including a transaction entered into or an instrument made, executed, lodged or given) because of, or for a purpose connected with or arising out of, a specified exempt matter.

(3) For all purposes and in all proceedings, a certificate under subsection (2) is conclusive evidence of the matter certified, except to the extent to which the contrary is established.'

An 'exempt matter' is defined in Section 3 of the AOTC Act.

'**"exempt matter"** means:

(a) the operation of Part 4; or

(b) the giving effect to Part 4; or

(c) making arrangements to achieve, in relation to a set of merging entities (other than Telecom and OTC) and the merged entity in relation to that set, a result that, for commercial purposes, is to a

substantial degree similar or analogous to a result achieved, in relation to Telecom, OTC and AOTC, by:

(i) the operation of Part 4; or

(ii) giving effect to Part 4;

for example (but without limitation), arrangements for:

(iii) some or all property or rights of the merging entities to become property or rights of the merged entity; or

(iv) the merged entity to otherwise get the benefit of some or all property or rights of the merged entities; or

(v) some or all liabilities of the merging entities to become liabilities of the merged entity; or

(vi) the merged entity to otherwise become responsible for some or all liabilities of the merging entities; or

(viii) the merged entity to become the successor in law, or the commercial successor, of the merging entities.'

Part 4 of the AOTC Act deals with AOTC as the successor of Telecom Australia and OTC. Therefore, Section 27 deals only with matters that arise out of the formation of AOTC from Telecom Australia and OTC, and has no effect on the requirement of AOTC to pay or not to pay income tax.

Furthermore Section 3 defines tax.

"'tax" includes:

(a) sales tax; and

(b) fees payable under the Corporations (Fees) Regulations; and

(c) stamp duty; and

(d) any other tax, fee, duty, levy or charge;

> but, except for the purposes of section 28, does not include income tax imposed as such by a law of the Commonwealth.'

Section 28 deals also deals with merging entities and merged entities. Its provisions have no effect on the payment of income tax by AOTC on a recurring basis.

Section 29 deals with AOTC complying with Commonwealth laws.

> '**29.** Subject to section 26 the laws of the Commonwealth apply to AOTC according to their tenor, and so far as they are capable of applying, except to the extent that AOTC is exempted from the application of a particular law or class of laws by express provision of this Act or of any other law of the Commonwealth.'

Section 29, in effect, required AOTC to pay income tax. It was a general requirement for AOTC to comply with all the laws of the Commonwealth including income tax laws. The AOTC 1992 annual report showed a provision for income tax of $716.5million.

(g) Was AOTC paying dividends?

There is nothing in the AOTC Act requiring AOTC to pay dividends to the Government. However, clauses 3, 56 and 58 of AOTC's Articles of Association, which were required to be lodged under subsection 9(8) of the AOTC Act, do refer to dividends.

'3. Subject to the Corporations Law and these articles, and without prejudice to any special rights conferred on the holders of any shares, the company in general meeting may authorise the allotment of shares in or other disposal of any part of the unissued capital of the company on such terms as the company may determine and without limitation to the foregoing may:

...

(c) pay dividends in proportion to the amount paid up on each share where a larger amount is paid on some shares than others.'

'56. **(1)** Within four (4) months after the end of each financial year and at least 30 days before the Annual General Meeting the directors shall give written notice to the Minister of the amount (if any) of the dividend they propose to recommend to the company in respect of that financial year as appears to them to be justified by the profits of the company.

(2) The directors may recommend, by written notice to the Minister, payment of such interim dividends as appear to them to be justified by the profits of the company.

(3) The company may by resolution declare such final and interim dividends as the members consider appropriate, whether or not in accordance with any recommendation referred to in article 56.1 or article 56.2.

(4) The dividend for a financial year shall be paid within six (6) months after the end of that financial year or such further period as the company resolves.'

> '**58.** Dividends and other amounts payable in cash by the company to a member may be paid by cheque to or to the order of the member or posted in accordance with article 63.'

The provisions in the Articles for the declaration and payment of dividends are typical of those for an ordinary limited company. However, AOTC was not an 'ordinary company'. Its dividends had to be either referred to the Minister or to AOTC's members. This means governmental oversight because Section 8 of the AOTC Act effectively restricted share ownership to the Government.

The Articles gave AOTC the power to pay dividends, and the profit and loss statement in the 1992 annual report showed a payment of $478.0million.

It is concluded, therefore, that AOTC was a 'public authority' within the definition of taxation. Furthermore, it is concluded that AOTC paid income tax and dividends.

7.6.2.3. Was collection of the payment 'enforceable by law'?

(a) Were there legislative provisions for the collection of fees charged by AOTC?

There were no specific provisions in the AOTC Act which gave AOTC power to collect its fees and charges.

(b) Was AOTC able to rely on contract law?

AOTC's service were partly paid for in advance and partly in arrears. The provision of a telephone line and rental of any equipment was paid for in advance. The cost of any calls made by a consumer, however, were paid for in arrears.

Where payments are made in arrears, AOTC would have been able to rely on contract law for the collection of those fees.

AOTC's fees could, therefore, be divided into two types. The first were paid in arrears in which event contract law would have applied. The second are those that were prepaid and, where the issue of enforcement does not arise.

It is concluded, therefore that the third criterion for a payment to a PSE to be classified as taxation is satisfied.

7.6.2.4 Conclusion for AOTC

The following has been concluded in relation to AOTC for the 1992 year.

1) AOTC operated a monopoly in which it provided essential services. Furthermore, AOTC earned revenue from the provision of those services.

2) AOTC was a public authority and that it received revenue which was used to pay income tax and dividends.

3) AOTC's charges were legally collectable.

It is concluded, therefore, that AOTC received revenue that can properly be described as taxation.

Accordingly, AOTC will undergo further testing in Chapter 8 to determine the amount and legality of the taxation.

7.6.3 Telecom

Telecom was constituted under the *Australian Telecommunications Corporation Act 1989* (Telecom Act), although it was in existence prior to that legislation. Telecom merged with OTC Limited on the 6th. November 1991 to form AOTC. Telecom's last annual report was prepared for the year ended the 30th. June 1991.

Telecom described its functions as follows:

> 'The principal function of the Corporation is to supply telecommunications services within Australia. A subsidiary function is to carry on, outside Australia, any business or activity relating to telecommunications. Whether inside or outside the country, the organisation may additionally conduct any business or activity that is incidental to these roles' (Telecom Australia Annual Report, 1991, inside front cover).

7.6.3.1 Was there 'a compulsory exaction of money'?

(a) Was Telecom a monopoly?

The Telecom Act controlled Telecom together with the *Telecommunications Act 1989*[9]. The general objects of the Telecommunications Act are described in Section 3.

> **3.** The objects of this Act include:
>
> (a) ensuring that the standard telephone service supplied by Telecom (namely, the public switched telephone service):
>
> (i) is supplied as efficiently and economically as practicable;
>
> (ii) is, in view of the social importance of the service, reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business; and
>
> (iii) is supplied at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community;
>
> (b) maximising the efficiency of the carriers and enabling them to meet their commercial and general governmental obligations and, in the case of Telecom, its community service obligations;
>
> (c) ensuring that the carriers achieve the highest possible levels of accountability and responsiveness to customer and community needs;

9. This should not be confused with the *Telecommunications Act 1991*.

(d) achieving optimal rates of expansion and modernisation for Australia's telecommunications infrastructure and networks, and, for example, the introduction of new and diverse telecommunications services;

(e) enabling all sectors of the Australian telecommunications industry to participate effectively in Australian and overseas telecommunications markets on a commercial basis; and

(f) promoting the development of other sectors of the Australian economy through the commercial supply of a full range of modern telecommunications services at the lowest possible prices.'

Section 4 defines a 'carrier'.

'"carrier" means Telecom, OTC or AUSSAT;'

The Telecommunications Act relates to those three carriers only, all of which are owned by the Commonwealth Government.

Division 3 of the Act deals with Reserved Services and the relevant Sections are as follows:

'**52. (1)** A telecommunications service is a reserved service if it is a service for primary communications carriage between 2 or more cadastrally separated places or persons.

(2) All other telecommunications services are value added services.

(3) Subject to subsection 59(3), the carriers have the exclusive right to supply reserved services (other than private network services that are supplied under a class licence).

(4) The supply of value added services is open to competition.

53. A telecommunications service is a service for primary communications carriage so far as it consists only of the functions necessary:

(a) to arrange, operate and manage connectivity across the telecommunications network by means of which the service is supplied; and

(b) to carry communications across the network or, if under section 55 there are service delivery standards applicable to the service, to carry communications across the network in a way that does not result in the service delivery standards being exceeded in the supply of the service.

...

56. (1) Subject to this section and section 60, Telecom has the exclusive right to supply reserved services between places within Australia (other than places all of which are within a particular prescribed external Territory).

(2) OTC may supply a reserved service between a place in Australia and:

(a) a ship at sea; or

(b) a commercial or private aircraft (other than an aircraft trading or operating exclusively within Australia);

whether or not the ship or aircraft is within Australia.

(3) OTC may, with the approval of AUSTEL, supply reserved services between places within Australia if the supply of the services is incidental to the supply of other telecommunications services that it has the right to supply under this Division.

(4) Subsection (1) does not prevent OTC or AUSSAT from supplying a reserved service for Telecom.

(5) This section does not authorise Telecom or OTC to supply a reserved service by means of satellite-based facilities.'

Subsection 59(3) and section 60 do not provide any circumstances which operate to reduce Telecom's reserved service capacity.

'Telecommunications services' is defined in Section 4.

> '"telecommunications service" means a service for carrying communications by means of guided or unguided electromagnetic energy or both, but does not include a service for carrying communications solely by means of radiocommunication;'

It is, therefore, apparent that Telecom had absolute control of Australia's domestic telecommunications services and was, therefore, operating a monopoly. However, it appears as if all of Telecom's activities were not intended to be a monopoly. This is suggested by sections 14, 15 and 16.

'**14.** The principal function of Telecom is to supply telecommunications services within Australia.

15. A subsidiary function of Telecom is to carry on, outside Australia, any business or activity relating to telecommunications.

16. **(1)** The functions of Telecom include the carrying on, within or outside Australia, of any business or activity that is incidental to:

(a) the supply of telecommunications services under section 14; or

(b) the carrying on of any business or activity under section 15.

(2) Without limiting subsection (1), the functions of Telecom include that carrying on, within or outside Australia, of any business or activity that is capable of being conveniently carried on:

(a) by the use of resources that are not immediately required in carrying out Telecom's principal or subsidiary function; or

(b) in the course of:

(i) supplying telecommunications services under section 14; or

(ii) carrying on any business or activity under section 15.'

It is concluded, therefore, that Telecom was a monopoly, but that the monopoly power did not necessarily extend to all its activities.

(b) Were the monopoly services that Telecom provided essential to the community?

It is unlikely that Australian businesses and households could have operated effectively without domestic telecommunication services. Furthermore, Section 3(a)(ii) of the Telecommunications Act (see 7.6.3.1(a)) infers a level of essentiality.

It is concluded, therefore, that the monopoly services that Telecom provided were essential.

(c) Did Telecom receive revenue from those services?

Telecom's 1991 operating revenue shown in its Profit and Loss Statement was $9,531.2million (1990 - $8,878.9million). The Note to that item provided the following information:

Operating Revenue	**1991**	**1990**
	$M	**$M**
Revenue from Telecommunications Services		
Service and Equipment charges	2,252.8	2,034.9
Calls	5.083.5	4,704.2
Other Telecommunications Revenue	1,915.2	1,794.3
	9,251.5	8,533.4
Other Revenue		
Interest Received - Other Persons	97.2	121.5
Proceeds on Sale on Non-Current Assets	77.7	75.6
Miscellaneous	104.8	148.4
	279.7	345.5
TOTAL REVENUE	9,531.2	8,878.9

Revenue received from Service and equipment charges and Calls relates to Telecom's monopoly operations. Therefore, Telecom has received revenue from its monopoly operations.

It is concluded, therefore, that $7.3billion of revenue received by Telecom was 'a compulsory exaction of money'. Telecom enjoyed a monopoly and consumers were obliged to purchase its services for which Telecom received revenue. Accordingly the first criterion of the definition of taxation is satisfied.

7.6.3.2 Was there a payment to a 'public authority for public purposes'?

A reference to 'public authority' is found in Subsections 59(1) and (2) of the Telecom Act.

> **'59.** **(1)** Telecom is subject to taxation under the laws of the Commonwealth and the States and Territories.
>
> **(2)** Telecom is not a public authority for the purposes of paragraph 23(d) of the *Income Tax Assessment Act 1936*.'

This reference to 'public authority' is limited to the requirement of Telecom to pay income tax and has no other implication.

(a) Was Telecom wholly owned by the government?

Telecom was a wholly owned by the Commonwealth Government.

(b) Could Telecom exercise command or authority which an individual could not?

Telecom had a legislative monopoly. Consequently, it is concluded that Telecom could exercise authority which an individual could not.

(c) Did Telecom provide a function in the public interest?

It is reasonable to conclude, like AOTC, that the provision of Telecom's telecommunications services was in the public interests.

(d) Did Telecom perform a traditional function of government?

The services that Telecom provided were a function that had in the past been performed by government owned operations.

(e) Did Telecom have government authority to carry on its activities?

Telecom received authority from the government to carry on its activities under the *Telecommunications Act 1989*.

(f) Was Telecom paying income tax?

The requirement of Telecom to pay income tax is provided under Section 59 of the Telecom Act (see 7.6.3.2). There is a further acknowledgment of the requirement to pay income tax in Subsection 50(5) (see 7.6.3.2(g) following). The 1991 annual report shows a

provision for income tax of $565.9million. It is concluded, therefore, that Telecom was required to pay taxes.

(g) Was Telecom paying dividends?

Sections 50 and 51 of the Telecom Act deal with the payment of dividends.

> '**50. (1)** The Board shall, within 4 months after the end of each financial year, by written notice to the Minister, recommend that Telecom pay a specified dividend, or not pay a dividend, to the Commonwealth for the financial year.
>
> **(2)** In making the recommendation, the Board shall have regard to the matters referred to in section 34 (other than the matter referred to in paragraph (a)).
>
> **(3)** The Minister shall, within 30 days after receiving the recommendation, by written notice to the Board, either:
>
> (a) approve the recommendation; or
>
> (b) direct the payment of a dividend or a different specified dividend, as the case requires.
>
> **(4)** In exercising powers under subsection (3), the Minister shall have regard to:
>
> (a) the matters referred to in section 34 (other than the matters referred to in paragraphs (a) and (f)); and
>
> (b) any other matters the Minister considers appropriate.
>
> **(5)** Telecom's dividend for a financial year shall not exceed its profit for the year, after provision has been made for income tax.

(6) Subject to section 51, the dividend payable for a financial year shall be paid within 6 months after the end of the financial year or such further period as the Minister directs after consultation with the Board.

(7) In exercising powers under subsection (6), the Minister shall have regard to any recommendation of the Board in relation to the time of payment of the dividend.

(8) A direction under subsection (6) shall be given in writing.

51. (1) The Minister may, at any time before or during a financial year, by written notice to the Board, require the Board to make a recommendation in relation to the payment of amounts to the Commonwealth on account of the dividend that may become payable under section 50 for the financial year.

(2) The Board shall, within 30 days after receiving the notice, by written notice to the Minister, make such a recommendation to the Minister.

(3) The Minister shall, within 30 days after receiving the recommendation, by written notice to the Board, either:

(a) approve the recommendation; or

(b) give directions to the Board in relation to the payment of amounts to the Commonwealth on account of the dividend that may become payable under section 50 for the financial year.

(4) In exercising powers under subsection (3), the Minister shall have regard to:

(a) the matters referred to in section 34 (other then the matters referred to in paragraphs (a) and (f)); and

(b) any other matters the Minister considers appropriate.'

Section 34 provides as follows:

'**34.** In preparing or revising a financial target, the Board shall have regard to:

(a) the need to earn a reasonable rate of return on Telecom's assets;

(b) the need to maintain the extent of the Commonwealth's equity in Telecom;

(c) the expectation of the Commonwealth that Telecom will pay a reasonable dividend:

(d) the need to maintain Telecom's financial viability:

(e) to maintain a reasonable level of reserves, especially to make provision for:

(i) any estimated future demand for telecommunications services; and

(ii) any need to improve the accessibility of, and the performance standards for, the standard telephone service;

(f) any other commercial matters the Board considers appropriate;

(g) the cost of carrying out Telecom's community service obligations;

(j) the cost of implementing any direction given by the Minister under section 45; and

(k) the cost of any other obligations of Telecom under this or any other Act that require it to act otherwise than in accordance with normal commercial practice.'

Section 45 provides as follows:

'**45. (1)** Subject to subsection (2), the Minister may, after consultation with the Board, give to the Board such written directions in

relation to the performance of Telecom's functions as appear to the Minister to be necessary in the public interest.

(2) The Minister shall not give a direction under subsection (1) in relation to the amounts to be charged for work done, or services, goods or information supplied, by Telecom.

(3) Where the Minister gives a direction under subsection (1), the Minister shall cause a copy of the direction to be laid before each House of the Parliament within 15 sitting days of that House after giving the direction.'

There was, therefore, a requirement for Telecom to pay dividends given appropriate commercial circumstances. However, as Telecom was not faced with any competition it could set its pricing to achieve the objectives of Section 34. It would be difficult to imagine a situation where insufficient profits were available to pay dividends. Furthermore, it is quite clear that the Government had control of the amount of dividends.

The profit and loss statement in Telecom's 1991 annual report showed a payment of $250.0million (1990 - $185.5million) for dividends.

It is concluded, therefore that Telecom was a 'public authority' within the definition of taxation. Furthermore, it is concluded that Telecom paid income tax and dividends.

7.6.3.3 Was collection of the payment 'enforceable by law'?

(a) Were there legislative provisions for the collection of fees charged by Telecom?

Section 29 of the Telecom Act deals generally with terms and conditions.

> '**29. (1)** Subject to any express provision of this or any other Act, the terms and conditions of a service supplied by Telecom for a person (including a person who is not authorised by Telecom to use the service) are:
>
> (a) so far as Telecom and the person agree on terms and conditions for the supply of the service - the agreed terms and conditions; and
>
> (b) so far as Telecom and the person do not agree on terms and conditions - the terms and conditions determined by the board that are applicable to supply the service.
>
> **(2)** Without limiting subsection (1), the terms and conditions determined by the Board may make provision with respect to the charges payable for services supplied by Telecom.
>
> **(3)** The Board shall ensure that copies of a determination made by it under this section are made available for inspection and purchase at all business offices of Telecom as soon as practicable after it is made.
>
> **(4)** A contravention of subsection (3) in relation to a determination does not affect the validity of the determination.'

It is reasonable to conclude that if Telecom and a customer agreed on terms and conditions then one condition would be that the customer

would be liable for payment of Telecom services. If no such agreements were made then it is probable that the terms and conditions determined by Telecom were that its customers would be liable for payment for Telecom services[10].

(b) Was Telecom able to rely on contract law?

Telecom's services were partly paid for in advance and partly in arrears. The provision of a telephone line and rental of any equipment was paid for in advance. The cost of any calls made by a consumer, however, were paid for in arrears.

Where payments are made in arrears, Telecom's would have been able to rely on contract law for the collection of those fees.

Telecom's fees could, therefore, be divided into two types. The first were paid in arrears when contract law would apply. The second was those payments where the issue of enforcement does not arise.

It is concluded, therefore that the third criterion for a payment to a PSE to be classified as taxation is satisfied.

7.6.3.4 Conclusion for Telecom

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10. Given that a significant period has expired since Telecom ceased operations it is highly unlikely that any of the copies of the terms and conditions still exist.

The following has been concluded in relation to the Telecom for the 1991 year.

1) Telecom operated a monopoly which provided essential services. Furthermore, Telecom earned revenue from the provision of those services.

2) Telecom was a public authority that received revenue which was used to pay income tax and dividends.

3) Telecom's charges were legally collectable.

It is concluded, therefore, that Telecom received revenue that can properly be described as taxation.

Accordingly, Telecom will undergo further testing in Chapter 8 to determine the amount and legality of the taxation.

7.6.4 OTC Limited

OTC Limited was formed when OTC was corporatised on the 1st. April 1989. OTC Limited remained in existence until it was absorbed into AOTC on the 31st. March 1991, which was the date of the last annual report of OTC Limited.

OTC Limited was controlled by the *Overseas Telecommunications Act 1946-1973* (OTC Limited Act). This legislation was the same Act that also covered the previous OTC, but most of its was repealed when OTC

Limited was formed. In place of the repealed legislation was the Memorandum and Articles of Association necessary for all public companies.

OTC Limited was the carrier of Australia's international telecommunications services.

7.6.4.1 Was there 'a compulsory exaction of money'?

(a) Was OTC Limited a monopoly?

There was nothing in the OTC Limited Act that provided OTC Limited with a monopoly. However, the *Telecommunications Act 1989* did contain provisions which were discussed in relation to Telecom. It is clear that that legislation provided OTC Limited with a monopoly.

Confirmation of the monopoly power held by OTC Limited was received from officers previously employed by OTC Limited.

It is concluded, therefore, that OTC Limited was a monopoly.

(a) Were the monopoly services that OTC Limited provided essential to the community?

It is unlikely that Australian businesses and households could have operated effectively without international telecommunication services.

It is concluded, therefore, that the monopoly services that OTC Limited provided were essential.

(b) Did OTC Limited receive revenue from those services?

The operating profit for OTC Limited shown in its 1991 annual report was $453.2million (1990 - $385.5million). The Note on that item provided the following information:

	1991	1990
Operating Profit	**$m**	**$m**
Operating revenue		
Sales revenue (note 3)	1,627.6	1,459.4
Other revenue	63.7	57.8
	1,691.3	1,517.2
Operating expenses	1,139.1	1,047.2
Depreciation	98.8	84.5
Operating profit	453.3	385.5

Note 3 provided as follows:

'Solas
Included in sales revenue is $9.630million (1990 $9.630million) relating to an agreement with the Department of Transport and Communications for the provision of Safety of Life at Sea services.'

While this above information does not specifically show revenue from the monopoly that OTC Limited enjoyed, it is a reasonable conclusion that sales revenue did include some monopoly based revenue.

7.6.4.2 Was there a payment to a 'public authority for public purposes'?

There was a reference to 'public authority' and 'public purposes' in Section 79 of the OTC Limited Act.

'**79.** OTC, as it exists after the transition, shall be taken for the purposes of a law of the Commonwealth or a State or Territory:

(a) not to have been incorporated or established for a public purpose or for a purpose of the Commonwealth:

(b) not to be a public authority or an instrumentality or agency of the Crown: and

(c) not to be entitled to any immunity or privilege of the Commonwealth;

except so far as express provision is made by a law of the Commonwealth, State or Territory, as the case may be, or the regulations otherwise provide.'

This is the same wording which appeared in Section 26 of the AOTC Act (see 7.6.2.2). Accordingly, the conclusion for OTC Limited is the same as that for AOTC. Section 79 of the OTC Limited Act is *ultra vires* the Australian Constitution and has no effect on this thesis.

(a) Was OTC Limited wholly owned by the government?

OTC Limited was wholly owned by the Commonwealth Government.

(b) Could OTC Limited exercise command or authority which an individual could not?

OTC Limited had a legislative monopoly. Consequently, it is concluded that OTC Limited could exercise authority which an individual could not.

(c) Did OTC Limited provide a function in the public interest?

OTC Limited provided the international telecommunications facilities. These services, among other things, allowed the transmission of information for the security, business development and progress of Australia with the rest of the world. To that extent it can be argued that OTC Limited provided a function in the public interest.

(d) Did OTC Limited perform a traditional function of government?

The monopoly services provided by OTC Limited were functions that had always been performed by government.

(e) Did OTC Limited have government authority to carry on its activities?

As already mentioned OTC Limited received authority from the government to carry on its activities under the OTC Limited Act and the *Telecommunications Act 1989*.

(f) Was OTC Limited paying income tax?

Section 79 of the OTC Act effectively provides that OTC Limited was liable for income tax. Furthermore, OTC Limited was a company and is liable to pay income tax pursuant to the *Income Tax Assessment Act 1936*. The 1991 OTC Annual Report shows a provision for income tax of $178.9million (1990 - $146.0million).

(g) Was OTC Limited paying dividends?

There is nothing in the OTC Limited Act that requires OTC Limited to pay dividends. However, clause 81 of the Articles of Association of OTC Limited deal with dividends.

> '81. Subject to any preferential, special, deferred or other rights upon which any shares may be issued or may from time to time be held, the Company in general meeting may, form time to time declare dividends or interim dividends to be paid to members and in doing so may take into account any dividend recommendation from the directors.'

Therefore, OTC Limited had the power to pay dividends, although it was not compelled to do so. However, the Government, being the sole shareholder, effectively controlled OTC Limited, which includes dividend generation. The 1991 profit and loss statement showed a dividend payment of $145.0million (1990 - $104.0million).

7.6.4.3 Was collection of the payment 'enforceable by law'?

(a) Were there legislative provisions for the collection of fees charged by OTC Limited?

There were no provisions in the OTC Limited Act that gave OTC Limited power to collect its fees and charges.

(b) Was OTC Limited able to rely on contract law?

The services provided by OTC Limited were payable in arrears and OTC Limited would have been able to rely on contract law for the collection of those fees.

It is concluded, therefore, that the third criterion for a payment to a PSE to be classified as taxation is satisfied.

7.6.4.4 Conclusion for OTC Limited

The following has been concluded in relation to OTC limited for the 1991 year.

1) OTC Limited operated a monopoly which provided essential services. Furthermore, OTC Limited earned revenue from the provision of those services.

2) OTC Limited was a public authority and received revenue which was used to pay income tax and dividends.

3) OTC Limited charges were legally collectable.

It is concluded, therefore, that OTC Limited received revenue that can properly be described as taxation.

Accordingly, OTC Limited will undergo further testing in Chapter 8 to determine the amount and legality of the taxation.

7.6.5 Overseas Telecommunications Commission (OTC)

OTC was established under the *Overseas and Telecommunications Act 1946* (OTC Act). It was corporatised on the 31st. March 1989. However, the last annual report prepared in the name of OTC was for the year ended the 31st. March 1988. Although, OTC Limited officially began on the 1st. April 1989, the annual report for the year ended the 31st. March 1989 was in the name of OTC Limited[11]. This 1989 annual report did not provide the same financial information as previous OTC's annual reports.

It stated that:

> 'The Overseas Telecommunications Commission - OTC - aims to be Australia's leader, and an active participant, in the world-wide information transfer process' (OTC Annual Report, 1987, p.2).

7.6.5.1 Was there 'a compulsory exaction of money'?

(a) Was OTC a monopoly?

Section 60 of the OTC Act dealt with OTC services.

> '**60. (1)** The Governor-General may by Proclamation declare that any overseas telecommunication service shall not, on or after a date

11. The 1989 financial information will be categorised under OTC's name because that would appear to be the appropriate entity.

specified in the Proclamation, be conducted, controlled or managed otherwise than by or on behalf of the Commission.

(2) A person shall not, on or after that date, conduct, control or manage any such service, otherwise than on behalf of the Commission.

Penalty: One thousand dollars for every day during which the overseas telecommunications service is conducted.'

'Overseas telecommunication services' is defined in section 5.

'"overseas telecommunication service" means the services specified in paragraphs (a), (c) and (d) of section thirty-four of this Act:'

Section 34 of the OTC Act deals with OTC's functions and duties.

'**34.(1)** For the purposes of this Act and subject to the provisions of this Act, the Commission may do all that is necessary or convenient to be done for, or as incidental to, in relation to, or in connexion with -

(a) the establishment, maintenance and operation in Australia by the Commission of cable and radiotelegraphic services (whichever means of communication is applicable) for the conduct of public communications between -

(i) Australia and other countries,

(ii) Australia and ships at sea,

(iii) Australia and commercial or private aircraft (except aircraft trading or operating exclusively within Australia),

(iv) the Commonwealth and any Territory not forming part of the Commonwealth; and

(v) any Territories not forming part of the Commonwealth;

(b) the establishment and maintenance in Australia by the Commission of radio transmitting and receiving apparatus to permit of the conduct of overseas telephone services in respect of public communications;

(c) the establishment, maintenance and operation in Australia by the Commission of any other radiocommunication services in respect of which a licence is granted under the *Radio Communications Act 1983*;

(d) all further developments of cable or radio transmission or reception for overseas telecommunications purposes in Australia as related to public communications, including the establishment, maintenance and operation of overseas facsimile services; and

(e) the conduct of investigations and researches with the object of improving the efficiency of the overseas telecommunications services generally.

(2) Without limiting the generality of sub-section (1), the Commission may enter into an agreement with a person (including the Government of another country) for the provision of consultancy services by that person to the Commission in relation to any of the matters set out in sub-section (1).'

It was not possible to determine whether the Governor-General issued the Proclamation. Indications are that it was issued because OTC was the only Australian provider of international telecommunications services. Officers previously employed by OTC were able to confirm this.

However, regardless of whether the Proclamation was issued, the fact remains that OTC was the sole provider of its services.

It is concluded, therefore, that OTC was a monopoly.

(b) Were the monopoly services that OTC provided essential to the community?

Given that OTC was supplying the same monopoly services that OTC Limited was providing, and that the OTC Limited monopoly services were essential, then it follows that OTC's monopoly services were also essential.

It is concluded, therefore, that the monopoly services that OTC provided were essential.

(c) Did OTC receive revenue from those services?

OTC's total operating revenue shown in its 1988[12] Profit and Loss Statement was $1,167.2million (1989 -$1,517.2million). The 1988 Profit and Loss Account provided the following information on revenue.

12. 1988 has been used here because the revenue breakdown was not produced in 1989.

	1988 $m
Revenue	
Sales revenue	
Telephone	982.7
Telex	86.7
Lease Services	29.0
Telegram	16.9
Television	6.0
Data Services	7.1
SOLAS	10.1
Other Sales Revenue	4.2
	1,142.7
Other Revenue	
Space Segment Investments	10.0
Other Investments	13.6
Miscellaneous	0.9
	24.5
Total Revenue	**1,167.2**

There is insufficient information to allow each and every item to be categorised as monopoly or non-monopoly based. However, it is apparent that revenue received from telephone, telex and telegram services are, at least, from OTC's monopoly.

It is concluded, therefore, that OTC received revenue as a result of its monopoly operations.

It is concluded, therefore, that revenue received by OTC was "a compulsory exaction of money'. OTC enjoyed a monopoly, consumers were obliged to purchase its services and OTC received revenue as a result thereof. Accordingly the first criterion of the definition of taxation is satisfied.

7.6.5.2 Was there a payment to 'a public authority for public purposes'?

Reference to 'public authority is found in 'Subsection 52A(1) of the OTC Act.

> '**52A. (1)** For the purposes of paragraph (d) of section twenty-three of the *Income Tax Assessment Act* 1936-1970, the Commission is not a public authority.'

This reference to 'public authority' is limited to the requirement of OTC to pay income tax and does not mean that Telecom is not a 'public authority' in the general sense.

(a) Is OTC wholly owned by the government?

OTC was wholly owned by the Commonwealth Government.

(b) Did OTC exercise command or authority which an individual could not?

As revealed at 7.6.5.1(a) OTC had a monopoly. Furthermore, it was revealed that Section 34(1) of the OTC Act contained powers conferred upon OTC. These powers allowed OTC to exercise authority which an individual could not.

(c) Did OTC provide a function in the public interest?

It has already been determined, with OTC Limited, that the provision of international telecommunications services is in the public interest.

(d) Did the OTC perform a traditional function of government?

The government established OTC in 1946. It can be said, therefore, that OTC's services had been a function and tradition of government.

(e) Did OTC have government authority to carry on its activities?

As already mentioned OTC received authority from the government to carry on its activities under the OTC Act.

(f) Was OTC paying income tax?

Sections 52 and 52A deal with taxation.

'**52.** **(1)** Subject to sub-section (4), the Commission is subject to taxation under the laws of the Commonwealth.

(2) Subject to the next succeeding sub-section, the Commission is not subject to taxation under a law of a State or of a Territory.

(3) The regulations may provide that the last preceding sub-section does not apply in relation to taxation under a specified law of a State or of a Territory.

(4) Stamp duty or any similar tax is not payable under any law of the Commonwealth or of a State or Territory in respect of -

(a) a security issued by the Commission;

(b) the issue, redemption, transfer, sale or purchase of such a security, not including a transaction entered into without consideration or for an adequate consideration; and

(c) any document executed by or on behalf of the Commission or any transaction, in relation to the borrowing of monies by the Commission.'

Subsection 52A(1) has been discussed above at 7.6.5.2. Subsection 52A(2) provided as follows;

'**(2)** The commission is liable to pay taxes on income under the laws of the Commonwealth only in respect of income derived by the Commission on or after the first day of April, One thousand nine hundred and seventy, and the Commission shall be deemed not to have been a public authority on and after that date.'

It is clear that OTC was liable for income tax. In 1989 the provision for income tax was $111.1million (1988 - $83.5million).

(g) Was OTC paying dividends?

There were references in the OTC Act to the payment of dividends.

> '**44. (1)** Interest is not payable to the commonwealth on the capital of the Commission but the Commission shall pay to the Commonwealth, out of profits of the Commission for the financial year ending on the thirty-first day of March, One thousand nine hundred and seventy-one, and for each succeeding financial year, such amount as the Minister, with the concurrence of the Minister of Finance determines.'

> '**38A. (1)** The Commission shall pursue a policy directed towards securing revenue sufficient to meet all its expenditure properly chargeable to revenue, and permit the payment to the Commonwealth of a reasonable return on the capital of the Commission.'

It is clear, therefore, that OTC was expected to earn sufficient revenue to pay dividends to the Government. The profit and loss statement for 1989 showed a dividend payment of $84.8million (1988 - $46.0million).

It is concluded, therefore, that OTC was a 'public authority' within the definition of taxation. Furthermore, it is concluded that OTC paid income tax and dividends.

7.6.5.3 Was collection of the payment 'enforceable by law'?

(a) Were there legislative provisions for the collection of fees charged by OTC?

There is nothing specific in the OTC Act that deals with the OTC being able to collect its fees.

(b) Was OTC able to rely on contract law?

OTC's services were payable in arrears and OTC would have been able to rely on contract law for the collection of those fees.

It is concluded, therefore, that the third criterion for a payment to a PSE to be classified as taxation is satisfied.

7.6.3.4 Conclusion for OTC

The following conclusions have been reached for OTC for the 1989 year.

1) OTC operated a monopoly in which it provided essential services from which it earned revenue.

2) OTC was a public authority and received revenue which was used to pay income tax and dividends.

3) OTC's charges were legally collectable.

It is concluded, therefore, that OTC received revenue that can properly be described as taxation.

Accordingly, OTC will undergo further testing to determine the amount and legality of the taxation.

7.7 Conclusions

This chapter analysed the PSEs identified in chapter 6 for evidence to satisfy the criteria of Latham's definition of taxation.

It was determined that the FAC did not satisfy the definition. Another PSE, Telstra, also did not satisfy the definition, but it had a number of predecessors that did.

The following PSEs will be considered in Chapter 8 to determine the amount and legality of the taxation which they collected.

1) Australian Maritime safety Authority (AMSA)
2) Australia Post (AP)
3) Civil Aviation Authority (CAA)
4) Overseas Telecommunications Commission (OTC).
5) OTC Limited
6) Australian Telecommunications Corporation (Telecom)
7) Australian and Overseas Telecommunications Commission (AOTC).

CHAPTER 8

THE AMOUNT AND THE LEGALITY OF THE TAXATION

8.1 Introduction

The last chapter identified seven PSEs which received money which could properly be described as taxation.

This Chapter has two purposes. The first is to determine how much of the revenue received by the PSEs was taxation. Chapter 7 concluded only that some of their revenues were taxation. The PSE's revenue will be analysed to determine, primarily, how much can be attributed to its monopoly operations.

Second, this Chapter considers whether this taxation was 'legal taxation'. To be 'legal', it must have been approved in accordance with the Constitution. Chapter 2 showed that laws imposing taxation must be contained in separate legislation and must only include taxation matters. If taxation does not satisfy this requirement then it will be illegal (Johnston, 1993, p.362)[1].Furthermore, the taxation legislation must receive appropriate parliamentary approval. Taxation which does not also satisfy this constitutional requirements is illegal. The authority used by PSEs to charge consumers, and thereby receive revenue, will be examined to determine if those processes are in accordance with the Constitution.

8.2 Australian Maritime Safety Authority (AMSA)

8.2.1 The amount of taxation

It was concluded in Chapter 7 that AMSA has a monopoly. To determine the revenue items which can be attributed to the monopoly, AMSA's 1994 profit & loss statement is examined below.

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1 Johnston actually uses the term 'invalidly imposed'. That is, taxation that is not contained in separate pieces of legislation is 'invalidly imposed'. While 'invalidly imposed' does not exactly mean illegal, it is considered that the difference in terminology is one of form and not substance. In the terms of this thesis the difference is not an issue because the ultimate effect is the same.

Revenues from the Profit & Loss Statement of AMSA for the year ended the 30th. June 1994

	$'000
Marine navigation levy	33,486
Regulatory functions levy	10,957
Protection of the sea levy	3,231
Services provided on behalf of government	14,480
Other receipts from government	935
Marine services	2,973
Crew services	1,522
Interest	1,147
Recovery of incident costs	37
Ship registration	567
Net (loss) gain on sale of non-current assets	(84)
Other revenue	1,301
Total	70,551

The following conclusions are reached.

1) The levies for marine navigation, regulatory functions and protection of the sea are received as the result of particular pieces of legislation (referred to in 7.2.1(c)). The purpose of the legislation is to give AMSA monopoly power in these areas.

2) The revenue items titled services provided on behalf of government, other receipts from government, marine services, crew services, recovery of incident costs and ship registration are

received as a direct result of the monopoly services that AMSA provides.

3) The remaining revenue items are received as a result of other activities. The interest is earned as a result of past revenues being invested. Losses (or gains) on sale of assets occur as the result of past revenues being invested in fixed assets. The other revenue items are an aggregate of minor management fees, equipment hire, marketing, fines and fees, sundry sales and miscellaneous.

   It is concluded that these remaining revenue items are earned as a consequence of AMSA's operations which are monopoly based and that they are also revenues arising as a result the monopoly.

It is concluded, therefore, that all of AMSA's revenue is derived from a monopoly and that all dividends that AMSA pays are a result of its monopoly operations. Thus the amount of revenue that can be described as taxation is equal to the amount of dividends paid.

AMSA began paying dividends in the 1991 financial period and Table 8.1 summarises the payments.

Table 8.1

Dividends paid by AMSA

Period/Year	Amount
1/1/91-30/6/91	$ 2,000,000
1991/92	1,000,000
1992/93	4,500,000
1993/94	3,065,000
1994/95	3,865,000
Total	$14,430,000

It is concluded, therefore, that for the period 1/1/91 to 30/6/95 the consumers of AMSA services and the payers of associated levies, have paid $14,430,000 in taxation which was reported as part of the operating revenue of AMSA.

8.2.2 The legality of the taxation

The second matter for consideration is how much of the $14,430,000 taxation was collected illegally.

A number of provisions in the AMSA Act relate to prices. Subsection 47(12) provides:

> 'The amount or rate of a charge must be reasonably related to the expenses incurred or to be incurred by the Authority in relation to the

> matters to which the charge relates and must not be such as to amount to taxation.'

This suggest that the legislators were aware that care was needed in setting fees so that they could not be classified as taxation.

Section 47 deals with AMSA's price or charge setting procedures. The first three subsections provide as follows:

> '**47.(1)** Subject to this section, the Authority may make determinations:
>
> (a) fixing charges and specifying the persons by whom, and the times when, the charges are payable; and
>
> (b) fixing the penalty for the purposes of subsection (14).
>
> (2) This section has effect subject to the *Prices Surveillance Authority Act 1983*.
>
> (3) Before making a determination, the Authority must give the Minister notice in writing of the proposed determination:
>
> (a) specifying the day from which the determination is intended to operate; and
>
> (b) if it fixes a charge or penalty - specifying the basis of the charge or penalty; and
>
> (c) if it varies a charge or penalty - specifying the reason for the variation.'

Other legislation authorising levies are the *Protection of the Sea (Shipping Levy) Act 1981*, the *Marine Navigation Levy Act 1989* and the *Marine Navigation (Regulatory Functions) Levy Act 1991*.

Section 47 of the AMSA Act does not comply with the constitutional requirements for the imposition of taxation because it is not a separate piece of legislation. The Act includes other matters. However, the legislation that imposes the three levies does comply with the Constitution. Each of these statutes deals only with the imposition of taxation. Other related matters, necessary for the administration of the tax, are in separate legislation.

It is concluded, therefore, that taxation included in AMSA revenues received as a result of the *Protection of the Sea (Shipping Levy) Act 1981*, the *Marine Navigation Levy Act 1989* and the *Marine Navigation (Regulatory Functions) Levy Act 1991* is legal. However, taxation included in revenues received as a result of the AMSA Act which are ultimately paid to the government is illegal.

The profit and loss statement for each of the periods 1990/91 to 1994/95 allow classification of revenue items into the levies and revenue received under the AMSA Act. Revenue items (eg interest) that cannot be allocated are negligible. The resulting classification is summarised in the Table 8.2. In 1990/91, for example, AMSA Act revenue was 14.46% of total revenue. It is assumed that 14.46% of the total dividend paid to the government relates to AMSA Act revenue. In 1990/91, therefore, $2,890,000 was collected from users of AMSA services under the guise of fee for service which was illegal taxation.

Table 8.2

Allocation of AMSA's taxation to AMSA Act revenue

YEAR	Levy Revenue $K	AMSA Act Revenue $K	AMSA Act Revenue %	Taxation Amount $K	AMSA Act Taxation $K
1991	22,745	3,845	14.46	2,000	289
1992	44,777	6,684	12.99	1,000	130
1993	42,506	6,000	12.37	4,500	557
1994	47,674	6,876	12.60	3,065	386
1995	46,314	7,138	13.35	3,865	516
					1,878

It is concluded that $1.878million illegal taxation was received by AMSA during the period under consideration.

8.3 Australia Post (AP)

8.3.1 The amount of taxation

It was established in Chapter 7 that AP had monopoly powers in some areas of its operations. Dividends or income tax payments must be separated into monopoly and non-monopoly components.

AP's 1994 annual report disclosed an operating profit of $142.2million from its monopoly operations. This was 50.1% of total operating profit. Analysis of the 1994 Annual Report allows classification of operations into monopoly and non-monopoly components This is summarised in Table 8.3.

Table 8.3

Monopoly and Non-monopoly information from the 1994 Annual Report of AP

	Monopoly		Non-Monopoly		Total	
	$m	%	$m	%	$m	%
Revenue	1,579.5	61.5	988.9	38.5	2,568.4	100.0
Expenses	1,437.3		847.2		2,284.5	
Op. Profit	142.2	50.1	141.7	49.9	283.9	100.0
ROR#		9.0		14.3		11.1
Assets Used*	1,206.5	60.1	772.4	39.9	978.9	100.0
ROA*		11.8		18.3		14.3

ROR means Return on Revenue

* These items are Estimated Total Averages

It can be seen that the monopoly activities contribute 61.5% of the total operating revenue, but that the profit margin is lower than for the non-monopoly component. There is virtually equal contribution to total

operating profit by the monopoly and non-monopoly activities. Non-monopoly activities have a higher rate of return on assets.

An AP officer advised that AP uses a comprehensive activity based costing system to determine and allocate costs and that it uses full cost recovery pricing. The AP officer also advised that there is no cross-subsidisation between any of the divisionalised operations and that each operation is responsible for its own share of allocated costs. Prices are set to achieve the full recovery of costs and an economic rate of return.

Individual operations contribute to the ability of paying dividends and income tax but any attempt to determine the dividends and income tax from particular operations will be arbitrary. In 1994 the monopoly and non-monopoly operations of AP recorded similar operating profits. Given that the individual operations of AP are autonomous, and that there is no cross-subsidisation, it is reasonable to assume that dividends and income tax are paid from the monopoly and non-monopoly areas in the same proportion as they contribute to total operating profit.

Therefore, to quantify the amount of taxation in AP's revenue, dividends and income tax are allocated to monopoly and non-monopoly areas in the same proportions that each area contributes to total operating profit. This procedure is arbitrary, but seems reasonable in the circumstances.

AP's operating profits for monopoly and non-monopoly operations for the 1993 to 1995 (inclusive) financial years are shown in Table 8.4. This information is not available prior to 1993.

Table 8.4

Proportions of Monopoly and Non-monopoly Operating Profits of AP

	AP Operating Profits			
	Monopoly		Non-monopoly	
YEAR	**$m**	**%**	**$m**	**%**
1993	140.6	57.0	105.8	43.0
1994	142.2	50.1	141.7	49.9
1995	155.2	46.6	177.8	53.4

The data suggests that there was a tendency for operating profit from the monopoly areas to decline in relative terms. For the pre-1993 years where the classified data is not available, dividends and income tax will be allocated on the same basis as for the 1993 year. If the apparent trend for 1993-1995 existed in the pre-1993 period, this basis of allocation would give a conservative measure of the amount of AP revenue that could be regarded as taxation.

Details of dividends and income tax paid by AP and the allocation thereof to the monopoly operations are shown in Table 8.5

Table 8.5

Allocation of AP's dividends and income tax

YEAR	Monopoly %	Total dividend $m	Monopoly dividend $m	Total I/Tax $m	Monopoly I/Tax $m
1990	57.0	1.0	0.6	na	na
1991	57.0	25.0	14.3	20.9	11.9
1992	57.0	50.0	28.5	85.0	48.5
1993	57.0	62.0	35.3	88.8	50.6
1994	50.1	90.0	45.1	60.3	30.2
1995	46.6	120.0	55.9	105.4	49.1
TOTAL		**348.0**	**179.7**	**360.4**	**190.3**

It is concluded, therefore, that for the period 1990 to 1995 (inclusive) consumers of AP monopoly services paid $370.0million in taxation which was described as operating revenue.

8.3.2 The legality of the taxation

The next issue is to determine how much of the $370.0million taxation was illegally collected

The legislation governing pricing for AP is contained in subsection 32(2) and section 33 of the AP Act. These provide as follows:

'32. (2) Without limiting subsection (1), the terms and conditions determined by the Board may make provision with respect to:

(a) the kinds of articles that may be carried by post and the means by which different kinds of articles may be carried;

(b) the carriage of letters and other postal articles;

(c) rates of postage;

(d) the payment of postage, including the issue and sale of postage stamps, the pre-stamping of postal articles and the use of franking machines;

(e) the carriage of letters to or from an office of Australia Post that is not the nearest office of Australia Post;

(f) undelivered letters and others articles (including forfeiture and destruction of such articles); and

(g) the publications that may be carried by post as registered publications.

(3) The Board shall ensure that copies of a determination made by it under this section are made available for inspection and purchase at all offices of Australia Post as soon as practicable after it is made.

(4) A contravention of subsection (3) in relation to a determination does not effect the validity of the determination.

(5) This section has effect subject to section 33 of this Act and to the *Prices Surveillance Act 1983*.

33. (1) This section applies to the rates of postage for:

(a) the carriage within Australia of standard postal articles by ordinary post; and

(b) the carriage within Australia of registered publications.

(2) Before making a determination under section 32 fixing or varying rates of postage to which this section applies, the Board shall give the Minister written notice of the proposed determination.

(3) The Minister may, within 30 days after receiving notice of a proposed determination, give the Board written notice disapproving it.

(4) In exercising powers under subsection (3), the Minister shall have regard to:

(a) Australia Post's obligations under this Act; and

(b) any other matters the Minister considers appropriate.

(5) The Board may make a determination under section 32 fixing or varying rates of postage to which this section applies only if 30 days have elapsed since the Minister received notice of it and the Minister has not, within that period, given the Board a notice disapproving it.'

These sections provide AP, subject to some Ministerial oversight, with the power to set the prices it deems to be appropriate. The prices are also subject to Prices Surveillance Authority (PSA) approval. There is no other legislation which mentions revenue for AP. It can be concluded, therefore, that all of AP's revenue is collected as a result of the AP Act.

The provisions of the AP Act do not comply with the requirements of the Constitution for the imposition of taxation because subsection 32(2) and section 33 of the AP Act are not separate pieces of taxation legislation. It is concluded that AP collected $370.0million of illegal taxation because the monies were not collected in accordance with the Constitution.

8.4 Civil Aviation Authority (CAA)

8.4.1 The amount of taxation

It was concluded in Chapter 7 that a significant portion of the CAA's revenue was received from its monopoly operations. It is, therefore, necessary to examine the revenue items in the CAA's 1994 profit and loss statement to determine the amount of revenue attributable to its monopoly. The statement is re-produced below.

Revenue of the CAA from the Profit & Loss Statement for the year ended the 30th. June 1994

Revenue	**1994**	**1993**
	$'000	**$'000**
Airways Revenue	470,506	565,545
Excises	24,265	23,863
Safety Services	55,500	59,260
Regulatory Services	3,675	4,488
Navigational Instrument Testing	3,457	3,079*
Sundry Commercial Work	2,554	2,102*
Interest Received	3,840	1,892*
Sale of Publications	4,773	4,758*
Rental of Property	3,163	2,099*
Miscellaneous	1,498	2,091*
Profit on Sale of Assets	1,241	608*
Total	$574,472	$669,785

* denotes information obtained from the Notes to the financial statements.

The following conclusions can be reached.

1) The airways, safety services, regulatory services and navigational instrument testing revenue were earned wholly as a result of the monopoly operations of the CAA.

2) The excises are received by the CAA as a result of the *Aviation Fuel Revenues (Special Appropriation) Act 1988*. This Act

requires that the monies received from the excise must be paid to the CAA. Therefore, this revenue is also received as the result of a monopoly.

3) The remaining items arise as a corollary of the other revenue areas which are monopoly based. It is concluded, therefore, that the sundry items are also monopoly based.

It is concluded, therefore, that all of the CAA's revenue results from a monopoly.

The government provides some funds but this level of contribution is being reduced. In 1994 government funding was $50.8million (1993 $62.3million)[2]. These payments are used to offset the costs of safety and other services. The difference between the government funding and actual costs is covered by the fees charged by the CAA. Therefore, the government contribution does not change the conclusion that all of the CAA's revenue is received as the result of its monopoly.

It can be concluded, therefore, that all dividends and income tax that the CAA pays to the government are a result of its monopoly operations. It follows that the amount of revenue that can be properly described as taxation is equal to the amount of income tax and dividends paid to the government.

The CAA did not pay dividends until the 1992 financial year. Income tax was paid from the 1st. July 1991. Details of dividends and income

2. These amounts have been extracted from the Cash Flow Statement and were headed as an inflow of operating revenue under the title of 'receipts from government'.

tax paid to the government for the period 1991/92 to 1994/95 are disclosed in Table 8.6

Table 8.6

Dividends and Income Tax paid by the CAA

YEAR	Dividend paid $m	Income tax paid $m	Total $m
1991/92	3.7	9.2	12.9
1992/93	15.8	29.1	44.9
1993/94	27.5	22.7	50.2
1994/95	0	17.2	17.2
TOTAL	**47.0**	**78.2**	**125.2**

It is concluded, therefore, that for the 1992 to 1995 (inclusive) financial years consumers of CAA services paid $125.2million in taxation.

8.4.2 The legality of the taxation

The second matter of concern is to determine how much of the $125.2million taxation was collected illegally.

Section 67 of the CAA Act provides as follows:

> **‘67.** The amount or rate of a charge shall be reasonably related to the expenses incurred by the Authority in relation to the matters to which the charge relates and shall not be such as to amount to taxation.’

There seems to be some awareness of the need avoid charges being classified as taxation.

Section 66 is the primary section of the CAA Act that deals with the price setting mechanism. The most relevant parts of that section are as follows:

> **‘66. (1)** In this section:
>
> **"charge”** means:
>
> (a) a charge for a service or facility provided by the Authority; or
>
> (b) a fee or other charge in respect of a matter specified in the regulations, being a matter in relation to which expenses are incurred by the Authority under this Act or regulations, including, but without being limited to, a fee or other charge in respect of, or for an application for:
>
> (i) the grant, issue, renewal or variation of a certificate, licence, approval, permission, permit, registration or exemption under this Act or the regulations; or
>
> (ii) the grant or variation of an authorisation, or the cancellation, suspension, variation or imposition of a condition, relating to anything referred to in subparagraph (i).
>
> **(2)** The Board may make a determination:
>
> (a) fixing the amounts of charges; or

(b) setting out a method by which the amounts of charges may be worked out; or

(c) fixing penalties for the purpose of subsection (8).

(2AA) A determination under paragraph (2) (a) or (b) must specify the persons by whom and the times when the amounts of the charges are payable.

(2A) This section has effect subject to the *Prices Surveillance Authority Act 1983*.'

The section goes on to provide, among other things, that effectively the Minister has final authority in relation to the prices and charges of the CAA.

The provisions of the CAA Act do not comply with the procedures set down in the Constitution for the imposition of taxation. There is not a separate taxation legislation as the CAA Act deals with other matters. Consequently any revenue that can be properly described as taxation and attributed to the CAA Act is illegal taxation.

However, not all the CAA's revenue is collected under the authority of section 66 of the CAA Act. The CAA receives revenue from excise imposed under the *Aviation Fuel Revenues (Special Appropriation) Act 1988*. This excise legislation complies with the constitutional requirements of imposing taxation. The *Aviation Fuel Revenues (Special Appropriation) Act 1988* deals only with taxation. Therefore, the taxation[3] amounts determined in Chapter 7 need to be allocated between CAA Act revenue and excise revenue.

---

3. It is highly likely that the CAA would be liable for income tax on excises pursuant to either section 25(1) or 26(g) of the *Income Tax Assessment Act 1936*. Therefore, payments for dividends and income tax can be treated as one.

A perusal of the 1994 profit and loss statement of the CAA suggests that $492.8million or 95.3% of total revenue was collected under the authority of the CAA Act. (Those revenue items (eg interest) that cannot be allocated are negligible in size and are not included.) The excise of $24.265million was collected under the authority of the *Aviation Fuel Revenues (Special Appropriation) Act 1988*. In 1994, the CAA paid dividends and income tax of $50.2million to the government. It is assumed that 95.3% of this $50.2million (ie $48.3million) was derived from revenue raised under the CAA Act. The situation for each of the years 1991/92 to 1994/95 is summarised in Table 8.7. It can be seen that over the period under consideration $120.0million in illegal taxation was collected by the CAA under the guise of fee for services.

Table 8.7

Allocation of the CAA's taxation to CAA Act revenue

YEAR	Excise Revenue $m	CAA Act Revenue $m	CAA Act Revenue %	Taxation Amount $m	CAA Act Taxation $m
1991/92	23.5	625.7	96.38	12.9	12.4
1992/93	23.9	579.1	96.04	44.9	43.1
1993/94	24.3	492.8	95.30	50.2	47.8
1994/95	15.2	519.5	97.16	17.2	16.7
					120.0

Therefore $120.0million of the taxation is attributed to revenue received as a result of the CAA Act. It is, therefore, concluded that $120.0million revenue received by the CAA from the 1992 to 1995 (inclusive) is illegal taxation.

8.5 Overseas Telecommunications Commission (OTC)

8.5.1 The amount of taxation

It was concluded in Chapter 7 that OTC received revenue from its monopoly of providing international telecommunication services. Its monopoly extended only to operations within Australia. It did, however, offer services in an international competitive market and, presumably, received revenue therefrom.

At 7.6.5.1(c) it was suggested that revenue from telephone, telex, telegram and television services were received from OTC's monopoly. In 1988[4] this represented $1,092.3million or 93.6% of total revenue. It is probable that other revenue was received as a result of OTC's monopoly, but there is insufficient information to determine the amount. It is likely, though, that revenue received from OTC's non-monopoly sources is insignificant. As a result it has been assumed that all of OTC's revenue arises from monopoly operations.

4. This being the last year where information was available.

Therefore, it is assumed that all payments of income tax and dividends by OTC to the government arise from monopoly operations. It follows that the amount of revenue that can properly be described as taxation is equal to the amount of income tax and dividends paid to the government.

OTC began paying income tax in 1971 and dividends in 1969. details are shown in Table 8.8.

Table 8.8

Income tax and dividend payments by OTC

Year	Dividend paid $m	Income Tax paid $m	Total $m
1969	6.5	-	6.5
1970	6.9	-	6.9
1971	2.0	6.9	8.9
1972	2.6	7.1	9.7
1973	3.0	7.5	10.5
1974	5.0	11.8	16.8
1975	5.0	10.1	15.1
1976	7.5	5.9	13.4
1977	12.5	8.7	21.2
1978	12.5	12.7	25.2
1979	17.5	15.7	33.2
1980	25.0	23.7	48.7

Table 8.8 continued

Year	Dividend paid $m	Income Tax paid $m	Total $m
1981	20.0	23.2	43.2
1982	19.0	23.4	42.4
1983	12.5	21.6	34.1
1984	18.4	33.7	52.1
1985	19.9	46.0	65.9
1986	29.8	56.8	86.6
1987	39.8	69.6	109.4
1988	46.0	83.5	129.5
1989	84.0	111.0	195.0
Total	**395.4**	**578.9**	**974.3**

It is concluded, therefore, that for the years 1969 to 1989 (inclusive) consumers of OTC's monopoly services paid $974.3million in taxation which was been held out to be operating revenue of OTC.

8.5.2 The legality of the taxation

The second matter for consideration is how much of the $974.3million taxation was collected illegally.

There is no reference in the OTC Act that related directly to OTC's pricing. However, the power for OTC to set prices was probably

authorised by sections 34 (see 7.6.5.1(a)) and 38A (see 7.6.5.2(g)) of the OTC Act. There is no other legislation which relates to OTC revenue and, therefore, it can be concluded that all of OTC's revenue is received as a result of the OTC Act.

This procedure did not comply with the requirements of the Constitution for the imposition of taxation because it is not a separate piece of taxation legislation as the OTC Act included other matters.

It may be argued that the OTC Act did not deal with pricing at all. This would mean that OTC was setting its monopoly prices without legislative support. This procedure would also contravene the Constitution for the imposition of taxation because it did not receive parliamentary approval.

It is concluded that the whole of OTC's revenue was received as a result of its monopoly. As a result a total of $974.3million of revenue could properly be described as taxation. Therefore, it can now also be concluded that those revenues represent illegal taxation of $974.3million.

8.6 OTC Limited

8.6.1 The amount of taxation

It was concluded in Chapter 7 that OTC Limited received revenue from its monopoly operations of providing international telecommunication

services. OTC Limited also received some revenue from non-monopoly operations. The information in the annual report of OTC Limited does not allow any basis of allocation of its revenue into monopoly and non-monopoly portions. However, OTC Limited was the corporatised version of the previous OTC. It is unlikely that OTC Limited did nothing that was significantly different from OTC. Following the procedure adopted at 8.5.1 all the revenue of OTC Limited has been allocated to its monopoly operations.

Based on this decision it, therefore, means that all payments of income tax and dividends made by OTC Limited to the government arise out of monopoly operations. It then follows that the amount of revenue that can properly be described as taxation is equal to the amount of income tax and dividends paid to the government.

OTC Limited paid income tax and dividends throughout its existence. Details are shown in Table 8.9.

Table 8.9

Dividend and income tax payments by OTC Limited

Year	Dividends paid $m	Income Tax paid $m	Total $m
1990	104.0	146.0	250.0
1991	145.0	178.9	323.9
Total	**249.0**	**324.9**	**573.9**

It is concluded, therefore, that for the 1990 and 1991 financial years consumers of the monopoly services of OTC Limited paid $573.9million in taxation which was held out to be operating revenue.

8.6.2 The legality of the taxation

The next issue is to determine how much of the $537.9million was illegal taxation.

There is nothing in the OTC Limited Act that deals with pricing. Furthermore, there is nothing specific in the Memorandum and Articles of Association of OTC Limited.

However, sections 62 to 66 of the *Telecommunications Act 1989* do contain provisions dealing with pricing.

> '**62. (1)** The Minister may, in writing, determine that a specified reserved service charge is to be subject to price control arrangements.
>
> **(2)** A determination under this section is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.
>
> **63. (1)** The Minister may, in writing, determine:
>
> (a) price-cap arrangements and other price control arrangements that are to apply in relation to a reserved

service charge that is subject to price control arrangements; and

(b) principles in accordance with which a carrier is to make alterations to a reserved service charge that is subject to price control arrangements.

(2) A determination under this section is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

64. (1) If a carrier proposes to alter a reserved service charge that is subject to price control arrangements, the carrier shall, by written notice, inform AUSTEL of the alteration and of the reasons why the alteration is in accordance with applicable determinations made by the Minister under section 63.

(2) The carrier shall not make the proposed alteration unless AUSTEL informs it, by written notice, that it agrees that the proposed alteration is in accordance with such applicable determinations.

65. (1) The Minister may, in writing, determine that a specified reserved service charge is subject to notification and disallowance.

(2) A determination under this section is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

66. (1) If a carrier proposes to alter a reserved service charge that is subject to notification and disallowance, the carrier shall, by

written notice, inform the Minister of the proposed alteration at least 30 days before the proposed alteration is to take effect.

(2) The Minister may, within 30 days after receiving the notice:

(a) request AUSTEL, in writing, to give a written report as to whether the proposed alteration should be disallowed in the public interest; and

(b) direct the carrier, in writing, not to make the alteration until the Minister has received and considered the report.

(3) AUSTEL shall give the report to the Minister within 30 days after receiving the request.

(4) If the Minister, after taking AUSTEL's report into account, is of the opinion that the proposed alteration is not in the public interest, the Minister may, by written notice given to the carrier within 30 days after receiving the report, direct the carrier not to make the alteration.'

The Telecommunications Act, therefore, controlled the pricing mechanism of OTC Limited in relation to its reserved (monopoly) services. No other legislation provides authority for OTC to earn revenue and, consequently, it can be concluded that OTC Limited received its monopoly revenue as a result of the Telecommunications Act.

The provisions of the Telecommunications Act did not comply with the procedures set out by the Constitution for the imposition of taxation. There was no separate taxation legislation and the Telecommunications Act dealt with other matters. Therefore, any revenue received by OTC Limited that arises out of its monopoly and that can be properly described as taxation is illegal.

It was concluded that the whole revenue of OTC Limited was received as the result of a monopoly and that a total of $573.9million of revenue could properly be described as taxation. It can now also be concluded that those revenues represent illegal taxation of $573.9million.

8.7 Australian Telecommunications Corporation (Telecom)

8.7.1 The amount of taxation

It was concluded in Chapter 7 that Telecom received revenue from its monopoly operations of providing domestic telecommunication services. However, Telecom was also able to earn revenue from other areas. These are dealt with in Section 18 of the Telecom Act.

> '**18.** Telecom has power, for or in connection with the performance of its functions:
>
> (a) to supply value added services;
>
> (b) to publish telecommunications directories, and to supply directory information services;
>
> (c) to supply, install and maintain customer equipment and customer lines;
>
> (d) to supply telecommunications services for Norfolk Island, Christmas Island, Cocos (Keeling) Islands and foreign countries; and
>
> (e) to conduct research into, and develop, manufacture and market, facilities and software.'

Therefore, Telecom was able to receive revenue from areas that are not controlled by its monopoly (eg the production of the Yellow Pages). As a result Telecom's revenue must be allocated between monopoly and non-monopoly activities. Unfortunately the 1991 annual report does not disclose any more information on revenue than that provided at 7.6.3.1(c). That is re-produced below.

Operating Revenue	**1991**	**1990**
	$M	**$M**
Revenue from Telecommunications Services		
Service and Equipment charges	2,252.8	2,034.9
Calls	5.083.5	4,704.2
Other Telecommunications Revenue	1,915.2	1,794.3
	9,251.5	8,533.4
Other Revenue		
Interest Received - Other Persons	97.2	121.5
Proceeds on Sale on Non-Current Assets	77.7	75.6
Miscellaneous	104.8	148.4
	279.7	345.5
TOTAL REVENUE	9,531.2	8,878.9

Revenue received from Service and Equipment Charges and Calls are wholly from the monopoly operations. Other telecommunications revenue could come from a variety of monopoly and non-monopoly activities. However, it is assumed that the other telecommunications

revenue resulted wholly from non-monopoly operations. All other revenue will be allocated to the monopoly and non-monopoly revenues in the proportion they bear to each other. Table 8.10 shows the resultant data for Telecom for the 1990 and 1991 years. For example in 1991, revenue from monopoly operations was $7336.3million or 79.3% of total operating revenue. Therefore, 79.3% of the other revenue of $279.7million (or $221.8million) was deemed to be derived from monopoly operations. The total revenue from monopoly operations was, therefore, $7558.1million.

Table 8.10

Allocation of Telecom's revenue into Monopoly and Non-monopoly portions

	Monopoly Revenue		**Non-monopoly Revenue**	**Total Revenue**
Year	**$m**	**%**	**$m**	**$m**
1990	7,011.9	79.0	1,867.0	8,878.9
1991	7,336.3	79.3	1,973.1	9,531.2

For the purposes of quantification of the size of taxation in Telecom's revenue, dividends and income tax will be allocated to monopoly and non-monopoly areas in the same proportions that each area contributes to total operating revenue. The results are shown in Table 8.11.

Table 8.11

Allocation of Telecom's dividends and income tax

YEAR	Monopoly %	Total dividend $m	Monopoly dividend $m	Total I/Tax $m	Monopoly I/Tax $m
1990	79.0	185.5	146.6	0	
1991	79.3	250.0	198.3	565.9	448.8
Total			**344.9**		**448.8**

It is concluded, therefore, that for the 1990 and 1991 financial years consumers of Telecom's monopoly services paid $793.7million in taxation which has been held out to be operating revenue of Telecom.

8.7.2 The legality of the taxation

The second matter of concern is how much of the $793.7million taxation was collected illegally.

There was no specific reference to pricing in the Telecom Act, although, section 17 deals with general powers.

> '**17. (1)** Telecom has power to do all things necessary or convenient to be done for, or in connection with, the performance of its functions.
>
> **(2)** Subsection (1) is not limited by any other provision of this or any other Act that confers a power on Telecom.'

Telecom was also subject to sections 62-66 (inclusive) of The Telecommunications Act (see 8.6.2). Accordingly its monopoly prices were subject to price approval and control through that legislation. Consequently, it can be concluded that Telecom received its monopoly revenue as a result of the Telecommunications Act.

The provisions of the Telecommunications Act did not comply with the procedures set out by the Constitution for the imposition of taxation because there was no separate taxation legislation and the Telecommunications Act dealt with other matters. Therefore, any revenue received by Telecom that arose out of its monopoly and that can be properly described as taxation is illegal.

It was concluded that Telecom received a total of $793.7million of monopoly revenue which could properly be described as taxation. It can also be concluded that those revenues represent illegal taxation of $793.7million.

8.8 Australian and Overseas Telecommunications Commission (AOTC)

8.8.1 The amount of taxation

It was concluded in Chapter 7 that some part of the AOTC's sales revenue was received as a result of its monopoly operations. However, the sales revenue also included revenue received by AOTC as a result of

non-monopoly activities. Therefore, the revenue items must be allocated to monopoly and non-monopoly services. The annual report of AOTC did not provide any information to assist in that allocation.

The allocation process is further complicated because AOTC's monopoly was eroded prior to the 30th. June 1992 when Optus Communications (Optus) began offering mobile telephone services on the 15th. June 1992. It has been assumed that the Optus entry into the telecommunications market had no impact in the 1992 financial year for two reasons. The first is that the time period is only 15 days and the impact of Optus is likely to have been small at that stage. The second is that the mobile telephone service represented only a portion of AOTC's monopoly.

AOTC resulted from the merger of OTC Limited and Telecom. At 8.5.1 it was assessed that all the revenue received by OTC Limited was as a result of its monopoly. At 8.6.1 it was determined that approximately 79% of Telecom's revenue was received as a result of its monopoly. Therefore, it is assumed that these proportions are relative to the operations of AOTC. Table 8.12 shows the relevant data for the basis of allocation.

Table 8.12

Basis of allocation of AOTC's revenue

	Monopoly revenue $m	Total revenue $m	%
1991 Telecom	7,558.1	9,531.2	
1991 OTC Limited	1,691.3	1,691.3	
Total	**9,249.4**	**11,222.5**	**82.4**

Therefore, it will be assumed that 82.4% of AOTC's revenue is received as a result of its monopoly operations.

Table 8.13 allocates the dividends and income tax paid by AOTC based upon the data in Table 8.12. The relevant period is from the 6th. November 1991 to the 30th. June 1992, the only period in which AOTC reported.

Table 8.13

Allocation of dividends and income tax paid by AOTC

Dividend paid $m	Income Tax paid $m	Total $m	Monopoly %	Adjusted Total $m
478.0	716.5	1,194.5	82.4	984.3

It is concluded, therefore, that for the period the 6th. November 1991 to the 30th. June 1992 consumers of AOTC's monopoly services have paid $984.3million in taxation which was been held out to be operating revenue of AOTC.

8.8.2 The legality of the taxation

Sections 190, 83, 84, 197, 198, 183, 184, 191, 192, 193, 194, 195, 196, 197, 199, 200, 201, 201A, 85 and 5 of the *Telecommunications Act 1991* primarily deal with prices and pricing control for AOTC[5]. The Act provides a procedure for AOTC to set prices and have them reviewed by AUSTEL. Accordingly AOTC's monopoly prices were subject to price approval and control through that legislation. Consequently, it can be

5. These sections are long, their inter-relationship complex and at times provide information that is of remote interest. As a result, it is felt that reciting them would not be useful.

concluded that AOTC received its monopoly revenue as a result of the provisions of the Telecommunications Act

The provisions of the Telecommunications Act did not comply with the procedures set out by the Constitution for the imposition of taxation because there was no separate taxation legislation and the Telecommunications Act dealt with other matters. Consequently, any revenue received by Telecom that arose out of its monopoly and that can be properly described as taxation, is illegal.

It was concluded that AOTC received a total of $984.3million of monopoly revenue which could properly be described as taxation. It can also be concluded that those revenues represent illegal taxation of $984.3million.

8.9 Conclusions

The purpose of this Chapter was to quantify the amounts of illegal taxation of the PSEs identified in Chapter 7. The process involved examining the origins of the PSEs revenue to ascertain how much was attributable to monopoly operations. Where revenue was from both monopoly and non-monopoly operations it was necessary to allocate it on some reasonable basis. In some cases this involved assumed relationships. It was also necessary to apportion the dividends and income tax paid by the PSE between monopoly and non-monopoly sources. The resultant amounts were concluded to represent amounts of revenue that could properly be described as taxation but disclosed as operating revenue of the PSEs.

A summary of the amounts of taxation are shown in Table 8.14.

Table 8.14

Summary of the amounts of PSE revenue that can properly be described as taxation

PSE	Period of taxation	Taxation amount $millions
AMSA	1/1/91 - 30/6/95	14.4
AP	1990 - 1995	370.0
CAA	1992 - 1995	125.2
OTC	1969 - 1989	974.3
OTC Limited	1990 - 1991	573.9
Telecom	1990 - 1991	793.7
AOTC	6/11/91 - 30/6/92	984.3
Total		**3,835.8**

It was concluded, therefore, that from 1969 to 1995 federal government PSEs have received $3,835.8million of taxation in the guise of revenue.

The second issue was to determine how much of the taxation was collected illegally. The legality of taxation was determined by compliance with constitutional requirements. In particular, laws dealing with taxation must only deal with taxation and must receive parliamentary approval.

It was found that amounts collected as levies by AMSA and excise by the CAA were legal taxation because the enabling legislation complied with the Constitution. However, legislation which authorised the collection of revenue by AMSA, AP, CAA, OTC, OTC Limited, Telecom and AOTC did not comply with the Constitution.

Table 8.15 summarises the total amount of illegal taxation received as revenue by the PSEs from 1969 to 1995.

Table 8.15

Summary of the amounts of PSE revenue that can properly be described as illegal taxation

PSE	Period of taxation	Taxation amount $millions
AMSA	1/1/91 - 30/6/95	1.9
AP	1990 - 1995	370.0
CAA	1992 - 1995	120.0
OTC	1969 - 1989	974.3
OTC Limited	1990 - 1991	573.9
Telecom	1990 - 1991	793.7
AOTC	6/11/91 - 30/6/92	984.3
Total		**3,818.1**

It is concluded, that during the period under examination, Australian PSEs collected $3.8181billion in illegal taxation from the public which believed that it was paying for services.

The hypothesis, developed in Chapter 1, is

> **that part of the revenue of some public sector entities is illegal taxation.**

It can, therefore, be concluded that the evidence supports this hypothesis.

CHAPTER 9

CONCLUSIONS, IMPLICATIONS AND FURTHER RESEARCH

9.1 Introduction

This thesis was concerned with the issue of whether some of the revenue collected by PSEs ostensibly as fees for the provision of goods or services was, in fact, illegal taxation. The specific hypothesis which was tested was:

> **that part of the revenue of some public sector entities is illegal taxation.**

9.2 Conclusions

The *Constitution of the Commonwealth of Australia Act 1900* (UK) (hereafter called 'the Constitution') is the statute that controls taxation

in Australia. It requires that bills imposing taxation must only deal with taxation and be approved by parliament.

The Constitution does not contain a definition of taxation and it has, therefore, been left to the High Court to determine a definition. In 1938 in *Matthews V Chicory Marketing Board*[1] Latham CJ provided a definition that is still used. 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'[2].

The definition consists of four criteria which must **all** be satisfied for taxation to exist. In the context of this thesis, these are:

1) **'a compulsory exaction of money'**

   Where a PSE operates a monopoly which provides goods or services which are essential to the community, then the fees paid for those activities are 'a compulsory exaction of money'.

2) **'by a public authority for public purposes'**

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1. (1938) 60 CLR 263.

2. Ibid at 276.

A PSE is a 'public authority' if there is a positive response to the following five questions.

1) Is the PSE wholly owned by the government?

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

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

4) Does the PSE perform a traditional function of government?

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

The Courts have determined that payments of dividends and/or income tax by PSEs to the Government which are paid into consolidated revenue are 'for public purposes'.

3) **'enforceable by law'**

A PSE is legally able to collect revenue that it has earned either by a statutory provision or under contract law.

4) **'is not a payment for services rendered'**

The Courts have determined that there must be an identifiable service provided to a consumer, in exchange for the fee, for there not to be a tax. Determining whether a service is rendered is relatively straight-forward. Determining whether the fee is solely a payment for that service is more difficult. The Courts have determined that where the fee exceeds the cost of providing the service, the excess is not a fee for services. In taxation cases to date, the Courts have not been asked to consider a general definition of the 'cost' of the provision of a service by a PSE.

An examination of Court decisions, in other areas, suggested that 'cost' is likely to be historical cost. A hypothetical example showed that if a government received income tax and/or dividends form a PSE then this fourth criterion of taxation was automatically satisfied.

All existing federal government PSEs at the 30th. June 1994, were examined to ascertain if they received revenue that could properly be

described as taxation. As a result the following PSEs were identified.

1) Australian Maritime safety Authority (AMSA)
2) Australia Post (AP)
3) Civil Aviation Authority (CAA)
4) Overseas Telecommunications Commission (OTC).
5) OTC Limited
6) Australian Telecommunications Corporation (Telecom)
7) Australian and Overseas Telecommunications Commission (AOTC)

Only AMSA, AP and the CAA were still in existence in 1994. The remaining PSEs were predecessors of Telstra.

Table 9.1 shows the amounts of revenue received that could be described as taxation.

Table 9.1

Summary of the amounts of PSE revenue that can properly be described as taxation

PSE	Period of taxation	Taxation amount $millions
AMSA	1/1/91 - 30/6/95	14.4
AP	1990 - 1995	370.0
CAA	1992 - 1995	125.2
OTC	1969 - 1989	974.3
OTC Limited	1990 - 1991	573.9
Telecom	1990 - 1991	793.7
AOTC	6/11/91 - 30/6/92	984.3
Total		**3,835.8**

The taxation amounts in Table 9.1 were paid from PSE revenues. The authorities to set the prices which generated that revenue were then

examined to determine if they complied with the Constitutional requirements for imposing taxation. Table 9.2 shows the PSEs and amounts determined to be illegal taxation.

Table 9.2

Summary of the amounts of PSE revenue that can properly be described as illegal taxation

PSE	**Period of taxation**	**Taxation amount $millions**
AMSA	1/1/91 - 30/6/95	1.9
AP	1990 - 1995	370.0
CAA	1992 - 1995	120.0
OTC	1969 - 1989	974.3
OTC Limited	1990 - 1991	573.9
Telecom	1990 - 1991	793.7
AOTC	6/11/91 - 30/6/92	984.3
Total		**3,818.1**

It is concluded, therefore, that the hypothesis was supported and that at least $3,818.1million PSE revenue from 1969 to 1995 was illegal taxation.

The research is based upon a number of assumptions and subjective decisions, some which are listed below, made to keep the study to a manageable level. However, those assumptions and decisions do not affect the conclusion to the hypothesis.

1) The selection of PSEs for analysis was made from the whole population in 1994. The law in 1994 was assumed to be relevant to other years. Where a PSE ceased to exist prior to 1994 then the law in the last year of operations of the PSE was applied in the same manner.

2) Determining the amounts of taxation and illegal taxation required a number of decisions. It is conceded that other choices could have been made but it is believed that the choices embodied in the research are the best in the circumstances.

9.3 Implications

There are two major implications from this conclusion. The first deals with the illegal taxation and the possible repercussions for Government. The second deals with the financial and accounting reforms embarked on by the Government.

9.3.1 The repercussions

The possible repercussions for the Government are divided into two groups dependant upon whether the Government accepts or rejects the findings.

1) If the Government accepts

If the Government accepts the findings then it must determine what actions to take . These actions would involve avoiding future illegalities and redressing past illegalities.

There are a number of avenues that the Government could take to avoid future illegalities of the type found in this thesis. The first would be to alter the Constitution to include a definition of taxation that excludes the payment of dividends and income tax to the government by PSEs[3]. A change to the Constitution requires a national referendum and there is no guarantee that it would be accepted by the electorate.

The second possible course of action would be to amend the enabling legislation of the PSEs to remove the requirement for them to pay dividends and income tax. This would mean that there would be no payments 'for public purposes' and the revenue of PSEs would not be taxation. If the Government would want contributions from PSEs then it could require them to repay debt (if relevant) or capital. This policy has a limited life and eventually the Government would not be able to use PSEs as a source of revenue without passing legitimate taxation legislation. It is reasonable to assume that if the Government ceased to rely on PSEs for contributions to consolidated revenue, then PSE prices would be lower.

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3. It should be noted that it is considered that this is a highly unlikely course of action.

A third option for the government to collect revenue from the PSEs is by the enactment of legitimate taxation legislation.

The government has a number of options in relation to past illegal taxation. The first would be to repay the consumers of PSE services the amounts paid as illegal taxation. The difficulty would be to identify those consumers. This may be possible with, say, the CAA. However, it would not be possible with AP because the specific consumers are not identifiable.

A second option would be to reduce future pricing so that the past illegal taxation is repaid as a 'price discount' over one or a number of years. While this option could be used for all PSEs, there is no certainty that the past consumers who need to be compensated would be so compensated because the benefit would be shared by all current consumers.

The third option would be for the Government to acknowledge the past illegality, but not to return any of the money. However, given such an admission, aggrieved consumers could seek legal redress from the Government and it is possible that compensation would have to be paid.

2) If the Government rejects

The government could reject the conclusions on the grounds of methodological limitations of this thesis. The arguments used in

the thesis rely on the definition of taxation, the ultimate determination of which can only be made by the High Court of Australia. To obtain a clarification from the High Court on this matter, there must be an action by an aggrieved consumer. It is not possible for the Government, or anybody else, to seek an opinion from the High Court (Lane, 1995, pp. 29 & 188). Consequently, the government could simply disagree with the conclusions of this thesis. The financial implications of challenging the government position in the High Court would be significant. An aggrieved consumer would take an action to the High Court only if they expected a compensation greater than the cost of the court proceedings. It seems unlikely that consumers of AP and Telstra's predecessors would proceed to Court.

This may not necessarily be the case for the consumers of the CAA's services. For example, QANTAS paid $192.5million in 1994 and $186.5million in 1995 to the CAA. These payments are 33.5% and 25.4% respectively of the CAA's total revenue. Therefore, QANTAS could argue that it is entitled to refunds of $16.0million for 1994 and $4.2million for 1995, and similar amounts for 1992 and 1993. Refunds that QANTAS could receive in the event of a successful action against the government and the CAA would probably exceed the cost of the action by a significant margin. Therefore, given the potential significant net benefits of an action by QANTAS then there is the possibility of an action being commenced. Of course, the result of the action would set a precedent for future litigation in this area.

9.3.2 The effects on Government financial and accounting reforms

The government has embarked on a process of financial and accounting reforms to address fiscal, accountability and efficiency concerns (Broadbent & Guthrie, 1992, p.3-4; Hopwood, 1984, p.167). In part, this process has led to the adoption of a version of private sector practices and, in particular, accrual accounting. The move to follow private sector accounting practices seems to have been made without regard to the Constitutional implications. The environment in which government operates are quite different from those of the private sector. This thesis has shown how the adoption of private sector practices can result in illegalities.

The government should not simply adopt private sector financial and accounting practices without a comprehensive review of the implications of those changes for the government. The Government must determine what it requires from its accounting and financial systems within the framework of its legal obligations and rights.

9.4 Further research

There are a number of areas of further research.

1) This thesis has considered only the Australian federal government. A study of the situation in each State could be an interesting extension. An important issue in those studies would be the Constitution of each State because they are different from the Australian Constitution and from each other.

2) Many governments have embarked on a process of privatising their PSEs. Given that a private company could still be a 'public authority' within the definition of taxation, research could be undertaken to establish whether there are any transactions between the privatised entity and the government which are taxation.

3) Some traditional government services are now subject to competition (eg telecommunications). As a result, within the framework used in this thesis, the revenues of those organisations could not be taxation because they do not arise from a monopoly. However, if governments have control over the issue of licences to provide a particular service, then a monopoly may lie with the government as the controller of the licences. If the government is receiving an annual licence fee, then it is possible that licensee's revenues may be part taxation. A detailed investigation of the definition of monopoly and the transactions involved is needed to resolve this issue.

4) This thesis has considered only the payment of income tax and dividends to the government. They are other transfers from PSEs to the government which have not been considered. These include sales tax, fringe benefits tax, payroll tax, licence fees

and excise. The revenue earned to fund some of these payments may also constitute illegal taxation. A study could be performed to quantify the full extent of the illegal taxation at the federal and state levels.

REFERENCES

AeroSpace Technologies of Australia Ltd. 1994, *AeroSpace Technologies of Australia Ltd. Annual Report 1994*, AeroSpace Technologies of Australia Ltd., Canberra.

Aiken, Max. 1994, 'Safeguarding Individual Rights and Community Ethics: Auditing Challenges of Accrual-Based Financial Reporting in Government', in *ASCPA Audit Centre of Excellence*, ed. B.Cooper, Australian Society of Certified Practising Accountants, Melbourne.

Aiken, M. and Capitanio, C. 1995, 'Accrual Accounting Valuations and Accountability in Government: A Potentially Pernicious Union', *Australian Journal of Public Administration*, vol.54, no.4, pp.564-575.

Aiken, M. and McCrae, M. 1992, 'Full Cost Pricing and Public Sector Reporting: Alleviating Undisclosed Short-Run Measurement Biases of 'User To Pay' Policies', *Financial Accountability & Management*, vol.8, no.1, pp.13-35.

AMSA Annual Report. *See* Australian Maritime Safety Authority. 1994.

AMSA Publication. *See* Australian Maritime Safety Authority. c.1994.

AOTC Annual Report. See Australian and Overseas Telecommunications Corporation. 1992.

AP Annual Report. See Australia Post. 1994.

Ashley, M. 1957, *The Greatness of Oliver Cromwell*, Hodder & Stroughton, London.

Ashley, M. 1978, *England in the Seventeenth Century*, Hutchison, London.

ASTA Annual Report. See AeroSpace Technologies of Australia Ltd. Annual Report. 1994.

Australia Post. 1994, *Australia Post Annual Report 1994*, Australia Post, Melbourne.

Australian Accounting Standard Review Board. 1989, *Approved Accounting Standard ASRB 1021 Depreciation of Non-Current Assets*, ASRB, Caulfield.

Australian and Overseas Telecommunications Corporations Act. 1991.

Australian and Overseas Telecommunications Corporation. 1992, *Australian & Overseas Telecommunications Corporation Annual Report 1992*, Australian and Overseas Telecommunications Corporation, Melbourne.

Australian Maritime Safety Authority. c.1994, *Australian Maritime Safety Authority*, Australian Maritime Safety Authority, Canberra.

Australian Maritime Safety Authority Act. 1990.

Australian Maritime Safety Authority. 1994, *Australian Maritime Safety Authority Annual Report 1993-94*, Australian Government Publishing Service, Canberra.

Australian Postal Corporation Act. 1989.

Australian Telecommunications Corporation. 1991, *Australian Telecommunications Corporation Annual Report 1991*, The McLaren Press Pty. Ltd., Melbourne.

Aviation Fuel Revenues (Special Appropriation) Act. 1988.

Ballard, A. 1923, *The Domesday Inquest*, 2nd. edition, Methuen & Co. Ltd., London.

Bowen, Jan. 1987, *The Macquarie Easy Guide to Australian Law*, The Macquarie Library Pty. Ltd., Chatswood.

Broadbent, J. and Guthrie, J. 1992, 'Changes in the Public Sector: A Review of Recent "Alternative" Accounting Research', *Accounting Auditing and Accountability Journal*, vol.5, no.2, pp.3-31.

Buchanan, J. and Bowman R.G. 1990, 'Corportisation and Asset Valuation for a Government Corporation', *Financial Accountability & Management*, vol.6, no.2, pp.77-91.

Bureau of Industry Economics. 1995, *Issues in Infrastructure Pricing*, Research Report no. 69, AGPS, Canberra.

Burton, William C. 1992, *Legal Thesaurus*, 2nd. edition, Macmillan Publishing Company, New York.

Butt, R. 1989, *A History of Parliament The Middle Ages*, Constable, London.

Butterworths Ltd. 1993, *Australian Legal Words and Phrases*, Butterworths Ltd, Sydney.

CAA Annual Report. See Civil Aviation Authority. 1994.

Caldwell, G.L. and Lawrence R.M. 1969, *'American Government Today'*, revised edition, W.W.Norton & Company, New York.

Cam, H.M. 1970, 'The Legislators of Medieval England', in *Historical Studies of the English Parliament Volume 1 Origins to 1399*, eds. E.B.Fryde and E.Miller, Cambridge University Press, Cambridge.

Cannon, J. 1994, 'The Nobility Ascendant', *The House of Lords A thousand years of British tradition*, Smith's Peerage Limited, London.

Challis, Darren. 1994, 'Ejecting the Blank Tape Levy: *Australian Tape Manufacturers Association Ltd v Commonwealth of Australia*', Sydney Law Review, vol. 16, pp.536-544.

Civil Aviation Authority. 1994, *Civil Aviation Authority Australia Annual Report 1994*, Civil Aviation Authority, Canberra.

Cook, L.H. 1952, 'Backgrounds of Modern Taxation', *Taxes*, August, 1952, pp.627-637.

Covaleski, Mark A. and Dirsmith Mark W. 1990, 'Dialetic Tension, Double Reflexivity and the Everyday Accounting Researcher: On Using Qualitative Methods, *Accounting, Organizations and Society*, vol.16, no.6, pp.543-573.

Crain, Gilbert W. 1978, An Investigation of the Usage and Comprehension of Municipal Accounting Reports in Two Montana Cities, PhD thesis, University of Illinois at Urbana-Champaign.

Davis, G.R.C. 1977, *Magna Carta*, British Museum Publications Limited, London.

Dixon, Keith. 1995, Qualitative Research in Accounting: Lessons from the Field, Discussion Paper Series 163, Department of Accounting, Massey University.

Dowell, Stephen. 1965, *A History of Taxation and Taxes in England Volume I*, 3rd. edition, Frank Cass & Co. Ltd., London.

Ellis, H. 1973, *A General Introduction to Domesday Book*, Genealogical Publishing Co., Baltimore.

FAC Annual Report, See Federal Airports Corporation. 1994.

Federal Airports Corporation. 1994, *Federal Airports Corporation Annual Report 1994*, Federal Airports Corporation, Sydney.

Ferreira, Lourdes D. and Merchant, Kenneth A. 1992, 'Field Research in Management Accounting and Control: A Review and Evaluation', *Accounting, Auditing & Accountability Journal*, vol.5, no.4, pp.3-33.

Fryde, E.B. 1970, 'Introduction', in *Historical Studies of the English Parliament Volume 2 1399-1603*, eds. E.B.Fryde and E.Miller, Cambridge University Press, Cambridge.

Gillies, P. 1992, *Business Law*, 4th. edition, The Federation Press, Sydney.

Graves, M.A.R. 1985, *The Tudor Parliaments Crown, Lords, and Commons, 1485-1603*, Longman, London.

Graw, Stephen. 1993, *An Introduction to the Law of Contract*, 2nd. edition, The Law Book Company Limited, Sydney.

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

Harding, A. 1993, *England in the Thirteenth Century*, Cambridge University Press, Cambridge.

Harriss, G.L. 1981, 'The Formation of Parliament, 1272-1377', in *The English Parliament and the Middle Ages*, eds. R.G.Davies and J.H.Denton, Manchester Unity Press, Manchester.

Henderson, S., Peirson, G. and Brown, R. 1992, *Financial Accounting Theory Its Nature and Development*, 2nd. edition, Longman Cheshire, Melbourne.

Hensman, Alfred P. 1860, *Handbook of The Constitution*, Longman, Green, Longman & Roberts, London.

Hindley, G. 1990, *The Book of Magna Carta*, Constable and Company Limited, London.

Holt, J.C. 1981, 'The Prehistory of Parliament', in *The English Parliament in the Middle Ages*, eds. R.G.Davies and J.H.Denton, Manchester Unity Press, Manchester.

Holt, J.C. 1993, 'The Ancient Constitution in Medieval England', in *The Roots of Liberty Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law*, ed. E. Sandoz, University of Missouri Press, Columbia.

Hopper, T. and Powell, A. (1985), 'Making sense of research into the organizational and social aspects of management accounting:a review of its underlying assumptions', *Journal of Management Studies*, pp.429-465.

Hopwood, Anthony. 1984, 'Accounting and the Pursuit of Efficiency', in *Issues in Public Sector Accounting*, eds. Hopwood, A. and Tomkins, C., Philip Allan, Oxford.

Hulme, S.E.K. 1992, Constitutions and The Constitution, paper presented to the Proceedings of The Samuel Griffith Society Inaugural Conference, Hilton-on-the-Park, Melbourne.

Humphrey, Christopher and Scapens, Robert W. 1996, 'Rhetoric and case study research: response to Joni Young and Alistair Preston and to Sue Llewellyn', *Accounting, Auditing & Accountability Journal,* vol.9, no.4, pp.119-122.

Industry Commission to the Council of Australian Governments. 1995, '*The Growth and Revenue Implications of Hilmer and Related Reforms*', Final Report, Australian Government Publishing Service, Canberra.

Jennings, I. 1965, *Magna Carta and its influence on the world today*, Headley Brothers, London.

Johnston, Peter. 1993, 'A Taxing Time: The High Court and the Tax Provisions of the Constitution', *Western Australian Law Review*, Vol. 23, pp. 362-371.

Kidder, L.H, Judd, C.M. and Smith E.R. 1986, Research Methods in Social Relations, 5th. edition, CBS Publishing Japan Ltd., Tokyo.

Lane, P.H. 1995, *A Manual of Australian Constitutional law,* Law Book Co., Sydney.

Llewellyn, Sue. 1996, 'Theories for theorists or theories for practice? Liberating academic accounting research?', *Accounting, Auditing & Accountability Journal*, vol.9, no.4, pp.112-118.

Lorig, Arthur N. 1963, 'Suggested Improvements in Governmental Accounting', *The Accounting Review*, vol. 38, no. 4, pp.759-763.

Lyon, Bryce. 1980, *Magna Carta, the Common Law, and Parliament in Medieval England*, Forum Press, St. Louis.

Ma, R. and Mathews, R. 1993, 'Financial Reporting by Government Departments: ED55 - A Dissenting View', *Australian Journal of Corporate Law*, vol.3, no.1, pp.67-88.

Marine Navigation Levy Act. 1989.

Marine Navigation (Regulatory Functions) Levy Act. 1989.

Miles, M.B. and Huberman, A.M. 1984, *Qualitative Data Analysis A Sourcebook of New Methods*, Sage Publications, Beverly Hills, California.

Miller, E. 1970, 'Introduction', in *Historical Studies of the English Parliament Volume 1 Origins to 1399*, eds. E.B.Fryde and E.Miller, Cambridge University Press, Cambridge.

Morabito, Vince and Barkoczy, Stephen. 1996, 'What is a Tax? The Erosion of the "Latham Definition", *Revenue Law Journal*, vol. 6, December 1996, pp. 43-63.

Myers, A.R. 1981, 'Parliament, 1422-1509', in *The English Parliament and the Middle Ages*, eds. R.G.Davies and J.H.Denton, Manchester Unity Press, Manchester.

NZ Financial Report. *See* Government of New Zealand. 1991.

Optus Communications. n.d., *Optus Communications*, Optus Communications, Sydney.

OTC Annual Report. See Overseas Telecommunications Corporation 1987.

Overseas and Telecommunications Act. 1946.

Overseas Telecommunications Act. 1946-1973.

Overseas Telecommunication Commission. 1994, *'OTC Annual Report 1994',* Overseas Telecommunications Corporation, Sydney.

Pareti, L. 1965, *The Ancient World Part I*, Unwin Bros, London.

Parker, Lee D. and Roffey, Bet H. 1997, 'Back to the drawing board: revisiting grounded theory and the everyday accountant's and manager's reality', *Accounting, Auditing & Accountability Journal*, vol.10, no.2, pp.212-247.

Parkin, Andrew and Summers, John. 1994, 'The Constitutional Framework', in *Government, Politics, Power and Policy in Australia*, 5th. edition, eds. Andrew Parkin, John Summers & Dennis Woodward, Longman Cheshire, 1994.

Patton, M.Q. 1987, *How to Use Qualitative Methods in Evaluation*, Sage Publications, Newbury Park, California.

Pearce, D.C. and Geddes, R.S. 1988, *Statutory Interpretation in Australia*, Butterworths, North Ryde.

Pennington, D.H. 1981, 'A Seventeenth-Century Perspective', in *The English Parliament and the Middle Ages*, eds. R.G.Davies and J.H.Denton, Manchester Unity Press, Manchester.

Pollard, A.F. 1920, *The Evolution of Parliament*, Longmans, Green & Co., London.

Prestwich, M. 1980, *The Three Edwards War and State in England 1272-1377*, Weidenfeld and Nicolson, London.

Protection of the Sea (Levy) Act. 1983.

Quick, J. and Garron, R.R. 1901, *The Annotated Constitution of the Australian Commonwealth*, The Australian Law Book Company, Sydney.

Redford, D. B. 1984, *Akhenaten The Heretic King*, Princeton University Press, Princeton.

Richardson, H.G. and Sayles, G.O. 1981, *The English Parliament in the Middle Ages*, The Hambledon Press, London.

Roskell, J.S. 1970, 'Perspectives in English Parliamentary History', in *Historical Studies of the English Parliament Volume 2 1399-1603*, eds. E.B.Fryde and E.Miller, Cambridge University Press, Cambridge.

Scapens, Robert W. 1990, 'Researching Management Accounting Practice: The Role of Case Study Methods', *British Accounting Review*, vol.22, pp.259-281.

Skottowe, B.C. 1895, *A Short History of Parliament*, Swan Sonnenschein & Co., London.

Snedden, B.M. 1979, *The Constitution, Parliament and the Westminster Heritage*, House of Representatives, Canberra.

Stacey, R.C. 1987, *Politics, Policy, and Finance under Henry III 1216-1245*, Clarendon Press, Oxford.

Stake, Robert E. 1994, 'Case Studies', in *Handbook of Qualitative Research*, eds. Norman K. Denzin and Yvonna S. Lincoln, SAGE Publications, Thousand Oaks, California.

Strauss, A. and Corbin, J. 1991, *Basics of Qualitative Research Grounded Theory Procedures and Techniques*, 3rd. edition, Sage Publications, Newbury Park, California.

Telecom Australia Annual Report. See Australian Telecommunications Corporation 1994.

Telecommunications Act. 1989.

Telstra Annual Report. See Telstra Corporation Limited. 1994.

Telstra Corporation Act. 1991.

Telstra Corporation Limited. 1994, *Telstra Annual Report 1994*, Telstra Corporation Limited, Melbourne.

The Commonwealth of Australia Constitution Act. 1900 (U.K.)

Tomkins C. and Groves, R. 1983, 'The Everday Accountant and Researching His Reality', *Accounting, Organizations and Society*, vol.8, no.4, pp.361-374.

Vermeesch, R.B. and Lindgren, K.E. (1990), *Business Law of Australia*, 6th. edition, Butterworths, Sydney.

Walker, B. 1992, 'The Hidden Value in Water Boards', Business Review Weekly, 30 October, pp.37-38.

Wallschutzky, I.G. 1988, *Australian Income Tax Law*, 2nd. edition, John Wiley & Sons, Brisbane.

Wilding, N. and Laundy, P. 1961, *An Encyclopaedia of Parliament*, Cassell and Company Ltd., London.

Witynski, G. 1993, 'What is a Tax? - Recent Developments', paper presented to the Constitutional Law Forum, Canberra.

Yin, R.K. 1989, *Case Study Research*, 2nd. edition, SAGE Publications, Newberry Park, California.

Young, P. and Holmes, R. 1974, *The English Civil War A Military History of The Three Civil Wars 1642-1651*, Eyre Methuen, London.

Ziehr, W. 1982, *The Ancient World From Ur to Mecca*, Book Cliu Associates, London.