

# HIGH COURT OF AUSTRALIA

GLEESON CJ,  
GAUDRON, McHUGH, KIRBY, HAYNE AND CALLINAN JJ

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ANTHONY IAN LUTON

PLAINTIFF

AND

GILLIAN GLADYS LESSELS & ANOR

DEFENDANTS

*Luton v Lessels*  
[2002] HCA 13  
11 April 2002  
C40/1995

## ORDER

*Answer questions as follows:*

### Question 1

*Is the scheme established by the Child Support (Registration and Collection) Act 1988 (Cth) and the Child Support (Assessment) Act 1989 (Cth) for the collection and payment by the second defendant of money otherwise payable to or receivable by the first defendant a tax?*

### Answer

*No.*

### Question 2

*If "Yes" to question 1 are the Acts invalid as being contrary to s 55 of the Constitution?*

### Answer

*Unnecessary to answer.*

Question 3

*Do the Acts in purporting to authorise the second defendant to make the assessments and the determinations, to enter the particulars, to issue the notices, and to collect and apply payments in the way in which the second defendant did involve the purported exercise of judicial power by the second defendant contrary to Ch III of the Constitution?*

Answer

No.

Question 4

*What orders for the further disposition of the action should be made in the light of the answers to these questions?*

Answer

*The action should be dismissed with costs, including the costs of the case stated under s 18 of the Judiciary Act 1903 (Cth).*

**Representation:**

G C Corr with G K Y Wong for the plaintiff (instructed by Tjakamarra-Forrest)

No appearance for the first defendant

D M J Bennett QC, Solicitor-General of the Commonwealth with C J Horan for the second defendant (instructed by Australian Government Solicitor)

B M Selway QC, Solicitor-General for the State of South Australia with A S Field intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for South Australia)

R M Mitchell intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for Western Australia)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

## CATCHWORDS

### **Luton v Lessels**

Constitutional law (Cth) – Taxation – Law imposing taxation – Statutory power to register a parent's or step-parent's child maintenance liability – Validity – Whether amounting to law imposing taxation – Whether law deals only with the imposition of taxation.

Constitutional law (Cth) – Judicial power of Commonwealth – Child Support Registrar may assess child support payable by parent or step-parent under statute – Validity – Whether impermissible conferral of the judicial power of the Commonwealth upon Registrar.

Words and phrases – "laws imposing taxation".

Constitution, ss 53, 55, 71.

*Child Support (Assessment) Act* 1989 (Cth), Pts 5, 6A.

*Child Support (Registration and Collection) Act* 1988 (Cth), Pt III.



1 GLEESON CJ. The plaintiff has commenced proceedings in this Court  
challenging the validity of the Commonwealth's legislative scheme for  
assessment and enforcement of child support liabilities. The scheme is contained  
in the *Child Support (Assessment) Act* 1989 (Cth) ("the Assessment Act") and the  
*Child Support (Registration and Collection) Act* 1988 (Cth) ("the Registration  
and Collection Act"). The first ground of challenge is that the scheme involves  
the imposition of taxation, and that there has been a contravention of s 55 of the  
Constitution. The second ground is that aspects of the legislation involve an  
attempt to vest the judicial power of the Commonwealth in the Child Support  
Registrar.

2 A case has been stated pursuant to s 18 of the *Judiciary Act* 1903 (Cth)  
raising certain questions for the decision of a Full Court. The specific questions,  
and my answers to them, will appear at the conclusion of these reasons.

3 The details of the legislation are set out in the reasons for judgment of  
Gaudron and Hayne JJ. I will refer to them only to the extent necessary to  
explain my reasons.

#### The legislative scheme

4 The objects of the Assessment Act are set out in s 4. The principal object  
is to ensure that children receive a proper level of financial support from their  
parents. To that end, the Act provides for a level of support to be determined in  
accordance with legislatively fixed standards, and permits carers of children to  
have the level readily determined without the need to resort to court proceedings.

5 There is an office of Child Support Registrar established by s 10 of the  
Registration and Collection Act. An application for administrative assessment of  
child support may be made, to the Registrar, under Pt 4 of the Assessment Act.  
Such an assessment is made in accordance with a statutory formula, unless the  
Registrar determines, or a court orders, that the provisions relating to  
administrative assessment of child support should be departed from (Assessment  
Act s 35). A parent's liability to pay child support arises on the acceptance by the  
Registrar of an application (s 31). The making of an assessment gives rise to a  
debt owing by the liable parent to the carer who is entitled to child support; the  
debt may be recovered in a court of competent jurisdiction (s 79).

6 It may be observed that, although the legislation is enacted in furtherance  
of a clearly defined public policy, it creates a distinctly personal liability. The  
natural and moral obligation of a parent to support a child becomes, by force of  
the legislation, a legal obligation reflected in a debt, calculated in accordance  
with the Assessment Act, owing by a parent to a carer of the child. Although it is  
not directly relevant to the questions raised, the legislation was enacted following  
a referral of matters by a number of States, and is supported by the powers  
conferred by s 51 (xxii), (xxxvii) and (xxxix) and s 122 of the Constitution.

7       The principal objects of the Registration and Collection Act are to ensure that children receive from their parents the financial support that the parents are liable to provide, and that periodic amounts payable by parents towards the maintenance of their children are paid on a regular and timely basis (s 3). Those objects are achieved by a system of registration and enforcement. The scheme is available to a carer who wishes to take advantage of it. Some carers may not. They can rely on private enforcement if they wish. If a liability has arisen under a child support assessment, it may be registered under the Registration and Collection Act (s 17). The effect of registration is that the carer is no longer entitled to enforce payment of the liability and, instead, there is a debt owing by the liable parent to the Commonwealth (s 30). The carer entitled to child support becomes entitled to payment of an amount equivalent to that collected by the Commonwealth from the liable parent or on account of that parent's liability (s 76). The debt owed by the liable parent to the Commonwealth must be paid in the manner prescribed by the Act, and may be collected from certain debtors of the parent. Amounts collected are paid into, and disbursed to carers out of, the Consolidated Revenue Fund. The Commonwealth does not benefit financially.

### Taxation

8       The question of what constitutes a tax, or the imposition of taxation, for the purposes of the Constitution may arise in a number of contexts. Under s 51(ii), the Parliament has power to make laws with respect to taxation. The broader the meaning given to taxation, the greater the reach of that power. Section 90 provides that the power of the Parliament to impose duties of excise is exclusive, depriving the States of that form of revenue. Whether a particular exaction is to be characterised as a tax on goods may determine whether it is a duty of excise. Sections 53 to 55 deal with matters concerning the relations between the two Houses of Parliament, and reflect one of the compromises by which Federation was achieved<sup>1</sup>. Section 53 provides that proposed laws imposing taxation shall not originate in the Senate, and the Senate may not amend proposed laws imposing taxation. If it were possible to "tack" on to a law imposing taxation another law, which the Senate might wish to amend, then the power of the Senate would be diminished. To guard against that, s 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.

9       The plaintiff argues that the Assessment Act and the Registration and Collection Act include laws imposing taxation. If they contravene s 55, the result is that any provisions in the Acts dealing with any matter other than the

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1     See Quick & Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 675.

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imposition of taxation are of no effect. That would give rise to a question whether there are any such provisions, or whether the entire Acts deal with the imposition of taxation<sup>2</sup>. However, the primary submission of the second defendant, (the first defendant does not appear), and the interveners, is that no such question arises, for the reason that neither Act is, or contains, a law with respect to, or imposing, taxation. For the reasons that follow, I agree with that submission.

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To decide whether an exaction of money or the imposition of some other financial obligation is a tax involves an exercise in characterisation. The often-quoted words of Latham CJ in *Matthews v Chicory Marketing Board (Vict)*<sup>3</sup> were not offered as a definition of a tax. They were an explanation of the features of the impost under consideration that justified the conclusion that it bore the character of a tax. Latham CJ said<sup>4</sup>:

"The levy is, in my opinion, plainly a tax. It is a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered."

He then cited a decision of the Privy Council, *Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd*<sup>5</sup>. The factors mentioned, that is, the compulsory exaction, by a public authority, for public purposes, and legal enforceability, had been listed by the Privy Council as reasons for concluding that the adjustment levies in question should be characterised as taxes<sup>6</sup>. They were not put forward by the Privy Council as a definitive statement of the essence of a tax. And Latham CJ's statement that the levy with which he was concerned was not a payment for services rendered was directed to the facts of that case; it was not exhaustive. Payments for services rendered are not the only exactions that stand outside the concept of a tax. Others include "a charge for the acquisition or use of property, a fee for a privilege and a fine or penalty imposed for criminal conduct or breach of statutory obligation"<sup>7</sup>.

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2 cf *Re Dymond* (1959) 101 CLR 11.

3 (1938) 60 CLR 263.

4 (1938) 60 CLR 263 at 276.

5 [1933] AC 168.

6 [1933] AC 168 at 175-178.

7 *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 467.

11 In *Parton v Milk Board (Vict)*<sup>8</sup>, Dixon J said of the contribution in question that it "is a compulsory levy by a public authority for public purposes and that is enough to show that it is a tax". The substantial question in that case was whether the tax was a tax on goods, and a duty of excise.

12 What constitutes a sufficient public purpose may be a matter of contention, as in *Australian Tape Manufacturers Association Ltd v The Commonwealth*<sup>9</sup>. Quick and Garran, writing in 1901, said<sup>10</sup>:

"Taxation may be now defined as any exaction of money or revenue, by the authority of a State, from its subjects or citizens and others within its jurisdiction, for the purpose of defraying the cost of government, promoting the common welfare, and defending it against aggression from without."

That, perhaps, illustrates the risks of definition. Depending upon what is meant by "promoting the common welfare", it may be difficult to reconcile with the decision in the *Australian Tape Manufacturers Association* case. Directly or indirectly, all legislation is aimed at promoting the common welfare. The legislative powers of the Parliament are to be exercised for the peace, order and good government of the Commonwealth. A law which imposes on one person an obligation to pay money to another, or to the government, will, by hypothesis, be enacted in pursuance of some policy or purpose which is regarded by the Parliament as in the public interest. The concept of "public purposes" in the present context is narrower than that.

13 As was pointed out in *Airservices Australia v Canadian Airlines*<sup>11</sup>, while an objective of raising revenue for the government is not a universal determinant, the presence or absence of such an objective will often be significant in deciding whether an exaction, or the imposition of a liability, bears the character of taxation. That is the most usual form of public purpose involved; an idea reflected in what was said by Quick and Garran. Revenue raised by a government may be earmarked, formally or informally, for a specific purpose, and still be a tax. For example, Commonwealth pay-roll tax was introduced in 1941 as a means of providing revenue to finance the provision of child

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8 (1949) 80 CLR 229 at 259.

9 (1993) 176 CLR 480.

10 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 550.

11 (1999) 202 CLR 133 at 178 [90] per Gleeson CJ and Kirby J.



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endowment under legislation enacted in the same year<sup>12</sup>. The impost in the *Australian Tape Manufacturers Association* case involved raising revenue from one group for the purpose of its application for the benefit of another group. The majority held that revenue was raised for a public purpose of compensating the second group. The group who were to be compensated had no prior legal right against the group from whom the revenue was to be raised. That is a point of distinction from the Registration and Collection Act. The fact that the proceeds of the exaction were not paid into, and out of, the Consolidated Revenue Fund was not regarded as decisive. I would also regard the converse as true.

14       The Assessment Act creates a private or personal obligation, in the form of a debt payable by the liable parent to the eligible carer. The debt is recoverable by the carer. The creation of a legal obligation, enforceable by private action, in a parent, to pay for the support of a child, is not taxation. It is a scheme for the creation and adjustment of private rights and liabilities. But the existence of the obligation is of significance in considering the aspect of the legislative scheme upon which the plaintiff principally relies, which is in the Registration and Collection Act. What is alleged to be taxation is in substance no more than a mechanism for the enforcement of a pre-existing private liability.

15       If a child support assessment is registered under the Registration and Collection Act the debt payable by the liable parent to the eligible carer is extinguished, and replaced by a debt payable by the liable parent to the Commonwealth. The Commonwealth, as necessary, collects the amount owing, and pays it into the Consolidated Revenue Fund. An amount equal to the amount collected is transferred to the Child Support Account. Payments of child support are then made to the carer from the Child Support Account. What is involved is a collection mechanism to facilitate the recovery of child support payments that a parent becomes liable to make under the Assessment Act. It enables the discharge of a personal obligation created by the Assessment Act. A multiplicity of payments may be involved, the amounts of payments are likely to be modest, and many carers would lack the means or the will to undertake private recovery proceedings. The practical advantages of such a scheme are obvious, but they do not include any financial benefit to the Commonwealth.

16       The payment of moneys collected by the Commonwealth into the Consolidated Revenue Fund, is necessitated by s 81 of the Constitution, which refers to "revenues or moneys". The legislation does not have either the purpose or the effect of raising revenue for the Commonwealth. Its purpose is to create, and facilitate the enforcement of, private rights and liabilities. The Assessment Act creates a personal liability in a parent to the carer of a child; the Registration and Collection Act gives the carer the facility, in exchange for extinguishment of

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12   *Victoria v The Commonwealth* (1971) 122 CLR 353 at 362 per Barwick CJ.

the liability to the carer, to have the Commonwealth recover the child support payments assessed and pay an equivalent amount to the carer.

17           The legislation does not bear the character of taxation.

Judicial power

18           In order to deal with the argument that the legislation purports to confer judicial power upon the Child Support Registrar, it is necessary to make further reference to some of the provisions of the two Acts.

19           When an application is made to the Registrar under the Assessment Act for administrative assessment of child support, the Registrar must assess the annual rate of child support payable (s 31(2)). The annual rate is calculated in accordance with a formula based upon a "child support percentage" multiplied by an "adjusted income amount" of the liable parent (ss 36, 37). Following such assessment, a daily rate of child support becomes due and payable monthly.

20           Part 6A of the Assessment Act provides for departure applications, which invoke a power in the Registrar to make a determination that the provisions relating to administrative assessments of child support will be departed from in relation to a child. The grounds for such an application relate to special circumstances which may include the capacity of either parent to provide financial support for a child, the costs of maintaining a child, and a consideration of whether the application of the administrative assessment provisions, would be unjust and inequitable (s 117). A departure determination may vary the rate of child support payable, the child support percentage, or the child support income amount.

21           The fact that the Registrar makes assessments, or departure determinations, by the application of legal criteria to the facts and circumstances of a particular case does not mean that what is involved is an exercise of judicial power. The making of decisions by the application of legal criteria to facts as found is characteristic, but not distinctive, of the judicial function. It is also characteristic of many administrative functions. An obvious, and topical, example is the way in which decisions are made under the *Migration Act* 1958 (Cth) when persons asserting refugee status make an application for a protection visa. The criteria by reference to which such applications are determined are contained in the *Migration Act* which, in turn, refers to the International Convention relating to the Status of Refugees. Deciding whether a person is owed protection obligations can involve difficult questions of fact and law. Such decisions are routinely made by officers of the executive government and, if necessary, reviewed by an administrative tribunal. A large majority of applications never go past the stage of administrative decision-making. Some decisions ultimately become subject to judicial review, but most claims to refugee status are decided without the involvement of any exercise of judicial

power. Another example, referred to by Windeyer J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*<sup>13</sup>, is that of customs officials who decide whether some article is a prohibited import or, if a permissible import, whether it is dutiable and in what sum.

22 The exercise by the Registrar of the powers referred to above does not involve the determination of pre-existing rights and obligations. It involves the creation of new rights and obligations for the future. The acceptance of an application, the making of an administrative assessment, and the making of a departure determination constitute the *factum* upon which the legislation operates to fix or alter the rights and obligations of parent and carer<sup>14</sup>.

23 Furthermore, the enforceability of such rights and obligations depends upon the intervention of a court and the independent exercise of judicial power<sup>15</sup>. The Registrar cannot enforce his or her own assessments or determinations.

24 In addition, neither an assessment nor a departure determination is conclusive. In the case of an assessment, after an objection made to the Registrar has been decided, an application may be made to a court for a declaration that an applicant is or is not entitled to an administrative assessment, or to appeal against the assessment (ss 106, 106A, 107, 110). In the case of a departure determination, following the disallowance of an objection either the liable parent or the carer may apply to a court (ss 115-118). In both cases, the court exercises original jurisdiction, and the court has broad powers to override decisions of the Registrar<sup>16</sup>.

25 For those reasons, the Assessment Act does not purport to confer judicial power upon the Child Support Registrar.

26 As to the Registration and Collection Act, if a person to whom a liability in respect of child support is owed chooses to seek registration, the Registrar is required to register the liability, with the legal consequences earlier described. If a payer or payee is dissatisfied with the registration, or the particulars entered in the register, there is a right of objection, and a person aggrieved with the Registrar's decision on the objection may "appeal" to a court. The registration of

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13 (1970) 123 CLR 361 at 398.

14 cf *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 111 [45].

15 cf *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 260-261; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 110-111 [42]-[43].

16 cf *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 111-112 [46]-[47].

a child support liability does not involve a binding and conclusive determination of existing rights and liabilities. It creates rights for the future. Under s 113 of the Act, debts due to the Commonwealth may be recovered in a court of competent jurisdiction at the suit of the Registrar.

27           The Registrar is involved in various ways in the collection and recovery mechanisms. These mechanisms include garnishment of wages and salaries. These functions do not involve the exercise by the Registrar of judicial power<sup>17</sup>.

28           This ground of challenge to the validity of the legislation fails.

### Conclusion

29           The questions should be answered as follows:

1.     Q. Is the scheme established by the *Child Support (Registration and Collection) Act* 1988 (Cth) and the *Child Support (Assessment) Act* 1989 (Cth) for the collection and payment by the second defendant of money otherwise payable to or receivable by the first defendant a tax?

A. No.

2.     Q. If "yes" to question 1 are the Acts invalid as being contrary to s 55 of the Constitution?

A. Unnecessary to answer.

3.     Q. Do the Acts in purporting to authorise the second defendant to make the assessments and the determinations, to enter the particulars, to issue the notices, and to collect and apply payments in the way in which the second defendant did involve the purported exercise of judicial power by the second defendant contrary to Ch III of the Constitution?

A. No.

4.     Q. What orders for the further disposition of the action should be made in the light of the answers to these questions?

A. The action should be dismissed with costs.

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<sup>17</sup> cf *Re Registrar, Social Security Appeals Tribunal; Ex parte Townsend* (1995) 69 ALJR 647 at 650 per Toohey J; 130 ALR 163 at 167.

30 GAUDRON AND HAYNE JJ. The questions for consideration of the Full Court concern the validity of the *Child Support (Registration and Collection) Act* 1988 (Cth) ("the Registration and Collection Act") and the *Child Support (Assessment) Act* 1989 (Cth) ("the Assessment Act"). The plaintiff contends that the former of these Acts is a law imposing taxation which, contrary to s 55 of the Constitution, does not "deal only with the imposition of taxation". The plaintiff further contends that both Acts, impermissibly, purport to vest the judicial power of the Commonwealth in the Child Support Registrar ("the Registrar"), an office established by s 10 of the Registration and Collection Act. Both contentions should be rejected.

31 The questions reserved are couched in the present tense and, therefore, invite attention to the Acts in the form in which they now stand. Since their enactment, both Acts have been amended several times but it was not submitted that anything turned on those amendments or on the particular form that the Acts took at the date of the various events described in the case stated. It is, therefore, convenient to refer to the principal features of the Acts as they now stand.

#### The Registration and Collection Act

32 The Registration and Collection Act (originally enacted as the *Child Support Act* 1988) commenced operation on 1 June 1988. Its principal objects<sup>18</sup> include ensuring:

- "(a) that children receive from their parents the financial support that the parents are liable to provide; and
- (b) that periodic amounts payable by parents towards the maintenance of their children are paid on a regular and timely basis".

33 Part III of the Registration and Collection Act (ss 17-42B) provides for the registration of certain liabilities of a parent, or step-parent, of a child to pay a periodic amount for the maintenance of the child. A person liable to make such payments is referred to in the Registration and Collection Act as "the payer". Section 17 identifies what is a registrable maintenance liability and Div 2 of Pt III (ss 20-32) provides for the registration of such liabilities. Section 30 of the Registration and Collection Act provides that, if a registrable maintenance liability is registered, first, the amounts payable "are debts due to the Commonwealth by the payer in accordance with the particulars of the liability entered in the Child Support Register" and, secondly, "the payee is not entitled to, and may not enforce payment of, amounts payable under the liability".

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18 Registration and Collection Act, s 3(1).

Registered maintenance liabilities that are enforceable under the Registration and Collection Act are called "enforceable maintenance liabilities"<sup>19</sup>. An amount that is a debt due to the Commonwealth under s 30 is called a "child support debt"<sup>20</sup>.

34 Part IV of the Registration and Collection Act (ss 43-65) provides for the collection of amounts due to the Commonwealth for enforceable maintenance liabilities. If the payer is an employee, the general rule is that, as far as practicable, the amount will be collected by deduction from the payer's salary or wages<sup>21</sup>. Provision is made for the Registrar to give notice to the employer of such a payer<sup>22</sup> instructing the employer to make periodic deductions from salary or wages paid by the employer to the payer. Section 46 obliges the employer to make the necessary deductions; s 47 requires the employer to pay to the Registrar the amounts deducted. An amount payable to the Registrar under Pt IV of the Act (including, therefore, an amount payable under s 47) is a debt due to the Commonwealth<sup>23</sup>. Until the amendment of the Registration and Collection Act in 2001<sup>24</sup>, the Registrar was the Commissioner of Taxation<sup>25</sup> and each Second Commissioner and Deputy Commissioner of Taxation was a Deputy Child Support Registrar<sup>26</sup>. The amending legislation provided that the Registrar was to be "the person who holds, or is acting in, the position known as the General Manager of the Child Support Agency", or if there is no such position, the person holding, or acting in, a position specified by the Secretary of the Department of Family and Community Services.

35 Part VI of the Registration and Collection Act (ss 73-79A) provides for payments to payees. (The Act defines<sup>27</sup> the "payee" in relation to a registrable maintenance liability as the person who is entitled, or would but for the

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19 s 4.

20 s 4.

21 s 43.

22 s 45.

23 s 64.

24 *Child Support Legislation Amendment Act 2001* (Cth), Sched 5, Item 38.

25 Registration and Collection Act, s 10(2).

26 s 12.

27 s 4.

registration of the liability under the Act be entitled, to receive payments under the liability.) By s 76 it is provided that every payee of a registered maintenance liability is entitled to be paid, each month, an amount equal to the aggregate of amounts deducted by an employer under Pt IV during the previous month, amounts received by the Registrar otherwise than under Pt IV during the payment period and, to the extent they have not previously been paid, any amounts deducted or received in respect of prior periods (in each case excluding any amount not due and payable by the payer on the seventh day of the current month).

36 Because the payment is to be made by the Registrar, and because both the amounts due under a registered maintenance liability and the amounts that employers have deducted on this account are debts due to the Commonwealth, provision is made in Pt VI for the treatment of receipts and payments.

37 When the Registration and Collection Act was first enacted, payments were to be made from the Child Support Trust Account. That account, established under the Registration and Collection Act, was a trust account for the purposes of s 62A of the *Audit Act* 1901 (Cth)<sup>28</sup>. To give effect to new Commonwealth financial management arrangements (made under the *Financial Management and Accountability Act* 1997 (Cth)) the Child Support Trust Account was replaced, in 1998<sup>29</sup>, by the Child Support Reserve, a component of the Reserved Money Fund. Provision was made in the Registration and Collection Act for transfers into<sup>30</sup> and payments out of<sup>31</sup>, that fund.

38 All of the amounts received by the Registrar (as payment of child support debts or deductions made by employees, as voluntary payments, or as refunds of amounts that should not have been paid) were "public money" under the *Financial Management and Accountability Act*<sup>32</sup> and therefore had to be credited to the Consolidated Revenue Fund<sup>33</sup>. Transfers *into* the Reserve came from the Consolidated Revenue Fund. Section 74 of the Registration and Collection Act

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28 Registration and Collection Act, s 73.

29 *Audit (Transitional and Miscellaneous) Amendment Act* 1997 (Cth), Sched 2, Items 605-620.

30 s 74.

31 s 75.

32 s 5, definition of "public money".

33 *Financial Management and Accountability Act* 1997 (Cth), s 18.

required the transfer to the Reserve, from the Consolidated Revenue Fund, of amounts equal to amounts that the Registrar received in payments of child support debts, whether by payers or employers of payers, together with amounts equalling payments made voluntarily by payers and refunds of amounts that should not have been paid out of the Reserve. Moneys standing to the credit of the Reserve were to be applied in making payments to payees of registered maintenance liabilities<sup>34</sup>. (It is not necessary to notice other ways in which moneys standing to the credit of the Reserve could be applied.)

39 By the *Financial Management Legislation Amendment Act 1999* (Cth) ("the Financial Amendment Act"), the *Financial Management and Accountability Act* was amended in a number of ways. The definition of Reserved Money Fund was repealed<sup>35</sup>. Components of the Reserved Money Fund became Special Accounts and each component was renamed as an "Account" rather than a "Reserve"<sup>36</sup>. References to amounts being *transferred from* the Consolidated Revenue Fund to a Reserve were to be read as references to *crediting* the relevant account<sup>37</sup> and references to amounts being *transferred to* the Consolidated Revenue Fund were to be read as *debiting* the relevant account<sup>38</sup>.

40 For present purposes, however, the essence of the arrangements reflected in Pt VI of the Registration and Collection Act remained unaffected by these changes. Amounts equal to amounts received by the Registrar in payment of child support debts (including amounts received from employers who had deducted amounts from salary or wages) are to be credited to the Child Support Account<sup>39</sup>. Moneys standing to the credit of the Child Support Account are to be applied in making payments to payees of registered maintenance liabilities. (Again, other ways of applying moneys standing to the credit of the Account need not be noticed.)

41 Because the amount which is to be paid to a payee is calculated by reference (among other things) to amounts *deducted* by an employer (as distinct

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34 s 75(a).

35 Financial Amendment Act, Sched 1, Item 13.

36 Financial Amendment Act, s 5(5).

37 Financial Amendment Act, s 5(6)(a).

38 Financial Amendment Act, s 5(6)(b).

39 Registration and Collection Act, s 74.



from amounts deducted *and remitted*) provision is also made (by s 77) for an amount equal to any unremitted deduction to be credited to the Child Support Account. The total amounts credited to the Child Support Account equal the total amounts actually paid out to payees and they equal the total amounts paid or given up by payers. If employers' obligations to remit deductions made from salary or wages were all met, total payments into the Consolidated Revenue Fund would equal the total payments made out of the Child Support Account.

### The Assessment Act

42 The Assessment Act commenced operation on 1 October 1989 (16 months after the Registration and Collection Act came into force). The Assessment Act records<sup>40</sup> that "[t]he parents of a child have the primary duty to maintain the child". This duty is said, by the Assessment Act<sup>41</sup>, (a) to be not of lower priority than the duty of the parent to maintain any other child or another person; (b) to have priority over *all* commitments of the parent other than commitments necessary to enable the parent to support himself or herself and any other child or another person the parent has a duty to maintain; and (c) to be not affected by the duty of any other person to maintain the child or any entitlement the child or another person may have to an income tested pension, allowance or benefit. Like the Registration and Collection Act, the principal object of the Assessment Act is said<sup>42</sup> to be "to ensure that children receive a proper level of financial support from their parents".

43 Part 5 of the Assessment Act (ss 35-79) provides for the administrative assessment of child support. "Child support" is defined<sup>43</sup> as "financial support under [the Assessment] Act, including financial support under [the] Act by way of lump sum payment or by way of transfer or settlement of property". An administrative assessment of child support requires the application of one or more of the several statutory formulae that is, or are, apposite in the particular circumstances. Section 79 of the Assessment Act provides that "[a]n amount of child support due and payable by a liable parent to a carer entitled to child support is a debt due and payable by the liable parent to the carer".

44 Part 6 of the Assessment Act (ss 80-98) provides for the parents of eligible children to make consent arrangements between themselves or with an eligible

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40 s 3(1).

41 s 3(2).

42 s 4(1).

43 s 5.

carer about the child support payable for the child. Those arrangements can be varied by subsequent agreement. Application can be made to the Registrar for acceptance of a child support agreement<sup>44</sup>. Upon acceptance of the agreement, the person by whom child support is to be paid or provided under the agreement becomes a "liable parent"<sup>45</sup>. The provisions governing consent arrangements need not be noticed further.

45 Where there has been an administrative assessment both the liable parent and the carer may lodge with the Registrar an objection against the assessment<sup>46</sup>. A person aggrieved by a decision on the objection may, pursuant to s 110 of the Assessment Act, appeal to a court having jurisdiction under that Act.

46 Again, where there has been an administrative assessment, both the liable parent and the carer may apply to the Registrar for a determination that there be a departure from the provisions of the Assessment Act relating to administrative assessment of child support<sup>47</sup>. Determinations of this kind are usually referred to as "departure determinations". The Registrar can also initiate the making of a departure determination<sup>48</sup>. The decision to make or refuse a departure determination is subject to the same objection<sup>49</sup> and similar appeal<sup>50</sup> procedures as administrative assessments.

#### Laws imposing taxation?

47 Although the plaintiff's statement of claim alleged that both the Registration and Collection Act and the Assessment Act are invalid, only the Registration and Collection Act was alleged to be an Act imposing (or, as the statement of claim put it, "dealing with") taxation. The plaintiff submitted that "[t]he actual imposition of this 'child support tax' is achieved by ss 17, 24A and 30 of the Registration and Collection Act while the specification of persons who are liable to taxation and the definition of their liability are to be found in the

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44 ss 88-89.

45 s 93(1)(e).

46 ss 98X, 98Y.

47 s 98B.

48 s 98K.

49 s 98X(1)(d).

50 s 116.

Assessment Act". Of the various provisions of Div 2 of Pt III which provide for registration of registrable maintenance liabilities, particular reference was made by the plaintiff to s 24A because it was under that section that the assessment of his liability to pay child support was registered.

48 It is clear that the Registration and Collection Act provides for the compulsory exaction of money which is to be paid to the Commonwealth. It is equally clear that it is inappropriate to speak of the exaction being in payment for any services rendered by the Commonwealth. Further, it may readily be assumed that the scheme for which the Registration and Collection Act provides is a scheme which is seen as being of public benefit, even though its principal focus can also be seen as being on the performance of each individual's obligation to provide child support for his or her child or children, and the satisfaction of the need, and the right, of that child or those children to that support. It by no means follows, however, that the Registration and Collection Act as a whole, or particular provisions of it, are properly described as a law imposing taxation.

49 All of the features which Latham CJ identified in *Matthews v Chicory Marketing Board (Vict)*<sup>51</sup> as typical of a tax – compulsory exaction, by a public authority, for public purposes, enforceable by law, and not being payment for services rendered – are important. The presence or absence of none of them, however, is determinative of the character of the legislation said to impose a tax. It is necessary, in every case, to consider all the features of the legislation which is said to impose a tax.

50 As was said in the joint judgment of the whole Court in *Air Caledonie International v The Commonwealth*<sup>52</sup>:

"[T]here is no reason in principle ... why the compulsory exaction of money under statutory powers could not be properly seen as taxation notwithstanding that it was by a non-public authority or for purposes which could not properly be described as public."

Secondly, as the Court also pointed out in *Air Caledonie*<sup>53</sup>, the reference to "payments for services rendered", as an antonym for "tax", is only one example of various special types of exactions of money which are not taxes. Charges for the acquisition or use of property, fees for a privilege, and fines or penalties for

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51 (1938) 60 CLR 263 at 276.

52 (1988) 165 CLR 462 at 467.

53 (1988) 165 CLR 462 at 467.

criminal conduct are some other examples of what are unlikely to amount to forms of tax.

51 Thirdly, in *Australian Tape Manufacturers Association Ltd v The Commonwealth*<sup>54</sup>, the majority of the Court concluded that the better view is that it is not essential to the concept of a tax that the exaction be by a public authority because it was "scarcely to be contemplated"<sup>55</sup> that the character of an impost as a tax depends upon whether the authority is a public authority. Nonetheless, as the majority also noted<sup>56</sup>, the character of the authority concerned may bear upon whether the purposes on which moneys raised are to be expended are themselves public. These matters were seen as significant in *Tape Manufacturers* because the impost then under consideration was to be paid directly to a collecting society designated under the relevant legislation; it was not to be paid into the Consolidated Revenue Fund.

52 Here, as has been noted earlier, amounts due from payers, and from the employers of payers, are debts due to the Commonwealth. When received, the amounts are paid into the Consolidated Revenue Fund. Amounts equal to what is received and amounts equal to deductions, made but not remitted, are then credited to the Child Support Account from which amounts payable to those entitled are paid. What is the significance of the fact that the amounts exacted are paid into the Consolidated Revenue Fund?

53 Section 81 of the Constitution provides that:

"All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution."

54 In *Tape Manufacturers*, it was said<sup>57</sup> that "[i]n 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". Support

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54 (1993) 176 CLR 480.

55 (1993) 176 CLR 480 at 501 per Mason CJ, Brennan, Deane and Gaudron JJ.

56 (1993) 176 CLR 480 at 501.

57 (1993) 176 CLR 480 at 503.

for this proposition was found primarily in what was said by Isaacs J in *R v Barger; The Commonwealth v McKay*<sup>58</sup>:

"[T]he imposition of a tax on any person or thing for the benefit of the Consolidated Revenue is taxation, and taxation within the meaning of the Constitution"

and in what was said by Latham CJ in *Moore v The Commonwealth*<sup>59</sup>:

"The moneys collected are paid into consolidated revenue ... The moneys can then be spent for any purpose for which the Commonwealth may lawfully appropriate money."

55 The destination of money that is exacted may well be significant in deciding whether it is exacted for public purposes. A requirement that a sum which legislation requires is paid be paid into the Consolidated Revenue Fund does not conclude the issue of characterising the law as one imposing *taxation*.

56 Both ss 55 and 81 must be understood having regard to their constitutional purpose. They form part of the means of effecting the legislative, as distinct from executive, control of the raising and expenditure of public moneys. Section 53, dealing with the powers of the Houses of Parliament in respect of proposed laws appropriating revenue or moneys, or imposing taxation, s 54 dealing with proposed laws which appropriate revenue or moneys for the ordinary annual services of the Government, s 56 about messages recommending the purpose of any appropriation, s 82 about expenditure charged on the Consolidated Revenue Fund and s 83 about the need for an appropriation made by law for the drawing of money from the Treasury of the Commonwealth, all have their own part in that scheme.

57 Sections 81, 82 and 83, taken together, give effect to the proposition described by Durell in his work on Parliamentary Grants<sup>60</sup>:

"The prohibition of raising taxes without parliamentary authority would be nugatory if the proceeds, even of legal taxes, could be expended at the will

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58 (1908) 6 CLR 41 at 82.

59 (1951) 82 CLR 547 at 561.

60 Durell, *The Principles and Practice of the System of Control over Parliamentary Grants*, (1917) at 3. See also *The Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198 at 224 per Isaacs and Rich JJ; *New South Wales v Bardolph* (1934) 52 CLR 455 at 475-478 per Evatt J.

of the sovereign. The right, therefore, of appropriation was a logical consequence of the right of levying supplies."

In particular, the constitutional requirement of s 81, for legislative appropriation of the Consolidated Revenue Fund formed of "[a]ll revenues or moneys raised or received by the Executive Government of the Commonwealth", is both the consequence of, and a necessary step in the effecting of, parliamentary control over taxation.

58 It follows that every *tax* that is raised must be paid into the Consolidated Revenue Fund. But the converse is not universally true. Not *every* sum that statute requires to be paid to the Commonwealth, and which is paid into the Consolidated Revenue Fund, is a tax. Perhaps so much would follow inevitably from the statement in s 53 that "a proposed law shall not be taken ... to impose taxation, by reason only of its containing provisions for the imposition ... of fines or other pecuniary penalties, or for the demand or payment ... of fees for licences, or fees for services under the proposed law." Whether or not that is so, it is a proposition that is now well established and not challenged.

59 What marks the present exactions apart from other exactions that have been held to be taxes is that in every case the sum exacted under the Registration and Collection Act is, when the maintenance liability is *first* registered, the amount which otherwise would be due and payable by the payer in satisfaction of an existing obligation owed by that payer to the carer of a child as maintenance for the child.

60 There is, therefore, under the Registration and Collection Act, more than the mere earmarking of a compulsory exaction for a particular application. Imposing a financial burden on one group in society for the benefit of another group in society will often constitute a tax. Pointing to some identifiable relationship between the group of payers and the group of recipients or even to some relationship between a particular payer and a particular recipient will not usually require some different conclusion. Under the Registration and Collection Act, however, the obligation to make a payment to the carer of the child is replaced by the obligation to pay the same amount to the Commonwealth. That obligation is coupled with the creation of a new right in the carer to have the Commonwealth pay the carer whatever the payer thereafter gives up – whether by making a payment to the Commonwealth or by suffering a compulsory deduction from salary or wages. The combination of these features – the substitution of a new obligation to the Commonwealth equal to an existing obligation which is terminated, coupled with the substitution of new rights in the carer against the Commonwealth equal to the extent to which the payer performs his or her obligation to the Commonwealth – takes this compulsory exaction outside the description of "taxation".

61 The fact that the original liability may later be varied requires no different conclusion. Subsequent variation of the amount for which a payer is liable does not diminish the significance of the fact that, when first registered, the liability owed by a payer to a carer is brought to an end and replaced by an obligation, in the same amount, owed to the Commonwealth. All that is changed by registration is the identity of the party to whom the liability is owed. Neither the existence nor the exercise of the power to make changes to the amount of the liability, in response to changed circumstances, alters the character of the exaction. The exaction not being a tax, the Registration and Collection Act is not a law imposing taxation. The first challenge to the Registration and Collection Act fails.

Judicial power

62 The plaintiff submitted that provisions of the Assessment Act, and the Registration and Collection Act, purport to confer the judicial power of the Commonwealth on the Registrar. Particular reference was made to departure determinations made by the Registrar under Pt 6A of the Assessment Act, but the plaintiff's submissions were not confined to the validity of that part of the Act. Rather, it was submitted that both Acts provided for the Registrar to exercise the judicial power of the Commonwealth first, because the Registrar's decisions under the Acts are binding, authoritative and conclusive and, secondly, because the Registrar's decision fixed the extent of, or varied the extent of, existing rights and duties respecting the maintenance of children.

63 That the Registrar's determinations, if made within statutory power and otherwise made according to the requirements of the relevant Acts, are binding and authoritative may be readily accepted. So much follows from the terms of the Acts. Account must, of course, be taken of the various provisions for "appeal" against, or review of, determinations but, subject to that caveat, it may also be accepted that the determinations are conclusive. It does not follow, however, that the Acts confer judicial power on the Registrar.

64 The plaintiff submitted that the rights and duties respecting maintenance of children are now found in the *Family Law Act 1975* (Cth) and are not rights and duties derived from the Assessment Act or the Registration and Collection Act. It was submitted that the Assessment Act and the Registration and Collection Act fixed the extent of, or varied the extent of, rights and duties which were to be found in s 66C of the *Family Law Act*. That section provides that, subject to Div 7 of Pt VII of that Act, "[t]he parents of a child have ... the primary duty to maintain the child".

65 No doubt it is right to say, as the plaintiff submitted, that under English common law a parent owed no duty to maintain a child that was a duty enforceable by court action<sup>61</sup>. But, in England, statute intervened in that regard as early as the first *Poor Law*. That obliged parents, on pain of penalty, to maintain their poor children<sup>62</sup>. So, too, in Australia, legislation in one form or another has, for many years, obliged one or both parents of a child to provide some maintenance for the child<sup>63</sup>. And often, such legislation has provided for the curial determination of the amount that was to be paid as maintenance<sup>64</sup>. It may be doubted, however, that s 66C of the *Family Law Act*, or the other provisions of subdiv B of Div 7 of Pt VII of that Act which set out "statements of objects and principles relevant to the making of child maintenance orders"<sup>65</sup>, can be understood as creating a duty, the terms or content of which are different from, or wider than, the particular obligations which arise under the other provisions of the *Family Law Act* which deal with maintenance of children and orders made under that Act.

66 If orders for the maintenance of children are made under the *Family Law Act*, those orders may give rise to a registrable maintenance liability under the Registration and Collection Act<sup>66</sup>. The Registrar's exercise of the power to register either a liability of that kind, or any other form of registrable maintenance liability, does not constitute the exercise of the judicial power of the Commonwealth. It is an entirely administrative act which requires the Registrar to decide whether the statutory criteria for registration are met. Very many administrative tasks for which legislation provides require decisions of that kind. In the end, it appeared that the weight of the plaintiff's argument did not rest on this aspect of the Registration and Collection Act. Rather, the plaintiff's submissions focused more upon the powers of the Registrar under the Assessment Act than upon the Registrar's duty to register certain kinds of liability under the Registration and Collection Act.

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61 *Mortimore v Wright* (1840) 6 M & W 482 [151 ER 502]; *Shelton v Springett* (1851) 11 CB 452 [138 ER 549]; *Bazeley v Forder* (1868) LR 3 QB 559 at 565; *Coldingham Parish Council v Smith* [1918] 2 KB 90 at 96-97; *National Assistance Board v Wilkinson* [1952] 2 QB 648 at 657. Cf the position under the common law of Scotland noted in *Coldingham Parish Council v Smith* [1918] 2 KB 90 at 97.

62 *The Poor Relief Act* 1601 (UK), s 7 (43 Eliz c 2).

63 *Wives Act* 1840 (NSW) (4 Vict No 5).

64 See, for example, *Wives Act* 1840, s 7.

65 *Family Law Act*, s 66A(a).

66 s 17.



67 It is, therefore, necessary to notice some further aspects of the Assessment Act. Of those, there is one to which reference has already been made but which is of particular importance. Section 79 of the Assessment Act provides that an amount of child support under the Act, which is due and payable by a liable parent to a carer, is a debt due and payable by the liable parent to the carer. It may be sued for and recovered in a court. What is important for the purposes of the present inquiry is, first, that the Registrar can take no step to enforce an assessment made under the Act – that is a matter for those who have the benefit or burden of the assessment and it is to be done by recourse to the courts in the same way as any other debt is enforced. There is not that capacity (so often found when judicial power is exercised) to make a decision enforceable by execution<sup>67</sup>. Secondly, the assessment creates and quantifies the debt. It does not determine a question about the *existence* of any right or obligation<sup>68</sup>. It is the factum on which other provisions of the Assessment Act and the Registration and Collection Act operate, thereby creating new rights and new obligations which are to govern the future<sup>69</sup>.

68 An administrative assessment of child support under Pt 5 of the Assessment Act requires<sup>70</sup> the Registrar to "assess under [the Assessment Act] the annual rate of the child support payable by the liable parent to the carer entitled to the child support for the child for the days in the child support period that starts on the day the application was made". This assessment requires the application of relevant formulae. The basic formula<sup>71</sup> requires the multiplication of a "Child support percentage" (fixed by s 37 according to the number of children) and what is called the "Adjusted income amount". The adjusted income amount is determined by reference to the amount of the liable parent's taxable income for the previous year of income, adjusted<sup>72</sup> to take account of

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67 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 268 per Deane, Dawson, Gaudron and McHugh JJ. See also *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 176 per Isaacs J; *Rola Co (Australia) Pty Ltd v The Commonwealth* (1944) 69 CLR 185 at 198-199 per Latham CJ.

68 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374 per Kitto J.

69 *Tasmanian Breweries* (1970) 123 CLR 361 at 378 per Kitto J.

70 s 31(2).

71 s 36.

72 s 38A.

some other amounts – exempt foreign income, rental property loss and reportable fringe benefits total – amounts which, it might be thought, would increase the liable parent's capacity to pay child support.

69 The Assessment Act provides for some modifications of the basic formula in certain cases<sup>73</sup>. It provides for cases in which the care of children is shared or divided between parents<sup>74</sup>, for cases where there are two liable parents<sup>75</sup>, for cases where there are two or more carers entitled to child support<sup>76</sup>, and for cases where care of the child is modified or affected by a court order or parenting plan<sup>77</sup>. The detail of those provisions is not important. What is important is that all of them require the application of relevant formulae.

70 None of the provisions requiring administrative assessment of child support permit, let alone require, the Registrar to make any decision other than one attributing the circumstances disclosed by the application to one or other of the various statutory classes we have just mentioned, followed by a mathematical calculation of the monetary consequences that the Assessment Act prescribes. And because "the Registrar may act on the basis of the application and the documents accompanying the application, and is not required to conduct any inquiries or investigations into the matter"<sup>78</sup> there is no requirement for the Registrar to engage in any processes of fact finding<sup>79</sup>.

71 The Registrar may make a departure determination on the application of a liable parent or carer only if satisfied of certain matters<sup>80</sup>. They are<sup>81</sup> that, in the special circumstances of the case, the capacity of either parent of the child to

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73 Pt 5, Div 2, subdivs C and D (ss 42-46).

74 Pt 5, Div 2, subdiv E (ss 47-49).

75 Pt 5, Div 2, subdiv F (ss 50-52).

76 Pt 5, Div 2, subdiv G (ss 53-54).

77 Pt 5, Div 2, subdiv H (ss 54A-54B).

78 s 29(1).

79 *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617 at 627 per Mason J.

80 Departure determinations initiated in this way are regulated by Pt 6A, Div 2 (ss 98B-98JA).

81 ss 98C and 117(2).

provide financial support for the child is significantly reduced for one of several specified reasons<sup>82</sup>, or the costs of maintaining the child are significantly affected by one of several matters<sup>83</sup>, or the application of the provisions of the Act for dealing with administrative assessments "would result in an unjust and inequitable determination of the level of financial support to be provided by the liable parent for the child"<sup>84</sup>, again, for one or other reason identified in the Act.

72 Similarly, the Registrar may initiate the making of a departure determination under Pt 6A<sup>85</sup> if, among other things, he or she is satisfied that the application of the provisions relating to administrative assessment "would result in an unjust and inequitable determination of the level of financial support to be provided by the liable parent for the child because of the income, earning capacity, property and financial resources of either parent"<sup>86</sup>.

73 Obviously, the provisions governing both kinds of departure determination, with their reference to what would be "unjust and inequitable" require the making of a judgment about which opinions may differ in a particular case. And because the circumstances that may touch a decision about what would be unjust and inequitable may vary so widely, provision is made for the Registrar to refuse to make a departure determination, whether initiated by a liable parent or carer or by the Registrar, where "the issues involved are too complex to be dealt with" under Pt 6A<sup>87</sup>. In such a case, the Registrar may recommend that application be made to a court having jurisdiction under the Act for an order under Div 4 of Pt 7.

74 Part 7 of the Assessment Act (ss 99-146) deals with the jurisdiction of courts under the Act. In particular, provision is made<sup>88</sup> for applications to a court for a declaration about the applicability of the administrative assessment

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82 s 117(2)(a).

83 s 117(2)(b).

84 s 117(2)(c).

85 Departure determinations initiated by the Registrar are regulated by Pt 6A, Div 3 (ss 98K-98R).

86 s 98L(1)(a).

87 ss 98E and 98R.

88 Pt 7, Div 2 (ss 106-109).

provisions. Provision is made<sup>89</sup> for what are called "appeals" against incorrect administrative assessments and<sup>90</sup> for orders for departure from administrative assessment. (The reference to "appeal", although similarly used in other contexts<sup>91</sup>, may mislead. The proceeding which is so described is the *first* application of judicial power; it is an exercise of original, not appellate jurisdiction.) An order by a court for departure from an administrative assessment may be made on the grounds on which the Registrar may make a departure determination<sup>92</sup>. The other provisions of Pt 7 of the Assessment Act are not immediately relevant to the present question.

75 Finally, and no less importantly, it is necessary to notice the provisions made for objection to the Registrar's assessment of child support, whether by way of administrative assessment or departure determination. Part 6B of the Act (ss 98W-98ZJ) provides for objections to and internal reconsideration of decisions of the Registrar, including those decisions that are reviewable by a court having jurisdiction under the Act. The decisions reviewable by a court include decisions to accept or not accept an application for administrative assessment<sup>93</sup>, decisions as to the particulars of an administrative assessment<sup>94</sup> and decisions to make or refuse to make a departure determination, whether initiated by the liable parent or carer, or by the Registrar<sup>95</sup>. A person may not appeal to a court against the particulars of an administrative assessment unless the person has objected under s 98X, and the objection has been disallowed or allowed only in part<sup>96</sup>. Similarly, an application for a declaration about an administrative assessment may be made only if the objection procedure has first been exhausted<sup>97</sup>.

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89 Pt 7, Div 3 (ss 110-113).

90 Pt 7, Div 4 (ss 114-120).

91 For example, *Administrative Appeals Tribunal Act* 1975 (Cth), s 44.

92 s 117.

93 s 98X(1)(a) and (b).

94 s 98X(1)(c).

95 s 98X(1)(d).

96 s 110(1A).

97 ss 106(1A), 106A(1A), 107(1A).

76 Several points emerge from an examination of these features of the Assessment Act. First, as mentioned at the outset, the Registrar's assessment, whether as an administrative assessment or as a departure determination, is the factum by reference to which the statute *creates* rights for the future which then are to be enforced by resort to the courts; the assessment does not adjudge existing rights. Secondly, the Registrar's assessment, again whether as an administrative assessment or as a departure determination, is not final. It is open to the processes of objection and then "appeal" to a court. Thirdly, so far as administrative assessments are concerned, the statutory processes are wholly administrative. So far as departure determinations are concerned, the Registrar may make such a determination, but need not if the issues are "too complex". If the Registrar does make a departure determination, the party dissatisfied can object and if still dissatisfied go to a court; if the Registrar does not make such a determination, again the party dissatisfied can object and then go to court. In either event the Court will decide the question afresh, without regard to what the Registrar has done.

77 Neither the Registration and Collection Act nor the Assessment Act vests the judicial power of the Commonwealth in the Registrar.

78 The questions reserved should be answered as follows:

Question 1 Is the scheme established by the *Child Support (Registration and Collection) Act* 1988 (Cth) and the *Child Support (Assessment) Act* 1989 (Cth) for the collection and payment by the second defendant of money otherwise payable to or receivable by the first defendant a tax?

Answer Neither Act is, within the meaning of s 55 of the Constitution, a law imposing taxation.

Question 2 If "yes" to question 1 are the Acts invalid as being contrary to s 55 of the Constitution?

Answer Unnecessary to answer.

Question 3 Do the Acts in purporting to authorise the second defendant to make the assessments and the determinations, to enter the particulars, to issue the notices, and to collect and apply payments in the way in which the second defendant did involve the purported exercise of judicial power by the second defendant contrary to Ch III of the Constitution?

Answer No.

*Gaudron J*  
*Hayne J*

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Question 4      What orders for the further disposition of the action should be made in the light of the answers to these questions?

Answer          There should be judgment for the defendants in the action, with costs, including the costs of the case stated under s 18 of the *Judiciary Act 1903* (Cth).

79 McHUGH J. I agree with the answers proposed by Gleeson CJ to the questions reserved for consideration by the Full Court of this Court and with his Honour's reasons for answering the questions in the manner that he does.

80 I would only add that the amounts collected by the Registrar do not acquire the characterisation of "taxation" merely because they form part of the Consolidated Revenue Fund. Before the decision in *Australian Tape Manufacturers Association Ltd v The Commonwealth*<sup>98</sup>, it might have been thought that no imposition could be a tax unless it formed part of the Consolidated Revenue Fund. But the decision in that case denied that proposition. Whether or not that case was correctly decided – and I remain of the view that it was wrongly decided – it does not follow that a compulsory exaction for a public purpose is a tax simply because it forms part of the Consolidated Revenue Fund. Penalties payable to the Commonwealth are compulsory exactions. Quite often fees payable to the Commonwealth are compulsory exactions. Because those penalties and fees are part of the "revenues or moneys raised or received by the Executive Government of the Commonwealth"<sup>99</sup>, they form part of the Consolidated Revenue Fund. But that fact does not by itself mean that they are taxes. If there were any doubt about that point, s 53 of the Constitution quashes it. That section declares that "a proposed law shall not be taken ... to impose taxation, by reason only of its containing provisions for the imposition ... of fines or other pecuniary penalties, or for the demand or payment ... of fees for licences, or fees for services under the proposed law".

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98 (1993) 176 CLR 480.

99 Constitution, s 81.

81 KIRBY J. These proceedings come before the Full Court on a case stated by Callinan J<sup>100</sup>. They raise two questions of a constitutional character, concerning the legislative scheme established by the *Child Support (Registration and Collection) Act* 1988 (Cth) ("the Registration and Collection Act") and the *Child Support (Assessment) Act* 1989 (Cth) ("the Assessment Act") (together, "the Acts").

82 The first question concerns the validity of the Acts, it being contended that they amount to "laws imposing taxation" within the meaning of s 55 of the Constitution and do not comply with the requirements governing laws of that character. The second is whether, by purporting to authorise the Child Support Registrar ("the Registrar") to make assessments and determinations, enter particulars, issue notices and collect and apply payments, the Acts invalidly attempt to confer on the Registrar the judicial power of the Commonwealth, contrary to the requirements of Ch III of the Constitution.

#### The facts and issues

83 Mr Anthony Luton ("the plaintiff") and Ms Gillian Lessels ("the first defendant") began to cohabit in a de facto relationship, in about November 1991. They never married. In August 1992 cohabitation ceased. In February 1993, a child was born as a consequence of their relationship. The legislative provisions governing the financial support of that child have given rise to the present controversies.

84 In July 1993, the first defendant applied to the Registrar (the second defendant) for an assessment under the Assessment Act and registration of a child support arrangement under the Registration and Collection Act. In August 1993, the Registrar made an assessment of the liability of the plaintiff to pay child support. Pursuant to the Registration and Collection Act, the Registrar registered a registrable maintenance liability that arose as a result of such assessment<sup>101</sup>. In October 1994, the Registrar amended that assessment<sup>102</sup> and varied the commencement date after which the plaintiff had to pay child support. The particulars entered in the Child Support Register were amended to conform to this variation<sup>103</sup>.

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100 Case stated, 13 March 2001.

101 Registration and Collection Act, s 24A.

102 Assessment Act, s 75.

103 Registration and Collection Act, s 37A.



85 There followed applications and counter-applications to the Registrar. In December 1993, the first defendant applied for a "departure" from the assessment previously made, so as to increase the rate of child support payable<sup>104</sup>. In February 1994 the plaintiff, by way of reply to the first defendant's application, sought a reduction in the child support payable<sup>105</sup>.

86 In April 1994 a Child Support Review Officer, acting as a delegate of the Registrar, made assessments of the child support income payable<sup>106</sup> for the period 1 January 1994 to 30 June 1994, for the ensuing year and subsequent years. The Registrar entered particulars of the assessments in the Child Support Register<sup>107</sup>.

87 The Registrar has enforced collection of the amounts payable by the plaintiff in various ways, including by issuing notices to the plaintiff's employers to make deductions from his salary<sup>108</sup>. In accordance with such notices, the plaintiff's employers have made periodic deductions of that kind<sup>109</sup> and have paid the amounts to the Registrar<sup>110</sup>. The Registrar has also applied an amount owing by the Commonwealth to the plaintiff under the *Income Tax Assessment Act 1936* (Cth) in reduction of the debt due by the plaintiff to the Commonwealth<sup>111</sup>. By inference, the Registrar has paid the sums so received to the first defendant, who has the care and custody of the child.

88 The questions asked in the case stated are set out in the reasons of other members of this Court<sup>112</sup>. There is no point in repeating them.

89 Several amendments have been made to the Acts whose validity is in question in these proceedings. The questions in the case stated do not identify

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**104** Assessment Act, s 98B. A number of grounds are set out in the Assessment Act, s 117.

**105** Assessment Act, s 98G(2).

**106** Assessment Act, s 98C.

**107** Registration and Collection Act, s 37A.

**108** Registration and Collection Act, s 45(1) and (2).

**109** Registration and Collection Act, s 46.

**110** Registration and Collection Act, s 47.

**111** Registration and Collection Act, s 72.

**112** Reasons of Gleeson CJ at [29], Gaudron and Hayne JJ at [78], Callinan J at [150].

the date at which the issue of validity is to be determined. However, it was not disputed that the answers could be given by reference to the legislation as it now stands. The relevant legislation has been described in the reasons of Gleeson CJ, Gaudron and Hayne JJ and Callinan J<sup>113</sup>.

90 Few would question the ethical principle that "parents of a child have the primary duty to maintain the child"<sup>114</sup>. Few, if any, would cavil with legislation intended, as the Assessment Act proclaims it is, to "ensure that children receive a proper level of financial support from their parents"<sup>115</sup>. However, the issues before the Court are not whether the legislation has laudable objectives or beneficial consequences in its ordinary operation. The only issues are the two points of constitutional objection raised by the plaintiff.

### Constitutional underpinning

91 Except under its territories power<sup>116</sup> and any other specific powers applicable, the Federal Parliament does not have general legislative power to make laws with respect to the children of a couple who are unmarried ("ex-nuptial children"), such as the child of the plaintiff and the first defendant. There is power to make laws with respect to divorce and matrimonial causes "and in relation thereto, parental rights, and the custody and guardianship of infants"<sup>117</sup>. There is also power to make laws with respect to "child endowment", which makes no distinction in respect of the marital status of the child's parents<sup>118</sup>. However, neither of those powers afforded the legislative authority to the Federal Parliament necessary to extend the application of the Acts to apply to the support of the child of the present parties.

92 In relation to ex-nuptial children, the validity of the impugned Acts in relation to the Australian States rests upon a reference of power to the Commonwealth under the Constitution<sup>119</sup>. Such reference was envisaged by the

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**113** Reasons of Gleeson CJ at [4]-[7], Gaudron and Hayne JJ at [32]-[46], Callinan J at [152]-[175].

**114** Assessment Act, s 3(1).

**115** Assessment Act, s 4(1).

**116** Constitution, s 122.

**117** Constitution, s 51(xxii).

**118** Constitution, s 51(xxiiiA).

**119** Constitution, s 51(xxxvii).

terms of the Acts<sup>120</sup> and has occurred in five of the States<sup>121</sup>, with Western Australia adopting the federal Act as a State Act<sup>122</sup>. The Acts, so far as they relate to the maintenance of children, "appl[y] in and in relation to the Territories"<sup>123</sup>.

93 The plaintiff, first defendant and the child are resident in Australia. By virtue of the foregoing provisions, the two Acts apply in relation to the parties and the child. This was not contested. The validity of the Acts in so far as they depended upon the reference of powers was also not disputed. Nor did any party suggest that a referral of power could alter or limit, even by implication, any of the express terms of, or implications in, the federal Constitution. A power referred to the Federal Parliament under the Constitution<sup>124</sup>, like any other power in s 51 of the Constitution (including the taxation power<sup>125</sup>), is subject to the requirements of s 55 of the Constitution and of Ch III.

The first issue - are the Acts taxation laws?

94 *The usual criterion:* Where contested questions arise as to whether an impugned law is one "imposing taxation", it is common for this Court to start with the definition of such a law offered by Latham CJ in *Matthews v Chicory Marketing Board (Vic)*<sup>126</sup>. According to his Honour's description, a law imposing taxation is one that involves "a compulsory exaction of money by a public authority for public purposes, enforceable by law, and ... not a payment for services rendered".

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**120** Assessment Act, s 13; Registration and Collection Act, s 5.

**121** *Commonwealth Powers (Family Law - Children) Act 1986* (NSW); *Commonwealth Powers (Family Law - Children) Act 1986* (Vic); *Commonwealth Powers (Family Law - Children) Act 1990* (Qld); *Commonwealth Powers (Family Law) Act 1986* (SA); and *Commonwealth Powers (Family Law) Act 1987* (Tas).

**122** *Child Support (Adoption of Laws) Act 1990* (WA).

**123** Registration and Collection Act, s 5(3); Assessment Act, s 13(3). See also Registration and Collection Act, s 9.

**124** Constitution, s 51(xxxvii).

**125** Constitution, s 51(ii).

**126** (1938) 60 CLR 263 at 276. See *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 189 [132] ("*Airservices*") where Gaudron J described this as the "traditional" understanding.

95        *The plaintiff's argument:* The plaintiff submitted that when that traditional definition was applied to the facts of this case, the impugned legislative scheme constituted "laws imposing taxation". His argument went thus: There is an exaction of money by a public authority because, by the Registration and Collection Act, a debt of a purely private character is converted into one to the Commonwealth and provision is then made for compulsory deduction of that debt from a person's salary, wages or other entitlements, just as tax instalments are commonly so deducted. Such deductions do not represent a payment by the plaintiff for services rendered by the Commonwealth, the Registrar or any other public authority. They are "enforceable by law" in accordance with the scheme of enforcement laid down by the Registration and Collection Act. Moreover, the exaction of moneys, from people like the plaintiff, is for a public purpose. That is the provision of support for a defined class of children and the enforcement of payment for that purpose from the sources of funds available to the liable parent who has not made payments for child support acceptable to the other parent and to the law.

96        *Taxation laws and the parliamentary context:* In giving meaning to the expression "laws imposing taxation" in s 55 of the Constitution, it is essential both to see that section in its context, particularly in relation to the restrictions imposed by s 53, and to recall the history that preceded the making of the Constitution. Much of the recent Australian debate about the meaning of "laws imposing taxation" has taken place with only occasional glances at these considerations.

97        To the extent that the expression "laws imposing taxation" is given an over-broad meaning, s 55 could have consequences that tend to throw the integrated constitutional provisions out of joint. Section 53 of the Constitution provides that "[p]roposed laws appropriating revenue or moneys, *or imposing taxation*, shall not originate in the Senate" and that "[t]he Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government."<sup>127</sup> The grant of legislative power to make laws with respect to taxation should be noted<sup>128</sup>, as well as the provisions in Ch IV of the Constitution ("Finance and Trade") establishing the Consolidated Revenue Fund and requiring that "[a]ll revenues or moneys raised or received by the Executive Government of the Commonwealth" shall form that Fund, to be appropriated for the purposes of the Commonwealth

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127 Constitution, s 53 (emphasis added).

128 Constitution, s 51(ii).

in the manner provided by the Constitution<sup>129</sup>. Within Ch IV is a provision limiting the drawing of money from the Treasury of the Commonwealth "except under appropriation made by law".<sup>130</sup>

98 The foregoing provisions are not features peculiar to Australia's constitutional arrangements. Their origins may be traced to the constitutional struggles in England and in the American colonies by which, ultimately, the authority of the people, in the respective Houses of Parliament directly elected by the people, was successfully asserted to determine conclusively the revenue that could be raised by way of taxation.

99 In the *Bill of Rights* of 1688, for the purpose of "Vindicating and Asserting ... ancient Rights and Liberties" of the people of England, it was enacted that "... the levying Money for or to the Use of the Crown by pretence of Prerogative without Grant of Parliament for longer time or in other manner than the same is or shall be granted is Illegal"<sup>131</sup>. In the Australian colonies, before Federation, this principle had been upheld as axiomatic and as an inherited part of Australian law<sup>132</sup>. Soon after Federation, in England, the principle was again reiterated<sup>133</sup>. Later still, in *Re Dymond*<sup>134</sup>, Menzies J pointed out that the provisions of the Constitution, notably ss 53 and 55, reflected the parliamentary convention which<sup>135</sup>:

"prevented the Lords from amending Bills which they received from the Commons dealing with aids and supplies, so as to alter, whether by increase or reduction, the amount of a rate or charge - its duration, mode

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129 Constitution, s 81. This provision may be traced to the Imperial Statute 27 Geo III c 13 (1787), which sought to ensure that the revenues of the Crown, including taxes, were brought together in one Consolidated Fund under the control of Parliament: *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 503 ("*Tape Manufacturers*"); *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 575-577.

130 Constitution, s 83.

131 *Bill of Rights* 1688 1 Will & Mar Sess 2 c 2.

132 *Stevenson v The Queen* (1865) 2 WW & A'B (L) 143 at 159; cf *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 187-188.

133 *Bowles v Bank of England* [1913] 1 Ch 57 at 84-85.

134 (1959) 101 CLR 11.

135 *Re Dymond* (1959) 101 CLR 11 at 27-28.

of assessment, levy, collection, appropriation, or management; or the persons who pay, receive, manage, or control it; or the limits within which it is leviable."

100 The Australian Constitution involved a mixture of features borrowed from English and United States constitutional law<sup>136</sup>. The preoccupations of the founders of the Australian Constitution, in this respect, concerned four main themes:

- To avoid discrimination between the States, or parts of the States, in the raising of taxation<sup>137</sup>;
- To provide for the case of deadlock between the House of Representatives and the Senate in the making of laws having revenue implications<sup>138</sup>;
- To prevent the House of Representatives using its pre-eminence, in originating laws appropriating revenue or moneys or imposing taxation, in ways that would diminish the legitimate powers of the Senate to amend other laws; and
- To render the collection and expenditure of all revenue subject to law<sup>139</sup>, and hence to judicial superintendence.

101 A fear that s 55 of the Constitution might be misused to incorporate in a "law imposing taxation" provisions in some ways related to, but essentially concerned, with wider questions of policy had troubled this Court from its earliest days. In *Osborne v The Commonwealth*<sup>140</sup>, Barton J described this device ("tacking") as one which, if unrestrained:

"would ... annihilate the intended powers of the Senate, who, favouring some and dissenting from the rest, would find themselves forced either to

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**136** *Constitution of the United States of America*, Art 1, s 7 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills").

**137** Constitution, s 51(ii).

**138** Constitution, s 57.

**139** Through the provisions of ss 81, 82 and 83 of the Constitution: see *Tape Manufacturers* (1993) 176 CLR 480 at 505-506, 522; *Airservices* (1999) 202 CLR 133 at 260-261 [372].

**140** (1911) 12 CLR 321 at 353.

pass the entire agglomeration, perhaps including much that they considered an outrage on the interests of the States they represented; or to reject all, and thus perhaps cripple the finances of the Commonwealth."

His Honour pointed out that this consideration was more serious<sup>141</sup>:

"when it is remembered that the sections dealing with the powers of the two Houses *inter se*, viz 53 and 54, contain no provisions whatever against the 'tacking' of tax Bills, and only one against the tacking of extraneous matter to an appropriation Bill, and that, the ordinary annual one. We cannot fail to remember that the Constitution designed the Senate to be a House of greater power than any ordinary second chamber."

102 This exposition of the purposes of s 55 was repeated by Barton ACJ in *Buchanan v The Commonwealth*<sup>142</sup>. It is in consequence of this rule that an Australian parliamentary convention has developed<sup>143</sup>:

"of having separate 'tax' Acts and 'assessment' Acts which goes beyond what is necessary to avoid invalidity under s 55, but which is directed to securing to the Senate a wider power of amendment than it would have if tax Acts were themselves to contain the machinery for the assessment, collection and enforcement of tax."

103 It was after explaining the history of the origins of s 55 of the Constitution, and its purposes within the Australian Commonwealth and the Parliamentary conventions that have grown around it, that Menzies J in *Re Dymond*<sup>144</sup> remarked that this Court had always adopted a "strict construction of s 55". It is such a "strict construction" that avoids an overreach of the expression "laws imposing taxation". Such overreach would have consequences not only inconvenient to efficient lawmaking by the Federal Parliament but, far more importantly, inimical to the legitimate powers of the Senate, envisaged by the Constitution, and the character and functions of that House of the Parliament as they have emerged during the Constitution's history.

104 *Characterising the law*: Ultimately, the task of a court addressing the argument that a law is one with respect to or imposing taxation (whether for the purposes of s 51(ii) or ss 53 and 55 of the Constitution), is to characterise the law

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141 (1911) 12 CLR 321 at 353.

142 (1913) 16 CLR 315 at 328-329.

143 *Re Dymond* (1959) 101 CLR 11 at 28 per Menzies J.

144 (1959) 101 CLR 11 at 28.

in question<sup>145</sup>. A court, performing the task of characterisation, will remember the historical and constitutional purposes behind the provision, the constitutional consequences of a decision that a law is one imposing taxation, and the fact that the phrase is ultimately not a term of art but one of ordinary English language evoking an impression based upon a consideration of the entire legislative scheme.

105        *Compulsory exaction:* Much of the argument of those who supported the validity of the legislation was addressed to attempting to show that the legislation, specifically the Registration and Collection Act, did not involve an "exaction" of moneys or, if it did, that such "exaction" was not "for public purposes". I regard those arguments as unpersuasive.

106        The submission that there was no "exaction" rested on a contention that the obligation to pay the statutory child support was separately imposed on the liable parent by the Assessment Act and no additional financial burden was cast on that parent merely by transferring the debt from one owed to the carer to one owed to the Commonwealth. However, the fact that the identity of the creditor is changed does not mean that the law is any less an "exaction" of money by a public authority. To hold otherwise would be to decide the question by reference to the form of the exaction rather than its substance and character as a compulsory public financial imposition.

107        Moreover, owing a debt to the Commonwealth may be significantly more exacting than owing it to a private individual. That individual, as a single parent, will often be vulnerable and without the resources to effect recovery. The Commonwealth, on the other hand, has large resources and substantial powers to exact recovery. Those powers include enforceable duties placed upon employers to make deductions from salary or wages<sup>146</sup>. It would, therefore, be artificial to deny that the Registration and Collection Act involves a compulsory "exaction" of money by a public authority of the Commonwealth, in this case the Registrar.

108        *For public purposes:* Similarly, the Registrar's contention that such exaction was not "for public purposes" is unpersuasive. That argument was advanced on the footing that the public authority engaged in recovery of the designated child support under the Registration and Collection Act was no more than a conduit for the payment of moneys primarily owing by the liable parent to the carer as a private debt created by the Assessment Act. However, once that private debt was converted, by the Registration and Collection Act, into a debt to

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145 *Airservices* (1999) 202 CLR 133 at 177 [88].

146 Registration and Collection Act, ss 51-56.



the Commonwealth recoverable by the Commonwealth using the methods provided, it became an enforceable exaction "for public purposes".

109 The public has an obvious interest in the receipt by children of "a proper level of financial support from their parents".<sup>147</sup> There is thus a "public purpose" in ensuring that this aspirational idea is translated into effective payments by an efficient system of registration and collection. Without more, this establishes the "public purposes" of the Registration and Collection Act.

110 South Australia, one of the States intervening, suggested an additional consideration relevant to this point. That State submitted that, with the referral of powers from the State to the Commonwealth, the traditional powers and duties of the Crown, and its rights and responsibilities as *parens patriae* in relation to the welfare of such children, were also transferred<sup>148</sup>. Such powers may indeed have passed to the Commonwealth under the transfer of powers. However, in order to find a public purpose, no resort to notions of *parens patriae* is necessary.

111 Another argument in support of the finding of a "public purpose" is the requirement for payment into the Consolidated Revenue Fund. Whilst the interposition of the Consolidated Revenue Fund is not determinative of the character of a payment as a "tax", it is relevant to characterising the exaction as one for public purposes and thus as having a feature common to "laws imposing taxation"<sup>149</sup>.

112 *Revenue raising*: The fundamental argument, advanced by both sides, related to whether the impugned Acts involved any nett revenue for the Commonwealth, centred on s 53 of the Constitution, which distinguishes between laws imposing taxation and laws imposing penalties and fees for services. In relation to the argument of revenue raising, the plaintiff relied on the holding of this Court in *Tape Manufacturers*<sup>150</sup>. That was a case concerning legislation with some similarities to the Acts under consideration here.

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**147** Assessment Act, s 4(1).

**148** cf *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 254-263; *P v P* (1994) 181 CLR 583 at 607; *AMS v AIF* (1999) 199 CLR 160 at 189-190 [85]-[88].

**149** *Tape Manufacturers* (1993) 176 CLR 480 at 504; cf *The King v Barger* (1908) 6 CLR 41 at 82; *Parton v Milk Board (Vict)* (1949) 80 CLR 229 at 258; *Moore v The Commonwealth* (1951) 82 CLR 547 at 561.

**150** (1993) 176 CLR 480.

113 Various arguments were offered to distinguish the legislation declared a "tax" in *Tape Manufacturers* and the legislation under consideration in these proceedings. The Registrar submitted that the difference was to be found in the fact that the legislation in *Tape Manufacturers* imposed its monetary exaction upon one group in the community for the benefit of another group<sup>151</sup>, whereas the legislation in question here imposed liability on a particular individual, interposed the Commonwealth as a conduit of obligations, and provided for the payment of the exact amount recovered to the other individual concerned.

114 This argument is also unconvincing. Whilst the exaction of moneys in the legislation considered in *Tape Manufacturers* did, in one sense, address "groups" in the community, so does the present legislation. Legislation, of its nature, is normally concerned with the general and not, as such, with individuals. The obligation to pay the "royalty" in issue in *Tape Manufacturers* eventually fell upon the individual purchaser of a single blank tape. Ultimately, payments were contemplated by the legislation there considered from the collecting society to an individual member who was a relevant copyright owner or that member's agent<sup>152</sup>. The feature of a conduit was equally applicable. The only difference was that, in the present case, the conduit led into and out of the constitutional Consolidated Revenue Fund, thereby enhancing the character of the present laws (or at least the Registration and Collection Act) as ones imposing a "tax", when compared with the law under consideration in *Tape Manufacturers*.

115 The concern of principle which chiefly appeared to trouble the majority in *Tape Manufacturers* was, with respect, a legitimate one. It was a concern that the legislative technique attempted there could, if upheld, effectively circumvent the constitutional requirement that moneys exacted compulsorily by federal law should be paid not, as there, to a private company but through the Consolidated Revenue Fund by which all revenue raised by taxes imposed by the Parliament is brought under the control of the Parliament<sup>153</sup> and in that way to ensure that the recovery and expenditure are carried out in accordance with law. These are not concerns in the present case. On the face of things, the *Tape Manufacturers* decision presents difficulties both in some of its reasoning and in its outcome, for the validity of the Acts impugned in these proceedings.

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151 *Tape Manufacturers* (1993) 176 CLR 480 at 504.

152 *Copyright Act* 1968 (Cth), s 135ZZU (inserted by *Copyright Amendment Act* 1989 (Cth), repealed by *Copyright Amendment Act* 1993 (Cth) and substantially replaced by the current s 135ZZT, as inserted by *Copyright Amendment (Digital Agenda) Act* 2000 (Cth)): *Tape Manufacturers* (1993) 176 CLR 480 at 496.

153 *Tape Manufacturers* (1993) 176 CLR 480 at 505-506.

116 The Registrar sought leave, if necessary, to reargue the correctness of the holding in *Tape Manufacturers* if this Court were to conclude that the principles for which it stood necessitated a conclusion that the laws impugned here were "laws imposing taxation". In the end, I do not believe that it is necessary to reconsider *Tape Manufacturers*. It was a decision arrived at by a narrow majority. There was a particular feature of the legislation that contributed to the majority conclusion. The statutory scheme in question was unique and significantly different from that under consideration here. Neither the majority nor the minority in *Tape Manufacturers* purported to do more than to apply established doctrine.

117 By that doctrine, the most significant feature that distinguishes a "law imposing taxation" from one that does not, is that such a law, with very few exceptions<sup>154</sup>, has the purpose and effect of raising general revenue for the government. This is the view that has also been expressed in the United States Supreme Court. In *United States v Butler* it was said<sup>155</sup>:

"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."

To like effect are decisions of the Supreme Court of Canada and other final courts of Commonwealth countries<sup>156</sup>.

118 Many remarks in this Court before<sup>157</sup>, in<sup>158</sup> and since<sup>159</sup> *Tape Manufacturers* have laid emphasis on this core feature of the notion of a "law imposing taxation". It is a feature that is reinforced, in Australian cases, by the

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154 *Airservices* (1999) 202 CLR 133 at 178 [90].

155 297 US 1 at 61 (1936); cf *United States v Munoz-Flores* 495 US 385 at 397-398 (1990).

156 *Massey-Ferguson v Saskatchewan* [1981] 2 SCR 413 at 432; cf *Ratilal Panachand Gandhi v State of Bombay* AIR 1954 SC 388 at 395.

157 *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 19 per Windeyer J.

158 *Tape Manufacturers* (1993) 176 CLR 480 at 501-502, 522, 530. See also *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 568.

159 *Airservices* (1999) 202 CLR 133 at 178 [91], 239 [310].

"setting of the Constitution"<sup>160</sup>. However, two points need to be noted. The first was pointed out by Gleeson CJ and myself in *Airservices*, where it was said that<sup>161</sup>

"[n]ot all taxation has as its primary purpose the raising of revenue; and some forms of taxation are notoriously inefficient means to that end. An objective of raising revenue is not, therefore, a universal determinant. Even so, the presence or absence of such an objective will often be significant."

119 Secondly, the exaction of money does not always amount to revenue raising for general governance. Most federal laws envisage government activity of some kind. Such activities have an inevitable economic cost. More than at the time of federation, various expedients are now adopted by legislation to and otherwise to recover some of these costs for the Commonwealth and its agencies. In *Airservices*<sup>162</sup>, McHugh J said (in terms with which I agree):

"[I]t is legitimate to take account of the changing circumstances of government which are exemplified by the devolving of functions from government departments to statutory authorities or other corporate bodies which, under the terms of their enabling statutes, have a monopoly on the provision of a certain service and are directed by the legislature to provide those services on a 'user pays' basis. Charges by such authorities and bodies should be seen as essentially cost driven, imposed on users for the purpose of reimbursing the cost of services provided. They should not be approached as if they were imposed simply to raise revenue for the general government of the country." (footnote deleted)

120 Therefore, the weight of authority supports the proposition that the issue of revenue raising is a significant, if not determinative, feature of a law with respect to taxation.

121 *Conclusion: not a tax law:* When this approach is adopted in the case of the legislation impugned here, and in particular the Registration and Collection Act, it is my view that it cannot be characterised as a "law imposing taxation" within s 55 of the Constitution. It may be conceded that there are some indications which support that characterisation. These have been mentioned and

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<sup>160</sup> Referring to the Constitution, ss 81 and 82. See *Tape Manufacturers* (1993) 176 CLR 480 at 530 per McHugh J.

<sup>161</sup> *Airservices* (1999) 202 CLR 133 at 178 [91].

<sup>162</sup> (1999) 202 CLR 133 at 238-239 [309].

must be given weight. But the most telling feature of the Acts in question is that neither of them, directly or indirectly, performs a revenue raising function for the purposes of government. The most that can be said is that, by enacting the law, the Commonwealth might be seeking to deflect some of the burden that would otherwise fall on the revenue for child support by social security to a parent in receipt of salary, wages, or other income who should assume the primary responsibility for providing "a proper level of financial support" to a child. But no nett increment is made to the revenue for use on general government purposes or otherwise. On the contrary, the financial burden of implementing the scheme is borne by the Commonwealth and, in exceptional circumstances, the Commonwealth acts as a guarantor of defaulting employers.

122 This conclusion relieves me of the obligation to consider the alternative argument of the Registrar addressed to a question that has long awaited determination and that is presented by the closing words of s 55 of the Constitution. In the conclusion that I reach about the application of s 55 to this case, no question of invalidity for non-compliance with the section needs to be considered. The first issue must be resolved against the plaintiff.

The second issue - are the Acts contrary to judicial power?

123 *The "dual aspect" of the power:* The second argument for the plaintiff was that the powers conferred on the Registrar by the Acts invalidly purported to confer on the Registrar the judicial power of the Commonwealth, contrary to Ch III of the Constitution.

124 This Court has said many times that it is impossible to give an exhaustive definition of judicial power<sup>163</sup>. Where functions are conferred upon administrative authorities or officers of the Commonwealth, in the first instance, with later facilities of "appeal" or "review" by courts, this Court has repeatedly held that the power in question may assume a "double aspect". It may take its character from the repository of the power - whether judicial or administrative - so long as the power, of its nature, is not forbidden to either<sup>164</sup>. Thus<sup>165</sup>:

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**163** See *Cominos v Cominos* (1972) 127 CLR 588 at 606; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-189; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 67; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 257, 267 ("*Brandy*"); *Nicholas v The Queen* (1998) 193 CLR 173 at 256 [201.3].

**164** *Brandy* (1995) 183 CLR 245 at 261-262.

**165** *Farbenfabriken Bayer Aktiengesellschaft v Bayer Pharma Pty Ltd* (1959) 101 CLR 652 at 660; see also at 659, referring to *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, *Shell Co of Australia Ltd v Federal Commissioner of* (Footnote continues on next page)

"[w]ords which might otherwise be sufficient to confer judicial power may be governed by the context as well as by the character of the body or person upon whom the power is conferred and may be construed as going no further than granting administrative power."

125 The clearest instance of the conferral of judicial and administrative functions in a compendious statutory formula that was upheld as constitutionally valid, was the one examined in *The Queen v Quinn; Ex parte Consolidated Food Corporation*<sup>166</sup>. As the features of judicial power have recently been re-examined by this Court<sup>167</sup>, and as there is unanimity about them, it is unnecessary to traverse the same field again. However, I will address the relevant features as they have been argued in this instance.

126 *Creating rights and duties:* The plaintiff submitted that the Registrar was invalidly empowered by the Acts to determine that one citizen will have some of their property taken away and given to another citizen. However, there are many features of the legislation that take the conduct of the Registrar outside a purported usurpation of the judicial power of the Commonwealth. Neither the acceptance of an application made by an eligible carer, nor the assessment of child support payable by a liable parent, in accordance with the formula provided by the Assessment Act, represents a conclusive determination of pre-existing rights or obligations arising from the operation of law on past events<sup>168</sup>. Rather, once the assessment is made, it creates new rights and obligations concerning the respective parties to it, addressed thenceforth to the future. It is thus a classic case of an administrative determination although, as with most such determinations in a society such as ours, it is made by the administrator in accordance with pre-conditions laid down by law<sup>169</sup>.

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*Taxation* (1930) 44 CLR 530 at 545; [1931] AC 275 at 298 (PC); *Pasini v United Mexican States* [2002] HCA 3 at [12], [48], [59].

166 (1977) 138 CLR 1.

167 See *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 109-110 [40]-[42], 124-128 [78]-[86]; *Nicholas v The Queen* (1998) 193 CLR 173 at 186-190 [16]-[24], 218-222 [107]-[114], 254-263 [201]-[207]; *Pasini v United Mexican States* [2002] HCA 3 at [12]-[13], [51]-[60], [62]-[71].

168 cf *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188; *Brandy* (1995) 183 CLR 245 at 268.

169 cf *The Queen v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 371, 378; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 111 [45], 128-134 [87]-[101]; cf *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 176-177.

127 *Lack of conclusiveness:* The assessment by the Registrar also lacks the feature of conclusiveness that is a special characteristic of the exercise of judicial power<sup>170</sup>. Access is provided to a court for a declaration that the applicant is, or is not, entitled to the assessment made<sup>171</sup>. Provision is also made for an "appeal" to a court having jurisdiction under the Assessment Act where a liable parent or a carer entitled to child support is aggrieved by any of the particulars of an administrative assessment. There are administrative pre-conditions to the exercise of the appellate right<sup>172</sup>.

128 Jurisdiction is conferred by the Assessment Act on the Family Court, the Federal Magistrates Court, the Supreme Court of the Northern Territory and State Family Courts, as well (subject to a disqualifying proclamation by the Governor-General) as courts of summary jurisdiction in each State which are vested with the necessary federal jurisdiction<sup>173</sup>. Such courts may make orders with retrospective effect<sup>174</sup>. They may set aside, confirm or vary the assessment of the Registrar<sup>175</sup>. There are many avenues for challenge of the Registrar's decisions so as to submit these to scrutiny by courts of the Australian judicature, including, ultimately, this Court<sup>176</sup>.

129 *Lack of self-enforcement:* The Registrar is not empowered to enforce his own assessments, another feature commonly regarded as characteristic of the exercise of judicial power<sup>177</sup>. Instead, the Assessment Act provides that an amount of child support payable by a liable parent as a debt to the carer may be

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170 *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 111-112 [46], 132 [96].

171 Assessment Act, ss 106, 106A, 107.

172 Assessment Act, s 110(1A).

173 Assessment Act, s 99(1), (2) and (5).

174 Assessment Act, s 141(1)(h).

175 Assessment Act, s 111.

176 Assessment Act, s 129.

177 *Brandy* (1995) 183 CLR 245 at 257, 268; see also *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 451; *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 176; *Rola Co (Australia) Pty Ltd v The Commonwealth* (1944) 69 CLR 185 at 198-199; *The Queen v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 408.

sued for, and recovered, in a court having jurisdiction under that Act<sup>178</sup>. It follows that before any debt arising under the Assessment Act may be enforced by execution, there is interposed an "independent exercise of judicial power"<sup>179</sup>. This is the most significant difference between the legislation in the present case and the legislation that was declared defective in *Brandy v Human Rights and Equal Opportunity Commission*<sup>180</sup>. In this case, the scheme of the Assessment Act does not purport to clothe the Registrar's determination of the rights and liabilities of the parties with characteristics that are binding, conclusive and immediately enforceable by him or her.

130        *Discretion and administration:* Nor do the departure determinations<sup>181</sup> of the Registrar involve an impermissible exercise of functions reserved to the judiciary under Ch III of the Constitution. It would be a sorry day if the separation of the judicial power, required by Ch III, were construed to impose upon administrators an unyielding inflexibility so that they were unable, in accordance with law, to adjust their administrative determinations to the particular features of a given case. Flexibility and adaptability within a legal framework are common elements of good public administration. Nothing in Ch III of the Constitution forbids such powers to administrators. On the contrary, in my opinion, the Constitution envisages and supports these features of the executive power.

131        In a sense, the conferral of discretionary powers may reinforce, as it does in this case, the fact that the determination by the Registrar involves the creation or alteration of rights and liabilities for the future, rather than the conclusive determination of already existing rights characteristic of the exercise of the judicial power. Moreover, departure determinations are not finally binding or conclusive as such. Under Div 4 of Pt 7 of the Assessment Act, following the completion of specified administrative steps<sup>182</sup>, either a liable parent or a carer entitled to child support may apply to a court of competent jurisdiction for a "departure order"<sup>183</sup>. In practice, the court hearing such an application engages in

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178 Assessment Act, s 79.

179 *Brandy* (1995) 183 CLR 245 at 261.

180 (1995) 183 CLR 245.

181 Assessment Act, s 117.

182 Assessment Act, s 116(1A), referring to s 98X.

183 Assessment Act, ss 115-118.



a rehearing of the question as to whether the provisions relating to the administrative assessment should be departed from<sup>184</sup>.

132 Further, determinations by the Registrar under Pt 6A of the Assessment Act are not immediately enforceable without an independent exercise of judicial power. These considerations, and a reflection on the features of the Registrar's powers under Pt 6A, reinforce the conclusion that, in the hands of the Registrar, such powers are administrative and not judicial in character<sup>185</sup>.

133 *Conclusion: no offence to Ch III:* When all the features of the powers and functions of the Registrar under the Assessment Act are taken into account, it is clear that the drafter of the legislation has escaped the two perils mentioned by Fullagar J in *Re Dymond*<sup>186</sup>. The "Charybdis of s 55" of the Constitution has been avoided by the design of the Registration and Collection Act. And the Scylla which "might lie in wait in the shape of an argument [of offence to] ... the judicial power"<sup>187</sup> has been safely negotiated by the design of the Assessment Act with the respective functions conferred by it upon the Registrar and the courts.

134 It follows that the plaintiff's complaint that the judicial power of the Commonwealth was invalidly vested in the Registrar must also be rejected.

#### Orders

135 I agree with the answers to the questions reserved and the orders set out in the reasons of the other members of this Court<sup>188</sup>.

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**184** *In the Marriage of Perryman* (1993) 17 Fam LR 200 at 206.

**185** The Registrar is not bound by the rules of evidence: Assessment Act, s 98H(4). The Registrar has power to carry out his or her own inquiry and investigation: s 98H(1)(b). The Registrar also has power to decline to exercise jurisdiction in complex matters: s 98E. The Registrar may replace an earlier departure determination: s 98J and may make such a determination on the Registrar's own initiative: Pt 6A.

**186** (1959) 101 CLR 11 at 22.

**187** *Re Dymond* (1959) 101 CLR 11 at 22.

**188** Reasons of Gleeson CJ at [29], Gaudron and Hayne JJ at [78], Callinan J at [203].

136 CALLINAN J. In this case, the plaintiff challenges the scheme established by the *Child Support (Registration and Collection) Act* 1988 (Cth) ("the Collection Act") and the *Child Support (Assessment) Act* 1989 (Cth) ("the Assessment Act") for the collection and payment of money for child support. The matter comes before this Court by way of case stated. The questions raised by it are whether the scheme involves an exaction of tax and an exercise of judicial power.

The facts

137 On or about 1 November 1991 Anthony Luton ("the plaintiff") and Gillian Lessels ("the first defendant") began to cohabit as if they were husband and wife. On 1 August 1992 cohabitation ceased. On 15 February 1993 a child was born of the relationship between the plaintiff and the first defendant.

138 On 9 July 1993 the first defendant who was caring for the child applied to the second defendant, the Child Support Registrar ("the Registrar"), for determination and registration of a child support arrangement under the Collection Act.

139 On 7 August 1993 the second defendant made a determination of the liability of the plaintiff to pay child support.

140 Upon making the assessment referred to in the previous paragraph, the second defendant registered the registrable maintenance liability which arose under that assessment in the Child Support Register pursuant to s 24A of the Collection Act.

141 On or about 18 October 1994, pursuant to s 75 of the Assessment Act, the second defendant amended the assessment made on 7 August 1993 so as to vary the commencement date of the period in respect of which child support was payable by the plaintiff from 12 June 1993 to 9 July 1993.

142 Upon making the amendment referred to in the previous paragraph, the second defendant made appropriate variations to the particulars entered in the Child Support Register pursuant to s 37A of the Collection Act.

143 On or about 10 December 1993, the first defendant made an application under s 98B of the Assessment Act to the second defendant seeking a determination under Pt 6A of the Assessment Act to depart from the provisions of the Assessment Act relating to the administrative assessment of child support, so as to increase the rate of child support payable on the ground that the income, earning capacity, property and financial resources of the plaintiff were not properly reflected in the assessment.

144 On or about 3 February 1994, pursuant to s 98G of the Assessment Act, the plaintiff lodged with the second defendant a reply to the first defendant's

application, and by application under s 98B sought a reduction in the rate of child support payable on a number of grounds of the kind for which s 117 of the Assessment Act made provision.

145 On 14 April 1994, Ms Cheryl Peterson, a Child Support Agency Review Officer and a delegate of the second defendant, made a determination pursuant to s 98D of the Assessment Act in the following terms: there should be a departure from the assessment made for the 1993/1994 child support year; for the period 1 January 1994 to 30 June 1994 the child support income of the plaintiff should be \$37,188; for the period 1 July 1994 to 30 June 1995 the child support income of the plaintiff should be \$38,489.

146 On or about 28 April 1994, the second defendant entered particulars of the determination made on 14 April 1994 in the Child Support Register, pursuant to s 37A of the Collection Act.

147 In relation to subsequent child support years, pursuant to s 31(2)(b) of the Assessment Act, the second defendant has assessed the annual rate of child support payable by the plaintiff.

148 The second defendant has enforced collection of the amounts payable under the various assessments in a number of different ways: by issuing notices (pursuant to s 45(1) and (2) of the Collection Act) to the plaintiff's employers requiring them to make deductions from the plaintiff's salary (in accordance with s 46 of the Collection Act) and to pay those deductions to the second defendant (in accordance with s 47 of the Collection Act); pursuant to s 72 of the Collection Act, by applying an amount owing to the plaintiff by the Commonwealth under the *Income Tax Assessment Act* 1936 (Cth) against the amount of the debt due to the Commonwealth by the plaintiff under the Collection Act.

149 The plaintiff's employers have made periodic deductions from his salary pursuant to s 46 of the Collection Act and, have paid the amounts deducted, to the second defendant in compliance with s 47 of the Collection Act.

150 The precise questions to which the case gives rise are as follows:

1. Is the scheme established by the Collection Act and the Assessment Act for the collection and payment by the second defendant of money otherwise payable to or receivable by the first defendant a tax?
2. If "yes" to question 1 are the Acts invalid as being contrary to s 55 of the Constitution?
3. Do the Acts in purporting to authorise the second defendant to make the assessments and the determinations, to enter the particulars, to issue the notices, and to collect and apply payments in the way in which the second defendant did,

involve the purported exercise of judicial power by the second defendant contrary to Ch III of the Constitution?

4. What orders for the further disposition of the action should be made in the light of the answers to these questions?

151 Both Acts have from time to time been amended. No party suggested however that the questions should be answered other than by reference to them in their current form or that the changes would materially affect those answers. The way in which the Acts operate and their key provisions need some explanation.

### The Assessment Act

152 The Assessment Act was enacted to ensure that children receive a proper level of financial support from their parents<sup>189</sup>. To this end, the Act makes provision for the payment of child support by a "liable parent" to an "eligible carer" of a child or children.

153 An "eligible carer" or a "liable parent" may apply to the Registrar, who is the second defendant, under Pt 4 of the Assessment Act for administrative assessment of child support (ss 25 and 25A). Such an application is properly made if it complies with the requirements of ss 24, 25, 25A and 27 of the Assessment Act which are concerned with the identity of the child in respect of whom the application is made, the identity of the applicant, and formal requirements specified by the Registrar.

154 If the Registrar is satisfied that an application has been properly made, he or she must accept the application: s 30(1). The Registrar must then immediately notify the applicant and other affected persons (s 34), and must, as quickly as practicable, assess the annual rate of child support payable by the liable parent to the carer (s 31(2)). The person who is liable under the Assessment Act may lodge with the Registrar an objection to the decision to accept the application (s 98X). If the objection is disallowed, whether in whole or in part, the objector may apply to a court of competent jurisdiction for a declaration that the applicant is not entitled to administrative assessment of child support under the Assessment Act (s 107).

155 If the Registrar is not satisfied that an application has been properly made, he or she may refuse to accept the application (s 30(2)), and must then immediately notify the applicant (s 33). The unsuccessful applicant may lodge with the Registrar an objection to the decision to refuse to accept the application (s 98X), and if such an objection is disallowed, whether in whole or in part, may

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**189** Section 4(1) of the Assessment Act.

apply to a court of competent jurisdiction for a declaration that the applicant is entitled to administrative assessment of child support under the Assessment Act (s 106).

156       The provisions governing the administrative assessment of child support are contained in Pt 5 of the Assessment Act. With some exceptions, the amount of a child support liability is calculated in accordance with a basic formula set out in s 36, the "child support percentage", as defined in s 37, multiplied by the "adjusted income amount" of the liable parent. The possible exceptions to the application of the basic formula are to be found in other parts of the Assessment Act.

157       Division 2 of Pt 5 sets out modifications of the basic formula in relation to particular situations when either the Registrar or a court makes an order for departure from administrative assessment (under Pt 6A, or Div 4 of Pt 7 respectively); or when parties have entered into a child support agreement under Pt 6.

158       Section 75 confers on the Registrar power to amend an administrative assessment by making such alterations and additions as the Registrar considers necessary to give effect to the Assessment Act, including to correct any error or mistake, or to give effect to the happening of an event or change of circumstances that affects the annual rate at which child support is or was payable.

159       When the Registrar makes an administrative assessment, he or she must immediately give written notice of the assessment to the liable parent and the carer entitled to child support.

160       Both the parent who is liable, and the carer entitled to child support have the right to lodge with the Registrar an objection to the particulars of an administrative assessment (s 98X), and if that objection is disallowed, may appeal to a court of competent jurisdiction against the assessment (s 110).

161       The Assessment Act also makes provision for applications for a departure from the ordinary rules relating to administrative assessment of child support. Such applications may initially be made to the Registrar under Pt 6A. The primary grounds for such a departure application are those set out in s 117 in relation to applications to the court which are picked up by s 98C so as to apply to applications to the Registrar. An objection may be lodged with the Registrar to any decision by the Registrar to make or refuse to make a determination under Pt 6A (s 98X). If such an objection is disallowed in whole or in part, the person who lodged the objection may apply under Div 4 of Pt 7 to a court of competent jurisdiction for a departure order (ss 116, 118).

In certain circumstances, under Div 3 of Pt 6A (ss 98K-98R), the Registrar can make a determination on his or her own initiative that the provisions relating to administrative assessment should be departed from.

The effect of an assessment is that the amount of child support payable becomes a debt due and payable by the liable parent to the carer entitled to child support: s 79.

### The Collection Act

The objects of the Collection Act are to ensure that children receive from their parents the financial support that the parents are liable to provide, and that periodic amounts payable by non-custodial parents towards the maintenance of their children are paid on a regular and timely basis: s 3.

Part III of the Act provides for the registration of "registrable maintenance liabilities", which include liabilities that arise under a child support assessment: s 19(2).

Section 24A requires the Registrar to register liabilities arising under a child support assessment by entering particulars of the liability in the Child Support Register unless the payee elects in his or her application not to have the liability enforced under the Collection Act; or if the application for the child support assessment was made by the liable parent.

When a child support liability is not registered, the payee may apply to the Registrar for the registration of the liability (s 25). When a child support liability is registered, the payee (either alone or jointly with the payer) may elect to have the liability no longer enforced under the Act: s 38A.

The particulars that are required to be entered in the Child Support Register include the names of the payer and payee; details of the child support assessment; the name and date of birth of the relevant child or children; the periodic amounts payable by the payer; and the payment rate and payment period: s 26.

When the Registrar amends a child support assessment under which a registrable maintenance liability arises, the Registrar must immediately make such variations to the particulars entered in the Child Support Register as are considered necessary or desirable to enable the amendment to be given effect under the Act (s 37A). The Registrar also has power to vary the particulars entered in the Child Support Register for the purpose of correcting a clerical error or mistake: s 42.

170 Upon registration under s 30, amounts payable under the child support  
assessment become debts due to the Commonwealth by the payer and the payee  
is no longer entitled to, and may not enforce payment of the relevant amounts.

171 Part IV of the Act makes provision for the collection of registered child  
support liabilities by the Commonwealth by deduction from the salary or wages  
of the payer. The Registrar may give a notice to an employer of the payer  
specifying the name of the payer and instructing the employer to make periodic  
deductions from the payer's salary or wages, and to direct payment to the  
Registrar: s 45. The employer is then under a duty to make such deductions, and  
to pay to the Registrar the amounts deducted (ss 46 and 47). The deduction and  
payment of an amount from the salary or wages of a payer operates, to the extent  
of the payment, as a discharge of the payer's liability to make payments to the  
Registrar, and as a discharge of the employer's liability to pay the amount to any  
person other than the Registrar: s 49.

172 Part V makes provision for the payment and recovery of child support  
debts. It includes a provision which allows the Registrar to apply towards  
payment of such debts any amounts owing to the debtor by the Commonwealth  
under an Act of which the Registrar has the administration (either as Child  
Support Registrar or as Commissioner of Taxation): s 72. The Registrar may  
also garnishee debts owing by third parties to a child support debtor (s 72A), or  
make deductions from social security pensions or benefits (s 72AA).

173 Part VI made provision for the payment of child support to payees from  
the Child Support Reserve. The Child Support Reserve was established as a  
component of the Reserved Money Fund, and comprised amounts transferred to  
the Reserve out of the Consolidated Revenue Fund equal to the amounts received  
by the Registrar in payment of child support debts. The money is now held and  
paid out of a special, differently designated account<sup>190</sup>.

174 The registration of a child support liability under the Act, or the variation  
of any particulars entered in the Child Support Register, must be notified to both  
the payer and the payee: s 80. Part VII confers rights of objection against  
decisions relating to registration, and of appeal to a court of competent  
jurisdiction against a decision of the Registrar in relation to an objection.

175 Section 123 of the Collection Act states that the Act "is not a taxation law  
within the meaning of the *Taxation Administration Act 1953*."

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190 See discussion by Gaudron and Hayne JJ at [39]-[40].

The answers to the questions

176 I turn to the issues raised by questions 1 and 2. In *Air Caledonie International v The Commonwealth*<sup>191</sup>, Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ discussed the conventional constitutional concept of a tax. Their Honours said<sup>192</sup>:

"In *Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd*, the Privy Council identified three features which sufficed to impart to the levies involved in that case the character of a 'tax'. Those features were that the levies: were compulsory; were for public purposes; and were enforceable by law. In *Matthews v Chicory Marketing Board (Vict)*, Latham CJ adopted those three features as the basis of what has subsequently been recognized in this Court as an acceptable general statement of positive and negative attributes which, if they all be present, will suffice to stamp an exaction of money with the character of a tax: 'a compulsory exaction of money by a public authority for public purposes, enforceable by law, and ... not a payment for services rendered' ... More recently this Court has drawn attention to other criteria, namely, that a tax is not by way of penalty and that it is not arbitrary ...

There are three comments which should be made in relation to the above general statement of Latham CJ. The first is that it should not be seen as providing an exhaustive definition of a tax. Thus, there is no reason in principle why a tax should not take a form other than the exaction of money or why the compulsory exaction of money under statutory powers could not be properly seen as taxation notwithstanding that it was by a non-public authority or for purposes which could not properly be described as public. The second is that, in *Logan Downs Pty Ltd v Queensland*, Gibbs J made explicit what was implicit in the reference by Latham CJ to 'a payment for services rendered', namely, that the services be 'rendered to' – or (we would add) at the direction or request of – 'the person required' to make the payment. The third is that the negative attribute – 'not a payment for services rendered' – should be seen as intended to be but an example of various special types of exaction which may not be taxes even though the positive attributes mentioned by Latham CJ are all present. Thus, a charge for the acquisition or use of property, a fee for a privilege and a fine or penalty imposed for criminal conduct or breach of statutory obligation are other examples of special types of exactions of money which are unlikely to be properly

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191 (1988) 165 CLR 462.

192 (1988) 165 CLR 462 at 466-467 (footnotes omitted).



characterized as a tax notwithstanding that they exhibit those positive attributes. On the other hand, a compulsory and enforceable exaction of money by a public authority for public purposes will not necessarily be precluded from being properly seen as a tax merely because it is described as a 'fee for services'. 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 that value, properly to be seen as a tax."

177 Against the background of those remarks by their Honours these observations can fairly be made about the scheme established by the two Acts. Their purpose is not to raise revenue for the Commonwealth. The scheme does not contemplate any net benefit to the Commonwealth. The scheme does not confer any direct benefit upon the general community. It does not seek to exact money from the community. It may apply to, and require deductions from a social security pension or benefit payable by the Government (s 72AA of the Collection Act), features which hardly give the scheme the appearance of one for the exaction of a tax<sup>193</sup>. The beneficiaries of the scheme are of a limited class: children whose parent or parents would seek to avoid their moral and legal obligations owed to them. The Collection Act extinguishes the debt payable pursuant to the Assessment Act by a liable parent to an eligible carer: it creates a debt payable by a liable parent to the Commonwealth. And, it is important to note, s 76 of the Collection Act confers rights to payment upon an eligible carer of an equivalent amount by the Commonwealth. The result that the Collection Act is intended to achieve, and the means by which it is achieved, have some similarity to what happens when a creditor assigns a debt to another. As a result of the operation of the Acts, the Commonwealth becomes the substitute creditor, for and on behalf of the eligible carer, a situation no doubt very acceptable for the eligible carer and, accordingly of a kind to which a creditor (carer) would be likely to wish to assent.

178 These aspects of the scheme would be immediately sufficient to put beyond doubt any question that it is not one for the exaction of a tax but for the recent decision of this Court in *Australian Tape Manufacturers Association Ltd v The Commonwealth*<sup>194</sup>. There, amounts of royalties were paid in the first

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**193** Notwithstanding that historically the common law may not have imposed an obligation of support of children upon parents, few in the community, for at least many hundreds of years would doubt that a parent or parents of a child should support that child to the extent that it is reasonable and is possible for him or her to do so, and not leave the burden to be assumed by the rest of the community.

**194** (1993) 176 CLR 480.

instance by purchasers of blank recording tapes to a collecting society, to be held in a fund for the benefit of copyright owners who were members of the society. The Court was narrowly divided as to the characterization of the legislative scheme there. It was held in that case that the royalty was imposed for a "public purpose", namely the compensation of relevant copyright holders. If a purpose of compensating copyright holders is a public purpose, it is not immediately apparent why a purpose of ensuring that child carers receive maintenance for children, should not also be so regarded. The majority there (Mason CJ, Brennan, Deane and Gaudron JJ) regarded the relevant enactment as one for the exaction of money from one group for redistribution for the benefit of another group, with a view to bringing about what was seen to be an equitable outcome<sup>195</sup>. There was no necessary correspondence between a copyright holder and the purchaser of a blank tape, who might not even use the tape to copy copyright material. By contrast, the amounts payable under this scheme are paid to the Commonwealth by a particular debtor in relation to a particular child or children, and an equivalent amount is paid to the particular person entitled to that amount of child support. It is this feature which makes *Australian Tape Manufacturers Association* distinguishable and it is unnecessary to consider the Commonwealth's submission that it should be permitted to reopen that case to argue that the correct approach was the minority's (Dawson, Toohey and McHugh JJ).

179        Some further reference to *Air Caledonie*<sup>196</sup> is however useful, although in this field of discourse, of high moral, social and, in modern times, legal obligations owed to children by parents, and the designing of provisions for an effective means of discharging those obligations, not all of the language used in cases concerned with the payment of money to the Commonwealth by income earners and commercial enterprises has a necessary application. Here, unlike in *Air Caledonie*, this scheme does not involve an exaction by a public authority for a public purpose of the kind discussed in that case. A person assessed under this scheme may have no ultimate choice but to pay the assessment to the Commonwealth, but the compulsion to pay only arises, if, and only if, the payer has not otherwise discharged the obligation that a parent owes to his or her child or children. It is parenthood that is, and continues to be the source of the obligation. There is a clear connexion between what is payable and what is received in return for it. What is payable is the value of reasonable child support. What is received in return for it, is a discharge of the liability that the parent owes to the child.

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<sup>195</sup> (1993) 176 CLR 480 at 504.

<sup>196</sup> (1988) 165 CLR 462.

180 For these reasons, I am satisfied that the scheme does not involve the  
exaction of a tax and does not infringe s 55 of the Constitution<sup>197</sup>.

### Judicial power

181 I turn now to what I consider to be the more difficult of the questions,  
whether the scheme involves the purported exercise by the second defendant of  
judicial power within the meaning of Ch III of the Constitution.

### The plaintiff's arguments

182 The plaintiff points out that if the Registrar determines the payer child's  
support liability in a Pt 6A departure application, and enters his or her decision in  
the Register, then the outcome of that decision is binding on both the payer and  
payee. Even though a challenge may be mounted in the courts, the plaintiff  
submits, the existence of a right of review thereof does not change the nature of  
the original determination<sup>198</sup>. The obligations of parents to maintain their  
children are imposed by s 66C of the *Family Law Act* 1975 (Cth). It is not  
therefore a new duty imposed by the scheme. The plaintiff accepts that although  
there are occasions when an issue may lawfully be determined, either  
administratively or judicially, this is not one of them. The determination of the  
rights of, and enforceable obligations owed by citizens, is not within the lawful  
capability of an administrative body<sup>199</sup>. Once a child support liability is entered  
in the Register, it can in fact be enforced, inter alia, by garnisheeing the liable  
parent's wages and applying against that liability any amounts owed by the  
Commonwealth to the liable parent.

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197 Section 55 of the Constitution provides:

"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, and laws imposing duties of excise shall  
deal with duties of excise only."

It is unnecessary to explore the reasoning of the Court, and in particular Fullagar J,  
as to the reach of s 55, in *Re Dymond* (1959) 101 CLR 11 at 20-21.

198 *Harris v Caladine* (1991) 172 CLR 84.

199 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

183 These features, the plaintiff submits, mean that the procedures for which the scheme makes provision involve the exercise of judicial power as described by Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead*<sup>200</sup>:

"[T]he power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property."

184 Reference was also made to what Kitto J said in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*<sup>201</sup>:

"[A] judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist."

185 A number of the features to which Kitto J referred are present here also. The inquiry to be undertaken is as to facts and the application of the law to them. So too, while the determinations stand, the parties are bound by them. The decisions or determinations here affect defined persons or classes of persons.

#### The answer to the final question

186 To characterize a judgment in a conventional sense, as a charter for the future is perhaps to overstate the nature and effect of some judgments, for example, declarations as to the illegality of past conduct<sup>202</sup>, and may not therefore be a criterion for all judgments. Sometimes the distinctions which have been drawn between executive and judicial power have an appearance of some artificiality. Matters of impression are inescapably involved. The diversity of

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**200** (1909) 8 CLR 330 at 357.

**201** (1970) 123 CLR 361 at 374.

**202** *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

reasoning of the majority in *Harris v Caladine*<sup>203</sup> would certainly suggest this to be so. That some degree of delegation of judicial power does not impinge on Ch III but a greater (non-specific) helping of it might, does not, with respect, strike me as a very satisfactory basis for a determination of whether judicial power is, or is not being exercised. Judges are not mere supervisors. Nor do they have the power of appointment of other judges conferred by Ch III upon the Executive. The fact that delegates may be bound to perform their duties in a judicial way provides no substitute for the performance of judicial duties by duly appointed judges. I would doubt whether the "specified functions" performed on behalf of courts by officials to which Windeyer J referred in *Kotsis v Kotsis*<sup>204</sup> were intended by his Honour to embrace the performance of delegated judicial duties, however few or seemingly unimportant they might appear to be. However, *The Commonwealth v Hospital Contribution Fund*<sup>205</sup>, and *Harris*<sup>206</sup> have now settled that some federal judicial power may be exercised by persons other than judges, and it is upon that basis that I am bound to proceed.

187 Before stating what I consider to be the appropriate tests I should point to some significant differences between the relevant features of this case and the criteria to which Kitto J referred in the *Tasmanian Breweries* case. This scheme does create new rights and obligations. Its effect is to interpose a Commonwealth agency as the collector and payer of child support. Obligations of a somewhat different kind from any owed under the *Family Law Act* 1975 (Cth) do come to be owed to that agency, and a child carer may look to it for payment.

188 It is common ground that it is not always possible to define a power or function as being exclusively administrative or judicial. Powers may overlap<sup>207</sup>, and some functions or powers may be conferred on either a court or an administrative body. It has also been said (in the context of a consideration of the power of a Registrar of Trademarks) that some functions "may, chameleon like, take their colour from their legislative surroundings or their recipient"<sup>208</sup>.

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**203** (1991) 172 CLR 84.

**204** (1970) 122 CLR 69 at 91.

**205** (1982) 150 CLR 49.

**206** (1991) 172 CLR 84.

**207** *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 373 per Kitto J, quoting Privy Council in *Labour Relations Board of Saskatchewan v John East Iron Works Ltd* [1949] AC 134 at 148.

**208** *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1 at 18 per Aickin J.

And as both *Harris*<sup>209</sup> and *Brandy v Human Rights and Equal Opportunity Commission*<sup>210</sup> decide, the availability and nature of a review by a court are relevant considerations.

189 I would prefer to state a test by reference to several questions, not all of which will be of equal importance in every case. First, is the exercise to be undertaken under the relevant scheme, one which calls for independence and tenure of a kind traditionally enjoyed by judges? Secondly, does the scheme require the making of findings on disputed facts, or as to the law to be applied? Thirdly, is the relevant decision made by reference to a formula or a fairly standard set of criteria? Fourthly, is the decision appealable? Fifthly, if it is, what is the nature of the appeal? Sixthly, is the decision likely, as a legal or as a practical matter to serve as a precedent for decisions in future similar instances? Seventhly, has the legislature expressed a view about the nature of the process involved? Eighthly, is the process to be followed of a kind that has traditionally been undertaken by courts? Ninthly, does the decision relate to pre-existing rights and obligations, or does it create new ones? Tenthly, is the decision enforceable by the maker of it or by the institution of which he or she is a member? And, last, is there any other feature of the process which is historically of an administrative or a non-judicial kind?

190 I deal now with each of those questions.

191 Naturally the officers administering the scheme should act fairly. However, they are not called upon to adjudicate between the State and citizen, or between substantial vested, personal, or corporate interests. They are unlikely to be placed in a position of susceptibility to one side or the other. They do not need to be selected from a group of experienced legally qualified people in order to perform their duties under the scheme. There is therefore no reason why the administrator of the scheme need enjoy judicial tenure and the independence that it should ensure, in order to administer the scheme.

192 The area of factual dispute is likely to be small. No serious questions, indeed in all probability, no questions of law at all, are likely to be required to be determined by the Registrar or those serving under him or her.

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**209** (1991) 172 CLR 84.

**210** (1995) 183 CLR 245.

193 The decisions are likely to be made largely on a formulaic basis (see ss 36  
and 75 of the Assessment Act). They would not normally call for the application  
of any analytical legal skills.

194 The relevant decisions are appealable and effectively by way of a hearing  
de novo, even though the Acts refer to a review.

195 The decisions are, as I have said, based on formulae: they would have no  
precedential value.

196 The legislature has stated that the Collection Act (s 123) is not a taxation  
law, but otherwise the Acts are silent as to their intended constitutional status.  
This consideration may have relevance in a truly borderline case but will rarely  
be of significance.

197 Courts have traditionally made decisions about the amount of maintenance  
to be paid for the support of a child. The orders made have descended to the  
detail of intervals between, amounts and places of payment. They have not  
however been made, as here, for the purpose of substituting a governmental  
collection and disbursement agency.

198 In modern times, and under the *Family Law Act 1975* (Cth) parents are  
bound to support their children. This scheme, although it may proceed upon the  
basis of the existence of such a pre-existing obligation, does in fact create new  
rights and obligations to which I will refer in more detail, as this consideration is  
one of special significance in this case.

199 The scheme does make provision for a system of enforcement. But that  
system is different from the system of enforcement by a court's own officials,  
bailiffs and sheriffs, acting under specific court orders authorizing various curial  
processes, of, for example, forfeiture, seizure, arrest, execution and sale.

200 And, last, there is nothing about the nature of the scheme, except for one  
matter, which gives it the stamp of either a judicial or an administrative  
character. That matter which is of an administrative, rather than a judicial kind,  
is the right, albeit of a limited nature, of a Registrar to act on his or her own  
initiative, something not generally compatible with the exercise of true judicial  
power.

201 The answers to the questions by which the matter should be tested, do, on  
balance, well favour the conclusion that the scheme does not involve an exercise  
of judicial power. Three matters taken together are, in my opinion however,  
especially important and ultimately decisive here. The first is the availability of  
resort to a court of competent jurisdiction to challenge the relevant decisions of  
the Registrar. That the challenge is by way of appeal, and an appeal allowing a  
hearing de novo, and not simply by way of review under, for example the

*Administrative Decisions (Judicial Review) Act 1977 (Cth)* is very relevant. Although a liable parent may have a pre-existing obligation to pay maintenance, the Acts do create new statutory rights and obligations: for the payee, a right of recourse to the Commonwealth as his or her agent to obtain and ensure payment; against the payer, an obligation to submit to a liability imposed upon him or her, to make payment or suffer deductions from money due, in favour of a Commonwealth agency. And thirdly, the exercise undertaken here is of a largely formulaic kind, not requiring judicial tenure and independence, or any substantial degree of legal expertise or analytical legal skills.

202 It follows that Ch III of the Constitution is not infringed by the statutory scheme, and the enactments are valid.

Answers to questions stated

203 The questions should therefore be answered as follows:

1. Is the scheme established by the Collection Act and the Assessment Act for the collection and payment by the second defendant of money otherwise payable to or receivable by the first defendant a tax?

No.

2. If "yes" to question 1 are the Acts invalid as being contrary to s 55 of the Constitution?

Unnecessary to answer.

3. Do the Acts in purporting to authorise the second defendant to make the assessments and the determinations, to enter the particulars, to issue the notices, and to collect and apply payments in the way in which the second defendant did, involve the purported exercise of judicial power by the second defendant contrary to Ch III of the Constitution?

No.

4. What orders for the further disposition of the action should be made in the light of the answers to these questions?

The action should be dismissed. The plaintiff should pay the first defendant's costs.