

HIGH COURT OF AUSTRALIA

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

AIRSERVICES AUSTRALIA

APPELLANT

AND

CANADIAN AIRLINES INTERNATIONAL LTD

RESPONDENT

Airservices Australia v Canadian Airlines International Ltd
[1999] HCA 62
2 December 1999
C22/1998

ORDER

1. *Adjourn further hearing of appeal to a date to be fixed.*
2. *In the absence of agreement between the parties as to the form of the orders:*
 - (a) *on or before 4 February 2000 each party to file and serve on the other party short minutes of the orders it contends should be made;*
 - (b) *on or before 18 February 2000 each party to file and serve on the other party written submissions concerning the orders to be made.*

On appeal from the Federal Court of Australia

Representation:

D J S Jackson QC with J C Sheahan SC for the appellant (instructed by Mallesons Stephen Jaques)

J C Campbell QC with A S Bell for the respondent (instructed by Allen Allen & Hemsley) at the hearing on 14 April 1999 and 15 April 1999.

J C Campbell QC with S J Gageler for the respondent (instructed by Allen Allen & Hemsley) at the hearing on 3 May 1999.

Interveners:

D M J Bennett QC, Solicitor-General for the Commonwealth with G Witynski and G R Kennett intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

D Graham QC, Solicitor-General for the State of Victoria with S G E McLeish intervening on behalf of the Attorney-General of the State of Victoria (instructed by Victorian Government Solicitor)

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

B M Selway QC, Solicitor-General for the State of South Australia with M Panagiotidis and L K Byers intervening on behalf of the Attorney-General of the State of South Australia (instructed by Crown Solicitor for the State of South Australia)

B T Dunphy, Acting Solicitor-General of the State of Queensland with G R Cooper intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Solicitor for the State of Queensland)

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

HIGH COURT OF AUSTRALIA

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

AIRSERVICES AUSTRALIA

APPELLANT

AND

MONARCH AIRLINES LIMITED

RESPONDENT

Airservices Australia v Monarch Airlines Limited
2 December 1999
C23/1998

ORDER

1. *Adjourn further hearing of appeal to a date to be fixed.*
2. *In the absence of agreement between the parties as to the form of the orders:*
 - (a) *on or before 4 February 2000 each party to file and serve on the other party short minutes of the orders it contends should be made;*
 - (b) *on or before 18 February 2000 each party to file and serve on the other party written submissions concerning the orders to be made.*

On appeal from the Federal Court of Australia

Representation:

D J S Jackson QC with J C Sheahan SC for the appellant (instructed by Mallesons Stephen Jaques)

J C Campbell QC with A S Bell for the respondent (instructed by Allen Allen & Hemsley) at the hearing on 14 April 1999 and 15 April 1999.

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B T Dunphy, Acting Solicitor-General of the State of Queensland with G R Cooper intervening on behalf of the Attorney-General of the State of Queensland (instructed by the Crown Solicitor for the State of Queensland)

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HIGH COURT OF AUSTRALIA

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

AIRSERVICES AUSTRALIA

APPELLANT

AND

POLARIS HOLDING COMPANY

RESPONDENT

Airservices Australia v Polaris Holding Company
2 December 1999
C24/1998

ORDER

1. *Adjourn further hearing of appeal to a date to be fixed.*
2. *In the absence of agreement between the parties as to the form of the orders:*
 - (a) *on or before 4 February 2000 each party to file and serve on the other party short minutes of the orders it contends should be made;*
 - (b) *on or before 18 February 2000 each party to file and serve on the other party written submissions concerning the orders to be made.*

On appeal from the Federal Court of Australia

Representation:

D J S Jackson QC with J C Sheahan SC for the appellant (instructed by Mallesons Stephen Jaques)

J C Campbell QC with A S Bell for the respondent (instructed by Allen Allen & Hemsley) at the hearing on 14 April 1999 and 15 April 1999.

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CATCHWORDS

Airservices Australia v Canadian Airlines International Ltd

Airservices Australia v Monarch Airlines Limited

Airservices Australia v Polaris Holding Company

Administrative law – Aviation – Civil Aviation Authority – Charges levied by CAA for use of services and facilities – Whether charges were reasonably related to expenses incurred in provision of services and facilities – Whether particular charges required to relate to particular services – Whether charges amounted to taxation.

Constitutional law – Acquisition of property – Statutory liens imposed on leased aircraft where lessee had accrued charges remaining unpaid – Discharge of liens by payment of charges and penalties by lessors – Whether such liens constituted the acquisition of property otherwise than on just terms.

Constitutional law – Taxation – Statutory authority – Provision of services to be paid for by users – Whether law effecting indirect subsidy between users of services a law imposing taxation.

Constitutional law – Executive government – Statutory authority – Provision of services to be paid for by users – Whether financial structure permitted by ss 81 and 83 of the Constitution.

Statutory interpretation – Statutory instrument – Construction to be adopted where two alternative constructions available.

Liens – Statutory liens imposed on property to secure debts of lessee – Whether acquisition of property otherwise than on just terms.

Words and phrases – "fee for service" – "just terms" – "reasonably related" – "taxation" – "value".

The Constitution, ss 51(xxxi), 55, 81, 83.

Civil Aviation Act 1988 (Cth), ss 66, 67, 68-81.

GLEESON CJ AND KIRBY J. Between December 1990 and December 1991 Compass Airlines Pty Ltd ("Compass") carried on business as an Australian domestic airline. It had facilities at Cairns, Brisbane, Sydney, Melbourne, Adelaide and Perth, and flew on routes between those cities. The business failed. In December 1991, Compass went into provisional liquidation. The aircraft operated by Compass were leased. The respondent Canadian Airlines International Ltd owned an aircraft which was leased to Compass. The respondent Monarch Airlines Ltd was the lessee of two aircraft which were sub-leased to Compass. The respondent Polaris Holding Company owned two aircraft which were leased to Compass.

At the relevant time, Div 2 of Pt VI of the *Civil Aviation Act* 1988 (Cth), ("the Act") contained provisions relating to the imposition of charges for services and facilities provided to airline operators. The legislation also created a statutory lien over aircraft to secure payment of such charges.

At the time Compass went into provisional liquidation, it owed the Civil Aviation Authority ("the CAA") substantial amounts in respect of charges and penalties payable in respect of the operations of each of the leased aircraft. The CAA invoked its statutory liens. Each respondent paid, under protest, the charges and penalties claimed to be owing in respect of each aircraft. The amounts paid were as follows:

Canadian Airlines	\$2,888,740.97
Monarch	\$5,002,187.86
Polaris	\$5,239,058.07

Upon receipt of those payments, the CAA discharged the liens it asserted. The amounts were paid pursuant to agreements which entitled the respondents to recover the moneys, together with interest, if it were to be held that, as against the respondents, the liens did not validly secure payment of the charges, or for any reason the liens, or the charges, or both, were, in whole or in part, illegal, void or unenforceable.

Each respondent commenced an action in this Court, claiming repayment of sums collected in reliance on the Act. The actions were remitted to the Federal Court of Australia.

The proceedings were commenced against the CAA. That body's functions, and rights and liabilities, so far as presently relevant, were later assumed by Airservices Australia, which was substituted for the CAA as a party. The relevant statutory provisions referred to the CAA, called "the Authority".

7 At first instance, Branson J upheld the contention of the respondents that the charges contravened s 67 of the Act, in that they amounted to taxation¹. There were other issues in the case, some of which her Honour decided in favour of the appellant, and some of which she found unnecessary to decide. Repayment of the moneys, together with interest, was ordered. The Full Court of the Federal Court (Beaumont, Wilcox and Lindgren JJ) dismissed an appeal, agreeing that the charges contravened s 67².

8 On the appeal to this Court, the respondents, in addition to supporting the conclusion of the courts below, pressed a number of additional arguments. In particular, they contended, as they had argued below, that, even if the charges were validly imposed upon Compass, the statutory liens were constitutionally invalid.

9 It is convenient to deal first with the argument which succeeded before Branson J and in the Full Court and, for that purpose, to examine the relevant statutory provisions.

The legislation

10 The Act established the CAA as a body corporate³, and conferred upon it a number of functions relating to civil aviation and, in particular, the safety of civil aviation. Those functions included⁴ providing air route and airway facilities (which included⁵ visual and non-visual aids, communications services, and meteorological observations), air traffic control services and facilities, a rescue and fire fighting service, a search and rescue service, and an aeronautical information service. The functions were to be performed under the direction of the Minister⁶.

11 Part VI of the Act, dealing with the subject of finance, contained a number of provisions designed to ensure that the CAA would operate on a commercial basis. The CAA was obliged to develop and maintain a corporate plan⁷. When preparing the plan it was obliged to consider, amongst other matters, the need to

1 *Monarch Airlines Ltd v Airservices Australia* (1997) 72 FCR 534.

2 *Airservices Australia v Monarch Airlines Ltd* (1998) 152 ALR 656.

3 s 8.

4 s 9.

5 s 3.

6 s 12.

7 s 43.

3.

maintain a reasonable level of reserves, the need to maintain the extent of the Commonwealth's equity in the CAA, the need to earn a reasonable rate of return on its assets (other than assets wholly or principally used in the performance of regulatory functions or the provision of search and rescue services), the expectation that it would pay a reasonable dividend, and any other appropriate commercial considerations⁸.

12 Section 56 of the Act provided for the payment of an annual dividend to the Commonwealth. There was evidence that the CAA's charges, to which detailed reference will be made below, were set so as to produce a forecast 7.5 per cent (real) rate of return on the capital employed by the CAA. That was regarded as representing the opportunity cost of the investment in assets of the CAA. It was explained that, in the absence of such a return, the investment would represent a subsidy to the aviation industry. However, the evidence also showed that this return of 7.5 per cent was not a major component of the CAA's charges. The CAA had a large turnover compared to its assets, and the return on capital employed did "not make a substantial difference to the Authority's cost structure".

13 The key provisions of the Act, for present purposes, were those contained in Div 2 of Pt VI. They provided:

"66 (1) In this section:

'charge' means:

- (a) a charge for a service or facility provided by the Authority; or
- (b) a fee or other charge in respect of a matter specified in the regulations, being a matter in relation to which expenses are incurred by the Authority under this Act or the regulations, including, but without being limited to, a fee or other charge in respect of, or for an application for:
 - (i) the grant, issue, renewal or variation of a certificate, licence, approval, permission, permit, registration or exemption under this Act or the regulations; or
 - (ii) the grant or variation of an authorisation, or the cancellation, suspension, variation or imposition of a condition, relating to anything referred to in subparagraph (i).

4.

- (2) Subject to this section, the Board may make determinations:
 - (a) fixing charges and specifying the persons by whom, and the times when, the charges are payable; and
 - (b) fixing the penalty for the purposes of subsection (8).

...

- (8) Subject to subsection (9), where a charge is not paid within the period determined by the Board, being a period beginning on the day on which the charge became due and payable, the person liable for the charge is liable to pay the Authority, in addition to the charge, a penalty, calculated upon the unpaid amount of the charge from the day on which the charge became due and payable, and compounded.
 - (9) The penalty shall not exceed a penalty equivalent to 1.5%, or such other percentage as is prescribed, of the unpaid amount of the charge for each month or part of a month during which it is unpaid
- ...

67 The amount or rate of a charge shall be reasonably related to the expenses incurred or to be incurred by the Authority in relation to the matters to which the charge relates and shall not be such as to amount to taxation.

68 There shall be a Register of Statutory Liens, which shall be maintained, and shall be open to public inspection, as prescribed.

- 69 (1) Subject to section 76⁹, where:
 - (a) at the end of the payment period after a charge became payable in respect of an aircraft, the charge is not paid; and
 - (b) at the end of that period, a statutory lien is not in effect in respect of the aircraft; and
 - (c) the charge or penalty in respect of the charge remains unpaid;

then, if an appropriate officer so directs at any time, the Registrar shall make an entry in the Register in the manner prescribed and, upon the making of the

9 Section 76, which is not presently material, provided for certification of amounts payable and unpaid, and limited the effect of a lien to the certified amount.

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entry, there is vested in the Authority in respect of the aircraft a statutory lien covering the following:

- (d) the charge or penalty;
- (e) any penalty that becomes payable in respect of the charge after the entry is made;
- (f) any further outstanding amounts in respect of the aircraft.

...

70 (1) Where a statutory lien has been registered in respect of an aircraft and until the lien ceases to have effect, the following provisions of this Division apply, in spite of any encumbrance in respect of the aircraft and any sale or disposition of, or dealing in, the aircraft or an interest in the aircraft, and whether or not the Authority has possession of the aircraft at any time.

(2) For the purposes of priorities amongst creditors and the purposes of the distribution of the proceeds of a sale made under section 73, the statutory lien has effect as a security interest in respect of the aircraft ranking in priority:

- (a) after any security interest (other than a floating charge) in respect of the aircraft created before the time of registration of the statutory lien, to the extent that that security interest covers a debt incurred before that time; and
- (b) before any security interest not falling within, or to the extent that it does not fall within, paragraph (a).

71 (1) In the case of an Australian aircraft, if an outstanding amount covered by the statutory lien is unpaid at the end of 6 months after the day on which it became an outstanding amount or the day on which the lien was registered, whichever is the later, an authorised officer may, having regard to all the circumstances, including the steps, if any, taken by any person to pay the whole or part of the outstanding amounts covered by the statutory lien, cancel the certificate of registration of the aircraft in the register of Australian aircraft maintained under the regulations.

(2) If the certificate is cancelled, the aircraft shall not be re-registered until the statutory lien ceases to have effect.

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72 If an outstanding amount covered by the statutory lien is unpaid at the end of 9 months after the day on which it became an outstanding amount or the day on which the lien was registered, whichever is the later, an authorised officer, or a person authorised in writing by such an officer to do so, may at any time, subject to section 79, seize the aircraft, and:

- (a) shall take reasonable steps to give notice of the seizure to:
 - (i) such persons as, in the opinion of an authorised officer, have a security interest in the aircraft;
 - (ii) each person who is any of the following, namely, an owner, operator, lessee, hirer, charterer or pilot in command, of the aircraft; and
 - (iii) such other persons as are prescribed; and
- (b) may keep possession of the aircraft until all outstanding amounts covered by the statutory lien are paid.

73 (1) If an outstanding amount covered by the statutory lien is unpaid at the end of 9 months after the day on which it became an outstanding amount or the day on which the lien was registered, whichever is the later, the Authority may at any time, whether or not the aircraft has been seized under section 72:

- (a) sell the aircraft as prescribed, whether by public auction or private contract;
- (b) make and execute all instruments and documents necessary for effecting the sale; and
- (c) give full and effective title to the aircraft free of all encumbrances, leases and contracts of hire.

(2) Before selling the aircraft, the Authority shall take reasonable steps to give reasonable notice of the sale to the persons referred to in paragraph 72(a)."

14 The Board is the board of the CAA¹⁰.

The charges

- 15 The charges said to have been payable by Compass were for air traffic services ("ATS"), rescue and fire fighting services, and meteorological services.
- 16 Two separate ATS charges were fixed. The first was in respect of terminal navigation services. The second was in respect of *en route* services. The terminal navigation charge related to facilities and services which included the provision, maintenance and operation of air traffic control services, including radar, within 55 kilometres of an aerodrome with an operating control tower, and navigational aids used in take-off, approach and landing of aircraft. The *en route* charges covered the provision, maintenance and operation of air traffic control information, and support and flight navigational aids, outside 55 kilometres from an aerodrome with an operational control tower.
- 17 The rescue and fire fighting charge related to the provision by the CAA of rescue and fire fighting facilities and services at airports and elsewhere.
- 18 As to the meteorological services, these were provided by the Bureau of Meteorology, which charged a lump sum fee to the CAA. The CAA in turn fixed charges which were intended to recover the amount paid to the Bureau.
- 19 The subject charges were fixed by a determination, dated 26 June 1991, purportedly made under s 66(2) of the Act. They were classified as "landing charges", which were charges "payable in respect of use by aircraft of facilities or a service relating to an aerodrome", *en route* charges, which were said to be "in respect of the use by an aircraft of air route and airways facilities and services operated or provided in Australian territory", and meteorological charges, which were said to be "[i]n respect of the use by an aircraft of meteorological facilities and services operated or provided in Australian territory". The *en route* charges and the meteorological charges were payable on each landing.

20 The relevant provisions of the determination were as follows:

Landing charges

21 "Landing charges" for "avtur" aircraft were imposed by cl 1. The determination's interpretation clause defined "landing charge" to mean a charge "payable in respect of use by aircraft of facilities or a service relating to an aerodrome". "Avtur aircraft" was defined to mean an aircraft powered by an engine or engines using aviation turbine kerosene. Clause 1 provided:

"1. In respect of each landing of an avtur aircraft at an aerodrome referred to in Column 2 of Item 1 in Table 1 below, a charge for services and facilities at the aerodromes referred to in Column 2, calculated at the rate per 1,000 kilogrammes weight specified in Column 3 of that item, is applicable."

22 Item 1 provided, in Column 2:

"Column 2

Aerodrome/Facility

1. Terminal navigation facilities and services, being such facilities and services relating to an aerodrome specified in Schedule 1."

23 Schedule 1 specified the following 32 aerodromes:

"SCHEDULE 1

Aerodromes Where a Charge is Payable for the Use of Terminal Navigation Facilities and Services

Adelaide	Karratha
Albury	Launceston
Alice Springs	Mackay
Archerfield	Maroochydore
Avalon	Melbourne
Bankstown	Moorabbin
Brisbane	Mount Isa
Cairns	Parafield
Camden	Perth
Canberra	Port Hedland
Coffs Harbour	Proserpine
Coolangatta	Rockhampton
Darwin	Sydney
Essendon	Tamworth
Hobart	Townsville

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Jandakot Wagga Wagga"

24 Column 3 provided for a rate of \$3.65 per 1,000 kilograms "weight". The term "weight" was defined in the interpretation clause to mean "the maximum take-off weight" (MTOW).

25 Clause 2 provided:

"2. In respect of each landing of an avtur aircraft at a place, being a place other than an aerodrome at which an Aerodrome Control Service is available at the time of the landing, within a control zone associated with an aerodrome referred to in Column 2 of Item 2 in Table 1 below, a charge for services and facilities at the aerodromes referred to in Column 2, calculated at a rate per 1,000 kilogrammes weight specified in Column 3 of that Item, is applicable."

26 Column 2 of Item 2 was in the same terms as Column 2 of Item 1, but the rate in Column 3 was less: \$1.83 (compared with \$3.65).

27 Clause 3 provided:

"3. In respect of each landing of an avtur aircraft at an aerodrome referred to in Column 2 of Item 3 in Table 1 below, a charge for services and facilities at the aerodromes referred to in Column 2, calculated at the rate per 1,000 kilogrammes weight specified in Column 3 of that Item, is applicable."

28 Column 2 of Item 3 specified the following:

"Fire fighting and rescue service, being such a service relating to an aerodrome specified in Schedule 2."

29 Schedule 2 specified the following 21 aerodromes:

"SCHEDULE 2

Aerodromes Where a Charge is Payable for Fire Fighting and Rescue Service

Adelaide	Launceston
Alice Springs	Mackay
Avalon	Melbourne
Brisbane	Norfolk Island
Cairns	Perth
Canberra	Port Hedland
Coolangatta	Rockhampton

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Darwin	Sydney
Devonport	Tamworth
Hobart	Townsville
Karratha"	

30 Column 3 provided for a rate of \$2.40 per 1,000 kilograms weight.

31 Landing charges for "non-avtur" aircraft (defined as "an aircraft other than an avtur aircraft") were dealt with in cl 6 as follows:

"6. In respect of each landing of a non-avtur aircraft at an aerodrome referred to in Column 2 of Item 1 in Table 2 below, a charge for services and facilities at the aerodromes referred to in Column 2, calculated at the rate per 1,000 kilogrammes weight specified in Column 3 of that item, is applicable."

32 Column 2 of Item 1 provided:

"Column 2

Aerodrome/Facility

Terminal navigation facilities and services, being such facilities and services relating to an aerodrome specified in Schedule 3."

33 Schedule 3 specified the following six aerodromes:

"SCHEDULE 3

Aerodromes where Landing Charges are Payable in Relation to Aircraft other than Avtur Aircraft

Adelaide	Brisbane
Hobart	Melbourne
Perth	Sydney"

34 The rate in Column 3 was \$3.65 per 1,000 kilograms weight.

35 Clause 7 provided:

"7. In respect of each landing of a non-avtur aircraft at an aerodrome referred to in Column 2 of Item 2 in Table 2 below, a charge for services and facilities at the aerodromes referred to in Column 2, calculated at the rate per 1,000 kilogrammes weight specified in Column 3 of that item, is applicable."

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36 Column 2 of Item 2 specified:

"Fire fighting and rescue service, being such a service relating to an aerodrome specified in Schedule 3."

37 Column 3 specified a rate of \$2.40 per 1,000 kilograms weight.

38 Clause 10 provided:

"Availability of Services and Facilities

10. A charge, referred to in paragraphs 1, 2, 3, 4, 5, 6, 7, 8 or 9 above, is not payable unless, at the time of the landing of the aircraft, the facilities or services to which the charge relates are available for use by the aircraft."

En route charges

39 Clause 11 provided:

"11. In respect of the use by an aircraft of air route and airways facilities and services operated or provided in Australian territory, a charge is payable on each landing –

(a) in the case of a flight by an avtur aircraft weighing 20,000 kilogrammes or less between two aerodromes in Australian territory, in accordance with the following formula:

$$C = R_1 \times D/100 \times W$$

(b) in the case of a flight by an avtur aircraft weighing more than 20,000 kilogrammes between two aerodromes in Australian territory, in accordance with the following formula:

$$C = R_2 \times D/100 \times \sqrt{W}$$

(c) in the case of a flight by an aircraft weighing 20,000 kilogrammes or less between a place outside Australian territory and a place in Australian territory, in accordance with the following formula:

$$C = R_3 \times D/100 \times W$$

(d) in the case of a flight by an aircraft weighing more than 20,000 kilogrammes between a place outside Australian territory and a

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place in Australian territory, in accordance with the following formula:

$$C = R_4 \times D/100 \times \sqrt{W}$$

where:

C is the amount in dollars of the charge payable

R₁ is a rate of \$3.60

R₂ is a rate of \$16.15

R₃ is a rate of \$2.85

R₄ is a rate of \$12.75

D is the distance travelled by the aircraft expressed as the great circle distance in kilometres –

(i) between two aerodromes in Australian territory; or

(ii) between the first point of entry to an Australian Flight Information Region and the first aerodrome of destination in Australian territory;

(iii) between the point of entry to an Australian Flight Information Region and the next point of departure from an Australian Flight Information Region.

W is the weight of the aircraft expressed in tonnes.

$\sqrt{W}$ is the square root of the weight of the aircraft expressed in tonnes."

Meteorological charges

40 For reasons that appear below, these may be disregarded.

The decisions in the Federal Court

41 At first instance, Branson J dealt with the respondents' claim that there had been a contravention of s 67 of the Act by considering two questions. First, her Honour asked, in relation to each charge, whether the amount or rate of the charge was reasonably related to the expenses incurred or to be incurred by the CAA in relation to the matters to which the charge related. Secondly, she asked

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whether the charges were such as to amount to taxation. Subject to one qualification, she answered both questions in the affirmative. The qualification concerns the first question insofar as it related to meteorological charges. Her Honour's answer to the second question required a conclusion that there had been a failure to comply with s 67, and that those charges, and the related penalties, had not been validly imposed.

42 In the Full Court, a somewhat different approach was taken, although the same final conclusion was reached.

43 It is necessary at this point to refer to some of the evidence in the case, and to the criticisms of the charges advanced on behalf of the respondents. The following summary is taken substantially from the reasons for judgment of Branson J.

44 The respondents' challenge to the determination commenced with the contention that, by identifying in the determination the services and facilities for which charges were imposed, the Board "fixed the parameters within which it [had to] be able to cost-justify its charges". The Board had to fix charges at a rate reasonably related to the expenses incurred in providing those particular services or facilities.

45 As to the terminal navigation charges, it was argued that those were not reasonably related to the MTOW of the aircraft in respect of which the services were provided. The differences in charges as between aerodromes was said to be arbitrary and unrelated to the expenses incurred. The expenses incurred in providing services differed substantially between aerodromes but the amount or rate of the charges did not reflect those differences.

46 Similarly, as to the rescue and fire fighting services, it was said that the expenses incurred by the CAA differed substantially between aerodromes but the rates did not differ. (Compass, it may be noted, flew relatively large aircraft and used only a relatively small number of aerodromes. An airline operator using the whole of the CAA network might not be greatly concerned about this issue, but it was significant for Compass.)

47 The amount of the *en route* charges was determined by reference to the MTOW of the relevant aircraft, the distance flown by the aircraft, and the rate of charge fixed by the determination. It was argued that the expenses incurred by the CAA in providing *en route* services were not related to the MTOW of the aircraft, and that the expenses incurred by the CAA differed substantially between routes and airways, whereas the amount or rate of the charge was constant. In particular, it was said that aircraft on international flights were charged a lower rate per kilometre travelled in Australian territory than aircraft travelling between

aerodromes in Australia, and they only paid the charge in respect of flights coming into Australia and not in respect of flights leaving Australia.

48 As to the meteorological charges, it was said that such services were used more frequently and extensively by aircraft with a lower MTOW than by aircraft with a higher MTOW, and that aircraft on international flights were treated more favourably for reasons similar to those given above.

49 This is not a comprehensive account of the respondents' complaints, but it serves to indicate their general tenor.

50 There was evidence as to the process by which the charges fixed by the determination were calculated. The total outgoings of the CAA for the 1991-1992 year were estimated. The total value of the CAA's assets was calculated, and 7.5 per cent of such value was added to the estimated outgoings. The resultant figure, less interest, was treated as the cost of the CAA. This was then broken down to the cost of each service, and the aggregate of the revenue from each service covered the cost of the CAA.

51 The evidence of Mr Barnes, the witness who explained the process, was summarised by Branson J as follows¹¹:

"As to the breaking down of the total costs of the CAA into the costs of the services and facilities for which charges were to be determined, Mr Barnes agreed that the information systems available to the CAA in 1991-92 did not allow this task to be undertaken with 100 per cent accuracy. The problem was with respect to property related costs and asset related costs. As to that Mr Barnes stated as follows:

'... the significance of that problem needs to be put into perspective by considering the cost structure of the organisation. Of the \$700-\$800 million annual cost of the CAA back at that time, a little over 60 per cent of that was salary costs and related costs. The asset and property related costs were probably of the order of \$100-\$130 million out of that \$800 million. So while it was a reasonable amount of money, it was relevant primarily to those areas which used assets. I should explain that the safety regulatory area of the organisation used very little assets, and in 1991 we were able to identify, with reasonable confidence, the cost of the safety function of the organisation, because they were a relatively minor user of the organisation's assets. The difficulty we faced was with the operational side of the organisation, which was Rescue and Firefighting Service, Channel Navigation and En Route Air Traffic

11 (1997) 72 FCR 534 at 561-563.

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Control, and we needed more information about an appropriate basis by which to split costs between those. We had some information, in that the standard categorisation of the assets of the organisation did line up, to some extent, with the organisational groups and the services that the organisation provided ... What we were still uncertain about was some common property costs and various other things.'

Mr Barnes gave evidence that the attribution of indirect and support costs to all operational services was based on a 1988 cost allocation study. He stated that the relationship of indirect and support costs to direct costs was assumed to continue to be in the same proportion as established by the study, taking into account organisational and other charges since the study was conducted and an adjustment arising from another 1988 study of the cost relativities of the CAA's operational services. Mr Barnes gave evidence that between 1988 and 1991 he had been monitoring the work done on a cost allocation model and also the general budget position of the various operating arms of the CAA. He said that he was aware that there had not been any major changes in the nature of the services provided or in the way in which they were provided. As to minor changes, he stated that they were taken account of as marginal changes.

... Mr Barnes asserted that he was confident that in 1991-92 the aggregate of the en route charges and the terminal navigation charges recovered the right amount of money but that it was not until 1992 that he had sufficient information to be confident about the split between en route services and terminal navigation services. He agreed that virtually all system support costs of air traffic services were recovered by the en route charges. This evidence is in accord with that given by Dr Fitzgerald.

As to the international en route charge, Mr Barnes acknowledged that it was only payable on the inward leg of a flight. He stated that that was a matter of administrative convenience as it reduced paper work for the industry. The costs being charged for, he said, were the costs of both the inward and the outward legs. As to the amount of the international en route charge, Mr Barnes gave his understanding as being that it was –

'intended to recover the additional costs which could reasonably be related to international flights, which was the full costs of air traffic control dealing with offshore airspace sectors and a reasonable share of communications costs that were used primarily by aircraft on international routes'."

52 An economist, Dr Fitzgerald, gave evidence of economic principles said to be relevant to the setting of charges by an entity such as the CAA. He said that it was consistent with such principles for the CAA to have set out to recover its total

costs from its users as a group. He also said that to achieve the most economically efficient outcome, while fully recovering the CAA's costs from its users as a group, charges for services should take account of user demand characteristics. Prices to different users should be set in inverse proportion to the sensitivity of their usage to price, a method known as "Ramsey pricing". This, he said, promoted efficiency, and was widely regarded as the best practice for pricing monopoly services. Provided each category of user pays at least marginal cost for each unit of service, no cross-subsidization is involved. In the light of those principles, he considered the CAA's pricing policy was reasonable. However, as Branson J observed, the issue was whether it complied with s 67.

53 Dr Fitzgerald also addressed the actual allocation of costs between services made by the CAA. All system overheads were attributed to *en route* services. This, he said, was in accordance with correct economic principles. He said that setting charges as a function of MTOW was, from the point of view of an economist, reasonable. For freight aircraft, payload and economic capacity to pay were directly related to MTOW. For passenger aircraft, capacity to pay was indirectly related to MTOW.

54 A witness, Mr Gemmell, gave evidence as to the cost of rescue and fire fighting services and air traffic services.

55 Putting to one side the matter of meteorological services, and the charges for such services, the evidence satisfied Branson J that the amount or rate of each of the subject charges was reasonably related to the expenses incurred or to be incurred by the CAA in relation to the matters to which the charge related.

56 Her Honour rejected the contention that it was not reasonable to include a rate of return on assets or funds employed, noting in that respect the statutory context in which s 67 appeared. She also noted that it was not contended that the particular rate of 7.5 per cent was inappropriate.

57 It is unnecessary for present purposes to go into the detail of her Honour's reasoning in relation to the remaining charges. She accepted that it was not sufficient that the totality of the charges should be reasonably related to the totality of the expenses incurred by the CAA; the amount or rate of each charge must be reasonably related to the expenses incurred or to be incurred by the CAA in relation to the matters to which that charge related¹². However, the matters to which the charges related were the categories or groups of services identified in the determination, not, for example, the services provided to an individual aircraft in respect of a particular flight. Furthermore, the relationship between charges and

12 *Monarch Airlines Ltd v Airservices Australia* (1997) 72 FCR 534 at 566.

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expenses could be established on a network basis. Her Honour said, for example, in relation to terminal navigation charges¹³:

"Nothing in s 67 of the Act, in my view, compels a conclusion that the CAA was not entitled to determine a rate of charge in relation to the provision of facilities and services at a number of aerodromes, subject, of course, to the requirements that such rate be reasonably related to the expenses incurred or to be incurred by the CAA in relation to the provision of such facilities and services and not be such as to amount to taxation. That is, in my view, s 67 of the Act does not compel location specific charging unless such charging is the only way to meet the explicit requirements of the section."

58 However, in relation to the meteorological services, her Honour saw a problem. She expressed that problem, and her conclusion, as follows¹⁴:

"The applicants grounded a further attack on the meteorological charges upon the differential established by cl 12 of the determination between meteorological charges for domestic flights and domestic legs of international flights and international flights.

Mr Barnes gave evidence, which I accept, that aircraft on international routes were only charged in relation to flights terminating in Australia for administrative simplicity, but that such charge covered both the inward and the outward flights. The adoption of this administrative procedure does not, of itself, in my view, offend any aspect of s 67 of the Act.

Only limited evidence was called as to the manner in which the meteorological charges for international flights were fixed. Mr Barnes gave evidence that they were fixed at a figure which reflected the proportion of the old en route charges in respect of international aircraft which related to meteorological services. His evidence was that the determination was the first which included a separate charge for meteorological services. Nothing in the evidence indicates how the proportion of the old en route charge which related to meteorological services was determined. The contention made on behalf of the applicants is, in effect, that there is no justification for the lower rates of meteorological charges in respect of international flights, and that the rates of charges fixed in respect of domestic flights were therefore not reasonably related to the expenses incurred or to be incurred by the CAA in relation to the matter to which the charges relate, as such charges resulted in

13 *Monarch Airlines Ltd v Airservices Australia* (1997) 72 FCR 534 at 569-570.

14 *Monarch Airlines Ltd v Airservices Australia* (1997) 72 FCR 534 at 575-576.

domestic operators subsidising international operators on international flights.

Mr Gemmell's concession that in 1991 the CAA would have been unable to work out the cost of providing meteorological information to particular users, by which I understand him to include particular categories of users, and the failure of any witness to articulate a rationale for the differential between the meteorological charges paid in respect of international flights and domestic flights suggests against such charges bearing a reasonable relationship to the expenses incurred by the CAA in relation to the matters to which the charges relate. The applicants' attack on the meteorological charges assessed against Compass Airline, in my view, succeeds on this ground."

59 The special leave to appeal to this Court was framed so as to exclude the subject of charges for meteorological services. Accordingly, the decision of Branson J on that matter, which was confirmed (albeit for different reasons) by the Full Court, stands. There is no appeal against the conclusion that those charges were invalid.

60 Branson J then went on to consider whether the charges in question were such as to amount to taxation, in contravention of s 67. She held that they were. The critical question, she said, was whether they could be regarded as a payment for services rendered¹⁵. It was at this point that the network approach to costing, and the lack of sufficient relationship between the value to Compass of the services provided to Compass and the charges for those services, was regarded as critical. For example, in relation to the terminal navigation charges, Branson J said¹⁶:

"... the fact that the level of the terminal navigation charges was determined by reference to the costs of maintaining facilities and services at 32 aerodromes whilst Compass Airlines aircraft landed at only six of those aerodromes, means that a 'discernible relationship', as that expression was used by the High Court in the *Air Caledonie* case, between the amount of the charges and the value of the relevant facilities and services to Compass Airlines is not, in my view, able to be identified."

61 In the Full Court of the Federal Court the leading judgment was that of Beaumont J. Although his Honour came to the same conclusion as Branson J, his

15 cf *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 467; *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 501, 507.

16 *Monarch Airlines Ltd v Airservices Australia* (1997) 72 FCR 534 at 578.

reasons were different. In particular, Beaumont J took a different approach to the interpretation both of s 67 of the Act and of the determination.

62 As to s 67, Beaumont J considered that it expressed a single composite idea, and that it contained, not two separate and disparate requirements, but one single requirement. In that respect, he considered that, when s 67 spoke of the expenses incurred "in relation to the matters to which the charge relates", the matters in question were not the services and facilities provided by the CAA viewed, together, as a network, but the specific or particular services and facilities for which a charge of the kind imposed was payable by the operator of an aircraft using those services and facilities¹⁷. This interpretation of the first limb of s 67 gave it an operation consistent with the authorities on the difference between a tax and a fee for service, which, in his Honour's view, emphasized the need for a relationship between the amount of the fee and the value of the particular services provided to the person required to pay the fee. It will be necessary to return to the concepts of value and cost in this proposition.

63 Beaumont J read the determination in a manner consistent with the meaning he gave to the first limb of s 67. The charges, he considered, were imposed for particular facilities and services, relating to particular aerodromes, and not for the services and facilities relating to all aerodromes listed in a given schedule, considered as a network, regardless of whether an individual operator used all such aerodromes.

64 Beaumont J was also of the view that the reference in s 67 to "expenses" excluded the possibility of allowing an element of profit, even in the form of a rate of return on capital.

65 Whilst accepting that, in order to satisfy the relationship required by s 67, and to avoid taxation, it was unnecessary that there be a precise correlation between charges and expenses, his Honour regarded it as necessary that "the amount, or rate, of the charge for a service or facility may be seen, when objectively viewed, to have been fixed in good faith so as to approximate the amount of the expenses incurred or to be incurred in relation to that service or facility"¹⁸. There had to be "an honest attempt to match the amount of a charge

17 *Airservices Australia v Monarch Airlines Ltd* (1998) 152 ALR 656 at 681-683.

18 *Airservices Australia v Monarch Airlines Ltd* (1998) 152 ALR 656 at 685.

with the amount expended in providing the specific service for which the charge [was] levied"¹⁹. Beaumont J summarized his conclusions as follows²⁰:

"The consequences of the Authority's failure to attempt to match, even on a 'by and large' basis, the amount or rate of a charge with the specific facility or service for which the charge is raised is reflected in the following figures and statistics. For the financial year ending 30 June 1991 more than 80% of the Authority's income came from aircraft operations. Of that total revenue, domestic jet aircraft were the source of 47%, international operators 31%, and non-jet aircraft only 4%. Yet for each of the years for which statistics are given (ie 1985-89 inclusive), the number of hours flown by GA aircraft (which were mostly non-jet) far exceeded the number of hours flown as part of domestic airline activity, and the number of GA aircraft movements (ie take-offs and landings), far exceeded the number of movements attributable to domestic and international airline activity combined.

In short, no attempt was made to match, even in approximate terms, the amount of a charge with the expense of providing a specific service as s 67 contemplated. In the result, the amount or rate of each of the charges under challenge was not 'reasonably related' to the relevant 'expenses'. Nor were they a 'true' fee for service. Accordingly, the charges also amounted to taxation, contrary to the constraints imposed by s 67.

None of this is to suggest that air safety is not important or that 'Ramsey' pricing principles lack merit. Section 67 says nothing to that effect and is simply silent on these questions. Rather, s 67 addresses an entirely different consideration, namely the relationship between the expense incurred, or to be incurred, in providing a particular service or facility to an individual operator and the amount or rate of the charge payable by the operator for that service or facility. The thrust of s 67 is that, in this scenario, the relationship must be such as not to be seen as excessive, or (really the same thing) not to amount to taxation. In fixing its charges, the Authority, instead of considering the relationship between the expense and the charge on the individual operator basis mentioned, sought to adopt a 'network' approach and to apply the 'Ramsey' principles to all its charges so as to minimise the cost that might be passed on by the operator to individual passengers. There is nothing in the language or evident purpose of s 67 to justify this course. In essence, the Authority's approach was flawed because it assumed that s 67 did no more

19 *Airservices Australia v Monarch Airlines Ltd* (1998) 152 ALR 656 at 685.

20 *Airservices Australia v Monarch Airlines Ltd* (1998) 152 ALR 656 at 685-686.

than provide that its charges must be generally 'reasonable' rather than reasonably related to relevant expenses, a very different concept."

66 Wilcox J agreed with Beaumont J. Lindgren J found it unnecessary to express a preference between the views of Branson J and those of Beaumont J on the meaning of the first limb of s 67, but agreed with both that there had been a contravention of the second limb.

67 The judges of the Federal Court found it unnecessary to consider the arguments concerning the constitutional validity of the statutory lien.

Compliance with s 67 – reasonable relationship of charges to services

68 The respondents, in seeking to uphold the ultimate conclusion of all of the judges in the Federal Court, have filed a notice of contention supporting the conclusion on additional grounds. In particular, the respondents challenge the reasoning of Branson J, insofar as it was favourable to the appellant, in certain respects.

69 Sections 66 and 67 were repealed by the *Civil Aviation Legislation Amendment Act 1995* (Cth).

70 Section 67 operated as a limitation on the power conferred by s 66. It was modelled on a provision in the *Air Navigation Act 1920* (Cth), s 26(2)(ca), which was introduced in 1974²¹, which conferred a power to make regulations concerning fees and other charges "but not being fees or charges the amounts or rates of which exceed amounts or rates that are reasonably related to the expenses incurred by Australia in relation to the matters in respect of which the fees or charges are payable or that otherwise amount to taxation".

71 In its terms, s 67 imposed two requirements, one expressed positively, and the other negatively. Whether each of those requirements amounted, in practical effect, to a mirror image of the other would depend upon the grounds advanced, in a given case, for contending that the requirements were not satisfied. In some cases, there would be substantial overlapping between the considerations relevant to the first limb and those relevant to the second limb. However, it would be wrong to say, as a universal proposition, that the two limbs could never raise separate issues. The second limb is related to, and should be understood in the light of, s 55 of the Constitution.

72 The inclusion in the amount or rate of a charge of an element designed to include a profit margin, or return on capital, was not inconsistent with either the

21 *Air Navigation Act 1974* (Cth), s 6.

first or the second limb. In that connection it is to be borne in mind that, in the present case, there was no challenge to the reasonableness of the figure of 7.5 per cent, (assuming any such margin to be permissible), and the evidence showed that it represented only a small element of the charges. Section 66 must be read in the light of other parts of the legislative scheme, including s 56²². The CAA was intended to operate on a commercial basis. In the statutory context, there is no warrant for confining the language of s 67 in such a way that it meant that a charge was not reasonably related to expenses incurred merely because it returned a commercially reasonable profit. Similarly, in the context of considering whether an imposition is a tax, or a fee for services, there is no reason why a fee for services should be limited to a fee which merely seeks to recover expenses or outgoings²³.

73 It may be accepted that the reference to expenses (incurred or to be incurred) was a reference to "amounts either disbursed or borne"²⁴. Even so, what s 67 required was a reasonable relationship to expenses and, in turn, a relation between those expenses and the matters to which the charge relates.

74 There is an issue as to the kinds of relationship comprehended by the language of s 67.

75 The references to "the charge" and "the matters to which the charge relates" direct attention to the language and scheme of the determination, read in the light of the definition of "charge" in s 66.

76 Section 66 defined "charge" as "a charge for a service or facility provided by the Authority". Central to the present dispute is the question of the level of particularity, or generality, at which the relevant service or facility provided by the Authority, for which a charge is imposed, is to be identified. The respondents contend that an examination of the determination shows that the Board imposed separate charges for the particular services or facilities used by separate aircraft in relation to each landing at a specified aerodrome. Separate charges, it is said, were imposed for each of the subcategories of air traffic services, and for the particular services and facilities used on a particular flight. Thus, charges were imposed upon Compass for the facilities and services provided each time one of its aircraft flew between, took off from, or landed at, one of the six airports to or from which Compass operated. Since the evidence showed that the expenses of the CAA, and the charges to recover those expenses, were related to the cost of providing services

22 See also s 45.

23 cf *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314.

24 *Semco Salvage and Marine Pte Ltd v Lancer Navigation Co Ltd* [1997] AC 455 at 467 per Lord Mustill.

and facilities across a network which included many airports at which Compass did not operate, and in circumstances where there was a substantial difference between the cost of providing services and facilities as between various airports, then the necessary relationship required by s 67 did not exist. Put simply, the charges imposed upon Compass for the services and facilities provided to Compass were related to the expenses of providing services and facilities which included services and facilities at or in relation to airports between which Compass never operated and at which its aircraft never landed. Even assuming, for the purposes of the argument, that the CAA's charges were reasonably related to the cost of providing a network of services and facilities, they were not related to the cost of the particular services and facilities for which Compass, a user of only part of the network, was, according to the terms of the determination, being charged.

77 The appellant, supported by the Attorney-General for the Commonwealth, argued that the relevant charges and services were to be considered at a higher level of generality. It is true, so the argument went, that landing charges, for example, were imposed in respect of each landing of a particular aircraft at a particular aerodrome, and were said to be payable in respect of the use of facilities or a service relating to an aerodrome. Similarly the fire fighting and rescue service in question was said to be a service relating to a specified aerodrome. However, that method of imposing and calculating the charges payable in respect of an individual operation did not mean that "the matters to which the charge relate[d]" were to be identified with the same particularity as applied to their exaction.

78 The CAA, it was argued, is charged with the responsibility of providing a network of services and facilities across Australia. The cost of providing some of those services and facilities at particular locations may bear little relationship to the cost of providing similar services and facilities at other locations. However, as Branson J held²⁵, the matters to which the charge created by cl 1 of the determination related were the terminal navigation facilities and services at the aerodromes referred to in Column 2 of Item 1 of Table 1, considered collectively, even though the landing of an aircraft at a specified aerodrome was what triggered the charge. Similarly, cl 11 fixed four separate *en route* charges, payable on the landing of an aircraft, but each of the four charges was in respect of "the use by the aircraft of any part of the total Australian network of air route and airway facilities and services"²⁶. On that approach to the identification of the relevant "matters", it was contended, the necessary reasonable relationship existed²⁷. In

25 *Monarch Airlines Ltd v Airservices Australia* (1997) 72 FCR 534 at 567.

26 *Monarch Airlines Ltd v Airservices Australia* (1997) 72 FCR 534 at 567.

27 cf *Allwrights Transport Ltd v Ashley* (1962) 107 CLR 662 at 668-669.

*Montchel Pty Ltd v Civil Aviation Authority*²⁸, an interlocutory matter, Pincus J had construed and applied s 67 in a manner similar to Branson J in the present case.

79 Leaving to one side its consequences for the taxation issue, the approach for which the appellant argues is to be preferred. Having regard to the nature of the statutory functions and responsibilities of the CAA, and to the interconnected nature of the services and facilities required in the interests of airline safety and efficiency, it is proper to identify the matters referred to in s 67 at the level of generality adopted by Branson J.

80 In *Airlines of NSW Pty Ltd v New South Wales [No 2]*²⁹ Barwick CJ, rejecting a suggestion that the power given by s 51(i) of the Constitution did not sustain air navigation regulations in respect of their operation upon the safety of intra-State commercial air transport, said³⁰:

"The plaintiff placed before the Court a great deal of evidence descriptive of the use and control of aerodromes, flight paths, controlled air space, navigational aids, systems of communication, and a number of other matters from which the clear conclusion must be drawn that the safety of air operations in Australia does not admit of any distinction being drawn between aircraft engaged in intra-State and those in inter-State or international air operations in connexion with all those matters which go to make up what I can compendiously call safety precautions and procedures. ...

I think the conclusion from the evidence is little, if anything, more than what I would think is within the common knowledge and understanding of all who for one moment contemplate the situation."

81 The legislation imposed upon the CAA the responsibility of providing a network of services and facilities, and, in empowering it to impose charges, it should be taken to have empowered the CAA to approach the identification of the matters to which the charges related on a network basis. The legislation did not require that particular charges for particular services be viewed in isolation from the integrated character of the network of which, necessarily, particular services are part. In the nature of the services provided by the CAA, most of which are relevant or essential to the safety of civil aviation, it is artificial to isolate a particular service, to a particular carrier, at a particular airport, and treat it as

28 (1991) 31 FCR 445.

29 (1965) 113 CLR 54.

30 (1965) 113 CLR 54 at 92.

disconnected from services provided throughout the network. Whatever might be possible in the provision of other public services, the nature of civil aviation demands integration of services for their safety and effectiveness.

82 It is true, as Beaumont J observed, that there is a difference between asking whether charges for services and facilities are reasonable and asking whether they are reasonably related to expenses incurred in relation to certain matters. However, the evidence at trial addressed the latter, and not merely the former, issue. It gave a rational explanation both for setting charges on a network basis, and for the manner in which, as between different kinds of operators and operations, charges were to be borne.

83 Both in this connection, and in connection with the taxation issue, it is to be remembered that, whilst it is in keeping with current practice to describe the CAA as a provider, on a commercial basis, of services and facilities, and to regard airlines as consumers or users of such services and facilities, there is an obligation, supported by international agreements, upon the Commonwealth to facilitate, regulate, and control air navigation, in the interests of the public as well as of operators and their customers, and many of the "services" for which Compass was being charged involved control and direction. It was open to Compass to choose to use only part of the CAA's network, but the language of the statute does not require the conclusion that the CAA was limited to charging on a basis which required segregation of costs attributable to particular aircraft on particular flights.

84 In their notices of contention the respondents argued that, even if the reasoning of Branson J on the issue considered above were to be accepted, nevertheless her Honour erred in the application of the first limb of s 67 in relation to her consideration of the significance of a number of factual matters.

85 The respondents' submissions in this regard involved, to an extent, a repetition of earlier arguments as to the approach to be taken to the meaning of s 67 and the determination. For example, in criticizing the use made of MTOW in working out the charges, it was argued that the system discriminated against larger aircraft and in favour of smaller aircraft (and hence discriminated against Compass). Insofar as such suggested discrimination was said to destroy the necessary relationship between charges and expenses, the argument is simply another way of expressing, or illustrating, the respondents' primary contention as to the meaning of the first limb of s 67. The same can be said of a number of the arguments advanced as to other matters of factual detail. However, it was also argued that the use made of MTOW went to the question of reasonableness. The same was said to apply, for example, to discrimination between international and domestic operators. As to overheads, it was said they were not known, or not sufficiently known, at the relevant time, for there to be a reasonable relationship between charges and expenses. These, and other issues raised in the notice of contention, were discussed in the evidence before Branson J and were taken into

account in her conclusions on the reasonableness of the relationships which she addressed. No reason has been shown which would justify this Court in disturbing her Honour's findings on that issue.

86 It is necessary now to consider the second limb of s 67, and the subject of taxation.

Compliance with s 67 – imposition of taxation

87 By hypothesis, we are here concerned with charges for services, and facilities, provided by the CAA to Compass. This is not a case like *Air Calendonia International v The Commonwealth*³¹ where there was an issue as to whether the compulsory exaction by a public authority could properly be described as a fee paid for the provision by the public authority of some service. A number of cases in which it was pointed out that no "particular" service was provided, for which an exaction could be regarded as a charge or fee, were cases in which either no service at all was provided to the person required to make the payment, or there was a colourable attempt to represent that the exaction was in consideration for services³². Furthermore, the question arises only because it has already been concluded that the amount or rate of the subject charge was reasonably related to the expenses incurred or to be incurred by the CAA in relation to the matters to which the charge related. If it were otherwise, there would be no occasion to consider the second limb of s 67. Nevertheless, the judges in the Federal Court regarded it as fatal to the ability of the CAA to demonstrate that the charges were not such as to amount to taxation that they were not related to the value to Compass of the particular services and facilities provided to Compass or to the cost to the CAA of providing those particular services and facilities. The corollary appears to be that, if an instrumentality of government provides services or facilities on a user-pays basis, but does not seek to relate its charges to the value of the services, or the cost of providing them, to particular users, then although its total revenues from that activity do not exceed its total expenses, (or total expenses plus a reasonable rate of return on capital), what is involved is taxation. Such a conclusion would be supported, in a different constitutional and legislative context,

31 (1988) 165 CLR 462.

32 eg *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 588; *Parton v Milk Board (Vict)* (1949) 80 CLR 229; *Swift Australian Co (Pty) Ltd v Boyd Parkinson* (1962) 108 CLR 189; *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59.

by the decision of the Supreme Court of Canada in *Re Eurig Estate*³³ that *ad valorem* fees for grants of probate were taxes. Such fees are common in Australia.

88 The Constitution, in s 53, contrasts proposed laws imposing taxation with proposed laws for the payment of fees for licences, or fees for services. However, there is no strict dichotomy. The problem is one of characterization. In *Hematite Petroleum Pty Ltd v Victoria*³⁴ a fee for a licence to operate an oil pipeline was held to be a tax. It was "an enormous impost laid directly by the legislature on three specified pipelines"³⁵. It was a means of raising revenue from the production of oil. The language of s 67 in terms recognizes that a charge for a service or facility could be such, in the particular case, as to amount to taxation.

89 What is it that would give a charge the character of one which was such as to amount to taxation? The most likely possibility would be that the charge was "devoted to building up consolidated revenue"³⁶. Compliance with the first limb of s 67 would go a long way towards negating that possibility. In the present case, the charges were not set so as to provide the Commonwealth with a source of additional revenue, and it was accepted that, if they were, they would be likely to fall foul of both limbs of s 67³⁷. The critical matter is said to be the lack of relationship between the manner in which the charges were calculated and the value to Compass of, or the cost to the CAA of providing to Compass, the particular services and facilities which it used. The question is not whether this makes the charges unfair; the question is whether it makes them taxes. The answer to the question has wide implications for instrumentalities of government operating in an environment in which the users of services and facilities are expected to bear the cost of providing them, even where such users have no practical choice but to use the services and facilities, and where some of the "services" are in the nature of public regulation and control. Do charges bear the legal character of taxation because some individual users or consumers pay more than the cost of the particular services which they use? In Australia, postal services, transportation services, educational services, and health services, amongst others, and many facilities, are provided by governments, or government instrumentalities, in circumstances where charges are imposed which take account of such factors as price sensitivity or capacity to pay, or which seek to equalize costs between, for example, rural and urban consumers, or which in some other way exhibit

33 [1998] 2 SCR 565.

34 (1983) 151 CLR 599.

35 (1983) 151 CLR 599 at 647.

36 cf *Harper v Victoria* (1966) 114 CLR 361 at 377.

37 The matter of return on capital has been dealt with earlier.

characteristics similar to those of the charges presently in question. It is not to the point that such pricing of services may have an economic effect, equivalent, or similar, to taxation. What is presently in issue is whether what is involved is taxation within the meaning of s 67 of the Act which, in turn, is to be understood in a wider constitutional context.

90 If it is necessary to concentrate upon the position of the individual user of a particular service, it is difficult to understand why one would prefer either of two different tests: the value of the service to the user, or the cost to the provider, in deciding whether there was taxation. In *Asiana Airlines v Federal Aviation Administration*³⁸ the United States Court of Appeals considered a challenge to the validity of charges imposed by the Federal Aviation Administration for services provided to aircraft which neither took off nor landed in the United States, but flew through United States air space. The Administration adopted a system of "Ramsey pricing", varying the share of total fixed and common costs allocated to a user based on the likely impact of such a cost change on that user's behaviour. This method of pricing was accepted as rational, but the Court held that it based fees on the value of the service to the user rather than on cost³⁹. The relevant statute required that each of the fees be "directly related to the Administration's costs of providing the service rendered". The fees were held invalid. The case turned on the particular statutory provision, but it illustrates, in a context similar to the present, the difference between the cost of providing services and facilities and their value to an individual user or consumer.

91 Not 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.

92 In this case:

- . the charges were not imposed to raise revenue;
- . the charges were undoubtedly charges for the provision of services and facilities;
- . the charges were imposed to recover the cost of providing such services and facilities across the entire range of users;

38 134 F 3d 393 (1998).

39 134 F 3d 393 at 402 (1998).

29.

- . the charges for categories of services were reasonably related to the expenses incurred in relation to the matters to which the charges related;
- . the services and facilities were, of their nature, part of an activity which must be highly integrated in order to be effective;
- . there was a rational basis for such discrimination between users as existed.

93 In those circumstances, there is no warrant for concluding that the charges amounted to taxation on the ground that they exceeded the value to particular users of particular services or the cost of providing particular services to particular users.

94 It has not been shown that the subject charges were such as to amount to taxation.

Validity of the statutory liens

95 It was argued on behalf of the respondents, although not decided in the Federal Court, that, even assuming the charges and penalties in question to have been validly imposed upon Compass, the provisions of the Act relating to statutory liens (ss 68 to 75) were invalid for the reason that, although they were laws for the acquisition of property for a purpose in respect of which the Parliament has power to make laws, they did not provide for the just terms required by s 51(xxxi) of the Constitution. If that argument is made good then, under the terms of the agreements relating to the payments made by the respondents to the appellant, the appeals must be dismissed.

96 The effect of the lien provisions is similar to that of the regulations under which the Civil Aviation Authority of the United Kingdom may detain aircraft in respect of which charges are due and may, if such charges remain unpaid for a certain period, sell the aircraft⁴⁰. The rationale underlying such provisions is not difficult to see. Aircraft operators, who may incur liability for charges and penalties, may have few assets within a particular jurisdiction at any given time except aircraft, and aircraft may leave a jurisdiction very quickly. As the facts of the present case show, charges in large sums can accumulate in a short time. The charges are for services related to the safety of aircraft, and those with a proprietary interest in aircraft, as well as the operators, receive a benefit from those services. They are in some respects akin to necessities supplied to a ship. The regulatory

40 See Shawcross and Beaumont, *Air Law*, 4th ed, vol 1, pars VI(18)-VI(19); Civil Aviation (Navigation Services Charges) Regulations 1998 (UK), regs 4(i) and (ii); Civil Aviation (Route Charges for Navigation Services) Regulations 1997 (UK), regs 4(1) and (9). There is, however, no constitutional provision equivalent to s 51(xxxi) to which effect must be given in the United Kingdom.

regimes which apply in various jurisdictions are likely to be widely known to owners of aircraft who may be assumed to enter into transactions affecting title to aircraft in the light of such knowledge. It is not to the point that it is possible to imagine other steps which might be taken to provide security for payment of charges and penalties. The Parliament has decided upon this regime for Australia.

97 Rights *in rem* against ships, recognized by law or granted by statute, have a long history⁴¹. So, more specifically, do maritime liens⁴². The practical problems to which such rights are directed apply to aircraft in much the same way as they apply to ships.

98 The principles which determine whether a law providing for a statutory lien, with the incidents specified in the Act, in support of a scheme of charging for services and facilities, is within the reach of the requirement of just terms stipulated by s 51(xxxi) have been considered in many recent cases. In *Mutual Pools & Staff Pty Ltd v The Commonwealth*⁴³ Brennan J⁴⁴, referring to earlier authority⁴⁵, pointed out that a grant of legislative power comprehends a power to enact provisions appropriate and adapted to the fulfilment of any objective falling within the power, and that s 51(xxxi) does not abstract the power to prescribe the means appropriate and adapted to the achievement of an objective falling within another head of power where the acquisition of property without just terms is a necessary or characteristic feature of the means prescribed. (In that context, "necessary" does not mean "indispensable".) That was the explanation of decisions that laws providing for the imposition of a tax, the compulsory payment of provisional tax, the seizure of the property of enemy aliens, the sequestration of bankrupts' property, the forfeiture of prohibited imports or the exaction of fines and penalties are not affected by s 51(xxxi). His Honour said⁴⁶:

"In my view, a law may contain a valid provision for the acquisition of property without just terms where such an acquisition is a necessary or

41 *Owners of the Motor Vessel "Iran Amanat" v KMP Coastal Oil Pte Ltd* (1999) 73 ALJR 559; 161 ALR 434.

42 See *Halsbury's Laws of England*, 4th ed, vol 43(2), par 1901.

43 (1994) 179 CLR 155.

44 (1994) 179 CLR 155 at 179-180.

45 *Wragg v State of New South Wales* (1953) 88 CLR 353 at 386; *Burton v Honan* (1952) 86 CLR 169 at 177; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 27.

46 (1994) 179 CLR 155 at 180-181.

characteristic feature of the means which the law selects to achieve its objective and the means selected are appropriate and adapted to achieving an objective within power, not being solely or chiefly the acquisition of property. But where the sole or dominant character of a provision is that of a law for the acquisition of property, it must be supported by s 51(xxxi) and its validity is then dependent on the provision of just terms."

99 In *Re Director of Public Prosecutions; Ex parte Lawler*⁴⁷ a law providing for the forfeiture of a fishing vessel operating illegally in Australian waters was held not to contravene s 51(xxxi), even though the owner of the vessel was not complicit in the offence. The considerations relevant to whether the forfeiture of property of an innocent third party, where such property has been used in the commission of an offence, is "appropriate and adapted to the enforcement of the offence-creating provision"⁴⁸, are not identical to those relevant to whether the creating of a statutory lien over an aircraft is appropriate and adapted to the provision, on a commercial basis, of services and facilities such as those provided by the CAA. However, the test is the same.

100 Having regard to the relationship between the services provided by the CAA and the safety of the aircraft concerned, the reasonableness of a system which provides that those who operate aircraft must pay charges which, in totality, will defray the cost of providing the services, the possibility that operators will have few assets in the jurisdiction apart from aircraft, the mobility of aircraft, and the desirability of providing adequate security for liabilities incurred, it is at least as easy to draw a conclusion supportive of the legislation as it was in *Ex parte Lawler*.

101 Concepts of "innocence", lack of "complicity" or "culpability" are difficult to relate to the present issue. However, the position of the respondents was not isolated from the conduct of Compass. They had leased or sub-leased aircraft to Compass. By inference, they did so knowing that such aircraft would be flown on routes to, from and within Australia, attracting charges for services and facilities provided to all airline operators. They could be taken to know that such charges were not insubstantial. Unpaid, they would accumulate to very large sums. They could readily have ascertained that provision for statutory liens existed under Australian law as under the laws of other jurisdictions involved in civil aviation of a comparable kind. By inference, it would have been open to them to protect themselves (by contract, insurance, or facilities for auditing and reporting) against

47 (1994) 179 CLR 270.

48 (1994) 179 CLR 270 at 281. In the present context there is little difference between the test of "reasonably appropriate and adapted" and the test of proportionality. See *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 377, 396; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567.

the kind of result that ensued. Without the provision of their aircraft to Compass, that company would not have been in a position to accumulate the very substantial charges which it did. We accept that s 51(xxxi) of the Constitution must not, in accordance with the authority of this Court, be given a pedantic or narrow construction. We also accept that the taking of property under a federal law is not removed from "acquisition" simply because it is described as "forfeiture". It is not the name, but the character of the taking, that controls the outcome of constitutional characterization. But, in this case, the statutory liens are valid. In our opinion they bear no similarity to outmoded notions of deodand. They were provided to secure the effectiveness of charges relating to aircraft which, of their very nature, could otherwise leave Australia with substantial debts unpaid and with no effective means for their recovery.

102 It was not argued that, assuming the charges imposed upon Compass complied with s 67 of the Act, they were beyond power. There was no attack on the validity of s 66. (At one stage it was foreshadowed that it would be argued that the lien provisions resulted in a contravention of s 55 of the Constitution, but that argument was not pressed.) There was discussion in argument as to the constitutional basis of s 66, especially insofar as it applied to intra-State operations, and non-commercial flights. However, the contentions for the respondents as propounded in the Amended Statement of Claim were as considered above. If s 66 were invalid, then the charges and penalties imposed on Compass would have been insupportable on that account, and there would have been no need to address the validity of the lien provisions.

103 Given the validity of s 66 of the Act, the existence of a power to provide services and facilities and to impose charges and penalties, and compliance with s 67, then the statutory liens were within power. They were not an acquisition of property within s 51(xxxi) of the Constitution. Accordingly, there was no constitutional requirement that the law providing for them should accord just terms to the respondents.

104 This challenge to the validity of the liens fails.

Orders

105 In each matter orders should be made which include that the appeal should be allowed; the orders of the Full Court of the Federal Court set aside; in place thereof, order that the appeal to the Full Court from the orders of Branson J be allowed in part and that the orders and declarations of Branson J be set aside. The respondent should pay the appellant's costs of the appeals to this Court and to the Full Court of the Federal Court, and four-fifths of the costs of the proceedings before Branson J.

106 Because the terms of the grant of special leave limited the extent to which the appellant could challenge the financial consequences of the decision of the Federal Court, it will be necessary for the parties to agree on the precise additional orders that should follow from the success of these appeals. They should, within a specified time, bring in short minutes of orders upon which they are agreed. In default of agreement, they should have a specified time within which they should serve on each other the short minutes of orders for which they contend, and a further time within which they should serve written submissions concerning the orders to be made. The entry of the Court's orders should be postponed until the resolution of such questions.

- 107 GAUDRON J. The facts and the history of these proceedings are set out in the joint judgment of Gleeson CJ and Kirby J. I shall repeat them only to the extent necessary to make clear my reasons for concluding that the appeals should be dismissed. I reach that conclusion not on the ground that the determination of charges made by the Civil Aviation Authority ("the Authority") pursuant to s 66(2) of the *Civil Aviation Act* 1988 (Cth) ("the Act") was invalid, but on the ground that s 69, which purports to authorise the imposition of liens for unpaid charges and penalties, is invalid in its application to the property of the respondents, being companies which did not incur those charges and penalties.

Legislative provisions relevant to the fixing of charges

- 108 The Act was amended in significant respects in 1995. It is convenient to refer to the Act as if it had been repealed. References to its provisions are references to the provisions as they stood prior to the 1995 amendments.

- 109 By s 8, the Act established the Authority, a number of whose functions were later assumed by the appellant, Airservices Australia⁴⁹. The Authority's functions included regulatory functions and, also, the provision of various civil aviation services and facilities including air route and airway facilities, and air traffic control, firefighting and other services⁵⁰. Those functions had previously been performed by the Department of Transport and Communications.

- 110 Strictly, the establishment of the Authority was simply an occasion for the vesting of governmental functions and responsibilities in a public or statutory body largely independent of government. It occurred, however, at a time of marked change in government and political economic theory. "Corporatisation", "privatisation" and "user pays" were gaining wide acceptance, along with "small government". And the "user pays" concept appears to have influenced a number of the provisions of the Act.

- 111 The Act allowed for the transfer from the Commonwealth to the Authority of various rights, assets, debts, liabilities and obligations⁵¹. Where assets were transferred from the Commonwealth to the Authority, s 51 provided for their valuation and, also, for a determination to be made as to the extent that the Authority was to be taken to have received a loan of the amount involved. In that

49 Airservices Australia was established pursuant to s 7 of the *Air Services Act* 1995 (Cth) to take over from the Authority the provision of services and facilities for safe navigation of aircraft. The functions of Airservices Australia are set out in s 8 of that Act.

50 See ss 9(1)(b), (c), (d), (e) and (f).

51 See ss 49, 50, 52 and 53.

context, s 54 provided for the identification of the capital of the Authority and for it to be repaid to "the Commonwealth at such times, and in such amounts, as the Minister determine[d]". Provision was also made for the payment of dividends to the Commonwealth⁵².

112 The Authority was established with a Board⁵³ which was "to ensure that the Authority perform[ed] its functions in a proper, efficient and economical manner"⁵⁴. The Board was to develop a corporate plan which identified the objectives of the Authority and the strategies and policies to be pursued⁵⁵. It was also to prepare a financial plan for the period covered by the corporate plan⁵⁶. When preparing that plan, the Board was required by s 45 to consider, amongst other things:

- "(e) the need to maintain a reasonable level of reserves, having regard to estimated future infrastructure requirements;
- (f) the need to maintain the extent of the Commonwealth's equity in the Authority;
- (g) the need to earn a reasonable rate of return on the Authority's assets (other than assets wholly or principally used in the performance of regulatory functions or the provision of search and rescue services);
- (h) the expectation of the Commonwealth that the Authority will pay a reasonable dividend; and
- (j) any other commercial considerations the Board thinks appropriate."

113 By s 66(2), the Board was empowered to make determinations "fixing charges and specifying the persons by whom, and the times when, the charges [were] payable" and, also, fixing penalties payable in the event that those charges were not paid within time⁵⁷. Charges and penalties were recoverable as debts due to the Authority⁵⁸. By s 66(1) "charge" was defined to mean "a charge for a service

52 Section 56.

53 Section 32A.

54 Section 32B(1)(b).

55 Section 43.

56 Section 44(2).

57 By s 66(9), a penalty was not to exceed a penalty equivalent to 1.5 per cent, or other prescribed percentage, of the unpaid amount of the charge for each month or part of a month during which it was unpaid, calculated from the day on which the charge became due and payable, and compounded.

58 Section 66(11).

or facility provided by the Authority" and, also, fees and charges for matters specified by regulation in respect of which expenses were incurred by the Authority. This case is concerned only with charges for services and facilities.

114 Charges were to be fixed in accordance with s 67 which provided:

" The amount or rate of a charge shall be reasonably related to the expenses incurred or to be incurred by the Authority in relation to the matters to which the charge relates and shall not be such as to amount to taxation."

Construction of s 67 of the Act

115 The first question which arises in relation to s 67 is whether it imposed a single composite requirement, as was held by the Full Court of the Federal Court of Australia⁵⁹, or two requirements, namely, (i) that the amount of the charge should be "reasonably related to the expenses ... in relation to the matters to which the charge relates" and (ii) that it not "amount to taxation".

116 Had s 67 of the Act required that a charge be reasonably related to the cost of providing a particular service to a particular user, there would be much to commend the view that s 67 imposed a single test for, in that event, a charge which bore that relationship to the service provided would not amount to taxation. And that construction would be reinforced by those provisions of the Act which appear to have been influenced by the "user pays" concept. However, the relationship which s 67 postulated is not a reasonable relationship between the amount of the charge and the cost of a particular service rendered to a particular user, but between the amount of the charge and "the expenses incurred or to be incurred ... in relation to the matters to which the charge relates".

117 "Matters" is a word of complete generality. And s 67 left it to the Authority to determine at what level of generality it might specify the matters in relation to which charges were determined. They might, for example, be flight services and facilities generally; they might be services or facilities of a particular kind or services and facilities provided in particular areas or at particular locations. Indeed, they might even be the particular services provided to particular users at particular times and places. But they need not be. All that s 67 required was that, once the Authority determined the matters to which the charges would relate, there should be a reasonable relationship between the rate of charge and the expenses incurred or to be incurred in relation to those matters.

118 The notion of "reasonable relationship", as postulated by s 67 of the Act, is as indeterminate as is that section's reference to "matters to which the charge

59 *Airservices Australia v Monarch Airlines Ltd* (1998) 152 ALR 656 at 679-680 per Beaumont J (Wilcox J agreeing at 686), Lindgren J not deciding.

relates". Relevantly, the relationship postulated by s 67 is between "the amount or rate of a charge" and "the expenses incurred or to be incurred". However, that relationship is to be determined in a commercial context in which the Authority was, by s 45, expected to pay dividends to the Commonwealth⁶⁰, and to make provision for infrastructure requirements, the maintenance of the Commonwealth's equity, and the need to earn a reasonable rate of return on its assets. In that context, there is a reasonable relationship between the amount of a charge for a service and the expenses incurred or to be incurred in providing that service if the charge is calculated to produce an amount equivalent to those expenses and to generate sufficient profit for future infrastructure requirements and those other matters for which the Authority was expected to provide. I have expressed the relationship as one that depends on calculation because no closer relationship can be postulated in circumstances where the relevant expenses were specified as "expenses incurred or to be incurred".

119 As already explained, however, a determination need not fix a charge for a specific facility or service. All that was required by s 67 of the Act was that a charge be fixed in relation to matters. Thus, for example, if a charge were made in relation to air services generally, there would, in my view, be a reasonable relationship with those matters if the charge were calculated to produce an aggregate amount equivalent to the expenses associated with the provision of those services and to yield a profit sufficient to meet the commercial expectations of the Commonwealth and, also, to meet the Authority's future infrastructure requirements.

120 Once it is accepted that, in its first limb, s 67 was simply postulating a relationship of the kind indicated between the rate of a charge and the expenses associated with the matters to which the charge related, which matters might be specified at any level of generality, there is ample scope for the independent operation of the requirement that the rate of charge not "amount to taxation". Thus, in my view, s 67 is to be construed as having two separate requirements, each of which had to be satisfied for a valid determination to be made. The meaning and effect of the requirement that the amount or rate of a charge not amount to taxation will be discussed later in these reasons.

The Determination

121 On 26 June 1991, the Authority made a determination under s 66(2) of the Act ("the Determination") fixing various charges, including what were called "Landing Charges", "En-route Charges" and "Meteorological Charges". No issue

60 See also s 56.

arises in these appeals with respect to meteorological charges and no further reference will be made to them⁶¹.

122 "Landing charge" was defined in the Determination to mean "a charge payable in respect of use by aircraft of facilities or a service relating to an aerodrome". The charge, which was expressed in the Determination to be imposed in respect of each landing, had two components: one for "Terminal navigation facilities and services" and the other for a "Fire fighting and rescue service". However, as the definition makes clear, the charge was not for terminal navigation and fire fighting services, as such, but for "use by aircraft of facilities or a service relating to an aerodrome". The rate for each component of the landing charge was fixed at a rate per 1,000 kilograms of maximum takeoff weight, with the aerodromes at which the charge was payable varying as between avtur and non-avtur aircraft⁶².

123 By cl 11 of the Determination, a charge was made payable on each landing "[i]n respect of the use by an aircraft of air route and airways facilities and services operated or provided in Australian territory". The Determination called these charges "En-route charges". They were calculated by reference to specified formulae which again differed as between avtur and non-avtur aircraft and, also, as between flights within and flights into Australia. The formulae took account of the distance travelled between aerodromes within Australia or, in the case of aircraft flying international routes, the distance travelled within Australian air space and, also, maximum takeoff weight or its square root.

61 At first instance, Branson J found that the meteorological charges levied by the Authority pursuant to the Determination were invalid. This was confirmed by the Full Court of the Federal Court, but on different grounds. The grant of special leave to appeal to this Court excluded all questions relating to meteorological charges.

62 "Avtur aircraft" is defined by the interpretation clause in the Determination as meaning an aircraft powered by an engine or engines using aviation turbine kerosene. "Non-avtur aircraft" is defined as meaning an aircraft other than an avtur aircraft.

The respondents' contentions with respect to the charges

124 By Notices of Contention, the respondents raise various matters relating to the charges fixed by the Determination. By reference to those matters it was argued on their behalf that the landing and en-route charges offended each of the requirements in s 67 of the Act. In order to understand their argument, it is necessary to say something as to the method by which the charges were fixed and, also, as to their differential impact on different users.

125 At first instance, Branson J accepted the evidence of Mr Christopher Barnes as to the manner in which the charges were fixed. At the relevant time, Mr Barnes was employed by the Authority as its Manager, Business Strategy. Her Honour summarised his evidence as follows⁶³:

"Mr Barnes' evidence was that the first step was for an estimate to be made of the total outgoings of the [Authority] for the 1991-92 year. The second was to calculate the total value of the [Authority's] assets and to calculate 7.5 per cent of such value. Interest to be paid was deducted from the estimated outgoings and 7.5 per cent of the value of the [Authority's] assets added to the estimated outgoings. The figure which resulted from this procedure was treated as the cost of the [Authority]. The cost ... was then broken down into the cost of each service so that the aggregate of the revenue from each service covered the cost of the [Authority]."

Mr Barnes accepted that the break down of the total costs into the costs for each service or facility for which charges were to be determined could not be done with complete accuracy. Particularly was that so with respect to indirect costs and support costs. His evidence was that the allocation of costs was done on the basis of a 1988 cost allocation study⁶⁴.

126 The next step in the process of fixing the charges was to allocate costs to particular users. This was done by application of what are known as "Ramsey pricing principles". According to the evidence, those principles, in their application to public sector monopolies, involve:

1. the recovery of total costs from users as a group;
2. each user paying the marginal cost of each service, ie the increment to total cost entailed in producing one extra unit of service;

⁶³ *Monarch Airlines Ltd v Airservices Australia* (1997) 72 FCR 534 at 561.

⁶⁴ (1997) 72 FCR 534 at 561.

3. the setting of prices for different users in inverse relation to their price sensitivity.

127 The result of the application of Ramsey pricing principles was that the charge to a particular user for a particular service did not necessarily reflect the cost to the Authority of providing that service. In this context, it was contended on behalf of the respondents that the charges favoured international operators over domestic operators and non-avtur aircraft over avtur aircraft. It was also put that use of maximum takeoff weight or its square root in the calculation of charges had the consequence that the charge levied for a particular service to a particular aircraft was not related to the cost of providing that service. It was by reference to these matters that it was argued that the charges fixed by the Determination contravened the requirements of s 67 of the Act.

Reasonably related: the matters in relation to which the charges were made

128 The first step in determining the question of reasonable relationship, for the purposes of s 67, is to ascertain, in the case of each charge, "the matters to which the charge relates". So far as the landing charge is concerned, those matters are identified by the definition of "landing charge" as "use by aircraft of facilities or a service relating to an aerodrome". Clearly, the definition is not directed to particular aircraft, particular facilities or particular services. And although it is, perhaps, less clear, it is not directed to the facilities or service provided at any particular aerodrome. That follows from the use of the indefinite article – "an aerodrome" – in a context in which there is an absence of specificity in relation to aircraft, facilities or services.

129 So, too, the "matters" in relation to which en-route charges were fixed were not particular facilities or services. Rather, by cl 11 of the Determination, the relevant matter was "the use by an aircraft of air route and airways facilities and services operated or provided in Australian territory". In a context involving the provision of air route and airways facilities and services generally, the use of the indefinite article in the expression "an aircraft" is to be taken to refer to aircraft in the abstract and not to any particular aircraft.

130 Once it is appreciated that, for the purposes of s 67 of the Act, the matters to which the charges fixed by the Determination relate are, respectively, facilities and services relating to an aerodrome, generally, and air route and airways services, generally, it follows that the relationship required was not a relationship between a charge and the cost of the particular service or services provided, but a relationship between the charge and the expenses incurred or to be incurred with respect to the provision generally of the services and facilities to which the charge related.

131 As the landing and en-route charges were calculated to produce an aggregate return covering the costs of the services and facilities to which each charge related

together with a profit calculated at 7.5 per cent of that proportion of the Authority's assets allocated to those services and facilities, which assets did not include those used for its regulatory functions, it cannot be said that the charges were not reasonably related to the expenses incurred or to be incurred in relation to the matters to which they related. And because each charge was fixed by reference to services and facilities generally, it is irrelevant that it was not reasonably related to the cost of supplying a particular service or particular services to a particular user.

Taxation: fee for service

132 A tax is traditionally understood as "a compulsory exaction of money by a public authority for public purposes, enforceable by law, and ... not a payment for services rendered"⁶⁵. There was nothing in the Act to suggest that the second requirement of s 67 was intended to do other than reflect that meaning. More precisely, it is clear that that requirement was directed to ensuring that the amount of any charge was such that it might properly be characterised as a fee for service. That is so because, in the context of the Act, any determination by the Authority would necessarily involve the exaction of money by a public authority for a public purpose. And because money was to be exacted by what was, in essence, a public sector monopoly, the charge inevitably involved practical, if not legal, compulsion⁶⁶.

133 For an exaction to constitute a fee for service, some service must actually be provided to the person liable to pay. It is not sufficient that the charge be levied to defray the expenses of an authority charged with the performance of functions which benefit the class of persons from whom it is exacted⁶⁷. There must be "particular identified services provided or rendered individually to, or at the request or direction of, the particular person required to make the payment"⁶⁸. In

65 *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 276 per Latham CJ.

66 As to practical compulsion, see *General Practitioners Society v The Commonwealth* (1980) 145 CLR 532 at 561 per Gibbs J (Barwick CJ, Stephen, Mason, Murphy and Wilson JJ agreeing), who assumed, without deciding, that practical compulsion would be sufficient to render a charge a tax. Aickin J expressly held that practical compulsion would be sufficient (at 568). See also *Re Eurig Estate* [1998] 2 SCR 565 at 577 per Major J (Lamer CJ, L'Heureux-Dubé, Cory and Iacobucci JJ concurring).

67 See *Parton v Milk Board (Vict)* (1949) 80 CLR 229 at 258-259 per Dixon J. See also *Swift Australian Co (Pty) Ltd v Boyd Parkinson* (1962) 108 CLR 189 at 200 per Dixon CJ (Kitto and Windeyer JJ agreeing), 222 per Menzies J (Taylor J agreeing); *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 63 per Gibbs J.

68 *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 469-470.

the present case, services were undoubtedly rendered individually to the person required to make the payment and, if not expressly requested by that person, then impliedly so. And the fact that there was some practical compulsion as to the use of those services cannot alter the character of a charge if it is otherwise a fee for service⁶⁹.

134 The argument for the respondents that the charges were not properly to be characterised as fees for service had two prongs: the first was that there was no relevant relationship between the charges and the services provided to individual users; the second, that by reason of the application of Ramsey pricing principles, some users were subsidising others. In essence, however, those matters raise identical questions, namely, whether there must be some relationship between the amount charged and the services provided before the charge can be characterised as a fee for service, and, if so, the nature of that relationship.

135 There are a number of statements in decisions of this Court to suggest that some relationship may be necessary if a charge is properly to be characterised as a fee for service. Thus, in *General Practitioners Society v The Commonwealth*⁷⁰ it was hypothesised that "an exaction may be so large that it could not reasonably be regarded as a fee". Similarly, in *Hematite Petroleum Pty Ltd v Victoria*⁷¹, Wilson J considered that the size of the impost there in question required "its rejection as a fee for services and its characterization as a tax". And in *Air Caledonie International v The Commonwealth*⁷² it was said:

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

69 *General Practitioners Society v The Commonwealth* (1980) 145 CLR 532 at 562 per Gibbs J (Barwick CJ, Stephen, Mason, Murphy and Wilson JJ agreeing).

70 (1980) 145 CLR 532 at 562 per Gibbs J (Barwick CJ, Stephen, Mason, Murphy and Wilson JJ agreeing). This possibility was also implicitly accepted by Aickin J (at 568-571). See also *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 63 per Gibbs J, where in holding the impost there in question to be a tax, his Honour referred to the fact that the impost was not payable in respect of services rendered to the person required to pay the impost, and bore no necessary relation to the expenditure incurred in providing the services.

71 (1983) 151 CLR 599 at 647.

72 (1988) 165 CLR 462 at 467.

136 Conversely, and as might be expected, the fact that a charge bears a close relationship with the cost or value of a service or the grant of a valuable right has been seen as indicating that it is not a tax. Thus, for example, in *Harper v Victoria*, where the legislation under consideration required that expenditure be estimated for grading eggs and fees fixed accordingly, it was held that the charge was not a tax, but a fee for services, as "the fee [was] exacted ... to defray the cost of those services"⁷³. Similarly, in *Harper v Minister for Sea Fisheries*, it was said that the most important factor in determining that the fee involved in that case (a fee for a licence to take abalone for commercial purposes) was not a tax was that it was "possible to discern a relationship between the amount paid and the value of the privilege conferred by the licence"⁷⁴.

137 In the course of argument, the respondents placed particular reliance on the decision of this Court in *Swift Australian Co (Pty) Ltd v Boyd Parkinson*⁷⁵ and, also, on the decision of the Supreme Court of Canada in *Re Eurig Estate*⁷⁶. In *Boyd Parkinson* a charge was levied "for the purpose of defraying the expenses of inspection of meat for sale and of carrying [the legislation authorising their imposition] into effect"⁷⁷. Dixon CJ said that, perhaps, the latter consideration was "fatal to the argument" that the charge in question was a fee for service⁷⁸.

138 In *Re Eurig Estate*, probate fees which were calculated according to the value of an estate were held to constitute a tax rather than a fee for service because of the "absence of a nexus between the levy and the cost of the service". That was so, it was held, by reason that "the cost of granting letters probate bears no relation to the value of [the] estate"⁷⁹.

139 The cases upon which the respondents rely involved circumstances quite different from the present. In particular, *Boyd Parkinson* was not concerned with a fee charged solely to defray the expenses associated with the services provided or to be provided. Nor, it is to be inferred, was *Re Eurig Estate*. Moreover, those cases were not concerned with the provision of services on a commercial basis.

73 (1966) 114 CLR 361 at 377 per McTiernan J. See also at 378 per Taylor J, 379 per Menzies J, 382 per Owen J.

74 (1989) 168 CLR 314 at 336 per Dawson, Toohey and McHugh JJ.

75 (1962) 108 CLR 189.

76 [1998] 2 SCR 565.

77 (1962) 108 CLR 189 at 200.

78 (1962) 108 CLR 189 at 200.

79 [1998] 2 SCR 565 at 579.

And although the service in question in *Boyd Parkinson* may have had some commercial value, it was provided as part of a regulatory scheme.

140 The services in question in these appeals were services which clearly had a commercial value and were to be provided on a commercial basis. They were levied at a rate calculated to defray the cost of those services together, only, with a profit to cover future infrastructure requirements and to satisfy the Commonwealth's commercial expectations with respect to its capital investment. And although the Authority had regulatory functions, the services for which charges were exacted were provided commercially and not as part of a regulatory scheme.

141 In a commercial context of the kind described, it seems to me that, notwithstanding that charges apply differently to different users and reflect neither the cost nor the value of the particular service rendered, they are properly characterised as fees for service if three conditions are met. The first is that they are levied only against persons who use the services. The second is that they are levied against all such users. The third is that there is a commercial justification for discriminating between different users.

142 It is not in issue that only those who used or availed themselves of the services and facilities provided by the Authority were liable to pay the charges now in question and that all such users were liable to a charge for their use. Moreover, where services are provided by a public sector monopoly on a commercial basis, there is a sound reason for fixing prices according to price sensitivity or demand elasticity. Put at its simplest, if those who are price sensitive are forced out of the market, the cost to others will necessarily increase. That being so, the landing and en-route charges are, in my view, properly to be characterised as fees for services and do not involve any element of taxation.

Liens: relevant legislative provisions

143 Subject to s 76, which is not presently relevant, s 69(1) of the Act relevantly allowed that if a charge payable in respect of an aircraft was not paid at the end of a payment period, the charge or penalty in respect of that charge remained unpaid and an appropriate officer directed the Registrar to make an entry in the Register, there was "vested in the Authority in respect of the aircraft a statutory lien covering the following:

- (d) the charge or penalty;
- (e) any penalty that becomes payable in respect of the charge after the entry is made;
- (f) any further outstanding amounts in respect of the aircraft".

144 By s 72, the Authority was empowered to seize any aircraft in respect of which any "outstanding amount covered by the statutory lien [was] unpaid at the end of 9 months after the day on which it became an outstanding amount or the day on which the lien was registered, whichever [was] the later". And by s 73, the Authority was given power to sell the aircraft. Section 70(2) provided that:

- " For the purposes of priorities amongst creditors and the purposes of the distribution of the proceeds of a sale made under section 73, the statutory lien has effect as *a security interest in respect of the aircraft* ranking in priority:
- (a) after any security interest (other than a floating charge) in respect of the aircraft created before the time of registration of the statutory lien, to the extent that that security interest covers a debt incurred before that time; and
 - (b) before any security interest not falling within, or to the extent that it does not fall within, paragraph (a)." (emphasis added)

Statutory liens: s 51(xxxi) of the Constitution

145 If valid, the effect of ss 69 and 70(2) of the Act, the latter of which gave a lien "effect as a security interest in respect of [an] aircraft", was to vest in the Authority an interest in property which it did not otherwise have. The question is whether, in its statutory context, s 69 is properly to be characterised as a law for "the acquisition of property" for the purposes of s 51(xxxi) of the Constitution.

146 Section 51(xxxi) of the Constitution empowers the Commonwealth to make laws with respect to "the acquisition of property on just terms ... for any purpose in respect of which the Parliament has power to make laws". It is well settled that

s 51(xxxi) operates as a guarantee of just terms⁸⁰ and, also, that it operates whether or not the acquisition is by the Commonwealth⁸¹.

- 147 It is also well settled that the guarantee contained in s 51(xxxi) does not apply to a law that is not properly characterised as a law for the acquisition of property even though the law affects property interests⁸². Nor does it apply to a law of a kind that does not permit of just terms⁸³. Moreover, it does not apply to a law which is supported by a head of legislative power that clearly authorises the

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- 80 *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 201-202 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ; *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 509 per Mason CJ, Brennan, Deane and Gaudron JJ; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 184 per Deane and Gaudron JJ; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 303 per Mason CJ, Deane and Gaudron JJ, 320 per Toohey J.
- 81 *McClintock v The Commonwealth* (1947) 75 CLR 1 at 23 per Starke J, 36 per Williams J; *P J Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382 at 401 per Latham CJ, 423 per Williams J (Rich J agreeing), 430 per Webb J; *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 404-405 per Barwick CJ, 407-408 per Gibbs J, 427 per Mason J, 452 per Aickin J; *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 510-511 per Mason CJ, Brennan, Deane and Gaudron JJ, 526 per Dawson and Toohey JJ.
- 82 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372 per Dixon CJ (Fullagar, Kitto, Taylor and Windeyer JJ agreeing). As to cases which fall within this category, see *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 172 per Mason CJ, 191 per Deane and Gaudron JJ; *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 236-237 per Mason CJ, Deane and Gaudron JJ; *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 161 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.
- 83 See *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 187 per Deane and Gaudron JJ, 220 per McHugh J. As to cases in this category, see *R v Smithers*; *Ex parte McMillan* (1982) 152 CLR 477 at 487-489; *Re Director of Public Prosecutions*; *Ex parte Lawler* (1994) 179 CLR 270 at 285 per Deane and Gaudron JJ. For other cases which, although not discussed in terms of laws which do not permit of just terms, may nevertheless be perceived as falling into this category, see *Burton v Honan* (1952) 86 CLR 169; *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361.

acquisition of property otherwise than on just terms⁸⁴, as, for example, the taxation power.

148 The laws which stand apart from the guarantee in s 51(xxxi) of the Constitution do not constitute discrete categories of exception. Thus, for example, a law which is not properly characterised as a law for the acquisition of property because it is a law adjusting competing rights and interests may also be a law enacted under a head of power which clearly authorises the acquisition of property other than on just terms⁸⁵. Whatever the precise relationship between the various categories of exception, however, a law under s 51 of the Constitution which operates to vest a person's property in another for a purpose for which the Commonwealth has power to make laws and which does not fall within one of those exceptions is a law to which the guarantee in s 51(xxxi) of the Constitution applies.

149 In determining whether the liens provisions of the Act are laws which attract the guarantee of just terms in s 51(xxxi) of the Constitution, it is convenient to first consider by which heads of legislative power, s 51(xxxi) aside, they might be supported. The two most obvious are the power to legislate with respect to "trade and commerce with other countries, and among the States" (s 51(i))⁸⁶ and the power to legislate with respect to external affairs (s 51(xxix))⁸⁷, including, in relation to those powers, what is known as "the implied incidental power". The only other relevant heads of power are s 122, so far as concerns civil aviation in the Territories, and, possibly, the power to legislate with respect to "foreign

84 As to why this is so, see *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 508-509 per Mason CJ, Brennan, Deane and Gaudron JJ; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 169-172 per Mason CJ, 177-178 per Brennan J, 187-188 per Deane and Gaudron JJ, 220-222 per McHugh J.

85 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 189 per Deane and Gaudron JJ. For an example of a case where a law simultaneously fell into these two categories, see *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160-161 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

86 See, with respect to the relevance to civil aviation of s 51(i), *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 56-57 per Latham CJ, 71 per Rich J, 81-83 per Dixon J, 106-107 per Williams J. To the extent that s 51(i) is relevant to civil aviation within States, see *Airlines of NSW Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54 at 92-93 per Barwick CJ.

87 See, with respect to the relevance to civil aviation of s 51(xxix), *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 641-642 per Latham CJ, 658-659 per Starke J, 670 per Dixon J, 696 per Evatt and McTiernan JJ.

corporations, and trading or financial corporations formed within the limits of the Commonwealth" (s 51(xx)).

150 As already indicated, the taxation power is one that clearly authorises the acquisition of property and will thus support laws which are not subject to the guarantee effected by s 51(xxxi) of the Constitution⁸⁸. So too is the power to legislate with respect to bankruptcy and insolvency (s 51(xvii))⁸⁹ and that with respect to "the acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State"⁹⁰. And in *Nintendo Co Ltd v Centronics Systems Pty Ltd* it was held that the legislative power with respect to "copyrights, patents of inventions and designs, and trade marks" (s 51(xviii)) clearly authorises laws which, "at their commencement, impact upon existing proprietary rights"⁹¹.

151 The acquisition of property other than on just terms is not clearly authorised by the trade and commerce power. Nor is it clearly authorised either by the corporations power or by the external affairs power⁹². Accordingly, so far as the liens provisions might otherwise have been enacted under s 51 of the Constitution, they do not fall outside s 51(xxxi) on the basis that they are laws enacted under a

88 See, in this regard, *Commissioner of Taxation v Clyne* (1958) 100 CLR 246 at 263 per Dixon CJ (McTiernan, Williams, Kitto and Taylor JJ agreeing); *Federal Commissioner of Taxation v Barnes* (1975) 133 CLR 483 at 494-495 per Barwick CJ, Mason and Jacobs JJ, 500 per Gibbs J; *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 638 per Gibbs CJ, Wilson, Deane and Dawson JJ (Murphy J agreeing), 649 per Brennan J; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 170-172 per Mason CJ, 224 per McHugh J.

89 See, in this regard, *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372 per Dixon CJ (Fullagar, Kitto, Taylor and Windeyer JJ agreeing); *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 170 per Mason CJ, 178 per Brennan J, 188 per Deane and Gaudron JJ.

90 Section 51(xxxiii) of the Constitution. See, as to this head of power, *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 170 per Mason CJ.

91 (1994) 181 CLR 134 at 160 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

92 With respect to the external affairs power, see *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 532 per Brennan CJ, 568-569 per Gaudron J; *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 31 per Toohey J, 101 per Kirby J (both of their Honours dissenting, but only as to their conclusions).

head of power which clearly authorises the acquisition of property "unaccompanied by any quid pro quo of just terms"⁹³.

152 It is arguable that different considerations apply with respect to laws passed under s 122 of the Constitution. In *Newcrest Mining (WA) Ltd v The Commonwealth*⁹⁴, a law for the acquisition of property which was otherwise properly characterised as a law with respect to external affairs and, at the same time, a law pursuant to s 122 for the government of a Territory, was held to be subject to the guarantee effected by s 51(xxxi). However, there was not a clear majority for the view that s 122 does not stand apart from s 51(xxxi) of the Constitution⁹⁵. My own view is that it does not⁹⁶. However, that question can be put to one side. There is no suggestion that the liens provisions in their operation in this case can be supported as laws under s 122.

153 Nor, in my view, can s 69 of the Act, in its application to persons or corporations who or which did not incur debts or penalties giving rise to a lien, be said to stand apart from s 51(xxxi) on the basis that it is not properly characterised as a law for the acquisition of property. It is well settled that "a law which is not directed towards the acquisition of property as such but which is concerned with the adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity is unlikely to be susceptible of legitimate characterization as a law with respect to the acquisition of property for the purposes of s 51 of the Constitution"⁹⁷.

93 *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

94 (1997) 190 CLR 513.

95 Brennan CJ (at 542-544), Dawson J (at 550-552), Toohey J (at 560-561) and McHugh J (at 574-576) were of the view that s 122 stood apart from s 51(xxxi) of the Constitution. Gaudron J (at 561), Gummow J (at 591-614) and Kirby J (at 652-662) were of the view that s 122 did not.

96 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 561.

97 *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 161 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ, referring to *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 510 per Mason CJ, Brennan, Deane and Gaudron JJ; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 171-172 per Mason CJ, 178 per Brennan J, 189-190 per Deane and Gaudron JJ; *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 236 per Mason CJ, Deane and Gaudron JJ; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 306-307 per Mason CJ, Deane and Gaudron JJ.

154 So far as concerns aircraft owned by persons or corporations who or which have incurred charges and penalties giving rise to a statutory lien pursuant to s 69 of the Act, the liens provisions are, in my view, properly to be characterised as laws adjusting the competing rights and claims of their existing and future creditors, rather than laws "directed towards the acquisition of property as such"⁹⁸. However, that is not the case with persons or corporations who or which have not incurred the charges or penalties concerned.

155 A person or corporation who or which did not incur penalties or charges giving rise to a lien cannot be said to be in a relevant relationship with anyone other than the person or corporation who or which, in the course of using the first mentioned person's or corporation's aircraft, incurred the charges or penalties involved. In this case, the relevant relationship was that of lessor and lessee, a relationship which, of itself, did not give rise to rights or obligations which might fairly be said to be in competition with the rights and obligations of others. True it is that there might, at some stage, also be a debtor and creditor relationship based in the lessor and lessee relationship and, although it is not necessary to decide the question, a law which postponed entitlement to recover moneys owing under the lease until charges or penalties owing to the Authority were paid would, in my view, be a law adjusting competing rights and claims and not one that is properly characterised as a law for the acquisition of property.

156 Whatever might be the situation with respect to a law ordering priority between creditors, a law which operates to acquire a security interest in the property of a person to satisfy charges or penalties incurred by another is not, itself, adjusting competing claims or interests. At least that is so when there is no relationship between the former and the person or body to whom the charges or penalties are payable, as, for example, would be the case if the former had guaranteed payment of those charges or penalties. Absent a relationship of that kind, a law acquiring a security interest in the property of a person who did not incur the charges or penalties is not adjusting any interest of or claim by that person, or any obligation owed by him or her. It is simply appropriating a security interest in that person's property. The fact that, once appropriated, that interest may be utilised to adjust the competing claims and interests of creditors, of which that person may be one, cannot alter the fact that it is primarily a law for the acquisition of property and is properly characterised as such.

157 It remains to be considered whether s 69 of the Act can be described, in its application to third parties, as a law which does not permit of just terms and which, thus, stands apart from s 51(xxxi) of the Constitution. Laws for the forfeiture of

⁹⁸ *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 161 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

the property of enemy aliens⁹⁹ or property used in the contravention of the criminal law are laws of that kind. And in certain circumstances, the Parliament may legislate to effect a forfeiture of the property of a person who has not been involved, either directly or indirectly, in any contravention of the law. Thus, in *Re Director of Public Prosecutions; Ex parte Lawler*¹⁰⁰, a law for the forfeiture of a vessel engaged in commercial fishing in the Australian fishing zone in contravention of a law of the Parliament was held to stand outside the guarantee effected by s 51(xxxi) of the Constitution notwithstanding that the owner was not in any way involved in that contravention.

158 In *Lawler*, Deane J and I pointed out that a law for the forfeiture of property, even that of a person not involved in a contravention of the law, is a law "in connexion with which 'just terms' is an inconsistent or incongruous notion"¹⁰¹ and which, on that account, stands outside s 51(xxxi). We pointed out, however, that "[a]lmost invariably, the validity of a law which effects or authorizes forfeiture of the property of 'an innocent third party' ... will depend on the law being reasonably incidental to the [legislative] power [pursuant to which the law in question was enacted]"¹⁰². We added that, in our view, a law of that kind would "not often satisfy the tests which reveal whether a law is reasonably incidental to a head of legislative power"¹⁰³. I think it may be doubted whether, in their application to the property of persons who did not incur the charges or penalties giving rise to a lien, the liens provisions of the Act can properly be described as reasonably incidental to any of the heads of legislative power which otherwise supported the Act. However, that question can be put to one side. Liens, even statutory liens, are not, in my view, inconsistent with the notion of "just terms".

159 Leaving aside a maritime lien, which in some circumstances operates to affect the property interests of a person who did not incur the debt or obligation secured by it, a lien ordinarily comes into existence by reason that some service has been rendered to the person whose property is affected¹⁰⁴, some advance has

99 See *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361.

100 (1994) 179 CLR 270.

101 (1994) 179 CLR 270 at 285.

102 (1994) 179 CLR 270 at 285-286.

103 (1994) 179 CLR 270 at 286.

104 As in the case of a solicitor's lien.

been made to him or her¹⁰⁵, or, at his or her request¹⁰⁶, or goods have been sold to him or her and the purchase price not paid. Ordinarily, the lien is the just quid pro quo for what has been provided to the person whose property is affected. At the very least, it contemplates a transaction which directly benefits the person whose property is affected. In that sense, there is no inconsistency between the notion of just terms and the imposition of a statutory lien.

160 Absent any direct benefit to the person whose property is affected, however, a lien simply effects an acquisition of property. The guarantee effected by s 51(xxxi) would be rendered nugatory if Parliament could legislate pursuant to some other head of legislative power to impose a lien where there is no direct benefit to the person whose property is affected.

161 Before leaving this matter, it is convenient to refer to maritime liens, with which the liens provisions of the Act bear some similarity. As with the liens provisions of the Act, a maritime lien may operate to affect the interests of a person other than the person who incurred the debt or obligation secured by it. It may be that, given the long history of maritime liens, a law imposing a new maritime lien, so far as it affects the property interests of persons who did not incur any debt or obligation, could properly be characterised as a law of the kind that does not permit of just terms. If so, that is because of the history of maritime liens – a history which predates the Constitution. In my view, the guarantee of just terms effected by s 51(xxxi) negates the possibility of the creation of statutory liens affecting the property of third parties in any other context.

162 The appeals should be dismissed.

105 As in the case of a banker's lien.

106 As in the case of a lien by agreement over the property of a guarantor.

163 McHUGH J. The first issue for determination in these factually complex appeals is whether certain charges, purportedly imposed on Compass Airlines by Airservices Australia (formerly the Civil Aviation Authority¹⁰⁷) for the use of the Authority's airways facilities and services in Australia, were validly imposed. The respondents challenge the validity of the charges on the ground that the determination imposing the charges was ultra vires s 67 of the *Civil Aviation Act* 1988 (Cth) ("the Act")¹⁰⁸ which provided:

"Limits on charges

67 The amount or rate of a charge shall be reasonably related to the expenses incurred or to be incurred by the Authority in relation to the matters to which the charge relates and shall not be such as to amount to taxation."

164 The first issue is in effect a twofold question:

- (1) Was the amount or rate of the charges imposed by the Authority pursuant to the determination reasonably related to the expenses incurred or to be incurred by the Authority in relation to the matters to which the charges related? and
- (2) If so, were the charges such as to amount to taxation?

165 If the charges were validly imposed under s 67, the second issue in the appeal is whether the Act could constitutionally authorise statutory liens to be imposed on aircraft which had incurred charges that remained unpaid. The respondents challenge the validity of the liens on the ground that the sections of the Act imposing the liens are beyond the power of the Parliament because they are a law with respect to the "acquisition of property" other than on "just terms" within the meaning of s 51(xxxi) of the Constitution.

107 The *Air Services Act* 1995 (Cth) established Airservices Australia as a body corporate which may sue and be sued in its corporate name. Although proceedings were originally commenced by the present respondents against the Civil Aviation Authority ("the Authority"), pursuant to s 11 of the *Civil Aviation Legislation Amendment Act* 1995 (Cth), Airservices Australia was substituted for the Authority in the proceedings with the same rights and obligations as the Authority had. In this judgment I will refer to the body corporate as the Authority, as it was known at the time of the events giving rise to this litigation.

108 The Act was significantly amended in 1995. References to the Act in this judgment are references to the Act as it stood at the time of the events giving rise to this litigation.

166 In my opinion, the charges levied by the Authority were validly imposed. The amount or rate of each charge was reasonably related to the expenses incurred or to be incurred by the Authority in relation to the matters to which the charge related, and the charges were not such as to amount to taxation. In addition, the provisions of the Act imposing the statutory liens are constitutionally valid. They are not laws within s 51(xxxi) of the Constitution which requires the provision of just terms, but are valid laws pursuant to s 51(i) of the Constitution. Accordingly, these appeals should be allowed.

I THE FACTUAL AND LEGAL BACKGROUND

The circumstances giving rise to these appeals

167 The respondents are Monarch Airlines Limited ("Monarch Airlines"), Polaris Holding Company ("Polaris") and Canadian Airlines International Limited ("Canadian Airlines"). Polaris owned two aircraft which it leased to Compass Airlines pursuant to two lease agreements, each of which was dated 25 June 1990. The two aircraft were subsequently registered in Australia as VH-YMA and VH-YMB. The lease relating to the aircraft VH-YMA commenced in April 1991 and the lease relating to the aircraft VH-YMB commenced in August 1991. Monarch Airlines was at all relevant times the lessee of two aircraft which, pursuant to two sub-lease agreements dated 29 June 1990, it sub-leased to Compass Airlines. The aircraft were subsequently registered as VH-YMJ and VH-YMK. The sub-lease relating to the aircraft VH-YMK commenced on 14 November 1990 and the sub-lease relating to the aircraft VH-YMJ commenced on 28 November 1990. Canadian Airlines, as lessor, entered into a lease agreement dated 5 June 1991 with Compass Airlines, as lessee, for the lease of an aircraft which was subsequently registered in Australia as VH-YMI.

168 Thus, Compass Airlines was relevantly the lessee of five aircraft:

- two of which (VH-YMA and VH-YMB) Polaris had an interest in as owner and lessor;
- two of which (VH-YMJ and VH-YMK) Monarch Airlines had an interest in as head lessee and sub-lessor; and
- one of which (VH-YMI) Canadian Airlines had an interest in as owner and lessor.

169 Between 1 December 1990 and 20 December 1991, Compass Airlines flew aircraft on domestic routes within Australia. The aircraft flown by Compass Airlines at various times during this period included the five leased aircraft referred to above ("the leased aircraft"). From time to time, the Authority rendered invoices to Compass Airlines in respect of charges purportedly payable to the Authority by Compass Airlines as a result of the use by the leased aircraft of facilities and services provided by the Authority. The charges were levied pursuant to a

determination of the Board of the Authority which was purportedly made under s 66 of the Act.

- 170 During the period 1 September 1991 to 1 January 1992, invoices were rendered by the Authority to Compass Airlines on account of the charges purportedly incurred by each of the leased aircraft. The table below sets out the amount invoiced in this period in respect of each aircraft and the amount paid by Compass Airlines in respect of each of the aircraft, as allocated to the various invoices by the Authority.

Aircraft	Total invoiced	Amount paid
VH-YMA	\$3,191,037.18	\$731,076.60
VH-YMB	\$2,538,344.41	Nil
VH-YMJ	\$3,170,733.16	\$1,036,431.58
VH-YMK	\$3,133,716.30	\$1,529,557.86
VH-YMI	\$3,162,938.39	\$408,586.65

- 171 Compass Airlines did not pay any of these amounts in full with the result that on 18 December 1991 s 69 of the Act purportedly vested in the Authority a statutory lien in respect of each of the leased aircraft. Penalties for non-payment also accrued on the above amounts pursuant to s 66(8).

- 172 On 20 December 1991, joint provisional liquidators of Compass Airlines and Compass Holdings Limited were appointed by the Federal Court on the application of those companies. At 9pm on that day the leased aircraft were "grounded".

- 173 The appointment of the provisional liquidators was an event of default under the terms of each of the agreements pursuant to which Compass Airlines leased the aircraft. Although in each case an event of default authorised the lessor to terminate the agreement and remove the aircraft from Australia, s 78A of the Act prohibited the removal of an aircraft from Australia while a lien in respect of the aircraft was in force unless the Authority gave prior approval to such a removal. No approval was given by the Authority in respect of any of the aircraft.

- 174 Faced with the sterilisation of their income-producing assets, in January 1992 each of Polaris, Monarch Airlines and Canadian Airlines entered into a deed with the Authority pursuant to which each of them agreed to pay under protest the relevant charges and penalties purportedly levied by the Authority and the Authority agreed to discharge the liens imposed upon the leased aircraft.

175 The amounts paid by each of the respondents were as follows:

Polaris	\$5,239,058.07
Monarch Airlines	\$5,002,187.86
Canadian Airlines	\$2,888,740.97

176 Upon receipt of the above payments, the Authority discharged the liens. The terms of each deed entitle Polaris, Monarch Airlines and Canadian Airlines to recover the money paid by them to the Authority, together with interest, if a court decides that, as against those companies, the lien did not validly secure payment of the charges or that for any reason the lien or the charges, or both, in whole or in part, were illegal, void or unenforceable.

177 Each of the present respondents commenced an action in the original jurisdiction of this Court seeking, in substance, a declaration that Div 2 of Pt VI of the Act was invalid, and the repayment to them of the sums paid by them under protest to the Authority, together with interest. On 28 April 1993, this Court remitted the proceedings to the ACT District Registry of the Federal Court. Subsequently, the proceedings were heard by Branson J, who found that the relevant charges were invalid because, whilst the charges (except the meteorological charges) were within the first limb of s 67 of the Act, they amounted to taxation, and were invalid by reason of the second limb of s 67¹⁰⁹. Branson J did not need to consider whether the liens imposed to secure payment of the charges were constitutionally valid.

178 The Full Court of the Federal Court dismissed an appeal by the Authority. The Full Court held that the charges were not reasonably related to the expenses incurred or to be incurred by the Authority in relation to the matters to which the charges related¹¹⁰. Thus, contrary to Branson J, the Full Court held that the charges were not authorised by the first limb of s 67. Because the Full Court held that the charges were not authorised by the first limb of s 67, it did not need to consider whether the charges were such as to amount to taxation, or whether the statutory liens were constitutionally valid.

179 The appellant appeals to this Court pursuant to a grant of special leave. It was a condition of the grant of special leave that there would be no appeal against Branson J's finding in relation to the meteorological charges.

109 *Monarch Airlines Ltd v Airservices Australia* (1997) 72 FCR 534 at 580.

110 *Airservices Australia (formerly Civil Aviation Authority) v Monarch Airlines Ltd* (1998) 152 ALR 656.

The functions, powers and duties of the Authority

180 The Act was described in its long title as:

"[a]n Act to establish a Civil Aviation Authority with functions relating to civil aviation, in particular the safety of civil aviation, and for related purposes".

Prior to the establishment of the Authority upon the enactment of the Act in 1988, most of the Authority's functions were performed by the Department of Transport and Communications. In the Second Reading Speech of the Civil Aviation Bill 1988, Mr Duncan explained the decision of the government to devolve functions from the Department to the new statutory authority. He said¹¹¹:

"It has been the policy of successive governments that the costs of services provided in support of the conduct of civil aviation operations should be recovered from the aviation industry. Given this policy, the body providing these services should be so structured as to make it adequately responsive to the industry's requirements and to industry's capacity and willingness to meet associated costs. ...

The commercial nature of the Authority needs to be clearly understood. It will be the Government's requirement that the Authority adopt a businesslike approach to its affairs, including the ongoing pursuit of cost efficiency and productivity improvement."

181 Thus, the purpose of the devolution of functions from the Department to the Authority was to allow aviation services to be supplied on a "user pays" basis. Although the Act did not explicitly direct the Authority to recover the costs of providing the services from the users of those services, several of the Act's provisions, when considered in combination, made it clear that giving effect to this principle was a fundamental purpose of the Act. Those provisions are set out below.

182 The functions of the Authority were set out in s 9(1) of the Act, which relevantly provided as follows:

¹¹¹ Australia, House of Representatives, *Parliamentary Debates* (Hansard), 14 April 1988 at 1622.

"The functions of the Authority are:

- (a) as provided by this Act and the regulations, to conduct safety regulation of:
 - (i) civil air operations in Australian territory; and
 - (ii) Australian aircraft operating outside Australian territory;
- (b) to provide air route and airway facilities;
- (c) to provide air traffic control services, and flight service services, for, in either case, surface traffic of aircraft and vehicles on the manoeuvring area of aerodromes;
- (d) to provide a rescue and fire fighting service;
- (e) to provide a search and rescue service;
- (f) to provide an aeronautical information service;
- ...
- (j) any functions conferred on the Authority under the *Air Navigation Act 1920*;
- (k) any other prescribed functions, being functions relating to any of the matters referred to in this subsection; and
- (m) any functions incidental to any of the foregoing functions."

183 The powers of the Authority were set out in s 13 of the Act. Section 13 relevantly provided:

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

(2) Without limiting the generality of subsection (1), the powers include, subject to this Act, power:

...

- (f) to do anything incidental to any of the powers specified in this subsection or otherwise conferred on the Authority."

184 The Authority was governed by a Board. The Board was to decide the objectives, strategies and policies to be followed by the Authority and to ensure that the Authority performed its functions in a proper, efficient and economical manner¹¹². The Board was required to develop a corporate plan and to review and revise it at least annually. The corporate plan was to include a statement of the objectives of the Authority for the subsequent three years and was to outline the strategies and policies that the Authority intended to adopt in order to achieve its objectives¹¹³.

185 Sections 44-47 of the Act were concerned with, amongst other matters, the financial performance of the Authority. They provided as follows:

"Corporate plan etc to Minister

44 (1) As soon as practicable after developing or revising the corporate plan, the Board shall give a copy to the Minister.

(2) When the Board gives the Minister a copy of the plan, it shall also give the Minister a copy of a financial plan that includes, in relation to each financial year in the period covered by the corporate plan:

- (a) performance indicators in such terms as the Board thinks appropriate;
- (b) in relation to services and facilities (other than search and rescue and aeronautical information services) provided by the Authority – a forecast of receipts and expenditure and a rate of return and dividend; and
- (c) estimates of receipts and expenditure in relation to:
 - (i) search and rescue and aeronautical information services provided by the Authority;
 - (ii) developing, and ensuring compliance with, standards; and
 - (iii) implementing standards, being matters relating to certificates, licences, approvals, permits, registrations and exemptions.

112 The Act, s 32B(1).

113 The Act, s 43.

Financial targets and performance indicators

45 When preparing the financial plan, the Board shall consider:

- (a) the need for high standards of aviation safety;
- (b) the objectives and policies of the Commonwealth Government known to the Board;
- (c) any directions given by the Minister under section 12;
- (d) any payments by the Commonwealth to the Authority to fund its regulatory functions and search and rescue services;
- (e) the need to maintain a reasonable level of reserves, having regard to infrastructure requirements;
- (f) the need to maintain the extent of the Commonwealth's equity in the Authority;
- (g) the need to earn a reasonable rate of return on the Authority's assets wholly or principally used in the performance of regulatory functions or the provision of search and rescue services);
- (h) the expectation of the Commonwealth that the Authority will pay a reasonable dividend; and
- (j) any other commercial considerations the Board thinks appropriate.

Estimates

46 (1) Subject to this section, the Board shall:

- (a) prepare estimates, in such form as the Minister directs, for each financial year and, if the Minister so directs, for any other period; and
- (b) submit those estimates to the Minister not later than:
 - (i) in the case of estimates for a financial year – 60 days before the beginning of the year; or
 - (ii) in any other case – such date as the Minister directs.

(2) In subsection (1):

'estimates' means estimates of receipts and expenditure referred to in paragraph 44(2)(c).

Minister may direct variation of financial plan

47 (1) The Minister may direct the Board to vary the financial plan in respect of financial targets, and performance indicators, relating to the provision of services and facilities.

(2) When doing so, the Minister shall consider:

- (a) the matters referred to in section 45 (other than paragraph (b));
- (b) the objectives and policies of the Commonwealth Government; and
- (c) any other commercial considerations the Minister thinks appropriate.

(3) A direction shall be in writing and shall set out its reasons."

186 Section 48 of the Act illustrated the financial independence of the Authority from the Commonwealth by providing that "[w]here the Authority satisfies the Minister that it has suffered financial detriment as a result of complying with a direction given by the Minister under this Act, the Authority is entitled to be reimbursed by the Commonwealth the amount that the Minister determines, in writing, to be the amount of that financial detriment."

187 Sections 50 and 51 encapsulated what was, to some extent, an arm's length commercial dealing between the Authority and the Commonwealth. Section 50 provided for assets to be transferred from the Commonwealth to the Authority where the asset was held by the Department for the performance of a function which had been devolved to the Authority. Assets so transferred were to be valued and the Commonwealth was taken to have made, on the day of the transfer, a loan to the Authority equal to that amount¹¹⁴. The terms and conditions of such a loan as to interest and otherwise were to be determined by the Minister for Finance¹¹⁵. Section 52 in substance provided for the transfer of amounts from the Commonwealth to the Authority where the Commonwealth had received a

114 The Act, s 51(3).

115 The Act, s 51(4).

payment in advance for the performance of some function which had been devolved to the Authority.

188 Section 54 dealt with the capital structure of the Authority. It provided that the value of assets that had been transferred to the Authority by the Commonwealth under s 51, the net realisable value of any rights transferred to the Authority under the Act, amounts paid to the Authority out of Parliamentary appropriations, and certain other items, were to be together regarded as the capital of the Authority. It also provided that interest was not payable to the Commonwealth on the capital of the Authority. However, the capital of the Authority was repayable to the Commonwealth at such times, and in such amounts, as the Minister determined in writing¹¹⁶.

189 Section 56 of the Act provided for payment by the Authority of a dividend to the Commonwealth. Section 56 of the Act was in the following terms:

"Payments of dividends to Commonwealth

56 (1) The Board shall, within 4 months after the end of each financial year, by notice in writing given to the Minister, recommend that the Authority:

(a) pay to the Commonwealth, in relation to the Authority's operations in the financial year, a dividend of an amount specified in the notice; or

(b) not pay a dividend to the Commonwealth for the financial year.

(2) In making a recommendation, the Board shall have regard to:

(a) the matters specified in section 45; and

(b) the extent of the Commonwealth's equity in the Authority.

(3) Subject to subsection (6), the Minister shall, within 30 days after receipt of the recommendation, give notice in writing to the Board:

(a) where the recommendation is that a dividend be paid:

(i) approving the recommendation; or

116 The Act, s 54(2).

63.

- (ii) directing the Authority to pay a dividend of a different specified amount; or
 - (b) where the recommendation is that a dividend not be paid:
 - (i) approving the recommendation; or
 - (ii) directing the Authority to pay a dividend of a specified amount.
 - (4) The Minister shall have regard to:
 - (a) the matters specified in section 45 (other than paragraph (b));
 - (b) the objectives and policies of the Commonwealth Government;
 - (c) the extent of the Commonwealth's equity in the Authority; and
 - (d) any other commercial considerations the Minister thinks appropriate.
- ..."

190 Section 64 provided that Div 2 of Pt XI of the *Audit Act* 1901 (Cth) was to apply to the Authority. Section 64(2) provided:

"In its annual report under Division 2 of Part XI of the *Audit Act* 1901, the Authority shall include:

- (a) an evaluation of its overall performance against:
 - (i) the objectives set out in the corporate plan in force during the financial year; and
 - (ii) the financial targets and performance indicators set out in the financial plan in force during the financial year; and
- (b) an assessment of the adverse effect (if any) that meeting the non-commercial commitments imposed on the Authority has had on the Authority's profitability during the financial year."

191 It is evident from these provisions that the Authority was intended to operate on a commercial basis and to be, to a large extent, financially autonomous and financially separate from the executive government. It is also evident that the Act gave effect to the "user pays principle" of public policy – the requirement in s 56(6) that any dividend be paid out of profits, when considered in conjunction with the

"need to earn a reasonable rate of return on the Authority's assets" in s 45(g), and the "expectation of the Commonwealth that the Authority will pay a reasonable dividend" in s 45(h), indicates that the Authority was intended to recover the costs of providing its services from the users of those services. Indeed, s 67 itself enshrined this principle to some extent.

The statutory scheme for the imposition of charges

192 Section 66 of the Act relevantly provided:

"(1) In this section:

'charge' means:

(a) a charge for a service or facility provided by the Authority; ...

(2) Subject to this section, the Board may make determinations:

(a) fixing charges and specifying the persons by whom, and the times when, the charges are payable ...

(3) Before making a determination, the Board shall give the Minister notice in writing of the proposed determination:

(a) specifying the day on and from which the determination is intended to operate;

(b) if it fixes a charge or penalty, specifying the basis of the charge or penalty; and

(c) if it varies a charge or penalty – specifying the reason for the variation.

...

(4) The Minister may, within the period referred to in subsection (5A), give the Board notice in writing approving or disapproving the proposed determination.

(5) In doing so, the Minister shall have regard to the duties and responsibilities of the Authority under this Act.

...

(6) The Board may make a determination only if:

65.

- (a) the Minister has approved it; or
- (b) the period within which the Minister may give to the Board a notice under subsection (4) has expired without the Minister having given such a notice."

193 It is convenient to set out again s 67, the construction of which is central to resolution of the first issue raised in these appeals:

"Limits on charges

67 The amount or rate of a charge shall be reasonably related to the expenses incurred or to be incurred by the Authority in relation to the matters to which the charge relates and shall not be such as to amount to taxation."

Services and facilities in respect of which charges were determined

194 The Authority divided the services it provided into three categories for the purpose of charging: air traffic services, rescue and fire fighting services, and meteorological services.

Air traffic services

195 Air traffic services ("ATS") were those services related to the control and coordination of air traffic. For the purposes of charging, the Authority divided ATS into two categories: terminal navigation services ("TNS") and en route services ("ERS"). TNS included the provision, maintenance and operation of air traffic control services (including radar) within 55 kilometres of an aerodrome with an operating control tower, and navigational aids used in the take-off and landing of aircraft. ERS included the provision, maintenance and operation of air traffic control information and support, and flight navigational aids, outside a 55-kilometre radius from an aerodrome with an operating control tower.

196 The trial judge made the following findings of fact in relation to ATS¹¹⁷:

- more sophisticated air navigation facilities and services and terminal facilities and services are set in place at airports at which larger aircraft land;
- ATS are available to be used by all aircraft whatever their size; however, the majority of ATS are provided to aircraft in controlled air space;
- the priority given by the Authority to regular passenger transport ("RPT") aircraft over general aviation ("GA") aircraft in the allocation of controlled

¹¹⁷ *Monarch Airlines Ltd v Airservices Australia* (1997) 72 FCR 534 at 558-559.

air space meant that there were considerably more RPT aircraft than GA aircraft in controlled air space.

Rescue and fire fighting services

197 Rescue and fire fighting services ("RFFS") related to the provision and maintenance by the Authority of rescue and fire fighting facilities and services, including the provision and maintenance of rescue and fire fighting equipment and other emergency services available at airports.

198 The effect of s 11 of the Act was to require the Authority, in 1991-92, to perform its functions in a manner consistent with the obligations of Australia under the Chicago Convention. The "Chicago Convention" was defined in s 3 as comprising the Convention on International Civil Aviation done at Chicago on 7 December 1944, the protocols amending that Convention, and the annexes to that Convention relating to international standards and recommended practices being annexes adopted in accordance with that Convention.

199 In relation to RFFS, Annex 14 to the Chicago Convention ("Annex 14") recommended the allocation of categories to aerodromes, based upon the length of the longest aircraft normally using that aerodrome. It recommended the minimum useable amounts of fire extinguishing agents to be available at the different categories of aerodrome, and the minimum discharge rate of foam solution for each category.

200 The larger the aircraft that landed at an aerodrome, the higher the category of the aerodrome according to Annex 14, and the more expensive it was to provide RFFS at that aerodrome. However, whilst the level of RFFS which was available at any aerodrome at any given time was dependent upon the category of the aerodrome, the RFFS were available for all aircraft which landed at that aerodrome.

201 Owing to the variance in the number of aircraft movements between aerodromes, the cost per tonne landed of providing RFFS at a small aerodrome could be higher than the cost per tonne landed of providing RFFS at a larger aerodrome, notwithstanding that the total cost of providing RFFS was higher at larger aerodromes than at smaller aerodromes. For example, the cost to the Authority of providing RFFS at Sydney airport was \$0.74 per tonne landed while it was \$4.14 per tonne landed at Cairns airport.

Meteorological services

202 Section 6 of the *Meteorology Act* 1955 (Cth) required the Bureau of Meteorology to provide meteorological services for the purposes of, inter alia, civil aviation in Australia. Each year the Bureau charged the Authority a lump sum for the provision of these services, and the Authority fixed charges for the services which were intended to recover the lump sum payable by the Authority to the Bureau. The meteorological services provided by the Bureau were:

- (a) observations in the form of aerodrome weather reports;
- (b) forecasts of weather conditions en route;
- (c) forecasts of weather conditions at aerodromes; and
- (d) meteorological watch and warnings of meteorological phenomena hazardous to aircraft operations en route and to aircraft operations, aerodrome facilities and aerodrome services at aerodromes.

All of the above services were required by Annex 3 of the Chicago Convention.

203 It is unnecessary to consider the meteorological services in any further detail as no issue relating to the charges for those services is presently before this Court. They are mentioned in order to convey a complete picture of the services provided by the Authority.

The Determination

204 A determination of charges made pursuant to s 66(2) of the Act was published in the Commonwealth *Gazette* on 28 June 1991 ("the Determination"). The Determination defined certain terms. An "avtur aircraft" was defined as "an aircraft powered by an engine or engines using aviation turbine kerosene." A "non-avtur aircraft" was defined as "an aircraft other than an avtur aircraft." "Weight" was defined to mean the "maximum take-off weight."

205 As the nature of the charges levied is fundamental to the outcome of these appeals, it is necessary to set out the relevant sections of the Determination in some detail. The Determination fixed charges for services and facilities under four headings: "Landing Charges – Avtur Aircraft"; "Landing Charges – Non-avtur Aircraft"; "En-route Charges" and "Meteorological Charges". Set out below is the detailed charging regime provided for by the Determination under each of these headings.

Landing Charges – Avtur Aircraft

206 A "landing charge" was defined to mean "a charge payable in respect of use
by aircraft of facilities or a service relating to an aerodrome."

207 Clause 1 of the Determination provided:

"In respect of each landing of an avtur aircraft at an aerodrome referred to in
Column 2 of Item 1 in Table 1 below, a charge for services and facilities at
the aerodromes referred to in Column 2, calculated at the rate per 1,000
kilogrammes weight specified in Column 3 of that item, is applicable."

Column 2 of Item 1 in Table 1 read: "Terminal navigation facilities and services,
being such facilities and services relating to an aerodrome specified in
Schedule 1."

208 There were 32 aerodromes listed in Sched 1. Included were the major capital
city airports, small regional aerodromes such as Mackay and Tamworth and small
metropolitan aerodromes such as Bankstown in Sydney and Essendon in
Melbourne.

209 Column 3 of Item 1 in Table 1 set out a rate of \$3.65 per 1,000 kilogrammes
of weight.

210 Clause 2 of the Determination provided:

"In respect of each landing of an avtur aircraft at a place, being a place other
than an aerodrome at which an Aerodrome Control Service is available at the
time of the landing, within a control zone associated with an aerodrome
referred to in Column 2 of Item 2 in Table 1 below, a charge for services and
facilities at the aerodromes referred to in Column 2, calculated at a rate per
1,000 kilogrammes weight specified in Column 3 of that Item, is applicable."

Item 2 was described in Column 2 of the table in identical terms to Item 1; Column
3 of Item 2, however, set out a rate for Item 2 of \$1.83 per 1,000 kilogrammes
weight.

211 Clause 3 of the Determination provided:

"In respect of each landing of an avtur aircraft at an aerodrome referred to in
Column 2 of Item 3 in Table 1 below, a charge for services and facilities at
the aerodromes referred to in Column 2, calculated at the rate per 1,000
kilogrammes weight specified in Column 3 of that Item, is applicable."

69.

212 Column 2 of Item 3 read as follows:

"Fire fighting and rescue service, being such a service relating to an aerodrome specified in Schedule 2."

213 Schedule 2 specified 21 different aerodromes, and Column 3 of Item 3 provided for a rate of \$2.40 per 1,000 kilogrammes weight.

214 Clause 4 and cl 5 of the Determination are not presently relevant.

Landing Charges – Non-avtur Aircraft

215 Clause 6 provided:

"In respect of each landing of a non-avtur aircraft at an aerodrome referred to in Column 2 of Item 1 in Table 2 below, a charge for services and facilities at the aerodromes referred to in Column 2, calculated at the rate per 1,000 kilogrammes weight specified in Column 3 of that item, is applicable."

Column 2 of Item 1 in Table 2 provided: "Terminal navigation facilities and services, being such facilities and services relating to an aerodrome specified in Schedule 3." Schedule 3 specified the six aerodromes of Adelaide, Brisbane, Hobart, Melbourne, Perth and Sydney. The rate specified in Column 3 of Item 1 in Table 2 was \$3.65 per 1,000 kilogrammes weight.

216 Clause 7 provided:

"In respect of each landing of a non-avtur aircraft at an aerodrome referred to in Column 2 of Item 2 in Table 2 below, a charge for services and facilities at the aerodromes referred to in Column 2, calculated at the rate per 1,000 kilogrammes weight specified in Column 3 of that item, is applicable."

Column 2 of Item 2 specified: "Fire fighting and rescue service, being such a service relating to an aerodrome specified in Schedule 3." Column 3 of Item 2 specified a rate of \$2.40 per 1,000 kilogrammes weight.

217 Clauses 8 and 9 of the Determination are not presently relevant.

218 Clause 10 of the Determination provided:

"A charge, referred to in paragraphs 1, 2, 3, 4, 5, 6, 7, 8 or 9 above, is not payable unless, at the time of the landing of the aircraft, the facilities or services to which the charge relates are available for use by the aircraft."

En-route Charges

219 Clause 11 provided:

"In respect of the use by an aircraft of air route and airways facilities and services operated or provided in Australian territory, a charge is payable on each landing –

- (a) in the case of a flight by an aircraft weighing 20,000 kilogrammes or less between two aerodromes in Australian territory, in accordance with the following formula:

$$C = R_1 \times D/100 \times W$$

- (b) in the case of a flight by an aircraft weighing more than 20,000 kilogrammes between two aerodromes in Australian territory, in accordance with the following formula:

$$C = R_2 \times D/100 \times \sqrt{W}$$

- (c) in the case of a flight by an aircraft weighing 20,000 kilogrammes or less between a place outside Australian territory and a place in Australian territory, in accordance with the following formula:

$$C = R_3 \times D/100 \times W$$

- (d) in the case of a flight by an aircraft weighing more than 20,000 kilogrammes between a place outside Australian territory and a place in Australian territory, in accordance with the following formula:

$$C = R_4 \times D/100 \times \sqrt{W}$$

where –

C is the amount in dollars of the charge payable

R₁ is a rate of \$3.60

R₂ is a rate of \$16.15

R₃ is a rate of \$2.85

R₄ is a rate of \$12.75

D is the distance travelled by the aircraft expressed as the great circle distance in kilometres –

71.

- (i) between two aerodromes in Australian territory; or
- (ii) between the first point of entry to an Australian Flight Information Region and the first aerodrome of destination in Australian territory;
- (iii) between the point of entry to an Australian Flight Information Region and the next point of departure from an Australian Flight Information Region.

W is the weight of the aircraft expressed in tonnes.

$\sqrt{W}$ is the square root of the weight of the aircraft expressed in tonnes."

Meteorological Charges

220 Clause 12 of the Determination imposed charges for meteorological services. For the reasons I have stated, it is not necessary to deal with the meteorological charges.

II ARE THE CHARGES ULTRA VIRES SECTION 67 OF THE ACT?

221 To resolve the first issue in these appeals, it is necessary to deal with the following matters:

1. the correct construction of the Determination;
2. the meaning of the first limb of s 67 and its application to this case; and
3. the meaning of "taxation" in s 67 and its application to this case.

The correct construction of the Determination

222 To determine whether the charges imposed by the Determination are ultra vires s 67 of the Act, it is first necessary to determine the nature of the charges which the Determination, on its proper construction, purported to impose on aircraft operators. The clauses dealing with TNS and RFFS charges, namely cll 1, 2 and 3 (in relation to avtur aircraft) and cll 6 and 7 (in relation to non-avtur aircraft), are capable of two competing constructions.

223 On the first construction, the clauses imposed a charge on account of the provision to an aircraft of those particular services and facilities which were provided from, or geographically located at, the particular aerodrome at which the aircraft landed. In contrast, on the second construction, the clauses imposed a charge on account of the provision of the services and facilities provided at all the

aerodromes listed in Sched 1 (in the case of cll 1 and 2), Sched 2 (in the case of cl 3) or Sched 3 (in the case of cll 6 and 7), and the occasion of landing at a particular aerodrome was simply the trigger for incurring liability to pay the charge. The second construction views the charges as being on account of the use of a "network" of facilities and services which were rendered from numerous individual aerodromes.

- 224 The two constructions arise from an inconsistent use of plural and singular expressions in the clauses themselves and the tables to which the clauses made reference. Clause 1 is a representative example. It provided:

"In respect of each landing of an avtur aircraft at *an aerodrome* referred to in Column 2 of Item 1 in Table 1 below, a charge *for services and facilities at the aerodromes* referred to in Column 2 ... is applicable." (emphasis added)

The reference to the singular *aerodrome* makes it clear that liability to pay the charge was incurred only upon landing at a relevant aerodrome. The reference to services and facilities at *aerodromes* suggests, however, that, while the charge was incurred on landing, it was a charge for, or on account of, the provision of services and facilities at all the aerodromes referred to in Column 2, and not just for the particular services and facilities which were provided from, or located at, the aerodrome at which the landing was made. Yet in Column 2 of Item 1 in Table 1, the reference was to a singular aerodrome: "Terminal navigation facilities and services, being such facilities and services relating to *an aerodrome* specified in Schedule 1."¹¹⁸ This suggests that the charge was only on account of the particular services and facilities which were provided from, or located at, the aerodrome at which the landing was made. On this view, the plural in the referring clause was used simply because the clause operated upon the list of aerodromes in Sched 1, notwithstanding that on each occasion that the clause operated, it only levied charges on account of the use of services and facilities which were provided from, or located at, the particular aerodrome at which the landing was made.

- 225 The choice between these two competing constructions is important because s 67 of the Act required that the charges be "reasonably related to the expenses incurred or to be incurred by the Authority in relation to the matters to which the charge relates". The content of the phrase "the matters to which the charge relates" in the context of the Determination depends upon which of the two competing constructions is correct. If the first construction is correct, "the matters to which the charge relates" will be only matters related to the provision of those services and facilities which were provided from, or located at, the aerodrome at which the landing generating the charge was made. If the second construction is correct, "the matters to which the charge relates" will be matters related to the provision of services and facilities across the entire network of aerodromes set out in Sched 1

118 Emphasis added.

(in the case of cll 1 and 2), Sched 2 (in the case of cl 3) or Sched 3 (in the case of cll 6 and 7) of the Determination.

226 At first instance, Branson J held that the second construction was the correct one. Her Honour said ¹¹⁹:

"To the extent that there may be an inconsistency between the reference in the opening lines of cl 1 to 'services and facilities at the aerodromes referred to in Column 2' and the reference in Column 2 of Item 1 of Table 1 to 'facilities and services relating to an aerodrome specified in Schedule 1', it seems to me that the language of the opening lines of the clause must prevail. That is, in my view, the charge created by cl 1 is a charge for a network of facilities and services, not a charge for facilities and services relating to a particular aerodrome."

227 In the Full Court of the Federal Court, Beaumont J (with whom Wilcox J agreed in this regard) held, contrary to the decision of Branson J, that the first construction was the correct one. His Honour reached this conclusion for the following reasons ¹²⁰:

- The concept of a "network" was not mentioned in the Act, the regulations or the Determination, and it could not be suggested that a landing charge was applied in return for permission to take off at one airport, fly, and land at another airport, because the licensing of aircraft operations and the grant of approval to land and take off were dealt with by other provisions of the Act, or by the provisions of the *Air Navigation Act 1920* (Cth), or by statutory regulations.
- Clause 10 provided that a charge was not payable unless, at the time of landing, the facilities or services were "available for use by the aircraft", and this could not possibly be a reference to any "network" of facilities or services at each of these aerodromes.
- Clause 1 should be construed in light of s 67, and s 67 spoke of the amount or rate of "a charge" and of the expenses incurred "in relation to the matters to which the charge relates". It therefore proceeded upon the footing, consistent with the authorities explaining the notion of what amounts to "taxation", that there would be a particular or individual relationship between

119 *Monarch Airlines Ltd v Airservices Australia* (1997) 72 FCR 534 at 567.

120 *Airservices Australia (formerly Civil Aviation Authority) v Monarch Airlines Ltd* (1998) 152 ALR 656 at 680-683.

the fee payable and the specific service for which, or in relation to which, it is payable.

- The plural "aerodromes" in cl 1 can be interpreted as the singular "aerodrome" where appropriate, and by reading "aerodromes" as "aerodromes or aerodrome", an unjust and arbitrary interpretation is avoided. The second construction was unjust and arbitrary because it required an operator landing at only one of the aerodromes in Sched 1 to contribute to the expense of providing services and facilities relating to the 31 other Sched 1 aerodromes. *Sin Poh Amalgamated (HK) Ltd v Attorney-General of Hong Kong*¹²¹ and *BP Australia Ltd v Bissaker*¹²² are authority for reading a plural as a singular where appropriate. Section 23(b) of the *Acts Interpretation Act 1901* (Cth) also allows a plural to be read as a singular.

228 In my opinion, notwithstanding these reasons of Beaumont J and although both constructions are reasonably open, the second construction is preferable for the reasons set out below.

229 First, the Determination should be construed in accordance with the maxim *ut res magis valeat quam pereat*. In *Widgee Shire Council v Bonney*¹²³, Griffith CJ said:

"[W]hen a by-law is open to two constructions, on one of which it would be within the powers of the local authority, and on the other outside of these powers, the former construction should be adopted, *ut res magis valeat quam pereat*."

230 The rationale behind this principle rests upon the presumed intent of the body promulgating the impugned instrument. In *Birch v The Australian Mutual Provident Society*¹²⁴, Barton J indicated that a construction of a delegated legislative instrument which is intra vires the enabling statute is to be preferred to one which is ultra vires the enabling statute:

"for the reason that it must not be taken that the [body], in framing the by-laws, intended to exercise anything beyond their statutory powers."

¹²¹ [1965] 1 WLR 62; [1965] 1 All ER 225.

¹²² (1987) 163 CLR 106.

¹²³ (1907) 4 CLR 977 at 983.

¹²⁴ (1906) 4 CLR 324 at 343.

231 The construction of the Determination, adopted by the Full Court of the Federal Court, inevitably leads to the clauses of the Determination dealing with TNS and RFFS charges being ultra vires s 67 of the Act, because those charges were invariant across all the various aerodromes and were not in any way related to services or facilities provided at a particular aerodrome. The charges depended only upon the weight of the landing aircraft and the distance travelled by the aircraft. If the first construction is adopted, the lack of a relationship between the amount of the landing charges and the services or facilities provided at a particular aerodrome means that the Determination does not comply with the requirement in s 67 that the amount or rate of the landing charges be "reasonably related to the expenses incurred or to be incurred by the Authority in relation to the matters to which the charge relates".

232 Accordingly, a construction which means that the Determination is arguably valid should be preferred to one which would automatically invalidate it. The Authority should be presumed to have intended to make a valid determination.

233 Second, although the charges purported to be imposed for TNS and RFFS, no charge was imposed for services and facilities provided on take-off or within the controlled zone after take-off where there was no subsequent landing in Australia. This omission indicates that the landing was the occasion or trigger for a charge, rather than that the charge was for services associated with landing. It would be odd if the Authority had adopted a regime which charged aircraft an amount based on the particular service or facility rendered to an aircraft upon landing at a particular aerodrome, and yet provided to the aircraft take-off services and services subsequent to take-off free of charge.

234 Third, the existence of cl 10 does not necessarily indicate that the charges were on account of services and facilities provided at a particular airport. Clause 10 extinguished a liability to pay charges which would otherwise arise, in circumstances where "the facilities or services to which the charge relates" were not available for use by the aircraft. It may be conceded that "the facilities or services to which the charge relates" in cl 10 were the facilities or services at the particular aerodrome at which the aircraft landed, as otherwise the liability to pay would only be extinguished in a situation where the facilities and services were unavailable across the whole network, or some significant proportion of it. Such an event seems extremely unlikely to occur, and would perhaps only ensue in the rare event of a catastrophic widespread failure of the Authority's systems.

235 Unless one is to give cl 10 an interpretation which would mean that it has almost no practical operation, therefore, the "facilities or services to which the charge relates" in cl 10 must be the facilities or services at the particular aerodrome at which the landing was made. But this does not mean that the expression "facilities and services relating to an aerodrome" in Column 2 of Tables 1 and 2 as incorporated into cll 1, 2, and 6, or the expression "service relating to an

aerodrome" as incorporated into cl 3 and 7, must be read as meaning the service or services and facilities provided from, or located at, a particular aerodrome.

236 Clause 10 operated of its own force, unlike the items in Column 2 of each of Tables 1 and 2 which only operated by being incorporated by reference into cl 1, 2, 3, 6 and 7. Each of these operative clauses referred to "services and facilities at the aerodromes" (emphasis added). Given the different context, there is no reason why the provisions should be interpreted in the same way. There is no inconsistency in saying that the landing charge was on account of the provision of facilities and services across the whole network and also saying that the liability to pay this charge was extinguished when the facilities and services were not available at the particular aerodrome at which the aircraft landed. The most that can be said about the effect of cl 10 is that the description of the event creating liability to pay the charge as "landing ... at [a specified] aerodrome" must be modified to "landing at a specified aerodrome at a time when the facilities and services were available at that aerodrome".

237 Beaumont J, in arriving at his preferred construction, said: "Finally, and most significantly, in my opinion, it is legitimate to interpret the plural reference in this part of cl 1 as the singular where this is appropriate"¹²⁵, and relied on s 23(b) of the *Acts Interpretation Act* together with the case law considering it and its equivalent provisions to read the plural "aerodromes" in cl 1, 2, 3, 6 and 7 as the singular "aerodrome". His Honour did so because "[i]n this way, an unjust and arbitrary interpretation is avoided."¹²⁶ Beaumont J referred to the example of an aircraft operator making a single landing at one of the relevant aerodromes. He thought that "[i]t would be arbitrary and unjust to require that such an operator contribute to the expense of providing services and facilities relating to the 31 other Sch 1 airports."¹²⁷

238 Section 23(b) of the *Acts Interpretation Act* states that, unless the contrary intention appears, "words in the singular number include the plural and words in the plural number include the singular."

239 Thus, s 23(b) allows either a plural expression to be read as a singular expression or a singular expression to be read as a plural expression. In this case, the two competing constructions of the Determination arise out of the very fact

¹²⁵ *Airservices Australia (formerly Civil Aviation Authority) v Monarch Airlines Ltd* (1998) 152 ALR 656 at 681.

¹²⁶ *Airservices Australia (formerly Civil Aviation Authority) v Monarch Airlines Ltd* (1998) 152 ALR 656 at 681.

¹²⁷ *Airservices Australia (formerly Civil Aviation Authority) v Monarch Airlines Ltd* (1998) 152 ALR 656 at 681.

that there is an inconsistent use of a plural expression followed by a singular expression. Section 23(b) is therefore inconclusive, as the choice of the use to which it is put (reading *aerodromes* as *aerodrome* or reading *aerodrome* as *aerodromes*) must depend upon a view of the correct construction of the Determination which is arrived at other than by reference to the terms of s 23(b).

- 240 With great respect to Beaumont J, there is nothing which is necessarily arbitrary and unjust in requiring a user who uses part of a network on one occasion to contribute a proportion of the expense of maintaining the whole network. It does not seem to me, for example, that it is unjust that a person who makes few telephone calls each year should be required to pay the same telephone line rental fee as more frequent users of the telephone. Moreover, in this case, the charges are not arbitrary in the sense that they were calculated on an ad hoc, capricious or irrational basis – an aircraft operator may have ascertained the amount of charges he or she would incur upon any particular landing simply by applying the formulae set out in the Determination. The view that the charging regime set up by the Determination was "arbitrary and unjust" is too slender a basis for concluding that the first construction should be adopted. It is not a reason for displacing the principle explained in *Widgee Shire Council v Bonney*¹²⁸ and *Birch v The Australian Mutual Provident Society*¹²⁹.

Are the charges reasonably related to the expenses incurred or to be incurred in relation to the matters to which the charge relates?

The relevant comparison

- 241 The first limb of s 67 requires a comparison between two items in order to determine whether the first of them meets the criterion of being "reasonably related" to the second. The first item is clear and unambiguous – the "amount or rate of the charge". The reference to "amount or rate" is significant in that it envisaged both a flat fee and some varying fee being within the ambit of s 67. The second item is the "expenses incurred ... or to be incurred in relation to the matters to which the charge relates". This item itself contains two components – the "expenses incurred or to be incurred" and the "matters to which the charge relates". The consequence of preferring the second construction of the Determination is that the "matters to which the charge relates" are the network of services and facilities provided by the Authority in the category of services being charged for. What then are "the expenses incurred or to be incurred ... in relation to" the network of services and facilities in the category being charged for?

¹²⁸ (1907) 4 CLR 977 at 983.

¹²⁹ (1906) 4 CLR 324 at 343.

242 In *O'Grady v Northern Queensland Co Ltd*¹³⁰, Toohey and Gaudron JJ held that the phrase "in relation to" is an expression of "broad import", although its precise ambit is confined by the context in which it appears. In the same case, I said¹³¹:

"The prepositional phrase 'in relation to' is indefinite. But, subject to any contrary indication derived from its context or drafting history, it requires no more than a relationship, whether direct or indirect, between two subject matters."

243 If the phrase "on account of" had been used instead of the phrase "in relation to", then clearly the relevant expenses would be only those expenses that were directly incurred by the Authority in order to provide the relevant services. However, the phrase "in relation to" indicates that the relevant expenses are wider in scope – they are all those expenses which bear a relationship, whether direct or indirect, to the provision of the relevant category of services. The question then is this: is the amount or rate of the charge for a particular category of service, reasonably related to the expenses incurred or to be incurred by the Authority which bear a relationship, whether direct or indirect, with the provision by the Authority of the network of services and facilities within that category?

244 Before this question can be answered, it is necessary to give content to the criterion of comparison, namely, "reasonably related".

The meaning of "reasonably related"

245 The concept of "reasonableness" is a category of indeterminate reference¹³². Its application in a given factual situation cannot depend upon a logical formulation. In one sense, the appearance of the word "reasonable" or a variant in a statutory provision is, as Oliver Wendell Holmes Jr pointed out, nothing more than a direction to the court applying the provision "[to derive] the rule to be applied from daily experience"¹³³. The requirement that the charges be reasonably related to the expenses as described above at least requires that there be some rational relationship between the charges and the expenses. But once this rather low threshold is met, the degree of closeness of the relationship which is required in order for the statutory requirement to be satisfied cannot be described in the abstract. It depends on the application, to the circumstances of a particular case, of the fact-value complex that the word "reasonably" invokes. Important in that

130 (1990) 169 CLR 356 at 374.

131 (1990) 169 CLR 356 at 376.

132 Stone, *Legal System and Lawyers' Reasonings* (1964) at 263-264.

133 Holmes, *The Common Law* (1881) at 123.

assessment are the purposes or objects of the Act – one of which was to have the Authority provide aviation services and charge for them on a "user pays" basis.

The Authority's rationale for the pricing structure in the Determination

246 Branson J accepted the evidence of economic theory given by Dr Vincent Fitzgerald, an economic expert called by the Authority. The only dispute between the parties was the relevance of that theory in determining the issues in the case¹³⁴.

247 As Dr Fitzgerald's evidence shows, economic theory dictates that, to ensure an efficient allocation of resources, the price charged for a service should be equal to the marginal cost of its provision, since that measure of cost most closely reflects the opportunity cost to the community of using, or not using, the extra resources needed to produce, or not produce, an extra unit of service. In economics, "marginal cost" is defined as the increment to total cost in producing an extra unit of service. In a competitive market with many producers, prices will tend to equal marginal cost through the pressures of the market because, to stay in business, all producers will have to operate at or very close to best practice costs, including a profit return on their assets or funds employed. However, as Dr Fitzgerald points out, natural monopolies are characterised by very large fixed costs of production relative to variable costs. The Authority fell into this category, as the fixed costs of such items as radar equipment and control towers are large. Once this equipment is installed, the cost of providing one more air traffic control service (the marginal cost) is quite small relative to total cost, and the average cost of providing the service (which includes the fixed cost) exceeds the marginal cost. In such a situation, if the price for a service is set with reference to marginal cost, total costs would exceed total revenues, meaning that the "user pays" principle would be violated, because the cost of providing the services would have to be borne by persons outside the user group.

248 If prices were set at a level above marginal cost so as to recoup total costs, then, as Dr Fitzgerald explains it, certain users would be caused to "greatly curtail their usage." The issue, then, confronting the natural monopolist is:

"how to set prices to the various users of the various services concerned so as to recover the total costs of the resources involved from the users as a group, while minimising the extent to which the outcome (in terms of the level and pattern of usage of the services among the users) deviates from the most efficient outcome – i.e. that which would emerge if prices were set at marginal costs."

249 Dr Fitzgerald's evidence explained two possible solutions to this problem. One was to charge a two-part price, in which the Authority could have charged all

134 *Monarch Airlines Ltd v Airservices Australia* (1997) 72 FCR 534 at 556.

aircraft operators a fixed access fee per period to recover part of the fixed costs, plus a usage charge equal to the marginal cost of providing that service. However, he explained that this would be impractical because the Authority's fixed costs were very large compared with total costs. A two-part pricing structure would therefore require either:

- (a) very large access fees, thereby entirely excluding otherwise infrequent users, such as general aviation operators and some international airlines; or
- (b) the introduction of a wide variety of two-part charges supported by a regulatory regime designed to exclude particular users from those service domains for which they had not paid access fees. Such a system was said to be "very costly to administer and fraught with inequities."

250 Another possible solution is that which was in fact adopted by the Authority, i.e. a pricing structure on the basis of "Ramsey pricing". The major tenet of Ramsey pricing is that "prices to different categories of users should be set in inverse relation to the sensitivity of their usage to price." Dr Fitzgerald gave evidence that a pricing structure based on Ramsey pricing carries "no connotation of cross-subsidisation so long as each category of user pays at least marginal cost for each unit of service". He noted that, for passenger aircraft, capacity to pay was related to the number of seats on a particular aircraft¹³⁵. For the 45 aircraft types which used Australian airways, a high correlation existed between number of seats and either maximum take-off weight ("MTOW") or its square root. For larger aircraft, the correlation between number of seats and the square root of MTOW was higher, for smaller aircraft the correlation was higher with MTOW simpliciter.

251 In addition, the evidence disclosed that the International Civil Aviation Organisation ("ICAO") recommended that airports have certain minimum RFFS capabilities¹³⁶. The minimum recommended RFFS capabilities for an airport increased with increases in the length of aircraft regularly landing at that airport. To this extent, there was a relationship between RFFS requirements and the size of the aircraft. Hence a relationship existed between RFFS requirements and the MTOW of the aircraft.

252 As a result of these considerations, MTOW or its square root (depending on the size of the aircraft) was chosen as a basis for charging for RFFS, TNS and ERS. In addition, distance was chosen as a basis for charging for ERS because the extent of services received bears a relationship to the distance travelled. The ICAO also

135 *Monarch Airlines Ltd v Airservices Australia* (1997) 72 FCR 534 at 557.

136 *Monarch Airlines Ltd v Airservices Australia* (1997) 72 FCR 534 at 557-558.

recommended that ERS charges should be levied on the basis of the weight of the aircraft and the distance travelled.

253 The net result of using MTOW as the basis of charging for TNS and RFFS and using MTOW and its square root as the basis of charging for ERS was that total Authority charges on a per passenger basis for 1991-92 were relatively flat across the fleet of aircraft using Australian airways. Dr Fitzgerald described the situation as follows:

"For large aircraft with many passengers, which typically fly relatively long distances, the charges will be a small fraction of the flight costs. Therefore, for these aircraft, the sensitivity of passenger demand to the charges will be small, and economic efficiency – specifically, Ramsey pricing principles – dictate [sic] that they be charged relatively more per aircraft than smaller aircraft. Other things ... being equal, it will be optimal to vary charges per aircraft so as to achieve – as the Authority did – a relatively constant charge per passenger."

The calculation of the rates of the charges in the Determination

254 Having chosen the variables upon which the charges were to be based, the Authority next had to calculate the rates of charge to be applied to these variables.

255 The calculation of the rates began by determining the costs of the Authority. This was achieved by making an estimate of the total outgoings of the Authority for the 1991-92 year (which included interest charges), adding to this figure 7.5% of the value of the Authority's assets (representing the rate of return on assets as accepted by the Commonwealth Government), and subtracting the interest charges. The evidence disclosed that the attribution of total costs as calculated to individual facilities and services was based upon a 1988 cost allocation study. This information was updated for the 1991-92 year by use of a computer model which was said to function as a "broad indication of the continued accuracy of the cost relativities established by the earlier study". However, as between TNS and ERS, a decision was made to attribute all ATS (the description of TNS and ERS together) overheads to ERS. This was the result of a judgment that it would minimise the impact of the charges on usage patterns and it would therefore accord with Ramsey pricing principles. As a result, approximately 80% of all ATS costs were attributed to ERS. However, Dr Fitzgerald gave evidence that this allocation involved no cross-subsidy, as each service at least bore its marginal costs.

256 The next step was to estimate the revenue base of the Authority. For TNS and RFFS, forecast growth rates were applied to the number of chargeable tonnes landing at the airports providing the services. For ERS, forecast growth rates were applied to composite weight/distance figures. The forecast growth rates were arrived at after consultation by the Authority with the industry in relation to the rate of growth for each of the sectors in the aviation industry. This led to a

weighted average for the growth rate in the revenue base of each service category, which accounted for the proportion of the revenue base for each service contributed by each sector. The sectors in the aviation industry comprise international operations, domestic RPT (which are mainly jet aircraft which are fuelled by aviation turbine kerosene ("avtur")), and general aviation (mainly small combustion engine aircraft fuelled by aviation gasoline ("avgas")).

- 257 The calculation next factored in revenue received by the Authority other than by way of charges after taking account of the forecast rates of growth for each sector. The Authority's revenue included receipts from the Commonwealth of a proportion of its avgas excise collections. The receipts were paid to the Authority in respect of its provision of ERS, TNS and RFFS to aircraft fuelled by avgas. The calculation then deducted from the target cost of each service revenue attributable to that service, a share of overall corporate miscellaneous revenues, such as interest earned, and a share of revenues from avgas excise. This produced the target amount which needed to be recouped by way of charges for each service. This was then divided by the forecast revenue base (in terms of the forecast number of units of the charging variables) for each service to produce the rate of charge for that service.

RFFS

- 258 By the above process, the RFFS charges were set at a level so that the income that they generated, when added to other RFFS-attributable revenue, recovered the total cost to the Authority of providing RFFS across the network. Cost in this context included a rate of return of 7.5% to the Commonwealth on its assets.

- 259 The evidence disclosed that, in relation to avgas aircraft (which comprise the majority of non-avtur aircraft), the major source of recovery of costs was the money which the Authority received from the excise which the Commonwealth levied on avgas fuel. There was difficulty in apportioning the RFFS costs attributable to non-avtur aircraft, for the reason that the Authority would not have provided RFFS at the same level but for the existence of the avtur aircraft. As a group, avtur aircraft approximated to the group of large, RPT aircraft. The RPT aircraft, for safety reasons, required a high level of RFFS. The expedient which was adopted was to levy RFFS charges on non-avtur aircraft at capital city airports only. This was done on the basis that the facilities and services at primary airports were the most sophisticated facilities and the most expensive to provide.

TNS

- 260 In relation to the rates for TNS arrived at as a result of the process described above, Branson J accepted Mr Barnes' evidence that "he was confident that in 1991-92 the aggregate of the en route charges and the terminal navigation charges

recovered the right amount of money"¹³⁷. This suggests that the total revenue received from the aggregate of the ERS charges, the TNS charges and the TNS-attributed portion of the avgas excise, was approximately equal to the aggregate costs incurred by the Authority in providing ERS and TNS. However, as I have indicated, 80% of all ATS costs were attributed to ERS.

261 The evidence of Mr Barnes, which was accepted by Branson J, was that it was not reasonably possible to say that any particular proportion of the costs of TNS related to non-avtur aircraft because the services were provided for the larger avtur aircraft¹³⁸. As a result, the same expedient adopted in relation to RFFS for non-avtur aircraft was employed in relation to TNS – i.e. to charge non-avtur aircraft only for landing at the six capital city airports which provided a high level of service.

ERS

262 As I have indicated, virtually all system support costs of ATS were recovered by charges for the ERS. Before Branson J, there was no challenge by the present respondents (other than in respect of the 7.5% planned rate of return on assets and the allocation of system overheads) to the appropriateness of the total revenue generated by the en route charges¹³⁹.

263 The entire cost of providing ERS for both the inward and outward legs of international flights was recovered with a charge which only related to the inward legs of flights. This was said to be for the sake of administrative simplicity. The effect of Mr Barnes' evidence in relation to the different rates levied for domestic and international ERS was described by Branson J as follows¹⁴⁰:

"Mr Barnes gave evidence that in the early part of the 1988 year an exercise had been undertaken to identify the marginal cost of services provided specifically for international flights and that that exercise provided the basis for the amount sought to be recovered by the international en route charges. Mr Barnes said that such charges were 'intended to recover the additional costs which could be reasonably related to international flights, which was the full costs of air traffic control dealing with offshore airspace sectors and a reasonable share of communications costs that were used primarily by aircraft on international routes'."

137 *Monarch Airlines Ltd v Airservices Australia* (1997) 72 FCR 534 at 562.

138 *Monarch Airlines Ltd v Airservices Australia* (1997) 72 FCR 534 at 562.

139 *Monarch Airlines Ltd v Airservices Australia* (1997) 72 FCR 534 at 572-573.

140 *Monarch Airlines Ltd v Airservices Australia* (1997) 72 FCR 534 at 573.

The finding of the Full Court of the Federal Court

264 Because of the construction which Beaumont J gave to the Determination, his Honour held that s 67 required that the amount or rate of a particular charge be reasonably related to the expenses incurred or to be incurred by the Authority in relation to the particular service provided to a *particular* aircraft on the *particular* occasion that it was charged. His Honour (with whom Lindgren J agreed on this point) said¹⁴¹:

"In short, no attempt was made to match, even in approximate terms, the amount of a charge with the expense of providing a specific service as s 67 contemplated. In the result, the amount or rate of each of the charges under challenge was not 'reasonably related' to the relevant 'expenses'."

265 Beaumont J's construction of the Determination meant that the Full Court of the Federal Court had no need to consider whether the first limb of s 67 was satisfied on the basis of the "network" interpretation of the Determination. As the Full Court's construction was incorrect, its finding with respect to the first limb must be set aside. Whether the charges are within the first limb of s 67 must therefore be determined by reference to the Notices of Contention, in which the respondents have set out matters which they contend expose as erroneous Branson J's conclusion that the ERS, TNS and RFFS charges were within the first limb of s 67.

The Notices of Contention

266 In par 1 of the Notices of Contention, the respondents contend that, in addition to the reasons the Full Court gave for concluding that the charges were not reasonably related to the expenses incurred or to be incurred in relation to the matters to which the charge relates, the Full Court's finding was correct because the following matters meant that the rate of each of the TNS, RFFS and ERS charges was not reasonably related to the expenses incurred by the Authority in relation to the matters to which each of those charges related:

- (a) the use of MTOW in the charging formula, which bears no reasonable relation to the extent of use of the facilities and services to which the charge relates;
- (b) the adoption of a uniform rate of charge across a network where costs varied substantially between locations;

¹⁴¹ *Airservices Australia (formerly Civil Aviation Authority) v Monarch Airlines Ltd* (1998) 152 ALR 656 at 685.

85.

- (c) in the case of the en route charges, the discrimination in the rate of the charge between international and domestic operators, where no reasonable basis was established for doing so;
- (d) the discrimination in the rate of the charge (in the case of the en route charges) and in the circumstances in which the charges apply (in the case of the TNS and RFFS charges) between avgas and avtur aircraft, where no reasonable basis was established for doing so;
- (e) the fact that the appellant did not know, in setting the various charges, what its expenses to be incurred were in relation to the provision of the services to which the charges related;
- (f) the inclusion of a rate of return of 7.5% on assets as an "expense".

267 Paragraph 2 of the Notices of Contention asserted that Branson J erred in making the following findings in support of her conclusion that the charges were reasonably related to the expenditure incurred or to be incurred in relation to the matters to which the charge relates:

- (a) assuming that there was a reasonable relationship in terms of the amount payable in respect of each passenger in an aircraft, even though use of the services bore no discernible relationship to passenger numbers but was dependent on aircraft movements;
- (b) concluding that there was a reasonable basis in 1991 for applying a lower per kilometre rate of en route charge to international operators than was applied to domestic operators;
- (c) concluding that the lower fixed rate for international en route charges did not have the consequence that the higher fixed rate for domestic en route charges did not reasonably relate to the expenditure incurred or to be incurred in connection with the matters to which the domestic en route charges related;
- (d) accepting the evidence of Mr Barnes that the en route charge for aircraft on international routes covered both the inward and outward flights and failing properly to take into account other evidence;
- (e) considering, in the case of en route charges, the reasonableness of the charges for the purposes of s 67 of the Act by having regard to the frequency with which those aircraft or types of aircraft used particular services or facilities, and failing to take into account the fact that the charges were only levied on aircraft when they did in fact use those services or facilities;
- (f) concluding that the more expensive en route facilities and services were put in place for bigger aircraft;

- (g) concluding that the differential in rates fixed for larger aircraft and small aircraft was justified by reference to expenses.

268 The respondents accept that the criterion of "reasonably related" does not require an exact equivalence between the amount or rate of a charge and an expense. However, many of their submissions seemed to assume that, although exact equivalence was not required, the criterion of "reasonably related" required some relationship of "reasonable proportionality" between charges and expenses. Paragraphs 1(a), 1(b), 1(c), 1(d), 1(e), 2(a), 2(c), 2(e) and 2(g) of the Notices of Contention are contentions based on this premise. But s 67 does not say that the charges must be "reasonably proportional" to expenditure. It only requires a reasonable relationship to exist. Indeed, the inclusion of the word "amount" in s 67 envisages a flat charge. Such a charge must often not be reasonably proportional to the expenses because it does not vary as the expenses do.

269 Furthermore, pars 1(c) and 1(d), and to some extent pars 2(b), 2(c), 2(f) and 2(g), recast the relevant inquiry by focusing on whether there is unreasonable discrimination as between different types of aircraft and different operating routes instead of whether each individual charge meets the criteria of s 67. While unreasonable discrimination as between charges may in some cases indicate that a particular charge is not reasonably related to expenses, this is not a necessary consequence of such discrimination. Moreover, it brings in a concept of "unreasonable discrimination" which is not grounded in s 67. Section 67 has no prohibition on discrimination. The correct approach is to apply s 67 to each charge individually to determine whether the statutory requirements are met, not to make a comparison as between charges.

270 Of the other matters in the Notices of Contention listed above, pars 2(b), 2(d) and 2(f) are quarrels with conclusions of fact as found by the trial judge. The limited circumstances in which this Court will overturn on appeal findings of fact made by a trial judge who has seen the witnesses are discussed by Dixon CJ and Kitto J in *Paterson v Paterson*¹⁴². The evidence in this case was complex, lengthy and technical. This Court should be slow to interfere with findings of fact made by the trial judge who undoubtedly became highly familiar with the technical aspects of the case over the lengthy course of the trial. Because that is so, the respondents have failed to convince me that Branson J erred to such an extent as would justify this Court in interfering with her findings of fact.

271 In relation to the issue raised by par 1(f), Branson J held that, in the context of s 67 and the Act as a whole, the word "expenses" could include a reasonable

¹⁴² (1953) 89 CLR 212 at 218-224. See also *Walsh v Law Society of New South Wales* (1999) 73 ALJR 1138; 164 ALR 405.

rate of return on assets¹⁴³. There is much to be said for the view that, in the context of s 67 and the Act as a whole, "expenses" should be so interpreted. Section 45(g) of the Act obliged the Authority to have regard to the need to earn a reasonable rate of return on its assets when preparing its financial plan. But whether or not "expenses" should be so interpreted is in my opinion immaterial because, even if the rate of return is not an expense in the strict sense, in the statutory context it is in the nature of an expense (as a cost of capital) and within the purview of s 67. Branson J referred to Mr Gemmell's unchallenged evidence that the Authority's charges built in¹⁴⁴:

"a forecast 7.5% (real) rate of return on the capital employed by the CAA. In effect, the 7.5% is treated as a cost. The economic rationale for this is that it represents the opportunity cost of the investment in assets of the CAA. Unless there was a return on capital employed by the CAA, it would be irrational for the CAA's shareholder to have invested capital in it. The investment would simply represent a subsidy to the aviation industry. To put it another way, without equity capital the CAA would be compelled to borrow all its capital requirements, and pass on the commercial borrowing costs (as opposed to the 7.5% rate of return) as part of its charges."

The criterion of "reasonably related" is broad enough to admit of a factor which, although not an expense in the strict sense, is in the nature of an expense.

272 Accordingly, the fact that charges were calculated with reference to a rate of return does not prevent the charges from being reasonably related to the expenses incurred or to be incurred in relation to the matters to which the charge relates.

273 It will be apparent from what I have said above that I consider that the respondents have failed to make out any of the grounds advanced in pars 1 and 2 of the Notices of Contention.

Are the charges otherwise reasonably related to expenses?

274 As described in detail above, for each of RFFS, TNS and ERS, the charges in the Determination were arrived at by:

1. first arriving at charging variables (MTOW for RFFS and TNS; and MTOW, $\sqrt{\text{MTOW}}$ and distance for ERS); and then
2. calculating, given these charging variables, what rates were required to recoup from each class of aircraft (i.e. avtur or non-avtur) the approximate

143 *Monarch Airlines Ltd v Airservices Australia* (1997) 72 FCR 534 at 566.

144 *Monarch Airlines Ltd v Airservices Australia* (1997) 72 FCR 534 at 560.

cost of, or expenditure incurred in, providing each category of service to that class of aircraft.

275 The selection of the charging variables involved considerations relevant to Ramsey pricing and international conventions with respect to charging for aviation services. In so far as Ramsey pricing was employed, it was used to achieve one of the underlying purposes of the Act – that of the Authority providing aviation services on a "user pays" basis. Each variable selected has a sound economic justification. It could not be suggested that any variable selected was too arbitrary or capricious to found the basis of the charges.

276 The calculation of expenditure on each category of service involved approximations and estimates, and also considerations relevant to Ramsey pricing, because of the problems associated with calculating a marginal cost. Accordingly, there was not a precise correlation between actual expenditure in providing a category of service and the cost attributed to that category of service. For example, Ramsey pricing principles meant that in the case of ERS and TNS, all overheads were attributed to ERS. However, s 67 includes any expenditure which bears some relationship, whether direct or indirect, with the provision by the Authority of the network of services and facilities in the category of service to which the charge relates. Furthermore, to a large extent, each category of service and facility supplied by the Authority is interdependent with other categories of services and facilities provided by the Authority. The Authority does not make available one category of service or facility in isolation from the others. Although at a particular time, a particular aircraft may utilise only one category of service or facility, nevertheless each is interrelated in the sense that their combination is what ensures the safety and efficiency of aviation in the skies in and around Australia. The effect of the network of services is greater than the sum of the effect of each individual service.

277 In my opinion, given that the variables selected have a sound economic justification, that the pricing structure was employed in order to achieve an underlying purpose of the Act, that the rates of charges were essentially determined with reference to approximate cost, that s 67 permits regard to be had to a wide range of expenditures, and that the services and facilities provided by the Authority are interrelated, a reasonable relationship exists between the rate of each of the RFFS, TNS and ERS charges and the expenditure incurred by the Authority in providing the categories of service to which those charges related.

278 Accordingly, in my opinion, each of the RFFS, TNS and ERS charges were within the first limb of s 67.

Are the charges "such as to amount to taxation"?

The meaning of "taxation" in s 67

279 Numerous Commonwealth Acts¹⁴⁵ contain provisions that a charge is not to be "such as to amount to taxation". The term "taxation" is defined in only one of the provisions which uses this formulation, namely, s 65(7) of the *Employment Services Act* 1994 which provides:

"An amount payable as mentioned in paragraph (2)(b) must not be such as to amount to the imposition of taxation within the meaning of section 55 of the Constitution."

Some of the provisions are similar to s 67 of the Act in that they include the "reasonably related" requirement, as well as the "not be such as to amount to taxation" requirement.

280 Examples of such provisions are:

"A charge fixed under subsection (1) must be reasonably related to the expenses incurred or to be incurred by the ACA in relation to the matters to which the charge relates and must not be such as to amount to taxation."¹⁴⁶

"An aeronautical charge shall not be fixed at an amount that exceeds the amount that is reasonably related to the expenses incurred or to be incurred by the Corporation in relation to the matters in respect of which the charge is payable and shall not be such as to amount to taxation."¹⁴⁷

"A charge fixed under subsection (1) must be reasonably related to the costs and expenses incurred or to be incurred by APRA in relation to the matters to which the charge relates and must not be such as to amount to taxation."¹⁴⁸

145 *Australian Communications Authority Act* 1997, s 53(2); *Australian Maritime Safety Authority Act* 1990, s 47(12); *Australian Prudential Regulation Authority Act* 1998, s 51(2); *Employment Services Act* 1994, s 65(7); *Federal Airports Corporation Act* 1986, s 56(10); *Fisheries Administration Act* 1991, s 94; *Radiocommunications Act* 1992, s 297.

146 *Australian Communications Authority Act* 1997, s 53(2).

147 *Federal Airports Corporation Act* 1986, s 56(10).

148 *Australian Prudential Regulation Authority Act* 1998, s 51(2).

"The amount or rate of a charge must be reasonably related to the expenses incurred or to be incurred by the Authority in relation to the matters to which the charge relates and must not be such as to amount to taxation."¹⁴⁹

281 The use of the criterion "not be such as to amount to taxation" is clearly a device which is used by the Parliament to limit the power of statutory authorities to levy charges, pursuant to delegated legislation, for services rendered by those authorities. This is the function being performed by the word "taxation" in s 65(7) of the *Employment Services Act*, and it would therefore seem likely that the word "taxation" is being used in the other provisions mentioned, and in s 67 of the Act, in the same sense in which it is used in s 65(7) of the *Employment Services Act*.

282 In *Lennon v Gibson and Howes Ltd*¹⁵⁰, Lord Shaw of Dunfermline speaking on behalf of the Privy Council said:

"In the absence of any context indicating a contrary intention, it may be presumed that the Legislature intended to attach the same meaning to the same words when used in a subsequent statute in a similar connection."

283 Fullagar J made comments to a similar effect in *Gale v Federal Commissioner of Taxation*¹⁵¹:

"[N]ice distinctions ought not be drawn between different forms of words in statutes *in pari materia*."

284 Moreover, s 55 of the Constitution renders invalid any provision of a "[law] imposing taxation" which deals with a matter other than taxation.

285 It is likely that the Parliament, in cognisance of this fact, intended the word "taxation" in s 67 and its equivalent provisions to have a meaning which coincides with the meaning of "taxation" in s 55 of the Constitution. A statutory prohibition on levying taxation (in its constitutional sense) pursuant to delegated legislation prevents the situation where a whole Act save for one provision is invalid because that one provision incidentally authorises taxation to be levied pursuant to delegated legislation.

286 Accordingly, I would regard the word "taxation" in s 67 of the Act as equivalent to "taxation within the meaning of s 55 of the Constitution". There is a

¹⁴⁹ *Australian Maritime Safety Authority Act* 1990, s 47(12).

¹⁵⁰ [1919] AC 709 at 711-712.

¹⁵¹ (1960) 102 CLR 1 at 12.

substantial body of jurisprudence which has been built up in this Court concerning the constitutional meaning of "taxation".

Distinction between "taxation" and "fee for services"

287 In *Matthews v Chicory Marketing Board (Vict)*¹⁵², Latham CJ listed features which, if present, indicate that an exaction of money is taxation:

"a compulsory exaction of money by a public authority for public purposes, enforceable by law, and ... not a payment for services rendered".

288 In this case it does not automatically follow from the conclusion that the charges are "reasonably related to the expenses incurred or to be incurred ... in relation to the matters to which the charge relates" that the charges are "fees for services" and therefore not taxation. No doubt the existence of this relationship means that the charges are, *prima facie*, to be regarded as fees for services. However, there are two reasons why a conclusion that the charges are not taxation cannot be reached without further analysis.

289 First, the services were ones which an aircraft operator was required by law to acquire if he or she wished to fly in Australian airspace¹⁵³. If the operator wished to fly in Australian airspace, he or she had no practical alternative but to acquire the services in question. Thus, in a practical sense, the exaction was compulsory and the compulsory nature of the exaction is an indication that a charge is taxation. In *General Practitioners Society v The Commonwealth*¹⁵⁴, however, Gibbs J said that "the fact that the service for which the fee is charged is one which the practitioner is in effect compelled to obtain does not in my opinion alter the character of the fee or convert it into a tax."¹⁵⁵

290 In this case, the aircraft operators were not compelled to fly in Australian territory, but they were compelled to obtain at least some of the services (such as air traffic control services) if they wished to do so. The material facts of the case cannot be distinguished from those in *General Practitioners*. Accordingly, in my opinion, the element of practical compulsion involved in the charges does not destroy the *prima facie* character of the charges as fees for services.

¹⁵² (1938) 60 CLR 263 at 276.

¹⁵³ See, for example, Reg 100(1) of the Civil Aviation Regulations (Cth) which stated that "[a]n aircraft shall comply with air traffic control instructions. Penalty: \$5,000."

¹⁵⁴ (1980) 145 CLR 532.

¹⁵⁵ (1980) 145 CLR 532 at 562.

291 Second, and more significantly, the pricing structure employed by the Authority was such that it was not possible to identify a discernible relationship at the lowest level between the amount of a particular charge and the value of the particular service received by a particular user as the quid pro quo for the charge. This feature of the charging structure is an indication that the charges are taxation.

292 In *Air Caledonie International v The Commonwealth*¹⁵⁶, this Court, after referring to Latham CJ's statement in *Matthews*, said:

"The third [comment] 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 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."

293 In *Harper v Minister for Sea Fisheries*¹⁵⁷, Dawson and Toohey JJ and I, referred to this passage from *Air Caledonie* in the context of saying that an exaction of money for the purpose of conserving a public natural resource could amount to taxation if the exaction "has no discernible relationship with the value of what is acquired"¹⁵⁸.

294 The formulation that the exaction must be related to the "value of what is acquired" which was enunciated in *Air Caledonie* and *Harper v Minister for Sea Fisheries* differs slightly from that described in previous cases in this Court. In *Harper v Victoria*¹⁵⁹, Taylor J indicated that a charge for an egg grading service would be a tax:

156 (1988) 165 CLR 462 at 467.

157 (1989) 168 CLR 314 at 336-337.

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

159 (1966) 114 CLR 361 at 378.

"if fees were fixed which bore no relation to the *expenditure incurred* by it with respect to the grading, testing, marking and stamping of eggs delivered and presented to it". (emphasis added)

295 In *Marsh v Shire of Serpentine-Jarrahdale*¹⁶⁰, Barwick CJ held that delegated legislation, which purported to exact a charge, was ultra vires because:

"the fee bears no relation to the cost of administering a licensing system. It is evidently not a charge fixed as a reasonable fee for the issue of licences. Whilst that consideration may not be always decisive, in my opinion, the statute in this case authorized no more than fees which fall within this description."

This passage suggests that, in the context of the taxation/fee for services dichotomy, a charge must bear a reasonable relationship to the *cost* of providing the service in order to be characterised as a fee for service.

296 Similarly, in *Swift Australian Co (Pty) Ltd v Boyd Parkinson*¹⁶¹, where the appellant argued that a particular exaction was a tax, McTiernan J said:

"It is argued for the respondent that the pecuniary exaction in the present case falls within that category [of a fee for services] and, in support of that argument it cites figures to show that the amount exacted was less than the *costs* of administration. This argument is of doubtful worth, since the scale stands whatever may be the *costs* of administering the Act." (emphasis added)

297 But *Air Caledonie* and *Harper v Minister for Sea Fisheries* show that the emphasis in determining whether a fee for services is taxation has shifted from cost to value. Unless this shift had been made, it would have been difficult, if not impossible, to describe the charge in *Harper v Minister for Sea Fisheries* as a fee for services. In that case, the formula for determining the licensing fee was explicitly related to the market value of abalone taken in the previous licence period and there was no attempt to relate the amount of the licence fee to the cost of administering the licensing scheme.

298 In my opinion, however, the shift from "cost" or "expenses" in the earlier cases to "value" in *Air Caledonie* and *Harper v Minister for Sea Fisheries* is not a conceptual shift. It is really a recognition of the fact that the cost of a service is merely evidence of whether the payment is *for* that service. Thus, the expenses incurred in providing, or the costs of providing, a service are simply one criterion

¹⁶⁰ (1966) 120 CLR 572 at 581.

¹⁶¹ (1962) 108 CLR 189 at 204.

of the relationship. In *Harper v Minister for Sea Fisheries*, on the other hand, market value, as promulgated by declaration in the *Gazette* by the Director of the relevant government department, was the relevant criterion for determining whether the payment was *for* the benefit acquired. In *Air Caledonie*, the issue of "value" did not arise, as the Court held that¹⁶²:

"[a] requirement that a returning citizen submit, in the public interest, to the inconvenience of such administrative procedures at the end of a journey cannot, however, properly be seen as the provision or rendering of 'services' to, or at the request or direction of, the citizen concerned."

299 In the present case, the Authority had a monopoly in the provision of relevant services. The need for a unified system of air traffic control suggests that there is no way in which these services could practicably be provided other than by a monopolist. Moreover, an aircraft operator had no choice as to whether or not to obtain these services if he or she wished to fly in Australia. In the situation of a natural monopolist, no supply side competition exists. There is nothing to generate a market value. The relevant measure of value would seem to be the cost of providing, or the expenses incurred in providing, the service. For present purposes, I will assume that these costs or expenses could include a reasonable rate of return on assets as a "cost of capital", and return to this issue later.

300 In *Air Caledonie*, the Court indicated that, to be characterised as a "fee for services", the relevant charge must be "exacted for particular identified services provided or rendered individually to, or at the request or direction of, the particular person required to make the payment."¹⁶³ When this requirement as to the individual nature of the service is combined with the requirement that there must be a discernible relationship between the value of the service provided and the amount or rate of the charge, it tends to suggest that there must be a discernible relationship between the particular charge for the service provided on a particular occasion and the cost of providing that service, or the value of receiving that service. That is a different requirement from a requirement that the total value (or cost) of providing the services on all occasions bear a discernible relationship to the total of all charges levied for those services. Indeed, it is this difference which explains why Branson J concluded that, while the charges for TNS, ERS and RFFS were reasonably related to the expenses incurred by the Authority in relation to the matters to which those charges related, they nevertheless amounted to taxation¹⁶⁴.

¹⁶² (1988) 165 CLR 462 at 470.

¹⁶³ (1988) 165 CLR 462 at 470.

¹⁶⁴ *Monarch Airlines Ltd v Airservices Australia* (1997) 72 FCR 534 at 576-579.

301 Branson J's "network" interpretation of the Determination meant that, in addressing the first limb of s 67, her Honour was considering the issue of whether the total network expenses incurred by the Authority in relation to each category of charges were reasonably related to the charges imposed on Compass Airlines, on a network basis¹⁶⁵. In considering whether the charges amounted to taxation, her Honour quoted passages from *Air Caledonie* and *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth*¹⁶⁶ and asked herself the question¹⁶⁷:

"[I]n the circumstance that Compass Airlines aircraft used such facilities and services at only some such aerodromes, was the relationship between the value which it acquired and the amount of the charges which it was required to pay such as to prevent the charges being characterised as taxes?"

Her Honour concluded, in respect of TNS, for example¹⁶⁸:

"[I]n my view, the fact that the level of the terminal navigation charges was determined by reference to the costs of maintaining facilities and services at 32 aerodromes whilst Compass Airlines aircraft landed at only six of those aerodromes, means that a 'discernible relationship', as that expression was used by the High Court in the *Air Caledonie* case, between the amount of the charges and the value of the relevant facilities and services to Compass Airlines is not, in my view, able to be identified."

302 Her Honour seems to have thought that, in determining the taxation issue, it was necessary for her to confine her attention to the particular TNS, ERS and RFFS actually rendered to Compass Airlines and that it was not permissible to characterise the particular services rendered to Compass Airlines as use of a network. This view finds some support in the following passage from the judgment of the Court in *Air Caledonie*¹⁶⁹:

"Indeed, one need do no more than refer to the second reading speech of the responsible Minister, to which both sides referred the Court, to confirm that the *moneys intended to be raised by the purported impost were not related to particular services to be supplied to particular passengers* but were intended to provide, when paid into consolidated revenue, a general off-setting of the administrative costs of certain areas of the relevant Commonwealth

165 *Monarch Airlines Ltd v Airservices Australia* (1997) 72 FCR 534 at 570.

166 (1993) 176 CLR 555.

167 *Monarch Airlines Ltd v Airservices Australia* (1997) 72 FCR 534 at 578.

168 *Monarch Airlines Ltd v Airservices Australia* (1997) 72 FCR 534 at 578.

169 (1988) 165 CLR 462 at 470.

Department, including, for example, the administrative costs involved in maintaining facilities for the issue of visas in overseas countries and 'general administrative overheads'." (emphasis added)

303 To similar effect are the comments made by members of this Court in *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth*¹⁷⁰ where a statutory scheme required employers to expend a minimum amount in the training of their workforces; any failure to expend the minimum amount resulted in a liability to pay the shortfall to the Commonwealth. The money received by the Commonwealth was designated for expenditure on workforce training. An employer alleged that the legislation imposed a fee for services and was not supported by the taxation power in s 51(ii) of the Constitution. In concluding that the charge was a tax, the majority said¹⁷¹:

"The [Act imposing the charge] does not by its terms establish any sufficient relationship between the liability to pay the charge and the provision of employment related training by the ultimate expenditure of the money collected to regard the liability to pay the charge as a fee for services or as something akin to a fee for services."

304 Dawson J (with whom I agreed on this issue) said¹⁷²:

"The employees of an individual employer upon whom the charge is levied might or might not benefit from a training program financed by a State or Territory. *If a training program may be characterized as a service it is not a particular service rendered to a particular employer by reference to the charge levied upon him.* A particular employer may derive no more benefit from payments made under training guarantee agreements than is derived by employers or the community in general from having a better trained workforce upon which to draw." (emphasis added)

305 The above passages may be read as indicating that, to avoid characterisation as a tax, this Court has required some relationship between the amount of a particular charge imposed and the value of the services actually received by a particular person on a particular occasion. However, in both *Air Caledonie* and *Northern Suburbs*, it could not be said that there was a particular identifiable service provided to the person liable to pay the charges. In terms of their ratio decidendi, *Air Caledonie* and *Northern Suburbs* did not hold the charges in question to be taxes because the charges levied in relation to the service did not

¹⁷⁰ (1993) 176 CLR 555.

¹⁷¹ (1993) 176 CLR 555 at 568.

¹⁷² (1993) 176 CLR 555 at 588.

bear a discernible relationship to the value of that service. Those cases held that the charges were taxes for the reason that no particular service could be identified. In the present case, it is clear that a service, however identified, was being provided.

306 But in any event, I am of the opinion that, even if the accepted doctrine of the Court is that there should be a discernible relationship between a particular charge and the value of a particular service in order for the charge to be characterised as a "fee for service", that suggestion ought to be considered afresh in light of the circumstances in this case.

Relevance of "user pays" to characterising a charge as taxation or a fee for services

307 If it were correct that there must be a relationship between the particular charge levied and the particular service received, statutory authorities would be constrained to relating charges to the marginal cost of providing the service in order that the charges not amount to taxation. Where the statutory authority has high fixed costs and low variable costs, this constraint would mean that it would not be able to fully recover its costs. In that case, the statutory purpose, such as that underlying the Act, could not be achieved. The issue then, is whether such a consideration can be legitimately taken into account in determining whether a charge is taxation or a fee for services.

308 In *R v Barger*¹⁷³, Griffith CJ, Barton and O'Connor JJ referred to the meaning of "taxation" in s 51(ii) and said: "[W]hatever [taxation] meant in 1900 it must mean so long as the Constitution exists". This comment may express no more than the traditional distinction between the connotation or meaning of a constitutional term, which does not change, and the denotation or application of a constitutional term, which changes as circumstances change. In any event, in light of current notions of legitimate methods of constitutional interpretation, the comment is not determinative of the factors which may be taken into account in characterising a charge as taxation or a fee for services. As I said in *Re Wakim; Ex parte McNally*¹⁷⁴:

"Philosophers are now said to regard the distinction between connotation and denotation as outdated¹⁷⁵. And in *R v Federal Court of Australia; Ex parte WA National Football League*¹⁷⁶, Mason J said that '[t]he distinction

¹⁷³ (1908) 6 CLR 41 at 68.

¹⁷⁴ (1999) 73 ALJR 839 at 849-850; 163 ALR 270 at 285.

¹⁷⁵ Zines, *The High Court and the Constitution*, 3rd ed (1992) at 16.

¹⁷⁶ (1979) 143 CLR 190 at 234.

between meaning and denotation is not without its difficulties'. But whether criticism of the distinction is or is not valid should not be seen as decisive. What is decisive is that, with perhaps only two exceptions¹⁷⁷, the Court has never hesitated to apply particular words and phrases to facts and circumstances that were or may have been outside the contemplation of the makers of the Constitution. That is because, with the striking exception of s 92 – which has an historical meaning – the words of the Constitution, for the most part, describe concepts and purposes that are stated at a sufficiently high level of abstraction to enable events and matters falling within the current understanding of those concepts and purposes to be taken into account. In the words of an earlier work of Professor Dworkin¹⁷⁸, the Constitution draws a distinction between concepts and conceptions. That being so, once we have identified the concepts, express and implied, that the makers of our Constitution intended to apply, we can give effect to the present day conceptions of those concepts."

- 309 Accordingly, in my opinion, in characterising a charge as a fee for services or taxation, it 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" basis¹⁷⁹. 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.

The utility of "discernible relationship" as a discriminant of characterisation in these circumstances

- 310 The rationale behind using the existence of a discernible relationship between the value of the particular service received and the amount of the exaction as an indicia of a fee for service appears to be based on two related propositions. First, where there is no discernible relationship, it is easier to infer that there is a revenue-

177 *Attorney-General for NSW v Brewery Employees Union of NSW* (1908) 6 CLR 469; *King v Jones* (1972) 128 CLR 221.

178 Dworkin, *Taking Rights Seriously* (1977) at 134.

179 As is the Authority.

raising purpose behind an exaction¹⁸⁰. In *Fairfax v Federal Commissioner of Taxation*¹⁸¹, Windeyer J pointed out that:

"[t]axes are ordinarily levied to replenish the Treasury, that is to provide the Crown with revenue to meet the expenses of government. That is the prime purpose of the income tax."

311 In *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth*¹⁸², Mason CJ, Deane, Toohey and Gaudron JJ answered the plaintiff's argument that the law was not taxation because there was no revenue-raising purpose by identifying a revenue-raising purpose which could be discerned from the operative provisions of the statute, even though it was not set out in its objects. *Northern Suburbs* indicates that, while "in the characterization of a law with respect to taxation, the legislative purpose has limited relevance"¹⁸³, it is nevertheless a factor to be taken into account in determining whether a law is a law "with respect to taxation" within s 51(ii) of the Constitution. In my opinion, the existence or non-existence of a revenue-raising purpose has greater relevance when the issue is whether an exaction is "taxation" or a "fee for services" by reason of a lack of a discernible relationship between the value of a particular service and the amount of the exaction. That is because the presence of a discernible relationship negatives the inference that the charge was imposed for a revenue-raising purpose.

312 Second, the operation of the market generally means that there will be a relationship between the value of a service provided by the private sector and the fee imposed by the private sector for that service. Thus, an exaction for a service exhibiting this characteristic can be seen to be commercial in nature. Hence it can be characterised as a "fee" even though it is levied by a public authority. But, as the evidence in this case discloses, where a natural monopoly exists, whether in the public or private sector, there are difficulties associated with levying a price which exhibits a discernible relationship to the value of the service provided to a particular user on a particular occasion. Where services are provided by a public authority with a natural monopoly and where the statutory context and the surrounding circumstances otherwise fail to indicate a revenue-making purpose for a charge, the lack of a discernible relationship between the value of a particular

¹⁸⁰ In *General Practitioners Society v The Commonwealth* (1980) 145 CLR 532 at 562, Gibbs J said: "[A]n exaction may be so large that it could not reasonably be regarded as a fee."

¹⁸¹ (1965) 114 CLR 1 at 19.

¹⁸² (1993) 176 CLR 555 at 568-569.

¹⁸³ (1993) 176 CLR 555 at 570.

service received on a particular occasion and the amount of the charge for that service does not necessarily indicate that the charge has the character of a tax.

313 What then is the statutory context and what, if any, are the surrounding circumstances from which it can be inferred that there is no revenue-making purpose behind a charge for a service levied by a public authority with the result that the charge can be properly characterised as a fee for a service?

314 In my opinion, the following elements of the statutory context and the circumstances of this case indicate that the charges are properly characterised as fees for services:

- the services were provided by a statutory authority which had as one of its statutory functions the provision of those services or services of that general type;
- the position of the statutory authority in providing the services approximated that of a natural monopolist;
- the statutory authority was (at least impliedly) directed under statute to recover the costs of providing those services from the users of those services;
- the statutory authority exhibited a large degree of financial independence from the executive government and was intended to operate on a commercial basis; and
- the pricing structure which gave rise to the lack of a discernible relationship between the value of the services provided on a particular occasion and the charge levied for those services (in this case, Ramsey pricing) was a reasonably and appropriately adapted means of achieving a legitimate public purpose (other than revenue raising) which was related to the functions, powers or duties of the statutory authority.

315 These matters support the inference that the lack of a discernible relationship arises from factors, commercial in nature, related to implementing the "user pays" principle of public policy by a body which is financially separate from government. They therefore negate the inference that the particular pricing structure arises from a revenue-raising purpose. Where the total charges recovered for providing the services exceeds the total cost of providing the services, however, a rebuttable presumption naturally arises that the pricing structure is employed for a revenue-making purpose.

316 Here the evidence disclosed that the rates of the charges were calculated by making an estimate of the total outgoings of the Authority for the 1991-92 year, adding to this figure 7.5% of the value of the Authority's assets (representing the rate of return on assets) and subtracting the interest charges. There is no suggestion

that the figure of 7.5% is an unreasonable rate of return on the assets in question. But can that 7.5% rate of return be properly included in the "costs" of the Authority?

317 The degree of financial autonomy of the Authority from the executive government indicates that a reasonable rate of return on assets from the Authority to the Commonwealth may be legitimately considered to be the cost to the Authority of utilising capital provided by the Commonwealth to provide the services in question. Section 54 of the Act indicates that the capital of the Authority was to be regarded as separate from the capital of the Commonwealth and that the capital of the Authority was, in a large part, previously capital of the Commonwealth. Although s 54(2) stated that "[i]nterest is not payable to the Commonwealth on the capital of the Authority, but the capital of the Authority is repayable to the Commonwealth at such times, and in such amounts, as the Minister determines in writing", s 45 demanded that "[w]hen preparing the financial plan, the Board shall consider", inter alia, "the need to earn a reasonable rate of return on the Authority's assets (other than assets wholly or principally used in the performance of regulatory functions or the provision of search and rescue services)".

318 The rate of return required by the Commonwealth arose as an incident of the Commonwealth utilising the Authority to provide the services in question. The Commonwealth required that its assets provide a reasonable rate of return so that there was no opportunity cost to the Commonwealth of allowing a semi-autonomous statutory authority to tie up what would be Commonwealth assets if the functions of providing the services in question had not been devolved to the Authority. But the overarching purpose of the requirement, as discerned from the operation of the Act, was to allow the Authority to provide the services in question while minimising the opportunity cost to the Commonwealth. It was not to "replenish the Treasury"¹⁸⁴.

The charges are not such as to amount to taxation

319 It follows that in the statutory context of this case the lack of a discernible relationship between the charge levied for, and the value of, a particular service provided on a particular occasion, does not destroy the prima facie character of the charges as fees for services. All the charges in question are therefore properly regarded as fees for services and do not amount to taxation.

¹⁸⁴ *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 19.

III ARE THE LIENS INVALID BY VIRTUE OF SECTION 51(xxxi) OF THE CONSTITUTION?

The statutory framework for the imposition of the liens

320 Sections 69 and 70 of the Act relevantly provided:

"Imposition of statutory lien

69 (1) Subject to section 76, where:

- (a) at the end of the payment period after a charge became payable in respect of an aircraft, the charge is not paid; and
- (b) at the end of that period, a statutory lien is not in effect in respect of the aircraft; and
- (c) the charge or penalty in respect of the charge remains unpaid;

then, if an appropriate officer so directs at any time, the Registrar shall make an entry in the Register in the manner prescribed and, upon the making of the entry, there is vested in the Authority in respect of the aircraft a statutory lien covering the following:

- (d) the charge or penalty;
- (e) any penalty that becomes payable in respect of the charge after the entry is made;
- (f) any further outstanding amounts in respect of the aircraft.

...

Effect of lien

70 (1) Where a statutory lien has been registered in respect of an aircraft and until the lien ceases to have effect, the following provisions of this Division apply, in spite of any encumbrance in respect of the aircraft and any sale or disposition of, or dealing in, the aircraft or an interest in the aircraft, and whether or not the Authority has possession of the aircraft at any time.

(2) For the purposes of priorities amongst creditors and the purposes of the distribution of the proceeds of a sale made under section 73, the statutory lien has effect as a security interest in respect of the aircraft ranking in priority:

- (a) after any security interest (other than a floating charge) in respect of the aircraft created before the time of registration of the statutory lien, to the extent that that security interest covers a debt incurred before that time; and
- (b) before any security interest not falling within, or to the extent that it does not fall within, paragraph (a)."

321 Section 71 of the Act provided for the de-registration of an Australian aircraft if an outstanding amount covered by a statutory lien remained unpaid at the end of six months after the later of the day on which it became an outstanding amount and the day on which the lien was registered. Section 72 of the Act provided for seizure by the Authority of an aircraft if an outstanding amount covered by a statutory lien remained unpaid at the end of nine months after the later of the day on which it became an outstanding amount and the day on which the lien was registered. In such a case, s 71 required that the Authority, through its authorised officer:

- "(a) shall take reasonable steps to give notice of the seizure to:
 - (i) such persons as, in the opinion of an authorised officer, have a security interest in the aircraft;
 - (ii) each person who is any of the following, namely, an owner, operator, lessee, hirer, charterer or pilot in command, of the aircraft; and
 - (iii) such other persons as are prescribed; and
- (b) may keep possession of the aircraft until all outstanding amounts covered by the statutory lien are paid."

322 Section 73 provided:

"Sale of aircraft

73 (1) If an outstanding amount covered by the statutory lien is unpaid at the end of 9 months after the day on which it became an outstanding amount or the day on which the lien was registered, whichever is the later, the Authority may at any time, whether or not the aircraft has been seized under section 72:

- (a) sell the aircraft as prescribed, whether by public auction or private contract;
- (b) make and execute all instruments and documents necessary for effecting the sale; and

- (c) give full and effective title to the aircraft free of all encumbrances, leases and contracts of hire.

(2) Before selling the aircraft, the Authority shall take reasonable steps to give reasonable notice of the sale to the persons referred to in paragraph 72(a)."

323 Section 74 dealt with the application of payments received by the Authority in discharge of amounts covered by statutory liens. The payments were to be applied in discharge of those amounts in the order in which they became payable. Section 75 provided that a lien ceased to have effect if there was no outstanding amount covered by the lien, if the aircraft was sold under s 73, or if an appropriate officer so directed in writing.

The argument in the courts below

324 At first instance and in the Full Court of the Federal Court, the respondents contended that the provisions of the Act relating to the liens, namely ss 68-81, were invalid because they were laws with respect to "the acquisition of property ... from any ... person for any purpose in respect of which the Parliament has power to make laws" on other than just terms. That being so (so the argument went), the negative implications in s 51(xxxi) of the Constitution precluded the Commonwealth from imposing the liens. Neither Branson J nor the Full Court had to decide this question because they each held that the charges which the liens secured were invalid. The respondents also initially contended that the liens provisions imposed taxation and as such the Act was in breach of s 55 of the Constitution. However, that argument was abandoned in this Court.

The operation of s 51(xxxi)

325 Not every taking or acquisition of property from a person or State by the Commonwealth is an acquisition for the purpose of s 51(xxxi) of the Constitution. In *Mutual Pools & Staff Pty Ltd v The Commonwealth*¹⁸⁵, Brennan J described the operation of s 51(xxxi) of the Constitution:

"Section 51(xxxi) of the Constitution has a dual effect. First, it confers power to acquire property from any State or person for any purpose for which the Parliament has power to make laws and it conditions the exercise of that power on the provision of just terms. Second, by an implication required to make the condition of just terms effective, it abstracts the power to support a law for the compulsory acquisition of property from any other legislative

¹⁸⁵ (1994) 179 CLR 155 at 177-178.

power¹⁸⁶ (s 122 apart¹⁸⁷). Nevertheless, there are sundry laws providing for the acquisition of property which are supported by heads of power other than s 51(xxxi) and which are not affected by the requirement of just terms. For example, laws providing for the imposition of a tax¹⁸⁸, the compulsory payment of provisional tax¹⁸⁹, the seizure of the property of enemy aliens¹⁹⁰, the sequestration of bankrupts' property¹⁹¹, the forfeiture of prohibited imports or the exaction of fines and penalties¹⁹² have been held to be unaffected by the guarantee of just terms. If the laws considered in these cases had been classified as laws falling within s 51(xxxi), the acquisitions of property for which they provided would have failed for want of the provision of just terms. Clearly there are some laws which, though they provide for what can properly be described as an acquisition of property, are not classified as laws falling within s 51(xxxi). The acquisitions of property for which they provide are not acquisitions of property *for the purposes of* s 51(xxxi)." (emphasis in original)

Did the liens provisions effect an acquisition of property in the circumstances of this case?

326 The first issue is whether the liens provisions operated to effect an "acquisition of property". The appellant argued that no acquisition of property could take place until an aircraft had been seized under s 72 or sold pursuant to s 73 and that there was no such seizure or sale in this case. Once a lien was vested in the Authority in respect of an aircraft, s 78A of the Act prohibited removal of that aircraft from Australian territory without the approval of the Authority (which was not given in this case). Notwithstanding this interference (virtually a taking)

186 *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v The Commonwealth* (1943) 67 CLR 314 at 318, 325; *W H Blakeley & Co Pty Ltd v The Commonwealth* (1953) 87 CLR 501 at 521; *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 371; *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 445.

187 *Teori Tau v The Commonwealth* (1969) 119 CLR 564; *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 201.

188 *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 638, 649.

189 *Commissioner of Taxation v Clyne* (1958) 100 CLR 246 at 263, 270; *Federal Commissioner of Taxation v Barnes* (1975) 133 CLR 483 at 494-495, 500.

190 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372-373.

191 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372.

192 *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 408; *R v Smithers; Ex parte McMillan* (1982) 152 CLR 477 at 487-489.

with property, the Authority claims that *Australasian United Steam Navigation Co Ltd v The Shipping Control Board*¹⁹³ is authority for the proposition that a restriction on the use of an aircraft while it remains in the possession of its owner does not effect an acquisition for the purposes of s 51(xxxi). The respondents, on the other hand, contend that the liens vested in the Authority conferred on the Authority "an identifiable and measurable advantage"¹⁹⁴ relating to the ownership or use of property. They therefore effected an acquisition of property.

327 In *Mutual Pools*, Deane and Gaudron JJ said¹⁹⁵:

"[T]he word 'acquisition' is not to be pedantically or legalistically restricted to a physical taking of title or possession. Once it is appreciated that 'property' in s 51(xxxi) extends to all types of 'innominate and anomalous interests'¹⁹⁶, it is apparent that the meaning of the phrase 'acquisition of property' is not to be confined by reference to traditional conveyancing principles and procedures."

328 Section 69 of the Act referred to the liens being "vested" in the Authority and s 70(2) described the liens as a "security interest". The operative effect of the liens was to divest the respondents of valuable interests in the aircraft including the right to demand the immediate return of the aircraft should it be seized and the ability to sell the aircraft and give clear title to the aircraft to the buyer. Furthermore, the Authority obtained an "identifiable and measurable advantage"¹⁹⁷ by the vesting of the lien because the Authority was given rights of control in that it could refuse to approve the removal of the aircraft by the respondents until the outstanding charges were paid.

329 Accordingly, in my opinion, the liens provisions effected an "acquisition of property", notwithstanding that there was no seizure or sale of the aircraft.

193 (1945) 71 CLR 508.

194 *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 283 per Deane J.

195 (1994) 179 CLR 155 at 184-185.

196 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349 per Dixon J; see also *The Tasmanian Dam Case* (1983) 158 CLR 1 at 145, 246-247, 282-283.

197 *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 283 per Deane J.

Principles relevant to the characterisation of the liens

330 Although the two major propositions referred to by Brennan J in *Mutual Pools* are well established by decisions in this Court, a difficulty arises in determining which "sundry laws" providing for the acquisition of property "are supported by heads of power other than s 51(xxxi) and which are not affected by the requirement of just terms."¹⁹⁸ In the passage quoted above, Brennan J provides examples of laws which have been held to fall outside s 51(xxxi). However, the liens provisions of the Act do not precisely match any class of law which has been previously held by this Court to fall outside s 51(xxxi). They are most closely analogous to laws providing for the forfeiture of property as a consequence of, and a penalty for, a breach of a Commonwealth law, a class of laws examined in *Burton v Honan*¹⁹⁹, *Cheatley v The Queen*²⁰⁰, and *Re Director of Public Prosecutions; Ex parte Lawler*²⁰¹. They differ from such laws, however, because the lien did not vest in the Authority as a result of a breach of a Commonwealth law. There was no provision of the Act which created a positive statutory obligation to pay to the Authority the charges secured by the lien. Instead, s 66(11) of the Act simply provided that charges and penalties may be "recovered as debts due to the Authority."

331 Because no precedent is on all fours with the present case, the question arises as to whether there is any principle which enables a court to say whether an apparent acquisition of property by the Commonwealth can be justified by a head of power other than s 51(xxxi) of the Constitution. In *Burton v Honan*²⁰², Dixon CJ, in the course of referring to the implied incidental power of the Parliament, said:

"[E]verything which is incidental to the main purpose of a power is contained within the power itself so that it extends to matters which are necessary for the reasonable fulfilment of the legislative power over the subject matter".

His Honour, in referring to a law which provided for the forfeiture of goods imported in breach of the *Customs Act* 1901 (Cth), later said²⁰³:

¹⁹⁸ (1994) 179 CLR 155 at 177-178.

¹⁹⁹ (1952) 86 CLR 169.

²⁰⁰ (1972) 127 CLR 291.

²⁰¹ (1994) 179 CLR 270.

²⁰² (1952) 86 CLR 169 at 177.

²⁰³ (1952) 86 CLR 169 at 181.

"It is nothing but forfeiture imposed on all persons in derogation of any rights such persons might otherwise have in relation to the goods, a forfeiture imposed as part of the incidental power for the purpose of vindicating the Customs laws."

332 Dixon CJ's comment contains the genesis of the approach which has been since adopted in varying degrees by members of this Court in determining whether a law which effects the acquisition of property is nevertheless outside the requirement of "just terms" in s 51(xxxi). That approach is one of characterisation. Thus, in *Mutual Pools*, Mason CJ expressed the view²⁰⁴ that, of the cases which prima facie fall within s 51(xxxi), but which are to be regarded as authorised by the exercise of specific powers on other than just terms:

"it may be said that they are all cases in which the transfer or vesting of title to property or the creation of a chose in action was subservient and incidental to or consequential upon the principal purpose and effect sought to be achieved by the law so that the provision respecting property had no recognizable independent character."

In the same case, Deane and Gaudron JJ gave a more explicit explanation of the issues of characterisation involved. Their Honours said²⁰⁵:

"The settled method for determining whether a particular law is or is not of the kind referred to in one or other of the grants of legislative power contained in s 51 is that of characterization. That being so, the indirect operation of par (xxxi) does not extend beyond abstracting from other grants of legislative power authority to make laws which can properly be characterized as laws with respect to the acquisition of property for a purpose in respect of which the Parliament has power to make laws. That does not, of course, mean that a law will be outside the reach of par (xxxi) unless that is its sole or dominant character. For the purposes of s 51, a law can have a number of characters and be, at the one time, a law with respect to the subject matter of a number of different grants of legislative power. However, unless a law can be fairly characterized, for the purposes of par (xxxi), as a law with respect to the acquisition of property, that paragraph cannot indirectly operate to exclude its enactment from the prima facie scope of another grant of legislative power. Put differently, 'it is at least clear that before the restriction involved in the words "on just terms" applies, there must be a law with respect to the

204 (1994) 179 CLR 155 at 171.

205 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 188.

acquisition of property (of a State or person) for a purpose in respect of which the Parliament has power to make laws'²⁰⁶."

333 Despite the recognition by their Honours that a law can bear more than one character and a denial that a law will be outside s 51(xxxi) unless that is its "sole or dominant character", the approach taken by other members of the Court to s 51(xxxi) appears to search for the "sole or dominant character" of the law. Support for this assertion may be found in statements which have implicit in them a choice of characterisation between s 51(xxxi) and another s 51 head of power. The analysis often seems to indicate that a law is outside s 51(xxxi) because it is more properly regarded as being within another s 51 head of power – which is based on an assumption that there is a "most correct" characterisation of a law.

334 For example, in *Mutual Pools*, Deane and Gaudron JJ gave two examples of categories of laws which are likely to be outside s 51(xxxi). Those categories were "laws which provide for the creation, modification, extinguishment or transfer of rights and liabilities as an incident of, or a means for enforcing, some general regulation of the conduct, rights and obligations of citizens in relationships or areas which need to be regulated in the common interest"²⁰⁷, and "laws defining and altering rights and liabilities under a government scheme involving the expenditure of government funds to provide social security benefits or for other public purposes."²⁰⁸ Their Honours explained that, where such laws are of general application, "even though an 'acquisition of property' may be an incident or a consequence of the operation of such a law, it is unlikely that it will constitute an element or aspect which is capable of imparting to it the character of a law with respect to the subject matter of s 51(xxxi)."²⁰⁹ But the only logical way in which a generally described category of laws can be held to be unlikely to bear a particular characterisation is if the characterisation suggested by its general description can be said to preclude that other characterisation.

335 Similarly, in *Mutual Pools*, Brennan J said²¹⁰:

"Although s 51(xxxi) abstracts from other heads of power the power of acquisition which that paragraph itself confers, it does not thereby abstract the power to prescribe the means appropriate and adapted to the achievement

²⁰⁶ *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372; see also *The Tasmanian Dam Case* (1983) 158 CLR 1 at 282.

²⁰⁷ (1994) 179 CLR 155 at 189-190.

²⁰⁸ (1994) 179 CLR 155 at 190.

²⁰⁹ (1994) 179 CLR 155 at 190.

²¹⁰ (1994) 179 CLR 155 at 179-180.

of an objective falling within another head of power where the acquisition of property without just terms is a necessary or characteristic feature of the means prescribed.

In each of the cases in which laws for the acquisition of property without the provision of just terms have been held valid, such an acquisition has been a necessary or characteristic feature of the means selected to achieve an objective within power, the means selected being appropriate and adapted to that end. Therefore a law which selects and enacts means of achieving a legitimate objective is not necessarily invalid because the means involve an acquisition of property without just terms. What is critical to validity is whether the means selected, involving an acquisition of property without just terms, are appropriate and adapted to the achievement of the objective. The absence of just terms is relevant to that question, but not conclusive. Where the absence of just terms enhances the appropriateness of the means selected to the achievement of the legitimate objective, the law which prescribes those means is likely to fall outside s 51(xxxi) and within another supporting head of power."

336 This passage to some extent utilises the criteria expressed in *Nationwide News Pty Ltd v Wills*²¹¹ for determining whether a law is supported by the implied incidental power inherent in a s 51 head of power. This is significant, as it appears to incorporate an assumption that if a law is properly characterised as an incidental law with respect to another head of power in s 51, it is not within s 51(xxxi).

337 Brennan J reaffirmed his *Mutual Pools* approach in *Re Director of Public Prosecutions; Ex parte Lawler*²¹², a case in which the issue was the validity of a law providing for forfeiture of a fishing vessel which was found fishing in the Australian fishing zone in breach of s 100 of the *Fisheries Management Act 1991* (Cth). In the same case, Deane and Gaudron JJ said²¹³:

"[T]he validity of a law that effects or authorizes forfeiture of property in consequence of its use in the commission of an offence depends on whether it can be characterized as a law with respect to some matter concerning which the Commonwealth Parliament has power to make laws. Almost invariably, the validity of a law which effects or authorizes forfeiture of the property of 'an innocent third party', by which is meant a person who neither committed the offence nor knowingly facilitated its commission, will depend on the law being reasonably incidental to the power in question. And that will usually

211 (1992) 177 CLR 1 at 26-27.

212 (1994) 179 CLR 270 at 277-278.

213 (1994) 179 CLR 270 at 285-286.

involve a consideration of whether it is reasonably capable of being seen as appropriate and adapted to achieving, or, as reasonably proportionate to some object or purpose within power²¹⁴."

338 Mason CJ said in *Lawler*²¹⁵ that "[t]here is, as I see it, no inconsistency between what I said in [*Mutual Pools*] and what is said with respect to s 51(xxxi) by Deane and Gaudron JJ in the present case." Dawson J's judgment in *Lawler* also discloses a similar approach²¹⁶.

339 Thus, the approach taken by the Court to s 51(xxxi) is an exception to the general principle that a law can bear more than one character for the purposes of s 51²¹⁷. Although this is so, I would prefer to approach the issue in a different way from that expounded by Deane and Gaudron JJ in *Lawler*²¹⁸. Where the inquiry is whether an acquisition of property is within federal power but outside s 51(xxxi), a two-stage process must be undertaken. First, is the impugned law a law within s 51(xxxi)? Second, if no, is the law otherwise within the legislative power of the Commonwealth as a law with respect to another head of federal power? It is incorrect to seek to answer the second question and treat it as determining the answer to the first. Section 51(xxxi) doctrine holds that, where that paragraph applies, the power of acquisition is abstracted from all other heads of Commonwealth power. The first question must always be answered, therefore, before resort is had to the second question.

340 I discussed the first question in *Mutual Pools*²¹⁹ where I said:

"The compound conception²²⁰ of an 'acquisition of property on just terms' predicates a compulsory transfer of property from a State or person in circumstances which require that the acquirer should pay fair compensation

214 See, generally, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 26-34, 39-40, 68-69, 92-94, 100-101.

215 (1994) 179 CLR 270 at 274-275.

216 (1994) 179 CLR 270 at 291.

217 *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 192-193 per Stephen J; *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 151-152 per Mason J; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 295 per Mason CJ.

218 (1994) 179 CLR 270 at 285-286.

219 (1994) 179 CLR 155 at 219-220.

220 *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 290 per Dixon J.

to the transferor. When, by a law of the Parliament, the Commonwealth or someone on its behalf compulsorily acquires property in circumstances which make the notion of fair compensation to the transferor irrelevant or incongruous, s 51(xxxi) has no operation."

341 In that passage, I gave content to the first question in a manner which is independent of the answer to the second. If the law effects an acquisition of property and the notion of compensation is not incongruous or irrelevant, the law is within s 51(xxxi) and its validity will depend on whether it provides just terms for the acquisition, nothing more. Of course, the notions of incongruity and irrelevance necessarily assume that the subject matter or the purpose of the acquisition is one that, but for s 51(xxxi), would *prima facie* fall within another head of federal power such as taxation, bankruptcy or defence. But that is different from treating s 51(xxxi) as if, in some circumstances at least, its content is the residue of other federal powers. Where the Commonwealth acquires property, s 51(xxxi) must be addressed at the beginning and not at the end of the inquiry.

342 If the circumstances are such that the notion of fair compensation to the transferor is irrelevant or incongruous, the law is not a law with respect to s 51(xxxi). Its validity will then depend on whether it can be supported under another head of federal power. If the law is correctly characterised as within the core of a s 51 head of power, other than s 51(xxxi), there is no need to resort to the implied incidental power. However, as the inquiry will only be made in a situation where the operation of a law effects the acquisition of property, it will often be difficult to say that the law falls "fairly and squarely within the core of the subject matter"²²¹ of another s 51 head of power²²². When that is so, the extent of the incidental power will be decisive.

343 There remains to be examined the precise manner in which the test for incidental power has been applied in s 51(xxxi) cases. In *Nationwide News*, Mason CJ said²²³:

"Each specific grant of legislative power in the Constitution extends to all matters incidental to the subject matter of the power which are 'necessary for the reasonable fulfilment of the legislative power'²²⁴ over that subject matter.

²²¹ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 27 per Mason CJ.

²²² But cf Toohey J in *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 291-292.

²²³ (1992) 177 CLR 1 at 26-27.

²²⁴ *Burton v Honan* (1952) 86 CLR 169 at 177 per Dixon CJ.

Or, to put it another way, the specific substantive power extends to matters 'the control of which is found necessary to effectuate its main purpose'²²⁵. ...

The formulations to which I have just referred are not without their difficulties. The first formulation impliedly assumes and the second expressly assumes that a legislative power has a main purpose or object. As very few of the Parliament's legislative powers are truly purposive powers, the reference to purpose or object in this context has a wider meaning. The ascertainment of what is the main purpose or object of a particular power may in some cases be a matter of some difficulty. But in the case of s 51(xxxv) no such difficulty arises. The main, if not the sole, purpose or object of the power is the prevention and settlement of interstate industrial disputes and the sole means of achieving that object is by means of conciliation and arbitration²²⁶.

The second difficulty which arises from the formulations already quoted is to be found in the use of the word 'necessary'. If one thing emerges clearly from the decisions of this Court it is that, to bring a law within the reach of the incidental scope of a power, it is enough that the provision is appropriate to effectuate the exercise of the power; one is not confined to what is necessary for the effective exercise of the power²²⁷."

344 Perhaps in recognition of one of the difficulties referred to by Mason CJ – that of identifying the "main purpose" of a non-purposive head of power – Brennan J's judgment in *Mutual Pools*²²⁸ couches the test for determining whether a law is incidental to a s 51 head of power in terms of whether "the acquisition of property without the provision of just terms ... [is] a necessary or characteristic feature of the means selected to *achieve an objective within power*, the means selected being appropriate and adapted to that end."²²⁹ Thus, Brennan J refers to achieving an objective within power, rather than achieving the "main purpose" of the power. In my opinion, this shift from the requirement of an incidental law achieving the main purpose of the power to the requirement of an incidental law

²²⁵ *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77 per Dixon CJ, McTiernan, Webb and Kitto JJ.

²²⁶ *Australian Boot Trade Employés' Federation v Whybrow & Co* (1910) 11 CLR 311 at 338 per Isaacs J; *R v Kelly; Ex parte State of Victoria* (1950) 81 CLR 64.

²²⁷ *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth* (1987) 162 CLR 271 at 281; *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492 at 515 per Stephen J.

²²⁸ (1994) 179 CLR 155 at 179.

²²⁹ Emphasis added.

achieving an objective within power, is one which is required in order to surmount the difficulty referred to by Mason CJ. This more liberal formulation of the test for an incidental power is evident in the judgment of Deane and Gaudron JJ in *Lawler*, who refer to "some object or purpose within power"²³⁰, in my judgment in *Nationwide*, in referring to achieving the "main purpose or purposes"²³¹, and in the judgment of Dawson J in *Nationwide* who says that "notwithstanding the immediate operation of the law, if its end lies within the scope of the power, then there will ordinarily be a sufficient connexion to support the law."²³²

The application of these principles to this case

Is the notion of fair compensation irrelevant to or incongruous with the liens provisions?

- 345 The conclusion that the charges which the liens secured are "fees for services" and not taxation is important to the resolution of this question. It means that the debt secured by the lien was the quid pro quo accruing to the Authority as the result of its prior supply of valuable services to the aircraft operator. The lien was used to secure an existing indebtedness and it was only in force until that indebtedness was discharged²³³. The subject matter of the lien is one that is arguably within the power conferred on the Parliament by s 51(i) and s 51(xxix) of the Constitution. If "fair compensation" were to be paid to those having a proprietary interest in an aircraft upon the imposition of a lien, it would mean that the Authority would have an interest in the aircraft which on sale could be realised to satisfy the operator's previously incurred debt to the Authority, but on the other hand the Authority would incur a liability to pay "fair compensation" to those having a proprietary interest in the aircraft. The amount of this liability for "fair compensation" would be at least equal to the amount secured by the lien (as the "fair value" of the lien in the sense of the amount required to be paid before it will be discharged), and may be greater than the amount secured by the lien (if fair compensation involved an amount for loss of profits consequent upon the loss of use of the aircraft). Thus, the entire purpose of the lien would be frustrated as the Authority would be no better off, and indeed may be worse off, in terms of net recovery of the charges levied as a quid pro quo for the provision of the services. Accordingly, in my opinion, the imposition of a statutory lien in these circumstances is irrelevant to or incongruous with the notion of fair compensation

²³⁰ (1994) 179 CLR 270 at 286.

²³¹ (1992) 177 CLR 1 at 100.

²³² (1992) 177 CLR 1 at 87.

²³³ The Act, s 75(1).

in the sense adverted to by me in *Mutual Pools*²³⁴. Fair compensation would not be incongruous or irrelevant if there were no services provided. But that is not this case.

Are the liens provisions supportable by another s 51 head of power?

346 The Authority argued that the liens provisions were incidental to the provisions of the Act relating to the provision of airways services by the Authority and the charging of aircraft operators for those services. The Authority contended, and the respondents did not seriously contest, that the provisions of the Act relating to the provision of airways services by the Authority and the charging of aircraft operators for those services are supported by either or both of s 51(i), the interstate and overseas trade and commerce power, and s 51(xxix), the external affairs power. The reliance on s 51(i) is in part based on *Airlines of NSW Pty Ltd v New South Wales [No 2]*²³⁵. The effect of *Airlines [No 2]* is that provision of services to intra-State traffic, in so far as those services are concerned with ensuring or promoting the safety of interstate or international aviation, is supported by s 51(i). Reliance is placed on the external affairs power in so far as the provisions of the Act gave effect to Australia's obligations under the Chicago Convention or were a means for effectuating an objective of the Chicago Convention²³⁶.

347 The real issue between the Authority and the respondents is whether the liens provisions are properly characterised as laws within the implied incidental power of s 51(i) and/or s 51(xxix). This leads to the question whether the liens provisions are "reasonably capable of being seen as appropriate and adapted to achieving ... some object or purpose within"²³⁷ s 51(i) or s 51(xxix).

348 The purpose which the liens provisions sought to achieve was securing the payment of the charges levied for the services provided by the Authority. Given that levying the charges is within s 51(i), making the exercise of that power effective by securing the payment of those charges is undoubtedly a purpose within the scope of s 51(i). The only issue is whether imposing a lien is reasonably capable of being seen as appropriate and adapted to that purpose. Perhaps the strongest argument for contending that the liens provisions are not appropriate and adapted is that they bore harshly upon third parties such as the respondents themselves, who were owners of, lessors of, or had other proprietary interests in, the aircraft which had accrued the charges secured by the liens, even though the

234 (1994) 179 CLR 155 at 219-220.

235 (1965) 113 CLR 54.

236 In accordance with the approach taken in *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1.

237 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 286.

charges had been accrued by the operator of the aircraft and not by those third parties. Yet harsh though this may be, it is not decisive.

349 It is true that, in *Lawler*, Deane and Gaudron JJ said²³⁸:

"It can, we think, be taken that a law for the forfeiture of the property of an innocent third party, in the sense indicated, will not often satisfy the tests which reveal whether a law is reasonably incidental to a head of legislative power."

This statement by their Honours is based on their conception of an "innocent third party" as a "person who neither committed the offence nor knowingly facilitated its commission"²³⁹. Undoubtedly, the forfeiture of the property of such a person would not in general promote the enforcement of, or compliance with, the law in question. For example, forfeiture of the property of the neighbours of an offender would not promote the enforcement of the law in question.

350 However, the liens provisions are not open to this objection. What I said in *Lawler* about the legislation pursuant to which the vessels were forfeited seems applicable to the liens provisions²⁴⁰:

"The forfeiture of vessels engaged in illegal fishing not only sends a persuasive message to potential wrongdoers, it also prevents further illegal use of the vessels and renders the illegal behaviour of the masters and crews unprofitable²⁴¹. Knowledge by the owner of a foreign vessel that he or she can lose the vessel also assists in enforcing the Act because it makes it likely that the owner will exercise vigilance to prevent the vessel being used in breach of the Act."

351 While there is no "illegality" in this case, the analogy of this case with the above passage is that the owners and lessors of an aircraft, like the owners of the ship in *Lawler*, cannot be regarded as third parties who have no rational connection with the achievement of the purpose sought to be achieved by the impugned provision.

352 In addition, in this case, the "innocent" third parties received a benefit from the provision of the services on account of which the charges were levied, even

²³⁸ (1994) 179 CLR 270 at 286.

²³⁹ (1994) 179 CLR 270 at 286.

²⁴⁰ (1994) 179 CLR 270 at 295.

²⁴¹ See *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 at 687 (1974).

though they had themselves not incurred the charges. Owners and lessors of aircraft benefited in that:

1. without acquiring the services, the operator of the aircraft could not fly the aircraft commercially in Australia and therefore would not have taken the lease; and
2. the services, being largely directed to safety, protected the physical integrity of their valuable assets which were the aircraft.

353 Moreover, any reasonable due diligence process on the part of the owners or lessors prior to the granting of a lease to the operator would have disclosed that at the time the leases were executed, the Australian regulatory framework included the liens provisions. That such a process in fact took place in this case is illustrated by the fact that the leases made the imposition of a lien on the aircraft an event of default. Thus, the imposition of liens over the aircraft was one of the commercial risks evaluated by the owners and lessors when negotiating the lease.

354 In determining whether a particular provision is appropriate and adapted to achieving a particular purpose, it is also permissible to have regard to legislative schemes in other jurisdictions. In *Burton v Honan*²⁴², the fact that the forfeiture provisions were "Customs provisions which are of a standard pattern" was a factor militating in favour of the finding that they were supported by the implied incidental power. The imposition of liens upon aircraft for non-payment of air service charges is part of legislation in the United Kingdom²⁴³ and Canada²⁴⁴. It is a non-exceptional legislative measure in international aviation. There is also a close analogy between the rights granted by the liens provisions and the existence of maritime liens in admiralty law²⁴⁵.

355 It is also relevant to have regard to the difficulty of securing payment of charges in another manner²⁴⁶. In this regard, it is necessary to take account of the fact that an aircraft is a highly mobile piece of property which can be removed from the jurisdiction at very short notice. Because of the nature of the services provided by the Authority, a significant proportion of users of those services are

242 (1952) 86 CLR 169 at 179.

243 Civil Aviation (Navigation Services Charges) Regulations 1998 (UK), regs 11-14.

244 *Aeronautics Act*, RSC 1985 (Can), s 4.5.

245 See *Marine Insurance Act* 1909 (Cth), s 59; *Navigation Act* 1912 (Cth), s 94; *Admiralty Act* 1988 (Cth).

246 cf *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 276 per Mason CJ.

unlikely to be domiciled, or have any assets, in Australia. The Authority may be left without an effective manner of recovering these charges if it did not have any rights *in rem* against the only asset of its debtor which may be present in Australia.

356 The respondents contend that despite these considerations, there were other measures which would have secured payment of charges levied by the Authority in a manner less drastic than the imposition of a statutory lien, such as requiring a bank guarantee for charges before an operator was permitted to fly. However, in *Burton v Honan*, Dixon CJ said²⁴⁷:

"These matters of incidental powers are largely questions of degree, but in considering them we must not lose sight of the fact that once the subject matter is fairly within the province of the Federal legislature the justice and wisdom of the provisions which it makes in the exercise of its powers over the subject matter are matters entirely for the Legislature and not for the Judiciary."

357 In my opinion, whatever view one takes of the justice or wisdom of the liens provisions, the above considerations indicate that they are undoubtedly reasonably capable of being seen as appropriate and adapted to the achievement of a purpose (securing payment of the charges) which is within the scope of s 51(i). Therefore the liens provisions are properly characterised as being a law with respect to s 51(i).

Orders

358 I would allow the appeals and make orders as proposed by Gleeson CJ and Kirby J.

247 (1952) 86 CLR 169 at 179.

GUMMOW J.

359 This judgment is divided into Sections as follows:

	<u>paragraph</u>
I The Facts	[360]
II Constitutional Background	[372]
III The Act	[381]
<i>Functions and powers of the Authority</i>	[385]
<i>Economic burden on the Authority</i>	[387]
IV Commercial Operations of the Authority	[391]
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<i>Financial structure of the Authority</i>	[396]
V The Charges	[404]
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<i>Economic evidence and "Ramsey pricing"</i>	[420]
<i>Case law</i>	[435]
VIII The Critical Problem	[451]
IX Validity of the Determination	[462]
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<i>Other grounds in the Notice of Contention</i>	[471]
X Validity of the Lien Provisions	[480]
XI Conclusions	[507]

I THE FACTS

360 These appeals were heard together. They concern the power of the appellant, the Civil Aviation Authority ("the Authority"), both to impose levies, or "charges", for services and facilities it provides in discharge of its functions under the *Civil*

Aviation Act 1988 (Cth) ("the Act")²⁴⁸ and to enforce payment by a statutory lien imposed upon the aircraft in respect of which the services and facilities were provided. The Act is an example of a statutory regime regulating the provision of services, where the cost of the provision of those services is financed by the users thereof and the necessary infrastructure remains under public ownership. The financial structure provided by the Act for the Authority (now Airservices Australia²⁴⁹) will be considered in Section IV of these reasons. It is convenient now to outline the circumstances which led to the institution of these appeals.

361 Compass Airlines Pty Ltd ("Compass") operated five leased aircraft on Australian domestic routes between 1 December 1990 and 20 December 1991. Compass obtained the registration in Australia of each aircraft. Canadian Airlines International Ltd ("Canadian Airlines"), the respondent in the first appeal, was the owner of an Airbus Industrie A310-304 aircraft leased to Compass, and Monarch Airlines Limited ("Monarch Airlines"), the respondent in the second appeal, was the lessee of two Airbus Industrie A300B4-605R aircraft which were in turn sub-leased to Compass. Canadian Airlines executed a lease agreement with Compass on 5 June 1991, and delivery of the aircraft to Compass was to occur on or about 17 June 1991. Monarch Airlines executed two lease agreements with Compass on 29 June 1990, the term of the leases commencing on 14 November 1990 and 28 November 1990 respectively. On 25 June 1990, the respondent in the third appeal, Polaris Holding Company ("Polaris"), leased to Compass, in separate agreements, two Airbus Industrie A300-600R aircraft. The lease terms for these aircraft commenced in April and August 1991. It is not clear from the record whether Polaris owned the aircraft or had leased them from the owner or a head lessee.

362 On 26 June 1991, in reliance upon the power conferred upon the Board of the Authority by s 66(2) of the Act, the Chairman signed and sealed a determination²⁵⁰ ("the Determination"). This stated that "the Board HEREBY DETERMINES that the charges shall be fixed and the persons by whom and the times when the charges are payable for the period commencing on 1 July 1991 shall be as specified in the

248 The Act was enacted subsequent to the Independent Inquiry into Aviation Cost Recovery, *Aviation Cost Recovery – Report of the Independent Inquiry*, November 1984.

249 Section 11 of the *Civil Aviation Legislation Amendment Act* 1995 (Cth) substituted Airservices Australia for the Authority in these proceedings. The Authority was established by s 8 of the Act as a body corporate with perpetual succession which could sue and be sued. Airservices Australia was established as a body corporate which may sue and be sued in its corporate name by s 7 of the *Air Services Act* 1995 (Cth).

250 *Commonwealth of Australia Gazette*, P18, 28 June 1991.

schedule numbered 1 to 37 attached hereto". The Determination provided that it was to come into effect on 1 July 1991. Section 67 of the Act imposed limits upon the power conferred by s 66 to fix the amount or rate of the charges; in particular, that the amount or rate of the charges "shall not be such as to amount to taxation". The content of the Determination, in conjunction with ss 66 and 67, will be considered in Sections V to IX of these reasons. However, it should be noted immediately that the effect of cl 21(a) thereof was to designate Compass as the party by whom charges for the use of facilities and services by the five aircraft leased to Compass were to be payable to the Authority.

363 The Authority billed Compass for charges purportedly payable to the Authority by Compass arising under the Determination. For four of its leased aircraft, Compass paid part only of the sums billed and, for the fifth aircraft, no part of the invoice sum was paid to the Authority. Apart from its obligation to pay the charges, Compass became liable under s 66 of the Act to pay to the Authority penalties in the nature of interest upon the charges. In the period between September and December 1991, the penalty interest totalled \$650,262.58. On 18 December 1991, a statutory lien was vested in the Authority in each of the five aircraft, purportedly pursuant to s 69 of the Act, to cover the charges and the penalty interest which had accrued and would thereafter accrue with respect to each aircraft. The validity of Div 2 of Pt VI (ss 66-83) of the Act, which is headed "Charges and Statutory Liens", other than ss 66 and 67, is challenged by the respondents. This aspect of the appeals will be considered in Section X of these reasons.

364 On 20 December 1991, the Federal Court of Australia placed both Compass and Compass Holdings Limited in provisional liquidation. This was an event of default under each of the agreements pursuant to which Compass leased the aircraft. Each of these lease agreements in turn authorised the lessor to terminate, and to remove the aircraft from Australia.

365 It was at this critical juncture that the interests of the respondents were restricted by those of the Authority: the lessors were precluded by statute from exercising their rights to remove the aircraft from Australia. Section 78A of the Act provided:

"A person who knows or has reasonable grounds to believe that a statutory lien is in effect in respect of an aircraft must not remove that aircraft from Australian territory without the prior approval of an authorised officer.

Penalty: Imprisonment for 3 years."

No written approval from an authorised officer was forthcoming. In January 1992, each of the respondents entered into a deed with the Authority by which, subject to the terms of the deed, each respondent agreed to pay "under protest" the outstanding moneys claimed by the Authority in respect of the aircraft it had leased

to Compass. The Authority acknowledged in the deed that the payments were made "under protest". Pursuant to the respective deeds, the Authority was paid \$2,888,740.97 by Canadian Airlines, \$5,002,187.86 by Monarch Airlines and \$5,239,058.07 by Polaris. Upon payment, s 75(1) of the Act brought about the result that the liens over the aircraft ceased to have effect.

366 It is unnecessary to consider the contractual rights and obligations of the parties to each of these deeds, other than to note their broad effect; each respondent is entitled to recover the moneys paid by it to the Authority, with interest at the rate of 7.5 per cent per annum calculated from the date of the deed in question, if a court decides that, as against the respondents, the liens did not validly secure payment of the charges or for any reason the liens or the charges, or both, in whole or in part, are illegal, void or unenforceable.

367 By actions commenced in this Court, each respondent sought a declaration that Div 2 of Pt VI of the Act is invalid and judgment for the moneys paid to the Authority with interest at 7.5 per cent per annum. The original jurisdiction of this Court was attracted by the constitutional question respecting the validity of Div 2 of Pt VI of the Act²⁵¹. The nature of the money claim is less apparent. The obligations of the Authority under the deeds to make payments to the respondents arise only if there first be a favourable decision on the issues respecting the charges or liens. That had not occurred when the actions were instituted and indeed was an object sought to be achieved in those actions. The money claim is best understood as an action to recover moneys had and received by the Authority, the payment having been made under compulsion, in the sense of that term established by *Mason v New South Wales*²⁵².

368 By orders in each action dated 28 April 1993 the proceedings were remitted to the Federal Court. Branson J held that the Determination, insofar as it fixed the charges in question, was beyond the power conferred by s 66 of the Act, under which it had been made, because it did not satisfy the limitations on power imposed by s 67²⁵³. Her Honour thus did not have to consider any constitutional issues. The Full Court (Beaumont, Wilcox and Lindgren JJ) dismissed appeals by the Authority²⁵⁴.

369 The issues in this Court require an appreciation of the functions and powers conferred on the Authority by the Act. This in turn is assisted by an understanding

251 Constitution, s 76(i); *Judiciary Act* 1903 (Cth), s 30(a).

252 (1959) 102 CLR 108.

253 *Monarch Airlines Ltd v Airservices Australia* (1997) 72 FCR 534 at 580.

254 *Airservices Australia (formerly Civil Aviation Authority) v Monarch Airlines Ltd* (1998) 152 ALR 656.

of the place in the financial structure of government, established by the Constitution, of statutory bodies, such as the Authority, through which various spheres of economic activity are regulated.

370 The services in question were provided to Compass by the Authority. It would have been open to the Parliament to have substituted for that body a department of State of the Commonwealth established under s 64 of the Constitution and controlled by the fiscal provisions of the Constitution to which reference will be made in the next Section. That appears to have been the regime formerly employed. Further, the Parliament might have provided for the provision of those services by an entity or entities privately owned and operated under a franchise system with accompanying financial arrangements.

371 It is convenient now to consider the constitutional background against which the Authority was created.

II CONSTITUTIONAL BACKGROUND

372 In *Australian Tape Manufacturers Association Ltd v The Commonwealth*, Mason CJ, Brennan, Deane and Gaudron JJ said²⁵⁵:

"The principle adopted by the Constitution is that revenues or moneys raised shall form part of [the Consolidated Revenue Fund] from which they can be appropriated only for Commonwealth purposes and only by law. That principle finds expression in s 81. It is supplemented by s 83 which forbids the drawing of money from the Treasury except under appropriation by law."

Section 81 of the Constitution provides:

"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."

Section 83 mandates that "[n]o money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law".

373 The Authority is not financed, except in limited circumstances, by appropriations under s 83 of the Constitution, nor do the revenues or moneys raised or received by the Authority form part of the Consolidated Revenue Fund. The Authority stands apart from the financial structure imposed by the Constitution on the Executive Government of the Commonwealth. The Authority is a hybrid entity. It owes its life to statute and does not form part of the Executive

²⁵⁵ (1993) 176 CLR 480 at 506; see also at 522.

Government of the Commonwealth²⁵⁶. It derives its funding principally from sources other than appropriations by law from the Consolidated Revenue Fund, in particular, charges fixed by determination under s 66 of the Act.

374 Thus the issues presented in these appeals are not to be answered by asking whether the charges eventually paid to the Authority by the respondents were exacted by a law which provided the Commonwealth with a source of additional revenue. Further, the character of the provisions of the Act in question is to be determined by their operation, not by whether they were made with an objective which might be the raising of revenue.

375 The Authority is but one of a number of bodies established by laws of the Commonwealth to exercise what once may have been and elsewhere may be regarded as governmental functions²⁵⁷. For example, s 69 of the Constitution provided for the transfer to the Commonwealth of various departments of the public service in each State, including "posts, telegraphs, and telephones" and "lighthouses, lightships, beacons, and buoys". The officers of the transferred departments became subject to the control of the Executive Government of the Commonwealth²⁵⁸. Nevertheless, the present state of affairs finds its origins in the colonies before federation when the corporate form became a common vehicle for carrying out government activities²⁵⁹.

376 The establishment of entities such as the Authority to discharge public functions using sources of finance other than appropriations of public moneys

256 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 458-460, 470-472; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561; *British Steel Corporation v Granada Television Ltd* [1981] AC 1096 at 1168.

257 Examples of legislation containing provisions substantially similar to ss 66 and 67 of the Act include: *Australian Maritime Safety Authority Act* 1990 (Cth), ss 46 and 47; *Australian Prudential Regulation Authority Act* 1998 (Cth), s 51; *Australian Communications Authority Act* 1997 (Cth), s 53. Examples of legislation which provide for the levying of charges subject to the prohibition that the amount payable not be such as to "amount to taxation" or "amount to the imposition of taxation within the meaning of section 55 of the Constitution" include: *Fisheries Administration Act* 1991 (Cth), s 94; *Radiocommunications Act* 1992 (Cth), s 297; *Employment Services Act* 1994 (Cth), s 65.

258 Constitution, s 84.

259 *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219 at 231. See also *The Federated Amalgamated Government Railway and Tramway Service Association v The New South Wales Railway Traffic Employees Association* ("the *Railway Servants Case*") (1906) 4 CLR (Pt 1) 488.

involves significant change to the financial structure of the Commonwealth. These developments also bear upon the nature of responsible government, in particular with respect to the position of the Minister charged with the administration of the statute constituting the entity in question²⁶⁰.

377 In *Hughes Aircraft Systems International v Airservices Australia*²⁶¹, Finn J has remarked on two "significant fissures in Australian jurisprudence" arising from the use of the corporate form as a vehicle for carrying out the activities of government. His Honour said:

"The one concerns the constitutional status and standing in our system of government of statutory corporations that by statute are subject to prescribed (hence, presumably, correspondingly limited) powers of ministerial direction. Do they fall within the Executive? Or are they a fourth arm of government? The other raises the extent to which the manner of scrutiny of the formally 'non-governmental' action of a statutory corporation (that is, entering into a 'commercial' contract) can or should be affected by the considerations that it nonetheless is a public body that is so acting and that in so doing it is exercising a public function."

378 The second "fissure" is revealed by the facts in these appeals. With the creation of the Authority, the Parliament severed the immediate control and financial responsibility of the Commonwealth from the provision of air safety services and facilities. There is no issue in these appeals, s 51(xxxi) apart, of the extent, if any, to which the Constitution imposes fetters on the making of laws by which the Authority finances its functions on a "user pays" basis. However, in construing the relevant provisions of the Act, questions do arise concerning the constitutionally derived jurisprudence as to the meaning of "fees for services". These matters will be considered in Sections VII and VIII of these reasons.

379 This jurisprudence may have application elsewhere; for example, s 60(2) of the *Constitution Act* 1934 (SA), which, in dealing with the relative powers of the two chambers of the South Australian legislature in relation to money bills, provides that a bill, or clause of a bill:

"shall not be taken to appropriate revenue or public money, or to deal with taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or

260 See *Egan v Willis* (1998) 195 CLR 424; *Egan v Chadwick* [1999] NSWCA 176.

261 (1997) 76 FCR 151 at 179. See also Finn, "A Sovereign People, A Public Trust", in Finn (ed), *Essays on Law and Government*, (1995), vol 1, 1 at 12-13.

payment or appropriation of fees for licences or fees for services under the proposed Act".

380 It is convenient now to consider the material provisions of the Act.

III THE ACT

381 The validity of those provisions in the Act which vested power in the Authority to provide the facilities and services used by Compass (ss 8-16) and to fix the charges imposed on Compass (ss 66-67) were not challenged by the respondents. Section 51(i) of the Constitution, the interstate trade and commerce power, was relied upon by the Authority, and the interveners, to support these provisions. Leave was not sought by the respondents to re-open *Airlines of NSW Pty Ltd v New South Wales [No 2]*²⁶². The respondents did, however, submit that the lien provisions in the Act (ss 68-82) were beyond the legislative competence of the Commonwealth Parliament, a matter to be considered in Section X of these reasons.

382 The long title of the Act was "[a]n Act to establish a Civil Aviation Authority with functions relating to civil aviation, in particular the safety of civil aviation, and for related purposes". The Act established the Authority, embodied it with functions and invested it with power to discharge those functions. Further, the Act imposed a financial structure within which the Authority was to operate. The section central to the present appeals, s 67, which was the subject of differing interpretations in the Federal Court, limited the power of the Authority under s 66 to impose charges, such as those imposed on Compass pursuant to the Determination.

383 The meaning of a statutory provision must be determined "by reference to the language of the instrument viewed as a whole"²⁶³. In *Commissioner for Railways (NSW) v Agalianos*²⁶⁴, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". The process of construing ss 66 and 67 of the Act must therefore begin with an examination of the statutory context of those provisions.

²⁶² (1965) 113 CLR 54.

²⁶³ *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320.

²⁶⁴ (1955) 92 CLR 390 at 397. See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381.

384 It is appropriate to consider, first, the functions and powers of the Authority and, secondly, the financial structure within which the Authority was to perform those functions. These matters disclose the extent to which, for all practical purposes respecting these appeals, the Authority was obliged to operate on the basis that it would be financially autonomous from the Commonwealth. A corollary was that the Authority was obliged to fund the provision of its facilities and services from its principal source of revenue, namely the charges imposed under ss 66 and 67 of the Act.

Functions and powers of the Authority

385 Part II (ss 8-16) of the Act, entitled "ESTABLISHMENT, FUNCTIONS AND POWERS OF AUTHORITY", established the Authority and delineated its functions and powers. Section 9(1) provided:

"The functions of the Authority are:

- (a) as provided by this Act and the regulations, to conduct safety regulation of:
 - (i) civil air operations in Australian territory; and
 - (ii) Australian aircraft operating outside Australian territory;
- (b) to provide air route and airway facilities;
- (c) to provide air traffic control services, and flight service services, for, in either case, surface traffic of aircraft and vehicles on the manoeuvring area of aerodromes;
- (d) to provide a rescue and fire fighting service;
- (e) to provide a search and rescue service;
- (f) to provide an aeronautical information service;
- (g) to provide consultancy and management services relating to any of the matters referred to in this subsection;
- (h) to provide services to the Bureau of Air Safety Investigation in relation to the investigation of aircraft accidents and incidents;
- (j) any functions conferred on the Authority under the *Air Navigation Act 1920*;

- (k) any other prescribed functions, being functions relating to any of the matters referred to in this subsection; and
- (m) any functions incidental to any of the foregoing functions."

386 Section 9(4) directed, subject to s 12, that the functions of the Authority to provide services and facilities might be performed at the discretion of the Authority. Section 12 materially provided that the Minister "may give the Authority written directions as to the performance of its functions or the exercise of its powers" and that the Authority was obliged to comply with a direction given by the Minister. Section 11 confined the performance of the Authority's functions, requiring the performance to be "in a manner consistent with the obligations of Australia under the Chicago Convention and any other agreement between Australia and any other country or countries relating to the safety of air navigation". Section 13(1) conferred, in addition to any other powers conferred on the Authority by the Act, the "power to do all things necessary or convenient to be done for or in connection with the performance" of the Authority's functions.

Economic burden on the Authority

387 The requirements of the Act for the provision of facilities and services by the Authority imposed a distinct economic burden: high fixed infrastructure costs and relatively low variable costs. That is, in the language of restrictive trade practices law, the provision of these facilities and services tended towards large "economies of scale" and high fixed entry costs²⁶⁵.

388 In the United States, it is common for private companies to own the infrastructure which constitutes a natural monopoly for services or which constitutes the primary means of production for a business which exhibits the same or substantially similar economic characteristics as that operated by the Authority. Such private companies, known as "public utilities", are regulated by a public authority (or commission)²⁶⁶. Professor Schwartz has observed that²⁶⁷ "[t]he most

265 See *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 190, 201.

266 Areeda and Turner, *Antitrust Law*, (1978), vol 1, §223b. Such authorities have a long history in federal law: Rabin, "Federal Regulation in Historical Perspective", (1986) 38 *Stanford Law Review* 1189. That history, in turn, inspired the provision in s 101 of the Constitution with respect to the Inter-State Commission: Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901), §423.

267 Schwartz, *Administrative Law*, 3rd ed (1991), §1.9. He lists a number of the commissions concerned and their dates of creation as follows:

"Federal Communications Commission (1934)

(Footnote continues on next page)

important federal commissions regulate key areas of the economy" and "the quality and service received and the prices paid by consumers in well-nigh every category of trade and commerce". This regulation involves the adjustment of competing public policy interests. These arise from either the lack of a competitive market for those services, or from the distinct characteristics of the regulated industry.

389 In contrast, the Act is not directed to the regulation of infrastructure in private ownership. Rather, it removed the infrastructure assets from the ownership of the Commonwealth itself and vested them in the Authority. Further, the Act regulated the provision of the facilities and services by the Authority in a manner which adjusted the competing public policy interests arising from a lack of a competitive market for those facilities and services and the unique subject-matter, civil aviation safety. In delivering the second reading speech for the Civil Aviation Bill, the Minister identified this question concerning the manner of the regulation of the Authority in the following terms²⁶⁸:

"A concern expressed from a number of quarters is that safety standards may become degraded if the body responsible for safety regulation is required to operate on a commercial basis and is therefore subject to cost pressures. The commercial nature of the Authority needs to be clearly understood. It will be the Government's requirement that the Authority adopt a businesslike approach to its affairs, including the ongoing pursuit of cost efficiency and productivity improvement. The Authority will operate commercially in this sense. However, it will not, *because of the nature of its activities*, be subject to the full range of pressures that apply to business enterprises operating in a free market situation. Whilst the legitimacy of the concern that safety considerations should not take second place to commercial aspects of the Authority's operations is accepted, the latter aspects should be kept in a proper perspective." (emphasis added)

390 To facilitate the legislative purpose or object, as disclosed by the Minister, that the Authority operate on a commercial basis, the Act provided for (i) a system for financial and corporate planning, subject to Ministerial supervision; and (ii) a financial structure within which such planning was to occur.

Federal Energy Regulatory Commission (1930)
 Federal Trade Commission (1914)
 Interstate Commerce Commission (1887)
 National Labor Relations Board (1935)
 Securities and Exchange Commission (1934)".

See also Breyer et al, *Administrative Law and Regulatory Policy*, 4th ed (1999) at 26.

268 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 14 April 1988 at 1622.

IV COMMERCIAL OPERATIONS OF THE AUTHORITY

Financial and corporate planning by the Authority

391 Part V (ss 43-48A) of the Act, entitled "OPERATION OF AUTHORITY", prescribed the system within which the Authority was to undertake corporate and financial planning. The effect of s 43 was to oblige the Board to develop an initial corporate plan and thereafter, for each subsequent financial year, review and revise the plan. Each plan was to include a statement of the objectives of the Authority for the coming financial years and to outline the strategies and policies that the Authority intended to adopt in order to achieve those objectives.

392 Sections 44-48A of the Act provided for Ministerial oversight of the Board's corporate and financial planning. Section 44(1) provided that "[a]s soon as practicable after developing or revising the corporate plan, the Board shall give a copy to the Minister". Section 44(2) obliged the Board to also give the Minister a copy of a "financial plan" in relation to each financial year covered by the corporate plan. The financial plan included, in relation to the services and facilities (other than search and rescue and aeronautical information services) provided by the Authority, a forecast of receipts and expenditure and a rate of return and dividend (s 44(2)(b)).

393 The obligations of the Board when preparing the financial plan were specified by s 45 of the Act. It required the Board to consider:

- "(a) *the need for high standards of aviation safety;*
- (b) the objectives and policies of the Commonwealth Government known to the Board;
- (c) any directions given by the Minister under section 12;
- (d) any payments by the Commonwealth to the Authority to fund its regulatory functions and search and rescue services;
- (e) the need to maintain a reasonable level of reserves, having regard to estimated future infrastructure requirements;
- (f) the need to maintain the extent of the Commonwealth's equity in the Authority;
- (g) *the need to earn a reasonable rate of return on the Authority's assets (other than assets wholly or principally used in the performance of regulatory functions or the provision of search and rescue services);*

- (h) *the expectation of the Commonwealth that the Authority will pay a reasonable dividend; and*
- (j) *any other commercial considerations the Board thinks appropriate".*
(emphasis added)

394 Section 47(1) empowered the Minister to "direct the Board to vary the financial plan in respect of financial targets, and performance indicators, relating to the provision of services and facilities". This discretion was fettered by s 47(2). This obliged the Minister to consider matters in s 45, the objectives and policies of the Commonwealth Government and such other commercial considerations as the Minister thinks appropriate. Any direction by the Minister to the Board under s 47(1) was required to be in writing and to set out reasons (s 47(3)).

395 The Act provided a financial safety valve in the event that the Minister made a direction under the Act, other than a direction specified in s 48(3), and the Authority satisfied the Minister that it suffered financial detriment as a result of complying with the direction. In such circumstances, the Authority was "entitled" under s 48(1) to reimbursement by the Commonwealth. The amount of the reimbursement was that determined by the Minister, in writing, to be the amount of that financial detriment.

Financial structure of the Authority

396 Part VI (ss 49-83E) of the Act, entitled "FINANCE", provided for the imposition of charges and statutory liens. Division 1 (ss 49-65) created a four-tiered financial structure, to the consideration of which I now turn.

397 The first tier of the Authority's financial structure was directed to its assets and capital. The opening sections of Div 1 (ss 49-50) facilitated the transfer of assets from the Commonwealth to the Authority ("the Assets"). Section 54 in turn provided that the capital of the Authority was to be calculated by reference to the sum of the Assets, any amounts paid by the Authority out of money appropriated by the Parliament for the purpose of providing capital, and a variety of other rights and economic reserves, less (i) loans under s 51 in respect of the Assets; (ii) liability provisions in respect of personnel transferred from the Commonwealth; (iii) debts, liabilities and obligations of the Commonwealth transferred to the Authority under s 51(5); and (iv) any amounts of capital repaid to the Commonwealth by the Authority. In respect of the Assets, the relevant Minister was obliged to determine their value as on the day of their transfer (s 51(2)(a)). The Minister, in addition, was empowered to determine an amount, not exceeding that value, which, by force of s 51(3), the Authority would thereby be deemed to have borrowed from the Commonwealth on the day of the transfer of those assets. This transfer of assets, revaluation and loan-back mechanism was one step in the process of establishing the Authority as an autonomous financial entity, liable to the Commonwealth for a variety of debts.

398 A further step consolidating the Authority's financial autonomy was the transfer to the Authority of certain rights of the Commonwealth. These arose out of debts, liabilities or obligations of any other person in favour of the Commonwealth, in respect of services or facilities which had previously been provided by the relevant department in the performance of a function now to be performed by the Authority (s 53). The Authority was not liable to pay any tax of the Commonwealth or of a State or Territory (s 55)²⁶⁹.

399 Section 56 dealt with the payment out of the Authority's profits of dividends to the Commonwealth; in some circumstances the Minister might direct payment of a dividend against the recommendation of the Board. This second tier thus provided for profits of the Authority to be paid to the Commonwealth, as opposed to the direct passage of all the revenues of the Authority into the Consolidated Revenue Fund.

400 Pursuant to these dividend provisions, the Commonwealth obtained a financial interest in the profitability of the Authority, fashioned in such a way as to ensure that regard was to be paid to the Commonwealth's equity in the Authority (s 56(2)). Section 45, in conjunction with s 56(2), facilitated the payment of a sum equal to a reasonable return on the Commonwealth's equity in the Authority. It did so by ensuring that the Board, when making its recommendation to the Minister concerning a dividend, had regard to the "need to earn a reasonable rate of return on the Authority's assets" and "the expectation of the Commonwealth that the Authority will pay a reasonable dividend".

401 The third tier concerned the Authority's capacity to raise additional funds. Section 57 provided that the Minister for Finance might, on behalf of the Commonwealth, lend money to the Authority out of money appropriated by the Parliament for the purpose. However, the Authority was empowered to borrow money otherwise than from the Commonwealth or raise money otherwise than by borrowing (s 58). To facilitate this raising of funds from sources other than the Commonwealth, the Treasurer, on behalf of the Commonwealth, was empowered to guarantee by contract such further moneys so raised by the Authority (s 59).

402 The fourth tier was found in s 64. The Authority was a public authority to which Div 2 of Pt XI of the *Audit Act* 1901 (Cth)²⁷⁰ applied. In complying with

269 See *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46.

270 This Act has been repealed by s 3 and Sched 1 of the *Audit (Transitional and Miscellaneous) Amendment Act* 1997 (Cth) ("the Transitional Act"). Contemporaneously, the *Auditor-General Act* 1997 (Cth), the *Financial Management and Accountability Act* 1997 (Cth) and the *Commonwealth Authorities and Companies Act* 1997 (Cth) ("the Authorities Act") were enacted to administer matters of public finance with respect to certain agencies and authorities of the
(Footnote continues on next page)

its reporting requirements under this legislation, s 64(2)(b) obliged the Authority to include "an assessment of the adverse effect (if any) that meeting the non-commercial commitments imposed on the Authority has had on the Authority's profitability during the financial year".

403 Central to the process of construing ss 66 and 67 of the Act is an appreciation of the rate structure adopted by the Authority. If the rate or amount of each charge which the Authority had recouped from a particular user of its services had been only the increment to the Authority's total costs incurred in producing that extra unit of service on the particular occasion, the Authority may not have recovered sufficient revenue to meet its total costs to all users of that service. This inability would have frustrated the object or purpose of the Act. The financial structure of the Authority thus casts contextual light on the meaning of s 67. It does so, in particular, with respect to (i) the requirement in s 67 of a "reasonable relationship" between the rate or amount of each charge and the "expenses incurred or to be incurred by the Authority in relation to the matters to which the charge relates"; and (ii) the meaning of the phrase "expenses incurred or to be incurred". These matters are considered further in Sections VI-IX of these reasons.

V THE CHARGES

404 It is now convenient to consider the operation of ss 66 and 67. These are the key provisions for the purposes of these appeals. The material text of ss 66-73 of the Act is set out in the judgment of the Chief Justice and Kirby J. However, it is necessary for comprehension of what follows to set out here the text of ss 66(2) and 67:

"66 (2) Subject to this section, the Board may make determinations:

- (a) fixing charges and specifying the persons by whom, and the times when, the charges are payable; and
- (b) fixing the penalty for the purposes of subsection (8)."

"67 The amount or rate of a charge shall be reasonably related to the expenses incurred or to be incurred by the Authority in relation to the matters to which the charge relates and shall not be such as to amount to taxation."

405 Pursuant to s 66(2) of the Act, the Board of the Authority made the Determination. The Determination fixed the charges and specified the persons by whom, and the times when, the charges were to be payable and fixed the penalty for non-payment of the charges for the purposes of s 66(8). Section 66(4) provided

Commonwealth, including the Authority: see Transitional Act, Sched 2, item 621 and Authorities Act, s 7.

that the "Minister may, within the period referred to in [s 66(5A)], give the Board notice in writing approving or disapproving the proposed determination". No such notice was given.

406 Compass was said to have become liable to pay sums accruing under four categories of charges. The charges accrued as a result of the five aircraft leased by Compass enjoying the benefit of terminal navigation services ("TNS"), en route services, rescue and fire fighting services ("RFFS"), and meteorological services. The grants of special leave to appeal to this Court excluded the fourth category of charges. The material clauses of the Determination with respect to the charges imposed on Compass are set out in the judgment of the Chief Justice and Kirby J. The five leased aircraft were "high capacity aircraft" as defined in the Determination, and Compass was the holder of the Air Operator's Certificates authorising the use of the aircraft on Australian domestic air routes.

407 The respondents submit that the Authority did not have the power to impose the charges on Compass due to the limits imposed by s 67 of the Act. Section 67 of the Act contained two limbs, each limiting the Authority's statutory power to fix charges: the first required that the amount or rate of a charge be reasonably related to the expenses incurred or to be incurred by the Authority in relation to the matters to which the charge related ("the first limb")²⁷¹; and the second required that the amount or rate of the charge "shall not be such as to amount to taxation" ("the second limb"). Both the primary judge (Branson J) and the Full Court held that the Determination was beyond power. Branson J did so for failure of the Determination to satisfy the second limb²⁷², and the Full Court for failure to satisfy both the first and second limbs²⁷³. However, the Full Court differed from Branson J in respect to the construction of the Determination, to which I now turn.

VI THE DETERMINATION

408 The Determination was an instrument issued under statutory authority. Differing views as to its construction were adopted in the Federal Court. In *Widgee*

271 Section 67 of the Act can be contrasted with s 273 of the *Federal Aviation Reauthorization Act*, 49 USC §45301, considered in *Asiana Airlines v Federal Aviation Administration* 134 F 3d 393 (1998), which required that "each of the [required] fees ... [be] *directly related* to the Administration's costs of providing the service rendered" (emphasis added).

272 (1997) 72 FCR 534 at 576-579.

273 (1998) 152 ALR 656 at 685, 687.

*Shire Council v Bonney*²⁷⁴, Griffith CJ said that, when a statutory instrument "is open to two constructions, on one of which it would be within the powers of the [Authority], and on the other outside of these powers, the former construction should be adopted, *ut res magis valeat quam pereat*". This precept is supplemented by the opening clause of s 46(1)(b) of the *Acts Interpretation Act* 1901 (Cth) which materially provides that the Determination shall be read and construed subject to the Act.

409 The construction adopted by Branson J²⁷⁵ stands in contrast to that in the Full Court of Beaumont J, with whom Lindgren and Wilcox JJ concurred²⁷⁶. Beaumont J construed the "matters", as disclosed by the text of the Determination, to which each charge related as being a landing of an aircraft at a particular aerodrome on a particular occasion²⁷⁷. Consequently, given the terms of s 67, the expenses incurred or to be incurred by the Authority in relation to those "matters" were also narrowly confined. His Honour disposed in the negative the final question of whether the rate of the respective charges was "reasonably related" to those narrowly confined expenses. Beaumont J found that the rates for each charge were not a "bona fide (albeit 'by and large') cost accounting exercise that [made] an honest attempt to match the amount of a charge with the amount expended in providing the specific service for which the charge [was] levied"²⁷⁸. It followed that the fixing of the charges failed to comply with the requirements of s 67 of the Act.

410 In contrast, Branson J had rejected the respondents' contention that on the proper construction of the Determination "a separate charge is imposed for each of the four types of service, and a separate charge is imposed in relation to each landing, at an aerodrome which is listed in the Schedule [to the Determination]"²⁷⁹. In this Court, the respondents submitted that an examination of the Determination shows that the Board imposed separate charges for the particular services or facilities used by separate aircraft in relation to each landing at a specified aerodrome.

274 (1907) 4 CLR (Pt 2) 977 at 983. See also *Foley v Padley* (1984) 154 CLR 349 at 371; *South Australia v Tanner* (1989) 166 CLR 161 at 180; Pearce and Argument, *Delegated Legislation in Australia*, 2nd ed (1999), §30.4.

275 (1997) 72 FCR 534.

276 (1998) 152 ALR 656.

277 (1998) 152 ALR 656 at 683.

278 (1998) 152 ALR 656 at 685.

279 (1997) 72 FCR 534 at 563.

411 Branson J held that each of cll 1, 2, 3, 6 and 7, as well as each sub-paragraph in cll 11 and 12, imposed separate charges²⁸⁰. Having, correctly, assumed that cll 1, 2, 3, 6 and 7 followed a common pattern, Branson J construed cl 1 on the basis that the reasoning would apply equally to the other clauses²⁸¹. Her Honour was of the view that "the matters to which the charge created by cl 1 of the [D]etermination relates, within the meaning of s 67 of the Act, are the matters for which the charge is made: that is, the terminal navigation facilities and services at the aerodromes referred to in Column 2 of Item 1 of Table 1"²⁸². Branson J read cl 1 as creating "a charge for a network of facilities and services, not a charge for facilities and services relating to a particular aerodrome"²⁸³.

412 Branson J construed cl 11 such that her reasoning would apply equally to cl 12. It is convenient to set out this reasoning²⁸⁴:

"Clause 11 fixes four separate en route charges. In each case the charge is payable on the landing of an aircraft. In each case the charge is '[i]n respect of the use by [such] aircraft of the air route and airways facilities and services operated or provided in Australian territory'. In my view, cl 11 is intended to fix charges in respect of the use by an aircraft of the network of air route and airway facilities and services operated or provided in Australian territory. Clause 11 is not intended, in my view, to fix a charge in respect of the use by an aircraft, the landing of which triggers the charge, of only the specific air route and airway facilities and services used by it on the flight resulting in such landing. The charge was, in my view, a charge for the use by the aircraft of any part of the total Australian network of air route and airway facilities and services."

413 In conclusion, her Honour held that the "matters" to which the charges created by cl 11 related, within the meaning of s 67 of the Act, "are the air route and airways facilities and services operated or provided in Australian territory"²⁸⁵.

414 The proper construction of the "matters" to which each charge "relates" is to be resolved in favour of that construction which would preserve validity of the Determination. Beaumont J's analysis forecloses such an outcome, given the rate

280 (1997) 72 FCR 534 at 563-564.

281 (1997) 72 FCR 534 at 566.

282 (1997) 72 FCR 534 at 567.

283 (1997) 72 FCR 534 at 567.

284 (1997) 72 FCR 534 at 567.

285 (1997) 72 FCR 534 at 567.

set for each charge in the Determination. As will be considered in Section IX of these reasons, the fidelity of the construction adopted by Branson J to the statutory purpose of financial autonomy of the Authority from the Commonwealth is supported by a consideration of the power of the Authority to issue the Determination.

415 Before returning to further consider the operation of the first limb of s 67, it is convenient to deal with the second limb.

VII "NOT ... AMOUNT TO TAXATION"

416 Section 67 of the Act curtailed the power of the Authority to fix the rate or amount of a charge by reference to the prohibition that it "not be such as to amount to taxation". This phrase may be compared to and contrasted with references in the Constitution to taxation. In ss 53 and 55 of the Constitution, reference is made to proposed laws "imposing taxation", whilst in s 51(ii) the Parliament is given power to make laws for the peace, order and good government of the Commonwealth "with respect to ... taxation". Section 114 prohibits the States, without the consent of the federal Parliament, from, amongst other matters, imposing "any tax on property of any kind belonging to the Commonwealth". This section also commands "nor shall the Commonwealth impose any tax on property of any kind belonging to a State".

417 Therefore, the meaning of the second limb in s 67 does not, without more, "pick up" existing jurisprudence on any individual section in the Constitution. However, in light of the language adopted in the first limb of s 67, the second limb can properly be seen to incorporate the distinction drawn between a tax and a fee for service.

418 Further, the use of the phrase "amount to taxation" is properly construed as informing the meaning of the first limb. The first limb requires that the amount or rate of each charge be "reasonably related" to the expenses incurred or to be incurred in relation to the matters to which each charge relates. "Reasonable", particularly when used to provide a criterion for the sufficiency of the connection between two subject-matters, is a relative term and textual indeterminacy therefore lurks in s 67 with the phrase "reasonably related"²⁸⁶. It is a concept in need of standards. It is proper to construe the second limb of s 67 as providing a standard. The prohibition that the rate or charge "not ... amount to taxation" indicates the circumstances within which the Authority could formulate a pricing structure which would reasonably relate the amount or rate of each charge to the expenses incurred or to be incurred in relation to the matters to which that charge related.

²⁸⁶ See *Opera House Investment Pty Ltd v Devon Buildings Pty Ltd* (1936) 55 CLR 110 at 117.

Within this ambit, the restrictions in the first limb allow for the Authority to select a particular rate or amount.

419 It is necessary now to determine how the second limb provides an epexegetis of the operation of the first limb. In doing so, consideration of the role of government regulation in redistributing economic surplus and the existing case law on the meaning of "fees for services" is required. However, it is convenient first to turn to the economic evidence received at the trial and the method by which the Authority selected the rate of the charges imposed on Compass. This will cast light on the foundations (not always disclosed in the judgments in question) of the case law respecting the meaning of "fees for services".

Economic evidence and "Ramsey pricing"

420 Dr Fitzgerald, an economist, gave evidence for the appellant by way of oral testimony and a written report ("the Report"). Dr Fitzgerald was cross-examined. Branson J found that the respondents did not make any serious challenge to the "validity of the economic theory espoused by Dr Fitzgerald or to his conclusion concerning [the Authority's] pricing policies in 1991-92 so far as they were based upon such economic theory"²⁸⁷. Her Honour accepted the cogency of this evidence, although she rejected its relevance to the issues she determined.

421 In the Report, Dr Fitzgerald opined that the resources used by the Authority had an "opportunity cost" to the Australian community. The prices for services should, as a matter of general economic theory for highly competitive markets, be charged at "marginal cost"²⁸⁸ by the service provider in order to recover the opportunity cost from the user group. Dr Fitzgerald then isolated the central difficulty when applying this proposition to the financial structure of the Authority:

"The difficulty with those principles in the [Authority's] case is that its activity has the characteristics of a natural monopoly: its fixed costs are very large and would not be fully recovered by pricing on a marginal cost basis. The issue then is how to price so as to achieve an outcome as close as possible (in terms of the level and pattern of usage of the [Authority's] services) to the

²⁸⁷ (1997) 72 FCR 534 at 556.

²⁸⁸ The Report defined the concept of "marginal cost" of production as the increment to the total cost of producing an extra unit of service. This was contrasted with the concept of "average cost" which was defined as the total cost of production divided by the number of units of service produced. The Report noted that, in a highly competitive market, prices will gravitate towards "marginal cost". However, where a producer has high fixed costs and relatively low variable costs, the average cost of production (which includes fixed costs) will usually exceed the marginal cost of production.

economically most efficient outcome while fully recovering its costs from its users as a group."

In the Report, having concluded that average costs will exceed the marginal cost for the provision of the services and facilities by the Authority, Dr Fitzgerald put the issue in the following terms:

"It is then *not* appropriate to set the price of the service equal to marginal cost, for this would mean that total costs would exceed total revenues, implying that the shortfall must be paid by someone other than the users as a group – violating the 'user pays' principle." (original emphasis)

422 The so-called "'user pays' principle" is referential to Dr Fitzgerald's major premise that the "opportunity cost" for the provision of the facilities and the services by the Authority is to be recovered from the user group of those facilities and services. This premise belies the possibility of another source, appropriations by law from the Consolidated Revenue Fund, a matter considered in Section II of these reasons. However, ss 66 and 67 of the Act provided for recovery of the opportunity cost from the users of the Authority's facilities and services. The Authority was empowered to impose charges on its users which, in turn, required the selection of a rate, or pricing, structure by the Authority in order to calculate the charge to be paid in respect of use on a particular occasion.

423 Chief Judge Posner²⁸⁹ has commented, extrajudicially, on the three principal restrictive trade practice concerns facing regulators of public utilities in the United States:

"(1) profit control (the regulated firm's rates are not to exceed the level necessary to enable the firm to cover its cost of service, including a reasonable return on invested capital); (2) entry control (a firm may not provide a regulated service without first obtaining a certificate of public convenience and necessity from the regulatory agency); (3) control over price structure (the firm may not discriminate in its rates)."

The question at stake in the present case does not involve any application of Pts IIIA, IV or XIB of the *Trade Practices Act* 1974 (Cth) to services provided by governmental authorities. However, the question does concern the third of the issues identified by the Chief Judge. Dr Fitzgerald put the pricing structure problem in stark relief in the following passage in the Report:

"Unlike a producer in a highly competitive industry, a monopoly producer which is not prevented from doing so can make more profit by setting the price of its service above marginal cost. From the community's viewpoint,

289 Posner, *Economic Analysis of Law*, 5th ed (1998) at 380.

too few services will then be produced, at too high a price. For this reason, the pricing practices of monopolies have often been subject to regulation, with a view to obliging them to set prices at (or close to) the marginal costs of production, and to make only normal profits. The recent trend has been to attempt to maximise exposure to competition where possible (as in electricity generation or telephony), rather than to have government *directly* involved in setting prices, but there are cases where this is not feasible and it is appropriate for government at least to set the *rules* for pricing and to require authorities to be efficient. This is the case for airways services." (original emphasis)

424 The Authority adopted a price, or rate, structure based on an economic theory known as "Ramsey pricing"²⁹⁰. It is a method for imposing price distinctions and variations between users of the same or similar services and facilities. The characteristic selected to discriminate between users was economic capacity to pay²⁹¹. As Dr Fitzgerald identified in the Report, this method involves the price charged a user departing from marginal cost to the extent that the user "values" the commodity (as reflected by inelastic demand or the user's economic capacity to pay).

425 One alternative was identified as dual or two-part tariff pricing. For example, historically, the statutory telecommunications provider in New Zealand charged customers both a fixed access or rental charge and a variable traffic charge depending on the time and distance of the calls²⁹². Dr Fitzgerald, under cross-examination, identified the difficulty likely to be faced by the Authority if it had adopted a two-part tariff system: it could be assumed that a high proportion of potential users would not have paid the first tariff or entry price. This hypothetical initial tariff would have been set at a price sufficient to recover the total fixed costs of providing the service.

426 The effect of Dr Fitzgerald's evidence was that the adoption of Ramsey pricing by the Authority was the "most economically efficient outcome" in terms of the level and usage of services provided by the Authority. Ramsey pricing

290 See Ramsey, "A Contribution to the Theory of Taxation", (1927) 37 *Economic Journal* 47; Baumol and Bradford, "Optimal Departures from Marginal Cost Pricing", (1970) 60 *American Economic Review* 265.

291 This expression was used in the Report to refer to the object that "prices to different categories of users should be set in inverse relation to the sensitivity of their usage to price". Sensitivity to price, in turn, referred to a user's "unit" (or percentage) change in the quantity demanded in response to a change in price.

292 See *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 at 391.

minimised the impact on the level and usage of the services provided by the Authority of the recovery of the fixed costs of the Authority.

427 Nonetheless, the pricing structure adopted by the Authority was not a perfect application of Ramsey pricing. The precise elasticities of demand of the various users were not measured, nor were the rates imposed in the Determination expressly calculated by reference to elasticity of demand. Rather an approximation was used. The Authority set the charges by reference to the maximum take-off weight ("MTOW") of the aircraft using the services.

428 Dr Fitzgerald's evidence was that the effect of using this variable was that the total of the Authority's "airways charges on a per passenger basis for 1991-92 were relatively flat across the fleet using Australian airways" and that "the sensitivity of usage of airways services to their price varies directly with the fraction which these charges are of the cost to a passenger of a flight"²⁹³. Dr Fitzgerald's evidence underscored that (i) for freight aircraft, economic capacity to pay was directly related to MTOW; and (ii) for passenger aircraft, the economic capacity to pay was related to the number of seats on a particular aircraft. There was a high correlation, for the 45 aircraft types using Australian airways in the relevant financial period, between the number of seats on a passenger aircraft and MTOW or its square root. Dr Fitzgerald concluded that "[o]ther things affecting the unit cost of passenger travel being equal, it will be optimal to vary charges per aircraft so as to achieve – as the Authority did – a relatively constant charge per passenger"²⁹⁴.

429 Broadly, and this is highly significant for these appeals, the effect of the pricing structure adopted by the Authority was to subsidise the provision of services to users with high elasticities of demand (or high economic incapacity – in the sense of unpreparedness or unwillingness – to pay). It did so by using the economic surplus which it obtained from those users with high inelasticities of demand (or high economic capacity to pay) for those services. The means by which this redistribution occurred was the exercise in the Determination of the statutory power of the Authority to levy the charges. Whilst all users were charged the marginal cost of the service provided, the burden of paying the fixed costs incurred by the Authority was not equally borne by all users. This is the hidden subsidy within the pricing structure adopted by the Authority. Certain ("inframarginal") users of the services subsidised the provision of services to other more price sensitive, or economically fragile ("marginal"), users.

293 (1997) 72 FCR 534 at 557.

294 (1997) 72 FCR 534 at 557.

430 Chief Judge Posner has highlighted the difficulties faced when fixing rate structures for economic entities such as the Authority²⁹⁵:

"In the case of an industry in which average cost decreases with output, a firm that charged a uniform price equal to its marginal cost would not recover its total costs. It could recover them by setting a uniform price equal to average cost. This would force customers willing to pay a price equal to or slightly above marginal cost but not the higher price equal to average cost to turn to more costly substitutes. Neither result is optimal, and the proper solution to the dilemma is a matter of fair debate. One attractive possibility is to charge a price equal to marginal cost for marginal purchases and a sufficiently higher price for inframarginal purchases to cover total costs without losing those sales. Although the proper design of the rate structure is not easy, this approach seems preferable to either the uniform marginal-cost price, which necessitates a government subsidy to make up the deficit in covering total costs, or the uniform average-cost price, which excludes the marginal sale."

431 Where Ramsey pricing is adopted, it would appear to be inevitable that some users, or customers, are required to pay a higher price than would apply under a uniform average cost pricing structure. However, the problem of setting a uniform average cost price is that it gives rise to a subsidy which is "indirect but inescapable: the additional price that the rejected marginal customers must pay for substitute products is a cost imposed on them in order to enable inframarginal customers to buy at a cheaper price than if an efficient pricing system were employed"²⁹⁶.

432 In the present case, if a uniform average cost price structure had been adopted, the highly price sensitive or "marginal" user would have had no substitute service provider. The Authority was the sole provider of the facilities and services at the aerodromes to which the charges applied. If an average cost charge was imposed, it might be that an airline, operating a barely profitable route with passengers who were extremely price sensitive to increases in air fares, would cancel its operations and thus the "use" of the facilities and services of the Authority.

433 However, the issues of construction of s 67 of the Act which arise in light of this differential treatment between users are not resolved by asking whether there was a "rational basis" for that treatment. That and cognate expressions are

295 Posner, "Taxation by Regulation", (1971) 2 *Bell Journal of Economics and Management Science* 22 at 25.

296 Posner, "Taxation by Regulation", (1971) 2 *Bell Journal of Economics and Management Science* 22 at 26.

understood in a particular sense in United States constitutional law respecting "substantive due process". In particular, in considering statutes regulating socioeconomic matters and containing norms which discriminate between persons on the basis of non-"suspect" and non-"quasi suspect" classifications, the federal courts, in applying the constitutional guarantee, engage in "rational basis review"²⁹⁷. The present litigation is outside any such universe of discourse. The United States position respecting utilities is further discussed in Section IX of these reasons.

434 It is convenient now to turn to the existing case law on the meaning of "fees for services".

Case law

435 The case law concerns (i) the disputed validity of State laws said to impose duties of excise forbidden by s 90 of the Constitution, rather than fees for services²⁹⁸; (ii) the operation upon laws of the Commonwealth of s 55 of the Constitution to render of no effect in a law, dealing with the imposition of taxation (rather than requiring a fee for a service), any provision dealing with any matter other than the imposition of taxation²⁹⁹; and (iii) Commonwealth laws which were not supported by s 51(ii) of the Constitution as laws with respect to taxation (because they concerned fees for services) and were not supported by any other head of power in s 51³⁰⁰.

436 To determine the character of a law imposing a monetary burden, Latham CJ in *Matthews v Chicory Marketing Board (Vict)*³⁰¹ stated that the following positive and negative attributes, 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*" (emphasis added). A question to be determined in the present appeals is whether the charges imposed, in respect of the use of the Authority's services

297 Tribe, *American Constitutional Law*, 2nd ed (1988), §16-2.

298 *Attorney-General (NSW) v Homebush Flour Mills Ltd* (1937) 56 CLR 390; *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263; *Parton v Milk Board (Vict)* (1949) 80 CLR 229; *Swift Australian Co (Pty) Ltd v Boyd Parkinson* (1962) 108 CLR 189; *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314.

299 *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462.

300 *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 566; see also *Air Caledonie* (1988) 165 CLR 462 at 472.

301 (1938) 60 CLR 263 at 276; *Air Caledonie* (1988) 165 CLR 462 at 466-467.

and facilities by the aircraft operated by Compass, constituted "payment[s] for services rendered", that is, "fees for services".

437 In *Air Caledonie International v The Commonwealth*, the Court commented upon Latham CJ's statement in three respects³⁰²:

"The first is that it should not be seen as providing an exhaustive definition of a tax ... The second is that, in *Logan Downs Pty Ltd v Queensland*³⁰³, 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."

Turning to the third proposition, the Court then considered the character of a law which, whilst nonetheless satisfying the positive attributes mentioned by Latham CJ, did not constitute a tax³⁰⁴:

"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 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.*" (emphasis added)

In *Air Caledonie*, the Court, having considered ss 53-55 of the Constitution, went on to state that the reference in s 53 to "fees for services" was to "be read as referring to a fee or charge exacted for particular identified services provided or

302 (1988) 165 CLR 462 at 467.

303 (1977) 137 CLR 59 at 63.

304 (1988) 165 CLR 462 at 467.

rendered individually to, or at the request or direction of, the particular person required to make the payment"³⁰⁵.

438 The Court in *Air Caledonie* disposed of the case on the ground that the administrative procedures for re-entry into Australia imposed on a citizen could not "properly be seen as the provision or rendering of 'services' to, or at the request or direction of, the citizen concerned"³⁰⁶ and therefore the law was not one imposing a fee for service. The Court went on to consider that the *Migration Act* 1958 (Cth) did not identify any "particular services provided or rendered to the individual passenger for which the impost could relevantly be regarded as a fee or quid pro quo"³⁰⁷. The second reading speech of the responsible Minister disclosed that the revenues from the immigration impost were not to be used for other services to be provided to the persons who suffered the liability to pay the impost. Rather the revenues were to be paid into the Consolidated Revenue Fund.

439 The legislation at issue in *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth*³⁰⁸ created a scheme whereby the moneys raised from the charge were dedicated to fund the provision of employment related training. The Court held that there was an insufficient relationship between the liability to pay the levy and the provision of services. It was said in the joint judgment that the legislation fell "a long way short of requiring either that the money received be expended on the provision of eligible training programs or that the money received be expended in relation to eligible training programs for those employers"³⁰⁹ who incurred the liability to pay the training charge, and as such the training charge was not a fee for service³¹⁰.

440 Dawson J, in a separate judgment in *Northern Suburbs*, adopted the reasoning in *Air Caledonie* and applied it in the following manner³¹¹:

"The employees of an individual employer upon whom the charge is levied might or might not benefit from a training program financed by a State or Territory. If a training program may be characterized as a service it is not a

305 (1988) 165 CLR 462 at 470.

306 (1988) 165 CLR 462 at 470.

307 (1988) 165 CLR 462 at 470.

308 (1993) 176 CLR 555 at 564-566.

309 (1993) 176 CLR 555 at 568.

310 (1993) 176 CLR 555 at 568.

311 (1993) 176 CLR 555 at 588.

particular service rendered to a particular employer by reference to the charge levied upon him. A particular employer may derive no more benefit from payments made under training guarantee agreements than is derived by employers or the community in general from having a better trained workforce upon which to draw. The training guarantee charge is not a charge 'exacted for particular identified services provided or rendered individually to, at the request or direction of' the employer required to make the payment. It cannot, therefore, be said to be a fee for services or akin to a fee for services in any sense which would prevent it from being a tax."

441 The facts of the present appeals stand in contrast to those in *Air Caledonie* and *Northern Suburbs*. The Authority provided "services" to Compass to which the charges imposed related. Nonetheless, the respondents submit that the charges imposed, properly characterised, "amount to taxation" within the meaning of s 67 of the Act and thus are not "fees for services". The respondents submit that the charges will "amount to taxation" if the Determination, in specifying the charges, imposed a tax. This will be so, the respondents submit, if (i) in words taken from an earlier decision, "the amount of the exaction has no discernible relationship with the value of what is required"³¹²; and (ii) the liability to pay is not in respect of any particular service but generally for the purposes of defraying expenses or not merely for a particular nominated service but in truth also for, as the respondents put it, "carrying the Act considered as a whole into effect, that is to say, for administration expenses generally"³¹³. These submissions rely on the statement in *Air Caledonie* italicised in the quotation above from the joint judgment³¹⁴.

442 Three threshold problems arise. One is that if ss 66 and 67 of the Act, in authorising the Determination, are laws imposing taxation they may do so, but s 55 of the Constitution would deny effect to any provision in the Act dealing with any other matter. In the end, the respondents disavowed any reliance on s 55. But the conundrum remains unless, as pointed out earlier in this Section, the second limb of s 67 be construed as incorporating the distinction between a tax and a fee for service which, in turn, informs the requirement in the first limb of a "reasonable relationship".

443 The second problem is that in *Air Caledonie* it was unnecessary for the Court to consider the means by which "value" was to be assessed. The case turned on the lack of services provided. In this case, the question of the assessment of value squarely arises and it does so in circumstances where no market exists for the

312 *Air Caledonie* (1988) 165 CLR 462 at 467.

313 *Swift Australian Co (Pty) Ltd v Boyd Parkinson* (1962) 108 CLR 189 at 200. See also *Air Caledonie* (1988) 165 CLR 462 at 470.

314 *Air Caledonie* (1988) 165 CLR 462 at 467.

services. For the statement of the Court in *Air Caledonie* to be of weight to the determination of these appeals, it is first necessary to determine the meaning of "value" in the context of the present appeals.

444 What to an economist is "value" does not necessarily find its synonym in "market value" or "exchange value" as understood in the case law respecting resummptions which has been built up around *Spencer v The Commonwealth*³¹⁵. "Market value" is determined by an inquiry into what a willing purchaser will pay and a not unwilling vendor will receive for the subject-matter being valued³¹⁶. The premise of the inquiry is that an efficient market exists or, at least, that an efficient market can be reasonably hypothesised from an existing inefficient market. Where there is no market for exchange of the subject-matter, it is necessary to consider other means of fixing value³¹⁷.

445 In *Harper v Minister for Sea Fisheries*³¹⁸, this Court decided that a licence fee for the taking of abalone was not an excise duty. Abalone was a finite resource and the licensing regime precluded unlicensed persons from taking abalone. As Brennan J emphasised, "[t]he only compensation, if compensation it be, derived by the public for loss of the right of fishing for abalone consists in the amounts required to be paid by holders to obtain the abalone licences"³¹⁹. Mason CJ, Deane and Gaudron JJ characterised the licence fee as³²⁰:

"properly to be seen as the price exacted by the public, through its laws, for the appropriation of a limited public natural resource to the commercial exploitation of those who, by their own choice, acquire or retain commercial

315 (1907) 5 CLR 418, esp at 431; cf *The Moreton Club v The Commonwealth* (1948) 77 CLR 253 at 257.

316 *Marks v GIO Australia Holdings Ltd* (1998) 73 ALJR 12 at 22; 158 ALR 333 at 348; *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 73 ALJR 901 at 912, 917-918; 163 ALR 611 at 627, 635.

317 See *Commissioner of Succession Duties (SA) v Executor Trustee and Agency Co of South Australia Ltd* (1947) 74 CLR 358 at 361-362. In *United States v Miller* 317 US 369 at 374 (1943), the Supreme Court of the United States said: "Where, for any reason, property has no market, resort must be had to other data to ascertain its value; and, even in the ordinary case, assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety" (footnote omitted).

318 (1989) 168 CLR 314.

319 (1989) 168 CLR 314 at 332.

320 (1989) 168 CLR 314 at 325.

licences. So seen, the fee is the quid pro quo for the property which may lawfully be taken pursuant to the statutory right or privilege which a commercial licence confers upon its holder. It is not a tax."

446 Brennan J concluded that the licence fee was not a tax as the amounts payable were of the "same character as a charge for the acquisition of property"³²¹. Whilst agreeing with Brennan J, Dawson, Toohey and McHugh JJ commented that the "fact that it is possible to discern a relationship between the amount paid and the value of the privilege conferred by the licence, namely, the right to acquire abalone for commercial purposes in specified quantities", was "[m]ost important"³²².

447 The statutory formula by which in *Harper* the amount of each abalone licence was calculated turned on the gross value of abalone. Equally, it was not disputed that abalone meat and abalone shell were "marketable commodities"³²³. The value of the privilege to take abalone conferred by the licence was referable to the market value of abalone meat and abalone shell. It was unnecessary for the Court to consider non-market values when attempting to discern a relationship between the amount paid for the licence and the value of the privilege conferred. Further, it was unnecessary in that case to consider the relationship between the amount paid and the costs of administering the licensing system.

448 In *Swift Australian Co (Pty) Ltd v Boyd Parkinson*³²⁴, the Court decided that fees imposed by regulation, for the purpose of both defraying the expenses of providing a service for the inspection of meat for sale and carrying into effect the Act under which the regulations were made, were not fees for services and were excise taxes. Dixon CJ, with whom Kitto and Windeyer JJ concurred, rejected the contrary submission, stating³²⁵:

"It is evident from the introductory words of the regulation that some attempt is made to represent the fees as a charge for services. But when the regulation is examined it appears that the fees are not payable in respect of any particular service but generally for the purpose of defraying expenses. Further, and this perhaps is fatal to the argument, the expenses are not merely those of inspecting meat but those of carrying the Act considered as a whole into effect, that is to say, for administration expenses generally."

321 (1989) 168 CLR 314 at 336.

322 (1989) 168 CLR 314 at 336.

323 (1989) 168 CLR 314 at 326.

324 (1962) 108 CLR 189.

325 (1962) 108 CLR 189 at 200.

449 However, the present case does not suffer such a "fatal" defect. The charges imposed defray those costs incurred by the Authority for the provision of the network of services to which those costs relate. As will be discussed in Section VIII, Dixon CJ's additional observation that the fees be payable in respect of particular services is not determinative of the present case.

450 Here, in determining the meaning of the second limb of s 67 of the Act, and thus the concept "fees for services", "value" of the services provided by the Authority is to be determined by reference to the costs incurred³²⁶. More particularly, what, on a proper construction of the Act, is required is an assessment of the total costs necessarily, or reasonably, incurred or to be incurred in providing the services in a financial period. Allowance is also to be made for a reasonable rate of return on the equity (or assets) of the Authority and a margin which may arise from bona fide errors in financial planning by the Authority, matters considered further in Section IX.

VIII THE CRITICAL PROBLEM

451 It is now necessary to turn to the third and critical problem which is revealed in applying the statement in *Air Caledonie*, referred to above in Section VII, to the present case. It is that the adoption of Ramsey pricing by the Authority, as the method of structuring the price (or rate) of the charges imposed on Compass, severed any discernible relationship between the amount charged a user and costs incurred in providing the *particular services* to the user.

452 The charges imposed pursuant to the Determination were the result of rates set by reference to Ramsey pricing. Ramsey pricing uses inelasticity of demand, or economic capacity to pay, as the material criterion linking the price, or amount payable, and the provision of particular services to the user. In *Re Eurig Estate*³²⁷, the Supreme Court of Canada considered that significant price discrimination between users of services which cost the same to provide gives rise to the inference that there is no reasonable connection between the cost of the individual service provided and the amount charged. In that case, a probate levy was charged under regulations pursuant to an Ontario statute³²⁸ without reference to the cost of the service of granting probate. Rather, the levy was imposed on a graduated scale

326 This method is used by regulators of public utilities and common carriers in the United States. "Ratemaking" involves an initial inquiry into the "cost of service" in order to determine a public utility's or common carrier's probable future costs, from which a rate of return on equity can then be calculated. See Breyer et al, *Administrative Law and Regulatory Policy*, 4th ed (1999) at 228-229.

327 [1998] 2 SCR 565.

328 *Administration of Justice Act 1990* (Ont).

increasing in cost with the value of the estate subject to probate, that is, it was an *ad valorem* rate structure. The proceeds of the levy were intended for defraying the costs of court administration in general, in contrast to offsetting the costs of providing the service of granting probate³²⁹. It was unnecessary for the Supreme Court to consider the character of a law by which a public body imposed a charge to fund the provision of a service where the public body operated with a cost structure similar to that of the present Authority.

453 Ramsey pricing involves the imposition of a rate structure for the provision of services to the entire user group of those services such that, broadly, particular users (ie those with high demand inelasticity) subsidise other particular users (ie those with high demand elasticity). That each user pays at least the marginal cost emphasises that the rate of the charges imposed has little to do with the cost of providing the particular service to a particular user. Rather it has everything to do with recouping high fixed costs incurred in providing a network (or integrated system) of services to a group of users.

454 In *Australian Tape Manufacturers*³³⁰, the Court held that a law imposing a financial burden may be characterised as a law imposing taxation within the meaning of s 55 of the Constitution even if the payments received are not required to be paid into the Consolidated Revenue Fund. In their joint judgment, Mason CJ, Brennan, Deane and Gaudron JJ observed that the purpose of s 81 of the Constitution would be "circumvented readily if a law which imposed a tax on one group for the benefit of another group in the community was not a law 'imposing taxation'"³³¹. For example, in *Attorney-General (NSW) v Homebush Flour Mills Ltd*³³² a financial burden was imposed by a New South Wales law upon the owners of flour for the relief of necessitous farmers. The issue was whether the law imposed a duty of excise within the meaning of s 90 of the Constitution. It was held to be an excise. Starke J emphasised that the imposition of this financial burden on the first group was "not in exchange for any service rendered to them but for a government purpose, namely, the relief of necessitous farmers"³³³.

455 The critical distinction presented by the present appeals is that the redistribution occurs within a single user group, and the incidents which trigger liability to pay each of the charges which effect the redistribution are part of a

329 [1998] 2 SCR 565 at 578.

330 (1993) 176 CLR 480 at 506-507.

331 (1993) 176 CLR 480 at 506.

332 (1937) 56 CLR 390.

333 (1937) 56 CLR 390 at 408.

common service provided to that user group and inter-connected by a cost structure with the characteristics identified in Section III above.

456 The changes in the governmental arrangements for the provision of services, considered in Section II of these reasons, are significant here. The charges imposed by the Determination are examples of financial burdens placed upon "users" to fund public assets and the provision of public services. The case law on the meaning of "fees for services" is concerned with those provisions of the Constitution which give special classification to taxes, including excise taxes. The present appeals concern the construction of s 67 of the Act, not its validity. The question of validity arises only with respect to the Determination, the issue being whether by reason of s 67 it was beyond the power conferred on the Authority by s 66.

457 On its proper construction, s 67 of the Act involves the notion of a fee for service as an indicator of a reasonable relationship between the amount or rate of a charge imposed by a determination of the Board and the expenses of the Authority in relation to the matters to which that charge relates. The requirement that a discernible relationship exist between the amount charged a user and the provision of *particular services* to the user, as considered by the Court in *Air Caledonie*³³⁴ and *Northern Suburbs*³³⁵, does not apply to cases such as the present. That there may have been no reasonable or discernible relationship between the amount or rate of a charge imposed by the Determination and the value of the service to aircraft operations on particular occasions is not determinative of the present appeals.

458 The operation of the Determination has the following characteristics. First, the incident which triggered the liability of a particular user to pay each of the charges was a step in the provision of a service to that user. Secondly, each particular service was part of a set (or network) of integrated or inter-connected services which were made available by the Authority to a user group ("the services"), the integration or inter-connection arising from the cost structure of the Authority and the network of aerodromes to which the services related. Thirdly, the Authority provided the services in circumstances where it would not have recovered its total costs for the services if it had charged the marginal cost for particular services to all users³³⁶. Fourthly, the Authority set the rate for each

334 (1988) 165 CLR 462.

335 (1993) 176 CLR 555.

336 It is not possible *a priori* to identify every circumstance which may present the issues raised by the facts of the present case. Dangers lurk in excessive generalisation: see, for example, Coase, "The Lighthouse in Economics", (1974) 17 *The Journal of Economics* 357, where it was demonstrated that particular public infrastructure in
(Footnote continues on next page)

of the services by reference, as described in Section VII of these reasons, to each particular user's economic capacity to pay; however, the rate obliged each user to pay at least marginal cost for the provision of the service on a particular occasion. Fifthly, the provision of the services was in discharge of functions conferred on the Authority by the Act. Finally, as indicated in Section III of these reasons, the Authority, if not expressly obliged to do so, was expected to generate revenue from the user group in order to cover its costs of providing the services.

459 In the case of the Determination, these features would otherwise disclose no immediately apparent relationship between the amount or rate of the charge and the value of the service to a particular user on a particular occasion. Nevertheless, if each of the charges is a reasonably and appropriately adapted means of achieving a legitimate public purpose, each is properly to be characterised as a fee for services, and its amount or rate will bear to expenses the reasonable relationship required by the first limb of s 67.

460 However, two further questions are to be considered in determining whether the means chosen by the Authority were not reasonably and appropriately adapted. The first arises if the total revenue raised by each charge exceeds the total costs necessarily, or reasonably, incurred or to be incurred in providing the services in a financial period (making allowance for a reasonable rate of return on the equity (or capital) of the Authority and a margin of error which may arise from bona fide errors in financial planning by the Authority) ("the first question"). The second arises if the functions of the Authority to which the legitimate public purpose relates are not substantially for the benefit, whether directly or indirectly, of the user group subject to the charges ("the second question").

461 The second limb of s 67, which requires that the amount or rate of the charges "not amount to taxation", is clarified, in the sense discussed earlier in this Section, by the meaning of "fees for services". The second limb of s 67 informs the requirement in the first limb that there be a "reasonable relationship" between (i) the expenses incurred or to be incurred in relation to the matters to which each charge relates; and (ii) the amount or rate of the charge. There will be such a "reasonable relationship" where (a) the "matters" to which each charge relates are constituted by the provision of the integrated or inter-connected service network, as held by Branson J and considered in Section VI of these reasons; and (b) the rate structure adopted by the Authority for each charge satisfies the criterion of a fee for service as indicated in these reasons. It is convenient now to consider the validity of the Determination in light of these matters.

England had, in fact, been provided by the private sector over a long period; cf in Australia the Constitution, ss 51(viii), 69.

IX VALIDITY OF THE DETERMINATION

462 The rate structure adopted for each charge is to be measured against the criterion of "fees for services" explained in Sections VII and VIII of these reasons.

463 The rate structure imposed by the Determination for each charge was based on the Ramsey pricing model. MTOW was used as a surrogate for price elasticity. It was not suggested that these rates were designed other than to facilitate the recovery of the costs (including a reasonable rate of return) of providing the entire system of services and facilities for civil aviation safety. This is a matter which is a legitimate public purpose unrelated to revenue raising, in discharge of the Authority's functions under the Act. On the footing that the construction of Branson J as to the "matters" to which each charge relates should be accepted, it is to be concluded provisionally that each charge was a reasonably and appropriately adapted means of achieving a legitimate public purpose, other than revenue raising, related to the functions of the Authority. It would follow that the charges imposed are properly characterised as "fees for services". Further, it would follow that the functions of the Authority, to which the above public purpose relates, were substantially and directly for the benefit of the user group subject to each of the charges. Therefore the second question does not arise.

464 It remains to be considered whether the issues involved in the first question apply here so as to displace this provisional conclusion. The respondents' Notices of Contention raise several matters which are referable to whether the total revenue raised by each charge exceeded the total costs necessarily, or reasonably, incurred or to be incurred in providing the services in the financial year 1991-1992. It is convenient now to deal with these contentions.

Reasonable rate of return

465 Rate regulation of public utilities in the United States is subject to constitutional review under two clauses of the United States Constitution: the due process clause of the Fifth Amendment and the equal protection clause of the Fourteenth Amendment. Broadly, these clauses so operate as to make the validity of orders fixing those rates turn not upon the method of computing the rate base; rather, validity turns upon whether the rates have an impact which is "just and reasonable". A rate which enables the utility to maintain its financial integrity, to attract capital and to compensate investors for the risks they take will not be unjust and unreasonable even if it produces only a meagre return on the present "fair value" of the public utility's assets³³⁷. No such doctrine applies under the Australian Constitution. The question to be determined on the facts of the present case is whether the Determination authorised the Authority to act in a manner

³³⁷ *Federal Power Commission v Hope Natural Gas Co* 320 US 591 at 602-603, 605 (1944).

which was beyond the power conferred by ss 66 and 67 of the Act when it selected a rate for each charge which operated to produce a particular return on equity.

466 At trial, Mr Gemmell gave unchallenged evidence for the appellant, accepted by Branson J, that the Authority's charges were set to produce³³⁸:

"a forecast 7.5% (real) rate of return on the capital employed by the [Authority]. In effect, the 7.5% is treated as a cost. The economic rationale for this is that it represents the opportunity cost of the investment in assets of the [Authority]. Unless there was a return on capital employed by the [Authority], it would be irrational for the [Authority's] shareholders to have invested capital in it. The investment would simply represent a subsidy to the aviation industry. To put it another way, without equity capital the [Authority] would be compelled to borrow all its capital requirements, and pass on the commercial borrowing costs (as opposed to the [7.5 per cent] rate of return) as part of its charges."

The forecasting of a 7.5 per cent rate of return on the capital employed by the Authority in the provision of all of its services and facilities was then added to formulate a total cost base. Branson J accepted the evidence of Mr Barnes, an officer of the Authority who undertook corporate financial planning, the development of prices for major services and pricing policy matters in general. His evidence concerned the method employed by the Authority in calculating its total cost base. Her Honour summarised this evidence³³⁹:

"Mr Barnes' evidence was that the first step was for an estimate to be made of the total outgoings of the [Authority] for the 1991-92 year. The second was to calculate the total value of the [Authority's] assets and to calculate 7.5 per cent of such value ... The figure which resulted from this procedure was treated as the cost of the [Authority]. The cost of the [Authority] was then broken down into the cost of each service so that the aggregate of the revenue from each service covered the cost of the [Authority]."

467 Beaumont J in the Full Court held that the phrase "expenses incurred" in s 67 of the Act excluded any element of profit³⁴⁰. In order to determine whether the charge imposed is a fee for service, a comparison between the revenue generated and the total costs necessarily, or reasonably, incurred or to be incurred in providing the services to which the charge relates in a financial period is required. These total costs include an allowance for a reasonable rate of return on the equity

338 (1997) 72 FCR 534 at 560.

339 (1997) 72 FCR 534 at 561.

340 (1998) 152 ALR 656 at 674.

(or assets) of the service provider and a margin of error which may arise from bona fide errors in financial planning by the service provider. The phrase in s 67 "expenses incurred or to be incurred" is to be construed, consistently with what has been said in Section VII of these reasons as to the construction of the first limb of s 67, as incorporating these allowances.

468 The evidence considered above supports the proposition that the rate of return adopted by the Authority was reasonable with respect to the total cost base of the Authority. With respect to the rate of return, the respondents' sole contention was that the rates of each of the TNS, RFFS and en route charges in the Determination were not reasonably related to the expenses incurred or to be incurred by the Authority in relation to the matters to which each charge related. This was said to be by reason of the "inclusion of a rate of return of 7.5% on assets as an 'expense'". In light of the construction of the first limb of s 67, this contention is not made good.

469 I turn now to consider the manner in which the total cost base of the Authority was divided between the charges and the remaining contentions raised by the respondents' Notices of Contention.

Allocation of the Authority's total costs

470 Branson J accepted the evidence of Mr Barnes as to the manner in which the Authority divided its total costs into the costs of the particular services for which charges were to be determined, as set out in the judgment of Gleeson CJ and Kirby J. Mr Barnes accepted that the Authority's information systems did not allow this task to be undertaken with 100 per cent accuracy. A computer spreadsheet model had been created in mid-1989 and designed to allocate the Authority's corporate overheads and support costs across the services provided by the Authority, with the aim of updating the fully distributed costs of providing each of those services. However, it could not be used because of the lack of reliable information. In addition, Mr Barnes conceded that the Authority did not, at the relevant time, have the accounting systems necessary to enable it to implement a scheme for location specific charging for the Authority's services. However, no evidence was adduced that, when undertaking its financial planning for the purposes of setting the rates of each of the charges in the Determination, the Authority was in breach of statutory obligations or otherwise acted in a manner which would give rise to a finding that it did not act bona fide.

Other grounds in the Notice of Contention

471 The respondents' Notices of Contention raised various grounds attacking the validity of the Determination. Ground 1 contended that a number of reasons, additional to those accepted by the Full Court, exists for concluding that the rate of each of the TNS, RFFS and en route charges was not reasonably related to the expenses incurred or to be incurred by the Authority in relation to the matters to

which each of those charges related, or that the charges were such as to "amount to taxation" contrary to the second limb of s 67. The remaining reasons to be disposed of arising under ground 1 of the Notices of Contention are:

- "(c) In the case of the en route charges, the discrimination in the rate of charge between international and domestic operators, where no reasonable basis was established for doing so.
- (d) The discrimination in the rate of charge (in the case of the en route charges) and in the circumstances in which the charges apply (in the case of the TN[S] and RFFS charges) between Avgas and Avtur Aircraft, where no reasonable basis was established for doing so.
- (e) The fact that the [Authority] did not know, in setting the various charges, what its expenses to be incurred were in relation to provision of the services to which the charges related."

Grounds 1(c) and 1(d) are not well founded. The Authority was not obliged to justify the reasonableness of the distinctions adopted in the Determination: the "matters" to which each charge related were open to be selected by the Authority. Ground 1(e) is also not well founded. The "reasonable relationship" criterion in s 67, as informed by the second limb of s 67 and the meaning of "fees for services", accommodates errors, such as those indicated by the difficulties canvassed in Mr Barnes' evidence above, which may arise during the course of bona fide financial planning.

472 In ground 2 of the Notices of Contention, the respondents contended that the Full Court should have held that Branson J erred on a number of matters in addition to those identified by that Court. These matters related to Branson J's conclusion that the rate of each of the TNS, RFFS and en route charges was "reasonably related" within the meaning of the first limb of s 67. In light of the approach taken to the construction of s 67 in Section VII of these reasons, sub-pars (a) and (e) of ground 2 no longer have any bearing on these appeals.

473 In dealing with each of the remaining grounds, it is convenient to set out their text:

"In further support of the reasons it gave for concluding that the rate of each of the TN[S], RFFS and en route charges was not reasonably related to the expenses incurred or to be incurred by the appellants in relation to the matter to which each of these charges relate, and in further support of the matters contended for in Ground 1, the Full Court of the Federal Court should have held that Branson J erred in:

...

157.

- (b) concluding that there was a reasonable basis in 1991 for applying a lower per kilometre rate of en route charge to international operators than was applied to domestic operators;
 - (c) concluding that the lower rate fixed for international en route charges did not have the consequence that the higher rate fixed for domestic en route charges did not reasonably relate to the expenses incurred or to be incurred in connection with the matters to which the domestic en route charges related ...;
 - (d) accepting the evidence of Mr Barnes that the en route charge for aircraft on international routes covered both the inward and outward flights ... and failing properly to take into account the following evidence:
 - (i) The express terms of the Determination pursuant to which the en route charge was levied which provide for a rate per kilometre for international flights which is less than half that charged to domestic flights.
 - (ii) Admissions made by the appellant in its Amended Defence.
 - (iii) Admissions contained in the appellant's own documents and in the cross examination of Mr Gahan.
- ...
- (f) concluding that the more expensive en route facilities and services were put in place for bigger aircraft and not for smaller aircraft ...;
 - (g) concluding that the differential in rates fixed for larger aircraft and small aircraft was justified by reference to expenses".

474 Each of these sub-paragraphs concerns the en route charges levied by the Authority pursuant to cl 11 of the Determination. Four separate charges were imposed. The four charges were directed to flights of (a) avtur aircraft weighing 20,000 kgs or less between two aerodromes in Australian territory; (b) avtur aircraft weighing more than 20,000 kgs between two aerodromes in Australian territory; (c) aircraft weighing 20,000 kgs or less between a place outside Australian territory and a place within Australian territory; (d) aircraft weighing more than 20,000 kgs between a place outside Australian territory and a place within Australian territory. Different rates were imposed by each of these four charges.

475 The respondents' contentions in sub-pars (b)-(d) focus on the distinction drawn between domestic and international en route charges in cl 11 of the Determination. The different rates levied by the Authority on flights on

international, as opposed to domestic, routes were said by the respondents to evidence the proposition that the domestic flight operators were being charged on a per kilometre basis more than twice the cost of the services they were utilising.

476 Branson J accepted the evidence of Mr Barnes that these charges were "intended to recover the additional costs which could be reasonably related to international flights, which was the full costs of air traffic control dealing with offshore airspace sectors and a reasonable share of communications costs that were used primarily by aircraft on international routes"³⁴¹. Further, to the extent to which it did not contradict Mr Barnes' evidence, Branson J accepted the relevant evidence of Dr Fitzgerald. This was that, for administrative simplicity, the Authority averaged the costs of its en route services between certain routes, and that the history of prior charging by the Authority, which had reflected an excise once charged on aviation turbine kerosene, had at least an equal impact on the rate of the international en route charges.

477 These matters are properly to be attributed to the bona fide planning undertaken by the Authority in setting the rate of each of the charges in cl 11 of the Determination, a matter to be taken into account for the purposes of determining the first question. To the extent that the revenue generated with respect to each of the charges in cl 11 was in excess of the costs necessarily, or reasonably, incurred or to be incurred by the Authority in providing the services to which each charge respectively related, this is properly to be attributed to errors which arose in bona fide financial planning the Authority undertook with available planning resources.

478 Sub-paragraphs (f) and (g) of ground 2 of the Notices of Contention concern the differential rates imposed for heavier, as opposed to lighter, aircraft in cl 11 of the Determination. These contentions cannot be sustained in light of the evidence at trial that the Authority incurred higher infrastructure costs in order to provide en route services to the heavier aircraft. Further, to the extent that the revenue generated by the rates adopted by the Authority did not directly correlate to the costs necessarily, or reasonably, incurred or to be incurred by the Authority, this is again to be attributed to errors which arose from the bona fide financial planning of the Authority.

479 The grounds contained in the Notices of Contention therefore do not provide a basis for concluding that the charges imposed in the Determination and challenged in these appeals were other than "fees for services".

341 (1997) 72 FCR 534 at 573.

X VALIDITY OF THE LIEN PROVISIONS

480 Section 66(11) of the Act specified that charges and penalties under the interest provisions in sub-ss (8), (9) and (10) of s 66 for overdue charges might be recovered as "debts due to the Authority". Due from whom? The answer to that question in these appeals is indicated by s 66(2), in conjunction with cl 21(a) of the Determination, as considered in Section I of these reasons. The effect of cl 21(a) was to make the charges for the use of facilities and services by the aircraft in question payable by Compass. In other circumstances, where the use was by foreign aircraft the Determination provided (cl 22(b)) for payment by the owner of the aircraft.

481 The statutory lien provisions did not disturb, in the distribution of the proceeds of sale made under s 74 of the Act, the priorities of security holders under securities in respect of the aircraft created before the time of registration of the statutory lien. This protection operated to the extent that the security in question covered a debt incurred before registration of that lien (s 70(2)). This was subject to the qualification that priorities under a floating charge were not protected from the statutory lien. In *Federal Commissioner of Taxation v Barnes*, Barwick CJ, Mason and Jacobs JJ pointed out³⁴²:

"A floating charge over the whole of the assets and undertaking of a company anticipates the day when the creditor of the company secured by the floating charge may intervene and claim priority over those creditors who have dealt with the company in the meantime."

However, until that day arrived, the chargor was free to conduct its business in its ordinary course, and this may have involved, directly or indirectly, the activities giving rise to the charges covered by the statutory lien.

482 The statutory lien provisions provided for the deregistration of an aircraft registered in Australia (s 71), and the seizure and retention of the aircraft until all outstanding amounts covered by the statutory lien were paid (s 72). For so long as the statutory lien had effect, the provisions supporting it applied in spite of any encumbrance in respect of the aircraft, and in spite of any sale or disposition of, or dealing in, the aircraft or an interest therein (s 70(1)). The statutory lien provisions also applied whether or not the Authority had possession of the aircraft at any time. However, notice of seizure of the aircraft was to be given to various persons including those holding security interests, as well as owners, operators, lessees, hirers and charterers (s 72(a)). Decisions to impose the statutory lien by entry in the Register of Statutory Liens (s 69(1)), to deregister the aircraft (s 71(1)), and to sell the aircraft in exercise of the statutory lien (s 73(1)), were specified in s 82(1) as "reviewable decisions". This had the consequence that there was an avenue for

³⁴² (1975) 133 CLR 483 at 494.

review by the Authority and in turn the decision of the Authority was a "reviewable decision" in respect of which application may have been made to the Administrative Appeals Tribunal (s 82(6)). It may be assumed, without deciding, that payment by a party in the position of the respondents of the amount covered by the statutory liens, having the effect that the liens ceased to have effect (s 75(1)), would have subrogated that party to the rights of the Authority to debts due to the Authority under s 66(11).

483 Where statute creates an obligation to pay money it is for the legislature to provide remedies for enforcement of that obligation. Unless the law provides to the contrary, an action will lie for recovery of the money³⁴³. Further, in the Australian colonies there was before federation a number of legislative regimes conferring further rights, in the nature of securities, in respect of indebtedness to public authorities for fees and other dues in respect of the utilisation of services they provided³⁴⁴. Various laws of the Commonwealth have placed in a preferred position, beyond that enjoyed under the prerogative, indebtedness to the Commonwealth and to other public authorities.

484 In such cases one question has been whether the law in question has sufficient connection with the head or heads of power relied upon to sustain its validity. Laws designed to facilitate the collection of revenue contain many examples. In *Federal Commissioner of Taxation v Barnes* the Court was concerned with provisions of the *Income Tax Assessment Act 1936* (Cth), in particular s 221P, which were designed to support the "pay as you earn" system. Barwick CJ, Mason and Jacobs JJ said³⁴⁵:

"The overall effect of s 221P(2), therefore, is that when the whole of the property of a defaulting employer vests in or passes under the control of a trustee and when it includes property representing the value of the deductions made and not paid over, the Crown debt is given priority even over a creditor entitled to the whole of the employer's property, as it then exists, as security for his debt. Such a law is a law with respect to taxation.

It was suggested but faintly argued that even if s 221P(2) be an otherwise valid law with respect to taxation, it is nevertheless an acquisition of property of a stranger without just terms and therefore is invalid. The principle enunciated in *Johnston Fear & Kingham & Offset Printing Co Pty Ltd v The*

343 *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 305, 313, 326.

344 For example *Railways Act 1858* (NSW), s 105; *Railway Act 1863* (Q), s 106; *Navigation Act 1871* (NSW), s 111; *Melbourne Harbor Trust Act 1890* (Vic), s 117; *Railways Act 1890* (Vic), s 13.

345 (1975) 133 CLR 483 at 494-495.

*Commonwealth*³⁴⁶ (see per Latham CJ³⁴⁷ and per Starke J³⁴⁸) as to the relationship of s 51(xxxi) of the Constitution to other legislative powers can have no application to such a provision as s 221P(2); cf per Dixon CJ in *Attorney-General (Cth) v Schmidt*³⁴⁹."

485 In the same case Gibbs J³⁵⁰, with reference to the reasons of Menzies J in *Commissioner of Taxation v Card*³⁵¹, said that, construed in this way, s 221P did not require A to pay B's debt to the Commissioner; rather it required the debt to the Commissioner to be paid out of the company's property before the security held over it by A became effective. That being so, the provision was a law with respect to taxation and not a law providing for the acquisition of property.

486 In *Mutual Pools & Staff Pty Ltd v The Commonwealth*³⁵², McHugh J referred to the passage in the judgment of Dixon J in *Grace Brothers Pty Ltd v The Commonwealth* in which his Honour said³⁵³:

"The legislative power given by s 51(xxxi) is to make laws with respect to a compound conception, namely, 'acquisition-on-just-terms'. 'Just terms' doubtless forms a part of the definition of the subject matter, and in that sense amounts to a condition which the law must satisfy. But the question for the Court when validity is in issue is whether the legislation answers the description of a law with respect to acquisition upon just terms."

McHugh J then said³⁵⁴:

"The compound conception of an 'acquisition of property on just terms' predicates a compulsory transfer of property from a State or person in circumstances which require that the acquirer should pay fair compensation

346 (1943) 67 CLR 314.

347 (1943) 67 CLR 314 at 318.

348 (1943) 67 CLR 314 at 325.

349 (1961) 105 CLR 361 at 370-373.

350 (1975) 133 CLR 483 at 500.

351 (1963) 109 CLR 177 at 194-195.

352 (1994) 179 CLR 155 at 219.

353 (1946) 72 CLR 269 at 290.

354 (1994) 179 CLR 155 at 219-220.

to the transferor. When, by a law of the Parliament, the Commonwealth or someone on its behalf compulsorily acquires property in circumstances which make the notion of fair compensation to the transferor irrelevant or incongruous, s 51(xxxi) has no operation." (footnote omitted)

487 A law which imposes a penalty, by way of forfeiture of property, for an unlawful activity is a valid law of the Commonwealth, if otherwise within a head of power; at least in some instances this will be so even if the owner of the property was not involved in the unlawful activity³⁵⁵. That is not this case. There is no offence against a law of the Commonwealth to which the statutory lien provisions are appendant.

488 Nor is the notion of fair compensation to the person whose interests in the aircraft are displaced or postponed irrelevant or incongruous on grounds that (a) the lien provisions are an exercise of the taxation power in s 51(ii) of the Constitution; and (b) the exercise of that power necessarily involves an acquisition of property from the taxpayer. Proposition (b) is well established but proposition (a) does not apply to the lien provisions. Whatever other heads of power in s 51 support them, they are not laws with respect to taxation.

489 More to the point is the requirement in s 81 of the Constitution that "[a]ll revenues or moneys" raised or received by the Executive Government of the Commonwealth form one Consolidated Revenue Fund. Of that provision Quick and Garran observe³⁵⁶:

"Revenue is the annual yield of taxes, excise, customs duties, rents, etc, which a nation, state, or municipality collects and receives into the treasury for public use' (Webster, Internat Dict). It includes not only revenue from taxation, but all revenue received by the Government as payment for services rendered – such as the revenue of the post and telegraph department. It also includes all payments in the nature of penalties, or fees for licenses, etc, and in fact every kind of public income."

490 Section 81 thus proceeds on the footing that a concomitant of the provision of the services will be a quid pro quo expressed as an obligation in favour of the service provider³⁵⁷. To supplement that exchange by the further notion of compensation to be furnished by that provider to a party receiving the services, or the benefit of the provision of those services, is irrelevant or incongruous in the

355 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270.

356 *The Annotated Constitution of the Australian Commonwealth*, (1901) at 812; see also *Northern Suburbs* (1993) 176 CLR 555 at 575-576, 591, 599.

357 cf *General Practitioners Society v The Commonwealth* (1980) 145 CLR 532 at 562.

sense used by McHugh J in the above passage from *Mutual Pools*. This is so whether the service provider is the Executive Government itself (thereby attracting s 81 of the Constitution) or a body, such as the Authority, exercising functions under a law of the Commonwealth which creates it and endows it with those functions.

491 In a given case, provision of the services under a determination might require payment of a "fee" by a particular user which so departs from the criteria, applied in Sections VIII and IX of these reasons, as to what will constitute a fee for service, as to deny it the character of a charge for the provision of the service and give it the character of a new form of taxation. This might attract, among other matters, the operation of s 55 of the Constitution. Aickin J referred to this possibility in *General Practitioners Society v The Commonwealth*³⁵⁸. However, s 51(xxxi) of the Constitution still would have no application in such circumstances.

492 What is of more significance for the present case is, in addition to the propositions derived in Section VII of these reasons from the authorities of this Court discussed there, a particular holding in *General Practitioners*³⁵⁹. This was that the service in question may be one which the recipient in practical terms may be compelled to obtain in order to conduct a particular activity regulated by the legislative scheme which prescribes the fee. In the present case, the effect of the Determination was to impose the specified charges for the use, by aircraft operated by Compass (but in respect of which the respondents were interested either as owners or head lessees), of services and facilities provided by the Authority. The privilege so obtained was necessary for the conduct in Australia of commercial operations using those aircraft.

493 The consequences which the statutory lien provisions attach to the classification of charges and penalties as debts due to the Authority contain elements of practical and legal compulsion designed to achieve recoupment of those debts. But the accrual of the debts owed the Authority and the subsequent imposition of the statutory liens to facilitate payment were not the product of any compulsion exerted by the Authority. Those having control of the operations of the aircraft as operator or lessee or owner (such as, respectively, Compass and the respondents) had been legally free as they pleased to introduce them or not into

358 (1980) 145 CLR 532 at 568-571.

359 (1980) 145 CLR 532 at 562, 568. See also, as to imposts described as licence and franchise fees but set at a level of a revenue-raising inland tax on goods, *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 635, 668; *Ha v New South Wales* (1997) 189 CLR 465 at 503.

Australian trade and commerce, in particular for the conduct of commercial passenger operations³⁶⁰.

494 The protection which s 51(xxxi) provides, as Dixon J put it³⁶¹, is not "a protection ... to the general commercial and economic position occupied by traders". The debts, with concomitant aids to recovery, were created by the Act and the Determination in return or exchange for the provision by the Authority of services essential to the conduct of the commercial passenger operations in question. It is incongruous to treat the constitutional protection of property in the aircraft as requiring protection of the commercial and economic position of those who employed, or permitted or required the employment of, the aircraft in operations requiring the provision of services which by law could come only at a particular price.

495 The placement of Compass in provisional liquidation on 20 December 1991 was, on the respondents' case, an event of default entitling them to terminate their arrangements with Compass and to remove the aircraft from Australia. Shortly before the provisional liquidation, the statutory liens had vested in the Authority. The effect of s 78A of the Act was to prohibit the respondents removing the aircraft from Australia without the consent of the Authority. The Act also conferred the other remedies to which reference has been made.

496 The substance of the complaint by the respondents is that the Determination made the charges payable not by them but by Compass, and it was the default by Compass which led to the imposition of the statutory liens; these were imposts which the respondents, all foreign corporations, had to satisfy to avoid the impounding of the aircraft in Australia and to remove the threat of the destruction of their titles and interests in the aircraft by exercise of the statutory power of sale.

497 It was said in their joint judgment in *Australian Tape Manufacturers* by Mason CJ, Brennan, Deane and Gaudron JJ, that a law may be supported by a head of power outside the operation of s 51(xxxi) if it imposes an obligation that involves "a genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship"³⁶². If that relationship "need[s] to be regulated in the common interest", the law is likely to fall outside s 51(xxxi) because it is unlikely that any "acquisition of property" which is an incident of the operation of

360 cf *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 270-271; *Poulton v The Commonwealth* (1953) 89 CLR 540 at 577, 603.

361 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 270.

362 (1993) 176 CLR 480 at 510; see also *Mutual Pools* (1994) 179 CLR 155 at 171, 177, 189-190; *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160-161.

that law will be capable of imparting to the law the character which attracts s 51(xxxi)³⁶³.

498 The criterion which is invoked by their Honours in this passage has some affinity with the notion attributed³⁶⁴ to Sir Matthew Hale CJ that when private property is "affected with a public interest" it is subject to regulatory control by the state. The Lord Chief Justice was speaking³⁶⁵ of the scope and limits of three interests relative to the operation of such utilities as a public port, namely private property, public use and the interest of the Crown in the facilitation of trade, and of the power of the Crown to confer, in the public interest, exclusive franchises upon terms regulated by it³⁶⁶.

499 This notion for a time was influential in the United States in the interpretation of the guarantee in the Fifth and Fourteenth Amendments against deprivation of property without due process of law³⁶⁷. However, Holmes J in his dissenting judgment in *Tyson & Brother v Banton* said, perhaps characteristically, that "the notion that a business is clothed with a public interest and has been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to the sufferers"³⁶⁸. In his dissent in the same case, Stone J discerned an element of circularity in the reasoning involved in application of that notion³⁶⁹. In the United States, the "public interest" doctrine, with respect to the permissible regulation of

363 *Mutual Pools* (1994) 179 CLR 155 at 189-190 per Deane and Gaudron JJ.

364 *Munn v Illinois* 94 US 113 at 126 (1876). See Fairman, "The So-called Granger Cases, Lord Hale, and Justice Bradley", (1953) 5 *Stanford Law Review* 587 at 653-657; Pierce, Allison and Martin, *Economic Regulation: Energy, Transportation and Utilities*, (1980), Ch 5.

365 Hale, "*De Portibus Maris*", reprinted in Hargrave, *A Collection of Tracts Relative to the Law of England*, (1787), vol 1 at 77-78.

366 See also Wilberforce, Campbell and Elles, *The Law of Restrictive Trade Practices and Monopolies*, 2nd ed (1966), §§125-139.

367 *Wolff Packing Co v Industrial Court* 262 US 522 at 535-536 (1923); Freund, *The Police Power*, (1904), Ch XVIII.

368 273 US 418 at 446 (1927).

369 273 US 418 at 451 (1927).

the rates, charges and conditions of service of business enterprises, has fallen into disfavour³⁷⁰.

500 Moreover, it may be said that many laws which affect property rights are in some sense made by the legislature in an attempt to resolve competing claims with respect to that property and its use. As a result, it may not be easy to draw a line between a law to which s 51(xxxi) applies and one which resolves competing claims or specifies criteria for some general regulation of conduct which is "needed" in the sense used in *Australian Tape Manufacturers*.

501 However, the line drawn in *Australian Tape Manufacturers* is to be drawn in the present case. The statutory lien provisions are part of the regulatory scheme for civil aviation safety created by the Act. The lien provisions adjust the respective interests of those who own, lease or operate the aircraft and of the provider of services necessary for commercial operations of the aircraft in Australia. The interests of security holders are, to the extent discussed above, not displaced. The services were provided by the Authority to the aircraft, in the sense that it was particular operations using the aircraft which provided the incident for the attraction of the charges.

502 It would be an error to classify the relationship to which the statutory scheme gave rise as if all that were involved was an obligation in the nature of a contract between Compass and the Authority to which the respondents were strangers who might rely upon some mutation of the doctrine of privity. The "price" which had to be provided or suffered to acquire from the Authority services to the aircraft was the indebtedness of Compass. This was supplemented by the remedies available to the Authority, recourse, or threat of recourse, to which provided a strong incentive to the respondents to see that the charges and penalties were met.

503 The bundle of rights and remedies held by the Authority constituted the exchange for the provision of the services. In the events that occurred, the services were provided, but the charges and penalties were not recouped to the Authority. For the Authority then to assert its rights and remedies against the respondents is not to compulsorily acquire property from the respondents with an attendant obligation of fair compensation to the respondents from the Authority. The lien provisions are not invalid as laws which must answer the condition imposed by s 51(xxxi) of the Constitution in order to be valid.

504 It is not to the point that other legislative arrangements may have been made to secure payment to the Authority. For example, in argument references were made to the provision of bonds or the imposition of a requirement of payment in advance of the provision of services. Questions might then arise, though they were

370 *The Constitution of the United States of America, Analysis and Interpretation*, (1996) at 1594-1607.

not explored in argument, as to whether in those circumstances treaty obligations to which Australia is subject could be discharged. As indicated in Section III of these reasons, s 11 of the Act obliged the authority to perform its functions in a manner consistent with the Chicago Convention and any other international agreement relating to the safety of air navigation. The legislation is not invalid by reason of the circumstance that if the legislation had been in another form there would have been an even clearer case for validity. Nor do I place any particular significance upon the presence of analogous lien provisions in the legislation of many other countries³⁷¹ respecting landing fees and other charges for aircraft operations. If any analogy is apt, it is that referred to by the Chief Justice and Kirby J respecting the position established at the time of federation with respect to those maritime claims which were enforceable by actions *in rem*.

505 There remains the submission by the respondents that the provisions respecting statutory liens in Div 2 of Pt VI of the Act are not supported by any head of power in s 51, putting s 51(xxxi) to one side (as it should be on this hypothesis). The charges secured by the statutory lien are, relevantly, charges for services or facilities provided by the Authority (s 66(11)). One function of the Authority immediately involved for these appeals was the provision of air traffic control services and flight service services for "surface traffic of aircraft ... on the manoeuvring area of aerodromes" (s 9(1)(c)). An "aerodrome" relevantly is (s 3(1)) "an area intended for use wholly or partly for the arrival, departure or movement of aircraft", which is established as an aerodrome under the Civil Aviation Regulations (Cth) ("the Regulations"). Licensing of aerodromes under the Regulations was provided for in Div I of Pt IX of the Regulations (regs 86-94) and an aircraft may not take off or land from any place that was not established, licensed or authorised thereunder (reg 92). These regulations applied, in their broadest operation, to all air navigation within Australian territory (reg 3(1)(g)). A provision of that scope is supported in its application to the safety, regularity and efficiency of intra-state air operations by s 51(i) of the Constitution. The holding to that effect in *Airlines of NSW Pty Ltd v New South Wales [No 2]*³⁷² was not challenged.

506 Upon that basis, to charge for services and facilities provided at such aerodromes and to provide means for the recovery of those charges by liens imposed upon the aircraft whose use of the services and facilities was the occasion for the charges, has sufficient connection with s 51(i) of the Constitution. That is true also of what appear to have been the other relevant functions of the Authority, to which the charges and liens related, those functions conferred by pars (b), (d)

371 Including statutory liens under laws of the several States in the United States: McBain (ed), *Aircraft Liens and Detention Rights*, (1999), heading "United States of America", Pt 1, §§6, 13.3.

372 (1965) 113 CLR 54 at 90-91, 106, 113-117, 140, 153-155, 167.

and (m) of s 9(1) of the Act. These links are not so insubstantial, tenuous or distant that Div 2 of Pt VI of the Act cannot sensibly be described as a law with respect to that head of power³⁷³.

XI CONCLUSIONS

507 Each appeal should be allowed and orders made as proposed by the Chief Justice and Kirby J.

373 *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 368-369; *Leask v The Commonwealth* (1996) 187 CLR 579 at 601-602, 621, 634.

508 HAYNE J. The facts and circumstances giving rise to the present appeals are set out in the judgments of other members of the Court. There are two central issues in the appeals. The first is whether the determination of charges payable to the Civil Aviation Authority ("the Authority") for the period commencing on 1 July 1991 ("the Determination") was valid. The second is whether the legislative provisions giving the Authority a statutory lien over the aircraft operated by Compass Airlines Pty Ltd ("Compass") (and which the respondents leased to Compass) are valid. It is convenient to examine the issues in that order.

The validity of the Determination

509 I agree with Gaudron J (substantially for the reasons given by her Honour) that the preferable construction of s 67 of the *Civil Aviation Act* 1988 (Cth) ("the Act") is that it imposed two limitations on the power of the Authority to determine charges:

first, that the amount or rate of a charge be "reasonably related to the expenses incurred or to be incurred by the Authority in relation to the matters to which the charge relates"; and

second, that the amount or rate of a charge should not be such as to amount to taxation.

I also agree with her Honour that the Determination did not infringe either of these requirements.

510 In considering the first of these limitations it is important to recognise, as Gaudron J points out, that "[m]atters' is a word of complete generality"³⁷⁴ and that "[t]he notion of 'reasonable relationship', as postulated by s 67 of the Act, is as indeterminate as is that section's reference to 'matters to which the charge relates'."³⁷⁵ The respondents contended, in effect, that "reasonably related to" meant more than simply "having a discernible logical connection with". They contended that, in its context, the phrase meant either "not greater than" or "not substantially different from". Further, they contended that the comparison required was a comparison with expenses incurred or to be incurred by the Authority in providing each *particular* service to each *particular* user. Thus the respondents contended that s 67 required that "the amount or rate of a charge" be not greater than or not substantially different from the expenses incurred or to be incurred by the Authority in providing the particular service to the particular user.

374 Gaudron J at [117].

375 Gaudron J at [118].

511 I do not accept this construction of s 67. For the reasons given by Gaudron J, I agree with her Honour that the relationship required by the section was not a relationship between a charge (or rate of a charge) and the cost of a particular service, but a relationship between a charge and the expenses incurred or to be incurred with respect to the provision generally of the services and facilities to which the charge related. I would add some further observations to the reasons which Gaudron J gives for this conclusion.

512 First, it is not possible to draw some precise accounting comparison between a *rate* of a charge and the expenses incurred in providing a particular service to a particular user. Such a comparison could be made only by first converting the *rate* of charge to the money sum that is to be charged to the user. But the Act speaks of comparing the amount *or* rate of a charge with expenses. That is, it contemplates a comparison between a rate and an amount identified as expenses incurred or to be incurred. A comparison of that kind does not readily invite any precise accounting dissection and calculation of the sums that are to be compared. Rather, it invites qualitative comparisons of broad equivalence between global receipts and expenditures.

513 Secondly, if the inquiry is to focus on the particular occasion for charge, how are future expenses ("expenses ... to be incurred by the Authority") to be taken into account? Assuming that future expenses are capable of estimation, acceptance of the respondents' argument would mean that no use could be made of such estimates in deciding the amount of expenses properly allocated to a particular occasion for charge. The future expenses could never be said to relate, in the manner contended for by the respondents, to the "actual" expenses incurred in providing a service. The reference to "expenses ... to be incurred" suggests, then, that the inquiry is not confined to the particular occasion for charge and is not directed to ascertaining the "actual" expenses incurred in providing the particular service.

514 Thirdly, if the inquiry is of the kind asserted by the respondents, how is account to be taken of the statutory requirements that the Authority make a reasonable return on assets³⁷⁶, pay a reasonable dividend³⁷⁷ and maintain a reasonable level of reserves³⁷⁸? Payment of a dividend might be said to be an expense in that there is an outflow of money, but I doubt that the Authority's making a return on assets or retaining sufficient funds to maintain reserves could be described as expenses.

376 *Civil Aviation Act* 1988 (Cth), s 45(g).

377 s 45(h).

378 s 45(e).

515 Finally, if it were to be necessary to ascertain the cost to the Authority of providing each particular service to each particular user, how is that costing to be done? How, for example, is the Authority's overhead to be allocated? No doubt some allocation of overhead and system-wide expenses could be made, but any such allocation would very likely be based, in part, on more or less arbitrary assumptions and would very likely require great administrative effort and cost. It is to be doubted that the statute required it.

516 For the reasons given by Gaudron J, I also agree that the Determination did not "amount to taxation" and that none of the other attacks on its validity made by the respondents should succeed. It follows that the Determination was valid.

The statutory lien

517 There can be no doubt that the effect of the Act's provisions dealing with the imposition of a statutory lien over aircraft was to provide for the acquisition by the Authority of an interest in property which it did not previously have. But the guarantee of just terms that is contained in s 51(xxxi) of the Constitution is not automatically engaged by the fact that a law provides for an acquisition of property. To engage that guarantee, the law in question must be characterised as a law with respect to that compound conception "acquisition-on-just-terms"³⁷⁹. It is the power to make that kind of law which is abstracted from the content of some of the other heads of power.

518 As was said by six members of the Court in *Nintendo Co Ltd v Centronics Systems Pty Ltd*³⁸⁰:

"The cases also establish that a law which is not directed towards the acquisition of property as such but which is concerned with the adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity is unlikely to be susceptible of legitimate characterisation as a law with respect to the acquisition of property for the purposes of s 51 of the Constitution³⁸¹."

379 *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 290 per Dixon J.

380 (1994) 181 CLR 134 at 161 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

381 See, eg, *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 510; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 171-173, 177-178, 188-189; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 285-286; *Health Insurance* (Footnote continues on next page)

519 The charges which may be satisfied by sale of an aircraft under these provisions of the Act may not have been (and were not, in these cases) incurred by the owner of the aircraft. Thus the security interest, for the creation of which the Act provides, attaches in this case to the property of one person to satisfy the debt of another. That fact might suggest that the law providing for creation of the security interest is not concerned with the adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity. It is necessary to recall, however, that the lien is a lien over the aircraft which was used in ways that gave rise to the imposition of the charge; it is not a lien over any other property of the owner of the aircraft. That being so, for the reasons given by Gummow J, the statutory lien provisions are not properly characterised as a law with respect to the acquisition of property on just terms from any person for any purpose in respect of which the Parliament has power to make laws. Rather, they are to be characterised as a law with respect to trade and commerce with other countries and among the States.

520 Each of the appeals should be allowed and orders made as proposed by Gleeson CJ and Kirby J.

521 CALLINAN J. The facts and the outcome of the proceedings in the Federal Court are fully stated in the reasons for judgment of other members of the Court. I would resolve this case by reference to s 51(xxxi) of the Constitution which, in my opinion, the relevant provisions of the *Civil Aviation Act* 1988 (Cth) infringe.

522 The following are the provisions of the *Civil Aviation Act* which have to be considered.

523 Section 66 relevantly provided as follows:

"(1) In this section:

'charge' means:

- (a) a charge for a service or facility provided by the Authority; or
- (b) a fee or other charge in respect of a matter specified in the regulations, being a matter in relation to which expenses are incurred by the Authority under this Act or the regulations, including, but without being limited to, a fee or other charge in respect of, or for an application for:
 - (i) the grant, issue, renewal or variation of a certificate, licence, approval, permission, permit, registration or exemption under this Act or the regulations; or
 - (ii) the grant or variation of an authorisation, or the cancellation, suspension, variation or imposition of a condition, relating to anything referred to in subparagraph (i).

(2) Subject to this section, the Board may make determinations:

- (a) fixing charges and specifying the persons by whom, and the times when, the charges are payable; and
- (b) fixing the penalty for the purposes of subsection (8).

(2A) This section has effect subject to the *Prices Surveillance Authority Act* 1983.

(3) Before making a determination, the Board shall give the Minister notice in writing of the proposed determination:

- (a) specifying the day on and from which the determination is intended to operate;

(b) if it fixes a charge or penalty, specifying the basis of the charge or penalty; and

(c) if it varies a charge or penalty – specifying the reason for the variation.

...

(8) Subject to subsection (9), where a charge is not paid within the period determined by the Board, being a period beginning on the day on which the charge became due and payable, the person liable for the charge is liable to pay the Authority, in addition to the charge, a penalty, calculated upon the unpaid amount of the charge from the day on which the charge became due and payable, and compounded.

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

(10) Subsection (9) does not require the penalty to be calculated on a monthly basis.

(11) Charges and penalties may be recovered as debts due to the Authority."

524 Section 67 was in these terms:

"The amount or rate of a charge shall be reasonably related to the expenses incurred or to be incurred by the Authority in relation to the matters to which the charge relates and shall not be such as to amount to taxation."

525 Section 68 made provision for "a Register of Statutory Liens, which shall be maintained, and shall be open to public inspection, as prescribed".

526 Key provisions are s 69 and s 70:

"69 (1) Subject to section 76, where:

(a) at the end of the payment period after a charge became payable in respect of an aircraft, the charge is not paid; and

(b) at the end of that period, a statutory lien is not in effect in respect of the aircraft; and

(c) the charge or penalty in respect of the charge remains unpaid;

then, if an appropriate officer so directs at any time, the Registrar shall make an entry in the Register in the manner prescribed and, upon the making of the entry, there is vested in the Authority in respect of the aircraft a statutory lien covering the following:

- (d) the charge or penalty;
- (e) any penalty that becomes payable in respect of the charge after the entry is made;
- (f) any further outstanding amounts in respect of the aircraft.

(2) In subsection (1):

'appropriate officer' means:

- (a) if, at the end of the payment period, the only relevant charge is a charge under section 66 – an authorised officer;
- (b) if, at the end of that period, the only relevant charge is a charge under the *Air Navigation (Charges) Act 1952* – an officer of the Department designated in writing by the Secretary to the Department; or
- (c) in any other case – an officer referred to in either paragraph (a) or (b).

70 (1) Where a statutory lien has been registered in respect of an aircraft and until the lien ceases to have effect, the following provisions of this Division apply, in spite of any encumbrance in respect of the aircraft and any sale or disposition of, or dealing in, the aircraft or an interest in the aircraft, and whether or not the Authority has possession of the aircraft at any time.

(2) For the purposes of priorities amongst creditors and the purposes of the distribution of the proceeds of a sale made under section 73, the statutory lien has effect as a security interest in respect of the aircraft ranking in priority:

- (a) after any security interest (other than a floating charge) in respect of the aircraft created before the time of registration of the statutory lien, to the extent that that security interest covers a debt incurred before that time; and
- (b) before any security interest not falling within, or to the extent that it does not fall within, paragraph (a)."

527 The appellant had the right to seize and sell an aircraft in respect of which charges remained unpaid. Section 72 was the provision relating to seizure:

"If an outstanding amount covered by the statutory lien is unpaid at the end of 9 months after the day on which it became an outstanding amount or the day on which the lien was registered, whichever is the later, an authorised officer, or a person authorised in writing by such an officer to do so, may at any time, subject to section 79, seize the aircraft, and:

- (a) shall take reasonable steps to give notice of the seizure to:
 - (i) such persons as, in the opinion of an authorised officer, have a security interest in the aircraft;
 - (ii) each person who is any of the following, namely, an owner, operator, lessee, hirer, charterer or pilot in command, of the aircraft; and
 - (iii) such other persons as are prescribed; and
- (b) may keep possession of the aircraft until all outstanding amounts covered by the statutory lien are paid."

And s 73 provided for the sale of an aircraft subject to a lien:

"(1) If an outstanding amount covered by the statutory lien is unpaid at the end of 9 months after the day on which it became an outstanding amount or the day on which the lien was registered, whichever is the later, the Authority may at any time, whether or not the aircraft has been seized under section 72:

- (a) sell the aircraft as prescribed, whether by public auction or private contract;
- (b) make and execute all instruments and documents necessary for effecting the sale; and
- (c) give full and effective title to the aircraft free of all encumbrances, leases and contracts of hire.

(2) Before selling the aircraft, the Authority shall take reasonable steps to give reasonable notice of the sale to the persons referred to in paragraph 72(a)."

528 Section 74 governed the application of the proceeds of a sale of an aircraft. Section 75 had the effect of maintaining the lien until payment on sale. Notice relating to a lien was to be published in the *Gazette* pursuant to s 77. The knowing

removal of an aircraft subject to a lien may have rendered the culprit liable to imprisonment for three years (s 78A). Section 80 conferred an immunity against action in favour of persons involved in the enforcement of a lien. The only remedy that a person affected by a lien had was a right to seek a review of a decision to exercise any rights attaching to it by the Administrative Appeals Tribunal (s 82).

- 529 The first time that the position of an innocent third party whose property had been forfeited following an activity prohibited by a Commonwealth statute was considered by this Court was in *Burton v Honan*³⁸². There the defendant was the vendor, and the plaintiff was the innocent purchaser of a motor car. The car had been illegally imported into Australia in breach of various provisions of the *Customs Act* 1901 (Cth) which created offences and authorised its seizure and sale. The defendant argued that the legislation providing for the seizure was illegal for contravention of s 51(xxxi) of the Constitution which provides:

"51 The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...

(xxx) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws".

- 530 Dixon CJ, with whom the other three members of the Court (McTiernan, Webb and Kitto JJ) agreed, discussed the argument and stated his conclusions³⁸³:

"It is argued that, as a consequence, s 262 of the *Customs Act* dispossesses him, or at least seizures may have dispossessed him and then s 262 makes conclusive the right so to dispossess him; he is thus left without his goods and without any title to his goods, because s 262 purports to make the conviction of the offender conclusive on the subject. It leaves the innocent purchaser without any right to contest the forfeiture. It is said that that does not give him just terms, because just terms require that he should have a right to contest a forfeiture.

The short answer to this contention is that the whole matter lies outside the power given by s 51(xxxi). It is not an acquisition of property for any purpose in respect of which Parliament has power to make laws. It is nothing but forfeiture imposed on all persons in derogation of any rights such persons

382 (1952) 86 CLR 169.

383 (1952) 86 CLR 169 at 180-181.

might otherwise have in relation to the goods, a forfeiture imposed as part of the incidental power for the purpose of vindicating the Customs laws. It has no more to do with the acquisition of property for a purpose in respect of which the Parliament has power to make laws within s 51(xxxi) than has the imposition of taxation itself, or the forfeiture of goods in the hands of the actual offender."

531 There are some comments that I would make about this passage in which his Honour reaches his conclusion in favour of validity.

532 First, the use of the word "forfeiture" to describe the extinction of all proprietary rights of innocent as opposed to complicit third parties does not strike me as apt. The Oxford Dictionary³⁸⁴ gives the following as the first definition of forfeit: "[a] misdeed, crime, transgression; hence, wilful injury". The second definition is: "[s]omething to which the right is lost by the commission of a crime or fault; hence, a penal fine, a penalty". These definitions well capture the historical and legal origins of a forfeiture and emphasise two aspects: its relationship with a crime and the consequences to the actual transgressor. In modern legal parlance the word is used in respect of, for example, a clause in a will which provides for the forfeiture of a gift for some act or omission; the forfeiture of shares for failure to pay a valid call, and forfeiture of bail and forfeiture of a lease. In the first example the forfeiture operates upon the person doing or omitting to do some act. In the case of shares, the shareholder, by taking up an issue or acquiring partly paid shares, is bound by the terms of the issue and well knows that the consequence of a default will result in a forfeiture. A lessee by entering into, or accepting assignment of a lease effectively acknowledges that the lease may be forfeited on default. And a surety liable on a default by a person admitted to bail, by entering into a recognisance or otherwise will have voluntarily acknowledged liability for forfeiture of the bail by agreeing to be a surety. Every example has in common that the forfeiture only occurs in respect of a failure by the person, whose property or interest is forfeited, to satisfy either an obligation voluntarily assumed, or to answer for a transgression he or she has personally committed.

533 Secondly, the passage does not explain how the implementation of "part of the incidental power for the purpose of vindicating the Customs laws" is any different from or adds anything to the implementation, to use the language of s 51(xxxi) of the Constitution, of "[an express] purpose [the collection of customs duties] in respect of which the Parliament has power to make laws". An incidental power requires no less a constitutional foundation than an express one.

534 Thirdly, I cannot accept, as his Honour appears to do, that because forfeiture of the goods in the hands of the actual offender may be regarded as an incident of

384 *The Shorter Oxford English Dictionary*, 3rd (rev) ed (1973) at 790.

the customs power and not the acquisitions power, forfeiture of an innocent third party's goods should also be so regarded. Furthermore, for reasons I will explain later, I cannot regard references to the imposition of taxation as assisting in the resolution of any question of the constitutionality of the taking of the property of innocent third parties on other than just terms in situations involving neither taxation, excise nor customs. The power to tax is quite different from other powers. Its whole purpose is the collection of property (money) from recipients, of means or property, generally indiscriminately, except as to quantum, and not in exchange for any identified service provided to any particular taxpayer, in order to finance the activities of government generally³⁸⁵. The special character of taxation laws is given recognition by s 55 of the Constitution which 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."

535 It can also be seen that the same special character of both the customs and excise laws, as revenue raising statutes, is given recognition by their inclusion in s 55.

536 In *Mutual Pools*, McHugh J said³⁸⁶:

"Although I have previously been attracted to the view that taxation does not involve any acquisition of property by the Commonwealth the elaborate argument on s 51(xxxi) which the Court heard in this case and the associated cases of *Health Insurance Commission v Peverill* and *Georgiadis v Australian and Overseas Telecommunications Corporation* has convinced me that Deane J was correct when he expressed the view in *The Commonwealth v Tasmania* ("*The Tasmanian Dam Case*") that compulsory taxation does involve an acquisition of property but is nevertheless outside the scope of s 51(xxxi). This is because the exercise of the taxation power necessarily involves an acquisition of property from the taxpayer." (footnotes omitted)

385 See *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 408 per Gibbs J and cases there cited.

386 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 220-221.

537 What his Honour said may readily be adapted and applied to the imposition of customs duties.

538 Despite the serious doubts that I entertain as to its reasoning and conclusions, in my opinion *Burton v Honan* is distinguishable from this case for two reasons: first, it is a case in which the Court had to consider the imposition of customs duties; and, secondly, the statute created criminal offences out of which the forfeiture arose.

539 The Court has not, before this case, had to consider the constitutional validity of a statute making provision for the forfeiture of property of innocent third parties in circumstances in which, as here, the same statute creates no criminal offence for lack of compliance.

540 In *Mutual Pools*³⁸⁷ the facts were that a builder had agreed to construct a swimming pool for a customer at a time when the Commonwealth was contending that builders of swimming pools were liable for sales tax under a Sales Tax Assessment Act. In its contract with the customer, the builder paid the sales tax and added it to the price charged to the customer. Subsequently the builder successfully challenged the validity of the provision under which the tax had been charged and paid. After the decision of this Court denying the validity of the original legislation the Commonwealth enacted a Refund Act providing for the making of a refund to a builder, if the builder could satisfy one or more of a number of conditions, including that it had not passed on to the customer the amount of the tax subsequently declared to be unlawful. On the basis that the builder had passed on the tax to the customer, the Commonwealth rejected the builder's claim for a refund under the Act. A challenge to the Refund Act was mounted by the builder on the ground that the Act infringed s 51(xxxi) of the Constitution.

541 This Court unanimously rejected the challenge, but different judges expressed various reasons for doing so. The circumstances of that case are very special. In my opinion nothing was said in that case by a majority of judges which would be determinative of this case. It was also a case which was concerned with taxation laws, the almost unique constitutional quality of which I have already discussed.

542 The next case in which the possible effect of s 51(xxxi) of the Constitution upon a forfeiture by the Commonwealth was considered is *Lawler*³⁸⁸. There the *Fisheries Management Act* 1991 (Cth) made it an offence for a person to use a foreign boat for commercial fishing in the Australian fishing zone unless there was a licence in force to authorise such a use. Section 106(1)(a) of the Act gave a court

³⁸⁷ *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155.

³⁸⁸ *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270.

convicting a person of such an offence power to order the forfeiture of the boat. An order for forfeiture of the boat which was owned by a third party was made. The owner challenged the making of the order. The Court held that s 106(1)(a) was not a law with respect to the acquisition of property within s 51(xxxi) because it imposed a penalty by way of forfeiture for an unlawful activity. The Court further held that s 106(1)(a) was a law under s 51(x) of the Constitution even though the owner of the forfeited boat was not involved in the unlawful fishing. Mason CJ said this³⁸⁹:

"In essence, the position is that the prescription of forfeiture of property used in the commission of a fisheries offence is within the power conferred by s 51(x) and that power extends to the prescription of forfeiture of that property, notwithstanding that the owner is innocent of complicity in the commission of the offence. Likewise, the legislative prescription of forfeiture of that property pursuant to s 51(x) is not a law for the acquisition of property within s 51(xxxi) and it does not become such a law by reason of the legislative prescription authorizing forfeiture of property in circumstances in which the owner is innocent of complicity in the commission of the offence."

543 To say that a forfeiture of an innocent third party's property is not within s 51(xxxi) because it is within s 51(x) is, with respect, to state a conclusion and not the reasoning for it. But the fact that a forfeiture so called, if it involves an acquisition, is within a power conferred by s 51 does not mean that it is outside s 51(xxxi). Section 51(xxxi) only operates to authorise acquisitions in respect of purposes in pursuance of which the Parliament has power to make laws. If there is no power to make a law on the topic, there can be no power to acquire, whether by forfeiture so called or otherwise. And to call an acquisition a forfeiture cannot alter the nature and substance of what is in truth an acquisition.

544 In his judgment Brennan J regarded the Court's decision in *Mutual Pools*³⁹⁰ as doing no more than vindicating the customs laws, and in the same passage treated the fishery laws providing for forfeiture as if they had the same constitutional basis, without adverting to the special constitutional position of, the customs laws³⁹¹. His Honour also took into account important policy considerations earlier stated by Mason J in *Cheatley*³⁹² when he referred to the

389 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 276.

390 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155.

391 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 277-278.

392 *Cheatley v The Queen* (1972) 127 CLR 291 at 311.

difficulty of tracking the movement of vessels off the extensive coastline of Australia. His Honour said³⁹³:

"The need for drastic penalties to vindicate the laws governing customs and fisheries exists in part by reason of the difficulty in policing these laws and ensuring that foreign owners of vessels (or other conveyances) do not permit their use in breaching those laws. As Mason J pointed out in *Cheatley*³⁹⁴:

'The difficulty of enforcing compliance along the length of the Australian coastline called for a stern deterrent if observance of the provisions was to take place. There were obvious difficulties in laying obligations upon foreign owners and taking proceedings against them.'

These considerations demonstrate that the provision for forfeiture contained in s 106(1)(a) of the Act authorizing, as it does, the forfeiture of vessels owned by persons who are or might be innocent of any complicity in the offence which creates the liability to forfeiture is appropriate and adapted to the enforcement of the offence-creating provision. The forfeiture provision is therefore properly characterized as a law with respect to fisheries supported by s 51(x) of the Constitution. That power is not to be read down in order to protect the rights of private owners. I would recall the passage from *Charles River Bridge v Warren Bridge*³⁹⁵ which I cited in my judgment in *Mutual Pools & Staff Pty Ltd v The Commonwealth*.

Section 106(1)(a) of the Act is not to be classified as a law with respect to the acquisition of property falling within s 51(xxxi). The guarantee contained in s 51(xxxi) does not affect the validity of s 106(1)(a)."

545 I would read this reasoning as involving an acceptance that, for its validity, the liability to the forfeiture had to be appropriately adapted to an "offence-creating" provision.

546 Deane and Gaudron JJ in *Lawler* acknowledged the uncertainties surrounding the application of s 51(xxxi) and expressed the opinion that some laws stand

393 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 280-281.

394 *Cheatley v The Queen* (1972) 127 CLR 291 at 311.

395 36 US 341 at 431 (1837).

wholly outside s 51(xxxi)³⁹⁶. Their Honours quoted the following passage from the judgment of Gibbs J in *Trade Practices Commission v Tooth & Co Ltd*³⁹⁷:

"[I]t has been held that laws providing for the forfeiture of prohibited imports³⁹⁸, the compulsory payment of provisional tax³⁹⁹ and the application of the property of former enemy subjects reparations⁴⁰⁰ are not within s 51(xxxi). Other laws to which s 51(xxxi) obviously does not apply are those for the imposition of tax, the sequestration of the property of a bankrupt or the condemnation of prize⁴⁰¹. I am not sure that a completely satisfactory explanation has yet been given of the principles by which it is to be determined which laws do, and which laws do not, fall within s 51(xxxi). With great respect I doubt whether the suggestion of Dixon CJ in *Attorney-General (Cth) v Schmidt* – that the section does not affect 'anything which lies outside the very general conception expressed by the phrase "use and service of the Crown"' – fully expresses the ground of distinction."

547 Some of the examples that Gibbs J gave in the passage quoted can immediately be distinguished from this case. The observations of Dixon CJ in *Schmidt's case*⁴⁰² as to the scope of s 51(xxxi) repeat views of the kind that his Honour expressed in *Burton v Honan*⁴⁰³ which I have already discussed. But in any event the forfeiture provisions which this Court held justified the transfer of the funds in *Schmidt's case*⁴⁰⁴ had to be exercised under "various exigencies and perils [of war or imminent war]" which may provide a justification in such times

396 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 284.

397 (1979) 142 CLR 397 at 408.

398 *Burton v Honan* (1952) 86 CLR 169 at 180-181.

399 *Commissioner of Taxation v Clyne* (1958) 100 CLR 246 at 263, 270.

400 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361.

401 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372-373. As to imposition of a tax, see further: *Federal Commissioner of Taxation v Barnes* (1975) 133 CLR 483 at 494-495; *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 638-639; *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 508-510; and, as to sequestration of the property of a bankrupt, *The Tasmanian Dam Case* (1983) 158 CLR 1 at 282.

402 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372-373.

403 (1952) 86 CLR 169.

404 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361.

for a special reading of s 51(vi) and s 51(xxxi). Neither the bankruptcy laws nor the prize laws could have effective operation unless there was power to deal with a bankrupt's property and to seize and deal with a prize.

548 Deane and Gaudron JJ in *Lawler*⁴⁰⁵ did not doubt however that s 51(xxxi) operated as a constitutional guarantee and that the words "acquisition" and "property" should be construed liberally⁴⁰⁶. Their Honours also drew a distinction between laws in connexion with which just terms were an inconsistent or incongruous notion and laws where they were not.

549 Dawson J, in *Lawler*, said that confiscation of property connected with the commission of crimes was long part of the common law and had its origin in the doctrines of attainder and deodand and that property could be forfeited even if its owner was not involved in the crime⁴⁰⁷. The historical origins and implications of attainder and deodand must yield to the Constitution. But in any event they can afford little or no modern justification for the forfeiture of the property of innocent persons. The history of the deodand is summarised by Brennan J delivering the opinion of the Supreme Court of the United States in *Calero-Toledo*⁴⁰⁸:

"At common law the value of an inanimate object directly or indirectly causing the accidental death of a King's subject was forfeited to the Crown as a deodand⁴⁰⁹. The origins of the deodand are traceable to Biblical⁴¹⁰ and pre-Judeo-Christian practices, which reflected the view that the instrument of death was accused and that religious expiation was required. See O Holmes, *The Common Law*, c 1 (1881). The value of the instrument was forfeited to the King, in the belief that the King would provide the money for Masses to be said for the good of the dead man's soul, or insure that the deodand was put to charitable uses. 1 W Blackstone, *Commentaries* 300⁴¹¹.

405 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270.

406 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 284-285. See also *The Commonwealth v Western Australia* (1999) 73 ALJR 345 at 380-381 per Kirby J; 160 ALR 638 at 686-687.

407 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 289.

408 *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 at 680-682 (1974).

409 Deodand derives from the Latin *Deo dandum*, "to be given to God".

410 See Exodus 21:28 ("[i]f an ox gore a man or a woman, and they die, he shall be stoned: and his flesh shall not be eaten").

411 See 1 M Hale, *Pleas of the Crown* 419, 423-424 (1st Am ed 1847); 2 F Pollock & F Maitland, *History of English Law* 473 (2d ed 1909); *Law of Deodands*, 34 Law (Footnote continues on next page)

When application of the deodand to religious or eleemosynary purposes ceased, and the deodand became a source of Crown revenue, the institution was justified as a penalty for carelessness⁴¹².

Forfeiture also resulted at common law from conviction for felonies and treason. The convicted felon forfeited his chattels to the Crown and his lands escheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown. See 3 W Holdsworth, *History of English Law* 68-71 (3d ed 1927); 1 F Pollock & F Maitland, *History of English Law* 351 (2d ed 1909). The basis for these forfeitures was that a breach of the criminal law was an offense to the King's peace, which was felt to justify denial of the right to own property. See 1 W Blackstone, *Commentaries* 299⁴¹³.

550 In his *Lectures on Legal History*, Sir Victor Windeyer discussed the primitive notions underlying the doctrine⁴¹⁴:

"When a man was killed, even accidentally, by anything in motion, that thing, animate or inanimate, which caused the death had to be surrendered. It might be the sword with which he was slain, the ox that gored him, the cart that ran over him. This remarkable rule was a part of the law of England until 1846⁴¹⁵ until, indeed, it became difficult to apply when men began to be killed by railway trains! Much amusing learning came into existence concerning

Mag 188, 189 (1845); Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 Temp L Q 169, 182 (1973).

412 See Hale [supra] at 424. Indeed, the abolition of the deodand institution in England in 1846, 9 & 10 Vict c 62, went hand in hand with the passage of Lord Campbell's Act creating a cause of action for wrongful death, 9 & 10 Vict c 93 (1846). Passage of the two bills was linked, because Lord Campbell was unwilling to eliminate the deodand institution, with its tendency to deter carelessness, particularly by railroads, unless a right of action was granted to the dead man's survivors. See 77 Hansard's Parliamentary Debates, Third Series 1031 (1845). See generally Finkelstein [supra] at 170-171.

The adaptation of the deodand institution to serve the more contemporary function of deterrence is an example of a phenomenon discussed by Mr Justice Holmes [in *The Common Law* (1881) at 5].

413 In 1870, England eliminated most forfeitures of those convicted of felonies or treason. 33 & 34 Vict c 23.

414 *Lectures on Legal History* (1938) at 19-20.

415 See 9 & 10 Vic, c 62.

deodands, and some surprising articles were thus forfeited. But it is all long obsolete now. On the origin of these rules we can only speculate. The name deodand tells us that the forfeited article was given to God, according to Cowel 'for the pacification of His wrath'⁴¹⁶. We know that during the Middle Ages the value of the deodand was often used for masses for the dead man's soul, and after the Reformation usually given to some charity. But deodands were probably a survival from superstitious times before Christianity. Originally, apparently, the kinsmen of the dead man received the deodand, perhaps as compensation for their loss, but more probably because it was itself an unclean and guilty thing which they must destroy. The matter drifts off into the realm of conjecture. But we may remember the words in the *Book of Exodus*⁴¹⁷: 'If an ox gore a man or a woman, that they die; then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit'." ⁴¹⁸

551 To require the forfeiture of animals and inanimate things in modern times without regard to any culpability on the part of the owner smacks of hearkening to primitive notions of animism and anthropomorphism.

552 Neither the old learning on the topic of the deodand, nor the variety of opinions expressed in the quite different factual situation under consideration in *Lawler*⁴¹⁹, can be determinative of this case.

553 In *Health Insurance Commission*⁴²⁰ the facts were that whilst a valid claim for fees payable by the Commission to a medical practitioner was pending in the Federal Court, the Act regulating the quantum of refunds payable for medical services was amended with the consequence that the values of the refunds were significantly reduced. The Court (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) held that the amending Act was not a law with respect to the acquisition of property but did so on a variety of grounds: Mason CJ, Deane and Gaudron JJ on the ground that the reduction was effected both as a genuine adjustment of competing claims between parties who stood in a particular relationship, and also as part of a regulatory scheme for the provision of welfare benefits from public funds; Brennan J on the ground that the right conferred by the Act was not "property" for the purposes of s 51(xxxi); Dawson J on the ground that the Commonwealth had not "acquired" property; Toohey J also on the ground

416 Cowel's *Interpreter*, published by Manley in 1672.

417 *Exod* xxi, 28.

418 See also Holmes, *The Common Law* (1882) at 22-25.

419 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270.

420 *Health Insurance Commission v Peverill* (1994) 179 CLR 226.

that there was no "acquisition", and on the further ground that the operation of the amending Act lay outside the scope of s 51(xxxi); and McHugh J on the ground that the entitlement to payment was conferred subject to the condition that it could be altered or revoked by Parliament at any time.

554 The Court also held that the amending Act did not contravene s 55 of the Constitution because the reduction of the value of a chose in action, or the substitution of a chose in action for a lesser amount for another chose in action, was not an imposition of a tax.

555 With respect, for myself, I would have thought that the second holding which accepted that the medical practitioner's claim was a chose in action contradicted any notion that he did not own property, the property being the debt payable by the Commission, and that, by reducing the value of that debt (by statute) there was effectively an acquisition of property by the Commission to the extent of the amount of the reduction of the debt. As to the relationship between the Commission and Dr Peverill, no matter what other complexion it might bear, it certainly included, as an element, the relationship of debtor and creditor and there is no reason in principle to distinguish between legislation to effect a welfare purpose and legislation to effect some other purpose (except for legislation relating to tax, customs and excise). And any acquisition must involve a disbursement of public funds.

556 The different facts and legislation, and the diversity of the reasons given by the Justices of this Court in that case are such that I would not regard it as dictating any particular conclusion in this case.

557 Before disposing of this case I would make some brief observations about some policy considerations as some members of this Court did in *Lawler*⁴²¹. There are some obvious measures which might be taken to ensure that large debts for charges are not allowed to be run up by aeroplane operators, such as perhaps the requirement of a substantial bond or deposit in advance of permission to land or fly over Australia, or the withholding of permission to operate without payment in advance. There are no doubt other measures which would be effective to ensure payment. The point is that the special difficulties referred to in upholding the fishery laws are not present in the case of laws governing the use of airports.

558 In *The Commonwealth v Western Australia*⁴²², I discussed the particular advantages enjoyed by government in dealing with, by reducing or sterilising, by executive action, people's property rights. No narrow view is in my opinion warranted of the constitutional guarantee contained in the acquisitions power.

421 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270.

422 (1999) 73 ALJR 345 at 398-400; 160 ALR 638 at 710-713.

Ample breadth should be accorded to it, as a constitutional guarantee, indeed one of the very few explicit guarantees in the Constitution. In *The Commonwealth v Western Australia*, Kirby J made observations to a similar effect⁴²³:

"The word 'acquisition' is not to be treated pedantically. It is not limited to the physical taking of title or possession in, relevantly, a State's 'property'. Nor is it to be confined by reference to traditional conveyancing principles and procedures."

559 There is no doubt that there has been an acquisition of property here to the extent that the lien purports to operate to reduce the value of the aeroplanes owned by the respondents. The statutory provisions upon which its existence depends purport to confer an absolute right upon the appellant to dispose of the aircraft and to pay itself part, or the whole of the proceeds, if required, to discharge the debt owed by the operator of it. The respondents are third parties not shown in any way to be complicit in the failure of the operator to pay the relevant charges. The failure to pay the charges does not involve in any way the commission of a criminal offence. There is no criminal or quasi-criminal sanction provided for in the legislation. Policy considerations of the kind referred to in the fisheries case of *Lawler*⁴²⁴ are not present here. The seizure and sale of the aircraft are not necessary to vindicate the laws authorising the fees and charges under the Act. These are not laws concerned with taxes, excise or customs duties. The defence power is not, and could not be invoked in the circumstances of this case. One or more of these reasons might be sufficient to distinguish this case from those that I have discussed. I would however rest my decision on all of the matters to which I have just referred. The appellant accordingly had no right to exercise any of the powers purportedly conferred by the Act to take the benefit of a lien against the respondents and to exercise rights under it to defeat or diminish any of the respondents' property rights in and to the aircraft without providing for compensation on just terms to the respondents.

560 On the view that I take of the case I do not need to decide any of the other questions that were debated.

561 I would dismiss the appeal with costs.

423 (1999) 73 ALJR 345 at 382; 160 ALR 638 at 687.

424 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270.