Making the tax system comply with s.82 of the Constitution

A submission to the Treasury review on
Australia's Future Tax System

by

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Summary

If we must have personal income tax, *responsibility for withholding PAYE tax should be shifted from employers to financial institutions*. If we must have compulsory superannuation, the present 9% employer-funded contribution should be rolled into wages and salaries, and future contributions should be deducted from wages and salaries by the same financial institutions. The Reserve Bank should be empowered to vary the superannuation contribution rate as an anti-inflationary tool. *The Commonwealth should pay financial institutions* for these services.

If we must have a GST, it should be simplified so as to *eliminate the need for tax invoices*, either by allowing input credits on input-taxed supplies or (preferably) by turning the GST into a retail tax. The oft-repeated claim that a retail tax is more evadable than a value-added tax is shown to be completely without merit.

These reforms would create jobs and boost production by greatly reducing **compliance costs**, especially for employers and for traders whose turnover is small enough to qualify for input-taxed status (but who currently may be forced to become GST collectors because their customers want input credits), and would end the iniquitous arrangement whereby sole traders, small proprietors and charitable organizations are required to work as **unpaid tax collectors**.

That said, I do not imagine for a moment that the legislators will do the right thing simply because it is right, or that a submission like this, coming from a nobody like me, will be given any prominence simply because of its moral and economic merits. Accordingly I point out that if s.82 of the Constitution means what it literally says, the "costs, charges, and expenses" incurred by private entities in collecting Federal taxes are fully recoverable from the Commonwealth—not merely deductible from taxable income. *The reforms suggested herein would ensure that GST and PAYE tax comply with any possible interpretation of s.82*, so that the Commonwealth's revenue stream cannot be interrupted by any constitutional challenge. ***You have been warned.***

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1 The literal construction of s.82

"*Woe unto him that buildeth his house by unrighteousness, and his chambers by wrong; that useth his neighbour's service without wages, and giveth him not for his work...*" (Jeremiah 22:13).

In this life, our Federal legislators may ignore the Prophets with impunity. But not even in this life can they ignore s.82 of the Constitution, which says in part:

> **82. The costs, charges, and expenses incident to the collection, management, and receipt of the Consolidated Revenue Fund shall form the first charge thereon...**

The literal meaning of these words would make it unconstitutional to require employers, at their own expense, to *collect* personal income tax payable by employees, or to require vendors, at their own expense, to *collect* GST payable by customers. It is no defence that the charges and expenses in question are deductible against taxable income; they must be fully chargeable to the Commonwealth. Assuming that "costs" are separate from "charges" and "expenses", we must further conclude that "costs" include opportunity costs of time. The words "incident to" further support a wide construction of "costs, charges, and expenses".

Even on the widest construction, compliance with s.82 could be guaranteed simply by keeping all tax *collectors* (not to be confused with *payers*) on the public payroll, as indeed they were when our founding fathers wrote s.82, and when the founding fathers of Canada wrote a similar provision into the *British North America Act* (s.103). But if the tax collectors are not directly employed by the Commonwealth, the fair alternative is that their "costs, charges, and expenses", including the value of their time, be reimbursed by the Commonwealth.

Not until World War II did employers find themselves conscripted as unpaid collectors of personal income tax. If this was constitutional in wartime, when legislators could rely on a broad and overriding interpretation of the defence power, it does not follow that the wartime arrangement remained constitutional in peacetime. And if the wartime conscription of civilian employers as unpaid tax collectors could be defended on the moral grounds that (a) citizens were liable to be conscripted to risk life and limb, albeit with pay, and (b) civilian employers were diverting scarce labour from the war effort and ought to give something in return, those grounds disappeared when the war ended.

But, having retained an unconscionable and arguably unconstitutional arrangement for the collection of personal income tax, the legislators didn't need a war to extend the arrangement to consumption taxes by inventing the **tax invoice**. When the nose of the camel was inside the tent, the rest of it would follow, unless and until the tax collectors could show that its continued presence was unconstitutional.

2 Prevention better than cure

If the High Court agrees with a literal interpretation of s.82 while present collection arrangements remain in place, those arrangements will suddenly be—or rather will suddenly always have been—unenforceable. This will not require the Commonwealth to pay back any taxes, because the issue is compliance costs rather than taxes *per se*. Neither will it require the Commonwealth to refund any past compliance costs, because the Parliament will simply impose a 100% "windfall tax" on any such refunds. But the Government, in order to preserve the flow of revenue, will be forced to announce that the tax laws will be amended to bring them into conformity with s.82 and that the amendments will be backdated to the time of the announcement.

Such "**legislation by press release**", which purports to require citizens to comply with laws that have not yet been written, could raise question that the Government would strongly prefer *not* to have litigated, such as:

- whether the principle that "ignorance of the law is no defence" applies to laws that have not yet been written;
- whether it is possible to know a law that has not yet been written and, if not, whether the principle that "ignorance of the law is no defence" gives way to the principle that the law does not demand the impossible;
- whether a law demanding the impossible is compatible with the rule of law and, if not, whether the mere existence of a constitution, or even of a court, presupposes the rule of law.

Those questions aside, the legislation will be drafted in haste and will inevitably contain serious bugs, for which the Government will take the flak.

It would therefore be prudent for the Parliament to bring the tax laws into conformity with a literal interpretation of s.82 *before* the issue comes before the High Court. This might require not only the timely drafting of legislation, but also the use of executive discretion to keep cases out of court until the legislation is passed. For example:

- While no prudent person would pick a fight with the ATO, we must assume that the ATO has already picked fights with numerous people for alleged non-compliance with tax-withholding requirements. Such a person, facing bankruptcy and/or prosecution, would have nothing further to lose by challenging those requirements under s.82, in which case the ATO would probably settle on terms favourable to the unpaid tax collector rather than risk a legal precedent.
- If s.82 means what it says, anyone carrying a criminal conviction for failing to withhold tax would seem to be entitled not only to have the conviction quashed, but also to have every related indictment, charge, arrest or warrant declared null and void for want of constitutionally valid subject-matter, and to be substantially compensated. And presumably the Constitution trumps any ordinary law purporting to impose limits on appeals, so that it is never too late to appeal against a conviction on constitutional grounds. But by offering pardons and sufficiently generous ex-gratia payments, ostensibly on the ground that the Commonwealth should have exercised a discretion not to prosecute, the Government could keep such cases out of court without admitting liability under s.82.

A literal interpretation of s.82 would give the legislators a fiscal incentive to draft the tax laws so as to minimize collection costs, which is no more than the legislators *ought* to do for moral and economic reasons, even in the absence of a constitutional imperative. But this would make a constitutional imperative seem all the more reasonable to the High Court!

Let us therefore consider, under the next two headings, how the collection mechanisms of personal income tax and GST might be amended in accordance with a literal interpretation of s.82. For completeness, alternative interpretations are considered in the Appendix.

3 PAYE personal income tax

The Commonwealth, given that it is liable for the collection costs of personal income tax, has an incentive not only to minimize those costs but also to make them easily quantifiable. Both of these ends are served by *minimizing the number of collection points*.

Australia has more than a million employers. Requiring each of them to be a PAYE tax collector, and to maintain the necessary information systems and know-how, is ridiculously wasteful—the more so when a single computer can process a million employees as easily as a dozen. In contrast, Australia has only 198 **Authorised Deposit-taking Institutions** (**ADI**s), comprising 58 banks, 11 building societies and 129 credit unions (as at September 2008, according to the Reserve Bank). Furthermore the average ADI, by the nature of its business, is better equipped to process PAYE withholding than the average employer. So, by shifting responsibility for PAYE-withholding duties from employers to ADIs, the Commonwealth could *reduce the number of PAYE collection points from over 1,000,000 to under 200* and gain further efficiencies due to specialization.

Under the taxation power, the "matters incidental" power and the newly recognized workplace powers, the Federal Parliament can easily

- require wages and salaries to be paid into ADIs,
- require each personal taxpayer to have a single ADI account into which all taxable income is initially paid, and
- require the ADI to deduct and remit PAYE tax.

Then, to guarantee compliance with s.82, the Commonwealth can offer to *pay the ADIs for their services* according to a specified formula. ADIs should be free to reject the offer, in which case accounts with those ADIs will simply not be eligible to accept direct deposits of taxable personal income. If any ADIs allege that the Commonwealth's payments are too low to satisfy s.82, they can take the matter to court. Presumably the Commonwealth will deliberately err on the side of generosity in order to avoid such litigation; it can afford to be generous because of the economies of scale and specialization.

This system has several incidental advantages:

1. If you have more than one employer, you no longer need to claim the **tax-free threshold** from one employer and inform the other(s) of the appropriate income bracket(s). Each employer simply makes wage/salary payments into your nominated account, and your ADI does the rest.
2. Because your ADI has a record of your total taxable income since the start of the financial year, it can deduct tax on a **cumulative pro-rata** basis. For example, if you find a new job after a short period of unemployment, tax deductions don't start until your cumulative income catches up with your cumulative tax payments. This capability minimizes the need for a settlement of accounts at the end of the financial year and is therefore conducive to the **elimination of tax returns** for most individual taxpayers.
3. The reduced number of collection points would allow **easier detection of fraud**. In particular, anyone who tried to claim the tax-free threshold more than once would be paying tax not through multiple employers, but through multiple ADI accounts; and whereas is it not illegal to have multiple employers, it would be illegal to have multiple ADI accounts with tax-withholding facilities.
4. ADIs can be made responsible for **compulsory superannuation contributions**; that is, your present employer-funded super contributions can be rolled into your wages/salary and paid into your nominated account, and your ADI can deduct super contributions and forward them to your super fund. In this way, *super contributions are automatically maintained when you change jobs*; this administrative efficiency is in addition to the economies of scale and specialization that follow from reducing the number of collection points for super contributions.

5. Relieving employers and prospective employers of the paperwork for employees' superannuation and PAYE income tax would remove a major impediment to **job creation**.

6. If ADIs were made responsible for compulsory super contributions, future variations in the contribution rate (currently 9%) would affect take-home pay instead of the cost of labour, so that an increase in the rate would be *dis*inflationary instead of inflationary. In contrast, a rise in interest rates is disinflationary only in the short term; in the long term it is inflationary in so far as interest is a cost of production. So, if the Reserve Bank were empowered to vary the super contribution rate, **control of inflation** would be more effective than at present, but **without redistributive effects** caused by changes in interest rates.

In short, making employers responsible for superannuation and PAYE income tax has been one of the more remarkable campaigns of legislative vandalism perpetrated against the Australian people. But, as the immoralities and inefficiencies of the system were not enough to stop it being imposed in the first place, they probably won't be enough to get it changed—whereas a constitutional threat probably will be.

4 Goods and Services Tax

4.1 The game of the name

"**GST**" is the name adopted in New Zealand, and later in Canada and Australia, for the value-added tax (**VAT**). In New Zealand the name-change was justified by an unusually broad base. Canada and Australia have no such excuse.

The name "value-added tax" suggests that the enterprise subtracts its taxable purchases from its taxable sales to obtain the "**value added**", and multiplies this by the tax rate to obtain the tax payable. Under this arrangement it is arguable that the compliance costs are not costs of *collection* but rather costs of payment, in which case they don't offend s.82. Of course the VAT feeds into prices that the enterprise charges its customers. But this is true of all variable costs, of which the VAT is just one. If the enterprise doesn't think of itself as collecting revenue for suppliers and other parties that impose variable costs, why should it think of itself as collecting VAT?

4.2 The problem

But the Australian GST doesn't work that way. It is implemented as a *consumption* tax, which the seller explicitly collects from the buyer (consumer) by issuing a **tax invoice**. These tax invoices, being prescribed by law, constitute a legislative admission that the seller *collects* the tax while the buyer pays it.

Each seller reclaims the GST paid on its purchases (i.e. claims **input credits**), using the tax invoices as proof of payment. Buyers who don't resell—in other words, retail customers—don't get to reclaim the tax. Thus the tax falls on final consumption. But it doesn't fall *only* on final consumption, due to the anomalous treatment of **input-taxed** enterprises—that is, enterprises that don't collect GST on their sales and consequently don't reclaim GST paid on their inputs. This unreclaimed GST is buried in the prices charged by input-taxed enterprises. And because such enterprises don't issue tax invoices, their customers can't reclaim the buried GST even if the customers are GST-collecting enterprises. The unreclaimed GST, known as "sticking" or "sticky" GST, feeds into the prices of the customers' products, causing what is loosely called "double taxation".

To avoid this "double taxation", many GST-collecting enterprises refuse to deal with input-taxed suppliers. In response, hundreds of thousands of enterprises that are small enough to qualify for input-taxed status have been forced to register as GST-collectors and incur the associated collection costs. Their small size compounds the immorality of forcing them to collect tax without pay.

4.3 Two ways to eliminate tax invoices

From the Commonwealth's point of view, the easiest way to make sure the GST is constitutional is not to pay the collectors, but to do away with tax invoices, so that all GST-registered entities become *payers* instead of collectors.

What then should be done about input-taxed enterprises? In the absence of the tax invoices that presently distinguish GST-registered suppliers from input-taxed suppliers, the obvious solution is to allow full input credits for both—in other words, to give tax credits for input-taxed suppliers as if their "value added" had been taxed, although it has not. The net effect is to exempt from taxation the value added by input-taxed suppliers. Curiously, input-taxed enterprises are called "**exempt**" in the UK and Canada. To "exempt" their "value added" would therefore be consistent with the name "value-added tax". The lack of such consistency means that the GST isn't really a VAT.

At this point I should note that the UK/EU "VAT", like the Australian GST, doesn't allow credits on exempt supplies. So it isn't really a VAT either. In the UK they complain of "sticking VAT", which is an oxymoron; real VATs don't stick.

Allowing full input credits on exempt supplies would amount to a narrowing of the GST base. Fortunately this is within the Terms of Reference of this Review, which rule out increasing the rate or broadening the base, but say nothing about reducing the rate or narrowing the base.

Allowing input credits on exempt supplies would also remove the need for small enterprises to register for GST for the sole purpose of allowing their customers to claim input credits. Thus it would lead to a real reduction in compliance costs; it would not merely make the present compliance costs technically legal. The ability to start a small enterprise without registering for GST would lead to more business start-ups, hence more jobs.

A more radical way to do away with tax invoices, with a greater saving in compliance costs, is to turn the GST into a **retail tax**. This too would be within the Terms of Reference, as it does not involve any increase in the rate or broadening of the base.

4.4 The superiority of a retail tax

Compared with the present GST, a retail tax would have lower compliance costs because it would be calculated only on sales (purchases being irrelevant) and would exempt all non-retail enterprises (including exporters). The up-front cost of starting a business would be lower because it would not include tax—whereas under a VAT, tax is paid on set-up costs and not recovered until the business makes enough sales to offset the input credits. These savings may help to explain why the broad-based indirect tax proposed by Treasurer Howard and Treasurer Keating was a retail tax; not until the days of Hewson and "Fightback!" was Australia threatened with a VAT.

It is often claimed that a VAT is harder to evade than a retail tax because input credits constitute a duplicate record of each taxable sale. That claim is nonsense for four reasons:

1. Any purchase that attracts an input credit will also attract an income-tax deduction which is worth more than the input credit. So the desire to claim the input credit will not cause any additional records to be kept. (This observation by itself wipes out the alleged advantage of the VAT.)

2. The existence of input credits opens a second front for tax evasion: bogus input credits! (In combination with the first reason, this means a VAT is *more* susceptible to evasion than a retail tax.)

3. Input credits are not claimed by retail customers (final consumers) and therefore do little to prevent evasion at the retail level, which is the level at which the VAT, like the retail tax, is eventually paid. While retailers themselves want to claim input credits, this does not deter non-declaration of sales unless there is a predictable proportionality between sales and input credits. When there is such a proportionality, the first reason still applies; and when there isn't, the second reason also applies.

4. If necessary, tax evasion at the retail level can be deterred by allowing small rebates to retail customers who use credit/debit cards, which create independent electronic records of transactions. The rebate rate should be such that the reduction in evasion is more than enough to pay for the rebates. (Such a system operates in South Korea, whose consumption tax is a VAT. Clearly the South Koreans do not have much faith in VAT as an anti-evasion weapon.)

When a demonstrably invalid argument is repeated *ad infinitum* while arguments to the contrary go unanswered, you know you're dealing with a hidden agenda. In the case of VAT, unless and until someone suggests a more plausible explanation, I submit that the hidden agenda is to maximize compliance costs in order to maximize the advantage of large enterprises over smaller enterprises, including startups.

The saving in compliance costs from turning the GST into a retail tax, although smaller than that from relieving employers of PAYE duties, would be considerable, and the same reform would reduce evasion by completely eliminating input-credit fraud. Thus the case for change is not limited to the technicality that sellers "collect" VAT but "pay" retail tax.

5 Note on Employment Tax Credits

The reforms proposed in this submission are compatible with the one proposed in my article "Employment tax credits: the 'marginal' approach to full employment" (*On Line Opinion*, March 23, 2009), namely that every employer be given a tax credit proportional to the change in its workforce since a certain (past) reference date. From the viewpoint of employers, these tax credits would reduce the *marginal* cost of hiring and (if allowed to be negative) the marginal benefit of firing. From the viewpoint of the Government, the tax credits would not "cost" anything, because employers that retained their workforces would pay the same tax, while those that expanded their workforces would expand the bases of personal income tax and consumption taxes.

Employment tax credits can be understood as offsetting the extreme anti-employment bias of the present tax-transfer system. That bias is described in, e.g., subsection 8.3 of my earlier submission on behalf of the Land Values Research Group. The same submission suggests alternative revenue bases that might be suitable for new employers that enter the system *after* the reference date for employment tax credits.

6 Conclusion

Compliance costs could be greatly reduced by shifting PAYE withholding duties from employers to financial institutions and turning the GST into a retail tax. Minimizing compliance costs would be a moral and economic imperative even in the absence of a constitutional imperative. But if the only way

to get any action on that moral and economic imperative is to raise a constitutional threat to the existing regime, so be it. And any unpaid tax collector who is being threatened with bankruptcy (or worse) for non-compliance with the present regime has nothing further to lose by raising a constitutional issue. ***You have been warned.***

A Appendix: Alternative constructions of s.82

A.1 Internal qualification?

Here is s.82 in context, in Chapter IV of the Australian Constitution:

> 82. The costs, charges, and expenses incident to the collection, management, and receipt of the Consolidated Revenue Fund shall form the first charge thereon; and the revenue of the Commonwealth shall in the first instance be applied to the payment of the expenditure of the Commonwealth.
>
> 83. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.
>
> But until the expiration of one month after the first meeting of the Parliament the Governor-General in Council may draw from the Treasury and expend such moneys as may be necessary for the maintenance of any department transferred to the Commonwealth and for the holding of the first elections for the Parliament.
>
> . . .
>
> 94. After five years from the imposition of uniform duties of customs, the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth.
>
> . . .
>
> 96. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

One might claim that the second half of s.82 (after the semicolon) excludes the expenditure of private agents, at least in the first instance. But in that case the second part would not only contradict the literal meaning of the first part, but also render any residual meaning completely redundant, because any "costs, charges, and expenses" incurred directly *by the Commonwealth*, whether for "collection, management, and receipt" of revenue or for any other purpose, are clearly "expenditure of the Commonwealth". The more natural interpretation is to take the "expenditure of the Commonwealth" as distinct from the payments and grants to the States under ss. 94 & 96, but as *including* all the "costs, charges, and expenses" in the first part—unless, of course, the first part is being breached!

Alternatively, one might claim that the first part of s.82 is by way of exception to the first sentence of s.83. But in that case, why is the "exception" juxtaposed with the second part of s.82, which separates the "exception" from s.83 but is unrelated thereto? And why is this "exception" placed *before* the provision that it allegedly qualifies, while the second sentence of s.83, which clearly *is* an exception, is introduced by "But. . . " and placed *after* the provision that it qualifies? Moreover, if s.82 is indeed included by way of exception, it does not follow that s.82 does not mean what it literally says.

A.2 Canadian precedent?

The claim that s.82 qualifies s.83 may seem to be supported by the Supreme Court of Canada in *Reference re Goods and Services Tax* (1992, 2 SCR 445). In Canada, however, the arrangement of the relevant sections of the *Constitution Act 1867* (also called the *British North America Act*) is very different:

> 103. The Consolidated Revenue Fund of Canada shall be permanently charged with the Costs, Charges, and Expenses incident to the Collection, Management, and Receipt thereof, and the same shall form the First Charge thereon, subject to be reviewed and audited in such Manner as shall be ordered by the Governor General in Council until the Parliament otherwise provides.
>
> 104. The annual Interest of the Public Debts of the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union shall form the Second Charge on the Consolidated Revenue Fund of Canada.
>
> 105. Unless altered by the Parliament of Canada, the Salary of the Governor General shall be Ten thousand Pounds Sterling Money of the United Kingdom of Great Britain and Ireland, payable out of the Consolidated Revenue Fund of Canada, and the same shall form the Third Charge thereon.
>
> 106. Subject to the several Payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the Public Service.

Here the literal wording of s.106 makes it clear that ss. 103–105 are exceptions to the rule that the Consolidated Revenue Fund "shall be appropriated by the Parliament". And while the exceptions are listed first, they are listed in a continuous sequence immediately before the provision that they qualify, and are not mixed with or separated by any unrelated material.

The meaning of s.103 came before the Supreme Court in the context of a challenge to the *GST Act*, which received the Royal Assent on December 17, 1990. The challenge was not amenable to an out-of-court settlement; it came not from an unpaid tax collector being prosecuted for non-compliance, but from the government of Alberta, which referred six questions to the Court of Appeal of that province. Question 3 was:

> 3. Having regard to section 103 of the *Constitution Act, 1867* and the common law, are suppliers entitled to charge and to collect from the Consolidated Revenue Fund of Canada all costs, charges and expenses incidental to collecting and paying a remittance under the *GST Act*?

The Court of Appeal answered in the affirmative, but only on the ground that because the *GST Act* designated vendors of taxable supplies as agents of the Crown, it triggered the common-law obligation of principals to reimburse outgoing expenses of agents. This obligation could have been extinguished by legislative provisions; but the *GST Act*, in the opinion of the Court, contained no such provisions. In the absence of contractual provisions to the contrary, the common-law obligation did not extend to compensation for time and effort. The Court did not find it necessary to rule on whether s.103 imposed an independent duty of reimbursement.

The Attorneys-General of Alberta and Canada, for opposite reasons, were dissatisfied with that answer (and others), and appealed to the Supreme Court. On Question 3, the Canadian Federation of Independent Business (CFIB) intervened in support of the Attorney-General of Alberta.

The Supreme Court held that the *GST Act*, by providing a one-off transitional credit for small businesses, implicitly extinguished any common-law right to additional reimbursement of compliance

costs. On whether s.103 imposed an independent right to reimbursement, the Supreme Court rightly noted that s.103 is one of a series of exceptions to s.106, and concluded:

> Clearly, therefore, the purpose of s.103 was to immunize the revenue collecting machinery of the federal government from the uncertainties of annual appropriations by Parliament.

But the Court immediately added:

> It was never intended to create a legally enforceable right in third parties to receive compensation for revenue-raising duties imposed on them by Parliament.

That addition is highly disturbing on several counts.

First, it is a clear *non sequitur*. A right to compensation for third parties is not incompatible with the purpose of protecting revenue-raising expenses from disallowance by Parliament, but merely includes third parties within the scope of the desired protection.

Second, La Forest and L'Heureux-Dubé JJ., in agreeing with the majority of the Court, found it necessary to add that s.103

> . . . does not impose an independent legal obligation on Canada to compensate collecting agents. Rather, it refers to costs, charges and expenses the Government of Canada is obliged to pay by statute or contract independently of s.103.

This clarifies what has been read into s.103, as well as what has been read out of it, but does not conjure away the *non sequitur*.

Third, this problematic reasoning is offered in support of the otherwise surprising conclusion that s.103 does not mean what it literally says.

Fourth, if one were to apply the same reasoning to the other appropriations that the *Constitution Act* protects from disallowance by Parliament, one would conclude that s.104 does not imply an obligation to pay the interest on public debts, and that s.105 does not imply an obligation to remunerate the Governor General.

Fifth, while the Court was silent on the surprising implications of its own position, Lamer C.J. (writing for the majority, without dissent from La Forest and L'Heureux-Dubé JJ.) waxed bombastic on the implications of the contrary position:

> At the outset, I must say that if this submission is correct, it produces a startling result. The federal government would be obliged to reimburse any expenses incurred by statutory agents of the Government of Canada in the collection of taxes. I see no reason why this obligation would be limited to expenses incurred in the collection of the GST. Under ss. 153 and 227(4) of the *Income Tax Act*, S.C. 1970-71-72, c.63, for instance, employers are under a duty to withhold and remit income tax in respect of their employees. It has not hitherto been suspected that all such persons have a right—indeed, a constitutional right which cannot be modified or extinguished by statute—to be reimbursed for their time, effort and expenses out of the consolidated revenue fund of Canada.

In any other context, the right of workers to be paid for their time and reimbursed for their expenses would be regarded as a fundamental human right. That anyone, let alone the Chief Justice of Canada, finds it "startling" that persons forced to work for the government might enjoy any of the same rights is a sad commentary on the morality of government and on public expectations of government. (That said, I obviously find it reassuring that the Chief Justice recognized the nexus between the GST and personal income tax.)

Sixth, if indeed it was never intended that private tax collectors be given a constitutional right to compensation, that is probably because it was never envisaged that the legislators of a free country would be so depraved as to compel private entities to collect tax *at all*, let alone without pay. Before World War II, which enabled legislators to justify almost anything by citing the defence power, private tax collectors had always and everywhere been regarded with contempt. The attitude of the founding fathers of Canada (and Australia) would have been no different.

Seventh, the judgment is silent on any question of morality or fairness. That might not have impressed William Blackstone:

> This law of nature, being coeval with mankind and dictated by God Himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original. [*Commentaries on the Laws of England*, Introduction, s.2.]

The Supreme Court need not have gone that far in order to make some concession to morality. It could have taken the view that any reasonable interpretation of the law that is consistent with universal moral principles is to be preferred over any other interpretation that is not so consistent. But it did not. And had the Justices felt duty-bound to uphold a point of law in the teeth of its manifest immorality, they could still have allowed themselves to express some moral indignation at what they were required to do. But they did not. It seems that moral considerations not only failed to influence their deliberations, but failed even to register on their radar.

The Supreme Court having spoken, it is now too late to hear the above objections in Canada. It is not yet too late to hear them in Australia. Moreover, because the Australian Constitution does not explicitly state that s.82 qualifies s.83, one could completely agree with the Supreme Court of Canada while maintaining that its reasoning is not applicable to Australia.

A.3 Australian colonial analogies?

Arrangements similar to ss. 103–106 of Canada's *Constitution Act 1867*, albeit more complex and verbose, may be found in the colonial constitutions of NSW, Victoria and Western Australia, and in Canada's *Union Act 1840*. To interpret these documents in the same manner as the Supreme Court of Canada interpreted the *Constitution Act 1867* would be open to the same objections.

The authors of the Australian Constitution were presumably familiar with these earlier documents, especially the Australian ones, but did not imitate them in the sequence of, or the stated relations between, ss. 82 & 83. Hence the reasoning of the Supreme Court of Canada, even if valid, would not necessarily be applicable.

And if, in view of all the above, the Justices of the High Court of Australia find that they can decide the case either way with reasonable legal justification, what they decide will be an expression of their morality or lack thereof.

"*Behold, the hire of the labourers who have reaped down your fields, which is of you kept back by fraud, crieth: and the cries of them which have reaped are entered into the ears of the* LORD *of sabaoth.*" (James 5:4.)