

## SECTION 90 OF THE COMMONWEALTH CONSTITUTION: FISCAL FEDERALISM OR ECONOMIC UNITY?

### 1. INTRODUCTION – A RANDOM DIVISION OF FISCAL POWER

In the Australian federation, fiscal power has been divided (as have other aspects of governmental power) between central (Commonwealth) and regional (State) governments. The pattern of that distribution can be located by piecing together a series of irregularly-shaped (indeed, eccentric) elements. Of these, s 90 of the Commonwealth Constitution (which denies to the States the power to levy “duties of excise”) is, perhaps, the most irregular. A great deal of the eccentricity which characterizes this limitation on State power is due to the radically different styles of analysis adopted by different members of the High Court in assessing whether particular State taxes fall within what is now accepted (with only one explicit judicial dissent) as the standard constitutional definition of an excise duty: “A tax upon a commodity at any point in the course of distribution before it reaches the consumer...”<sup>1</sup> Essentially, the disagreement has been between those members of the court who would analyze the economic effect of State taxes to determine if they answer this description and those who would concentrate exclusively on the legal operation of those taxes. The accidents of majorities (frequently relying on the casting vote of the chief justice) have largely determined whether, from one case to another, the result has been a preservation or a reduction of the States’ tax base.

If we focus on the past 25 years (that is, on the period since the landmark decision in *Dennis Hotels Pty Ltd v Victoria*),<sup>2</sup> we find the High Court has excluded the States from taxing receipts issued by vendors in acknowledgement of the payment of the purchase price of commodities;<sup>3</sup> from imposing a tax on livestock where the livestock was used for production (of meat or wool);<sup>4</sup> from collecting (through what appeared to be the only cost-effective means available) a tax on the consumption of cigarettes;<sup>5</sup> from imposing a “licence fee” tax on the processing of fish intended for human consumption;<sup>6</sup> from imposing a tax on the operation of pipelines used to transport oil and gas;<sup>7</sup> and from imposing a “licence fee” on the slaughtering of animals intended for human consumption;<sup>8</sup> But over the same period, the Court has

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1 *Parton v Milk Board (Victoria)* (1949) 80 CLR 229, 260 (Dixon J).

2 (1960) 104 CLR 529.

3 *Western Australia v Hamersley Iron Pty Ltd* (1969) 120 CLR 42; *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1.

4 *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59.

5 *Dickenson’s Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177.

6 *M.G. Kailis (1962) Pty Ltd v Western Australia* (1974) 130 CLR 245.

7 *Hematite Petroleum Pty Ltd v Victoria*. (1983) 47 ALR 641.

8 *Gosford Meats Pty Ltd v New South Wales* (1985) 57 ALR 417.

endorsed State licence fee taxes on the sale of alcohol,<sup>9</sup> on the sale of tobacco,<sup>10</sup> and on the sale of petrol.<sup>11</sup>

In most of these decisions, the Court has been closely divided. Indeed, if we place on one side the tobacco and petrol licence decisions (where several members of the Court endorsed the taxes only because of the authority of the *Dennis Hotels* decision),<sup>12</sup> the diversity of opinion on the Court is remarkable: the Court has been consistent only in maintaining a fine balance of disagreement over the appropriate analysis of State taxing legislation.

Despite that diversity of analysis and result, the Court has, so far as the published reasons of the justices reveal, paid scant attention to what must be the critical question in establishing the scope and impact of s 90 — the constitutional purpose which lies behind the prohibition. Until its recent decision in *Hematite Petroleum Pty Ltd v Victoria*,<sup>13</sup> the Court appears to have been preoccupied (with the exceptions, at different times, of Fullagar J, Barwick CJ and Murphy J)<sup>14</sup> with a relatively arid debate over the appropriate method of statutory analysis (is it the “criterion of liability” of the tax or the economic burden imposed by the tax which is critical?) to be used when fitting the standard definition of an excise duty to the State taxing legislation under challenge.

## 2. THE PURPOSE OF S 90: TOWARDS A RATIONAL DIVISION OF FISCAL POWER

But now, with the Court’s reasons for judgement in the *Hematite Petroleum* case,<sup>15</sup> members of the Court have begun to articulate their views on the constitutional purpose of the s 90 prohibition — views which are diametrically opposed (as are the methods of analysis); and which may not withstand critical scrutiny.

In the *Hematite Petroleum* case the plaintiffs sought a declaration from the High Court that ss 35(2) of the *Pipelines Act* 1967 (Vic) was invalid because it imposed excise duties contrary to s 90 of the Commonwealth Constitution. Sub-section 35(2) fixed the annual licence fee payable by a person who operated a “trunk pipeline” at \$10 million. The plaintiffs operated two trunk pipelines which carried oil and gas, recovered from wells in Bass Strait, from the east coast of Victoria to a processing plant at Westernport (a distance of 184 kilometers). A majority of the Court<sup>16</sup> concluded that the tax thus imposed on the plaintiff’s operation of the pipelines was an excise duty.

9 *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529;

*Evda Nominees Pty Ltd v Victoria* (1984) 52 ALR 401.

10 *Dickenson’s Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177.

11 *HC Sleigh Pty Ltd v South Australia* (1977) 136 CLR 475.

12 *Dickenson’s Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177, 189 (Barwick CJ, Mason J), cf 206 (McTiernan J); *HC Sleigh Pty Ltd v South Australia* (1977) 136 CLR 475, 502 (Mason J, with whom Barwick CJ agreed), cf 518 (Jacobs J), 527 (Murphy J).

13 (1983) 47 ALR 641.

14 See, for example, *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529, 555-556 (Fullagar J); *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1, 17 (Barwick CJ); *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59, 84 (Murphy J).

15 (1983) 47 ALR 641.

16 Mason, Murphy, Deane and Brennan JJ; Gibbs CJ and Wilson J dissenting. (Dawson J did not sit, presumably because, as Solicitor-General for Victoria, he had advised that State’s Government on the validity of the tax.)

The reasons offered by the majority and minority justices exemplified the diversity of judicial approaches to excise duties which has been a feature of practically every decision in this area since *Dennis Hotels Pty Ltd v Victoria*.<sup>17</sup> Four of the six justices (Gibbs CJ, Mason, Wilson and Brennan JJ) endorsed the broad definition of an excise duty which has been the basis for all s 90 decisions since *Parton v Milk Board (Victoria)*: any tax on the production or distribution of a commodity would be an excise duty. (Only Murphy J insisted on a narrower definition of excise duties — they were, he said, taxes which fell selectively on locally produced goods; although Gibbs CJ might have adopted a similar view were it not for the weight of authority; and Deane J declined to commit himself to the broad definition.) Two justices (Gibbs CJ and Wilson J) said that the Victoria legislation could only fit within the broad definition of excise duties if it chose, as its criterion of liability, some dealing in the commodity. Three of the justices (Mason, Murphy and Deane JJ) insisted that the validity of the Victorian legislation was to be approached by considering its practical effect on the production and distribution of goods; the sixth justice (Brennan J) preferred that approach to characterizing the State tax but demonstrated that he could reach the same result by adopting the narrower, criterion-of-liability approach.

The decision illustrates the tension, or the shifting balance, which is involved in the competing definitions of “excise duties” and in the different approaches to the characterization of State taxing legislation. The broad definition of excise duty, adopted by four of the six justices, threatens the tax raising capacity of the States; the narrow definition adopted by Murphy J (and left open by Deane J) avoids, as Murphy J recognized, “adverse consequences to the States”.<sup>18</sup> On the other hand, approaching the validity of legislation by concentrating on its criterion of liability limits the prohibition’s impact on the States’ taxation powers, as both Gibbs CJ and Wilson J recognized.<sup>19</sup> But to assess the validity of State legislation by considering its practical effect further diminishes the range of taxes which the States may impose, if only because that approach cuts through State attempts to avoid, through adoption of indirect means, the prohibition in s 90. The point is that, while the adoption of a broad definition of excise duties places the States’ taxing powers at risk, the real threat to those powers materialises only when that definition is applied to taxing legislation in a way which takes account of the legislation’s assumed economic impact.

#### (a) Centralising tariff policy

The insistence that the question whether legislation imposes a tax upon goods should be judged by looking at the legislation’s criterion of liability can be justified as an attempt to preserve the taxing powers of the States, an attempt undertaken to minimize the destruction of the States’ tax base which s 90 would otherwise work, rather than as an unthinking adoption of Owen Dixon’s admonition that the only safe guide in constitutional issues was “a strict and complete legalism”.<sup>20</sup> This concern for preserving some taxing capacity for the States is the silent

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17 (1960) 104 CLR 529.

18 (1983) 47 ALR 641, 665.

19 Ibid 649, 675.

20 85 CLR at xiv.

theme underlying the analyses of, for example, Kitto J in the *Dennis Hotels, Hamersley Iron and Chamberlain Industries* cases,<sup>21</sup> and Gibbs J in the *Dickenson's Arcade* and *Logan Downs* cases.<sup>22</sup> What is remarkable about the *Hematite Petroleum* case is that this theme was openly articulated by the two dissenting justices and Murphy J (who was in the majority), and supported by a detailed argument (on the part of Gibbs CJ and Murphy J) as to the constitutional purpose of s 90.

Gibbs CJ expressly supported the adoption of a legalistic analysis of State taxing laws as a means of minimizing s 90's impact on State taxing powers. He referred to the current interpretation and application of s 90 which had narrowed the field of taxation open to the States, which had (combined with the uniform tax arrangements) created great difficulties for the States and, perhaps, pushed the States into imposing economically undesirable taxes.<sup>23</sup> By insisting on a strict "criterion of liability" application of the definition of excise duties, Gibbs CJ was seeking to avoid those consequences and to ensure that the impact of s 90 did not go beyond the achievement of its purpose. He identified that purpose as being "to give the Commonwealth a real control of its tariff policy".<sup>24</sup>

The two objectives, of preserving the fiscal autonomy of the States and ensuring that the Commonwealth's tariff policies were not undermined, could best be served by ensuring that a "wide and loose construction" was not given to the provisions of s 90. This call, for a narrow, purpose-orientated reading of s 90 did not herald a return to the narrow definition of excise duties first adopted in *Peterswald v Bartley*<sup>25</sup> and abandoned by the High Court in *Parton v Milk Board (Victoria)*<sup>26</sup>: a tax which isolated or discriminated against locally produced goods.<sup>27</sup> The broad definition was not, according to Gibbs CJ, disturbed by the imperative which he identified. For the Chief Justice, the need to avoid a "wide and loose construction" simply meant that there was:

"no justification for deciding the question whether a tax is a duty of excise by considering whether the real or practical effect of the legislation is the same as that which would be produced by a duty of excise".<sup>28</sup>

That is, the broad definition of excise duties which had underpinned every decision since *Parton v Milk Board (Victoria)*<sup>29</sup> — a tax on any commodity during its production or distribution — was undisturbed; but State taxes were to be measured against that definition by concentrating on their legal operation and ignoring their economic impact.<sup>30</sup> With respect, one would have thought that if the impact of s 90 on the taxing powers of the States is to be guided by the two considerations identified by Gibbs CJ (that of preserving some fiscal autonomy for the States and

21 (1960) 104 CLR 529, 565-567; (1969) 120 CLR 42, 63; (1970) 121 CLR 1, 21-22.

22 (1974) 130 CLR 177, 224; (1977) 137 CLR 59, 67.

23 (1983) 47 ALR 641, 649.

24 *Ibid* 648.

25 (1904) 1 CLR 497.

26 (1949) 80 CLR 229.

27 See the definition adopted by Murphy J in the *Hematite Petroleum* case (1983) 47 ALR 641, 666.

28 *Ibid* 649.

29 (1949) 80 CLR 229.

30 See Gibbs CJ's "two propositions", (1983) 47 ALR 641, 647.

that of protecting the Commonwealth's tariff policies), then the Court must consider the "real or practical effect" of those State taxes which are brought before it. How is it possible to serve those broad economic objectives if economic considerations are excluded from the analysis? The contradiction is compounded by the Chief Justice's insistence (in support of his "criterion of liability" analysis) that

"s 90 does not forbid the States to achieve any particular economic result; it forbids them to enact a particular form of taxation".<sup>31</sup>

While I do not wish to labour the point, I should have thought that the Chief Justice had earlier demonstrated, without doing violence to the structure and context of s 90, that the prohibition on State excise duties was indeed a prohibition on those State taxes which did "achieve [a] particular economic result", namely, undermining the "real control of...tariff policy" given to the Commonwealth.<sup>32</sup>

The Chief Justice's understanding of the purpose behind s 90's exclusive vesting of customs and excise duties in the Commonwealth was endorsed by Murphy J, although the latter justice used his understanding of the section's purpose to support a different view of the meaning and application of its provisions. Murphy J referred to the federal considerations which should persuade the Court to read s 90 narrowly — the avoidance of "adverse consequences to the States"; noted that the context in which the provision appeared (in particular, ss 91,92 and 93) focused on the distinction between goods imported into, and goods produced within, a State; and adopted the view of excise duties expressed in *Peterswald v Bartley*, by Latham CJ and McTiernan J in *Parton v Milk Board (Victoria)*, by Fullagar J in *Dennis Hotels Pty Ltd v Victoria*, and by himself in *Logan Downs Pty Ltd v Queensland*.<sup>33</sup> These references make it clear that Murphy J had in mind that s 90 served the purpose of centralizing, in the hands of the Commonwealth, control over Australia's tariff policy.<sup>34</sup> This view of s 90's purpose led Murphy J to reject the broad definition of an excise duty (a broad definition which was unequivocally adopted by the other members of the Court, apart from Deane J). He said that a State tax could only fall within the prohibition of s 90 if it discriminated between goods produced in the State and those produced outside the State: it would be an excise duty if it was aimed at taxing production within the State. In general, he said, a non-discriminating tax on all goods, regardless of their origin, would not contravene s 90 as an excise duty or as a customs duty.<sup>35</sup> Moreover, this view of s 90's purpose persuaded Murphy J that, in determining whether a State tax improperly discriminated against (say) locally produced goods, the substance, and not the form, of the tax must be considered. The economic environment in which a State tax operated might show that a tax framed in general indiscriminate terms fell only on goods produced in the State.<sup>36</sup>

Deane J also discussed the constitutional purpose of s 90 in

31 Ibid 651.

32 See Gibbs CJ's analysis of the history and content of s 90: *ibid* 647-648.

33 Ibid 665.

34 See the discussion of the earlier views of McTiernan J at n 81 *infra*; Fullagar J at nn 87-89 *infra*; and of Murphy J at nn 90,91 *infra*.

35 Ibid 666.

36 Ibid.

substantially the same terms as those adopted by Gibbs CJ and Murphy J. That discussion led him close to the definition of excise duties promoted by Murphy J, although Deane J avoided clear commitment. He described s 90 as eliminating State boundaries “as barriers in the path towards economic and national unity”,<sup>37</sup> and as

“a necessary ingredient of any acceptable scheme for achieving the abolition of internal customs barriers which was an essential objective of the Federation and for ensuring that the people of the Commonwealth were guaranteed equality as regards the customs and excise duties which they were required to bear and the bounties which they were entitled to receive”.<sup>38</sup>

This view of s 90's purpose, and the sense in which the term “excise” had been used in Australia in the late 19th century, led Deane J to the point where he almost adopted the narrow, *Peterswald v Bartley* definition of “excise duty” — “a tax upon internally produced or manufactured goods”.<sup>39</sup> I say “almost adopted” because, although Deane J said that this was the sense in which the term “duties of excise” was used in the Constitution, he went on to say that he did not need to consider whether discrimination against local production or manufacture was an essential characteristic of an excise duty<sup>40</sup> although that element was undoubtedly implicit in the *Peterswald v Bartley* definition of excise duties and in the more recent judicial versions of that definition.<sup>41</sup>

There are, no doubt, many possible State taxes whose consistency with s 90 can be determined without resolving the question left open by Deane J. Where the tax in question falls only on local production, as did the pipeline operation fee in the *Pipelines Act 1967* (Vic) (a tax upon a “part of the overall process of manufacture or production” of goods from the plaintiff's refinery),<sup>42</sup> it is unnecessary to decide whether a general tax, which falls indiscriminately on externally and locally produced goods would run foul of the prohibition. So, too, in *Gosford Meats Pty Ltd v New South Wales*<sup>43</sup> Deane J was able to join with Mason J in concluding that a State licence fee imposed on the operator of an abattoir, and calculated by the number of animals slaughtered in a 12 month period preceding the period of the licence, was an excise duty because it was “a tax upon internally produced or manufactured goods” (that is, animal products).<sup>44</sup> The tax in question fell (as a matter of substance) only on locally produced goods; so that Mason J (who had endorsed the wider definition of excise duties in *Hematite Petroleum*)<sup>45</sup> and Deane J (who had come close to adopting the narrower definition in that case)<sup>46</sup> were able to agree that the tax fell within s 90's prohibition.

37 Ibid 683.

38 Ibid 685.

39 Ibid 687.

40 Ibid 688.

41 See, for example, Isaacs J in *Commonwealth and COR Ltd v South Australia* (1926) 38 CLR 408, 426, 430-1; McTiernan J in *Parton v Milk Board (Victoria)* (1949) 80 CLR 229, 267; Fullagar J in *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529, 555-6, 558; and Murphy J in *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59, 84-5.

42 (1983) 47 ALR 641, 690 (Deane J).

43 (1985) 57 ALR 417.

44 Ibid 425.

45 (1983) 47 ALR 641, 660-1.

46 Ibid 687.

Although Deane J hesitated at the final step in the definition of excise duties (and allowed the theoretical possibility that s 90 might strike down indiscriminate State taxes on, for example, the sale of commodities), he did join Murphy J in asserting that the conformity of any State tax to s 90's mandate was to be assessed by reference to the substantial effect, rather than the form of the tax; and he declined to accept the technical "criterion of liability" approach which had been endorsed by the Court in *Bolton v Madsen*,<sup>47</sup> and adopted by the minority in this case.<sup>48</sup>

### (b) Centralizing commodity taxes

Although Mason J came to the same conclusion as Murphy and Deane JJ on the validity of the Victorian pipeline operation fee, he asserted a significantly broader purpose for the s 90 prohibition. He adopted and expanded on the account of the section's objective given by Dixon J in *Parton v Milk Board (Victoria)* — that is, that the grant to the Commonwealth of exclusive power over customs duties and excise duties "was intended to give the Parliament a real control of the taxation of commodities and to ensure that the execution of whatever policy it adopted should not be hampered or defeated by State action."<sup>49</sup> As a statement of purpose, this proposition is equivocal: it might better be described as a statement of means ("real control of the taxation of commodities") by which an unstated or assumed objective is to be achieved. It could, for example, be taken as the means of achieving the relatively narrow objective of protecting the Commonwealth's tariff policies. But Mason J resolved much of the ambiguity inherent in this statement and showed that he saw s 90 achieving a substantial centralization of the taxation of commodities.

Amongst the ends towards which commodity tax policy might be directed, Mason J referred to the raising of government revenues, protecting home production, lowering domestic prices and exposing Australian producers to increased competition.<sup>50</sup> The assertion of such a relatively broad purpose for s 90 led to the adoption by Mason J of the broad definition of excise duties — "all taxes upon or in respect of a step in the production manufacture, sale or distribution of goods".<sup>51</sup> And recognition of that broad purpose led Mason J to insist that the question whether a State tax met that definition must be answered by considering whether the tax "enters into the cost of the goods and is therefore reflected in the prices at which the goods are subsequently sold",<sup>52</sup> that is, by considering the practical effect of the taxing law.

So, for Mason J at least, commodity taxes are an important lever in the Commonwealth's economic and financial management. The national Government's capacity to manipulate that lever must not be weakened through State initiatives which might, for example, diminish demand for commodities by increasing their market price.

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47 (1963) 110 CLR 264, 271.

48 See, for example, Gibbs CJ (1983) 47 ALR 641, 647.

49 (1949) 80 CLR 229, 260.

50 (1983) 47 ALR 641, 660.

51 *Ibid* 661.

52 *Ibid*.

### (c) The unconscious approach

The other members of the court (Wilson and Brennan JJ) did not attempt to establish the purpose behind s 90's cryptic prohibitions and contented themselves with analyzing "the line of authority" – that is, extracting the revealed truth on the meaning of excise duties from earlier decisions of the court. (The equivocal nature of that revelation was betrayed by the fact that Wilson and Brennan JJ managed to extract opposed versions of the definition of excise duties from the earlier decisions.) Wilson J went so far as to claim that the application of s 90 was not assisted by "resort to questions of assumed constitutional purpose". And he justified this imposition of the judicial blindfold on the ground that the only clear guide to the purpose of s 90 was that contained in the words of the section, which did not authorize "the court to assume the responsibility of determining larger questions of fiscal responsibility within the federation".<sup>53</sup>

Most observers of the High Court would have difficulty in accepting this last statement, in the light of the significant impact which such decisions as the *First Uniform Tax* case<sup>54</sup> and *Western Australia v Chamberlain Industries Pty Ltd*<sup>55</sup> have had on the distribution of fiscal powers in Australia. Putting aside that difficulty, it must be observed that even the most technical rule-orientated and policy free analysis of s 90 does attribute a functional purpose to the section. Accordingly, when Brennan J indicated his preference for "the broader approach" to the application of the wide definition of excise duties,<sup>56</sup> he was giving (even if unconsciously) to s 90 the function outlined by Mason J. And when Wilson J insisted that the standard (wide) definition of excise duties should be applied strictly by concentrating on the "legal operation" of the taxing statute (rather than its practical or economic effect),<sup>57</sup> he was (in fact, consciously) attributing to s 90 a function which avoided seriously diminishing the taxation powers of the States.<sup>58</sup>

The fact is that, when the High Court draws the boundary between what a State may do by way of taxation measures and what only the Commonwealth may do, the Court is imposing a shape or pattern on the distribution of fiscal powers in our federation; it is advancing the capacity of one of the parties in the federal system to use taxation as a tool of economic and social management and, simultaneously, retarding the capacity of the other party. The pattern may be eccentric, but the Court (and its individual justices) cannot avoid responsibility for that pattern by asserting that justice is blind, that constitutional decisions are made without regard to their consequences, and (which is the same thing) without regard to the intended purpose of the Constitution.

### 3. THE COMPETING VIEWS: WHICH IS "CORRECT"?

It is because four members of the Court were prepared to confront (although not necessarily resolve) these questions in the *Hematite Petroleum* case that the case stands out, as a light in a fog, in the long

<sup>53</sup> Ibid 675.

<sup>54</sup> *South Australia v Commonwealth* (1942) 65 CLR 373.

<sup>55</sup> (1970) 121 CLR 1.

<sup>56</sup> (1983) 47 ALR 641, 681, 683.

<sup>57</sup> Ibid 675-6.

<sup>58</sup> Ibid 675.



sequence of decisions on the meaning and impact of s 90. We have, in the *Hematite Petroleum* case, two distinctly opposed views of the purpose of the section (although, again, those views were not necessarily worked through to their resolutions). First, Gibbs CJ, Murphy J and (it seems) Deane J supported the view that s 90 was intended to give the Commonwealth control over tariff policy, to prevent the States from levying those taxes which might undermine the Commonwealth's decisions on the degree of protection to be offered to local industry. (Of these three justices, only Murphy J carried through this conception to a coherent definition of the type of State taxes caught by s 90.) Secondly, Mason J (explicitly) and Brennan J (implicitly) advanced the view that s 90's purpose was to concentrate in the hands of the Commonwealth the control of all commodity taxes as tools of tariff policy and macro-economic management. The background to the framing of the Commonwealth Constitution and the context in which s 90 appears provide substantial support for the view of its purpose adopted by Gibbs CJ, Murphy and Deane JJ — that is, the States were not to impose taxes which could undermine the Commonwealth's absolute control over tariff policy.

**(a) History and context: support for the narrow view**

One of the most substantial political issues throughout the Australian colonies in the years leading up to federation was the free trade/protection debate.<sup>59</sup> There was strong support from both capital and labour, particularly in Victoria, for high import taxes (or customs duties) on goods brought into Australia, which allowed Australian-produced goods (for which production costs were relatively high) to compete with imported goods. On the other hand, rural interests generally supported a policy of free trade, partly because this kept down the prices of agricultural machinery and partly because rural interests were hoping for free access to overseas markets for their products. The free trade movement was especially strong in New South Wales where it was, paradoxically, associated with urban, radical politics and where rural interests favoured protection.<sup>60</sup>

At the Australian constitutional conventions during the 1890's, the decision was taken that the resolution of the argument over tariff policy should be left to the new national Government and Parliament;<sup>61</sup> and s 88 of the Commonwealth Constitution embodies that decision:

“Uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth.”

As the founders of the Constitution had assumed, during the first years of the Commonwealth, party politics was conducted as a struggle between free trade supporters and protectionists, with the Australian Labor Party attempting to hold the balance between the two.<sup>62</sup>

This historical background supports the relatively narrow view of s 90's purpose promoted by Gibbs CJ, Murphy and Deane JJ in the *Hematite Petroleum* case.<sup>63</sup> The Commonwealth was given exclusive power over

59 See McMinn, *A Constitutional History of Australia* (1979) 98-99, 113.

60 See Sawyer, *Australian Federal Politics and Law 1901-1929* (1956) 14.

61 McMinn, 106; La Nauze, *The Making of the Australian Constitution* (1972) 39,41.

62 See, for examples, Sawyer, 15-19, 24, 34-37.

63 (1983) 47 ALR 641, 648 (Gibbs CJ), 666 (Murphy J), 684-685 (Deane J).

customs duties to ensure that it, and not the States, should determine the level of protective tariffs which might, from time to time, be imposed on imported goods. And the Commonwealth was given exclusive control of excise duties and bounties on the production of goods to ensure that no State should frustrate or undermine the former's tariff policy decisions. For example, a decision by the Commonwealth that the local motor vehicle industry should not be protected against imports, and that customs duties on imported vehicles should therefore be reduced, would be frustrated if a State were permitted to pay a bounty on the production of motor vehicles to local manufacturers. Conversely, a decision by the Commonwealth to increase customs duties on imported motor vehicles (to give greater protection to local vehicle manufacturers) would be frustrated if a State were permitted to impose an excise tax on the local manufacture of motor vehicles.<sup>64</sup>

The argument, that s 90 is concerned to ensure Commonwealth control of tariff policy, is reinforced by the context in which it appears: s 88, requiring uniform customs duties; the juxtaposition in s 90 of "bounties on the production or export of goods" with "duties of customs and of excise"; and the spelling out in s 93 that "duties and customs" are paid on goods imported into a State and "duties of excise" are "paid on goods produced or manufactured in a State". It is this context and the background to s 90 which, in combination, make a strong case for the argument that the taxes forbidden to the States by that section were taxes which, because of their application to imported or locally-produced goods, could interfere with the Commonwealth's tariff policies: that is, taxes which in their application discriminated between imported and locally produced goods.

#### (b) The course of decisions: support for the broader purpose

The early reading of s 90 confirmed that its intention was to secure the Commonwealth's control of tariff policy and that it only prevented the States from imposing taxes on the importation of goods (customs duties) and taxes on the local production of goods (excise duties) and from subsidizing the local production of goods (bounties). That reading of s 90 was spelt out in Quick and Garran's first detailed commentary on the Commonwealth Constitution<sup>65</sup> and in *Peterswald v Bartley*,<sup>66</sup> where Griffith CJ, Barton and O'Connor JJ said that excise duties were "limited to taxes imposed upon goods in process of manufacture".<sup>67</sup>

This view of s 90 was partly buttressed by the early Court's insistence that the Constitution should be construed so as to preserve intact the States' capacity to regulate their internal affairs — the "reserved powers" or "implied prohibition" doctrine.<sup>68</sup>

Although the "reserved powers" doctrine was unequivocally rejected in the *Engineers* case,<sup>69</sup> the process of expanding the scope of s 90 was not completed until 1949 and the decision in *Parton v Milk Board*

64 See the explanation offered by Gibbs CJ, *ibid* 648.

65 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 837.

66 (1904) 1 CLR 497.

67 *Ibid* 512.

68 *Ibid* 507.

69 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 26 CLR 129, 150, 155.

(Victoria).<sup>70</sup> However, the beginnings of that expansion lay in the judgment of Rich J in *Commonwealth and COR Ltd v South Australia*.<sup>71</sup>

Rich J was the one member of the Court in that case to reject the proposition that a tax must discriminate between local and external goods before it was caught by s 90:

“In my opinion, the Constitution gives exclusive power to the Commonwealth over all indirect taxation imposed immediately upon or in respect of goods, and does so by compressing every variety thereof under the term ‘customs and excise’. If the expression ‘duties and excise’ be restricted to duties upon or in respect of goods locally produced the fiscal policy of the Commonwealth may be hampered. One authority should exercise the complementary powers of customs, excise and bounties without hindrance, limitation, conflict or danger of overlapping from the exercise of a concurrent power by another authority vested in the States.”<sup>72</sup>

In *Matthews v Chicory Marketing Board*<sup>73</sup> Dixon J lent some (guarded) support to Rich J’s view. After concluding that a Victorian tax on the producers of chicory of \$1 for every half-acre planted with the crop was an excise duty. Dixon J said that there was no sound basis for confining excise duties on taxes on goods of domestic manufacture or production. But this question could be left open for future decision, as the present tax was on locally produced goods.<sup>74</sup>

The erosion of the *Peterswald v Bartley* conception of “excise duties” continued (and might be said to have reached its climax) with *Parton v Milk Board (Victoria)*,<sup>75</sup> where the High Court held a Victorian tax on dairy distributors, calculated on the volume of milk sold or distributed in Melbourne, was an excise duty. The majority, Rich, Dixon and Williams JJ, clearly saw s 90 as preventing the States from taxing any dealing in a commodity (other than consumption of that commodity).<sup>76</sup> Dixon J said:

“In making the power of the Parliament of the Commonwealth to impose duties of customs and of excise exclusive it may be assumed that it was intended to give the Parliament a real control of the taxation of commodities and to ensure that the execution of whatever policy it adopted should not be hampered or defeated by State action.”<sup>77</sup>

And Dixon J went on to identify, as an excise duty, a “tax upon a commodity at any point in the course of distribution before it reaches the consumer...”<sup>78</sup> Similarly, Rich and Williams JJ said that, to be an excise duty, a tax

“must be imposed so as to be a method of taxing the production or

70 (1949) 80 CLR 229.

71 (1926) 38 CLR 408.

72 Ibid 437. Cf Higgins J, *ibid* 435.

73 (1938) 60 CLR 263.

74 Ibid 299.

75 (1949) 80 CLR 229.

76 The exclusion, by all three justices, of taxes on consumption was prompted by a Privy Council decision of dubious relevance — *Atlantic Smoke Shops v Conlon* [1943] AC 550.

77 Ibid 260.

78 Ibid.

manufacture of goods, but the production or manufacture of an article will be taxed whenever a tax is imposed in respect of some dealing with the article by way of sale or distribution at any stage of its existence [before reaching the consumer].<sup>79</sup>

Not only did *Parton v Milk Board (Victoria)* exemplify the sharp difference of judicial opinion on the meaning of “duties of excise” (for Latham CJ and McTiernan J dissented on the ground that it was only taxes on local manufacture which were caught in the prohibited category), but it also highlighted a dispute on the Court as to the purpose which s 90 was intended to serve.

McTiernan J, in particular, went back to a proposition of Isaacs J in *Commonwealth and COR Ltd v South Australia*,<sup>80</sup> that taxes on the sale of “goods as existing articles of trade and commerce, independently of the fact of local production” were not excise duties. McTiernan J said that to limit s 90 in this way, so that it only withdrew from the States the power to tax local manufacture or production, would conform to the object of s 90 — “a uniform fiscal policy for the Commonwealth”. And he made it clear, through an example about customs and excise duties in the United Kingdom, that he meant a uniform *tariff* policy.<sup>81</sup> This was the first explicit judicial recognition of the “uniformity of tariff policy” objective of s 90, although Latham CJ had referred to this objective in *Attorney General (NSW) v Homebush Flour Mills*,<sup>82</sup> and *Peterswald v Bartley*<sup>83</sup> had almost certainly been based on the assumption that s 90 had that objective.

However, McTiernan J was in a minority in *Parton's* case and his view of s 90's purpose was eclipsed by Dixon J's view that the section “was intended to give the Parliament a real control of the taxation of commodities”<sup>84</sup> — a substantially broader objective. This sharp difference over the objective of s 90 was to be largely submerged until the decision in *Hematite Petroleum Pty Ltd v Victoria*.<sup>85</sup> Occasionally, the broad statement of the section's objectives and the wide definition of “duties of excise” which Dixon J had proposed in *Parton's* case were challenged. In *Dennis Hotels Pty Ltd v Victoria*,<sup>86</sup> Fullagar J insisted that the context and history of s 90 showed that the prohibition on State “duties of excise” only caught those State taxes which discriminated between goods of local production and externally produced goods. Once goods (whatever their origin) had passed into the general “mass of vendible commodities in a State”, taxes imposed on them were neither excise nor customs duties.<sup>87</sup> Thus, the definition of excise duties adopted in *Peterswald v Bartley*,<sup>88</sup> “fits with what one would suppose to be the policy behind the relevant provisions of the Constitution” — “a uniform fiscal policy for the Commonwealth”.<sup>89</sup> And a similar criticism was mounted by Murphy

79 Ibid 252.

80 (1926) 38 CLR 408, 430-1.

81 See (1949) 80 CLR 229, 264-7.

82 (1937) 56 CLR 390, 396.

83 (1904) 1 CLR 497.

84 (1949) 80 CLR 229, 260.

85 (1983) 47 ALR 641.

86 (1960) 104 CLR 529.

87 Ibid 656.

88 (1904) 1 CLR 497.

89 Ibid 555-556, endorsing McTiernan J's observations in *Parton v Milk Board (Victoria)* (1949) 80 CLR 229, 265.

J in *Logan Downs Pty Ltd v Queensland*.<sup>90</sup> “The extension of the constitutional concept [of excise duties],” he said, “seems to me to be unjustified by the constitutional context or the assumed purpose of s 90.”<sup>91</sup>

On the other hand, the (somewhat loosely expressed) broader version of the purpose of s 90 was explicitly supported by Barwick CJ in *Western Australia v Chamberlain Industries Pty Ltd*.<sup>92</sup> Its purpose was, the Chief Justice said in that case, to cede to the Commonwealth “the control of the national economy as a unity which knows no State boundaries...”<sup>93</sup>

### (c) The concealed debate

However, for almost all the period between 1949 and 1983 (that is, between the decisions in *Parton v Milk Board (Victoria)*<sup>94</sup> and *Hematite Petroleum Pty Ltd v Victoria*),<sup>95</sup> debate on the purpose of s 90 was submerged while the High Court focused on the issue which divided most of the justices in *Dennis Hotels Pty Ltd v Victoria*.<sup>96</sup> whether the characterization of a State tax, as a tax on the production or distribution of goods, should be determined by the taxing legislation’s “criterion of liability” or by its practical effect. With the benefit of hindsight, it can now be observed that the justices who supported the broader approach to the characterization of State taxes were working towards the concentration, in the hands of the Commonwealth, of all commodity taxes. That concentration must have resulted from the series of decisions in which Barwick CJ played an influential (often decisive) role: *Western Australia v Hamersley Iron Pty Ltd*,<sup>97</sup> *Western Australia v Chamberlain Industries Pty Ltd*,<sup>98</sup> *Dickenson’s Arcade Pty Ltd v Tasmania*<sup>99</sup> and *Logan Downs Pty Ltd v Queensland*.<sup>100</sup>

There is no doubt that those justices who insisted on the narrower, “criterion of liability” approach to the characterization of State taxes were seeking to avoid that concentration of taxing power in the hands of the Commonwealth. Their great success during this period was the (almost accidental) endorsement of retrospective licence fees on the vendors of alcohol in *Dennis Hotels Pty Ltd v Victoria*<sup>101</sup> — accidental because the majority in that decision was formed by the alliance of Kitto, Menzies and Taylor JJ (who favoured the narrow characterization approach) with Fullagar J (who insisted on a quite different definition of excise duties). That endorsement of the retrospective licence fee survived

90 (1977) 137 CLR 59.

91 *Ibid* 85.

92 (1970) 121 CLR 1.

93 *Ibid* 17.

94 (1949) 80 CLR 229.

95 (1983) 47 ALR 641.

96 (1960) 104 CLR 529.

97 (1969) 120 CLR 42 (where the Court was evenly divided and the casting vote of Barwick CJ decided the matter under s 23(2)(b) of the *Judiciary Act* 1903 (Cth)).

98 (1970) 121 CLR 1 (where the Court was divided, four justices to three, against the validity of the State tax).

99 (1974) 130 CLR 177 (where the Court was evenly divided on the validity of the “consumption” tax and the casting vote of Barwick CJ decided the matter under s 23(2)(b) of the *Judiciary Act* 1903 (Cth)).

100 (1977) 137 CLR 59 (where the Court was evenly divided and the casting vote of Barwick CJ decided the matter under s 23(2)(b) of the *Judiciary Act* 1903 (Cth)).

101 (1960) 104 CLR 529.

the "great purge" of State commodity taxes during the 1970's and 1980's; and the States were permitted to construct substantial revenue collection schemes on this somewhat contrived base.<sup>102</sup> Indeed, the States' retention of this taxing contrivance was justified by all members of the Court in *Evda Nominees Pty Ltd v Victoria*<sup>103</sup> on the ground that the States had organized their financial affairs so as to take advantage of the contrivance. On the other hand, those justices who endorse the "criterion of liability" approach to the characterization of State taxes have not been able to persuade the Court to extend this contrivance from taxes on sale of commodities to taxes on their production,<sup>104</sup> thereby limiting the positive effect of the *Dennis Hotels* decision on the States' fiscal autonomy.

#### (d) The case for an articulate judicial policy on s 90

The concern for the destructive effect, which s 90 could have on the fiscal autonomy of the States, pervades the judgments of those members of the Court who dissented in such cases as *Western Australia v Chamberlain Industries Pty Ltd*,<sup>105</sup> *Logan Downs Pty Ltd v Queensland*,<sup>106</sup> *Hematite Petroleum Pty Ltd v Victoria*<sup>107</sup> and *Gosford Meats Pty Ltd v New South Wales*.<sup>108</sup> But, apart from suggesting a judicial conception of shared authority over commodity taxes within the Australian federation, this concern and the reasons of the dissenters tell us almost nothing of those justices' understanding of the purpose behind the s 90 prohibition.<sup>109</sup>

Indeed, one of the serious problems involved in the approach to s 90 problems espoused by (for example) Kitto J in *Western Australia v Chamberlain Industries Pty Ltd*,<sup>110</sup> Gibbs CJ and Wilson J in *Hematite Petroleum Pty Ltd v Victoria*<sup>111</sup> and Gibbs CJ, Wilson and Dawson JJ in *Gosford Meats Pty Ltd v New South Wales*,<sup>112</sup> is that it attributes to s 90 no coherent positive purpose. The approach may avoid some of the worst consequences (for the States) of the approach advocated by (for example) Barwick CJ in *Western Australia v Chamberlain Industries Pty Ltd*<sup>113</sup> and Mason J in *Hematite Petroleum Pty Ltd v Victoria*;<sup>114</sup> but it gives to s 90 no rational function in Australian federalism. What purpose would be achieved, for example, in prohibiting the States from imposing a retail sales tax on commodities but permitting the States to impose a

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102 Similar taxes on tobacco and petrol were endorsed (not altogether enthusiastically) by the High Court in *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 and *H C Sleigh Ltd v South Australia* (1977) 136 CLR 475.

103 (1984) 52 ALR 401.

104 *M G Kailis (1962) Pty Ltd v Western Australia* (1974) 130 CLR 245; *Gosford Meats Pty Ltd v New South Wales* (1985) 57 ALR 417.

105 (1970) 121 CLR 1.

106 (1977) 137 CLR 59.

107 (1983) 47 ALR 641.

108 (1985) 57 ALR 417.

109 Wilson J went so far as to deny that a consideration of s 90's purpose was relevant to the resolution of the problem in *Hematite Petroleum Pty Ltd v Victoria*: (1983) 47 ALR 641, 674-5.

110 (1970) 121 CLR 1, 20-21.

111 (1983) 47 ALR 641, 647, 676.

112 (1985) 57 ALR 417, 422 (Gibbs CJ), 439 (Wilson J), 449 (Dawson J).

113 (1970) 121 CLR 1, 16.

114 (1983) 47 ALR 641, 661.

licence fee on the retail selling of the same commodities<sup>115</sup> or to impose a receipts duty on the proceeds of the sales of those commodities?<sup>116</sup> From the perspective of the taxpayer, the activity (retail selling of goods) continues to attract the burden of taxation; from the perspective of the retail sector of the economy, an extra cost is still incurred; from the perspective of the States, revenue continues to be collected from those enterprises engaged in selling commodities; and from the perspective of the Commonwealth, any protection which s 90 might have offered its fiscal policies continues to be undermined. The only identifiable and substantial effect wrought by this approach lies in the drafting of State taxing legislation; a result which reduces the function of s 90 to the absurdity of encouraging subtle legislative drafting.

Where the exercise of governmental power is subject to judicial veto in the interest of maintaining some basic proposition, it is incumbent on the courts to approach their task (the exercise of overriding and non-accountable power) consciously rather than unconsciously, with a clearly articulated (and, therefore, defensible) perception of the basic proposition which they seek to uphold. There may be no single, inevitably correct, version of the purpose or function of s 90; that is, there may well be room for debate over the role which that provision plays in the Australian federation. But, without that debate, the work of the High Court in striking down some State taxes and endorsing others takes on a capricious character and can do little to promote the public interest.

#### 4. BALANCING THE COMPETING INTERESTS

##### (a) The federal interests: tariff policy and the fiscal balance

In assigning a meaning to s 90 and thereby determining the distribution of taxing powers within the Australian federation, several interests compete for recognition. It seems that the political representatives who drafted the Commonwealth Constitution would have recognized, as the interests which s 90 sought to balance, the interest of the Commonwealth in the maintenance of its tariff policies and the general public interest in the elimination of State protectionism, on the one hand, and the interests of the States in garnering their revenues, on the other hand. Most recently, these interests have been recognized as the relevant interests to be balanced in the interpretation and application of s 90 by Gibbs CJ and Murphy J;<sup>117</sup> and given substantial recognition by Wilson, Deane and Dawson JJ.<sup>118</sup>

But, although this view of the crucial interests to be served by s 90 squares with the provision's historical background and its constitutional context, the Court's approach to s 90 issues has done little to advance those interests. Since *Parton v Milk Board (Victoria)*,<sup>119</sup> the High Court has shown little inclination to adopt a definition of "duties and excise"

115 See *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529; *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177; *H C Sleigh Ltd v South Australia* (1977) 136 CLR 475.

116 See the minority in *Western Australia v Hamersley Iron Pty Ltd* (1969) 120 CLR 42; *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1.

117 In *Hematite Petroleum Pty Ltd v Victoria* (1983) 47 ALR 641, 648 (Gibbs CJ); 666 (Murphy J).

118 Ibid 675 (Wilson J); 684 (Deane J); *Gosford Meats Pty Ltd v New South Wales* (1985) 57 ALR 417, 447 (Dawson J).

119 (1949) 80 CLR 229.

which would genuinely balance those interests. On the one hand, the interest of the Commonwealth in maintaining its tariff policies is threatened by the standard definition of "duties of excise" which has, through its exclusion of taxes on consumption, opened the way for State taxes which confront those policies. The Victorian Government's differential stamp duty on the first registration of new motor vehicles, introduced in 1983, is a clear (although curiously unnoticed) indication of this potential.<sup>120</sup> On the other hand, and from the perspective of the States' interests, that standard definition has narrowed the States' revenue base by, for example, preventing the imposition of a general sales tax (a form of tax which, it is said, offers substantial growth potential and which is exploited by the States of the United States of America without apparent disruption of national tariff policies).<sup>121</sup> And the States have been pushed into imposing a variety of taxes which are open to strong criticism on the grounds of both inefficiency and inequity.<sup>122</sup>

From the perspective of the States, the major problem in the current distribution of fiscal powers is its "vertical fiscal imbalance".<sup>123</sup> Even with the revenues garnered from the motley assembly of State taxes (payroll tax, stamp duties, business franchise fees, land tax, gambling taxes and motor vehicle taxes), the States are unable to meet the expenditure demands of their budget responsibilities; and the shortfall is made up by substantial general revenue and specific purpose grants. It is, no doubt, true that this imbalance might be modified through allowing the States access to commodity taxes: the Fiscal Powers Sub-Committee of the Australian Constitutional Convention has argued that the States' tax base should be broadened by allowing them access to commodity taxation — a course which, the Sub-Committee asserts, "would require constitutional amendment".<sup>124</sup> If the States were to take over from the Commonwealth the collection of wholesale sales tax (at current rates), their independent revenues would (on 1984-85 estimates) be boosted by \$4,704 million.<sup>125</sup> That modest recovery of a degree of fiscal autonomy for the States might be achieved without the constitutional amendment called for by the Fiscal Powers Sub-Committee. It could be reconciled with s 90's prohibition on State excise duties if the section were to be read by the High Court in terms advocated by Murphy J in the *Hematite Petroleum* case — as prohibiting only "State taxation which discriminates between goods produced in the State and those produced outside the State..."<sup>126</sup> Such a reading of s 90 would also serve the

120 The scheme, announced in the 1983 Budget, offered a rebate of \$250 of the stamp duty (a tax levied at the point of consumption) paid by each purchaser of "new Australian made motor cars and station wagons for registration in Victoria": Vic, Parl, *Debates*, 21.9.83, 778.

121 See Australian Constitutional Convention, *Fiscal Powers Sub-Committee Report to Standing Committee*, July 1984, paras 2.16, 2.24.

122 For example, payroll tax can be criticized as a penalty on employment; while financial institutions duties and stamp duties tend to have a regressive impact on taxpayers. The Campbell Report was particularly critical of State stamp duties which "in general impact unevenly and often inequitably on the flow of funds [and] interfere with the efficiency of the financial system": Aust, Committee of Inquiry into the Australian Financial System, *Final Report*, Parl Paper 208/1981, para 16.32.

123 Australian Constitutional Convention, *Fiscal Powers Sub-Committee Report to Standing Committee*, July 1984, para 2.12.

124 *Ibid* para 2.35.

125 Australia, *Budget Statements 1984-85* (Budget Paper No 1), 229.

126 (1983) 47 ALR 641, 666.



interests (identified above)<sup>127</sup> of preserving the Commonwealth's tariff policies and excluding State protectionism.

However, to do more than modify the "vertical fiscal imbalance" would require more radical measures than the transfer of current wholesale sales tax revenues from the Commonwealth to the States. In 1984-85, general revenue assistance (income tax reimbursement) grants to the States were estimated to total \$10,458.7 million and specific purpose (tied) grants were estimated to total \$7,751.0 million; a transfer of sales tax revenues would have given the States only 25.8% of the total of these grants,<sup>128</sup> and left the States heavily dependent on a continuing revenue transfer programme. If the States persist in their refusal to re-enter the income tax field (because of the perceived political or economic disadvantages attendant on this course of action),<sup>129</sup> and look to taxes on commodities as the means of regaining their fiscal autonomy, they would need to impose those commodity taxes at rates which generated net revenues of at least four times the Commonwealth's current receipts from wholesale sales taxes.

By way of comparison, the radical broad-based consumption tax on goods and services proposed in the 1985 Draft White Paper would have generated gross revenues of \$14,300 million in 1984-85<sup>130</sup> — that is, 78.5% of the estimated revenue assistance and specific purpose grants to the States in that period. This tax (which would have been levied as a 12.5 per cent "sales tax on consumer goods and services, levied on the retail value of the products at the point of sale to the final consumer")<sup>131</sup> not only aroused political opposition of the order frequently associated with the hypothetical reintroduction of State income taxes, but was recognized (even by its proponents) as having serious implications for the distribution of income and the state of the economy.<sup>132</sup> Those effects would have required, the Draft White Paper recognized, very careful management in order to compensate low income consumers for the inequity which is implicit in such taxes,<sup>133</sup> and to modify or control such macroeconomic effects as "a worsening in the ongoing rate of inflation...distortions in the pattern of investment, ...erosion of Australia's international competitiveness",<sup>134</sup> and a "weakening of aggregate final demand".<sup>135</sup> The Draft White Paper did not concede that these were inevitable consequences; rather, it argued that complementary measures, implemented and funded by the Commonwealth (including compensation for low income consumers and

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127 See text at n 117 supra.

128 See text at n 125 supra.

129 A variety of justifications has been offered for the States' refusal to levy income tax — taxes which are undoubtedly within their constitutional power. These include the political dangers of increasing the already high marginal tax rates, the limited capacity of the economy to bear additional income taxation and acceptance of economic inefficiency characteristics of income taxation: see Australian Constitutional Convention, *Fiscal Powers Sub-Committee Report to Standing Committee*, July 1984, paras 2.15, 2.28.

130 Australia, *Reform of the Australian Tax System* (Draft White Paper) (1985) para 13.30.

131 Ibid para 13B.1.

132 Ibid paras 13.14-13.15; 13.31; 22.28-22.48.

133 Ibid ch 14.

134 Ibid para 22.41.

135 Ibid para 22.44.

reductions in marginal income tax rates), would ensure that the new tax arrangements would assist the Australian economy.<sup>136</sup>

**(b) The national interest: managing the Australian economy**

The critical role which taxation policy plays in the management of the Australian economy is amply explained in the Draft White Paper; but the national Government's interest in the effective management of the economy seems to have been heavily discounted by the advocates of a broader (sales tax) revenue base for the States. The Fiscal Powers Sub-Committee was not convinced that a devolution of taxation powers from the Commonwealth to the States "would necessarily detract from Commonwealth power [for the purposes of national economic management]".<sup>137</sup> And that interest has been ignored by those High Court justices who have argued for a narrow view of the purposes served by s 90,<sup>138</sup> for a narrow definition of "duties of excise",<sup>139</sup> or for the narrow "criterion of liability" approach to the characterization of State taxes.<sup>140</sup>

To go back to the origins of s 90, it is almost certain that the colonial politicians who agreed to its insertion in the Constitution gave no thought to reinforcing the Commonwealth's capacity to manage the Australian economy; and that this interest was not amongst those which s 90 was conceived as bringing into the balance. But it is exactly this interest which is elevated by the expansive definition of excise duties and the "practical" approach to the characterization of State tax laws;<sup>141</sup> and which some High Court justices have articulated as the paramount interest served by s 90.<sup>142</sup> The "real control over the taxation of commodities"<sup>143</sup> can be claimed as integral to the national economy which has evolved in Australia since Federation; and, although the background to s 90 does justify Gibbs CJ's scepticism that the provision was intended to give the Commonwealth real control over commodity taxes or over the national economy as a unity,<sup>144</sup> there is at least a strong case that the evolution of the Australian economy since 1901 justifies national control over commodity taxes.

In addition to the macroeconomic effects of those taxes identified by

136 Ibid 22.48.

137 Australian Constitutional Convention, *Fiscal Powers Sub-Committee Report to Standing Committee*, July 1984, para 2.24.

138 For example, Gibbs CJ and Murphy J in *Hematite Petroleum Pty Ltd v Victoria* (1983) 47 ALR 641, 648, 665.

139 For example, Murphy J in *Hematite Petroleum Pty Ltd v Victoria* (1983) 47 ALR 641,666; and Fullagar J in *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529, 556.

140 For example, Gibbs CJ and Wilson J in *Hematite Petroleum Pty Ltd v Victoria* (1983) 47 ALR 641, 649-650, 675.

141 As in the judgments of Dixon CJ, McTiernan and Windeyer JJ in *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529, 541, 549; Barwick CJ, Windeyer and Owen JJ in *Western Australia v Hamersley Iron Pty Ltd* (1970) 120 CLR 42, 55-56, 71; and Mason and Brennan JJ in *Hematite Petroleum Pty Ltd v Victoria* (1983) 47 ALR 641, 661-662.

142 For example, Dixon J in *Parton v Milk Board (Victoria)* (1949) 80 CLR 229, 260; Barwick CJ in *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1,17; and Mason J in *Hematite Petroleum Pty Ltd v Victoria* (1983) 47 ALR 641, 660-661.

143 Argued for by Mason J in *Hematite Petroleum Pty Ltd v Victoria* (1983) 47 ALR 641, 660-661.

144 *Hematite Petroleum Pty Ltd v Victoria* (1983) 47 ALR 641, 648.

Mason J in the *Hematite Petroleum* case — raising revenue, protecting and stimulating local industry, influencing domestic price levels and adjusting demand for commodities<sup>145</sup> — there are three aspects of economic policy in which the level and the impact of commodity taxes can play a critical role. First, because commodity taxes add to the price of commodities, they can contribute to the rate of domestic inflation as measured by the consumer price index and stimulate demands for wage and salary increases which, in turn, would contribute to inflation so that the economy could become locked into a “wages/prices spiral”. Secondly, the level of government taxes can affect credit and monetary conditions: relatively low tax revenues would lead to a higher deficit in government accounts which in turn would place greater pressure on credit and interest rates; and higher tax revenues could restrict the money supply. Thirdly, because commodity taxes cannot discriminate between taxpayers on the basis of their incomes, they will be regressive in their impact: even allowing for different consumption patterns, low income earners will pay a higher proportion of their disposable income in tax than would high income earners.<sup>146</sup>

For each of these areas — inflation, wages policy, credit policy, the money supply, and the redistribution of income — the Commonwealth is now seen as having substantial responsibilities, which transcend party political debates over the appropriate balance to be struck in each policy area and between those areas. That responsibility, for which the Commonwealth is accountable to the Australian electorate, has evolved since Federation, just as the High Court’s broad reading of s 90 evolved in the period up to the Court’s decision in *Parton v Milk Board (Victoria)*.<sup>147</sup> It is, at least, strongly arguable that the Commonwealth cannot discharge its responsibility for these policy areas unless it is conceded control over commodity taxation: how, for example could the Commonwealth develop and implement measures to redress the regressive effects of substantial State commodity taxes (imposed at varying rates on different categories of goods) on social security recipients and low income earners? Such compensatory measures would be complicated by the lack of Commonwealth revenues on which to draw for their financing and by the practical impossibility of achieving that integration between taxation and social security policy which is now widely recognized as essential for effective tax and social policies.<sup>148</sup>

The problem, of State commodity taxes frustrating Commonwealth economic policies, is recognized by Gibbs CJ and Murphy J in the *Hematite Petroleum* case;<sup>149</sup> but the solution which they propose — Commonwealth legislation overriding and excluding (under s 109 of the Constitution) those State taxes which undermine Commonwealth policies<sup>150</sup> — may offer little comfort to the Commonwealth. The orthodox judicial view is that the Commonwealth Parliament cannot

145 Ibid 660-661.

146 Harding and Whiteford, *Equity, Tax Reform and Redistribution*, (April 1985) 27.

147 (1949) 80 CLR 229.

148 See, for example, Saunders, *Equity and the Impact on Families of the Australian Tax-Transfer System*. (Institute of Family Studies Monograph No 2, October 1982); Australia, *Reform of the Australian Tax System* (Draft White Paper) (1985) ch 10; Harding, “Tax reform, equity and social security” (1985) 2 *Aust Tax Forum* 223.

149 (1983) 47 ALR 641, 649, 666.

150 Ibid.

legislate so as to prevent the exercise of State taxing power.<sup>151</sup> While the grant of some immunity from State taxes may be regarded as incidental to specific legislative powers of the Commonwealth — for example the trade and commerce power (s 51(i)),<sup>152</sup> or the public service power (s 52(ii))<sup>153</sup> — the support offered by this incidental aspect of Commonwealth legislative powers is a thin reed, as shown by the High Court's striking down of s 90 of the *Family Law Act* 1975.<sup>154</sup>

If the Commonwealth Parliament were conceded to have the constitutional power to override or exclude State taxing laws, s 90 would be largely superfluous (whether it were given a wide or narrow meaning). Indeed, it might be argued that legislative protection is more likely than constitutional protection to enhance Commonwealth taxation and economic policies because of the former's flexibility. The arguments for constitutional protection raised by Mason J in the *Hematite Petroleum* case (that State taxes imposed before the Commonwealth legislated for their exclusion could undermine the Commonwealth's economic policies; and that such legislative measures could expose the Commonwealth and its policies to "political controversies and constraints")<sup>155</sup> are not compelling. The real weakness in the proposition, that the Commonwealth should look to its legislation, rather than to the Constitution, to protect its taxation and economic policies, is that the High Court is most unlikely to endorse that use of Commonwealth legislative power, despite the invitation apparently issued by Gibbs CJ and Murphy J.

## 5. CONCLUSION — FEDERALISM OR A NATIONAL ECONOMY?

The decision and reasons for judgment in *Hematite Petroleum Pty Ltd v Victoria*<sup>156</sup> mark a critical point in the evolving distribution of fiscal powers in the Australian federation.

There are, on the one hand, clear indications of gathering judicial support for a narrow view of the impact which s 90 should be permitted to have on the State's taxation revenues. If Gibbs CJ can convert his understanding of the historical and contextual purpose of s 90 into a coherent version of the section's meaning and operation, and if Deane J will commit himself to what appears to be the logical result of his view of s 90's purpose, these justices would, with Murphy J, constitute a solid core of justices committed to maintaining the States' revenue base, so long as the Commonwealth's tariff policies are not threatened and so long as State protectionism is not nurtured. On the other hand, the reasons for judgment of Mason J offer a developed, coherent and forceful argument of the broader view of the purposes of s 90 and the wide impact on the States' taxation revenues which those purposes demand.

The High Court may avoid making an overt choice between these competing views, one of which would recover and entrench State fiscal

151 *South Australia v Commonwealth* (1942) 65 CLR 373, 416 (Latham CJ); *Victoria v Commonwealth* (1957) 99 CLR 575, 614 (Dixon CJ), 657 (Fullagar J).

152 *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46.

153 *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657.

154 *Gazzo v Comptroller of Stamps (Victoria)* (1981) 38 ALR 25.

155 (1983) 47 ALR 641, 660.

156 (1983) 47 ALR 641.

autonomy, and the other of which would continue to reduce that autonomy. To evade the responsibility of choice, or to make that choice in a value-free appeal to “the words of the section”,<sup>157</sup> is to devalue the process of constitutional decision-making. Ultimately, the High Court’s decisions on the meaning and operation of the s 90 prohibition on State “duties of excise” will expand or contract the fiscal autonomy of the States and, correlatively, expand or contract the capacity of the Commonwealth to control the national economy. If the Court would admit that its decisions are a critical part of the process of defining the relative power of the parties to the Australian federation and proceed to articulate and debate the policy underpinnings for the competing views of s 90’s meaning and operation, then we might see a deliberate (and therefore coherent) choice made between the view of s 90 which promotes the federal nature of Australia’s Constitution and the view which accords priority to the unity of Australia’s national economy.

In making that choice, the Court might well take account of the historical purpose of s 90; but, if the Court were to see s 90 as expressing only the limited purposes outlined by Gibbs CJ and Murphy J in the *Hematite Petroleum* case,<sup>158</sup> it should be prepared to defend this reading of the section in terms which go beyond the intentions of the colonial politicians who drafted the Constitution and which emphasize that reading’s contribution to restoring the fiscal balance in the Australian federation.<sup>159</sup>

There is little doubt that High Court recognition of s 90 as expressing the wider purposes outlined by Mason J in the *Hematite Petroleum* case<sup>160</sup> would involve a significant gesture of judicial creativity – a departure from the historically and contextually supported meaning of the section. But that departure, that judicial constitution-making, is well within the tradition of the High Court:

“[T]he Constitution is not an ordinary statute: it is a fundamental law. In any country where the spirit of the common law holds sway the enunciation by courts of constitutional principles based on the interpretation of a written Constitution may vary and develop in response to changed circumstances.”<sup>161</sup>

157 The phrase (and the appeal) is that of Wilson J in *Hematite Petroleum Pty Ltd v Victoria*, *ibid* 675.

158 *Ibid* 648, 666.

159 As, indeed, Gibbs CJ and Murphy J did in the *Hematite Petroleum* case, *ibid* 649, 665.

160 *Ibid* 660-661; see also Barwick CJ in *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1, 17; and Dixon J in *Parton v Milk Board (Victoria)* (1949) 80 CLR 228, 260.

161 *Victoria v Commonwealth* (1971) 122 CLR 353, 396 (Windeyer J).