# *GOSFORD MEATS PTY LTD* v *NEW SOUTH WALES*[1]

*Constitutional law – Commonwealth – Excise duties – Tax on production – Licence to slaughter animals – Fee based on number of animals slaughtered in period prior to licence period – Whether invalid as tax on goods produced or valid as tax on business generally – Whether governed by* Dennis Hotels[2] *case – Constitution (Cth) s 90 – Meat Industry Act 1978 (NSW) s 11C – Meat Industry (Licensing) Regulations (1980) (NSW) cl 41.*

## *I Facts*

The Meat Industry Act 1978 (NSW) regulated the commercial slaughter of animals in New South Wales. It was an offence under s 10(1)(a) of the act to operate an abattoir without a valid licence. The Meat Industry Authority were empowered to issue licences which were valid to the 1st day of September following the issue of the licence: ss 11(1), 9(a), 11A(2)(b), 11A(3).

Section 11C(3) provided that the licence was renewable only upon payment of a licence fee or first instalment toward that fee; the fee being

> (a) . . . an amount calculated at the prescribed rate for each abattoir animal slaughtered during the "relevant period" at the premises in respect of which the licence or renewed licence is sought; or,
>
> (b) where no animals had been slaughtered, a prescribed flat fee.[3]

The "relevant period" was the last completed financial year preceding the date from which the licence was to run: s 11C(1).

The Meat Industry (Licensing) Regulations 1980 were made under the Act. Regulation 41(2) prescribed rates of payment for each abattoir animal. Subregulation 41(3) set a fixed flat rate of $100 in the event that no animals had been slaughtered in the "relevant period."

## *II The Case*

The plaintiffs operated an abattoir at Gosford, New South Wales. On 18 June 1984, the plaintiffs paid the Meat Industry Authority $13,911.60, representing two instalments toward the licence fee. The payments were made under protest. The plaintiffs sought recovery of the instalments claiming that s 11C of the Act and reg 41 made under it imposed upon the goods they

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[1] (1985) 155 CLR 368; 59 ALJR 221; 57 ALR 417; High Court of Australia; Gibbs CJ, Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ.

[2] *Dennis Hotels Pty Ltd* v *Victoria* (1960) 104 CLR 609.

[3] s 11C(4).

produced a duty of excise and hence, were invalid. New South Wales, the defendent, demurred to the settlement of claim.

A majority of the High Court (Mason, Murphy, Brennan, Deane JJ) overruled the demurrer invalidating s 11C and reg 41. Gibbs CJ, Wilson and Dawson JJ dissented.

## *III The Commonwealth Constitution*

Section 90 states

> On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.

## *IV Definition of Excise*

The approach common to all members of the Court, except Murphy J, was to define the term excise then determine whether the licence fee fitted that definition. Mason and Deane JJ in their joint judgment defined excise as taxes on internally produced or manufactured goods. Brennan J, cited *Hematite Petroleum Pty Ltd* v *State of Victoria*[4] as authority that the term excise includes taxes levied upon a step in the production of goods.

This definition was used by Gibbs CJ in his dissenting judgment and is in essential harmony with the definition used by Wilson J. Dawson J took a slightly different line by citing[5] the narrower words of the court in *Peterswald* v *Bartley*[6] which define excise as

> ... a duty analagous to a customs duty imposed upon goods either in relation to quantity or value when produced or manufactured.[7]

The limitation of the definitional approach is that the application of the definition to any given set of facts is influenced by the perceived purpose of the constitutional prohibition and the role the Court assumes in interpreting the Constitution. This limitation is illustrated by the even division of the six judges who followed the definitional approach.

## *V Criterion of Liability*

The consistent theme of the minority is that the case is indistinguishable from the line of cases *Dennis Hotels Pty Ltd* v *Victoria*;[8] *Dickenson's Arcade Pty Ltd* v *Tasmania*;[9] *H C Sleigh Ltd* v *South Australia*;[10] and most recently *Evda Nominees* v *Victoria*.[11]

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[4] *Hematite Petroleum Pty Ltd* v *Victoria* (1983) 151 CLR 599.
[5] (1985) 155 CLR 368.
[6] *Peterswald* v *Bartley* (1904) 1 CLR 497.
[7] *Ibid* 509.
[8] *Supra* n 2.
[9] *Dickenson's Arcade Pty Ltd* v *Tasmania* (1974) 130 CLR 177.
[10] *H C Sleigh Ltd* v *South Australia* (1977) 136 CLR 475.
[11] *Evda Nominees Pty Ltd* v *Victoria* (1984) 154 CLR 311.

The first case, *Dennis Hotels*,[12] occupies a position of central importance in the *Gosford Meats Case* as the first case to adjudicate upon the validity of a licence fee calculated by reference to the commercial activity of a past period. In *Gosford Meats*[13] Gibbs CJ quoted a passage[14] (also cited by Wilson J)[15] from the judgment of Kitto J in *Dennis Hotels*[16] that employed the criterion of liability test:

> ... a tax is not a duty of excise unless the criterion of liability is the taking of a step in the process of bringing goods into existence or to a consumable state, or passing them down the line which reaches from the earliest stage in production to the point of receipt by the consumer.[17]

This test requires the court to focus upon the operation of the taxing statute and ask what event creates the legal obligation upon which the tax is founded. It was accepted by the full court in *Bolton* v *Madsen*[18] and unanimously in *Evda Nominees* v *Victoria*.[19]

This test must be qualified by *Mathews* v *Chicory Marketing Board (Vic)*[20] where it was recognised that there need not be a precise arithmetic relationship between the tax and the quantity or value of the goods produced. The Marketing Board issued licences to producers of chicory the fee being £1 for every acre planted. The quantity of produce is not rigidly determined by the planted acreage and yet the fee was said to bear a sufficiently natural relationship with the goods produced to be a tax on those goods.

An analogy could be drawn between *Gosford Meats* and *Mathews*. The criteria upon which liability was founded, land planted in *Mathews* and livestock slaughtered in *Gosford*, were not the goods produced by the taxpayer. However, both criteria were inputs in and essential steps toward the production of chicory or meats, hides, tallow as the case may be. Both bore a similarly natural relationship to the goods produced.

The minority in *Gosford Meats* distinguished *Mathews* on several grounds:

(i) Gibbs CJ thought the number of livestock slaughtered bore no sufficiently natural relationship to the products derived from the animal. Closer criterion, such as the dressed weight of the animal may, in his opinion, have been sufficient. It was significant that some of the slaughtered animals could have been declared completely unfit for consumption.

(ii) the liability to pay the tax arose only upon an application to renew the licence. By ceasing operations or selling the business the abattoir operator could avoid liability altogether.

(iii) the licence would have permitted activity in a coming year. The tax was levied with reference to the slaughterings in a year before the licence came into effect. This acts to further weaken the nexus between the licence fee and the value of the goods produced under the licence.

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[12] *Supra* n 2.
[13] *Supra*n 1.
[14] *Ibid.*337.
[15] *Ibid.*400.
[16] *Supra* n 2.
[17] *Ibid* 559.
[18] (1963) 110 CLR 264.
[19] *Supra* n 11.
[20] (1938) 60 CLR 263.

The majority found it difficult to doubt the naturalness of the relationship between the act of slaughter and the goods despite there being many products derived from any one animal. Brennan J was quick to conclude that if the fee was calculated by reference to the killings during the currency of the licence it would be an excise. This places much emphasis on the distinction between current and past production; a distinction for which *Dennis Hotels*[21] is regarded as founding although the distinction is not central to the reasoning of the majority in that case.

The criterion of liability test forces these fine distinctions to be made. Dawson J refused to allow this possibility to sway his application of the criterion test to which he, and his brothers in the minority, felt bound by precedent:

> No doubt a particular form of tax may be adopted by a State for the purpose of avoiding the constitutional prohibition and that tight lines and fine distinctions, which are the unavoidable concomitants of revenue laws pressed to their limits, will in some cases occur. But this is no warrant to resort to economic consequences in the name of substance rather than form in order to re-define a legal concept, nor is any justification for doing so to be found in the Constitution itself.[22]

Brennan J was the only majority justice to address the short-coming of the criterion of liability test. He saw s 11C of the Act as creating a contingent tax liability in the slaughter of animals. This liability became an accrued liability only upon an application to renew the licence. However, this does not disguise the fact that two criteria are imposed by the statute. The court must determine which criterion gave the tax its character. Even accepting the mechanistic criteria of liability approach

> it would mistake the operation of the statute and the character of the tax it imposes to dismiss the other criteria which makes the slaughtering of animals the source of liability, albeit contingent, for those fees.[23]

Any distinction between past and current production was regarded by the majority justices as a mere device of form, immaterial to the tax's character. Murphy J put this point forcefully:

> The notion of a fee based on a previous period being valid but not a fee based on a current period, is irrational as a Constitutional discrimen. Why not the previous month or the previous week . . .?[24]

Despite this criticism Mason and Deane JJ resort to this distinction to limit the application of *Dennis Hotels* to cases where retailers but not producers are the taxpayers.

## *VI Substance versus Form*

Mason and Deane JJ set out to show that the definition of an excise rests not on the form of the tax but gains meaning by reference to the purpose

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[21] *Supra* n 2.
[22] (1980) 155 CLR 368, 417.
[23] *Ibid.* 407
[24] *Ibid.* 389

that s 90 was intended to serve. They rely upon Dixon's judgment in *Mathews* as authority. In their view no confidence could be placed in the definition implied by *Dennis Hotels* rather the Court should invalidate any tax whose substantial effect is to levy a tax on goods regardless of the form in which the tax is framed. This is the Court's approach in interpreting s 92 of the Constitution. However, no common purpose behind s 90 unites the majority judgments. Dawson J forcefully rebutted Mason J's line:

> It is not a matter of substance versus form an excise *is* a form of tax; it is a tax upon goods. If another tax has the same or a similar effect as a tax upon goods in that it has a tendency to increase the price of goods to the ultimate consumer, is it for that reason to be classified as a duty of excise although in form it is not a tax upon goods, if so, what is the distinction between it and a land tax, a payroll tax or even a franchise fee?[25]

This analysis fails to distinguish between a tax on a variable input such as the raw materials from which goods are produced and a land tax levied irrespective of the volume of production. Land in *Mathews* was a variable input. Yet even this distinction may put payroll taxes in the excise basket so Dawson J's questions compel explicit judicial answers.

Dawson J dismissed the analogy between ss 90 and 92 of the Constitution on the basis that the latter is framed in terms which prohibit any barrier to interstate trade whereas the former gives the Commonwealth exclusive power to enact a particular form of legislation. It does not prohibit the States achieving a particular economic result.

Dawson J and Wilson J regarded the reliance placed upon past interpretations of s 90 by State legislatures as another reason to be slow in overturning past cases. The failing of Mason, Deane and Brennan JJ was not to make explicit what they saw as the purpose to be upheld by s 90 so that this could be assessed as part of the balance of Commonwealth State financial relations.

## *VII Distinguishing* Dennis Hotels

The Court divided equally on whether to follow or distinguish the line of cases emanating from *Dennis Hotels* with Murphy J seeking to overule them altogether. The majority judges were influenced by Fullager J's judgment in *Dennis Hotels*. Although on the majority in that case, Fullager J was of the opinion that a distinction existed between taxes based on the purchases or sales of a retailer and those levied on acts of production.

The case involved a licence to operate as a victualler. The fee was calculated at 6% of the victualler's purchases in the previous financial year for a permanent licence (s 19(1)(a) Licensing Act 1985 (Vic)) and at £1 a day plus 6% of all liquor sold under the licence for a temporary licence (s 19(1)(b)).

Fullager J would have invalidated both paragraphs had they levied the tax on producers. This distinction is no longer acceptable as all the judges in *Gosford* agreed, and yet it forms the basis upon which Mason, Brennan and Deane JJ sought to distinguish the operation of *Dennis Hotels* which the

[25] *Ibid.* 416

whole Court refused to overule as recently as 1984 in *Evda Nominees* v *Victoria*.[26]

The majority insistence that taxes on production are different is far less persuasive than the minority's criticism of this argument. Gibbs CJ points out that there are no logical grounds upon which the distinction could be founded. Further, it runs counter to the majority case that it is the substantial effect of the tax that which determines the character of the tax.

The minority judges opted to follow *Dennis Hotels*, placing much emphasis on the fact that s 11C(4)(a) of the Act levies a tax on the commercial activity of a past period. Only Menzies J in *Dennis Hotels* found that fact material to the validity of s 19(1)(a) of the Victorian Licencing Act. On that basis he invalidated s 19(1)(b), but preserved s 19(1)(a). The other six judges divided evenly; Kitto, Taylor and Fullager JJ upholding both paragraphs; Dixon CJ, McTiernan and Windeyer JJ invalidating both. It cannot be said that the past-current distinction is central to the reasoning of the majority in *Dennis Hotels* and it only became material when it was picked up in *Dickenson's Arcade*[27] and entrenched in *Evada Nominees*.[28]

### *VIII Murphy's Judgment — the Purposive Approach*

Murphy J regarded the previous line of cases as unsatisfactory. In refusing to allow them he refuted the whole definitional approch to the interpretation of s 90. In his opinion s 90 could not be read in isolation, rather, it was part of a more general constitutional scheme embodied in Chapter 4 of the Constitution and supported by other sections. That scheme he saw as upholding free trade in Australia.

To this end s 90 contemplates uniform Commonwealth customs duties whilst prohibiting State bounties rewarding production and both customs and excise duties. These taxes penalize production outside and inside the State.

In support of these provisions, s 92 guarantees free interstate trade, s 51(2) and (3) give the Commonwealth power to tax and to offer bounties, provided States are treated equally. Of s 90 itself Murphy J had this to say:

> The prohibition against State excise duties precludes any discriminatory tax on the production of goods within the State, and thus prevents state exploitation of a monopoly or a shortage of the taxed goods.[29]

Armed with this constitutional purpose Murphy J proceeded to define a customs duty in s 90 as any tax on production which discriminates against goods purchased outside the State and, conversely, an excise as any tax upon goods with a discriminatory impact on goods produced within the State.

The New South Wales Meat Industry Act 1978 had no application outside the State, it acted so as to burden New South Wales abattoirs only and was prohibited by s 90. Murphy J's approach still leaves unanswered Dawson J's question: how should the Court distinguish land, payroll or legitimate franchise taxes from excise taxes?

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[26] *Supra* n 11.
[27] *Supra* n 9.
[28] *Supra* n 11.
[29] (1980) 155 CLR 389.

*IX Conclusion*

Murphy J's pursuit of the purposive approach splits the Court evenly. Thus, *Gosford Meats* does nothing to clear the confusion that has existed for over eighty years in the interpretation of s 90. That a majority upheld *Dennis Hotels* but distinguished it breathes life into Fullager J's distinction between taxes on distribution and those on production. This distinction is inconsistent with Kitto J's formulation which has gained wide acceptance in all later cases.

The numbers do come down against the criterion of liability test with only three of the seven endorsing it. However, the majority failed to present a unified voice on the underlying constitutional purpose that lends colour to the section. Only Murphy J framed his judgment to bring this out into the open. This judgment makes explicit the Court's role, indeed responsibility, to devine the purpose behind the provision and to uphold the vision of the founding fathers rather than to treat the bland words at face value. This search for a purpose ought to occupy the Court in the next inevitable dispute on the section because its meaning is far from settled.

I. A. Udechuku