COMMENTS

CONSUMPTION TAXES, LICENCE FEES AND EXCISE DUTIES

The Commonwealth derives a considerable portion of its total revenue from the imposition of excise duties. Section 90 of the Constitution forbids the States to impose these duties by making the power enabling their imposition exclusive to the Commonwealth. In this field, therefore, the Commonwealth enjoys a highly lucrative monopoly.

When a tax can be said to be an excise duty has been extensively litigated. The latest cases in the now long line of decisions upon this question are the *Tobacco* case and the *Fisheries* case.[1]

I EXCISE DUTIES AND THE CONSTITUTION

The original purpose behind section 90 is plain: for national unity to flourish, legislative competence in areas which would make for commercial disunity had to be denied to the States.[2] But exactly what it is that section 90 prevents the States from doing has been the subject of much uncertainty. Surrounding sections[3] in the Constitution yield but scant guidance. Among them, section 55 makes it clear that customs duties and excise duties are distinct, but apart from this it is section 93 which gives the only real clue: it speaks of 'duties of excise paid on goods produced or manufactured in a State'.

The search for meaning must be taken to the judgments of the High Court.

II EXCISE DUTIES AND THE HIGH COURT

In the first case on excise duties the High Court did not move far from the text of section 93 to define an excise duty as

> a duty analogous to a customs duty imposed upon goods either in relation to quantity or value when produced or manufactured, and not in the sense of a direct tax or personal tax.[4]

[1] *Dickenson's Arcade Pty Ltd v. Tasmania* (1974) 2 A.L.R. 460 (hereinafter referred to as the *Tobacco* case); *M. G. Kailis (1962) Pty Ltd v. Western Australia* (1974) 2 A.L.R. 513 (hereinafter referred to as the *Fisheries* case).

[2] *Western Australia v. Chamberlain Industries Pty Ltd* (1970) 121 C.L.R. 1, 27 *per* Windeyer J. On the history of the word 'excise' see Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 837-8 and *Matthews v. Chicory Marketing Board (Vic.)* (1938) 60 C.L.R. 263, 287 ff.

[3] Ss 55, 86, 87, 88, 89, 93.

[4] *Peterswald v. Bartley* (1904) 1 C.L.R. 497, 509.

In giving this definition, the Court was influenced by the doctrine of implied prohibitions. Numerous later cases expanded the definition, one of the reasons for the expansion being the demise of this doctrine.[5]

The threads of the years of judicial development were finally brought together in 1963 when the Court, in *Bolton v. Madsen,* redefined excise duties as

> taxes directly related to goods imposed at some step in their production or distribution before they reach the hands of consumers . . . [I]t is . . . the criterion of liability that determines whether or not a tax is a duty of excise.[6]

The decision in this case illustrates how this definition operates in practice. State law prohibited the carriage of goods without a permit. For a permit a fee was charged calculated according to an amount *per* ton *per* mile on the registered carrying capacity of the vehicle over the distance carried. The defendant chartered a vehicle to transport wool. He refused to pay the fee arguing it to be an excise duty. The Court held it not to be. What rendered the defendant liable to the fee was nothing to do with the goods carried but rather the distance covered by and the carrying capacity of the vehicle. The criterion of liability related directly to the vehicle and not to the goods.

The essentials of the *Bolton v. Madsen* definition are that the tax must be directly related to goods and that it is the criterion of liability adopted by the law imposing the tax, which is found in the words of that law, which determines whether it is. Since 1963 the controversial question has been whether these essentials must be strictly adhered to or whether the term 'excise' encompasses something wider.

Those taking the wider view rely in justification of their view on the significance they say should be attached to a grant of exclusive power to the Commonwealth.[7] It is submitted, however, that regard cannot be had to the Commonwealth alone for the Constitution is a federal constitution and section 90 is intended to effect a distribution between State and Commonwealth powers—and not a destruction of State powers.[8] Further, they argue that those of the narrower view are treating judicial exposition as if it were a text with statutory force.[9] The late Sir Cyril Walsh adequately disposed of this argument when he admitted that the Court in *Bolton v. Madsen* was concerned to decide the case before it; he went

[5] Among these, see, *The Commonwealth and Commonwealth Oil Refineries Ltd v. South Australia* (1926) 38 C.L.R. 408, 435; *Matthews v. Chicory Marketing Board (Vic.)* (1938) 60 C.L.R. 263, 277; *Parton v. Milk Board (Vic.)* (1949) 80 C.L.R. 239. Sawer, *Cases on the Constitution of the Commonwealth of Australia* (3rd ed. 1964) 365.

[6] (1963) 110 C.L.R. 265, 270-3.

[7] *E.g. Tobacco* case (1974) 2 A.L.R. 460, 464 *per* Barwick C.J.

[8] *Cf Ibid.* 494 *per* Gibbs J.

[9] *Western Australia v. Chamberlain Industries Pty Ltd* (1970) 121 C.L.R. 1, 15.

on to say however that, in so doing, it had made a considered formulation of the test to be applied and unless

> the question whether a duty is a duty of excise is to be left to be decided in each case . . . without the assistance of any definite test by which the duty is to be characterized, the tests which were formulated in *Bolton v. Madsen* . . . should be accepted and applied.[10]

Bolton v. Madsen may place a premium on form but it is a matter of opinion whether this results in the Constitution being mocked.[11]

The roots of the controversy lie in *Anderson's* case.[12] There, whilst all the Justices reached the same result, Owen J. and, in particular, Barwick C.J., did so by an approach which immediately sowed the seeds of uncertainty. Following *Bolton v. Madsen* only 'in substance', Barwick C.J. said that, in his opinion,

> the essence of a duty of excise is that it is a tax upon the taking of a step in a process of bringing goods into existence or to a consumable state or of passing them down the line which reaches from the earliest stage in production to the point of receipt by the consumer.[13]

He continued, that whether or not a tax was upon such a step would not necessarily be found by the form of the tax or by identifying what according to that form was the criterion of its imposition.[14] The Chief Justice's approach, therefore, omitted the requirement that the tax be directly related to goods and reduced the criterion of liability to only one among maybe many relevant factors determining whether a tax is an excise duty.

The conflict which was thereby potential became actual in 1969 in *Western Australia v. Hammersley Iron Pty Ltd (No. 1)*.[15] Here section 101A of the Stamp Act 1921-1968 (W.A.) was held valid by three Justices and invalid by another three Justices. This section imposed stamp duty on receipts for $10.00 or more calculated by reference to the amount paid. The non-issue of a receipt which should have been issued attracted a penalty of fixed amount but duty was not payable unless a receipt was issued. Those Justices who held the tax valid[16] did so by strict adherence to all the essentials of the *Bolton v. Madsen* definition. The criterion of liability was the issue of a receipt not, for example, the supply of goods: the act of supplying goods was made a condition precedent to liability

[10] *Ibid.* 35 *per* Walsh J.
[11] *Cf Tobacco* case (1974) 2 A.L.R. 460, 465 *per* Barwick C.J.
[12] *Anderson's Pty Ltd v. Victoria* (1964) 111 C.L.R. 353. See Howard, *Australian Federal Constitutional Law* (1972) 381-9 for a good account of what follows.
[13] *Ibid.* 364.
[14] *Ibid.* 365-6.
[15] (1969) 120 C.L.R. 42. Lane, 'Economic Federalism, Excise Duty and Receipt Duty' (1969) 43 *Australian Law Journal* 614.
[16] Kitto, McTiernan and Menzies JJ.

but not the criterion of liability.[17] The Chief Justice acknowledged that the immediate factor on which the tax operated was the issue of a receipt but he held that the legislation in substance imposed a tax on the first sale of goods.[18] Owen and Windeyer JJ. came to the same conclusion. Barwick C.J.'s opinion prevailed[19] owing to the death of Sir Alan Taylor before delivery of judgment and the tax was accordingly held invalid.

In the companion case to *Hammersley Iron, Western Australia v. Chamberlain Industries Pty Ltd*[20] the procedure the Act provided as an alternative to the issuing and stamping of receipts was also successfully challenged. This procedure consisted in the making of periodical returns of payments for which receipts should have been given and the payment of a sum equal to the total amount of duty which would have been payable on those receipts. The three minority Justices held that the criterion of liability was the receiving of a sum of money but, since under the Act it was immaterial for what purpose the money was received (even though in some cases it might represent the price of goods), the criterion of liability was not directly related to goods.[21] Barwick C.J., however, thought the tax operated on the transaction of sale. On the concept of the criterion of liability, he said that the criterion would not be found exclusively in the verbal formulae of the Act but in how the legislation was intended to and did operate.[22]

Owen and Windeyer JJ. agreed the tax was invalid. So did Menzies J. He distinguished *Hammersley Iron*. In his view the tax there was truly on the issue of a receipt whereas here the penalty for non-compliance (a fine of fixed amount *plus* double the duty originally payable) indicated the tax to be in reality on the receiving of payments and, therefore, on whatever payments were received for: to tax the price paid was to tax the sale and to impose an excise duty.[23]

By way of summary then, prior to the *Tobacco* case and the *Fisheries* case, the *Bolton v. Madsen* definition of 'excise' is weakened by *Anderson's* case and its status left most unclear by the *Hammersley Iron* case where three Justices maintain a strict adherence to all its essentials but are in a minority, whilst another three Justices, who are in the majority, take a wider view and maintain, in effect, that a tax can be an excise duty notwithstanding that, on a strict application of all its essentials, the tax would not be found to be. To some extent the *Chamberlain Industries*

[17] (1969) 120 C.L.R. 42, 63 *per* Kitto J., 56 *per* McTiernan J., 64, 66 *per* Menzies J.
[18] (1969) 120 C.L.R. 42.
[19] Judiciary Act 1903-1969 (Cth) s. 23(2)(b).
[20] (1970) 121 C.L.R. 1.
[21] *Ibid.* 21-2 *per* Kitto J., 18-9 *per* McTiernan J., 41 *per* Walsh J.
[22] *Ibid.* 15.
[23] *Ibid.* 24-5.

case tends to restore the balance in favour of the narrower view there being four out of six Justices who do not take the wider view. Menzies J. is added to the three minority Justices in this count because it was not on this ground that he differed from them but solely because of the different view he took of the legislation in question.[24] It remains to be seen what, if anything, the *Tobacco* case and the *Fisheries* case add to the state of the authorities.

III THE TOBACCO CASE

In issue in the *Tobacco* case were Parts II and III and the Regulations made under Part II of the Tobacco Act 1972 (Tas.).

PART II AND THE REGULATIONS

Part II[25] imposed a tax on the consumption of tobacco calculated at 7½% of the value of the tobacco consumed. Consumption of tobacco meant the smoking or chewing of it. Consuming tobacco for which tax was payable but which was not paid within seven days of consumption was an offence and the unpaid tax became a debt due to the Crown. The amount paid in tax for tobacco not consumed could be recovered. Tax was not payable on tobacco brought into Tasmania by a traveller if the tobacco was for his own consumption or for disposal by way of gift and if it was consumed within 28 days. Regulations[26] required a licensee of premises (the licensing provisions being Part III) either to be or to have on his premises an appointed collector to collect the tax. Provision was made for the collector's remuneration.

These provisions involved the Court in ascertaining the ambit of an excise duty. Statements could be found—for example, by Latham C.J. and Dixon J. in *Matthews v. Chicory Marketing Board (Vic.)*[27]—to the effect that an excise duty did include a tax on consumption. There was also, however, the unanimous statement of principle in *Bolton v. Madsen,* cited in an overwhelming number of later judgments, that an excise duty did not include a tax on goods in the hands of consumers.

Save for McTiernan J., all the Justices followed *Bolton v. Madsen* on this point although Barwick C.J. indicated that he was not altogether happy in doing so.[28] None of these Justices, with possibly one exception,[29]

[24] *Cf. Tobacco* case (1974) 2 A.L.R. 460, 495 *per* Gibbs J.
[25] Tobacco Act 1972 (Tas.) ss 3-8.
[26] Tobacco Regulations 1972 (Tas.) reg. 4.
[27] (1938) 60 C.L.R. 263, 277, 300 respectively. See also *The Commonwealth and Commonwealth Oil Refineries Ltd v. South Australia* (1926) 38 C.L.R. 408, 438 *per* Higgins J. *Cf. Parton v. Milk Board (Vic.)* (1949) 80 C.L.R. 229, 261 *per* Dixon J.
[28] (1974) 2 A.L.R. 460, 464-5.
[29] See *per* Stephen J. (1974) 2 A.L.R. 460, 501. This point tends to be confirmed at TAN 90-3 *infra.*

professed to derive any great assistance from the circumstance that the Privy Council had held, for Canadian constitutional purposes, a tax on consumption to be a direct tax[30] the theory being that since excise duties are generally indirect taxes a tax on consumption is unlikely to be an excise duty.[31] McTiernan J. alone concluded that a tax on consumption was an excise duty.[32] He relied chiefly on what Latham C.J. and Dixon J. had said in the *Chicory* case which had been cited with approval in *Brown's Transport Pty Ltd v. Kropp*[33] in a passage which purported to be a full description of an excise duty within the meaning of section 90.[34] He noted[35] that the Court in *Bolton v. Madsen* had also quoted what Dixon J. had said.

With respect, the correctness of McTiernan J.'s conclusion is open to question. It is difficult to regard *Browns etc. v. Kropp* as the final word on, rather than as just another step in the evolution of, the meaning of the word 'excise'. *Kropp*'s case came before *Bolton v. Madsen.* In *Bolton v. Madsen* the Court had had the advantage of having before it what Kitto J. had said in *Dennis Hotels Pty Ltd v. Victoria.*[36] The *Dennis Hotels* case came after *Kropp*'s case. Kitto J. had excluded from the field of excise everything coming after the point of receipt by the consumer.[37] The Court in *Bolton v. Madsen* 'adopted' *only* what Kitto J. had said and added, as if of information-value only, that this was 'based upon' what Dixon J. had earlier said.[38] It is submitted that, in and from the context, the Court quoted Dixon J.'s words not as definitive of the ambit of an excise duty but merely as illustrative of the principle behind the criterion of liability the distinction between the two being that the former defines the range within which the latter operates. Since the term 'excise' never has had any absolute meaning outside the cases,[39] it cannot be said that the Court was wrong in so doing or that what Dixon J. said was necessarily right.

Moreover, it is difficult to reconcile McTiernan J.'s conclusion with the position he (at least indirectly) took in *Hammersley Iron.* There, he agreed with Kitto J.'s analysis of section 101A of the Act saying that he thought it demonstrated that section 101A was not an excise duty according

[30] *Atlantic Smoke Shops Ltd v. Conlon* [1943] A.C. 550. See Arndt, 'Judicial Review under Section 90 of the Constitution: An Economist's View' (1952) 25 *Australian Law Journal* 667 and 706.
[31] See *Brown's Transport Pty Ltd v. Kropp* (1958) 100 C.L.R. 117, 128-9.
[32] (1974) 2 A.L.R. 460, 479.
[33] (1958) 100 C.L.R. 117.
[34] (1974) 2 A.L.R. 460, 479.
[35] *Ibid.* 479-80.
[36] (1960) 104 C.L.R. 529.
[37] *Ibid.* 559.
[38] (1963) 110 C.L.R. 264, 273.
[39] *Matthews v. Chicory Marketing Board (Vic.)* (1938) 80 C.L.R. 263, 287 ff. *per* Dixon J.

to the current interpretation of that term.[40] Kitto J.'s analysis specifically answered the question he posed for himself. That question, as he explicitly stated,[41] was framed in words borrowed from the *Bolton v. Madsen* judgment. That question excluded from the field of excise duties, taxes on goods in the hands of consumers.

Having ascertained the ambit of an excise duty, the Court in the *Tobacco* case now had to decide whether Part II and the Regulations fell within that ambit. Part II was held valid; the Regulations were held invalid.

On Part II, Menzies, Gibbs, Stephen and Mason JJ. formed the majority.[42] Part II did impose a tax on consumption. No liability to pay tax arose until consumption:[43] mere purchase of tobacco involved no tax liability on the part of the purchaser.[44] On consumption, tax was payable according to the value of the tobacco consumed by the person actually doing the consuming.[45] The retailer was not liable for any tax not collected by him.[46] If it was relevant, the tax could not be passed on by the consumer.[47]

McTiernan J. agreed the tax was on consumption[48] but on his view of the law it followed that it was invalid and so were the Regulations.

Certain factors led Barwick C.J. to conclude that the tax was not intended to be imposed upon the consumption of tobacco in any and all circumstances by any person.[49] To say a consumer of tobacco given by way of gift was liable to tax in respect of the value of what he had consumed was for several reasons,[50] ridiculous. Among these and perhaps most importantly was the thought that, in addition to his being most unlikely to be able to identify or recollect his separate acts of smoking or of 'consumption' of tobacco (smokers generally keeping no record of the amount or the occasions when they had smoked) such a consumer might have no means at all of knowing for the purposes of the Act, the value of what he had smoked.[51] In the Chief Justice's opinion, therefore, since

[40] (1969) 120 C.L.R. 42, 56 *per* McTiernan J.
[41] *Ibid.* 63 *per* Kitto J.
[42] (1974) 2 A.L.R. 460, 484 *per* Menzies J., 496 *per* Gibbs J., 502 *per* Stephen J., 510, 511 *per* Mason J.
[43] *Ibid.* 496 *per* Gibbs J., 502 *per* Stephen J., 510 *per* Mason J.
[44] *Ibid.* 502 *per* Stephen J.
[45] *Ibid.*
[46] *Ibid.* 496 *per* Gibbs J.
[47] *Ibid.* 501 *per* Stephen J.
[48] *Ibid.* 473.
[49] *Ibid.* 471.
[50] See generally, *ibid.* 468-71.
[51] *Ibid.* 469-70. The passage in question is worth quoting in full: 'Thus, a person who has been given tobacco may not have the means of knowing the value for the purposes of the Act of what he smokes, . . . It could scarcely be conceived that the elderly gentleman, resting after a life-time of labour, eking out his days in the sunshine on park-bench or wall, quietly cutting a pipeful from a block of tobacco

obviously consumption by somebody was intended to be taxed, the Legislature could only have intended to tax the consumption of tobacco *by or at the instance of a purchaser of tobacco purchased by retail* and the Regulations, by which it was contemplated that payment of the tax would be made in anticipation of consumption at the time of purchase and as part of the purchase transaction, assisted him in arriving at this conclusion.[52] The substantial or intended operation of Part II was, therefore, to impose a tax on the entry of tobacco into consumption.[53] It thus imposed an excise duty and was invalid. As a consequence, so also were the Regulations.

Mason J. too held the Regulations invalid.[54] In his view, they required the tax to be levied at the time of the last retail sale at the place of sale so that it was levied in respect of goods sold before they reached the consumer. The 'effect of the tax' was therefore that of an excise duty.

Menzies, Gibbs and Stephen JJ. held the Regulations valid. According to Menzies J.,[55] the method of collection did not require the tax to be regarded as a tax upon a step in the distribution of rather than upon the consumption of tobacco even though, normally, it would be collected at the point of sale. The tax did not have to be paid at the point of sale (it could be paid seven days later) and the consumption of tobacco not even purchased in Tasmania might attract tax. If, however, the purchaser did pay the tax at the point of sale its character did not change in that he could recover what he had paid if the tobacco was not consumed.[56]

Although it was more convenient to pay the tax at the time of purchase rather than later, this inducement did not, according to Stephen J.,[57] give to the tax the character of an excise. There was no harsh sanction to deter the purchaser from deferring payment. Whatever inconvenience there might be in deferring payment arose from the inherent nature of a tax when imposed on the consumption of non-durables.

provided by friend or charity, and after rubbing it to a suitable tilth, smoking it in contentment, was intended to be required to notify his self-indulgence and pay within seven days, if he could but remember the occasion, a tax of seven and a half per cent of the value of the pipeful or perhaps of only so much of the pipeful as he smoked before dropping off to sleep in the sun'.

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[52] *Ibid.* 471.
[53] *Ibid.* 471-2.
[54] *Ibid.* 510-1.
[55] *Ibid.* 484.
[56] *Ibid.* A third reason given by Menzies J. was that tax fell upon all consumption in Tasmania whether of tobacco of Australian or overseas manufacture. Note Gibbs J.'s reference to the 'open question' of whether goods must be produced locally for a tax upon them to be able to be regarded as an excise duty: *ibid.* 499. See also, Barwick C.J.'s reference to the 'open question' in *Western Australia v. Chamberlain Industries Pty Ltd* (1970) 121 C.L.R. 12-3. Lane discusses this question: *The Australian Federal System with United States Analogues* (1972) 592-3.
[57] *Ibid.* 503-4.

PART III

Part III[58] made it an offence to conduct a retail tobacco business or sell tobacco by retail without a licence to do so. For a licence a fee was charged. The amount of the fee for the ordinary retailer's licence was $2.00 or more calculated by reference to the monthly stock value for the premises for the relevant assessment period. That period was the period of 12 months ending six months before the commencement of the annual period in respect of which the licence was sought. That value was the average value, over the relevant assessment period, of the tobacco handled in a month in the course of the business.

The case immediately in point was *Dennis Hotels Pty Ltd v. Victoria.*[59] The Licensing Act 1958 provided for the granting of licences to sell liquor. Fees for licences were charged on two bases. Section 19(1)(a) prescribed a fee equal to 6% of the gross amount paid or payable for liquor purchased for the premises in the preceding year. Section 19(1)(b) prescribed a fee for temporary licences of £1 for each day the licence was in force plus a sum equal to 6% of the gross amount paid or payable for liquor purchased for sale under the licence.

Except in very general terms, owing to the acute division of opinion in the Court, it is extremely difficult to state matters of common agreement amongst the Justices as to why section 19(1)(a) was valid but not section 19(1)(b).[60] By aggregating the views of the majority on each fee it can be said that—section 19(1)(a) was valid because it referred to sales made in the preceding year to the grant of the licence: it imposed a fee which did not vary with the volume of sales made during the period that the licence, for which the fee was being paid, was to be in force;[61] section 19(1)(b) was invalid because it did refer to purchases for sale made in the period for which the licence was granted: it imposed a fee which could vary according to the amount of liquor purchased for sale under the licence during the period for which the licence was to be in force thus linking the fee to the process of sale.[62]

Again save for McTiernan J., all the Justices in the *Tobacco* case held Part III valid.[63] It was said to correspond with section 19(1)(a) of

[58] Tobacco Act 1972 (Tas.) ss 9-19; First Schedule.
[59] (1960) 104 C.L.R. 529.
[60] Dixon C.J., McTiernan and Windeyer JJ. held both fees invalid. Fullagar, Kitto and Taylor JJ. held both fees valid. Menzies J. held s. 19 (1) (a) valid and s. 19 (1) (b) invalid. Barwick C.J. in the *Tobacco* case said there was no common reason for decision as to why s. 19 (1) (a) was valid: (1974) 2 A.L.R. 460, 466.
[61] (1960) 104 C.L.R. 529, 563-8 *per* Kitto J., 575-6 *per* Taylor J., 591 *per* Menzies J.
[62] *Ibid.* 539-40 *per* Dixon C.J., 549-50 *per* McTiernan J., 592-8 *per* Windeyer J., 591 *per* Menzies J.
[63] (1974) 2 A.L.R. 460, 467-8 *per* Barwick C.J., 486 *per* Menzies J., 498-9 *per* Gibbs J., 505 *per* Stephen J., 511 *per* Mason J.

the Licensing Act 1958.[64] Current dealings in tobacco by way of sale played no part in determining the amount of the licence fee.[65] Menzies, Gibbs and Stephen JJ. accepted the *Dennis Hotels* case as good authority for their decision.[66] Mason J. did not appear quite as satisfied with it but did nevertheless follow it.[67] Barwick C.J. would not have followed it on this point had Part III not involved 'substantially and indistinguishably the same statutory and factual situation'.[68] McTiernan J. assigned no reason for preferring what Dixon J. had said in the *Chicory* case to following *Dennis Hotels* on this point.[69] He evidently regarded the fee as having such a close relation to the sale of goods (namely, tobacco) as to be of such a nature as to affect the goods as articles of commerce.[70] Certainly he did not think the way the fee was calculated prevented it from being an excise duty.

IV THE FISHERIES CASE

In issue in the *Fisheries* case[71] was the fee imposed by section 35G of the Fisheries Act 1905-1971 (W.A.).

By this Act, no one was allowed to operate or permit to be operated on his behalf an establishment for the processing of fish without a licence to do so. Section 35G(1) stated the fee was to be assessed as a percentage of the value of fish caught and moneys paid or payable for fish purchased for processing at the establishment. Section 35G(2) said the fee was not to exceed 1% of the gross amount of these two figures and was to be calculated during the period ending the thirtieth day of June next preceding the commencement of the year in respect of which the licence was sought. The fee was payable in two moieties: the first within 30 days of the date of the licence, the second within a period of six months thereafter.

Section 35J(1) provided that, where no or insufficient information was produced to enable either the gross value of fish caught or the gross amount paid or payable for fish purchased for processing to be determined, the Minister could fix a reasonable fee. Similarly was this the case where with the applicant there had not been a processing establishment in operation for the antecedent period of 12 months. Every applicant for a

[64] *Ibid.* 467 *per* Barwick C.J., 511 *per* Mason J.
[65] *Ibid.* 504 *per* Stephen J.
[66] *Ibid.* 486, 498, 505 respectively but Gibbs J. not quite as much as Menzies and Stephen JJ.
[67] *Ibid.* 511.
[68] *Ibid.* 467-8. Barwick C.J. followed only the *bare* decision in the *Dennis Hotels* case but he did express a preference for the views of Dixon C.J., McTiernan and Windeyer JJ.
[69] *Ibid.* 481. See also TAN 72 *infra.*
[70] *Matthews v. Chicory Marketing Board (Vic.)* (1938) 60 C.L.R. 263, 304 *per* Dixon J.
[71] (1974) 2 A.L.R. 513. Barwick C.J. did not participate.

new licence was required, by section 35J(2), to furnish all particulars available to enable the Minister to estimate 'the probable extent of the annual catches and purchases of fish for processing' at the establishment.

If certain conditions were satisfied, section 35C made provision for the granting of licences possibly without the need to pay a fee.

At first glance, on the basis of the *Dennis Hotels* case, the fee imposed by section 35G would appear valid as being calculated by reference to a period previous to the grant of the licence. Yet the fee was held invalid.

McTiernan, Menzies and Mason JJ. formed the majority. Not referring to the *Dennis Hotels* case, McTiernan J. once again relied chiefly on what Dixon J. had said in the *Chicory* case.[72] To him, as to Mason J., the fee possessed the 'characteristics' of an excise duty.[73] McTiernan J. did not regard it as essential to be an excise duty that an impost be 'directly and quantitatively related to the goods to which it will ultimately attach'.[74] Distinguishing the *Dennis Hotels* case, Menzies J. concluded that the fee was a tax upon the processing of fish caught or purchased for that purpose and, therefore, was upon a step in the production of goods.[75] In reaching this conclusion he was 'greatly influenced' by the terms of section 35G(1) itself.[76] But he did not rest his decision solely on that ground. He mentioned that the fee could not be considered as merely the price of a licence; a licence could be obtained without payment of a fee.[77] Moreover, the fee was payable, when payable, during the currency of the licence.[78] He had regard to and 'noted' the terms of section 35J(2)[79] but, unlike Mason J., did not discuss it at length though he obviously thought it significant.

In Mason J.'s opinion, section 35J(2) showed that where a processing establishment had not been in operation in the antecedent period of 12 months the Minister's fixing of the fee would 'necessarily' reflect an estimate of the quantity of fish to be processed in the establishment in a period of 12 months.[80] He said it was 'impossible' to escape the conclusion that this period of 12 months was not the period referred to in section 35G(2) but a future period which might well coincide with the term of the licence:

> [i]t is an estimate to be based on information supplied by the applicant; in

[72] *Ibid.* 516-7; see *Matthews v. Chicory Marketing Board (Vic.)* (1938) 60 C.L.R. 263, 302-4 *per* Dixon J., McTiernan J. (*ibid.* 517) also quoted Isaacs J. in *The Commonwealth and Commonwealth Oil Refineries Ltd v. South Australia* (1926) 38 C.L.R. 408, 423.

[73] (1974) 2 A.L.R. 513, 517 *per* McTiernan J., 529 *per* Mason J.

[74] *Ibid.* 516. Compare McTiernan J.'s position in *Parton v. Milk Board (Vic.)* (1949) 80 C.L.R. 229.

[75] *Ibid.* 518-9.

[76] *Ibid.* 519.

[77] *Ibid.*

[78] *Ibid.*

[79] *Ibid.*

[80] *Ibid.* 528.

> the nature of things, the information will be directed to the proposed production in the establishment once it commences to operate, that is, under the licence.[81]

Mason J. said that the tax was upon goods in that it was calculated by reference to the quantity of materials used in the production process.[82] It directly affected the price of the goods and had an impact not only on their consumption but upon the consequent demand for their production: in the normal course of events the tax would be added to the price of the goods and ultimately paid by the consumer or retail buyer.[83] Mason J. expressed no great support for the *Dennis Hotels* case.[84]

Gibbs and Stephen JJ. dissented. Had section 35G(1) stood alone most probably the fee would have been invalid.[85] But reading it with sub-section (2) and applying the *Dennis Hotels* case, they held the fee was not an excise duty.[86] Stephen J. regarded the fee as analogous to that imposed by Part III of the Tobacco Act 1972 (Tas.).[87] Neither Justice thought section 35J(2) altered the position.[88] Indeed section 35J(1) showed that the Act was concerned in the determination of the amount of the licence fees only with the antecedent period.[89] Gibbs J. felt that to construe Section 35G in the way, in particular, Mason J. did, was to give no effect to the provisions of section 35G(2).[90] Stephen J. chose to emphasize the 'passing on' attributes of the tax in question. There was an absence of relationship between particular fish or processed fish product and any part of the licence fee paid in respect of the period when that fish or processed fish product was dealt with by the processor.[91] In an important passage illustrating how the passing on of tax attributable in any sense to particular processed fish was inhibited, Stephen J. said:

> [t]he processor cannot, during a year's trading, know precisely what his total volume of production for that year will be so that he will not know how many units of fish products will be available over which to apportion the burden of the total licence fee; more importantly, any tax burden which he may seek to recoup by casting it upon the purchasers of the current year's production as part of its price is not measured by the value of the fish which goes into that production but rather by the value of the fish used in production during the financial year ended six months before the start of the current calendar year.[92]

[81] *Ibid.*
[82] *Ibid.* 529.
[83] *Ibid.* Compare Stephen J.'s somewhat more precise analysis of the 'passing on' attributes of the tax in question: *ibid.* 526. TAN 91-2 *infra.*
[84] *Ibid.*
[85] *Ibid.* 523 *per* Gibbs J., 525 *per* Stephen J.
[86] *Ibid.* 524, 527 respectively.
[87] *Ibid.* 526. Part III of that Act was, of course, held valid: TAN 63 *supra.*
[88] *Ibid.* 524, 527 respectively.
[89] *Ibid.* 527 *per* Stephen J.
[90] *Ibid.* 523-4.
[91] *Ibid.* 526. Stephen J.'s concern with the 'passing on' attributes of the tax confirms the doubt raised TAN 29 *supra.*
[92] *Ibid.* He made reference to what Kitto J. said in *Anderson's Pty Ltd v. Vic-*

Both Stephen J. and Gibbs J. regarded the tax as not being directly related to goods.[93]

V THE CONTROVERSIAL QUESTION OF BOLTON V. MADSEN REVISITED

Three Justices in the *Tobacco* case clearly supported the narrower view that a tax is not an excise duty unless it is found to be so by a strict application of all the essentials of the *Bolton v. Madsen* definition. Gibbs J., for example, said that *Bolton v. Madsen* should be accepted as an 'authoritative statement of principle' meaning it to be insufficient to be an excise duty that a tax should produce 'a similar, or even the same, economic or practical effect as that which a duty of excise would have produced'.[94] Menzies and Stephen JJ. made similarly strong remarks.[95]

Barwick C.J. was clearly in support of the wider view as was to be expected.[96] Mason J., the then newest member of the Court, expressed agreement[97] with earlier expressions of the Chief Justice's view and refused to accept *Bolton v. Madsen* as defining precisely a broad constitutional concept.[98] It is important to note, however, that Mason J. did not apply the Chief Justice's view to the point where he would have had to agree that Part II 'in substance' imposed an excise duty. All the same, it is possible to regard Mason J.'s treatment of the Regulations as being, at least in part, influenced by the wider view.[99]

In the *Fisheries* case, three out of five Justices clearly express support for the narrower view.[1] These are the same three Justices (Menzies, Gibbs, and Stephen JJ.) who took a similar course in the *Tobacco* case. Admittedly, Menzies J. did reach a different result from Gibbs and Stephen JJ. but this was not because he took a different view of the correct test to apply.

Mason J. tends to the wider view.[2] Again, it is important to note with him, that the *result* he reached could have been reached by a person holding the narrower view. Indeed it was: Menzies J. reached the same result. Perhaps this proposition also applies to much of Mason J.'s reasoning.

toria (1964) 111 C.L.R. 353, 374, about the characteristic of an excise duty being the expectation or intention that the burden of a tax should be passed on to the ultimate consumer.

93 *Ibid.* 523-4, 524-7 respectively.
94 (1974) 2 A.L.R. 460, 495.
95 *Ibid.* 483-4, 500-1, respectively.
96 *Ibid.* 464-5.
97 *Ibid.* 509-10.
98 *Ibid.* 509.
99 *Ibid.* 510-1.
1 (1974) 2 A.L.R. 513, 518 *per* Menzies J., 523 *per* Gibbs J., 524-5 *per* Stephen J.
2 *Ibid.* 528-9.

The position of McTiernan J. in both these cases is somewhat ambiguous.

If it is true that a tax on consumption is not an excise duty because it is not sufficiently directly related to goods[3] then, McTiernan J.'s conclusion, in the *Tobacco* case, that a tax on consumption is an excise duty, arguably places McTiernan J. in favour of the view that a tax can be an excise duty notwithstanding that it is not directly related to goods. Of course, the correctness of McTiernan J.'s conclusion has been respectfully submitted to be open to question[4] but, aside from this, one must naturally hesitate to attribute argumentatively any particular view to a judge when he expresses no decided comments on the matter in controversy.

McTiernan J.'s position is slightly clearer in the *Fisheries* case. Here, he said that it was not essential to be an excise duty that an impost be 'directly and quantitatively related to the goods to which it will ultimately attach'.[5] Possibly, McTiernan J. meant that the tax must be directly but need not be also quantitatively related to the goods. However, his quote from Dixon J.'s judgment in the *Chicory* case,[6] immediately following these words, would make it appear that he did intend that not only need the tax not be quantitatively related to goods but also that it need not be directly related to goods. If this is what McTiernan J. intended then it is hardly consistent with several of his own previous decisions.[7]

The result then, is that—in the *Tobacco* case: three Justices (Menzies, Gibbs and Stephen JJ.) clearly support the narrower view; one Justice (Barwick C.J.) clearly supports and applies the wider view; one Justice (Mason J.) supports but does not completely apply the wider view; and one Justice (McTiernan J.), if he says anything on this question at all, should be regarded, because of his own earlier expressions of opinion,[8] as being in favour of the narrower view—and in the *Fisheries* case: three Justices (Menzies, Gibbs and Stephen JJ.) clearly support the narrower view; one Justice (Mason J.) tends to the wider view but reaches a *result* consistent with one who holds the narrower view; and one Justice (McTiernan J.), appears to support a wider view but in so doing is hardly being consistent with several of his own earlier expressions of opinion.[9]

It can only be said that after the *Chamberlain Industries* case, the *Tobacco* case and the *Fisheries* case, the narrower view is plainly in the ascendant.

[3] *Tobacco* case (1974) 2 A.L.R. 460, 501 *per* Stephen J.
[4] *Supra* TAN 35-41.
[5] *Fisheries* case (1974) 2 A.L.R. 513, 516.
[6] See, in particular, *Matthews v. Chicory Marketing Board (Vic.)* (1938) 60 C.L.R. 263, 304, *per* Dixon J.
[7] *Cf Anderson's Pty Ltd v. Victoria* (1964) 111 C.L.R. 353, 369-70; *Western Australia v. Hammersley Iron Pty Ltd (No. 1)* (1969) 120 C.L.R. 42, 56; *Western Australia v. Chamberlain Industries Pty Ltd* (1970) 121 C.L.R. 1, 18-9.
[8] *Ibid.*
[9] *Ibid.*

VI THE DECISION IN THE TOBACCO CASE AND ECONOMIC FEDERALISM

It is overstatement to say that, because of the decision in the *Tobacco* case, the States will be able to 'reap a financial bonanza' by the widespread enactment of consumption taxes.[10] Matters are not that clear cut and, politically, such a move could well prove unwise.[11] Admittedly, however, in the arena of Commonwealth-State financial relations, the States may now have, as a result of the decision, more bargaining powers. But certain it is that actual, and potential, limiting factors will ensure that, to a large extent, any contribution the decision makes to economic federalism will remain, theoretical.

The Commonwealth is still legislatively and financially superior. The decision does not touch its taxing power.[12] At any one time, it can enact its own consumption taxes thus rendering invalid or pointless the enactment of State taxation laws upon the same matters.[13] The States and not the Commonwealth must observe the constraints laid down in the *Tobacco* case. As the States will still be dependent upon the Commonwealth for funds, should they enact consumption taxes, the amount of any revenue they receive from their imposition can be subtracted by the Commonwealth from its States' grants thus emptying the taxes of all purpose.[14] Or, the Commonwealth can make its grants to the States subject to the condition that the States enact no consumption taxes.[15]

Possibly, the most limiting factor is to be found in the very nature of the tax the States are permitted to impose. To be wholly effective the taxable range of goods would need to be limited to goods which are durable and easily identifiable (such as cars) otherwise the liability to tax becomes too difficult and expensive to ascertain and prove. However, a great many goods which are consumed do not possess these qualities and disappear shortly after sale. This, combined with the fact that, for the present, the tax cannot be collected at or before the point of sale by

[10] *Cf Age,* 2 April 1974, 1, 14. Judgments in the *Tobacco* case and the *Fisheries* case were delivered on the same day (1 April 1974). However, it has been the *Tobacco* decision which has had political 'impact'. It is relevant to an understanding of that decision and its effects that the context of economic federalism be discussed. This Section thus deals only with the decision in the *Tobacco* case.

[11] The last Premiers' Conference made it appear likely that the States would consider imposing consumption taxes. Subsequent reports confirmed this (*e.g. Age* 20 June 1974, 3, 21 June 1974, 1; but *cf* 3 July 1974, 1). See the remarks, reportedly made by Sir Henry Bolte, former Premier of Victoria, as to the inflationary nature of such taxes: *Herald,* 20 June 1974, 5. Possibly, the tax might best be used, if at all, with relation to luxury items.

[12] S. 51 (ii).

[13] S. 109.

[14] By an exercise of power under s. 96. See Myers, 'The Grants Power: Key to Commonwealth-State Financial Relations' (1970) 7 *M.U.L.R.* 549, and see, *Age,* 14 May 1974, 2.

[15] *Cf South Australia v. Commonwealth (First Uniform Tax Case)* (1942) 65 C.L.R. 373.

either an appointed collector or, say, the retailer as collector, reduces both the extent and the workability of the tax.

Of course, co-operation between the States and the Commonwealth could well see the enactment of a valid joint-scheme for the imposition of the tax and its collection at the point of purchase—the States enacting the imposition and the Commonwealth, the collection.[16] But even if this co-operation is forthcoming it will still only show the dependence of the States on the exercise by the Commonwealth of its legislative powers for the successful imposition of the tax.

At least so far as the tax and its collection is concerned, it may be possible to state somewhat different conclusions on another occasion should a tax on consumption and method of collection similar to that challenged in the *Tobacco* case be taken before the now[17] seven member Full Bench of the High Court.

VII CONCLUSION

It is instructive to make a summary of the main points emerging from the above—

CONSUMPTION TAXES

A tax on the consumption of goods is not an excise duty and can validly be imposed by the States. Essentially, a tax will be on the consumption of goods when the liability to pay the tax arises on consumption, and is then payable according to the value of what is consumed by the person actually doing the consuming. Such a tax is not a trading tax and cannot be passed on.

The difficulties start with the problem of how the tax can be collected for, if it cannot be, then it is an unworkable tax. It is clear that a method for collection which would be valid is one which places the onus of honesty upon the consumer and requires him to file a return stating how much he has consumed. But, in principle, this could be brought forward to the point of sale: at the place of sale, the purchaser could be required to file a statement with the retailer indicating the amount of the purchase. The retailer would verify it and pass it on to the authorities. Then, some time later, the purchaser could be assessed to tax according to a later return sent to the authorities stating how much was in fact consumed. Both methods could, to some extent, be safeguarded by the provision of penalties for the making of false statements or statements not reasonably believed to be true.

[16] See, *Age*, 19 June 1974, 1, where the Federal Treasurer (the Hon. F. Crean) reportedly mooted this proposal.

[17] Mr Justice Jacobs being now the seventh Justice in the Court: see (1974) 48 *Australian Law Journal* 54.

It is thought that methods such as these would avoid the conclusion that the tax was being levied at the time and the point of retail sale and that they would therefore be capable of commanding enough support in the High Court to have pronouncements in favour of their validity made. Obviously, however, the cost, the inconvenience, the possibilities of evasion and the intolerable burden of paperwork involved in the adoption of such schemes would be weighty factors in deciding whether to impose the tax in the first place.[18]

It remains a possibility, of course, that with the recent appointment of Jacobs J. to the High Court, a method for collection like that contemplated by Part II of the Tobacco Act 1972 (Tas.) and provided for in the Tobacco Regulations 1972 (Tas.) would be held valid thus removing the need for schemes such as these.

LICENCE FEES

A fee for a licence the quantum of which is based on the value of goods purchased or sold in a period previous to the grant of the licence is not an excise duty and can validly be imposed by the States.[19] On the other hand, it seems that a fee which does vary according to the sales or purchases for sale made under the licence during the currency of the licence is an excise duty and cannot validly be imposed by the States.[20] Falling somewhere between these two is the *Fisheries* case which, on its facts, appears to decide that a fee for a licence is an excise duty offending section 90 of the Constitution when it is calculated principally by reference to units of production in a period previous to the grant of the licence but also in some circumstances by reference to an estimate of production in a future period which may coincide with that of the currency of the licence.[21]

OTHER TAXES

The setbacks the *Bolton v. Madsen* definition received in the *Anderson's* and *Hammersley Iron* cases should now be taken to be reversed after the *Chamberlain Industries, Tobacco* and *Fisheries* cases. It is submitted that a tax will not now be held to be an excise duty unless the criterion of liability found in the words of the law imposing the tax demonstrates that the tax is directly related to goods imposed at some step in their production

[18] The immediately foregoing discussion does not purport to discuss any one method in full.

[19] *Tobacco* case (1974) 2 A.L.R. 460.

[20] *Dennis Hotels Pty Ltd v. Victoria* (1960) 104 C.L.R. 529; *Fisheries* case (1974) 2 A.L.R. 513, 519 *per* Menzies J., 523 *per* Gibbs J., 525 *per* Stephen J.

[21] (1974) 2 A.L.R. 513. See *e.g. per* Mason J. at 528. It is extremely difficult to state accurately what the case decided and it may be necessary, if the fee is to be an excise duty, that it be required to be paid during the currency of the licence. *Cf ibid.* 519 *per* Menzies J.

or distribution before they reach the hands of consumers.[22] Again the appointment of Jacobs J. may see even further support in favour of this view.

It is overstatement to say that the decision in the *Tobacco* case opens the way for the States to reap a financial bonanza by the widespread enactment of consumption taxes. The position of the Commonwealth and the problems involved with the tax the States are permitted to impose will ensure that, to a large extent, any contribution the decision makes to economic federalism will remain theoretical. At least so far as the tax and its collection is concerned, another challenge on similar facts before the now seven member Full Bench of the High Court may make for somewhat different conclusions on another occasion.

DAMIEN J. CREMEAN*

[22] *Bolton v. Madsen* (1963) 110 C.L.R. 64.

* LL.B. (Hons).