SECTION 90 AND EXCISE DUTIES: A CRISIS OF INTERPRETATION

BY CHRIS CALEO*

[*Section 90 of the Commonwealth Constitution states,* inter alia*: 'On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise . . . shall become exclusive'. Its apparent simplicity has been obscured by numerous attempts to define 'duties of excise'. The result has not only been frequent litigation but also unsatisfactory federal fiscal relations. The author analyses the case law in detail and then attempts to elucidate the policy assumptions and extra-legal factors that underly the decisions. A more comprehensive approach to constitutional interpretation is advocated, and the possibilities of constitutional amendment are investigated.*]

> The interpretation of section 90 — through diverse opinions, partial adherence to precedent, shifting majorities and changes in the composition of the Bench — is a complete mess.[1]

The judicial interpretation of section 90 of the Australian Constitution has been one of the significant failures of the High Court. The inability of successive benches to find a satisfactory and relatively certain meaning of excise duties demonstrates a failure of both principle and method. It has been a major contributory cause of the severe imbalance in federal-state financial relations and has driven the States to inefficient and often unworkable means of raising revenue.

The object of this article is to provide a comprehensive analysis of the factors that have been relevant in section 90 case law. This includes not only the development of judicial reasoning, but a consideration of wider elements such as constitutional purpose, theories of interpretation, the value of precedent and the state of fiscal federalism. An attempt will be made to evaluate these criteria in the light of recent cases.

A. *THE CASES*

The path from the first High Court decision on the meaning of excise duties, *Peterswald v. Bartley*,[2] to the recent cases of *Hematite Pty Ltd and Another v. The State of Victoria*,[3] *Evda Nominees Pty Ltd and Others v. The State of Victoria*[4] and *Gosford Meats Pty Ltd v. The State of N.S.W.*[5] has been long and tortuous. A similar description could be given to an analysis which proceeded chronologically and exhaustively, case by case in detail. For this reason, the major decisions will instead be considered under two specific questions.[6] It must be stressed, however, that this is not done to create the illusion that the decisions can be neatly categorized and reconciled: the underlying conviction of this essay is that they cannot.

* Student of Law, University of Melbourne.

1 Coper, M., *Sydney Morning Herald* (Sydney) 22 August 1983.

2 (1904) 1 C.L.R. 497.

3 (1983) 151 C.L.R. 599.

4 (1984) 154 C.L.R. 311.

5 (1985) 57 A.L.R. 417.

6 This approach is adopted from the judgment of Dixon C.J. in *Dennis Hotels Pty Ltd v. The State of Victoria and Another* (1960) 104 C.L.R. 529, 540.

In the history of section 90 interpretation, the case of *Bolton and Another v. Madsen*[7] forms a natural hinge. It was a unanimous, joint judgment of six justices, coming after a number of cases had demonstrated many different avenues of reasoning on what constituted a duty of excise. The earlier cases can thus be seen as a movement to the decision in *Bolton*,[8] while subsequent cases have been a movement away from its illusory certainty. *Bolton and Another v. Madsen*[9] settled upon a definition of duties of excise:

> It is now established that for constitutional purposes duties of excise are taxes directly related to goods imposed at some step in their production or distribution before they reach the hands of consumers.[10]

Two basic questions can be isolated from this definition. Firstly, what direct relationship is required between the tax and the goods to constitute a tax upon goods? Secondly, at what stage of the process of production/distribution must the tax be imposed? Undeniably the questions are closely related, but I believe that a consideration of each separately would be more effective in drawing out the lines of argument that have been advanced and the secondary issues raised by the cases.

1. *A tax directly related to goods*

The essential requirement of an excise duty is its reference to goods. However, this factor clearly admits of much flexibility. *Peterswald v. Bartley*[11] was the first attempt to grapple with 'duties of excise'. In a judgment that raises and addresses intelligently so many of the issues that remain unresolved, or unsatisfactorily resolved today, the Court held that a flat-rate licence fee imposed on brewers of beer was not an excise duty. The first task of the Court was to delineate how excise duties under the Australian Constitution differed from the equivalent in English law where they had assumed a 'secondary and enlarged'[12] meaning. The Court chose the narrower, original meaning and, by analogies drawn with customs duties — from sections 55, 86 and 93 — decided that a duty of excise was:

> a 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.[13]

The relevant aspect of this definition for the moment is the reference to a 'relation to quantity or value'. The requirement that the tax be assessed according to the quantity/value of the goods was a way of determining that the tax was upon goods. Two subsequent cases concerning a tax on every gallon of petrol sold[14] and a tax on every copy of a newspaper produced and sold[15] applied this criterion.

7 (1963) 110 C.L.R. 264.
8 *Ibid.*
9 *Ibid.*
10 *Ibid.* 271.
11 *Supra* n. 2.
12 Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (Reprint, 1976) 837.
13 (1904) 1 C.L.R. 497, 509.
14 *Commonwealth and Commonwealth Oil Refineries Ltd v. The State of South Australia and Another* (1926) 38 C.L.R. 408.
15 *John Fairfax & Sons Ltd and Others v. The State of New South Wales and Another* (1927) 39 C.L.R. 139.

However, it was challenged strongly in *Matthews v. The Chicory Marketing Board (Vic.)*.[16] In that case, a levy of £1 imposed on producers for every half-acre of land planted with chicory was held, by majority, to constitute an excise duty. Dixon J. reformulated the basic requirement of a tax upon goods in deciding that the tax must simply affect the goods 'as the subjects of manufacture or production or as articles of commerce.'[17] He said that

> . . . if the substantial effect [of the taxing statute] is to impose a levy in respect of the commodity the fact that the basis of assessment is not strictly that of quantity or value will not prevent the tax falling within the description, duties of excise.[18]

It is not to be conlcuded that Dixon J. was proposing that the relationship to quantity or value was not important; his decision can be seen as resting on the fact that the tax was placed on planting and was computed quantitatively.[19] Dixon J. remarked that the tax had a 'natural, although not a necessary'[20] relation to the quantity of goods produced. Therefore, it is inaccurate to claim that his Honour was radically altering the former test. He would have accepted the argument that it is difficult to conceive of a tax which would be upon goods, if it had *no* relation to quantity or value.[21]

This was the relevant background to the words 'directly related to goods' in the *Bolton* formula. The decision in *Bolton* can be seen, therefore, as relying on a finding that no natural relation existed between the goods and the impost, which was calculated by reference to the carrying capacity of the vehicle and the distance travelled. However, the definition adopted by the Court showed a change of approach. The Court held that it was the 'criterion of liability'[22] which determined whether or not a tax was a duty of excise. If the criterion of liability provided by the taxing statute was the taking of a step in the process of dealing with the goods, from production up to consumption, the tax was an excise. In *Bolton*, the criterion was the use of a vehicle to carry goods, and so was not directly related to the goods.

This interpretation was the legalistic refinement of Kitto J. in *Dennis Hotels Pty Ltd v. The State of Victoria and Another*.[23] This most remarkable constitutional law decision can be explained on the basis that, *prima facie*, a fee for a licence to carry on the business of a victualler is not an excise duty because the criterion of liability is the carrying on of the business, not the production or sale of goods. Kitto J. was able to reason in this way because the legislation was framed, and still is for so called business franchise licences, so that the amount of the fee was calculated by reference to the value of goods purchased for sale in a preceding period. The acceptance by the Court in *Bolton* of Kitto J.'s formalistic criterion meant that, for the first time, one definition *and* one application of this

16 (1938) 60 C.L.R. 263.
17 *Ibid.* 304.
18 *Ibid.*
19 (1983) 151 C.L.R. 599, 646-7 *per* Wilson J.
20 (1938) 60 C.L.R. 263, 303.
21 Coper, M., 'The High Court and Section 90 of the Constitution' (1976) 7 *Federal Law Review* 1, 40.
22 (1963) 110 C.L.R. 263, 271.
23 (1960) 104 C.L.R. 529.

definition had been accepted. A consequence of this development was that the former critical factor of the tax's relation to quantity or value seemingly became of secondary importance. Indeed, *Dennis Hotels*[24] had demonstrated that the fact that a tax had this characteristic did not necessarily make it an excise duty.[25]

The unanimity in *Bolton* could only ever have been an illusion of certainty. The subsequent disagreements, possibly sharper than in pre-*Bolton* days, were a natural consequence of both the method used and the conclusion. The judgment contains little reasoning; it masks ineffectually the incongruity of Dixon C.J.'s agreement, given his previous broader views; it provokes surprise with the use of the words 'it is now *established*' preceding the definition proposed, as very little had been established. Past decisions are not dealt with, but are ignored in order to reach post-*Dennis Hotels* certainty.

Most significantly, the decision appears to place a premium on form and legalism that was never likely to be accepted. In the next excise duty case, *Anderson Pty Ltd v. The State of Victoria and Another*,[26] Kitto J.'s criterion was apparently applied quite simply: the amount of tax payable varied directly with the amount of credit provided, and so the criterion of liability was the provision of credit and its repayment. However, Barwick C.J. presaged the future disagreements by effectively rejecting this formalistic approach and adopting a broader view.

> The indirectness of the tax, its immediate entry into the cost of the goods, the proximity of the transaction it taxes to the manufacture or production and movement of goods into consumption, the form and content of the legislation imposing the tax — all these are included in the relevant considerations.[27]

The willingness of Barwick C.J. to look at the statute's practical effect was in conflict with Kitto J.'s emphasis on the technical form of the legislation. This conflict, between liberalism and literalism, was by no means a new debate, but it now became the principal dividing line between those judges willing to extend the scope of the basic definition and those who valued 'certainty' and a restrictive view. Clearly, the broader approach would increase the reach of section 90. This is demonstrated in the receipt duty cases,[28] which represent the greatest clash of these two approaches. For example, in *The State of Western Australia v. Chamberlain Industries Pty Ltd*, Barwick C.J. adhered to his multi-factored approach and asked how the legislation was intended to and did operate.[29] On the other hand, Kitto J., relying peculiarly on the words of Dixon J., stated that nothing 'is relevant to the nature of a tax as being or not being a duty of excise except the imposition of the tax.'[30]

Although this debate is still relevant, it appears to have been won by what we can call the 'Barwick camp'. In *Hematite Pty Ltd and Another v. The State of Victoria*[31] there was a majority against the use of *Bolton's* criterion of liability;

[24] *Ibid.*
[25] Fullager J. expressly took this ground: *Ibid.* 556.
[26] (1964) 111 C.L.R. 353.
[27] *Ibid.* 365.
[28] *The State of Western Australia v. Hamersley Iron Pty Ltd (No. 1)* (1969) 120 C.L.R. 42; *The State of Western Australia v. Chamberlain Industries Pty Ltd* (1970) 121 C.L.R. 1.
[29] (1970) 121 C.L.R. 1, 15.
[30] *Ibid.* 21.
[31] (1983) 151 C.L.R. 599. The majority comprised Mason, Murphy, Brennan and Deane JJ.

Gibbs C.J., a supporter of Kitto J.'s opinion, impliedly recognized this in *Gosford Meats Pty Ltd v. The State of N.S.W.* when he used both the broad and narrow approaches.[32] The great significance of this development lies in the consequentially broader exposition given to the formula 'a tax upon goods' in recent cases. Hanks observes that *Chamberlain*[33] and *Logan Downs Pty Ltd v. The State of Queensland*[34]

> suggest that any tax, no matter how broad and general its legal incidence will be invalid as an excise duty to the extent that it falls on (or adds to the cost of) the production or distribution of goods.[35]

This position is a direct result of Barwick C.J.'s broader approach. In *Hematite*, Mason J. made this explicit in holding that, if a tax was such that it entered into the cost of the goods and was reflected in the prices at which the goods were subsequently sold, the tax was therefore upon goods.[36] Mason J. sought authority for this view in Dixon J.'s requirement of a 'natural though not a necessary' relation to the goods. With respect, Mason J.'s exposition is wider than any statement of Dixon J. or any other Justice. As such, it has inevitably attracted criticism.[37] In effect, it destroys this first question of the definition of an excise, because as will be seen below, it adopts an almost identical approach to that conventionally accepted for the second question. Mason J.'s approach, in its search for a nebulous, broad test, is the clearest example of the movement away from the restrictions of *Bolton*.

2. *A tax on the process*

> The second matter which perhaps arises as to the connotation of 'excise' is closely connected with the first. It is whether the tax in order to be an excise must be imposed on the production of the goods or may be imposed upon the goods in the hands of any of the various persons through whom they pass in the course of distribution.[38]

As will be recalled, *Bolton and Another v. Madsen*[39] chose the latter of these two options, as have all cases, but not all judges, since *Parton and Another v. Milk Board (Vic.) and Another*.[40] In this respect, therefore, the issue is relatively settled. However, problems of terminology and the extent of the principle remain.

(a) *Extension of the original doctrine*

In adopting the primary meaning of excise in English law, *Peterswald v. Bartley*[41] decided that the duty must be imposed upon the goods when produced or manufactured. Much support for this was derived from Quick and Garran's

32 (1985) 57 A.L.R. 417, 424.
33 (1970) 121 C.L.R. 1.
34 (1977) 137 C.L.R. 59.
35 Hanks, P., *Australian Constitutional Law* (3rd ed. 1985) 486-7.
36 (1983) 151 C.L.R. 599, 632.
37 The problems attending Mason J.'s analysis were foreshadowed by Latham C. J. in dissent in *Matthew v. The Chicory Marketing Board (Vic.)* (1938) 60 C.L.R. 263, 278-9. His argument is quoted in the *Report of the Committee of Inquiry into Revenue Raising in Victoria* (1982) Vol. I, 35.
38 *Dennis Hotels Pty Ltd v. The State of Victoria and Another* (1960) 104 C.L.R. 529, 540 *per* Dixon C.J.
39 (1963) 110 C.L.R. 264.
40 (1949) 80 C.L.R. 229.
41 (1904) 1 C.L.R. 497.

Annotated Constitiution of the Australian Commonwealth (extensively quoted), the nature of previous colonial excise laws, as well as other provisions of the Constitution, notably section 93. But the process of extending, or eroding, this principle began almost immediately. In both *Commonwealth and C.O.R. Ltd v. The State of South Australia and Another*[42] (the *Petrol* case) and *John Fairfax and Sons Ltd and Others v. The State of New South Wales and Another*[43] taxes on the first sale of motor spirit and newspapers, respectively, were held to be excise duties. In both cases, the taxpayer was the producer-seller. As Isaacs J. observed in the *Petrol* case, the tax was so connected with the production of the article sold as to be, in effect, a method of taxing the production of the article. He contrasted this with a tax unconnected with production and imposed merely with respect to the sale of goods as existing articles of trade.[44] On Isaacs J.'s view, this would not be an excise.

The further extension of the definition was presaged at the 1929 Royal Commission on the Constitution. Owen Dixon advocated the amendment of s. 90 to cover all forms of indirect taxation. His view was not heeded in the Commission's *Report* and recommendation, but eventually he was to achieve his purpose by judicial pronouncement.

Matthews[45] required no extension of this element of the definition of excise duties, for the tax was imposed on the producer-planter at a pre-production stage. Nevertheless, Dixon J. stated:

> a tax on commodites may be an excise although it is levied not upon or in connection with production, manufacture or treatment of goods or the preparation of goods for sale or for consumption, but upon sale, use or consumption . . .[46]

This was a radical extension of previous doctrine. While Latham C.J. also held that a tax imposed upon the sale or consumption of goods could be an excise,[47] he subsequently qualified this apparently wide view by requiring that the tax be imposed upon the producer, and in this way be related to production.[48] The correctness of Dixon J.'s extension arose on the facts in *Parton* — where the taxpayer was the distributor — and was confirmed by Dixon, Rich and Williams JJ.; Latham C.J. and McTiernan J. were adamant that this view was incorrect. Dixon J. felt compelled to make one modification to his *Matthews* opinion: in view of a Privy Council case, *Atlantic Smoke Shops Ltd v. Conlon and Others*,[49] he excluded consumption taxes from the field of s. 90. However, he expressly disagreed with the Chief Justice's principle that the tax must be levied upon the manufacturer or producer.[50]

Dixon J.'s approach was accepted in *Bolton and Another v. Madsen*, and remains authoritative. There have been factual extensions to cover sellers of goods who are neither manufacturers nor producers[51] and owner-graziers of

42 (1926) 38 C.L.R. 408.
43 (1927) 39 C.L.R. 139.
44 (1926) 38 C.L.R. 408, 426.
45 (1938) 60 C.L.R. 263.
46 *Ibid.* 300.
47 *Ibid.* 277.
48 (1949) 80 C.L.R. 229, 245-6.
49 [1943] A.C. 550.
50 (1949) 80 C.L.R. 229, 260.
51 *The State of Victoria v. I.A.C. (Wholesale) Pty Ltd* (1970) 121 C.L.R. 42.

livestock.[52] But Gibbs C.J. carefully and accurately expressed the present view when he observed that

> the judgments of all the members of the Court in [*Hematite*] (even that of Murphy J. who gave s. 90 a narrower operation than the other members of the majority) support the conclusion that an impost cannot be an excise unless it is a tax upon, or in respect of, a step in the production, manufacture, sale or distribution of goods.[53]

The inclusion of Murphy J. calls for comment. Consistent with his view of much of chapter 4 of the Constitution, Murphy J. adopted an unique discrimination test for identifying an excise duty.[54] Its genesis owes much to the reasoning in *Peterswald v. Bartley* and the judgment of Fullager J. in *Dennis Hotels*. Fullager J. held that[55] the characteristic of an excise duty was that the taxpayer was taxed by reason of, and by reference to, his *production* or *manufacture* of goods (*i.e. not* sale or distribution); he adopted a relatively broad meaning of the words 'manufacture' and 'production'.[56]

Murphy J. combined this reasoning with his own view of the history of the provision and the overall financial scheme of the Constitution. The result is a challenging theory. His basic proposition is that s. 90 prohibits *State* taxation which discriminates between goods produced in the State and those produced outside the State. Consonant with Fullager J., he believes that an excise does not extend to taxes on distribution or consumption unless these are in substance taxes on production within the State.[57] For example, a sales tax restricted to a particular commodity produced 'only or substantially only'[58] in the State may be a tax on the production of that commodity in the State and therefore a duty of excise. Whereas a sales tax which does not discriminate between goods on the basis of their production within or without the State is neither customs nor excise. In this way, even though Murphy J. was alone in his specific view of s. 90, Gibbs C.J. rightly included him in his proposition above.

The merits of Murphy J.'s theory will be examined below; however, one aspect that needs attention here is the question of 'home production'. Murphy J. considered this as an essential requirement of an excise duty, and used the phrase to mean production within any single State.[59] However, when other judges address this issue, they define the phrase as production within *Australia*, and compare with it imported goods. Therefore, when one follows the debate on home production through the cases[60], the issue is whether a tax can be an excise

52 *Logan Downs Pty Ltd v. The State of Queensland* (1977) 137 C.L.R. 59.

53 (1985) 57 A.L.R. 417, 421-2.

54 See his Honour's first judgment on s. 90, *H.C. Sleigh Ltd v. The State of South Australia* (1977) 136 C.L.R. 475, 526-7. Subsequent elaborations of his theory appear in *Logan Downs Pty Ltd v. The State of Queensland* (1977) 137 C.L.R. 59, 84-5; *Hematite Petroleum Pty Ltd and Another v. The State of Victoria* (1983) 151 C.L.R. 599, 638-40; *Gosford Meats Pty Ltd v. N.S.W.* (1985) 57 A.L.R. 417, 428-30.

55 (1960) 104 C.L.R. 529, 555.

56 *Ibid.* referring to (1949) 80 C.L.R. 229, 245, 246 *per* Latham C.J.

57 *E.g.* (1983) 151 C.L.R. 599, 638.

58 *Ibid.*

59 *Ibid.*

60 (1926) 38 C.L.R. 408, 426 *per* Isaacs J., 435 *per* Higgins J., 437 *per* Rich J.; (1927) 39 C.L.R. 139, 146-7 *per* Rich J.; (1937) 56 C.L.R. 390, 408 *per* Starke J.; (1938) 60 C.L.R. 263, 292, 299 *per* Dixon J.; (1949) 80 C.L.R. 229, 260 *per* Dixon J.; (1960) 104 C.L.R. 529, 540 *per* Dixon C.J., 590 *per* Menzies J.; (1970) 121 C.L.R. 1, 12-3 *per* Barwick C.J.; (1974) 130 C.L.R. 177, 210 *per* Menzies J.; (1985) A.L.R. 417, 425 *per* Mason and Deane JJ.

although placed on goods 'wherever produced',[61] or if the goods must be manufactured in Australia.[62] It is *this* question which has been labelled as 'still an open one'.[63] Murphy J.'s argument, while similar, proceeds upon a much narrower line, and is implicitly rejected by those judges debating the wider question.

(b) *Reasons for the extension of* Peterswald

There are two basic reasons for the extension of the relation required between the tax and the process: (i) a belief that the purpose of s. 90 was to give the Commonwealth real control over the taxation of commodities;[64] and (ii) the argument that 'a tax upon a commodity at any point in the course of distribution before it reaches the consumer produces the same effect as a tax upon its manufacture or production'.[65]

The first of these reasons will be considered in detail below. The second is essentially an economic argument, which is surprising to see in the judgments of a High Court which avowedly refuses to consider economic consequences or theories.[66] Nevertheless it has been accepted even by those judges who take a narrow view of s. 90.[67] However, even this requirement of a reflection back from the taxed step to production has been relaxed. Barwick C.J. has said:

> But there is no warrant, in my opinion, to require it to be established in any particular case that the tax in question will in fact so bear on manufacture or production. Its relevant effect will be *presumed*: it is enough that the impost is upon or in respect of goods before they have actually reached the consumer.[68]

At least three members of the present High Court bench appear to accept implicity this presumption.[69] In this way, we have moved from the original strict definition to a weaker 'deeming definition' — that is, a tax on the distribution of goods is a tax upon production of goods if it produces the same effect — and then virtually done away with the 'deeming condition'. Economic theory was invoked only to be ignored ultimately.

This notion of 'a tax on X stage producing the same effect as a tax on Y stage' seems curiously based on the nature of indirect taxation, *i.e.* the two taxes produce the same effect of passing a burden onto the finished product. This is curious, because the High Court has long rejected the element of indirectness as either a necessary or sufficient quality of the tax.[70] Economists have also rejected the usefulness of the distinction between direct and indirect taxes.[71] The definition in *Peterswald* adopted the distinction, reasoning that the indirectness of a tax

61 (1927) 39 C.L.R. 139, 146 *per* Rich J.
62 (1974) 130 C.L.R. 177, 210 *per* Menzies J.
63 (1970) 121 C.L.R. 1, 12 *per* Barwick C.J.
64 (1949) 80 C.L.R. 229, 260 *per* Dixon J.; (1970) 121 C.L.R. 1, 17 *per* Barwick C.J.; (1983) 151 C.L.R. 599, 631 *per* Mason J.
65 (1949) 80 C.L.R. 229, 260 *per* Dixon J.
66 (1964) 111 C.L.R. 353, 365 *per* Barwick C.J.
67 *E.g.* Mason J. in *Dickenson's Arcade Pty Ltd v. Tasmania* (1974) 130 C.L.R. 177, 238; Dawson J. in *Gosford Meats Pty Ltd v N.S.W.* (1985) 57 A.L.R. 417, 447-8.
68 (1970) 121 C.L.R. 1, 13 (emphasis added).
69 (1983) 151 C.L.R. 599, 634 *per* Mason J. ('inevitably increase'); (1985) 57 A.L.R. 417, 437-8 *per* Wilson J. (quoting and not disputing the words of Kitto J.); 447 *per* Dawson J.
70 A single authority cannot be cited to this effect. However *Bolton v. Madsen* (1963) 110 C.L.R. 264 certainly adopts the stated position by ignoring the characteristic.
71 Arndt, H.W., 'Judicial Review under Section 90 of the Constitution' (1952) 25 *Australian Law Journal* 667, 674.

usually indicated that it was not personal but imposed in respect of goods. Some judgments have selected it as a common characteristic of an excise duty;[72] in *Matthews*, Latham C.J. based his reasoning upon it.[73] However, in *Dennis Hotels*, Fullager J. delivered a damning criticism of this approach.[74] Arguing that a misunderstanding of *Peterswald* and undue attention to the decisions of the Privy Council on the British North America Act s. 92 (2) had been responsible for concentration upon the tax's indirectness, he dismissed the relevance of this element in interpreting s. 90. The Australian Constitution 'was adopted in a quite different setting and employs much more specific terminology'[75] than the B.N.A. Act, which simply refers to 'direct taxation within the Province'.[76] This strong criticism was effective, and the distinction is now of little value. However, as demonstrated, the effects of this incursion into unsound economic theory are revealed in the prevailing interpretations of s. 90.

(c) *The problem of consumption taxes*

Interpretation of the Canadian Constitution was also relevant to another curiosity of s. 90 case law: the survival of consumption taxes. As previously examined, Dixon J.'s broad definition in *Parton* explicitly excepted consumption taxes because of the Privy Council decision in *Atlantic Smoke Shops Ltd v. Conlon*,[77] a case on B.N.A. s. 92 (2). The assumption that s. 90 did not prevent the States imposing a consumption tax was accepted by the Court in *Bolton*,[78] and made consistently until the question fell for decision in 1974, in *Dickenson's Arcade Pty Ltd v. Tasmania*.[79] Only McTiernan J. refused to follow the authorities, and held that excise duties extended to a tax on the consumption of tobacco.[80] On first principles, it appears that Barwick C.J. would have agreed,[81] but he considered that the repetition of the exception of consumption taxes constituted strong authority. Mason, Menzies, Gibbs and Stephen JJ. all agreed that previous reasoning should be supported. However, because the Court held the regulations made under the Act invalid, it is very difficult to imagine how such a tax — valid in principle — could be drafted and administered effectively.

Logically, the one reason for excluding consumption taxes from the reach of s. 90 is that indirectness of the tax is an essential requirement. But we have seen that this position is no longer tenable; indeed, Gibbs J. in *Dickenson* considered such an element irrelevant[82] (yet held in favour of State consumption taxes). Once this is conceded, the coherence of the reasons for extending *Peterswald* can

72 *E.g.* (1949) 80 C.L.R. 229, 252 *per* Rich and Williams JJ.
73 (1938) 60 C.L.R. 263, 277-9.
74 (1960) 104 C.L.R. 529, 553-4.
75 *Ibid.* 554.
76 *Ibid.* 553.
77 [1943] A.C. 550.
78 (1963) 110 C.L.R. 264, 271.
79 (1974) 130 C.L.R. 177.
80 *Ibid.* 204.
81 *Ibid.* 185-6.
82 *Ibid.* 222-3.

scarcely be maintained if consumption taxes are made an exception.[83] Principle is thus compromised.

If *Bolton and Another v. Madsen* is the hinge of s. 90 case law, its repair has often been suggested. Subsequent cases have adopted its definition, yet often rejected its restrictive spirit. Nevertheless it remains a major touchstone for many judgments in the High Court, and as Dawson J. illustrates in *Gosford Meats Pty Ltd v. The State of N.S.W.*,[84] can continue to provide a desired breakwater from the onslaught of more liberal approaches.

B. *THE ROLE OF HISTORY AND PURPOSE*[85]

One oft-used criterion of criticism in the field of constitutional law is conformity with constitutional purpose.[86] However, it is difficult to explain precisely what this entails. Do we seek conformity with the purpose of the constitutional provision as perceived in 1900, or must we ask what purpose the section fulfils or should fulfil[87] today, in a vastly different world? And where does one look, what sources does one consult, to find such a purpose? Early in its history, the High Court decided that the Convention Debates of the 1890s were inadmissible as an aid to interpretation of the Constitution,[88] and even today only draft Bills of the Constitution may be examined.[89] Despite this rule, the Court does accept the value of historical evidence.[90] Judges often conduct detailed historical analyses of provisions and rules. This helps explain why judges, now more than ever, wrestle with and are influenced by the perceived purpose(s) behind sections of the Constitution, including s. 90.

1. *The drafting of section 90*

Economics was one of the driving forces for federation. The questions of free trade, tariffs, State preferences, equality of trade and revenue redistribution were major problems in the way of establishing a Federal Commonwealth. The tariff question was referred to as the 'lion in the path'[91] which federalists had either to slay or be slain by. The free trade/protection debate — represented by the border customs duties — was a bitter political issue for many years before federation.

83 Crommelin, M., 'Sections 90 and 92 of the Constitution: Problems and Solutions', *Current Constitutional Problems in Australia* (1982) 37, 48.

84 (1985) 57 A.L.R. 417, 450-1.

85 An invaluable source for this part of the paper was Coper, M., 'The High Court and Section 90 of the Constitution' (1976) 7 *Federal Law Review* 1.

86 Coper, M., 'Interpreting the Constitution: A Handbook for Judges and Commentators' in Blackshield, A.R. (ed.), *Legal Change: Essays in Honour of Julius Stone* (1983) 52, 53.

87 'However, the function of this Court is to consider not what the Constitution might best provide but what, upon its proper construction, it does provide': *Western Australia v. The Commonwealth* (1975) 134 C.L.R. 201, 248-9 *per* Gibbs J.

88 *The Municipal Council of Sydney v. The Commonwealth* (1904) 1 C.L.R. 208, 213-4.

89 *Tasmania v. The Commonwealth* (1904) 1 C.L.R. 329, 333.

90 'The question of the validity of an Act of the Parliament . . . is to be decided by the meaning of the relevant text of the Constitution having regard to the historical setting in which the Constitution was created . . .': *Attorney-General (Cth); ex rel. McKinlay v. The Commonwealth* (1975) 135 C.L.R. 1, 17 *per* Barwick C. J.

91 Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (Reprint, 1976) 119. *Cf.* La Nauze, J. A., *The Making of the Australian Constitution* (1972) 39.

Victoria favoured protectionism, advocating high customs duties on goods brought into the State either from overseas or another State; this allowed local goods, produced at higher costs, to compete favourably. New South Wales was firmly free trade except (curiously) for its rural interests.[92] Clearly, one could not expect the Conventions to solve this issue, either by framing the tariff or laying down guidelines to be followed.[93] The inevitable response was to leave the fiscal question to the federal Parliament (and thus the people) so that it could decide the level of a uniform duty. It is clear, therefore, why the imposition of customs duties was made an *exclusive* Commonwealth power: without such a provision, the bitter fight between the States could surface again at any time.

The more difficult question is why duties of excise were made exclusive to the Commonwealth. The purpose commonly proposed is that this was done to give the Commonwealth exclusive control over tariff policy.[94] But is this the case? The starting point for the 1891 Convention in Sydney, the resolutions of Sir Henry Parkes, contained no reference to duties of excise. However, on the motion of Deakin,[95] the relevant resolution was extended to include excise duties, which were seen as corresponding to or analogous with customs duties. There was confusion amongst the delegates throughout this debate. They appeared to be assessing how the federal body could use a power over excises, rather than why the power should be made exclusive.[96] The confusion is peculiar because (a) the draft Bill already contained a specific concurrent power over customs and excise, and (b) the delegates did seem to grasp part of the underlying problem, *i.e.* if the States had the power to impose excise duties, one poorer State, needing revenue, may choose to levy an excise, thereby favouring unfairly residents of those States which did not resort to this tax. Competition between the States could eventuate. As one delegate expressed the problem, it would be 'absolutely impossible to give the import duties to the federal government without the excise duties, unless we are to allow some colonies to take advantage of others'.[97] The confusion was compounded when Deakin proposed an amendment[98] that exclusive federal power would extend only to duties of excise levied 'upon goods the subject of customs duties'. This was misunderstood as limiting federal power,[99] rather than relaxing the prohibition on State power to impose such duties. However, the amendment was passed and the provision became clause 4 of Chapter IV of the draft Bill.

In 1897, at the Adelaide Session, Sir George Turner proposed the striking out of Deakin's amendment, again in the mistaken belief that 'if we leave these words in we limit the power of the Federal Government, but if we strike them out

92 Sawer, G., *Australian Federal Politics and Law 1901-1929* (1956) 14.

93 Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (Reprint, 1976) 132.

94 *E.g.* Arndt, H. W., 'Judicial Review under Section 90 of the Constitution' (1952) 25 *Australian Law Journal* 667, 667.

95 *Offical Report of the National Australasian Convention Debates* (Sydney, 1891) 346.

96 *Cf.* the view of Mr Baker, *ibid.* 367.

97 *Ibid.* 347 (Mr Munro).

98 *Ibid.* 361.

99 'Its effect will be to give to the federal parliament power to impose excise duties only on those articles upon which import duties are imposed' (Mr Thynne) *ibid.* 365.

we enlarge their power'.[1] The motion was successful and the clause passed seemingly without any recognition of its real significance. In Sydney (1897) and Melbourne (1898), the issue was again passed over, although Deakin, in a different context, once more stressed that customs and excise duties must run together 'to adjust the protective effect of a customs duty'.[2]

If one wishes to prove that s. 90 was intended to prevent Commonwealth tariff policy from being frustrated by the imposition of a countervailing State excise duty, the Debates are a mixed blessing. Some speeches do indicate an awareness of the problem, and naturally it can be argued that the Debates do not represent everything addressed by the delegates, for example, in informal meetings. However, a purpose such as that suggested was never explicitly addressed. The paramount concern was to avoid limiting the powers of the Federal Government. Nevertheless, there are other circumstances which reinforce the traditional view of the section's purpose: the philosophy of federation which revolved around preventing competition and discrimination between the States, the juxtaposition in s. 90 of 'bounties on the production or export of goods' with 'duties of customs and of excise', and the quasi-definition of both duties in s. 93. These three factors have been among those considered in judicial attempts to isolate the single purpose of s. 90.

2. *Judicial approaches: definition and purpose*

In *Peterswald v. Bartley*,[3] three founding fathers adopted an approach to s. 90 which, unfortunately, has been maintained ever since. Instead of asking *why* the power over excise duties was made exclusive to the Commonwealth, they asked '*what* is a duty of excise'. The approach is definitional rather than purposive. Throughout the history of s. 90 interpretation there has been a continuous play between these two approaches. While logic suggests that considerations of purpose would influence and affect the definition, the cases demonstrate a more subtle interaction. Undoubtedly most judges adopt a definitional approach, and are forced to deal with the 'definitions' given by other judges in previous cases, but ever-present is a nagging awareness that s. 90 must have some purposive justification. Recent cases demonstrate an increasing realization of this fact.

In the *Petrol* case, Rich J. dismissed the narrow definition of excises given in *Peterswald* by ascribing a novel purpose to 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'.[4]

It was an extremely broad view, from which Rich J. himself subsequently (grudgingly) retreated.[5] But in *Parton*, Dixon J.'s approach was similar:

[1] *Official Record of the National Australasian Convention Debates* (Adelaide, 1897) 835-6.

[2] Coper, M., 'The High Court and Section 90 of the Constitution' (1976) 7 *Federal Law Review* 1, 24; *Official Record of the Debates of the Australian Federal Convention* (Melbourne, 1898) 936-7.

[3] (1904) 1 C.L.R. 497.

[4] (1926) 38 C.L.R. 408, 437.

[5] (1927) 39 C.L.R. 139, 146-7. In *Dennis Hotels Pty Ltd v. Victoria* (1960) 104 C.L.R. 529, 590, Menzies J. criticized Rich J.'s judgment in the *Petrol* case. *The Report of the Royal Commission on the Constitution* (1929) also stated that 'there does not appear to be any sufficient reason for such a view', 259.

> In making the power of the Parliament . . . exclusive it may be assumed that it was intended to give the Parliament a real control of the taxation on commodities and to ensure that the execution of whatever policy it adopted should not be hampered or defeated by State action.[6]

It is interesting to follow the reasoning of Dixon J. It is assumed that his Honour had a firm conviction, pursued previously at the 1929 Royal Commission, that s. 90's purpose was far wider than generally considered, and that the definition of excise duties had to be expanded correspondingly. This is a natural conclusion to draw. However, his judgments do not support this view. More slavishly than any other judge before or since, Dixon J. followed the strict definitional approach, in one case (*Matthews*) quoting from the Encyclopaedia Britannica and the Oxford English Dictionary.[7] In *Parton*,[8] he defined the tax's relation to the process of production by observing, as we have seen, that a tax upon a commodity in its distribution produces the same effect as a tax upon its manufacture. *Therefore* (his logic proceeds) 'it may be assumed' that s. 90 has a wider purpose. Looked at in this way, Dixon J.'s novel purpose can be seen as mere support for the definition he had previously chosen in *Matthews*. In no subsequent case did he repeat this view of s. 90's purpose. One can therefore ask whether his Honour truly saw himself as departing far from the traditional opinion of s. 90. It is arguable[9] that rather than seeing control of commodity taxes as the aim of s. 90, Dixon J. saw such a monopoly as a means of achieving the narrower objective of tariff policy control.

Unfortunately subsequent judgments have not recognized any such ambiguity and have embraced the proposed wide ranging purpose. Barwick C. J. has said that the purpose of s. 90 was

> the control of the national economy as a unity which knows no State boundaries, by a legislature without direct legislative power over that economy as such.[10]

In *Hematite Pty Ltd v. Victoria*, Mason J. suggested that this broad objective had been 'generally accepted'.[11] Such a statement merely obscures an ongoing debate. Murphy J. never accepted this approach, nor did Fullager J. agree with it. In *Dennis Hotels*, Menzies J. identified the traditional purpose of s. 90 and saw no need to extend it.[12] And, illustrating a third point of view, Wilson J. has contented himself with observing that he finds 'little assistance . . . in resort to questions of assumed constitutional purpose'[13] at all.

Judged historically, it is highly unlikely that s. 90 was intended to have the purpose proposed by Barwick C. J. and Mason J. The one argument in support emerges from an examination of the 1891 and 1897 Draft Bills.[14] On the basis of these drafts it could be argued that the narrower 1891 clause did have the purpose of ensuring Commonwealth control over tariff policy, and that the omission of

6 (1949) 80 C.L.R. 229, 260.
7 (1938) 60 C.L.R. 263, 292, 298.
8 (1949) 80 C.L.R. 229, 260.
9 Hanks, P. J., *Australian Constitutional Law* (3rd ed. 1985) 376-7.
10 (1970) 121 C.L.R. 1, 17.
11 (1983) 151 C.L.R. 599, 631.
12 (1960) 104 C.L.R. 529, 582-3.
13 (1983) 151 C.L.R. 599, 649.
14 Coper, M., 'The High Court and Section 90 of the Constitution' (1976) 7 *Federal Law Review* 1, 25-6.

the narrowing words in the 1897 clause implied an intention to give s. 90 a wider purpose. As we know, the Debates do not support such an implication, but as they are inadmissible in court, the argument cannot be so easily disproved. It has, however, never been taken by any judge.

But this approach begs the question asked above: why should our concern be the intentions of those who drafted the Constitution? Shouldn't we take into account the greater responsibility the Commonwealth now bears for economic management and give effect to provisions of the Constitution with modern needs in mind? Would a wider view of s. 90 be justified in this context? A brief answer to such a question is obviously difficult. However, it is suggested that Commonwealth economic planning depends more on the existence of the necessary powers, *not* their exclusiveness. Gibbs C. J. has said:

> on any possible view of its effect, s. 90 itself confers on the Parliament only a very limited power to control the economy.[15]

His Honour was voicing the obvious but overlooked fact that s. 90 gives no power to the Commonwealth; it only withdraws power from the States. Therefore no wide definition of excise duties, no subscription to a broad purpose, can improve the Commonwealth's ability to control the economy, unless the rest of the Constitution first confers the necessary powers. Section 90 gives nothing to the Commonwealth; it only allows it to act unhindered in certain areas.[16] One can therefore doubt whether contemporary inter-governmental relations justify the widest view of s. 90.

The words of Gibbs C. J. underline the tension between the definitional and purposive approaches. Whichever view of the purpose of s. 90 one accepts, it is very difficult to settle upon a definition which fulfils the proposed purpose. A definition to correspond with the suggested wider purpose — real control over the taxation of commodities — has simply not been delivered. The decisions in *Dennis Hotels* and *Dickenson's Arcade* are monuments to this failure. It is arguable that there is *no* definition which can fulfil this purpose, for there are many taxes which have a tendency to enter into the price of commodities which common sense (if nothing else) tells us are not excise duties, for example payroll tax on a manufacturing company. In the same way, it is difficult to frame a definition that gives effect to the traditional purpose of s. 90, for quite a wide range of taxes (including consumption taxes[17]) *can* frustrate Commonwealth tariff policy indirectly.

While judges have proposed various purposes for s. 90, little attempt has been made to consider precisely how a particular purpose could be effected by any one interpretation of excise duties. The instinctive desire for certainty, the tension between literalism and liberalism, the problems of inconsistent precedents have all tended to prevent logical, principled analysis. Purposes have not been offered

[15] (1983) 151 C.L.R. 599, 617.

[16] One can, of course, take the view that this freedom from State 'interference' does improve the Commonwealth's ability to control the economy as much as the conferral of a new specific power on the Commonwealth.

[17] Hanks gives the example of the imposition of differential registration fees on motor vehicles owned in Victoria, which would be higher for locally manufactured vehicles: *op. cit.* 493.

as premises from which to progress rationally;[18] they have too often been rudely tacked on as 'further support'. *Hematite* and *Gosford Meats* give hope of a purposive approach prevailing but, in light of the above, one wonders whether the victory would be more than pyrrhic.

C. *THE METHOD OF THE HIGH COURT*

Several of the issues examined so far concern the legal methods employed by High Court justices: the degree to which purpose considerations are relevant, the debate on interpretation of statutes, and the material extraneous to the Constitution that the Court will consider. But beyond these issues, the confusion that is Section 90 case law forces us to face basic questions concerning judicial theory, legal reasoning, the rôle of the judge and the law's development. In several of these areas, the record of the High Court has been less than impressive.

1. *Constitutional interpretation*

Perhaps the most essential task in constitutional practice is the need to formulate an adequately principled theory of constitutional interpretation. In Australia, the avowed touchstone of interpretation is the decision in *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.*[19] It is not intended to examine the inadequacies of the application of this case's principles. Suffice to say that the failure of later cases to obey the exhortation in *Engineers* to consider the *context* of the constitutional provision in question — that is, the whole Constitution and the circumstances in which it was made[20] — has bedevilled the interpretation of s. 90. Too often, the High Court has resorted to the simple lexicographical exercise of defining 'duties of excise', with little attention given to the overall constitutional framework. Rarely has a more comprehensive analysis been offered.

This is the problem of interpretation seen broadly. However it is necessary to examine specifically the problem of characterization in s. 90 decisions. Characterization is generally seen as the process of identifying the subject matter of a Commonwealth Act in an attempt to discover if it falls within one of the listed heads of Commonwealth legislative power. But characterization may also be involved in determining whether certain State laws are invalid for intruding into areas of exclusive federal power. That is, once you have a definititon of the tax called an excise duty, characterization involves examining the State legislation to see if it imposes such a tax.

In s. 90 case law, there is a debate between those who characterize the law by concentrating on the self-selected criterion of liability in the statute and those who concentrate on the legislation's practical operation. As has been assessed,

[18] *E.g.* (1960) 104 C.L.R. 529, 582-3 *per* Menzies J.: after identifying what he saw as the purpose of s. 90, his Honour chose to consider the cases rather than use the purpose he had derived as the foundation of his judgment.

[19] (1920) 28 C.L.R. 129.

[20] Isaacs J. himself demonstrated the importance of these factors: *The Commonwealth v. Colonial Combing, Spinning and Weaving Co. Ltd* (1922) 31 C.L.R. 421, 446-7; *The Commonwealth v. Kreglinger & Fernau Ltd* (1926) 37 C.L.R. 393, 411-2.

the latter approach appears to be dominant in recent cases. But the question remains to be asked: is this the usual method used by the High Court to test the validity of legislation?[21]

Ever since *R v. Barger*,[22] there has been a continuing battle between form and substance in deciding the nature of a statute. *Barger* ruled that the statute's validity was to be tested by reference to substance, and not mere form, yet warned that the indirect effects of a statute and the intention of Parliament were irrelevant to the test. This is received and repeated wisdom. But what does 'substance' mean, and how does it differ from 'form'? The case of *Fairfax and Others v. Commissioner of Taxation of the Commonwealth of Australia*[23] is an illustration of how the High Court will speak the language of substance yet appear to be applying a more literal test. In that case, a law which offered 'substantial inducement'[24] to trustees of superannuation funds to invest in specified securities was nevertheless held to be a law with respect to taxation because 'the substance of the enactment is the obligation which it imposes, and the only obligation imposed is to pay income tax'.[25] The case stresses that substance does not mean either the purpose/motive of the statute or its indirect effect. If this is so, one wonders precisely how narrow 'substance' is and whether it differs from 'form' at all.

In one of the more perceptive judgments in s. 90 case law, Walsh J. said:

> When it has been said that the character of a duty depends upon the operation and effect rather than upon the form of the Act by which it is imposed I think that what has been meant is that an examination must be made of the provisions of the Act to determine its legal effect, according to the proper construction of its operative provisions, whatever their form may be and whatever label may be attached by the Act to the duty which is imposed by it.[26]

Walsh J. therefore defines substance as direct legal effect, while form is equivalent to the words of the statue accepted at face value. Adopting this as a sensible distinction and one which is consistent with *Fairfax*,[27] the disagreement since *Bolton and Another v. Madsen* is difficult to understand. The explanation seems to be that the debate in s. 90 law has shifted ground, so that form versus substance has *not* been the issue. Rather, the question has been, how far could certain judges push the concept of 'substance'. When Barwick C.J. speaks of examining what the legislation does 'in effect'[28] or 'in reality', he comes perilously close to considering the indirect effects of the statute, and even its intention. *Dickenson's Arcade* provides an excellent example of Barwick C.J. resorting to Denning-like illustrations in order to find the 'intended operation'[29] of the tax in question. With respect, when his Honour says that he finds a liability in substance, it is in fact an indirect, consequential liability. This is contrary to the principle in *Barger*[30] as stated above.

21 (1970) 44 *Australian Law Journal* 169, 170.
22 (1908) 6 C.L.R. 41.
23 (1965) 114 C.L.R. 1.
24 *Ibid.* 16 *per* Taylor J.
25 *Ibid.* 13 *per* Kitto J.
26 (1970) 121 C.L.R. 1, 37.
27 (1965) 114 C.L.R. 1.
28 (1969) 120 C.L.R. 42, 56.
29 (1974) 130 C.L.R. 177, 194.
30 (1908) 6 C.L.R. 41.

Once this debate is put in its proper context, it becomes much clearer. Certainly there have been some judgments that are rightly accused of formalism, for example Menzies J. in *Dennis Hotels*.[31] However the middle ground, represented by judges such as Walsh J. and Gibbs C.J., is truly a substance approach and so accords with prevailing principles of interpretation. Gibbs C.J. conceded that the name given to a tax by the statute or the form of the legislative provisions are not decisive, and so examined the legal effect of the provisions according to their proper construction.[32] To call this approach formalistic is nonsense. Any broader approach is unconstitutional. And yet, because Barwick C.J. and Mason J. (in particular) have used a more diffuse, practical test, they have succeeded in making Gibbs C.J. appear narrow and legalistic. The categorization of the debate has been to their advantage. The unfortunate fact is that such an approach, by whatever name it is called, now enjoys majority support on the High Court. Imprecise language has therefore contributed to a major extension of s. 90's reach.

2. *Precedent and consistency*

The lack of principle and precise language exhibited in s. 90 cases would be less reprehensible if certainty, coherence and consistency had otherwise been achieved. But they have not. Decisions have been marked by wild fluctuations in approach and individual dogmatism. The one serious attempt, in *Bolton and Another v. Madsen*, to achieve certainty was an inevitable failure; the number of close decisions in the Barwick court demonstrated that nothing had been settled.[33] Little has changed in this respect today.

But it would be a mistake to conclude that the rules of precedent have not been important. In fact, attention to precedent has almost manacled post-war judges as they suffocate under the tide of inconsistent judgments. The definitional approach must bear some responsibility for this impasse. Judges have allowed 'judicial gloss'[34] to supersede guidance from the Consitution itself; they have interpreted and applied the rules and definitions given by previous judges without considering the reason for their formulation or their correctness.

The par example of this incoherence is the decision in and subsequent application of *Dennis Hotels*. The judgments themselves show a fundamental degree of judicial uncertainty. Menzies[35] and Taylor[36] JJ. expressly relied on Dixon J.'s observation in *Parton*[37] that legislation framed precisely as in the instant case

31 (1960) 104 C.L.R. 529, 578-91.

32 (1974) 130 C.L.R. 177, 223-4; (1977) 137 C.L.R. 59, 64.

33 *Western Australia v. Hamersley Iron Pty Ltd (No. 1)* (1969) 120 C.L.R. 42 was decided in accordance with Judiciary Act 1903 (Cth) s. 23(2)(b); *Western Australia v. Chamberlain Industries Pty Ltd* (1970) 121 C.L.R. 1 was decided by 4:3 majority; the regulations in *Dickenson's Arcade Pty Ltd v. Tasmania* (1974) 130 C.L.R. 177 were held invalid in accordance with Judiciary Act 1903 (Cth) s. 23(2)(b); *M. C. Kailis Pty Ltd v. Western Australia* (1974) 130 C.L.R. 245 was decided by 3:2 majority; *Logan Downs Pty Ltd v. Queensland* (1977) 137 C.L.R. 59 was also decided in accordance with Judiciary Act 1903 (Cth) s. 23(2)(b).

34 Coper, M., 'The High Court and Section 90 of the Constitution' (1976) 7 *Federal Law Review* 1, 33.

35 (1960) 104 C.L.R. 529, 591.

36 *Ibid.* 572.

37 (1949) 80 C.L.R. 229, 263.

would not be an excise. Meanwhile, Dixon C. J. was convinced that his previous view had been entirely wrong.[38] Windeyer J. apparently had favoured the narrow interpretation of 'duties of excise' until convinced of the error of his view by the course of argument in the case.[39] Menzies J. conducted a thorough analysis of the purpose of s. 90 and the context of the Constitution, but was swayed by previous decisions to adopt a wider definition.[40] Fullager J. broke radically with the spirit and *rationes* of *Matthews* and *Parton*, and returned to the definition given in *Peterswald*. He derived support for his view from the judgment of McTiernan J. in *Parton*[41], from which McTiernan J. had now resiled.[42]

Nevertheless this judicial version of 'musical chairs' cannot compare with the subsequent history of the case. Putting Fullager J.'s opinion temporarily aside, the other six justices accepted the broader definition of excise duties, and split evenly on its application (*i.e.* either consider the practical effect of the tax or examine only the criterion of liability). One would think that the case could be only slight authority for any general principle. However, the decision has been treated as establishing that a tax imposed as a licence fee for the privilege of conducting a business and calculated on the basis of goods purchased for sale in an earlier period is not an excise[43] — yet only Menzies J. specifically decided on this basis. While it is clear that several judges (notably Barwick C. J. and Mason J.) have considered the case to be wrong, the decisions in *Dickenson's Arcade*,[44] *H. C. Sleigh*[45] and *Evda Nominees*[46] have made the legislation in *Dennis Hotels* an established loophole for the States' commodity taxes. *M. G. Kailis Pty Ltd v. Western Australia*[47] and *Gosford Meats*[48] have been effective in narrowly confining this peculiar survivor of s. 90. While this result can be justified on grounds of fiscal federalism,[49] it confounds rules of precedent, the prevailing wider view of s. 90's purpose and common sense.[50]

It is not surprising that in the very next case after *Dennis Hotels* the High Court attempted to establish some certainty in the case law. Unfortunately, there has rarely been a better example in Australian constitutional law that

> [t]he appearance of certainty and stability in legal rules and principles conceals existing uncertainty. 'We may think the law is the same . . . if we refuse to change the formulae. The identity is verbal only.'[51]

Of course, certainty should not be the sole criterion for evaluating s. 90 decisions, or any other area of the law. Society requires of any legal system both

38 (1960) 104 C.L.R. 529, 539.
39 *Ibid.* 598.
40 *Ibid.* 590.
41 *Ibid.* 555-6, quoting (1949) 80 C.L.R. 229, 264, 265.
42 *Ibid.* 549.
43 (1985) 57 A.L.R. 417, 422 *per* Gibbs C. J.
44 (1974) 130 C.L.R. 177.
45 (1977) 136 C.L.R. 475.
46 (1984) 154 C.L.R. 311.
47 (1974) 130 C.L.R. 245.
48 (1985) 57 A.L.R. 417.
49 (1974) 130 C.L.R. 177, 212 *per* Menzies J., 236 *per* Stephen J., *cf.* (1977) 136 C.L.R. 475, 525-6 *per* Jacobs J.
50 (1985) 57 A.L.R. 417, 429-30 *per* Murphy J.
51 Stone, J., *The Province and Function of Law* (1950) 205, quoting the words of Benjamin Cardozo.

stability and flexibility.[52] This is made possible precisely because the rules of precedent rarely compel an appellate judge to decide in any particular way, but leave the decision to his own 'act of will'.[53] As such it is perhaps more important that decisions exhibit clarity and coherence, rather than certainty and correctness.

But the judcial interpretation of s. 90 does not measure up even to these standards. It is interesting to examine the judgments of particular justices in order to see their individual swings of opinion. In his long career on the High Court, McTiernan J. moved from a position where he favoured giving 'duties of excise' a narrow definition (*Parton*) to the stage of accepting the broad purpose of s. 90 and including consumption taxes within its reach. It is a remarkable change, but paradoxically shows great judicial honesty. Once McTiernan J. felt compelled by authority to accept a broad definition of excise duties, he carried this to its logical conclusion. The development of Menzies J. is a little harder to comprehend. His decision in *Dennis Hotels* is now enshrined as a 'blot on our constitutional jurisprudence',[54] while his contrasting decisions in the receipt duty cases,[55] on substantially similar legislation, can only disillusion students and academics alike. These rapid changes in approach and reasoning are also evident in decisions of the court as a whole. A comparison of the reasoning in *Bolton and Another v. Madsen*[56] with that in *Chamberlain Industries*[57] leaves one amazed that both were decided in the same decade. It also leaves one despairing of any hope for coherence and consistency.

3. *Extra-legal considerations.*

The narrowness of decisions, the diversity of approaches, the selective appeals to *stare decisis*, and the possible effects of a change in High Court personnel should alert any commentator to the obvious fact that not only legal factors are at play in s. 90 cases. As in all areas of the law, value preferences and policy judgments constantly intrude. This is neither surprising nor necessarily undesirable. In discussing the relevance of those extra-legal considerations, Sir Julius Stone has observed:

> we ought to be constantly aware that these considerations of justice, or ideals or values for law, are not extra legal in the sense that the law jobs can be done either with or without reference to them. The choice is not between 'with' or 'without' or between 'legal' or 'extra legal'. It is between doing certain law jobs badly or not so badly . . .[58]

However, this 'open-ended' approach is in conflict with what is seen as the legalistic philosophy of the High Court. In the context of Australian constitutional law, legalism is identified with the 'strict and complete legalism'[59] of Sir

52 Coper, M., 'Interpreting the Constitution: A Handbook for Judges and Commentators' in Blackshield, A.R. (ed.), *op. cit.* 52, 54.

53 Stone, J. *op. cit.* 204.

54 (1983) 151 C.L.R. 599, 639 *per* Murphy J.

55 *Western Australia v. Hamersley Iron Pty Ltd* (1969) 120 C.L.R. 42, 63-8; *Western Australia v. Chamberlain Industries Pty Ltd* (1970) 121 C.L.R. 1, 23-6.

56 (1963) 110 C.L.R. 264.

57 (1970) 121 C.L.R. 1.

58 Stone, J., 'Some Reflections on the Seminar' in Hambly, A.D. and Goldring J.L. (eds), *Australian Lawyers and Social Change* (1976) 376.

59 (1952) 85 C.L.R. xiv

Owen Dixon, according to which emphasis is placed upon disinterestedness and inevitability in the decision making process. One can argue at length whether Dixon C.J. himself strictly practised this approach,[60] but it seems scarcely possible to contend that legalism has dominated High Court methodology as completely as the rhetoric of judges would have us believe. Judicial interpretation of s. 90 bears this out: the discussion (above) of approaches to testing the validity of statutes and the methods of characterization demonstrates the room for judicial manoeuvring. Combined with the flexibility afforded by the system of *stare decisis*, the truth is that judges are intellectually and logically at liberty to choose the decision and reasoning they prefer. Legalism can never be a complete answer.

This is not a facetious attempt to suggest that justices of the High Court engage in a form of judicial 'coin-tossing'. Rather it is an honest effort to recognize the *fact* that judges are in a position where, inevitably, they will be swayed by non-legal preferences and judgments. But because judges generally hold fast, even today, to the image of themselves as disinterested bystanders rather than active players, these policy factors are employed silently;[61] they are the unspoken intuitive premises of arguments, not open to analysis, debate or assessment.

This is the heart of the problem. The utter confusion and obscurity of much case law, including s. 90 decisions, can be laid at the feet of this failure in method. The question is not whether extra-legal factors are or are not being considered: it is undeniable that they are. The critical problem is that they are not articulated. Such articulation need not result in a court as policy-oriented as the United States' Supreme Court, nor need it damage the reputation of the High Court by involving it in political 'slanging matches'. It requires mere intellectual honesty to voice the *relevant* 'political' elements, and to seek facts which would allow for their intelligent evaluation. In the United States, the presentation of extrinsic facts in the so-called 'Brandeis brief'[62] is often important in constitutional cases. These briefs help the Court in making a more informed decision. It is to be deplored that the High Court has only rarely accepted the relevance of social, economic or political facts. It 'has never insisted on procedures designed to produce a maximum factual background for constitutional decision; on the contrary it has encouraged or at least tolerated procedures which ensure decision of constitutional questions in the abstract'.[63] It is not suggested that the Brandeis brief is a panacea or even a measure which should be precisely copied in Australian jurisdictions. However, the underlying aim of a more informed court is admirable and overdue for attention in this country.

The nature of the considerations which could be included in such a brief would vary widely with the legal issue in question. In s. 90 case law, one obviously relevant factor is the economic basis of federalism. There is no question that, in Australia, financial dominance lies with the Commonwealth Government. High

[60] Mason J., 'Closing Reflections' in Hambly, A.D. and Goldring, J. L. (eds), *op. cit.* 385, 388-90.

[61] Evans, G., 'The High Court and the Constitution in a Changing Society' in Hambly, A. D. and Goldring, J. L. (eds), *op. cit.* 13, 50-1. The following discussion draws heavily on Evans' paper.

[62] *Ibid.* 40; Zines, L., *The High Court and the Constitution* (1981) 317.

[63] Sawer, G., *Australian Federalism in the Courts* (1967) 56.

Court decisions on the uniform tax scheme, section 96 grants and duties of excise have significantly contributed to this imbalance. Mathews has written:

> The action of successive High Courts, in extending the definition of excise taxes in such a way as apparently to preclude the States from imposing taxes on consumption, is not only illogical, at variance with the intentions of the framers of the Constitution, and contrary to common English usage and the practice of other federal countries; it is also one of the greatest impediments preventing the achievement of a rational and lasting division of financial powers in the Australian federal system.[64]

The economic consequences of individual decisions demonstrate the truth of this statement. The invalidation of State receipt duties in *Hamersley* and *Chamberlain Industries* deprived the States of $88.4 million for the financial year 1970-1.[65] The invalidation of the pipeline licence fee in *Hematite* destroyed a significant source of revenue for the Victorian Government. Combining the full repayment required to be made to Esso and B.H.P. with the estimated tax yield lost for 1983-4, the Government effectively lost almost $120 million from State revenues.[66] The decision in *Dickenson's Arcade* forced Tasmania to abandon its tobacco consumption tax in order to secure an additional grant from the Commonwealth Government at the Premiers' Conference in June 1974.[67] If only on the basis of these cases, it is nothing less than an abdication of responsibility for any judge to suggest that the Court has no right to consider questions of fiscal responsiblity.[68]

Quite often, judges refer to the effect that a tax's invalidation would have on State budgets, the uncertainty that could be created in federal fiscal relations,[69] and the consequence that States might be driven to raise revenue by unnecessarily inefficient and complex measures.[70] But too often the reference is fleeting. In contrast, it is suggested that, since we must recognize that judges have the choice either to narrow or widen the definition of excise duties, the economic factors cry out for it to be restricted.[71] This does not amount to rewriting the Constitution, nor need it make the Court any more 'political' than it is at present. Indeed, this approach is no more 'political' than that of Mason J.[72] It is, with respect, more candid and sensible.

A consideration of economic theory not only suggests the worthy, alternative aim of greater fiscal independence for the States, but allows us to evaluate the

64 Mathews, R. L. and Jay, W. R. C., *Federal Finance* (1972) 317-8. *Dickenson's Arcade Pty Ltd v. Tasmania* (1974) 130 C.L.R. 177 subsequently validated consumption taxes (in principle).

65 Wade, P. B., 'Recent Developments in Fiscal Federalism in Australia, with Special Reference to Revenue Sharing and Fiscal Equalisation', in Mathews, R. L. (ed.), *Fiscal Federalism: Retrospect and Prospect* (1974) 34, 42.

66 Jolly, R. A., *Constitutional Restraints on the Fiscal Powers of the Australian States*: Submission by the Treasurer of Victoria to the State Fiscal Powers Sub-committee of the Australian Constitutional Convention (1983) 4. This burden on Victoria was reduced because the repayments to Esso and B.H.P. were spread over two years, and the Commonwealth government undertook some responsibility for the repayments. However the Grants Commission took these small grants into account when calculating Victoria's 'relativity' under the tax sharing scheme.

67 Sawer, G., 'The Future of State Taxes: Constitutional Issues' in Mathews, R. L. (ed.), *Fiscal Federalism: Retrospect and Prospect* (1974) 193, 203-4.

68 (1983) 151 C.L.R. 599, 649 *per* Wilson J.

69 (1974) 130 C.L.R. 177, 212 *per* Menzies J.

70 (1977) 137 C.L.R. 59, 85 *per* Murphy J.

71 (1983) 151 C.L.R. 599, 618 *per* Gibbs C. J.

72 *Cf.* Mason J.'s broad approach to s. 90 with his argument for reading s. 91 restrictively: *Seamen's Union of Australia v. Utah Development Co.* (1978) 144 C.L.R. 120, 148-9.

reasoning of judges and to demonstrate how their 'hidden' policy judgments are often ill-expressed and/or ill-informed. As we have seen, Dixon J. argued in *Parton* that a tax upon a commodity at any point in the course of distribution before it reaches the consumer produces the same effect as a tax upon its manufacture or production, and for this reason is an excise.[73] This is an authoritative approach. However, Sawer attacks it as unresearched economic theory.[74] Sawer agrees that the tax may have such an effect, but argues that the effect may equally be felt on an entirely different commodity. If this is the case, it is illogical for the Court to presume (as it does) that the tax will have the suggested effect; the Court should require evidence to be led as to the precise economic facts.

Mathews objects to the same argument of Dixon J. on the basis that it tends to blur the distinction between duties of customs and duties of excise.[75] Both duties are liable to be passed on, and so Dixon J.'s argument would prove ineffective in distinguishing one from the other. Mathews believes, however, that customs duties, excise duties and also sales taxes are all particular classes of taxes and plainly distinguishable. Indeed, Mathews carries his analysis further to produce a logical, economic explanation of ss 90 and 92 of the Constitution:

> Section 90 clearly precluded any State from imposing taxes solely on goods imported from overseas. These would have been customs duties. Section 92 of the Constitution clearly prevented any State from levying taxes solely on goods imported from other States. The logic of the narrow interpretation of excise duties was that no State could impose taxes which fell soley on its own producers. These would be excise duties.[76]

It is no answer to the recommendation that extra-legal factors be allowed to play their part that this would serve only to multiply the courses open to a judge and thus create greater confusion and incoherence. Rather, it is suggested that once the reasons for a judge's choice are made overt, the calculus of factors can still yield sufficient certainty and consistency. The decisions reached will also be more informed and more open to debate. The High Court is the supreme judicial body in Australia and its methods should not stifle public scrutiny by leaving silent the basic assumptions shared by the judges. Insisting on an articulation of all the reasons or motivations for a decision must make for better law.

D. *RECENT DEVELOPMENTS*

The recent cases on s. 90, *Hematite*[77] and *Gosford Meats*,[78] demonstrate the intriguing decisions that can result from a synthesis of all the factors considered in this paper. It is intended to examine both cases in some detail in order to demonstrate how the various elements are employed. Some aspects of the cases have been treated, and so will not be repeated. An attempt will be made, however, to consider how each case as a whole contributes to the total picture of s. 90 interpretation.

[73] If also directly related to goods.
[74] Sawer, G., 'The Future of State Taxes: Constitutional Issues' in Mathews, R. L. (ed.), *Fiscal Federalism: Retrospect and Prospect* (1974) 193, 203-4.
[75] Mathews, R. L. and Jay, W. R. C., *op. cit.* 232.
[76] *Ibid.* 132.
[77] (1983) 151 C.L.R. 599.
[78] (1985) 57 A.L.R. 417.

1. *The case of* Hematite Pty Ltd v. The State of Victoria

This case concerned a challenge to s. 35 of the Pipelines Act 1967 (Vic.) as amended by the Pipelines (Fees) Act 1981 (Vic.). This section imposed a fee for a licence to operate a pipeline. In the case of trunk pipelines, the fee was $10 million *per annum*, while the fee for any other pipeline was $40 *per* kilometre of pipeline. The Act defined a trunk pipeline such that only three pipelines fell within the description. The first two, described as the gas liquids pipeline and the crude oil pipeline, were owned by Hematite and Esso, as joint venturers. The crude oil pipeline carried stabilized crude oil from Longford (Gippsland) to a fractionation plant at Long Island Point (on Westernport Bay). The gas liquids pipeline carried liquefied petroleum gas between the same places. The third pipeline, owned by the Gas and Fuel Corporation of Victoria, carried natural gas from Longford to Melbourne. Before the 1981 amendment, the fee for these pipelines had been a flat $35 *per* kilometre of pipeline. Hematite and Esso challenged the amendment alleging, *inter alia*, that the fee constituted an excise duty. The Court, by a majority, held the fees invalid. The majority comprised Mason, Brennan, Murphy and Deane JJ., while Gibbs C.J. and Wilson J. dissented.

The judgments of Gibbs C.J. and Wilson J. derived explicity from *Bolton and Another v. Madsen*.[79] The judgment of the Chief Justice began with a formulation of the two principles he accepted in s. 90 law: (a) an excise is a tax directly related to goods imposed at some step in their production or distribution before they reach the hands of the consumer (*i.e.* the definition given in *Bolton*); (b) the question whether a duty is one of excise must be determined by having regard to the legal effect of the taxing statute and its proper construction.[80] Wilson J. agreed with both principles.[81] Therefore, they both refused to concede that the receipt duty cases, *Dickenson's Arcade* or *Logan Downs* were authorities preventing them from using the narrower application of the definition.

However, there are three significant differences between the two judgments, which demonstrate contrasting judicial methods. Firstly, Gibbs C.J. admitted that the grave distress caused to the States by s. 90 interpretation was a good reason for accepting Kitto J.'s criterion of liability rather than considering the real or practical effect of the legislation.[82] This was an honest recognition that, in the choice between two views that are both open on the authorities, extra-legal factors are helpful in tipping the balance one way. In contrast, Wilson J. disclaimed all responsibility for determining questions of fiscal federalism,[83] yet his Honour did refer to the concern that an extension of 'duties of excise' would seriously diminish State taxation powers.[84]

Secondly, Gibbs C.J. supported the narrower purpose of s. 90, Commonwealth control of tariff policy, thereby rejecting Dixon J.'s view in *Matthews*.[85]

[79] (1983) 151 C.L.R. 599, 623 *per* Gibbs C. J., 643-4 *per* Wilson J.
[80] *Ibid.* 615.
[81] *Ibid.* 643, 648.
[82] *Ibid.* 618.
[83] *Ibid.* 649.
[84] *Ibid.* 650.
[85] *Ibid.* 616-7.

It is interesting to note that the language of Gibbs C.J. suggests that Dixon J.'s approach had been expanded by later judges.[86] Wilson J., however, as previously noted, 'find[s] little assistance, when required to apply s. 90, in resort to questions of assumed constitutional purpose'.[87] While this may amount to an assertion that no one particular purpose is clear from the words of the section it is rather strange to ignore the purposive element in s. 90. One would think that the provision must reflect some purpose.

Thirdly, when it came to assessing the essential problem of whether the tax is directly related to the goods, Gibbs C.J. decided that the fee had no natural nor necessary relation to the quantity or value of hydrocarbons.[88] This was an adoption of the words of Dixon J. in *Matthews*[89] which Gibbs C.J. considered the Court in *Bolton* had impliedly approved. Wilson J. was more strict on this issue. He held that a closer relationship to quantity or value is an essential feature of an excise duty.[90]

It is suggested that these differences demonstrate the superior method and case analysis of Gibbs C.J. He was willing to examine factors other than the mere words of s. 90. Curiously, however, his judgment disappoints expectations. While he recognized the narrower purpose of s. 90, his adoption of the broad definition of excise duties (albeit with a narrow application) would appear less likely to achieve the desired result than the reasoning of Fullager J. in *Dennis Hotels*. The approach of Gibbs C.J. would also be more likely to trespass unnecessarily on State taxing powers.[91] There are two possible reasons for this unwillingness or inability to follow through his premise logically. First, Gibbs C.J. often demonstrated his respect for precedent, to the extent that even when he disagreed with a decision, he was prepared to follow the letter of it (while, admittedly, restricting its spirit).[92] As such, he would not have considered it open to him to adopt the reasoning of Fullager J. Secondly, while Gibbs C.J. recognized the narrower purpose of s. 90, he appeared to consider it impossible to marry any definition of excise duties to this purpose (or any purpose) and as such implicitly rejected a purposive approach.[93]

The majority judgments vary in their reasoning in some important respects. We have previously examined, in brief, the very broad approach of Mason J. He defined an excise as a tax which imposes a burden on production or manufacture, and recognized that the tax must have some relation to the goods.[94] However, he dissolved these two issues into one by effectively using the same test for each. A

[86] *Ibid.* 617 ('and still less clear').
[87] *Ibid.* 649.
[88] *Ibid.* 623.
[89] (1938) 60 C.L.R. 263, 303.
[90] (1983) 151 C.L.R. 599, 647.
[91] Hanks, P., *op. cit.* 509.
[92] See the judgments of Gibbs C. J. on s. 51 (xx) and s. 51 (xxix).
[93] Gibbs, C. J. at one stage takes a pure definitional approach: 'One must first define "excise", and then ask whether the tax imposed by the State statute comes within that definition': (1983) 151 C.L.R. 599, 618.
[94] Mason J. has, however, suggested that the relationship between the tax and the goods is more easily perceived where the tax is levied at a time when the goods are in the course of production than in cases where the tax is levied at the point of distribution or sale of the goods: (1977) 137 C.L.R. 59, 77.

tax on distribution or sale of goods places a burden on the *process* of production 'because it enters into the price of the goods'.[95] Similarly, the tax is upon or in respect of the goods, if it 'enters into the cost of the goods and is therefore reflected in the prices at which the goods are subsequently sold'.[96] One need not stress how massive an erosion of *Bolton* this represents. Mason J. found support for his analysis in a wide view of s. 90's purpose.[97] There is little doubt that this is an overt, political stance.

Brennan J. achieved a similar result by omitting any reference to the requirement of a direct relationship between the goods and the tax in his definition of excise duties.[98] Apparently, Brennan J. considers an excise to be a tax on production rather than a tax on the goods produced. Unfortunately, recent authorities do display a tendency to take this approach. Brennan J. in fact used Kitto J.'s criterion analysis, but admitted a preference[99] for the broader approach, *i.e.* a consideration of the tax's practical effect on the production and distribution of goods.

Murphy J.'s interpretation of s. 90 has already been canvassed, and his judgment in this case added little that was new. However, two elements of his method require attention. First, he openly acknowledged his premise that s. 90 should be read narrowly to avoid unintended adverse consequences to the States.[1] Interestingly, he noted that Stephen and Mason JJ. had reasoned similarly with respect to s. 91 of the Constitution.[2] Secondly, while Murphy J. took the view that the Court must look at the substance of the tax, he avoided the impression that he was examining the tax's indirect effect or motive under the guise of substance.

Deane J.'s judgment began with a novel view of the purpose of s. 90. That provision

> was a necessary ingredient of any acceptable scheme for achieving the abolition of internal customs barriers . . . 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 . . .[3]

He also referred to the desire for unrestricted access to goods and markets.[4] However, Deane J. drew no resulting definition from this approach. Indeed his judgment is interesting for the doubt it casts on what his ultimate view of s. 90 will be. He applied similar principles to those of Mason and Brennan JJ. However his emphasis on excise duties as taxes on manufacture or production,[5] combined with his reservation on the relevance of Murphy J.'s factor of discrimination against locally produced goods,[6] left open the chance that Deane J. may take a narrow view of excise duties.

95 (1983) 151 C.L.R. 599, 632.
96 *Ibid.*
97 *Ibid.* 631.
98 *Ibid.* 657.
99 *Ibid.* 659.
1 *Ibid.* 638.
2 *Ibid.*
3 *Ibid.* 661-2.
4 *Ibid.* 660.
5 *Ibid.* 665.
6 *Ibid.*

One more issue in this case is of potentially great importance: the observations of four justices on the ability of the federal government to use s. 109 to override State tax laws. Previous authorities suggest that s. 51 (ii) gives power to make laws with respect to taxation for the purposes of the Commonwealth *only*.[7] However in *Hematite*, Mason[8] and Murphy JJ.[9] explicitly supported the validity of a wider use of the taxation power, while Gibbs C.J.[10] and Deane J.[11] apparently agreed. If this issue arose for decision, and a majority of the High Court approved the power, the consequences could not be over-estimated.[12] In one blow it would threaten s. 90 case law with irrelevancy.

2. *The case of* Gosford Meats Pty Ltd v. State of New South Wales

In this case the six members of the Court in *Hematite* were joined by Dawson J., who had not sat in the earlier case because he had advised the Victorian Government, as Solicitor-General, on the validity of the tax there challenged. Because the bench was almost identical and because the case raised some of the same questions as in *Hematite*, the analysis of this case will be briefer.

Gosford Meats Pty Ltd sought a declaration that s. 11C of the Meat Industry Act 1978 (N.S.W.) and Regulation 41 of the Meat Industry (Licensing) Regulations 1980 (N.S.W.) were invalid. The Act provided for the regulation and control of the meat industry in N.S.W. It prohibited the slaughtering of animals without an annual licence, for which the fee was a prescribed amount *per* animal slaughtered in the 12 months preceding the period of the licence. The scheme was thus clearly modelled on the legislation held valid in *Dennis Hotels*. The Court held that the licence fee was invalid as an excise duty. It split in an identical manner to *Hematite*, with Dawson J. joining the minority.

The three minority judges relied upon the authority of *Dennis Hotels*,[13] made unimpeachable on its facts by *Evda Nominees*, and held that the fee was an exaction for the privilege of operating an abattoir. In response to the argument that *Dennis Hotels* could not be authority when the legislation provided for the fee to be calculated according to the value of the goods *produced* or *manufactured* in a previous period,[14] the minority refused to accept the distinction.[15] This involved a rejection of Mason J.'s view that the relationship between the tax and the goods is more easily perceived when the tax is levied at the time of production. Gibbs C.J. quoted back to Mason J. his own views:

[7] *Victoria v. The Commonwealth* (1957) 99 C.L.R. 575, 614 *per* Dixon C. J.; *West v. Commissioner of Taxation* (1937) 56 C.L.R. 657, 686 *per* Evatt J.
[8] (1983) 151 C.L.R. 599, 631-2.
[9] *Ibid.* 637, 639.
[10] *Ibid.* 617.
[11] *Ibid.* 660-1.
[12] *Fiscal Powers Sub-committee Report to Standing Committee of the Australian Constitutional Convention* (July 1984) 35-7.
[13] (1985) 57 A.L.R. 417, 423 *per* Gibbs C. J., 438 *per* Wilson J., 453 *per* Dawson J.
[14] *M. G. Kailis (1962) Pty Ltd v. The State of Western Australia and Another* (1974) 130 C.L.R. 245, 265-6 *per* Mason J.
[15] (1985) 57 A.L.R. 417, 422-3 *per* Gibbs C. J., 436-7 *per* Wilson J., 453 *per* Dawson J.

> In other words, a tax on sale or distribution is an excise because it places a burden on production.[16] If a licence fee quantified by reference to past sales or purchases of goods is not a tax upon the sale or purchase, there seems to be no reason for saying that a licence fee quantified by reference to past production is a tax upon production. Exactly the same reasoning applies in both cases . . .[17]

The majority judges obviously approached *Dennis Hotels* quite differently, and restricted it in line with Mason J's argument. (Murphy J. rested his decision on different grounds.) Mason, Deane and Brennan JJ. all suggested that had the plaintiff in *Dennis Hotels* been a manufacturer or producer, as here, Fullager J. would certainly have decided the other way, thereby swinging the decision.[18] Undoubtedly this is true, but it is ironic to see these justices embrace Fullager J., whose view of s. 90 could not differ further from that of Mason J. At least Murphy J. was stronger in his criticism of *Dennis Hotels* and rejected it as authority for any general proposition.[19] The saga of that decision is thus far from finished.

Three other aspects of the case are important. Firstly, both Gibbs C.J.[20] and Dawson J.[21] strongly criticized the ever broadening definition of excise duties given by Mason J., particularly his view that a tax is sufficiently related to goods if it has a tendency to enter into the price of the goods and so affect their manufacture or production. As judges in the past have argued, this does not distinguish excise duties from other expenses of production which may affect the price of a product, for example land tax, payroll tax and municipal rates levied upon a producer of goods. Mason J. must defend his view by demonstrating that it does not lead to this ludicrous conclusion.

The second aspect was the resurrection of the debate between substance and form. The 'practical operation' approach appeared to emerge victorious from *Hematite*, but the argument is clearly far from resolved. In powerful judgments, both Wilson[22] and Dawson JJ.[23] argued that the substance/form debate had been incorrectly posed. The content of this argument has previously been covered. Wilson J. quoted[24] the words of Walsh J. in *Chamberlain Industries*, and Dawson J. attacked the penumbra of factors introduced by Barwick C.J. on the ground that they focused attention on the forbidden *indirect* effects of the tax.[25] However, Brennan J. mounted his own attack on the criterion of liability.[26] Admitting that the tax was correctly described as a fee for an abattoir licence, he noted that liability for this fee was contingent not only on renewing the licence but on the slaughtering of animals (a step in production) in a previous period. Therefore, the slaughtering of animals created a contingent tax liability and, as such, was one of the two criteria of liability effectively selected by the statute. In this way, even if you take the Kitto J. approach, the tax is still an excise duty.

16 Gibbs C. J. quotes Mason J. in *Hematite Pty Ltd v. Victoria* (1983) 151 C.L.R. 599, 632.
17 (1985) 57 A.L.R. 417, 423.
18 *Ibid.* 426 *per* Mason and Deane JJ., 446 *per* Brennan J.
19 *Ibid.* 429-30.
20 *Ibid.* 424.
21 *Ibid.* 450-1.
22 *Ibid.* 438-9.
23 *Ibid.* 450-1.
24 *Ibid.* 439.
25 *Ibid.* 450.
26 *Ibid.* 443-4.

This is superficially a clever argument, but its plausibility depends on the use of the word 'criterion'. By adopting the same word as Kitto J., Brennan J. purported to take a narrow view of the statute, but actually took as broad a view as Mason J. He looked at the facts which lay behind the licence fee, and elevated them to the same status as the criterion actually selected by the statute. This demonstrates that Brennan J. likes to appear to use a narrow approach in order to reach the broad results he prefers.[27]

The final important aspect of this case was the decision of Dawson J., his first on s. 90. Some of his opinions have been mentioned already. His judgment began in a most promising manner, but concluded by adopting relatively dogmatic positions. While admitting that *Bolton and Another v. Madsen* had been criticized, and was far from an ideal position, he sought to cling to its unanimity and the 'sure path which was laid down'.[28] Dawson J. also supported the logic of the principle for which *Dennis Hotels* stands; this contrasts with Gibbs C.J. who impliedly admits the weaknesses in *Dennis Hotels*, but applied it according to the rules of precedent.[29] The opinion of Dawson J. therefore seems to be the most restrictive on the High Court at present.

E. *OPTIONS FOR THE FUTURE*

It is easy to conclude that s. 90 case law is an incomprehensible mess; such an opinion, however, does not advance analysis. Despite the varying approaches and definitions adopted by judges, it is possible to isolate trends in the decisions. The cases began with a restrictive interpretation of excise duties. This was progressively expanded to the highwater mark of *Parton*. In the cases of *Dennis Hotels* and *Bolton and Another v. Madsen*, there was a retreat from the spirit of *Parton*. This approach was vigorously attacked by Barwick C.J., and with the help of Mason J's reasoning, the authorities reached their greatest extension in *Hematite*. The decision in *Gosford Meats* also signalled that the restrictive interpretation of the early 1960s would not be tolerated. However, both *Hematite* and *Gosford* demonstrated a more critical analysis of opposing views, and a willingness to examine broader issues, including economic and purposive considerations.

Yet, it is difficult to imagine the case law reaching a satisfactory and rational position on the interpretation of excise duties. This author prefers the approach of Murphy J. above all others. It has the merits of historical accuracy and relative certainty of application; it provides the basis for a practical arrangement of fiscal federalism. But it is by no means the perfect answer. Murphy J. placed too much emphasis upon s. 93 of the Constitution, effectively treating its description of excise duties as a complete definition.[30] No principle of statutory interpretation supports this approach. Secondly, Murphy J. perhaps erred in defining the term 'duties of customs and excise' from the standpoint of a State.[31] By doing this, he

[27] *Hematite Pty Ltd v. Victoria* (1983) 151 C.L.R. 599; *Actors and Announcers Equity Association of Australia and Others v. Fontana Films Pty Ltd* (1982) 150 C.L.R. 169.
[28] (1985) 57 A.L.R. 417, 450.
[29] *Ibid.* 422.
[30] (1977) 136 C.L.R. 475, 526.
[31] (1983) 151 C.L.R. 599, 638.

was able to adopt his unique discrimination test and hold that an excise duty is a tax that burdens production or manufacture within a State. But his initial standpoint ignored the fact that the duties mentioned in s. 90 are *Commonwealth* duties, the power to confer which has already been provided by s. 51(ii). Section 90 makes these Commonwealth duties exclusive; it does not mention State duties.

Compounding these problems of reasoning, there is the practical problem of finding present High Court judges who would agree with Murphy J. As in several areas of the law, Murphy J. constituted a minority of one. There was hope after the decision in *Hematite* that Deane J. would adopt a similar approach; while *Gosford Meats* (a production case) made this unlikely, it is possible that the issue may arise soon and require Deane J. to decide upon his course. The other judges who have adopted a restrictive approach to s. 90 show little sign of taking up Murphy J.'s unique theory.[32] Thus, it must be conceded that it is unlikely to become authoritative.

Of course, judicial interpretation is not the only avenue for improvement of the law. Constitutional amendment of s. 90 has been constantly suggested. The 1929 Royal Commission recommended, in vain, a return to the original 1891 draft Bill.[33] The latest suggestion is in the form of the Fiscal Powers Sub-committee Report to the Australian Constitutional Convention in which it is recommended that the States be allowed to impose duties of excise by a removal of the words 'and of excise' from s. 90.[34] The 1985 Constitutional Convention session in Brisbane supported this recommendation.[35] If this amendment were carried, and there is no need to labour the obstacles that have made constitutional amendment a major problem in this country, it would mean that the power to impose excise duties would solely be regulated by s. 51(ii) of the Constitution. If this were the case, the *obiter* in *Hematite* concerning the possible role of s. 109 in this area would assume great importance.

Because of the barriers to this specific constitutional amendment, it is indeed unfortunate that the more general interchange of powers proposal failed to pass the electors in 1985. The problem of excise duties was a prime target for attention under such a scheme. At the time of the Bill's introduction into federal Parliament, the Attorney-General said:

> Under the Constitution Alteration (Interchange of Powers) Bill . . . it would become possible for the Commonwealth Parliament to confer legislative power on State Parliaments on matters now within the exclusive competence of the Commonwealth.[36]

The Fiscal Powers Sub-committee Report similarly recommended this option until the more permanent change of an amendment to s. 90 could be achieved.[37] It is to be hoped that the interchange of powers proposal will receive greater electoral acceptance if put forward again.

32 This may also be due to the fact that any judge who accepted Murphy J.'s theory on s. 90's operation may feel logically compelled to adopt Murphy J.'s overall view of Chapter 4 of the Constitution, including s. 92.

33 *The Report of the Royal Commission on the Constitution* (1929) 260.

34 *Op. cit.* 23.

35 *Proceedings of the Australian Constitutional Convention. Brisbane.* (1985) 102.

36 *Press Release by the Attorney-General* (Senator Gareth Evans) 8 August 1983, No. 108.

37 *Op. cit.* 23.

No apology is made for the many areas that are covered in this essay. It is the author's basic contention that s. 90 (or any provision of the Constitution) must be understood in context. This context includes *at least* the framework of the Constitution as a whole, its history, the manner in which it is interpreted, and the effects that it has in the Australian community. Only when all these factors are examined can we be confident of intelligent change. Unfortunately for students, academics and society at large, there are few signs that such change will occur in s. 90 law, predominantly because the correct approach has not been adopted by the High Court. One can only hope that this major fault is soon remedied.