SECTION 90 — NINETY YEARS ON

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Section 90 of the Commonwealth Constitution provides, inter alia, that:

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

With the possible exception of s 92,[1] no constitutional provision has created as much division in the High Court as has s 90. The difficulty surrounding the interpretation of s 92 was alleviated by the unanimous decision in *Cole v Whitfield*,[2] from which emerged a clear principle to assist the Court in future decisions. The problems besetting the Court in the interpretation of s 90 have yet to be resolved.

The tension which exists in interpreting the concept of a duty of "excise" is that in making such a duty exclusive to the Commonwealth, s 90 removes from the States a potentially large revenue base for meeting their numerous commitments without having to turn to the Commonwealth for assistance. The width of interpretation of the phrase "duties of excise" will, therefore, determine the extent to which the States are kept out of this field of taxation. The political and economic sensitivity that underlies the interpretation of the term has contributed to the lack of consistency in the numerous decisions of the High Court in this area and to the development of artificial distinctions in the absence of clear principles.

Before the decision in *Philip Morris Limited v The Commissioner of Business Franchises (Victoria)*[3] *("Philip Morris")* was handed down, there was considerable speculation as to the direction the Court would take in interpreting the concept of "excise". There was some hope that it would deliver a unanimous judgment drawing from ideas developed in *Cole v Whitfield* regarding State and Commonwealth fiscal power. In that case, the importance of economic unity within the Commonwealth was realised by an interpretation of s 92 which protected trade between the States from protectionist and discriminatory burdens. Unfortunately, the outcome of *Philip Morris* was rather unsatisfactory. No coherent principle was developed which would aid the Court in subsequent cases and remove previous uncertainty. The various judgments in *Philip Morris* exhibit a number of underlying political

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1 Section 92 reads: "On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free ...".

2 (1988) 165 CLR 360.

3 (1989) 167 CLR 399.

and economic considerations also present in earlier decisions involving the interpretation of s 90.

This paper will endeavour to explore the joint judgment of Toohey and Gaudron JJ in *Philip Morris* which moves some way towards providing a satisfactory interpretation of the term "duties of excise" that will not only remove the need for drawing artificial distinctions, but create some certainty of approach. That interpretation appears to be concerned with preventing the States from levying only those duties which affect goods by virtue of their being produced or manufactured in Australia. Only those types of duties will interfere with the Commonwealth's ability to determine a trade and tariff policy for Australia as a whole and should, therefore, be interpreted as being "excise duties". If the States are left with the ability to levy taxes upon goods which do not produce this effect, the result will be to increase the States' revenue base and decrease their dependence upon the Commonwealth.

Before examining the virtues and weaknesses in the principle that appears to emerge from the joint judgment of Toohey and Gaudron JJ, it is necessary first to consider the background to the drafting of s 90 and its volatile judicial history ever since.

THE DRAFTING OF SECTION 90

Before Federation each colony was free to impose duties of excise upon goods produced or manufactured within that colony and duties of customs on goods imported from other colonies or from overseas in order to protect its own produce against competition from the produce of other colonies.[4] Victoria adopted a particularly staunch protectionist stance, especially in relation to its agricultural and pastoral industries, bringing it into direct conflict with the free trade interests of New South Wales.

The burden caused to trading and commercial activities among the Australian colonies by differing colonial imposts was an important impetus to the establishment of Conventions to draft a Commonwealth Constitution. Undercurrents of tension between the free trade and protectionist theories were present at the Convention Debates, but it was readily decided by most of the Delegates that trade and commerce *between the States* should be free so as to ensure equality of trade:

> The expression "free trade" commonly signified in the nineteenth century, as it does today, an absence of protectionism.... Section 92 precluded the imposition of protectionist burdens: not only interstate border customs duties but also burdens, whether fiscal or non-fiscal, which discriminated against interstate trade and commerce. That was the historical object of s. 92 and the emphasis of the text of s. 92 ensured that it was appropriate to attain it.[5]

The position regarding trade and commerce *with overseas countries* was a matter of significant debate. It was eventually resolved to leave the decision as to the policy to be adopted, whether it be protectionist or free-trade, to the federal Parliament. Section 90 was therefore drafted so as to give the Commonwealth Parliament exclusive power with respect to laws imposing

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4 B Opeskin, "Section 90 of the Constitution and the Problem of Precedent" (1986) 16 *F L Rev* 170.

5 *Cole v Whitfield* (1988) 165 CLR 360, 392-393.

duties of customs or of excise or granting of bounties. When on 8 October 1901, the Commonwealth imposed uniform duties of customs, the new States were henceforth precluded from levying either customs or excise duties.

EARLY JUDICIAL APPROACHES

The term "duties of excise" has been the subject of over thirty principal cases argued before the High Court. In contrast, the accompanying phrase in s 90 —"duties of customs" — has produced very little difficulty. The earliest decision in which the High Court was invited to consider the meaning of a "duty of excise" was *Peterswald v Bartley*.[6] The Court, constituted by three of the Founding Fathers,[7] adopted a "definitional" approach, asking "what is a duty of excise?" as opposed to the "purposive" approach taken by more recent judges,[8] who ask why the power of levying such duties is made exclusive to the Commonwealth Parliament. It was held that a flat-rate licence fee imposed upon brewers of beer was not a duty of excise.The Court said that to constitute a duty of excise the fee must be:

> a duty ... imposed upon goods either in relation to quantity or value when produced or manufactured and not in the sense of a direct or personal tax.[9]

The Court treated "duties of excise" as being "in every respect analogous"[10] to "duties of customs" and applied the narrow interpretation of the concept provided by Quick and Garran, who had said that duties of excise were "taxes on the production and manufacture of articles which could not be taxed through the customs house".[11] Thus, a colony could place a reduced duty on its own produce to protect that particular industry. The authors note that the meaning of the term in England had expanded to include a considerable range of occupations and activities (for example refreshment-house keepers), but that in Australia the expression was regarded in the narrower or primary sense set out above. Quick and Garran believed that it was never intended that the concept should be regarded in the wide English sense.[12] Subsequent decisions have modified many aspects of the *Peterswald v Bartley*[13] definition and, in so doing, have created the confusion that has abounded in the s 90 decisions to the present time.[14]

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6 (1904) 1 CLR 497.

7 Griffith CJ, Barton and O'Connor JJ.

8 For example, the judgments in *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599.

9 (1904) 1 CLR 497, 509.

10 (1904) 1 CLR 497,506.

11 J Quick and R R Garran, *Annotated Constitution of the Australian Commonwealth* (1901) 837.

12 *Ibid* 837-838.

13 (1904) 1 CLR 497.

14 Only some aspects of the major cases will be dealt with here. A comprehensive discussion of these and other cases and the developments in the law relating to s 90 can be found in the articles written by C Caleo, "Section 90 And Excise Duties: A Crisis of Interpretation" (1987) 16 *MULR* 296; B Opeskin, *supra* n 4; M Coper, "The High Court and Section 90 of the Constitution" (1976) *F L Rev* 1.

THE STRUGGLE FOR A PRINCIPLE

The first moves away from the definition in *Peterswald v Bartley*[15] occurred in Commonwealth and *Commonwealth Oil Refineries v South Australia* ("the *Petrol* case")[16] and in *John Fairfax & Sons Ltd v New South Wales*,[17] where the Court found that sales taxes on the particular commodities involved in those cases were duties of excise because those taxes had a sufficient connection with their production or manufacture. The next significant development was the removal of the requirement for a direct relationship between the tax and the quantity or value of the goods. This occurred in *Matthews v The Chicory Marketing Board (Vic)*, where Dixon J stated:

> there is no ground for restricting the application of the word [i.e. excise] to duties calculated directly on the quantity or value of the goods.[18]

In *Matthews* a State levy of one pound for every half acre of land planted with chicory was imposed on chicory producers. Although no relationship between the levy and the quantity or value of the amount of chicory actually produced could be readily detected, the majority held that there was a natural, although not a necessary relation, between the levy and the eventual quantity produced. This was taken further in *Hematite Petroleum* by Mason, Brennan and Murphy JJ, who regarded it as sufficient that the tax was imposed on the goods at any step in the production, manufacture or distribution even if no natural relation to the quantity or value of the goods could be found expressly in the Act itself and by Deane J who found that such a relationship was not decisive.[19]

In addition, the definition has been extended beyond a tax on production or manufacture to embrace taxes upon distribution and sale.[20] The most significant decision in this respect is *Parton v Milk Board*,[21] where it was held that a tax imposed upon persons other than the producers of milk was nevertheless an excise. Justice Dixon stated that an excise could be constituted by a "tax upon a commodity at any point in the course of distribution before it reaches the consumer" because it "produces the same effect as a tax upon its manufacture or production".[22] While this is also true of a tax upon consumption, His Honour stopped short of extending the concept to its logical limit, adhering to an earlier Privy Council decision.[23] The decision in *Bolton v Madsen*[24] accepted the broader definition from *Parton* — that an excise is a tax directly related to goods and imposed upon them at some step in their

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15 (1904) 1 CLR 497.
16 (1926) 38 CLR 408.
17 (1927) 39 CLR 139.
18 (1938) 60 CLR 263, 302-303. See also *Bolton v Madsen* (1963) 110 CLR 264.
19 *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599, 632-33, 634 *per* Mason J; 640 *per* Murphy J; 656-57 *per* Brennan J; 668-69 *per* Deane J.
20 For example, *Commonwealth and Commonwealth Oil Refineries v South Australia* (1926) 38 CLR 408; *Parton v Milk Board (Vic)* (1949) 80 CLR 229; cf Fullagar J in *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529, 557.
21 (1949) 80 CLR 229.
22 *Ibid* 260.
23 *Atlantic Smoke Shops Ltd v Conlon* [1943] AC 550. See also *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177.
24 (1963) 110 CLR 264 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ).

production, manufacture, distribution or sale before they reach the consumer.[25] While the acceptance of this definition is uncontroversial, the same cannot be said of the formalistic principle adopted in applying that broad definition. The Court said that it was necessary to look for the "criterion of liability" of the tax to determine if it constituted a duty of excise. If the tax was not directly upon or affecting the goods, it would not be an excise.[26] On the facts before the Court in this case, the "criterion of liability" of the tax was the use of the vehicle to carry the goods and not the goods themselves. Thus, the tax was not a duty of excise.

The "criterion of liability" test emerged in the earlier decision of *Dennis Hotels Pty Ltd v Victoria,*[27] a case which has been followed despite the differing views of the majority judges.[28] At issue was the validity of a victualler's annual licence fee which was calculated by reference to the amount of liquor purchased for sale during a period preceding the currency of the licence. It was held that the fee was not a duty of excise. Rather, it was a fee for the privilege of carrying on the business of a liquor retailer. In addition, a fee was imposed upon the victualler's temporary licence, calculated by reference to liquor purchased for sale under the licence. This latter fee was held to constitute an excise. Justice Kitto said that to constitute a duty of excise, the criterion of liability of the tax must be the taking of a step in the process of producing or distributing goods.[29] This statement was referred to with apparent approval in *Bolton v Madsen*.[30] The other judges in *Dennis Hotels*[31] did not expressly refer to the "criterion of liability" concept, although the judgment of Menzies J indicated an implicit acceptance of its relevance.

As a consequence of the *Dennis Hotels* decision, it was inevitable that the States would impose licence fees which were to be calculated by reference to the handling of goods in a previous period so as to ensure their validity. The technique so adopted became known as the "backdating device", the use of which was confirmed in the later decisions of *Dickenson's Arcade v Tasmania*[32] and *H C Sleigh Ltd v South Australia*[33] (hereinafter referred to as "the *franchise* cases"). It was inevitable that a division of judicial opinion would emerge as a result of the development of this essentially legalistic concept. In *Western Australia v Hamersley Iron Pty Ltd [No 1],*[34] the relevant provision was s 101A of the Stamp Act (WA). This required that, within thirty one days of payment being received for goods supplied or services rendered, a receipt be issued by the supplier of such goods or services to the person making such payment. The rate of the duty on each receipt was one cent on every ten dollars received. Despite the "criterion of liability" of the duty being the receipt instrument itself, it was held that the duty was payable "in effect" upon the sale

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25 *Ibid* 271.
26 *Id.*
27 (1960) 104 CLR 529.
28 The majority consisted of Fullagar, Kitto, Taylor and Menzies JJ. Dixon CJ, McTiernan and Windeyer JJ formed the minority.
29 (1960) 104 CLR 529, 560.
30 (1963) 110 CLR 264, 273.
31 (1960) 104 CLR 529.
32 (1974) 130 CLR 177.
33 (1977) 136 CLR 475.
34 (1969) 120 CLR 42. The Court divided evenly.

of the goods.[35] The majority was concerned with the "real effect" or the "substance" of the operation of the tax and found that, in the circumstances, the requisite relationship to the goods existed.

In *Western Australia v Chamberlain Industries Pty Ltd*,[36] the High Court considered ss 99A and 99B of the Stamp Act 1921 (WA). These required a trader to submit periodic statements of money received to the revenue authorities if that trader did not wish to issue a duly stamped receipt as considered in *Hamersley Iron*. As in *Hamersley Iron*, the "criterion of liability" was the receipt of money for the goods. This was the basis upon which the minority held that the tax was not a duty of excise.[37] The majority again considered the actual operation of the tax in question as opposed to the "criterion of liability". Chief Justice Barwick expressly rejected the "criterion of liability" test in favour of looking at the practical or substantial operation of the law to determine how the Act was intended to and did, in fact, operate. This involved examining a number of factors, not merely the Act itself.[38] On this occasion Menzies J formed part of the majority, distinguishing the present case from *Hamersley Iron* on the basis that the tax in the earlier case was imposed upon the making of the receipt document, whereas the tax here was clearly imposed upon the sale transaction itself.[39]

The division of opinion that has prevailed in the excise duty cases goes beyond a mere tension between legalism and substance. It would seem that many judgments in recent cases are influenced by the particular purpose that a particular judge believes is served by the inclusion of the phrase "duties of excise" in s 90. It is arguable that the disparity of views revealed in the earlier cases may also have been somewhat influenced by the judges' particular opinions, unconscious or otherwise, as to the purpose of making excise exclusive to the Commonwealth. Against this, however, is the equally valid argument that some judges who were particular adherents of legalism and form would be likely to adopt a formal approach whatever their views as to the purpose of a constitutional provision.

THE PURPOSE OF SECTION 90

It is submitted that those judges who adopt a broad view of the purpose of s 90 have been inclined to examine the practical or substantial operation of the law,[40] whereas those taking the narrower view have persisted with a more legalistic approach in the attempt to reduce the Commonwealth's exclusive power over the taxation of commodities and to protect the position of the States.[41] To assess the validity of the differing views on the purpose served by making duties of excise exclusive to the Commonwealth, it is worthwhile to examine s 90 itself. The approaches of various justices will then be considered.

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35 *Ibid* 56 *per* Barwick CJ.
36 (1970) 121 CLR 42.
37 Kitto, McTiernan and Walsh JJ.
38 (1970) 121 CLR 1, 15.
39 *Ibid* 24-25.
40 For example, Barwick CJ in *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1.
41 For example, Gibbs CJ in *Hematite Petroleum* (1983) 151 CLR 609.

Statutory interpretation and intentions of the Founding Fathers

The basic tenets of statutory interpretation seem to indicate that the words "customs" and "bounties", which are also present in s 90, must have some relationship to the word "excise". Bounties are, essentially, grants on the production or export of goods produced or manufactured in a country and duties of customs are duties imposed on the importing or exporting of goods from a country. The *Macquarie Dictionary* defines "excise" as a "duty on the production or manufacture of commodities in a country." Fowler defines the term as a "duty charged on certain *home products,* especially alcoholic liquors, before they can be sold". All are made the exclusive domain of the Commonwealth. Thus, the inclusion of the term "excise" in the same section could be seen as contributing to the power of the Commonwealth over tariff and trade policy free of interference from incompatible and diverse State imposts.

Support for confining the meaning of the phrase to local or home production can be gathered from other surrounding constitutional provisions. The context of the term in s 90 itself and the provision in s 93 for payments to be made to the States for five years after the imposition of uniform duties of customs in respect of "...duties of excise paid on goods produced or manufactured in a State..." indicate that the concept has a strong relationship to home production. The Convention Debates provide little assistance as to whether the Founding Fathers actually intended the term to convey this narrower meaning.[42] Unfortunately, the Delegates did not seem to have addressed the reason for needing to include excise duties within s 90.

The wide view

In *The Commonwealth and Commonwealth Oil Refineries Ltd v South Australia,*[43] Rich J stated that s 90 gave exclusive power to the Commonwealth Parliament over all indirect taxation by compressing every variety thereof under the term "duties of excise". This view is an example of the very broad position that some judges have adopted when considering the object of s 90.[44] For example, in *Parton v Milk Board* Dixon J said that the purpose of s 90 was to give the Commonwealth Parliament:

> a real control over the taxation of commodities and to ensure that the execution of whatever policy it adopted should not be hampered or defeated by State action.[45]

As Caleo[46] correctly points out, it is likely that Dixon J was, in fact, implying only that the Commonwealth should have power over commodity taxes in order to achieve the narrower purpose of tariff and trade control.[47] Caleo makes the point that His Honour's judgments do not appear to support an adoption of the wider view of s 90 granting the Commonwealth national economic control. However, as will later be discussed, His Honour appears to

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42 C Caleo, *supra* n 14, 307.

43 (1926) 38 CLR 408, 437.

44 In *John Fairfax and Sons Ltd v New South Wales* (1927) 39 CLR 139, 146 Rich J retreated from this broad position.

45 (1949) 80 CLR 229, 260.

46 *Supra* n 14, 308.

47 This purpose will be explored below.

belong to the minority of Justices who have regarded the term "excise" as embracing all goods whether manufactured overseas or in Australia. Such a view would serve to increase the scope of s 90 and correspondingly reduce the States' capacity to levy taxes on goods.

A strong and unequivocal pronouncement of the wide view came from Barwick CJ who regarded s 90 as allowing:

> 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.[48]

Justice Mason (as he then was) has asserted that this view is one which is generally accepted.[49] As indicated below, such general acceptance is far from certain. The wider view does appear to transcend ordinary principles of statutory interpretation considered above.

The Commonwealth's power to make laws with respect to taxation and, hence, impose duties of excise, is contained in s 51(2).[50] Indeed, it is difficult to determine why, in a provision that does not confer upon the Commonwealth any extra power, but merely grants to it the exclusive power to levy excise duties, such broad and exclusive control over the national economy would be given. There is no constitutional provision that gives the Commonwealth express power over the national economy. When examining the so-called "implied nationhood power", which enables the Commonwealth to legislate in respect of matters which arise by virtue of its nature and status as a national polity,[51] only Jacobs J[52] would seem to envisage that power as encompassing national economic management. Even Mason J has not allowed the implied power to reach so far. Moreover, the clear legislative capacity of the Commonwealth to override State taxes or to protect its activities by virtue of s 109 of the Constitution provides an additional reason against denying the States *any* capacity to levy commodity taxes. If the Commonwealth did not possess this superior legislative position, the wide view would have more force.[53]

The narrow view

The view that the Commonwealth was given exclusive power over excise duties so as to enable it to pursue effective trade and tariff policies is one that seems to command the greatest support both historically and from the context of statutory interpretation. This opinion has been offered by Gibbs CJ in *Hematite Petroleum*[54] and by Toohey and Gaudron JJ in *Philip Morris*.[55]

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48 *Western Australia v Chamberlain Industries* (1970) 121 CLR 1, 17.

49 *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599, 631.

50 See further C Caleo, *supra* n 14, 309 and also the comments of Gibbs CJ in *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599, 617.

51 *Davis and Ors v The Commonwealth and Anor* (1988) 166 CLR 79, 95; *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338, 396-397.

52 In *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338, 412-13.

53 See the findings of the Constitutional Commission in *Final Report of the Constitutional Commission Volume 2* (1988) paras 11.242-11.285 esp 11.271-11.275.

54 (1983) 151 CLR 609, 616; see also Latham CJ in *Attorney General (NSW) v Homebush Flour Mills Ltd* (1937) 56 CLR 390, 396.

55 (1989) 167 CLR 399, 479.

However, the approach of each in interpreting the concept of duties of excise is markedly different. Chief Justice Gibbs adopted an essentially legalistic method of asking whether the tax was directly related to the goods, imposed at some step in their production or distribution before they reach the hands of consumers.[56] The broader approach of Toohey and Gaudron JJ, will be considered in detail below.

The less orthodox views

Two further views have been offered by Deane and Murphy JJ. Justice Deane believed that the object of s 90 was to prevent people in one State from being disadvantaged in relation to people in another State by the burden of higher excise duties.[57] The extent to which His Honour is committed to this view is unclear. His joint judgments with Mason J in *Gosford Meats Pty Ltd v New South Wales*[58] and Mason CJ in *Philip Morris*[59] indicate that he has abandoned this philosophy, in favour of Mason CJ's broader view. Against this, however, are Deane J's comments regarding Constitutional guarantees of equality and freedom from discrimination, during which His Honour makes reference to s 90.[60]

In a series of judgments[61] Murphy J developed a theory that s 90 was aimed at preventing:

> discrimination by a State tax between goods manufactured in the State and those of other States. Sections 51(i) [sic.], 92 and 99 prevent such discrimination by the Commonwealth.[62]

In *Hematite Petroleum,* His Honour confined the meaning of "excise" to taxes upon production or manufacture "unless ... in substance ... [the levy] taxes production within the State",[63] seeking assistance from the approach of Fullagar J in *Dennis Hotels.*[64] This approach focused essentially upon whether there was discrimination against local (that is State) production or manufacture. If a tax did so discriminate, it was a duty of excise; if the tax equally affected goods produced outside the State, it was not. His Honour believed that this view was consistent with ss 92 and 93 of the Constitution.

LATER JUDICIAL APPROACHES

Hematite Petroleum[65] marked the beginning of judicial "honesty" in looking at s 90. Members of the Court openly expressed their opinions as to the role of that section in the Constitution. Political and economic considerations were also apparent in the judgments, with Gibbs CJ, for example, voicing his

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56 (1983) 151 CLR 609, 619. The approach was similar to that taken in *Bolton v Madsen* (1963) 110 CLR 264.

57 *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 609, 660.

58 (1985) 155 CLR 368.

59 (1989) 167 CLR 399.

60 *Street v Queensland Bar Association* (1989) 168 CLR 461, 522; *Leeth v The Commonwealth* (1992) 66 ALJR 529, 542.

61 For example, *H C Sleigh Ltd v South Australia* (1977) 136 CLR 475.

62 *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59, 84.

63 (1983) 151 CLR 609, 638.

64 (1960) 104 CLR 529, 555.

65 (1983) 151 CLR 609.

concern that the adoption of a wide construction of the phrase "duties of excise" would "gravely hamper the States in the conduct of their financial affairs ...".[66] The case concerned the constitutionality of a ten million dollar per annum pipeline levy imposed upon a licence to operate two particular pipelines in Victoria. The majority[67] considered the practical operation of the impost and found that it was of such magnitude and imposed at such a point in production that it could be explicable only as an excise and not a fee for the privilege of carrying on the pipeline. The absence of a clear relationship between the fee and the quantity or value of the substance carried by the pipeline was of no significance. Such connection could be implied from all the facts.[68]

The decision in *Hematite Petroleum* appeared to indicate that the "criterion of liability" test was losing ground in favour of considering the practical operation or substance of the tax. The majority seemed inclined towards pragmatism and only two members of the Court indicated a preference for a more legalistic approach.[69] It was possible, therefore, that when confronted with facts of the kind found in *Dennis Hotels*, a similarly constituted majority would adopt the approach in *Hematite Petroleum* of looking at the substance or effect of the tax in order to ascertain whether it affected the goods at any point before consumption, even though the tax was imposed by means of a "backdating device".

On the surface, the majority judgment in *Gosford Meats Pty Ltd v State of New South Wales*,[70] appeared to adopt that approach. The abattoir's licence fee in issue was based on a prescribed amount per animal slaughtered in the twelve month period preceding the licence period (that is a *Dennis Hotels* form of backdating device). The majority held that the fee was a duty of excise. The minority disagreed, adhering to the precedent in *Dennis Hotels*.

It is submitted, however, that the majority came to this decision only because *Dennis Hotels* could be successfully distinguished. The present case concerned a licence fee upon the manufacture or production of goods in a previous period, that is the slaughter of animals, whereas in *Dennis Hotels*, the fee was imposed upon purchases in a previous period. Justices Mason and Deane asserted that their decision was consistent with the approach taken by the majority in *Hematite Petroleum* of considering the substance of the fee. Their Honours regarded *Hematite Petroleum* as a case which reinforced the essential relationship between production or manufacture and duties of excise.[71] The licence fee in *Dennis Hotels* had lacked this connection with production. Had the facts in *Gosford Meats* concerned a tax on the distribution or sales of goods rather than on their manufacture, the result may indeed have been different.

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66 *Ibid* 618.

67 *Ibid* 609. The majority consisted of Mason, Brennan, Murphy and Deane JJ. The minority comprised of Gibbs CJ and Wilson J.

68 *Ibid* 634 *per* Mason J.

69 These members were Gibbs CJ and Wilson J.

70 (1985) 155 CLR 368; Mason, Brennan, Murphy and Deane, *contra* Gibbs CJ, Wilson and Dawson JJ.

71 *Ibid* 385.

It was fortunate for the Court that some point of distinction existed in *Gosford Meats*.[72] That distinction, is, however, unconvincing and somewhat artificial. If the overwhelming view of the Court is that an excise may be imposed at any step in the production or distribution of goods before reaching the consumer,[73] then it is difficult to see why, in considering the substance or effect of the law, a retailer's licence fee quantified by reference to purchases in a past period is not to be regarded as an excise duty, but such a licence fee upon a manufacturer or producer is to be so regarded.[74]

Only one year previously, the Court had declined to hear argument urging it to depart from the decision in *Dennis Hotels* on the basis that the States had organised their financial affairs in reliance upon that case.[75] In a series of earlier decisions involving legislation that was indistinguishable from that in *Dennis Hotels*, the Court, albeit reluctantly in the case of some members,[76] adhered to the decision in that case. Even Mason J, who favoured a broad approach to the concept of duties of excise, was concerned not to disrupt the federal fiscal balance by allowing the Commonwealth to intrude into a field of taxation upon which the States had come to rely. It appeared that an impasse had been reached and that the franchise cases would stand as an anomaly in the law with respect to s 90. No doubt, if State reliance upon those cases was to be a significant factor in future decisions, that reliance would increase as more time elapsed. This would create an even greater reluctance to depart from precedent. In fact, the first major challenge to the *status quo* came only in 1989 with the *Philip Morris* case.[77]

Some hope that the Court would reach an unanimous judgment in this area was provided by the decision in *Cole v Whitfield*,[78] relating to s 92, which, like s 90, dealt with fiscal matters. The Court delivered a unanimous, joint judgment setting out its collective belief as to the perceived object of s 92. Further, the Court rejected the legalistic "criterion of operation" doctrine that had been applied in previous s 92 cases, producing artificial and unsatisfactory distinctions. It was the practical operation of the law that had to be considered.[79] This decision demonstrated that the Court was capable of departure from unsatisfactory legalistic interpretations of constitutional provisions. Unfortunately, this unified approach was not taken in *Philip Morris*.[80]

When one examines the history of the decisions in this area of the law, the diverse judgments in *Philip Morris* are not surprising. Never has the entire Court been of the one mind as to the purpose of s 90 and, in recent times, even the members of the Court who support a wide interpretation of s 90 have been

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72 (1985) 155 CLR 368.
73 *Bolton v Madsen* (1963) 110 CLR 264.
74 See Gibbs CJ's criticisms of this fine distinction: *Gosford Meats Pty Ltd v State of New South Wales* (1985) 155 CLR 368, 379.
75 *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311, 316.
76 For example, *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177, 188 *per* Barwick CJ; 240 *per* Mason J. See also *H C Sleigh Ltd v South Australia* (1977) 136 CLR 475.
77 (1989) 167 CLR 399.
78 (1988) 165 CLR 360.
79 *Ibid* 400.
80 (1989) 167 CLR 399.

reluctant to upset the financial arrangements of the States. The departure of Gibbs CJ and Wilson J appeared to open the way for the wider view of s 90, but, until the decision in *Philip Morris*, the views of the newer members of the Bench[81] were an unknown quantity. In addition, Dawson J's minority judgment in *Gosford Meats* indicated that His Honour was adopting a very narrow approach.

THE CASE OF *PHILIP MORRIS LIMITED v THE COMMISSIONER OF BUSINESS FRANCHISES (VICTORIA)*

This case involved a licence fee imposed by the Victorian government upon the wholesale sale of tobacco. The fee was calculated by reference to the value of tobacco sold during the month occurring two months before that in which the licence operated. The plaintiffs argued that the fee was a duty of excise and was, therefore, unconstitutional.

In the course of argument before the High Court, the State of South Australia asked that the decisions in *Dennis Hotels* and *Dickenson's Arcade* be overruled to the extent that they decided that some of the fees were not duties of excise. The intervening States and the Commonwealth opposed this move and, after hearing some argument, the Court announced that it would not reconsider the correctness of the cases in question. The reason for declining to reopen the franchise cases was the now predictable concern[82] that the financial and administrative arrangements of the States would be disrupted as a consequence. In a joint judgment, Mason CJ and Deane J stated that it would be right to overrule these decisions only if:

> in light of later insights into the true meaning of the Constitution, obedience to its terms or the interests of certainty in those arrangements clearly demanded [it].[83]

Their Honours apparently did not believe that any of these conditions existed here, despite the fact that the artificial distinctions made in the franchise cases would not sit comfortably with the broad construction of s 90 taken by both judges in *Hematite Petroleum*. The present case would therefore turn on whether the facts could be successfully distinguished from those in the franchise cases.

The minority judgments

Justices Brennan and McHugh formed the minority in *Philip Morris* in holding that the licence fee was a duty of excise. Their reasons for this finding were different, but both favoured an approach which involved a consideration of the practical operation of the impost as had occurred in *Hematite Petroleum*.[84] Justice Brennan criticised the way in which the "criterion of liability" formula had previously been treated as an exclusive test of whether a tax was a duty of excise and asserted that other factors must also be considered in making such a

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81 Toohey, Gaudron and McHugh JJ.
82 Similar to that in *Evda Nominees* (1984) 154 CLR 311.
83 (1989) 167 CLR 399, 438.
84 (1983) 151 CLR 609.

finding. Justice McHugh discounted the formula, preferring to consider the substance or operation of the particular tax in question.[85]

Justice Brennan recognised that the broad approach of the majority in *Hematite Petroleum* would not sit well with the artificial distinctions produced by the franchise cases. However, given his inability to overturn these decisions, His Honour proposed that they be followed only in cases which presented substantially similar facts to those found in the franchise cases. In contrast to Mason CJ and Deane J, whose joint judgment will be dealt with below, Brennan J could see no reason for placing tobacco and alcohol in a special regulatory category so that licence fees to deal in such products could not be regarded as an excise.

Turning to the facts in the case before him, Brennan J found several significant features which distinguished the licence fee in the present case from those in the franchise cases. These factors were: the fact that the licensing scheme was not regulatory in any sense, the fact that the incidence of the tax was variable so as to impose a once-only charge, that the fee was imposed at such a rate that it was very likely to enter immediately into the price of the goods, that the previous period by reference to which the fee was calculated was proximate to the licence period and, finally, that the licence period itself was shorter than those in the franchise cases (one month).[86] His Honour therefore found that the licence fee was a duty of excise.

The judgment of McHugh J would have been eagerly awaited. His Honour had not yet participated in a decision regarding excise duties. The tenor of his judgment indicated a preference for the wide view of Mason J in *Hematite Petroleum,*[87] that the purpose of making excise duties exclusive to the Commonwealth was to give the Commonwealth national economic control. His Honour adopted a similar approach to that of Brennan J in looking at circumstances which made "the legislation in question ... substantially different in operation and effect...."[88] from that considered in the franchise cases. In doing so, he found those factors considered by Brennan J, outlined above, led to the inference that the scheme in question was substantially different in operation and effect from those considered in the franchises cases. Thus, the fee was a duty of excise.

The majority views

The approach taken by Mason CJ and Deane J

The joint judgment of Mason CJ and Deane J found that the fee was not a duty of excise. Their Honours did not find reference to drafts of s 90 nor the Convention debates of any real assistance, although such materials helped the Court in *Cole v Whitfield.*[89] Instead, Mason CJ and Deane J sought assistance from an examination of the interrelationship between s 90 and other provisions of the Constitution, in particular, ss 92 and 93. Their Honours suggested that Commonwealth economic unity was sought by the insertion of ss 90, 92, 51(2)

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85 (1989) 167 CLR 399, 492.
86 *Ibid* 461-463.
87 (1983) 151 CLR 609, 632.
88 (1989) 167 CLR 399, 487.
89 (1988) 165 CLR 360, 389 ff.

and (3) and 88 and that the Commonwealth was intended to have real control over the taxation of commodities.[90] In doing so it appeared that Mason CJ and Deane J adopted a broad view of s 90's purpose. After noting the development of the concept of "duties of excise" to include taxes imposed upon production, manufacture, distribution and sale, Their Honours proceeded to discredit the "criterion of liability" test as legalistic and artificial. However the assertion that the test no longer commanded acceptance of the Court[91] may have been too general in light of Dawson J's judgment in *Gosford Meats*.[92]

Given that neither *Dennis Hotels* nor *Dickenson's Arcade* were open to reconsideration, an attempt was made to rationalise these decisions by characterising them as concerning commodities (alcohol and tobacco) that have traditionally been the subject of regulation by the State.[93] Their Honours were then able to conclude that the facts before them were on all fours with those in *Dickenson's Arcade*, falling within that special regulatory area to which tobacco products belonged. Thus, the licence fee was not a duty of excise.

It is submitted that this result is somewhat artificial. Nor does it conform to the approach of the majority in *Hematite Petroleum* which was strongly endorsed by Their Honours.[94] The judgment did, however, make it clear that the distinction was to be applied to sales of alcohol and tobacco only, leaving the question of petrol licence franchise fees considered in *H C Sleigh*[95] open for future reconsideration. It appears that the strain involved in attempting to distinguish the franchise cases was recognised.[96] Their Honours upheld the actual decision in *Dennis Hotels*, but undermined the supposed principle arising therefrom (that a fee for a licence calculated by reference to sales in a previous period is not a duty of excise) by demonstrating that only Menzies J in that case saw this factor as an important consideration.

The judgment of Dawson J

Justice Dawson formed part of the majority. His Honour's reasoning was substantially in line with that in his earlier judgment in *Gosford Meats*. His Honour could not find any distinction between the facts at hand and those present in the franchise cases so as to make the fee in this case a duty of excise. As previously foreshadowed, Dawson J was prepared to cling to the "criterion of liability" test, regarding it to be a rock in the sea of uncertainty arising from the various cases that attempted to provide an alternative approach of considering the substance of a particular law.[97] The narrow approach taken by Dawson J appears to conflict with the position adopted by him in *Cole v Whitfield*,[98] where he joined with the rest of the Court in rejecting the legalistic formula which had applied in earlier s 92 decisions.

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90 (1989) 167 CLR 399, 425-6.
91 *Ibid* 432.
92 (1985) 155 CLR 368.
93 (1989) 167 CLR 399, 438-9.
94 *Ibid* 434-5, 436, 438.
95 *H C Sleigh v South Australia* (1977) 136 CLR 475.
96 (1989) 167 CLR 399, 440.
97 *Ibid* 474.
98 (1988) 165 CLR 360.

His Honour considered both s 90 and s 92 and regarded both provisions as serving the twin objectives of achieving a common tariff and interstate freedom of trade.[99] His Honour's allusion to the need to prevent the States from imposing excise duties on locally produced goods by making such duties exclusive to the Commonwealth seems to indicate that he regarded the object of s 90 as being to protect Commonwealth trade policy. The reference to *local* production was not taken any further so it is difficult to determine whether there are any parallels with the judgment of Toohey and Gaudron JJ, examined below.

Justice Dawson was of the opinion that departure from the meaning given to "duties of excise" in *Peterswald v Bartley*[100] had brought a number of problems. He said that the view of Fullagar J[101] (that the concept of an excise did not extend beyond the production or manufacture of goods), must command serious attention should the scope of s 90 ever be reviewed.[102] As will be explored below, Toohey and Gaudron JJ did not appear to confine the concept to production or manufacture.

A new insight? The judgment of Toohey and Gaudron JJ

It is submitted that the joint judgment of Toohey and Gaudron JJ provides a possible insight into the confused state of the law in this area. Their Honours have begun to formulate a principle that would seem right for all occasions and have revealed a means of rationalising the franchise cases. Further, in applying that principle, Their Honours drew upon precepts from the majority judgment in *Hematite Petroleum*.[103] Thus, they did not adopt a legalistic approach, but favoured consideration of a range of factors in determining whether the levy was indeed an excise.

Their Honours examined the context of the provision and found that the object of s 90 was apparently to:

> secure to the Commonwealth the power to effectuate economic policy with respect to Australian imports and exports.[104]

Justices Toohey and Gaudron stated that s 90 and, particularly s 92, had the effect of placing the States on equal trade terms with one another in a single economic zone and prevented them from levying duties of excise upon goods manufactured or produced in Australia so as to enable the Commonwealth to determine the level of duties to be adopted for the nation as a whole.

It is submitted that the judgment does contain inconsistencies which make it difficult confidently to assert that the principle which seems to emerge from the judgment is what was actually intended. In construing the phrase "duties of excise", Their Honours stated that:

> [what is] necessary and sufficient to constitute a tax a duty of excise, ... [is] a relationship affecting goods in their character as goods produced or manufactured in Australia.[105]

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99 (1989) 167 CLR 399, 466.
100 (1904) 1 CLR 497.
101 In *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529, 555.
102 (1989) 167 CLR 399, 472.
103 (1983) 151 CLR 609, 629.
104 (1989) 167 CLR 399, 479. See also Gibbs CJ in *Hematite Petroleum* who held a similar view as to the object of section 90.

In *Matthews v Chicory Board*, Dixon J had said that to constitute a duty of excise the tax:

> must bear a close relation to the production or manufacture, or the sale ... of goods and must be of such a nature as to affect them as the subjects of manufacture or production or as articles of commerce.[106]

Justices Toohey and Gaudron adopted this statement, but with the modification that the reference to "articles of commerce" should be interpreted as a reference to "articles of commerce produced or manufactured *in Australia*". At this point in the judgment, the significance of the focus upon Australian manufacture is unclear.

It is not until Toohey and Gaudron JJ examine the facts of the case before them that the significance of that focus is revealed. At this point Their Honours seem to make it clear that the question is:

> whether the goods are taxed in their capacity as goods manufactured in Australia or in their character merely as articles of commerce.[107]

In the latter circumstances, the tax will not constitute a duty of excise. They concluded that the tax under consideration affected the tobacco products in their character as "articles of commerce" rather than in their character as goods manufactured in Australia and, therefore, it was not an excise. Their Honours followed the majority judgment in *Hematite Petroleum*[108] in considering a range of factors to determine the issue. The factors which supported this finding were that the scheme and operation of the Act in question appeared to have no other purpose than that of revenue collection and that the tobacco products which originated from overseas and were sold by the plaintiffs were treated in the Act in the same way as the Australian manufactured products. The fee was imposed when the manufacturing process was complete.[109] When determining the rate of the relevant licence fee, the value of the imported tobacco products was included in the calculation to the same extent as the value of the Australian product.

With respect, the judgment does exhibit some inconsistencies. In an early part of the judgement, Toohey and Gaudron JJ appear to regard the question as being whether:

> the goods caught by the prohibition on State duties of excise in s. 90 are goods produced or manufactured in Australia.[110]

This seems to imply that it is necessary to look not at whether the *tax* itself falls only upon goods manufactured in Australia, but whether the *goods* caught up in the tax are manufactured in Australia and, if they are, the tax will constitute a duty of excise. The latter part of the judgment, however, demonstrates a shift towards the necessity of examining the *tax* itself:

> [T]he question whether ... the Act imposes a duty of excise is to be answered by ascertaining whether the *tax* affects tobacco products as subjects of Australian manufacture.[111]

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105 *Ibid* 483.
106 (1938) 60 CLR 263, 304.
107 (1989) 167 CLR 399, 485.
108 (1983) 151 CLR 609, 629, 669.
109 (1989) 167 CLR 399, 485.
110 *Ibid* 480.
111 *Ibid* 484.

Unfortunately, in considering whether the licence fee in the case before them constituted a duty of excise, Their Honours reverted to their earlier position of focusing upon the goods subject to the tax rather than considering the terms of the taxing provisions themselves. Their Honours noted that the plaintiffs sold both imported tobacco products and Australian manufactured products and held that the licence fee was not a duty of excise.

It could be inferred from the way in which the question is finally posed, that is whether the goods are taxed in their capacity as goods manufactured in Australia or in their character merely as articles of commerce, that what is necessary to constitute a duty of excise is a levy that *discriminates* against goods which are the subjects of Australian manufacture. If the levy does not so discriminate, it affects the goods only as articles of commerce and will be a valid impost. The licence fee in this case did not discriminate against tobacco products manufactured in Australia and was, therefore, not a duty of excise. It affected the goods only as "articles of commerce".

There are several reasons supporting a principle of considering the concept of an excise duty from the point of view of a tax which *discriminates against* Australian manufacture. As will be seen below, such a view not only appears to be consistent with the ordinary rules of interpretation of that concept, but enables the outcomes, if not the principle, of the franchise cases to be upheld. Thus, it is an approach that is likely to commend itself to the States in enabling them to levy a wider range of duties than is presently possible. The various reasons for adopting a principle along the lines of that which Toohey and Gaudron JJ appeared to propose will now be considered in turn.

The rationalisation of the franchise cases

The franchise cases can be rationalised on the basis of the principle that a tax will constitute a duty of excise if it affects goods as subjects of Australian production or manufacture by discriminating against such goods in favour of imports. Their Honours explained the reason why the ordinary licence fee in *Dennis Hotels* was held not to be an excise duty on the basis that the fee was calculated by reference to the past retail purchases of goods irrespective of their origin. The levy did not affect the goods as the subjects of Australian manufacture or production.

The fact that Toohey and Gaudron JJ seemed at great pains to explain the reason why the temporary licence fee in *Dennis Hotels* was held to be a duty of excise, although it was calculated by reference to all goods whether produced in Australia or overseas, lends support to the inference that Their Honours were focusing on the need to find a tax which discriminates against Australian manufactured goods. Their Honours explained that finding in *Dennis Hotels* on the basis that two of the majority justices rested their decision upon the inability to sever the temporary licence fee provisions from the invalid ordinary licence fee provisions and that the other two justices adopted a different analysis.[112]

Their Honours seem to imply that the backdated licence fees in the franchise cases did not affect the goods as subjects of Australian manufacture or production, whereas the backdated licence fee in *Gosford Meats* had a sufficiently close connection with production to affect the goods as subjects of

112 *Ibid* 480.

Australian production. It was imposed on a producer calculated by reference to steps in the production of goods in a preceding period.[113] Thus, it could be concluded that the tax did, of necessity, discriminate as against that local production.

It would therefore appear that the closer the connection with production or manufacture (as in *Hematite Petroleum*, where the levy was imposed upon the transportation of a product between two places of production), the greater the likelihood of the impost constituting a duty of excise. Their Honours sought to limit Dixon J's wide statement in *Parton v Milk Board* 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,[114]

to a tax which has a *sufficiently close relationship* to the production, manufacture or sale of goods and which is of such a nature as to affect them as the subjects of manufacture or production in Australia. It may be that Their Honours were implying that a tax on sales or distribution of goods may not necessarily constitute an excise because it lacks any connection with the goods as subjects of Australian manufacture or production. However, it would not seem necessary that the impost fall upon production or manufacture itself, as contended by Fullagar J in *Dennis Hotels*,[115] provided the necessary connection with Australian production or manufacture could be found.

In contrast to the franchise cases, it is submitted that neither *Hamersley Iron* nor *Chamberlain Industries* can be upheld under the principle formulated by Toohey and Gaudron JJ. In both of these decisions the taxes in question were found to be excise duties to the extent that they imposed duties upon all amounts of money received by a supplier for goods sold. The taxes in both cases were actually imposed upon the sale of *all* goods irrespective of their place of manufacture. Had they been goods manufactured overseas and brought into the State for distribution and sale, the taxes would have fallen upon them in precisely the same way as Australian produced or manufactured goods. Chief Justice Barwick seemed to confine his conclusion to goods that were *in fact* manufactured in Australia, although the taxes themselves did not so discriminate. It appeared that Barwick CJ and, at least, Menzies J[116] considered the question as being "to the extent that the taxes fell upon goods which were actually manufactured in Australia, were they duties of excise?" It is submitted that, in terms of the principle adopted by Toohey and Gaudron JJ, as it finally emerges, the tax will be invalid if it is *imposed* upon goods by virtue of their character as goods manufactured in Australia. It should not matter whether the tax *in fact* applies to goods so manufactured.

The results in these two cases could be seen as an outcome of a broad application of the wide definition of an excise employed by Dixon J in *Parton v Milk Board*.[117] The principle developed by Toohey and Gaudron JJ impliedly limits that definition to the extent that the levy must be of such a nature to

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113 *Ibid* 484.
114 (1949) 80 CLR 229, 260.
115 (1960) 104 CLR 529, 555.
116 In *Western Australia v Chamberlain Industries* (1970) 121 CLR 1, 26.
117 *Hamersley Iron* (1969) 120 CLR 42, 55 *per* Barwick CJ; 71 *per* Owen J; *Western Australia v Chamberlain Industries* (1970) 121 CLR 1, 13, 17 *per* Barwick CJ.

affect the goods as subjects of Australian production or manufacture. In the above cases, the tax was imposed upon receipts for all sales for all goods irrespective of their origin.

While no attempt was made by Their Honours to reconcile or distinguish *Hamersley Iron* and *Chamberlain Industries*, the decision in *Victoria v IAC (Wholesale) Pty Ltd*[118] was specifically mentioned. This decision was handed down at the same time as that in *Chamberlain Industries* because similar taxing provisions were in question in each case. The action was brought by a wholesaler contesting a tax levied upon it in respect of its sale of motor vehicles manufactured in Australia. In *Chamberlain Industries* a virtually identical tax fell upon a company involved in the manufacture, sale and servicing of tractors. Justices Toohey and Gaudron believed that the basis of the *IAC* decision was the identification of the relevant goods by virtue of their Australian manufacture.[119] However, the majority in the *IAC* case held that the tax was a duty of excise on the basis only that it was indistinguishable from that considered in *Chamberlain Industries*.

In their analysis of the *IAC* case, Toohey and Gaudron JJ failed to look at the actual taxing provisions themselves (which imposed a tax upon receipts of the purchase price for goods) and focused instead upon the fact that the tax fell upon a wholesaler of motor vehicles manufactured in Australia. It is submitted that this analysis has the fault mentioned above in relation to the approach taken by Barwick CJ and Menzies J in *Chamberlain Industries* in that it looks at the actual incidence of the tax rather than at the tax itself. That approach is inconsistent with the principle which eventually emerges from the judgment of Toohey and Gaudron JJ, which appears to require an examination of the taxation provisions themselves. This part of the judgment demonstrates the difficulties caused by the inconsistencies in the judgment as a whole.

The section 92 connection

An attractive feature of considering the concept of an excise from a discriminatory point of view is that it accords with the *Cole v Whitfield* approach to s 92. What is necessarily prohibited by s 92 is a *discriminatory* burden of a protectionist nature, to ensure the preservation of the free flow of trade and commerce throughout the limits of the Commonwealth of Australia. If the burden is not discriminatory in a protectionist sense, but falls upon all goods equally irrespective of origin, it is not caught by s 92. Similarly, a tax which does not discriminate between goods as subjects of Australian manufacture and goods as subjects of overseas manufacture will not, on the analysis of Toohey and Gaudron JJ, constitute a duty of excise.

Achieving a fiscal federal balance

It is arguable that the States can impose non-discriminatory taxes upon goods and, in so doing, not affect the Commonwealth's trading policies. Such non-discriminatory taxes would not, on the analysis of Toohey and Gaudron JJ, constitute duties of excise. It has been suggested that, if the States are allowed to levy some form of excise duties, they will be assured of a significant revenue base and will not have to rely upon regressive payroll and land taxes in order

118 (1970) 121 CLR 1, 43 ff.
119 (1989) 167 CLR 399, 481.

to meet their many commitments. It has often been a cause for concern that the States raise so little revenue yet account for so much of the Commonwealth's expenditure.[120]

The difficulties created by diverse and possibly counteractive State excise duties are somewhat overstated, given the Commonwealth's obvious ability to pass legislation to override such State duties.[121] Putting this consideration aside, it is possible that the States might effectively levy duties which do not upset or interfere with Commonwealth economic policy, even in the narrower sense of tariff policy, if those duties were imposed in such a way as to avoid disadvantaging Australian produced or manufactured goods as against imported goods of the same type. This would mean that local manufacturers or producers are not subject to any State tax to which the overseas manufacturers or producers are not subject and the Commonwealth is free to pursue whatever trade or tariff policy it regards as appropriate.

For example, assume that a State imposes a tax upon every new motor vehicle sold in that State. The levy would fall equally on all motor vehicle manufacturers, whether situated in Melbourne or Tokyo and the respective position of each *vis-à-vis* the other will be the same. If the Commonwealth government wished to discourage domestic spending on imported motor vehicles it could impose a tariff upon such items without any interference from the State tax, because the respective positions of the two manufacturers, which were identical under the State tax, will be different after the implementation of the Commonwealth tariff. It would only be if the State could impose a tax purely upon Australian motor vehicle manufacturers that the State levy could interfere with the Commonwealth tariff to make the local manufacturer's motor vehicles as costly as those of the overseas counterpart.

Historical support

The approach taken by Toohey and Gaudron JJ, of considering the concept of excise from the point of view of whether or not it discriminates against Australian manufacture or production, appears to have support from earlier decisions of the Court and from various individual judgments in more recent cases. It may be worthwhile to consider some such cases and judgments.

The earliest case in which such support may be found is *Peterswald v Bartley*.[122] The Court relied upon the comments of Quick and Garran[123] in stating that an excise was a tax upon goods produced or manufactured in Australia. The focus of the judgment indeed appeared to be upon the importance of the Australian origin of the goods. Then in *The Commonwealth and Commonwealth Oil Refineries Ltd v South Australia ("the Petrol case")*,[124] it was held that the tax on the motor spirit was a duty of excise in respect of that spirit which was produced, refined, manufactured or compounded in South Australia. The Court, with the exception of Rich J, appeared to draw a distinction between goods produced in Australia and those produced overseas, despite the apparent concentration on the fact that the spirit

120 Constitutional Commission, *supra* n 53, paras 11.242-11.285 esp 11.251.
121 *Ibid* esp paras 11.271-11.276.
122 (1904) 1 CLR 497.
123 *Supra* n 11, 837.
124 (1926) 38 CLR 408.

was made in the State of South Australia.[125] Again, in *John Fairfax & Sons Ltd v New South Wales*[126] the whole Court found that the halfpenny tax upon each copy of a newspaper issued for sale and actually sold in New South Wales was a duty of excise and appeared to concentrate on the local production of the newspaper, although some justices regarded the State as the locality rather than Australia itself.[127] Justice Rich retreated from his earlier position in the *Petrol* case, that the concept of excise duties need not be restricted to locally produced goods,[128] and accepted that an excise duty was restricted to an impost upon local production.[129]

Further justification for adopting the approach of Toohey and Gaudron JJ can be found in the judgments of Menzies and Fullagar JJ in *Dennis Hotels.*[130] Justice Menzies carefully examined the relevant case law on the issue of what constituted a duty of excise and expressed a strong preference for the *Peterswald v Bartley* definition — that an excise is a duty imposed upon Australian production or manufacture — over that of Rich J (in the *Petrol* case) and of Dixon J.[131] His Honour thought that it was significant that the levy under consideration in *Dennis Hotels* was imposed on the previous purchase of *all* liquor irrespective of whether it was manufactured in Australia or overseas.[132] Justice Fullagar[133] restricted the concept of a duty of excise to a tax upon production or manufacture. While this narrow view is against the weight of authority, the judgment is important for its focus upon the *local* production or manufacture of the goods.

It may be that even proponents of the widest interpretation of s 90 can reconcile that view with the principle of confining the notion of excise to duties upon goods produced or manufactured in Australia. Chief Justice Barwick has regarded it as an open question whether the duty must be upon goods of local manufacture.[134] It should also be noted that in *Western Australia v Chamberlain Industries*, His Honour did seem to place importance on the fact that the duty fell upon goods that were, in fact, manufactured in Australia in finding that it was a duty of excise.[135] Justices Mason and Deane have also

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125 *Ibid* 426 *per* Isaacs J, 438 *per* Starke J.

126 (1927) 39 CLR 139.

127 *Ibid* 142 *per* Knox CJ, Gavan Duffy and Starke JJ; 145 *per* Higgins J. Powers J, at 146, made reference to goods produced or manufactured within the Commonwealth.

128 (1926) 38 CLR 408, 437. See also *Attorney-General (NSW) v Homebush Flour Mills Ltd* (1937) 56 CLR 390, 403.

129 (1927) 39 CLR 139, 146, 147.

130 (1960) 104 CLR 529, 590.

131 Justice Dixon had expressed the view on a number of occasions that there was no reason why the concept of duties of excise must be confined to goods of domestic manufacture. See eg *Matthews v The Chicory Marketing Board* (1938) 60 CLR 263, 299; *Parton v Milk Board (Vic)* (1949) 80 CLR 229, 260 and also in his judgment in *Dennis Hotels* (1960) 104 CLR 529, 540-541.

132 See also *Dickenson's Arcade v Tasmania* (1974) 130 CLR 177, 210.

133 (1960) 104 CLR 529, 555.

134 *Western Australia v Chamberlain Industries* (1970) 121 CLR 1, 12-13.

135 *Ibid.*

accepted that an excise is a tax upon goods of local production or manufacture, but without any substantial development of the point.[136]

Finally, the judgments of Murphy J,[137] referred to by Toohey and Gaudron JJ, lend a great deal of support to the principle of drawing a distinction between taxes which discriminate between goods of local manufacture and those which do not. Justice Murphy, however, took the reference to locality as being to the *State* rather than to *Australia* as a whole in considering whether the relevant discrimination existed.[138] Justices Toohey and Gaudron thought that the weight of authority required that *Australia* be taken as the focus rather than the *State*.[139] The judgments of Murphy J have previously been cast aside as unorthodox and as not representing any majority view, even when his judgment formed part of the majority decision. While the focus upon the State as the point of discrimination may have been too narrow, the general approach of confining excise duties to those duties which discriminate against goods of local manufacture seems quite valid and, indeed, appeared to influence the judgment of Toohey and Gaudron JJ.[140]

In conclusion, it would therefore appear that the approach which seemed to be adopted by Toohey and Gaudron, of confining duties of excise to those which discriminate against goods of Australian manufacture or production, has support from earlier authorities.

THE PATH TOWARDS CERTAINTY

As a result of the decision in *Philip Morris*, the States may validly draft business franchise licence fees so as to be indistinguishable from those considered in the franchise cases. Such precise similarity would accord with the minority judgments of Brennan and McHugh JJ. However, Mason CJ and Deane J would uphold the fees only if imposed upon tobacco or alcohol licences.

The decision itself has not removed the basic uncertainty created by the earlier cases as to when a tax will be considered to be an excise duty. On a superficial level, the decision has placed State petrol franchise fees in doubt.[141] On a deeper level, it has undoubtedly created a substantial degree of disquiet in the minds of both State and Commonwealth Attorneys-General as to the extent to which the Court will be prepared to live with the artificial distinctions created by the franchise cases and by the judgments of Mason CJ and Deane J in *Philip Morris*. Indeed, in that case, the Commonwealth joined with the

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136 See *Gosford Meats Pty Ltd v State of New South Wales* (1985) 155 CLR 368, 383.

137 For example, in *H C Sleigh v South Australia* (1977) 136 CLR 475, 526-527; *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59, 84; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 609, 638 and *Gosford Meats Pty Ltd v State of New South Wales* (1985) 155 CLR 368, 387-389.

138 Justice Fullagar appeared to take the same approach in *Dennis Hotels* (1960) 104 CLR 529, 555 ff.

139 *Philip Morris Limited v The Commissioner for Business Franchises (Victoria)* (1989) 167 CLR 399, 480.

140 See *ibid* 478-480.

141 See the comments of Mason CJ and Deane J *ibid* 440-441 regarding the position of the decision in *H C Sleigh Ltd v South Australia* (1977) 136 CLR 475.

intervening States in opposing the re-opening of the franchise cases. However, overwhelming pressure from litigants in future cases may induce the Court to reconsider its present position. The only comfort that the governments might take is the reluctance on the part of the High Court to overrule its previous decisions, a reluctance particularly demonstrated in the history of the cases on s 90. A consideration of importance to many justices in refusing to overrule the franchise cases is the fact that the States have relied upon the correctness of those cases for well over thirty years.

However, given the uncertainty which still prevails, the Court must eventually develop a basic principle to assist in determining whether a particular duty may be considered to be a duty of excise. The reluctance of many members of the Court to upset the reliance of the States upon the correctness of previous decisions may mean that the only acceptable principle will be one which embraces the States' ability to levy, at least, some form of duty on business franchise licences. It appears unlikely that the Court will adopt the broad majority approach in *Hematite Petroleum*. That approach would inevitably result in providing the Commonwealth with control over taxes on all commodities. Even Mason CJ, who has appeared to favour the wider view of the concept of excise duties, has balked at extending the *Hematite Petroleum* approach into the area of franchise fees of the type found in *Dennis Hotels*, at least where tobacco or alcohol is involved. As noted earlier, the context of the provision in the Constitution would not seem to suggest that s 90 was intended to grant such total control over taxation of commodities to the Commonwealth. Further, there does not appear to be any overwhelming reason for such taxes being the exclusive domain of the Commonwealth.

The principle that appears to have been proposed by Toohey and Gaudron JJ may be a satisfactory alterative as it has the advantage of allowing the States to levy some duties that would currently be struck down as duties of excise. In applying this principle, the Court merely asks whether or not the duty, fee or levy affects the goods as subjects of manufacture or production in Australia. If it applies to all goods irrespective of their origin, it will not be a duty of excise. If it discriminates against locally produced or manufactured goods, then it will constitute a duty of excise. In determining whether or not the levy so applies, a range of factors must be considered. Thus, it is not a legalistic principle, but one which considers the substance of the particular levy. In this sense, there are some similarities to the majority approach in *Hematite Petroleum*.

The greatest advantage of the principle is the degree of certainty that it may engender both in terms of future Court decisions and in the States' organisation of their financial affairs. It would avoid the necessity for meticulous drafting of licence fees and would counteract much of the disquiet in the minds of State authorities as to the continuing validity of such levies. In addition, such a principle would avoid the artificial distinctions drawn in the franchise cases and by Mason CJ and Deane J in *Philip Morris*.[142] Yet, the type of non-discriminatory fees which were imposed in the franchise cases can be upheld within this principle.[143] Whether the levy is based upon past turnover or past

142 (1989) 167 CLR 399, 438-439.
143 *Ibid* 484.

production or upon current activities, the levy will not constitute a duty of excise if it does not bear a close relation to the production or manufacture of the goods in Australia.

Adoption of the principle will not solve all problems. There may be difficulties in application just as there has been in the application of the principle in *Cole v Whitfield*[144] in relation to s 92 cases. One foreseeable problem is the situation where a tax is imposed upon goods which happen to be produced or manufactured wholly or substantially in Australia. As pointed out by Toohey and Gaudron JJ,[145] it is necessary to play close attention to the particular legislation or scheme which is involved, as these may reveal an intention by the State to regulate the sale of that particular product or to confer a genuine privilege. This might be relevant where a State wishes to control the exploitation of a scarce natural resource.[146]

A further problem may be whether it is necessary, in applying the principle, to determine whether the goods which are taxed in their capacity as goods manufactured in Australia are to be considered from the narrow perspective of the goods forming the subject of the dispute at hand or whether it is necessary to look at the goods as a whole. If Ampol decided to challenge a State petroleum franchise fee, would it be necessary to consider the extent of petroleum products which *Ampol* produces in Australia or to consider the extent to which the industry as a whole engages in such production? This problem, among others, must be faced if the principle seemingly adopted by Toohey and Gaudron JJ is to be applied.

CONSTITUTIONAL COMMISSION REPORT

The Constitutional Commission, in its *Final Report*, recommended that the States be able to levy duties of excise by removing the words "and of excise" from s 90.[147] The recommendation was a consequence of the Committee's finding that the operation of the section was unsatisfactory. In its present form it created significant inefficiency, allowed for circumvention by the States and contributed markedly to the high degree of fiscal imbalance that existed in Australia. Allowing the States to levy excise duties, it was believed, would go some way to alleviating that imbalance.[148]

The Commission considered the arguments against allowing the States power to levy duties of excise, including the submission that State taxes could upset federal tariff policy.[149] It was concluded, however, that the risk was not so great as to justify a constitutional prohibition, particularly when one considered the ample powers possessed by the Commonwealth to take

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144 (1988) 165 CLR 360. See, eg, *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411.

145 *Philip Morris Limited v Commissioner of Business Franchises (Victoria)* (1989) 167 CLR 399, 485.

146 For example, as seen in *Harper v Minister For Sea Fisheries* (1989) 168 CLR 314. The licence fee there was not a levy but a fee for the privilege of taking a scarce natural resource — abalone.

147 *Supra* n 53, paras 11.242-11.285.

148 *Ibid* paras 11.266-11.267.

149 *Ibid* para 11.270 considering arguments of the minority of the advisory Committee on Trade and National Economic Management.

measures to protect its activities from State taxation. This view is similar to that taken by Gibbs CJ in *Hematite Petroleum* where he stated:

> Moreover, s 109 of the Constitution, which invalidates State laws to the extent to which they are inconsistent with laws of the Commonwealth, plays a major part in preventing any State law from frustrating Commonwealth legislative policy. The presence of s 109 may well have rendered it unnecessary to include in s 90 a reference to duties of excise for the purpose of invalidation a State excise duty which counteracted the effect of a Commonwealth tariff.[150]

One can certainly recognise the force of this view. The federal government can readily ensure that its policies are not thwarted by State taxation by passing inconsistent legislation. Thus, the States are left free to tax commodities to the extent that there is not a perceived interference with national policy.

The Committee's recommendation is commendable and clearly should be implemented. However, any amendment of s 90 must be submitted to a referendum of the people.[151] Few proposed amendments have been successful. It is this impediment which has prompted the discussion in this paper as to how a satisfactory outcome may be achieved on the present wording of s 90 without a formal change being necessary. Given that the section, as it presently stands, prohibits the States from levying duties of "excise", the view of Toohey and Gaudron JJ provides an interpretation which gives some leeway to the States, yet preserves an area of exclusiveness to the Commonwealth, even though such exclusiveness is unwarranted.

It is encouraging that the Commission's recommendation that the States have power to levy duties of excise accords with the underlying premise of this paper, that the States should not be eliminated from the field of taxation of goods. Although the Committee advocates a formal amendment of s 90, this paper attempts to preserve a field of taxation to the States by adopting a preferred view of the current terms of the provision.

CONCLUSION

Adoption of the principle formulated by Toohey and Gaudron JJ may not please the adherents to the widest view of the purpose of s 90. This would enable the States to impose numerous taxes upon goods that were thought to be beyond their competence. Provided the tax does not discriminate against goods produced or manufactured in Australia it will be a valid impost. A significant attraction of the principle is the way in which it conforms with the notion of Australia as an economic unity in which the free flow of trade between the States is ensured by s 92. An integrated trade and tariff policy can be achieved by enabling the Commonwealth to determine the level of excise duties free of interference from State taxes which discriminate against Australian manufacture.

As with the "practical operation" approach to s 92 adopted by the Court in *Cole v Whitfield*,[152] the emphasis in s 90 decisions should be upon whether, after considering all the relevant factors, the levy or tax affects the goods as subjects of Australian manufacture or production. It is submitted that the

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150 (1983) 151 CLR 599, 617.
151 Section 128.
152 (1988) 165 CLR 360, 400.

approach of Toohey and Gaudron JJ in *Philip Morris,* despite some of the problems considered above, is the most satisfactory of all the judicial interpretations of s 90. While it appears to have contextual support and may act as a panacea for the ills of federal financial imbalance, it also conforms to the more recent endeavours of the Court in other areas of the law to free itself from artificial legalistic formulae. Unless and until express amendment to s 90 can be achieved, it can only be hoped that the High Court will take note of that judgment and its potential for creating some degree of certainty in the law.

POSTSCRIPT

At the time this article was sent to the publisher for printing the High Court had heard argument (20-23 April) but had not delivered judgment in the *second* phase of the proceedings in *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 66 ALJR 794. In the *first* phase of the same proceedings the High Court decided that s 90 of the Constitution prevented the Australian Capital Territory Legislative Assembly from imposing duties of excise. The case involves a challenge to the constitutional validity of the Business Franchises ("X" Videos) Act 1990 (ACT) which prohibits the sale, without certain licences, of "X" rated videos in the Australian Capital Territory. The fee payable to obtain one of the licences is calculated by reference to a percentage (40 per cent) of the videos supplied by a licensee in a period preceding the grant or renewal of the licence. It is therefore similar to the franchise fees upheld in the cases discussed in this article. The case presented the Court with an opportunity to review the correctness of the previous cases on s 90 of the Constitution. The Commonwealth, the States and the Northern Territory intervened in the case, but only South Australia and the Australian Capital Territory sought to have the existing definition of excise reopened.

[Editorial Note]