

HEMATITE PETROLEUM PTY. LTD. v. VICTORIA: BREAKTHROUGHS IN THE INTERPRETATION OF SECTION 90 OF THE CONSTITUTION?

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INTRODUCTION

The power of the Commonwealth Parliament to impose duties of excise is made exclusive by section 90 of the Constitution. The High Court's exposition of the meaning of "duties of excise" cannot be counted as one of the successes of Australian constitutional interpretation. The question of what constitutes a duty of excise has been extensively litigated without the Court being able to settle a definition of excise which is capable of consistent and predictable application or which conforms with any coherent notion of the constitutional purpose of section 90.¹ The search for a satisfactory definition of excise also involves issues of considerable practical importance. Allocation of power to impose duties of excise plays a significant role in contemporary Australian federal fiscal relations. The significance of the challenge facing the High Court in relation to the interpretation of section 90 is reinforced by the reluctance of the electorate to support constitutional reforms which would provide an alternative means of resolving the problems currently associated with the interpretation of this section.²

In the recent case of *Hematite Petroleum Pty. Ltd. v. Victoria*³ the High Court held, by a four/two majority, that a pipeline operation fee imposed by the Victorian Government upon transportation of hydrocarbons produced in Bass Strait was a duty of excise. In this case, two judicial initiatives were taken which added new dimensions to the High Court's exposition of the concept of excise. First, some members of the Court investigated and placed overt reliance upon the constitutional purpose of section 90 to an extent not evident in previous excise duty cases. Secondly, some members of the court accepted that the taxation power of the Commonwealth (section 51(2)) could be exercised so as to attract the general inconsistency provision of the Constitution (section 109) and render State taxation invalid.

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¹ For a detailed discussion of decisions in excise duty cases see: Coper M. "The High Court and Section 90 of the Constitution" (1976) 7 F.L.R.1.

² The interchange of powers proposal, which was rejected in a referendum held on Dec. 1, 1984, would have allowed the States to impose duties of excise with the agreement of the Commonwealth.

³ (1983) 47 A.L.R. 641.

This article discusses the significance of these initiatives for the search for a solution to the problems currently associated with interpretation of section 90. The discussion is introduced by a summary of previous interpretations of the meaning of excise and its effects upon Australian federal relations.

BACKGROUND OBSERVATIONS

1. In the first excise duty case, *Peterswald v. Bartley*⁴, the High Court defined a duty of excise as a "duty analogous to a customs duty imposed upon goods either in relation to quantity or value when produced or manufactured, and not in the sense of a direct tax or personal tax"⁵.

The adoption of a definition of this composite nature proved to be of enduring significance. It allowed subsequent courts to modify the concept of excise by denying the conclusiveness of elements of the definition rather than directly confronting the authority of *Peterswald's* case.

2. In *Peterswald v. Bartley*⁶, the Court chose to define the concept of excise without reference to the constitutional purposive of section 90. The initial adoption of a definitional rather than a purposive approach to interpretation was also destined to have an important influence upon the subsequent pattern of decision in excise duty cases. The High Court has adhered, at least outwardly, to a predominantly definitional approach to interpretation of section 90 with the result that the accumulation of precedents has been particularly important in settling the definition of excise. The important part which reliance upon purposive considerations has played in excise duty cases should not be overlooked. Nevertheless, such reliance has remained erratic, incomplete and largely unacknowledged.

3. The history of judicial interpretation of the concept of excise is one characterised by progressive widening of the original definition. The present concept of excise encompasses taxes directly related to goods imposed at any stage from production to final sale. In general, a broad view has been taken both to characterisation of imposts as taxes and to determination of whether a tax is sufficiently directly related to goods to constitute an excise.

4. Definition and application of the concept of excise has been marked by sharp differences of opinion amongst members of the Court. Many of the recent excise duty cases have been decided by narrow majorities. Continual disagreement has resulted not only in uncertainty about the definition of excise, but also in decisions based upon the drawing of fine and unpredictable distinctions. Attempts to settle a formula which provides a positive and unambiguous statement of what an excise duty is have failed.⁷

⁴ (1904) 1 C.L.R. 497.

⁵ *Ibid* 509.

⁶ (1904) 1 C.L.R. 497.

⁷ The closest the Court has come to such a formula was in the joint judgment in *Bolton v. Madsen* (1963) 110 C.L.R. 264 which emphasised that in order to be an excise a tax must be directly related to goods and its "criterion of liability" must be the taking of a step in the production, manufacture, sale or distribution of goods. This formula, itself not free from ambiguity, did not receive unanimous support in any subsequent case and has recently been rejected by a majority of the court.

Even the apparently simple proposition that an excise is a tax upon goods has been qualified by the exclusion of taxes upon consumption of goods⁸ and of business franchise taxes calculated with reference to goods sold in a previous rather than current period.⁹

5. Despite adherence by the High Court to a predominantly definitional approach to interpretation, judicial perceptions of the constitutional purpose of section 90 have had a significant influence upon exposition of the meaning of the concept of excise. Judicial opinions about the proper federal function of section 90 have been largely responsible both for widening the concept of excise and for failure to achieve certainty in its definition and application. The widening of the concept of excise owes much to the view that the purpose of section 90 was to give the Commonwealth Parliament a real control of the taxation of commodities and to ensure that the execution of whatever policy it adopted should not be hampered or defeated by State action. This was the view adopted by Dixon J. whose approach was instrumental in the decisions in *Matthew's case*¹⁰ (which denied the need to restrict the meaning of excise to duties calculated directly on the quantity or value of goods) and *Parton's case*¹¹ (which established that it was not essential to the concept of excise that a tax be imposed on the manufacturer or producer of goods).

Failure to achieve certainty in the interpretation of section 90 can be attributed largely to the fact that the Court has found no all-embracing formula able to accommodate both the view that allocation to the Commonwealth of a broadly defined exclusive power to impose duties of excise is indispensable to management of the national economy, and the conflicting view that a broad definition of this power unnecessarily restricts the taxation power of the States.

6. The High Court's exposition of the concept of excise has had a significant impact upon Australian federal relations. The broad effect of the evolution of federal financial and economic relations since Federation has been to expand Commonwealth power at the expense of the States. The Commonwealth has assumed primary responsibility for the vastly expanded governmental functions of national financial and economic management. The Commonwealth dominates federal financial relations. The States retain responsibility for functions of which the expenditure requirements greatly exceed their revenue raising capacity. In order to finance expenditures the States are forced to rely upon transfer payments from the Commonwealth, a significant proportion of which are specific purpose payments.¹²

In this context, and in particular because of the effective exclusion of the States from the field of income taxation, a broad interpretation of the concept

⁸ *Dickenson's Arcade Pty. Ltd. v. Tasmania* (1974) 130 C.L.R. 177.

⁹ Exclusion of these taxes was first recognised in *Dennis Hotels Pty. Ltd. v. Victoria* (1960) 104 C.L.R. 529.

¹⁰ *Matthews v. Chicory Marketing Board (Vic)* (1938) 60 C.L.R. 263.

¹¹ *Parton v. Milk Board (Vic.)* (1949) 80 C.L.R. 229.

¹² For an overview of developments in Australian federal financial relations see: Mathews R. and Jay, W. *Federal Finance*, Nelson, Melbourne, 1972.

of excise contributes significantly to compromise of State financial and economic independence. Aside from income taxation, the prospects for State growth taxes which would redress the imbalance in State revenue collection and expenditure depend significantly upon access to taxation of goods.¹³ Such access has been largely denied by the High Court's definition of excise.

The width and uncertainty of the definition have deprived the States of the benefit of a broad and secure tax base. Instead they have been encouraged to supplement Commonwealth grants with a range of taxes which individually and collectively do not comply with general measures of appropriateness of taxation. State revenue collection is characterised by cumbersome legislative and administrative arrangements and scores badly against the criteria of equity and economic neutrality.¹⁴

In addition to these broad effects on State financial and economic circumstances, the High Court's approach to the definition of excise has also impeded attempts by the States to achieve industrial rationalisation and improvement. Adoption by the High Court of a broad approach to characterisation of imposts as taxes in section 90 cases has resulted in the States being able to fund marketing schemes from within an industry only where it is practical to exact charges from producers by way of deductions from the proceeds of sale.¹⁵ A payment has been regarded as a fee for service rather than a tax only if the payment is a reasonable charge used only to defray the expense of providing a service to the person charged.¹⁶

These negative effects upon the financial and economic independence of the States must be balanced against the benefits which have accrued from adoption of a broad interpretation of the concept of excise. The capacity of the Commonwealth effectively to implement national taxation and economic management policies free from State interference has been enhanced by the High Court's interpretation of section 90. The notion that in a federal system it is appropriate for the central government to undertake responsibility for these governmental functions is widely accepted. The absence of specific constitutional powers providing the Commonwealth with a comprehensive range of economic management instruments provides some further justification for a broad interpretation of section 90. Duties of excise also constitute

¹³ For a detailed discussion of the prospects for State growth taxes see: Committee of Inquiry into State Government Revenue Raising in Victoria, (J.P. Nieuwenhuysen, Chairman) *The Treasury of Victoria*, 1983 Vols 1 and 2.

¹⁴ For a discussion of taxation criteria in the context of State taxation see: Taxation Review Committee, *Full Report* (Mr Justice K. W. Asprey, Chairman) Canberra AGPS 1975 Ch. 3; H. G. Brennan, Criteria for State and local taxation in R. L. Matthews (ed.), *State and Local Taxation*, Canberra, ANU Press 1977. Committee of Inquiry into State Government Revenue Raising in Victoria, (J. P. Nieuwenhuysen, Chairman) *The Treasury of Victoria*, 1983 Vol. 1, Ch. 5.

¹⁵ See *Crothers v. Sheil* (1933) 49 C.L.R. 399; *Vacuum Oil Company Pty. Ltd. v. Queensland* (1934) 51 C.L.R. 108. *Attorney-General (NSW) v. Homebush Flour Mills Ltd.* (1937) 56 C.L.R. 390. For a critical assessment of this aspect of the High Court's interpretation of section 90 see: Arndt H. W. "Judicial Review under Section 90 of the Constitution: An Economist's view". 1952 25 A.L.J. 667.

¹⁶ *Harper v. Victoria* (1966) 114 C.L.R. 361.

a significant source of Australian public revenue. If, as seems likely, the Australian taxation system is altered so as to increase reliance upon indirect taxes, excise duties will become even more important to national taxation policy. By excluding the States from most goods-related taxation, a broad definition of excise may assist in the achievement of a shift in taxation policy towards increased reliance upon taxation of goods. Australian taxpayers, and the union movement in particular, may be more easily persuaded to accept such a change if the Commonwealth is able to offer a simple, in political terms, trade-off between an increase in taxation of goods and a reduction in income tax.

JUDICIAL INITIATIVES IN HEMATITE PETROLEUM v. VICTORIA

A. The Constitutional Purpose of Section 90

1. Judicial Examination of the Purpose of Section 90

Gibbs C.J.

Gibbs C.J. observed that the intentions of the framers of the Constitution in including in section 90 a reference to duties of excise remain to some extent obscure. He noted that the presence of section 109 may well have rendered it unnecessary to include in section 90 a reference to duties of excise for the purpose of invalidating a State excise duty which counteracted the effect of a Commonwealth tariff. Nevertheless, in his view, the constitutional conjunction of customs, excise and bounties suggest that section 90 was intended to give the Commonwealth a real control over its tariff policy. He found no support in the Constitution for suggestions that section 90 was intended to limit further the taxation power of the States in order to give the Commonwealth Parliament a real control of the taxation of commodities or to give the Commonwealth control of a unified national economy. Gibbs C.J. observed that section 90 does not affect the power conferred on the Commonwealth by section 51(2) to make laws with respect to taxation and that on any possible view of its effect section 90 confers on the Commonwealth only a very limited power to control the economy. The States retain power to control or influence production or manufacture of goods through the use of other taxes, quotas, prohibition or the provision of infra-structural assistance.

The Chief Justice referred to the effects of a broad definition of excise upon Australian federal relations in order to support his view that the present scope of the concept not only goes beyond that required to allow section 90 to achieve its original constitutional purpose, but also has no contemporary purposive justification. He argued that a broad interpretation of the concept of excise has seriously restricted the financial and economic power of the States without conferring any corresponding benefit on the Commonwealth. By restricting the States to an artificially narrow taxation base, a broad definition of excise contributes to federal financial imbalance and encourages

unsatisfactory State revenue collection measures. Achievement of the goals of State industry policy is also impeded. Section 90 is not a source of Commonwealth power and Commonwealth legislative policy is adequately protected from State interference by section 109 of the Constitution.

Mason J.

Mason J. adopted the view that section 90 was part of a constitutional scheme which was intended to give the Commonwealth Parliament a real control of the taxation of commodities and to ensure that the execution of whatever policy it adopted should not be hampered or defeated by State action. He emphasised the importance of duties of excise as an instrument of economic management which should be available for utilisation by the central government in a federal system.

"Excise duties, like customs duties are significant instruments for raising revenue. What is more important is that Parliament possessing exclusive power to impose both forms of duties, can protect and stimulate home production by fixing appropriate levels of customs and excise duties. And it can lower the level of domestic prices by lowering customs and excise duties. By lowering customs duties alone it can put pressure on Australian producers and manufacturers to become more competitive."¹⁷

Mason J. observed that the Commonwealth might be able to rely upon the taxation power (section 51(2)) and the inconsistency provision (section 109) effectively to prevent the States from imposing excise duties. However, this observation did not modify his conclusion about the purpose of section 90. He reasoned that the Commonwealth's control was stronger if it possessed exclusive power. Exclusive power removed the potential for independent State action or political controversy and constraints undermining Commonwealth policy in relation to the taxation of goods.

Murphy J.

Murphy J. concluded, as he had in previous excise duty cases¹⁸, that section 90 was intended to operate as part of a constitutional scheme designed to regulate Commonwealth and State taxation which discriminates between goods according to their place of manufacture or production. This scheme had two related objectives: first, to prevent either a State (section 90) or a Commonwealth tax (sections 51(2), 92 and 99) from discriminatory operation in relation to locally produced goods, and secondly, to prevent State obstruction of Commonwealth tariff policy. In accordance with the first of these objectives, section 90 was designed to contribute to the removal of barriers to interstate trade. Section 90 achieved the second objective by

¹⁷ (1983) 47 A.L.R. 641, 660.

¹⁸ The excise duty cases, prior to the *Hematite Petroleum* case, in which Murphy was a member of the court were: *H. C. Sleigh Ltd. v. South Australia* (1976) 136 C.L.R. 475 and *Logan Downs Pty. Ltd. v. Queensland* (1977) 137 C.L.R. 59.

denying to the States power to impose duties or grant bounties which would countermand the effect of Commonwealth customs duties.

In support of his conclusion that section 90 was not intended to limit the taxation power of the States beyond the extent necessary to achieve these objectives, Murphy J. drew attention to the adverse consequences which a broad definition of excise has upon the financial and economic activities of the States. He also noted that section 90 does not affect the power of the Commonwealth to make laws with respect to taxation, including laws which exclude the States from particular taxation fields. In addition, he argued, contrary to Mason J., that a restricted interpretation of the excise power would, if the application of section 109 were extended to section 51(2), enhance the capacity of the Commonwealth to manage the economy. This argument was based upon the observation that Commonwealth taxation cannot discriminate between States or parts of States (section 51(2)) or give preference to one State or part over another State or part (section 99). A restricted interpretation of the excise power, in conjunction with the application of section 109 to section 51(2), would enable the Commonwealth either to allow or exclude the operation of State legislation which imposed taxation upon goods at rates which differed between States.

Wilson J.

Wilson J. denied the relevance to the interpretation of section 90 of considerations of assumed constitutional purpose.

“The difficulty is that there is no certain guide to the purpose of section 90 save that which is to be gleaned from the words of the section. The power to impose duties of customs and of excise, and to grant bounties on the production or export of goods, is denied to the States. Therein lies a constitutional distinction in terms of legislative power which it is the duty of this Court to preserve. That section alone defines the limits of exclusive legislative power in this respect. It provides no authority to the Court to assume the responsibility of determining larger questions of fiscal responsibility within the federation; nor, of course, is the Court equipped to undertake such a task. Those larger questions must be determined, consistently with the Constitution, in the political arena. It is there that the resources available in the community to cope with economic conditions of increasing complexity may be appropriately discovered and utilized.”¹⁹

Brennan J.

Brennan J. did not discuss the purpose of section 90. However, he indicated preference for a broad approach to the definition of excise for the reasons expressed by Mason J.. On this basis, it may be assumed that Brennan J. takes the view that section 90 was intended to give the Commonwealth a real control over the taxation of commodities.

¹⁹(1983) 47 A.L.R. 641, 674-5.

Deane J.

Deane J. concluded that section 90 constitutes part of a constitutional scheme the purpose of which was to achieve economic and national unity in the production and manufacture of goods. The grant to the Commonwealth of exclusive power to impose duties of excise was, in association with other measures, designed to remove barriers to interstate trade, ensure that the people of Australia were treated equally with respect to the imposition of duties and the grant of bounties, and to prevent State obstruction of Commonwealth tariff policy. These conclusions about the purpose of section 90 were supported by reference to the "federal principles" upon which this constitutional scheme was based and the connection between these principles and European experience with the rationalisation of customs and excise duties.

2. Reliance upon the Purpose of Section 90 in Hematite Petroleum

Gibbs C.J.

The conclusion of Gibbs C.J. that the purpose of section 90 was to give the Commonwealth a real control of its tariff policy influenced his approach to the interpretation of the concept of excise. This conclusion, in conjunction with his observation that the major constitutional significance of section 90 lies in its unjustified restriction of State taxation power led the Chief Justice to conclude that the concept of excise should be given a narrow construction. However, he did not seek to achieve a narrow construction by adopting a definition of excise which was consistent with his conclusion about the purpose of section 90.

He defined a duty of excise as "a tax directly related to goods imposed at some step in their production or distribution before they reached the hands of the consumer". This definition, developed in previous excise duty cases, cannot be reconciled with his view of the purpose of section 90 since it both includes and excludes taxes in non-compliance with the rationale of protection of Commonwealth tariff policy. Furthermore, this definition is clearly not, in itself, a narrow definition of excise.

Gibbs C.J. achieved a "narrow" construction of the concept of excise by adopting the view that a tax will only be sufficiently related to goods to be characterised as an excise if its "criterion of liability" is the taking of a step in the production, manufacture or distribution of goods. He identified the criterion of liability with reference to the legal form rather than the practical effect of the legislation which imposed the tax. In his view that a tax will have the same practical effect upon goods as an excise does not give the tax a sufficiently close relationship to the goods for it to be characterised as an excise. The desire to give section 90 a narrow interpretation led Gibbs C.J. to accept the additional requirement that in order for a tax to be an excise, it must have a natural or necessary relationship to the quantity or value of the goods in relation to which it is imposed.

Mason J.

The judgment of Mason J. indicated clearly his desire to give section 90 an interpretation broadly consistent with his conclusion that it was intended to give the Commonwealth a real control over the taxation of commodities. However, while he adopted a broad approach to interpretation, Mason J. did not define the concept of excise in conformity with his conclusion as to the purpose of section 90. He defined an excise as a tax upon or in respect of a step in the production, manufacture, sale or distribution of goods. Commonwealth control over taxation of commodities is restricted by the exclusion of consumption taxes from this definition.²⁰

The approach of Mason J. to characterisation of the pipelines fee with reference to the definition of excise was in accordance with his perception of the purpose of section 90. He sought to establish whether the fee was imposed upon a relevant step in relation to goods by identifying the substantial operation rather than the legal form of the taxing legislation. The "criterion of liability" test was rejected in favour of the view that

"in arriving at the conclusion that the tax is a tax upon the relevant step, consideration of many factors is necessary, factors which may not be present in every case and which may have different weight or emphasis in different cases. 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 or movement of the goods into consumption, the form and content of the legislation imposing the tax — all these are included in the relevant considerations."²¹

Mason J. also accepted the broad proposition that "To justify the conclusion that the tax is upon or in respect of goods it is enough that the tax is such that it enters into the cost of goods and is therefore reflected in the prices at which the goods are subsequently sold."²²

On the basis of his judgment in the *Hematite Petroleum* case it could reasonably have been concluded that, with the exception of consumption taxes, Mason J. was prepared in future to include or exclude taxes from the concept of excise in conformity with his notion of the constitutional purpose of section 90. However, more recently in *Evda Nominees Pty. Ltd. v. Victoria*²³ he joined other members of the High Court in refusing to characterise a business franchise tax as an excise. Any conclusion about the preparedness of Mason J. to interpret section 90 in conformity with his notion of its constitutional purpose must now take into account his willingness to defer to previous decisions upon which the States have relied in organizing their financial affairs.

²⁰ As a member of the Court in *Dickenson's Arcade Pty. Ltd. v. Tasmania* (1974) 130 C.L.R. 177., Mason J. accepted the exclusion of consumption taxes from the definition of excise.

²¹ (1983) 47 A.L.R. 641, 658-9.

²² *Id.* 661.

²³ (1984) 58 A.L.J.R. 307.

Murphy J.

Murphy J. sought to define the scope of the excise power in accordance with his perception of its constitutional purpose. He concluded that the constitutional objectives of removal of barriers to interstate trade and prevention of State obstruction to Commonwealth tariff policy can be achieved by restricting the definition of duties of excise to taxes upon goods which discriminate between goods locally produced or manufactured and other goods. Accordingly, a tax on distribution or consumption will not, in his view, be a duty of excise unless it discriminates against local production or is in substance a tax on production. A tax on distribution or consumption may in substance be a tax on production if, for example, it were restricted to a particular commodity which was wholly or almost wholly locally produced.

Murphy J. observed that a tax may still be an excise even if it is not assessed according to the quantity or value of goods. Beyond this, he gave no clear indication of the required closeness of relationship between goods and a tax for the tax to be a tax upon the production of goods. Some indication of his attitude is provided by his observation that a tax on distribution or consumption may in substance be a tax upon production. This suggests that in identifying the relationship between a tax and goods, he would be guided by the practical operation of the legislation. His conclusion that the pipelines fee was an excise because it effectively taxed the transportation and therefore the production of hydrocarbons is consistent with this view. However, Murphy J. has indicated elsewhere that there are limits to the extent to which the practical operation of legislation is relevant. In *Logan Downs v. Queensland*²⁴ he observed that that a tax adds to the cost of production of goods does not of itself give it a sufficiently close relationship to production of goods for it to be characterised as a tax upon their production.

The approach which Murphy J. has adopted to the definition of the concept of excise demonstrates that section 90 can be interpreted in broad conformity with a coherent notion of its constitutional purpose. In this respect, his approach can only be favourably compared with most of the alternative approaches which have been adopted in previous excise duty cases.²⁵ However, it should be pointed out that the definition of excise adopted by Murphy J. is not entirely consistent with his conclusions as to the constitutional purpose of section 90. A State tax, for example a sales tax, imposed without discrimination upon goods locally produced and those produced outside the State, will tend to increase the price and as a result reduce demand for the goods in question. To the extent that interstate demand for these goods falls, a barrier to interstate trade will have been erected. Commonwealth tariff policy will also be frustrated by the imposition of a non-discriminatory State

²⁴ (1977) 137 C.L.R. 59.

²⁵ The approach adopted by Murphy J. is similar to that previously adopted by Latham C.J. and McTiernan J. in *Parton v. Milk Board (Vic)* (1949) 80 C.L.R. 229 and by Fullager J. in *Dennis Hotels Pty. Ltd. v. Victoria* (1960) 104 C.L.R. 529.

tax to the extent that the State tax reduces demand for goods subject to Commonwealth protection.

Wilson J.

Wilson J. purported to define the concept of excise without placing reliance upon assumptions concerning the constitutional purpose of section 90. He argued that the constitutional role of section 90 should be determined only with reference to the words of the Constitution and previous decisions which have considered their meaning. His only concession to the suggested need to interpret section 90 consistently with broader notions about its constitutional purpose was to note that an extension of the concept of excise to cover any impost which may be seen in a practical sense to increase the cost of production or distribution of goods would seriously diminish the powers of taxation hitherto conceded to the States.

Although the definition of excise adopted by Wilson J. was not derived from any particular conception of the constitutional purpose of section 90, it is not free from the influence of purposive consideration. He defined an excise as a tax directly related to goods imposed at some step in their production or distribution before they reach the hands of consumers.

As previously stated, this definition derives from an accumulation of previous decisions which broadened the original definition in *Peterswald v. Bartley*²⁶ and which were significantly influenced by conclusions about the purpose of section 90.

The origins of the criterion of liability formula which Wilson J. utilized in determining whether the pipelines fee was a tax directly related to goods are not altogether free from the influence of conclusions about the constitutional purpose of section 90. This formula has received consistent support from members of the High Court who have considered that the constitutional role of section 90 is best served by restricting the scope of the concept of excise in the interests of State fiscal independence.

Brennan J.

Brennan J. did not refer to the purpose of section 90. His support for the reasoning of Mason J. provides some basis for the conclusion that he favours an interpretation of the concept of excise designed to give the Commonwealth control over the taxation of commodities. However, even this tentative conclusion must be modified because in the *Hematite Petroleum* case Brennan J. accepted the exclusion of consumption taxes from the definition of excise, and in *Evda Nominees Pty. Ltd. v. Victoria*²⁷ he also accepted the exclusion of a business franchise tax from the definition.

²⁶ [1904] 1 C.L.R. 497.

²⁷ (1984) 58 A.L.J.R. 307.

Deane J.

The approach adopted by Deane J. in characterising the pipelines fee conformed, in general, with his conclusion that the purpose of section 90 was to contribute to the removal of barriers to interstate trade and to protect Commonwealth tariff policy. He observed that the formulation and application of a precise definition of duties of excise will result in evasion of the excise power and the frustration of its constitutional purpose. He described a duty of excise as, in substance, a tax upon the manufacture of goods. In his view, this description encompasses taxes imposed upon steps preliminary and subsequent to actual production.

Deane J. rejected the argument that the "criterion of liability" formula provided an exhaustive and definitive test to be applied in determining whether a tax is a duty of excise. Instead, he sought to identify, with reference to a range of factors, the substantial operation of the legislation imposing the pipelines operation fee. Consistent with this approach he accepted that a tax may be a duty of excise notwithstanding that it is not calculated by reference to the quantity or value of goods.

Although the approach adopted by Deane J. was broadly consistent with his conclusions about the purpose of section 90, the facts of the *Hematite Petroleum* case did not require him, in reaching a decision, to articulate in full his view of the relationship between these conclusions and the scope of the concept of excise. He did, however, raise the possibility of adopting a definition of excise in accordance with which a tax applied in respect of both local and imported goods at a stage subsequent to actual production or manufacture would only be a duty of excise if it discriminated against local production or manufacture.²⁸ Deane J. did not elaborate upon this point. If he were to adopt this definition he would be in substantial agreement with Murphy J. both as to the constitutional purpose of the excise power and the extent to which it limits the taxation power of the States.

Concluding Remarks

In one respect, the investigation of and reliance upon the constitutional purpose of section 90 in the *Hematite Petroleum* case can be regarded as a significant breakthrough in the interpretation of the concept of excise. In previous excise duty cases judicial attitudes about the importance of section 90 to Commonwealth and State legislative power have remained hidden or appeared without justifying argument. In the light of the previous pattern of decision in excise duty cases and its effects upon federal fiscal relations, this situation was unsatisfactory. As previously stated, judicial perceptions of the constitutional purpose of section 90 have had an important influence upon its interpretation. This is sufficient reason in itself for the bases these perceptions to be exposed and subjected to detailed analysis and argument. In addition, once it is acknowledged that the constitutional controversy which

²⁸ (1983) 47 A.L.R. 641, 688.

currently surrounds the interpretation of section 90 cannot be resolved without exhaustive inquiry concerning the extent to which exclusion of the States from taxation of goods is justified, the need to investigate and rely upon considerations of constitutional purpose encompassing "extra-legal" factors cannot be denied.

The significance of the extensive discussion of the constitutional purpose of section 90 in the *Hematite Petroleum Case* stems primarily from the potential it creates rather than the results it achieved. The stage has been set for the Court to consider more detailed argument about the competing Commonwealth and State demands for revenue and economic management capacity, to which the interpretation of section 90 inevitably gives rise. The way has also been opened for the fundamental conceptions of federalism upon which resolution of issues concerning the constitutional concept of excise ultimately depend to be exposed to examination and argument.

The extent to which the potential which has been created for productive judicial consideration of the constitutional role of section 90 will be realised remains to be seen. The judgments delivered in the *Hematite Petroleum* case did little more than set out in general terms the opposing arguments in favour of a broad versus a narrow definition of excise, and the conceptions of federalism upon which they are based. Consideration of the purpose of section 90 is unlikely to assist the High Court in the search for a satisfactory definition of excise unless the relationship between excise duties and fiscal federalism is subject to much more specific and detailed examination. It can only be concluded that there is little immediate prospect of increased and more open reliance upon purposive considerations reducing the extent of judicial disagreement about, or producing a more satisfactory definition of, the concept of excise. Judicial disagreement about both the constitutional purpose of section 90 and the extent to which purposive considerations are relevant to its interpretation is one of the most striking characteristics of the *Hematite Petroleum* case.

Nevertheless in two respects, this case provided some cause for optimism. First, it now appears that a majority of the Court is concerned to interpret section 90 with reference to inquiry and argument about the consequences for contemporary fiscal federalism of allocation of power to impose duties of excise. Secondly, Deane J. may have been persuaded to join Murphy J. in adopting a definition of excise which, broadly speaking, conforms to a coherent notion of the constitutional purpose of section 90.

B. The Significance of Section 109 to Interpretation of Section 90

Section 109 of the Constitution provides that in the event of an inconsistency between Commonwealth and State laws the Commonwealth law shall prevail and the State law shall be invalid to the extent of the inconsistency. This section applies not only where there is direct inconsistency between Commonwealth and State laws but also where the Commonwealth law is held to cover the whole legislative field in which the State law operates. Before the decision in the *Hematite Petroleum* case judicial pronouncements provided

little support for the possibility that the taxation power of the Commonwealth (section 51(2)) could be exercised so as to attract section 109 and render State taxation invalid.

In *Municipal Council of Sydney v. Commonwealth*²⁹ Griffith C.J. described the power in section 51(2) as a power to impose "federal taxation for federal purposes". If State Parliaments are regarded as having power to impose taxes only for State purposes then inconsistency between Commonwealth and State taxation laws could not arise. Direct inconsistency could not arise because neither the Commonwealth nor a State Parliament could legislate to impose taxation for the purposes of the other. Similarly, no question of the Commonwealth covering a relevant legislative field could arise where the taxation powers of the respective Parliaments are confined to different fields.

The decision in *Victoria v. Commonwealth*³⁰ provided support for this view of the relationship between section 51(2) and section 109. In this case Dixon C.J. said that "the power to make laws with respect to taxation has never been, and consistently with the federal character of the Constitution could not be, construed as a power over the whole subject of taxation throughout Australia, whatever Parliament or other authority imposed taxation".³¹ By way of exception, Murphy J. had, in *Gazzo v. Comptroller of Stamps (Vic)*³² offered an unelaborated opinion that a Commonwealth law which purported to exempt from State stamp duty documents executed pursuant to an order of the Family Court was supported by section 51(2).

Judicial opinion in *Hematite Petroleum* throws doubt upon previous assumptions about the relationship between section 51(2) and section 109. *Dicta* from four members of the Court can be interpreted as supporting the view that the taxation power of the Commonwealth can be exercised so as to attract the operation of section 109. Mason and Murphy JJ. concluded that a law enacted under section 51(2) providing that no excise duties should be payable on designated goods would, by virtue of section 109, prevail over any inconsistent State law. Gibbs C.J. stated that "The presence of section 109 may well have rendered it unnecessary to include in section 90 a reference to duties of excise for the purpose of invalidating a State excise duty which counteracted the effect of a Commonwealth tariff".³³ While this statement is consistent with the view that exercise of the power in section 51(2) can attract the operation of section 109, it may also be interpreted as a reference to the trade and commerce power (section 51(1)). The comment of Deane J. was similarly inconclusive. He did not elaborate upon his statement that the concurrent taxation power of the States is subject to the effect of inconsistency provisions. This statement may be no more than an affirmation of the principle that the exercise of heads of Commonwealth power,

²⁹ (1904) 1 C.L.R. 208, 232.

³⁰ (1957) 99 C.L.R. 575.

³¹ *Ibid* 614.

³² (1981) 56 A.L.J.R. 143, 156.

³³ (1983) 47 A.L.R. 641, 649.

other than section 51(2), can attract the operation of section 109 and in so doing invalidate State taxation legislation.

It cannot be concluded, on the basis of the *dicta* in the *Hematite Petroleum* case that a majority of the High Court accepts that the Commonwealth could rely upon section 51(2) to invalidate State taxation. Nevertheless, that this interpretation of the relationship between the taxation power of the Commonwealth and section 109 has been raised as a serious possibility, has added an extra dimension to the controversy surrounding interpretation of section 90.

Extension of the operation of section 109 to section 51(2) would make all State taxation subject to Commonwealth approval. If this occurred the question which would then arise in the context of interpretation of section 90 is: could this expansion of Commonwealth power be complemented by the adoption of a narrow definition of excise so as to satisfy the legitimate fiscal demands of both the Commonwealth and the States? In the *Hematite Petroleum* case Mason and Murphy JJ. considered this question. Mason J. concluded that, in the interests of national economic management, the concept of excise should be broadly defined regardless of the application of section 109 to section 51(2).

"If the States had power to impose excise duties then the Commonwealth Parliament's power to protect and stimulate home production and influence domestic price levels might be compromised. It is possible that by an exercise of the taxation power the Commonwealth could effectively prevent the States from imposing excise duties. A law enacted under S.51(ii) providing that no excise duties should be payable on designated goods would, by virtue of S.109, prevail over any inconsistent State law. This is not a reason for denying that the object of granting exclusive power to the Commonwealth was as I have expressed it to be. The Commonwealth's control is stronger if it possesses exclusive power; then there is no potential for conflict between Commonwealth and State legislation. The possibility of the imposition of taxes on goods by the States in the period prior to the enactment of inconsistent legislation by the Commonwealth undermines the Commonwealth's real control of the taxation of commodities and provides a further reason for rejecting the existence of S.109 as a basis for narrowing the ambit of the Commonwealth's exclusive power under S.90. In any case, to make the power exclusive is to free its exercise from some of the political controversies and constraints which would inevitably surround any attempt by the Commonwealth Parliament to pass inconsistent legislation designed solely to override a State law."³⁴

As indicated earlier, Brennan J. expressed general agreement with the reasoning of Mason J.

Mason J. concluded that achievement of the goals of both national economic management and State fiscal independence would be facilitated by complementary interpretation of section 90, section 51(2) and section 109. With reference to national economic management he reasoned that

"If the concept of excise is narrow, so that the States have more freedom in the choice of taxing, this does not impair, but enhances, the capacity

³⁴ *Ibid* 660.

of the Australian Parliament to manage the economy. This is because the Parliament may allow the State tax to operate, or may legislate to exclude it by operation of S.109 of the Constitution. Such a federal law must however conform with the Constitution; it must not, for example, offend S.51(2) by discriminating between States or parts of States, or offend S.99 by giving preference to one State or part over another State or part.³⁵

Gibbs C.J. did not consider directly the implications of adopting a complementary interpretation of section 90, section 51(2) and section 109. Nevertheless it is clear that the Chief Justice considers that the concept of excise should be narrowly construed regardless of the application of section 109 to section 51(2). There is no doubt that on this point Wilson J. would agree with the Chief Justice. Deane J. did not discuss the relationship between section 90 and the application of section 109 to section 51(2).

By drawing attention to a possible complementary interpretation of section 90, section 51(2) and section 109, the *Hematite Petroleum* case has sharpened the focus of the High Court upon the fundamental question which must be addressed if the problems surrounding interpretation of section 90 are to be resolved. This question concerns the extent to which exclusion of the States from taxation of goods is justified in order to preserve for the Commonwealth sufficient power for the purposes of national economic management. At this point it is appropriate to venture beyond the judgments in the *Hematite Petroleum* case in order briefly to address this question. At the outset, it should be noted that the term "national economic management" encompasses an extremely broad range of governmental responsibilities. Furthermore, the constitutional allocation of power to impose taxation upon goods affects, in one way or another, almost all national economic management decisions. A detailed analysis of the relationship between taxation of goods and national economic management is beyond the scope of this article. With this in mind, the discussion which follows is limited to the important question of the role of taxation of goods in Australian economic stabilization policy concerned with the maintenance of full employment in conjunction with stable prices.

There is a growing body of literature concerning the criteria which should guide the allocation of taxes between various levels of government.³⁶ Contributors to this literature are generally agreed that taxes suitable for the purposes of economic stabilization policy should be centrally imposed. Taxes upon goods clearly fall within this category. Changes in the rates of indirect taxes upon goods are a more powerful weapon for economic stabilization purposes than changes in the rate of personal income taxes. In his analysis of Australian fiscal policy Nevile³⁷ concluded that a change in the average rate of Commonwealth indirect taxation has approximately one and a half

³⁵ Ibid 666.

³⁶ See, for example, Groenewegen P., "Apportioning Taxation Powers in a Federation" in Mathews R.L. (ed.), *State Taxation in Theory and Practice*, Centre for Research on Federal Financial Relations, A.N.U., Canberra 1981; Musgrave R. "Who Should Tax, Where and What" in McLure (ed.), *Tax Assignment in Federal Countries*, A.N.U. Press, 1983.

³⁷ Nevile J. W., *Fiscal Policy in Australia: Theory and Practice*, Longman and Cheshire, 2nd ed. 1975.

times as much effect on the level of economic activity as an equal percentage change in the rate of personal income tax. Nevile has also observed that "in dollar terms one needs three times as big a cut in personal income tax rates as in rates of indirect taxes to produce the same immediate reduction in the rate of inflation.³⁸ The Commonwealth Government has changed the rates at which indirect taxation is imposed more frequently, and on average by larger amounts, than the rates at which personal income tax is imposed. As a result, it can be concluded that control over indirect taxes has been more important to Australian economic stabilisation policy than control over personal income taxes.³⁹

These observations establish a *prima facie* case in favour of Commonwealth retention of control over taxation of goods and therefore in favour of a broad interpretation of section 90. However, the strength of this case should not be overstated. The States of the United States of America and the Canadian Provinces have access to a broader range of taxation, including taxation of goods, than the Australian States without any obvious ill effects upon central powers of economic management. In addition, it can be argued that Commonwealth control of income taxation, public borrowing and monetary policy is sufficient to compensate for any diminution of economic management capacity which would result from expansion, through interpretation of section 90, of the power of the States to impose taxation upon goods.

Nevertheless, in view of Australian economic stabilisation policy experience, and the importance of taxation of goods to some aspects of national industrial policy, and prices and incomes policy, the case in favour of Commonwealth retention of control over taxation of goods maintains considerable validity. It is important to note that this conclusion is not necessarily inconsistent with the view that the concept of excise should be narrowly defined. Commonwealth control of taxation of goods can be maintained provided that the Commonwealth Parliament retains effective capacity to control the rate of taxation upon goods. The Commonwealth can control the rate of taxation of goods providing that it is able, by imposing tax surcharges or granting tax rebates, to control the rate of taxation "at the margin".

The question which arises in the present context is: What are the implications, for Commonwealth control of the marginal rate of taxation of goods, of the approaches adopted in the *Hematite Petroleum* case to the interpretation of section 90, section 51(2) and section 109? Four possibilities emerge from this case. First, a broad interpretation of section 90 in conjunction with the application of section 109 to section 51(2). This was the approach adopted by Mason J. Secondly, a narrow interpretation of section 90 in conjunction with the application of section 109 to section 51(2). This was the approach adopted by Murphy J. Thirdly, a broad interpretation of section 90 without

³⁸ Nevile J. W., "Tax Cuts as an Anti-Inflationary Weapon", Centre for Applied Economic Research. University of N.S.W. paper No. 3, 1977-8 p.3.

³⁹ Nevile J. W., *Fiscal Policy In Australia: Theory and Practice*, Longman and Cheshire, 2nd Edition, 1975. Ch. 6.

the application of section 109 to section 51(2). Fourthly, a narrow interpretation of section 90 without the application of section 109 to section 51(2).

None of these alternatives precludes Commonwealth control of the marginal rate of taxation of goods. Even if the fourth alternative were adopted, the Commonwealth would retain exclusive power over much of the field of taxation of goods. Where it did not have exclusive power, the Commonwealth could, in reliance upon its concurrent taxation power (section 51(2)) still control the marginal rate of taxation. The effectiveness of Commonwealth reliance upon marginal tax surcharges or rebates would be seriously compromised only if the rate of taxation upon goods varied significantly between States and if the variation was inconsistent with the achievement of the Commonwealth Government's objectives. The Commonwealth cannot impose taxation which discriminates between States (section 51(2)).

It is suggested that, in practice, non-uniformity of State taxation is unlikely significantly to diminish Commonwealth control of the marginal rate of taxation of goods. Whilst, to some extent, inter-state tax competition is inherent in a federal system of government, extreme variations between rates of State taxation are unlikely to be sustained without causing re-location of capital and labour involved in production, manufacture, or distribution of the goods subject to taxation. The most suitable conditions for a sustained variation in rates of taxation occur where particular goods are produced only in one or more States and substitute goods are produced only in other States. Even in these situations, the States involved may wish to encourage local production of the substitute goods. Furthermore, to the extent that the Commonwealth encounters variable rates of State taxation inconsistent with its policies, it can rely upon a number of Commonwealth powers, the grants power (section 96) in particular, to bring pressure to bear upon the States.

Adoption of a narrow interpretation of section 90 without the application of section 109 to section 51(2), may reduce to some extent the Commonwealth Government's control of the marginal rate of taxation of goods. However, having regard to the present fiscal plight of the States, any impediment which would thereby be placed in the way of achievement of national economic stabilisation policy is unlikely to be sufficient to justify a broad interpretation of section 90. Certainly, the application of section 109 to section 51(2) cannot be justified by reference to the need to preserve for the Commonwealth sufficient power over taxation of goods for the purposes of economic stabilisation, even if section 90 is given a narrow interpretation. Application of section 109 to section 51(2) would dramatically alter the constitutional allocation of taxation powers in favour of the Commonwealth. Contemplation of such a radical change in the constitutional *status quo* raises issues more important than, and extending far beyond, the search for a satisfactory definition of section 90. Discussion of these complex issues is beyond this scope of this article.⁴⁰

⁴⁰ For a discussion of some of the issues relevant to consideration of the application of section 109 to section 51(2), see: Australian Constitutional Convention, 1984, Fiscal Powers Subcommittee. July 1984, p. 34-37.

Concluding Remarks

In the *Hematite Petroleum* case, consideration of the application of section 109 to section 51(2) drew attention to a possible indirect means of resolving the problems surrounding interpretation of section 90. However, there is no immediate prospect that this initiative will reduce the extent of judicial disagreement about the definition of excise. As we have seen, only Mason and Murphy JJ. were firmly of the opinion that the application of section 109 extends to section 51(2). Even if a majority of the High Court accepted that the Commonwealth could rely upon section 51(2) to invalidate State taxation, present indications are that this would not be helpful in the interpretation of section 90. Expansion of Commonwealth taxation power can assist in the search for a satisfactory definition of excise only if the expansion can be regarded as a necessary complement to the adoption of a narrow definition of excise. In the *Hematite Petroleum* case only Murphy J. adopted this view.

In this article, it has been argued that the problems which are currently associated with interpretation of section 90 cannot be resolved through the application of section 109 to section 51(2).

With reference to the interpretation of section 90, the significance of consideration of the application of section 109 to section 51(2), like the significance of consideration of the constitutional purpose of section 90, stems from its having set the stage for more detailed judicial analysis of the relationship between the constitutional allocation of power to impose excise duties and fiscal federalism.