Chapter Six

"A Hateful Tax"? Section 90 of the Constitution

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Section 90 of the Constitution includes the following provision: "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."

One effect of this provision, of course, is to put it beyond the power of the States to impose duties of excise. The current view of the majority of the High Court is that any tax in respect of goods at any step in their production or distribution before they reach the point of consumption is an excise. That definition may appear clear, but in fact it has caused persistent uncertainty resulting in frequent litigation, in the course of which the courts have drawn fine distinctions and reached anomalous results.

What is even worse, this interpretation of s.90 has so restricted the taxing powers of the States that they are forced to resort to methods of taxation which are inefficient and which have an adverse effect on the economy.

In addition, the inability of the States to impose duties of excise, widely defined in this way, has contributed to the severe imbalance between the revenues and the expenditures of the Commonwealth and of the States. The Commonwealth raises far more than it needs to meet its responsibilities, whereas the revenues raised by the States are quite inadequate to meet their needs. At the same time this restriction on the power of the States confers no practical benefit on the Commonwealth. The constitutional ban on the imposition of excise duties by the States, as interpreted by the High Court, is both unnecessary and harmful.

These criticisms may appear to be so dogmatic as to suggest that they provide an example of "the full immunity from doubt of the judicial mind", but they are neither novel nor idiosyncratic. Many commentators, economists as well as lawyers, have pointed out the unsatisfactory results of the interpretation of the section. Professor Coper has said that the interpretation of s.90 is "a complete mess". Even some whose views generally are strongly in favour of increased central power have been unable to suggest any good reason why the States should not be able to impose duties of excise.

As long ago as 1929 a Royal Commission on the Constitution recommended that s.90 be amended so that the power of the Commonwealth to impose duties of excise should not be exclusive in respect of goods "not for the time being the subject of customs duties". Again in 1988 the Constitutional Commission recommended that the words "of excise" be omitted from s.90 so that the States would be empowered to impose excise duties of any sort. The fact that no action has been taken on these recommendations may provide a reason for supporting the suggestion that the States should have power to initiate the procedure for amending the Constitution by referendum, but as things stand, the prospect that s.90 will be amended by referendum seems somewhat remote.

The reason for revisiting this issue is certainly not to criticise the decisions of the High Court, some of which are of long standing. However, some judgments in the latest case in which the question has been considered give reason for hope that the High Court may in future revert to a narrower and less restrictive test of what is a duty of excise. The object of this paper is to suggest that every argument of legal principle and political and economic convenience is in favour of the realisation of that hope.

"Excise", like many other words in the English language, can bear a variety of meanings. It is wide enough to include any tax. Dr Johnson in his Dictionary defined the term to mean "a hateful tax levied upon commodities, and adjudged not by the common judges of property but wretches

hired by those to whom excise is paid." This definition has been said by the Privy Council to be "distinguished by acerbity rather than precision", but it reflects the rather irrational unpopularity that seems to be the fate of some taxes on goods. William Blackstone, in his Commentaries on the Laws of England, said that excise "from its first original to the present time has been odious to the people of England". A century earlier the poet Andrew Marvell had described excise as having more teeth than a shark and as feeding on all trades like a cassowary, which in those days was regarded as a bird of prey. In recent times, in Australia, a proposed Goods and Services Tax has been reviled with similar hyperbole. However, in spite of the ambiguity of the term "excise" its common meaning, and some would say its fundamental meaning, is "a duty charged on home goods, either in the process of their manufacture or before their sale to the home consumers".

In the Australian colonies before 1901 the term seems to have been generally understood to mean a tax on the local manufacture or production of goods. Although the debates of the Constitutional Conventions contain little enlightening discussion about the purpose for which duties of excise were to be put beyond the powers of the States, they do show that influential members, such as Messrs Isaacs and Barton, intended excise, in the Constitution, to mean "a duty chargeable on the manufacture and production of commodities". Subsequently, all five members of the Conventions who later became members of the High Court – Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ. – held in their judgments that an excise is a tax on local production or manufacture, i.e. a tax on articles produced or manufactured in the country imposing the tax. In the earliest case on the subject, Sir Samuel Griffith said that, whenever the expression "duties of excise" is used in the Constitution," it is intended to mean 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".

If this decision had been followed in later cases some of the difficulties that have since arisen would have been avoided, but not all. However, critical elements of this definition of "duties of excise" have been whittled away and the field of taxation from which the States are excluded has grown wider and wider. First the meaning of excise was significantly expanded in 1938 by the decision that the expression was not restricted to duties calculated directly on the quantity or value of the goods. Then, in 1949, the Court held that it was not necessary that the tax should be levied on the producer or manufacturer, and that any tax on goods before they reached the hands of the consumer is an excise. It was said that a tax on the sale or distribution of goods before they reach the consumer produces the same effect as a tax on the production or manufacture of the goods. This reasoning is open to criticism. If it were correct, the same thing could be said of any tax on producers and manufacturers, including land tax and payroll tax, and also of taxes on consumption. In other words, on the reasoning which the Court accepted, excise duties would include a much wider range of taxes than have so far been suggested to be forbidden to the States. Nevertheless, this reasoning is still accepted by the majority of the Court.

Subsequently an attempt was made to limit this wide view of s.90 by holding that a tax is a duty of excise only if it is directly imposed on goods, and that whether a tax is directly imposed depends on the form of the statute imposing it. This test seemed to have secured majority support, but it was soon rejected, and the Court now has regard to substance rather than form, and looks at the practical operation of the statute. This gives s.90 an even wider effect, and probably a less certain one. Finally, the majority of the Court in the most recent decision has taken a further step; it has rejected the view, which previously had considerable support, that the goods the subject of a duty of excise must be of local production or manufacture. Thus the restriction on the taxing power of the States has grown more and more severe.

The Court has, however, given the States a grain of comfort; it has left undisturbed some of the earlier decisions that allowed the States to exact licence or franchise fees from vendors of alcohol or tobacco where the fees are calculated by reference to the quantity or value of goods sold or purchased during a period preceding the licence, although the Court obviously thought those decisions to be wrong in principle. This small concession does not alter the fact that the

States cannot impose a general sales tax, and since for practical purposes they have also been prevented from imposing an income tax, they have no significant area of growth tax available to them.

It is essential to the nature of a true federation that the States should have under their independent control financial resources sufficient to perform their functions. The way in which s.90 has been interpreted is one of the factors which have contributed to the instability of federation in Australia.

However, as I shall mention shortly, three members of the High Court have expressed an opinion very different from that of the majority as to what constitutes a duty of excise. When I sat on the Court, I felt bound by previous authority to hold that a tax directly related to goods was an excise even though the person taxed was not the producer or manufacturer. If a similar attitude to precedent prevailed today the judgments of judges in the minority might be merely of historical interest. Nowadays, however, the High Court allows itself more latitude in its treatment of earlier authorities. If the High Court, which reconsidered 140 earlier decisions in reformulating the meaning of s.92 of the Constitution, were to feel itself unable to depart from the comparatively few decisions on s.90, notwithstanding that it thought them to be wrong, it could surely be said that it had strained at a gnat, having swallowed a camel.

It may therefore be useful to consider the effect that should be given to s.90 if it were free from authority, and to compare that result with the judgments of the minority in the most recent decision.

The words of any provision in the Constitution should obviously be interpreted having regard to the context in which they appear and the purpose for which they were apparently designed. In s.90 duties of excise are closely linked with duties of customs and bounties on the production or export of goods. The provisions of that section were declared to come into effect only when uniform duties of customs had been imposed.

There could hardly be a plainer indication that exclusive power was given to the Commonwealth to impose duties of excise and to grant bounties on production or export for a purpose related to customs. It is well known that as a matter of history one important aim of those who supported federation and took part in framing the Constitution was to do away with the customs barriers that had been erected by the Australian colonies. For this purpose the Commonwealth was given exclusive power to impose duties on the exportation or importation of goods. The inclusion of excises and bounties in the area forbidden to the States was obviously intended to make effective the Commonwealth's control of its tariff policy.

If the Commonwealth were to adopt a free trade policy and to decide that the importation of a particular commodity should be free of duty, a State could have negated that policy by granting bounties on the local production of that commodity. On the other hand, if the Commonwealth were to adopt a policy of protection, and to impose a customs tariff with a view to favouring Australian manufacturers, a State could have defeated that policy by imposing an excise duty on local manufacturers.

It seems rather unlikely that a State would have wished to undo the benefits which a protective tariff would have given to manufacturers and producers within that State, and the justification for prohibiting the States from imposing duties of excise seems to have been largely theoretical, although in unusual circumstances, which could not be foreseen, the prohibition might prove to have practical value. It is unlikely that the prohibition was intended to prevent one State from imposing a tax on production or manufacture in another State, since a tax of that kind would probably have been regarded as a duty of customs rather than as a duty of excise. Even if it was over cautious to include a mention of excise duties in s.90, the logical attraction of protecting Commonwealth tariff policy by denying the States the power to impose excise duties as well as the power to grant bounties is obvious enough.

Some judgments of the High Court have however suggested other purposes which the prohibition of State excise duties was intended to serve. One view that has been expressed is that

s.90 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. There is nothing in the words of s.90 to support this theory and if it had been intended to give the Commonwealth the exclusive power to tax commodities it would have been very easy to say so.

An even broader constitutional purpose has been suggested, namely that the section was intended to give the Commonwealth Parliament the control of the economy as a unit which knows no State boundaries. Again, with all respect, there is nothing in the words of the section to suggest that this was intended, and if it had been the intention the section would have fallen far short of effecting it. There are many other ways in which the exercise of power by the States can affect the ability of the Commonwealth to control the economy. The States may impose taxes which affect the price of commodities but which are not excises; payroll tax and land tax are examples. The States can discourage the production and manufacture of particular goods by fixing quotas or they can forbid production or manufacture altogether. On the other hand, the States can encourage producers and manufacturers by reducing taxes and charges and by providing them with special facilities and other assistance. The restriction on State power effected by s.90 is inadequate for the purpose of giving the Commonwealth control of the economy and the words of the section do not suggest that it was intended to do so.

It is impossible to believe that if the framers of the Constitution had intended s.90 to serve wide purposes of these kinds, they would have hidden their intentions by the use of words which were quite inappropriate. If the question is not what the Constitution was intended to mean, but what meaning would best be given to it now, it is difficult to see why s.90 should be understood to impose restrictions which fall far short of giving the Commonwealth complete control over economic policy even in relation to goods, but at the same time seriously and capriciously limit the taxing powers of the States. There is nothing incompatible with the effective working of a federal system in allowing the regional governments to impose sales taxes and similar taxes. Everyone who has been to the United States knows that there sales taxes vary from State to State, but the economy of that nation has not been brought to its knees by allowing the States and even local authorities to impose sales taxes.

The ban imposed by s.90 extends far beyond sales taxes, and it is easy to give examples of taxes which the Court has held invalid but which one would have thought could not possibly affect the ability of the Commonwealth to control the economy. In one case, a levy imposed on the owners of stock used for production, and intended to provide funds for animal husbandry, was held to be an excise. In the most recent decision, which I have already mentioned, the Capital Duplicators Case, an Act of the Australian Capital Territory required persons selling "X" rated videos to have licences for which fees were payable, and this, the Court held, invalidly imposed a duty of excise. These two taxes fall within the words of the test which the Court accepted, but surely there was no good reason of policy for holding them to be beyond power.

Even before the Capital Duplicators Case there were some members of the High Court who were prepared to depart from the view which the authority of the decisions seemed to require. In 1960 Fullagar J. held that the character of a duty of excise is that the taxpayer is taxed by reason of, and by reference to, his production or manufacture of the goods and that once goods have entered into general circulation in the community a tax on them is no longer an excise. At that time his was a voice crying in the wilderness. From 1977 to 1985 Murphy J., in a number of cases, expounded the view that excise duties are taxes on goods produced or manufactured in a State, and that taxes imposed without regard to the place of production or manufacture are neither duties of customs nor duties of excise. In his opinion s.90 prohibits State taxation which discriminates between goods produced in the State and those produced outside the State. His views were at the time regarded as heterodox. However, in the most recent case – the Capital Duplicators Case – three Justices have returned to the notion that an excise is a tax on local production or manufacture. In that case, Dawson J. accepted that the primary constitutional

purpose of s.90 was to secure a customs union binding the States by ensuring a uniform policy with respect to external tariffs. He said that a tax should be characterised as an excise duty if it imposed a different level of tax on goods produced overseas and home produced goods. He concluded that an excise duty is a tax which falls selectively on the local production or manufacture of goods. Such a tax may be imposed on a step subsequent to production or manufacture, for example, a selective tax on the first sale after production may be an excise. However, a tax upon all sales is not an excise, and such a tax could not have an adverse effect on tariff policy, because the effect of the sales tax on the price of the goods would be indiscriminate and would not depend on whether the goods were imported or produced locally.

The other members of the minority, Toohey and Gaudron JJ., said that the purpose of s.90 is to give the Commonwealth power to effectuate economic policy with regard to Australian exports and imports. To secure that purpose, it is enough to deny to each State the power to levy duties of customs on goods entering that State from overseas, the power to levy duties of excise on goods locally produced or manufactured and the power to grant bounties on goods produced or manufactured in that State. They accepted the view of Murphy J. that a tax imposed without regard to the place of production or manufacture is neither a duty of customs nor a duty of excise. They did not agree however that an excise is limited to a tax on production or manufacture within a State. They said that if a State tax on goods produced outside the State did not infringe s.90, one or more States could combine to defeat Federal Government policy by imposing a sales tax or consumption tax which would frustrate Commonwealth tariffs. They therefore concluded that s.90 strikes down State taxation measures which discriminate against goods manufactured or produced in Australia. Dawson J. had left open the question whether an excise duty is confined to a tax upon production within the relevant State or includes a tax on production anywhere in Australia.

All three of the minority Justices in the Capital Duplicators Case have rejected the wider views which have been expressed in the authorities as to the purpose of s.90. In spite of some differences in language, their opinion is, I think, in substance the same as that which I have suggested, namely that s.90 is intended to give the Commonwealth effective control of tariff policy. The question whether s.90 strikes down State taxation measures which discriminate against goods produced or manufactured in Australia, or only those which discriminate against goods produced or manufactured in the State imposing the tax, seems to be of no great importance, since a discriminatory tax imposed by one State on goods produced or manufactured in another would be a customs duty if it were not an excise, and invalid on either view. The practical effect of both judgments would appear to be the same. Both would allow the States to impose sales taxes, and other taxes on goods, provided the taxes were applied without discrimination based on the place of production or manufacture.

If the minority view comes to be accepted as the true doctrine, there will still remain restrictions on the taxation policy of the States which would seem to achieve no sensible purpose. For example, Dawson J. suggested that the inability of a State to impose levies on locally produced goods might still result in the invalidation of a levy on the ownership of stock, or on a fee for the operation of a pipeline. The minority judgments do not go as far as the original definition formulated by Sir Samuel Griffith to limit the scope of s.90. Only an amendment of the Constitution could entirely remove the dead hand of that section. Nevertheless, the adoption of the view of the three minority Justices in the Capital Duplicators Case would significantly increase the taxing power of the States without in any way diminishing the power of the Commonwealth.

It is a matter for regret that it should be thought, as some appear to have thought, that the debate as to the meaning of s.90 concerns the width or efficacy of the power of the central government as compared with that of the States. Murphy J. did not fall into that error. He was not notable as a defender of State rights, but he saw no reason to expand the scope of s.90. On any view of the effect of s.90, central power is not threatened by the ability of the States to impose excise duties.

On the other hand, State finances, Commonwealth–State financial relations and the efficiency of the economy generally are all impaired by giving s.90 an effect that forbids the States to impose taxes on the sale or distribution of goods and requires them to resort to less satisfactory measures.

Whether or not taxpayers share Dr Johnson's view that a tax on goods is hateful, there is no reason why even the most ardent supporter of Commonwealth supremacy should object to taxes of that kind being imposed by the States. No valid constitutional purpose is served by extending the meaning of "duties of excise" in s.90 beyond the narrowest meaning of which the words are capable.

The prohibition on the imposition of excise duties by the States has been so detrimental in its effects, that one might well say that it is the reference to the tax in the Constitution, rather than the tax itself, that is hateful. The words of the section must of course be given some effect, however much one may regret their presence, but the High Court can, consistently with principle, so construe them that they cause the least harm. Convenience will be served, and an obstacle to fiscal rationality will be removed, if the words of s.90 are confined at least to the extent suggested by the three Justices in the minority in the latest decision of the High Court.