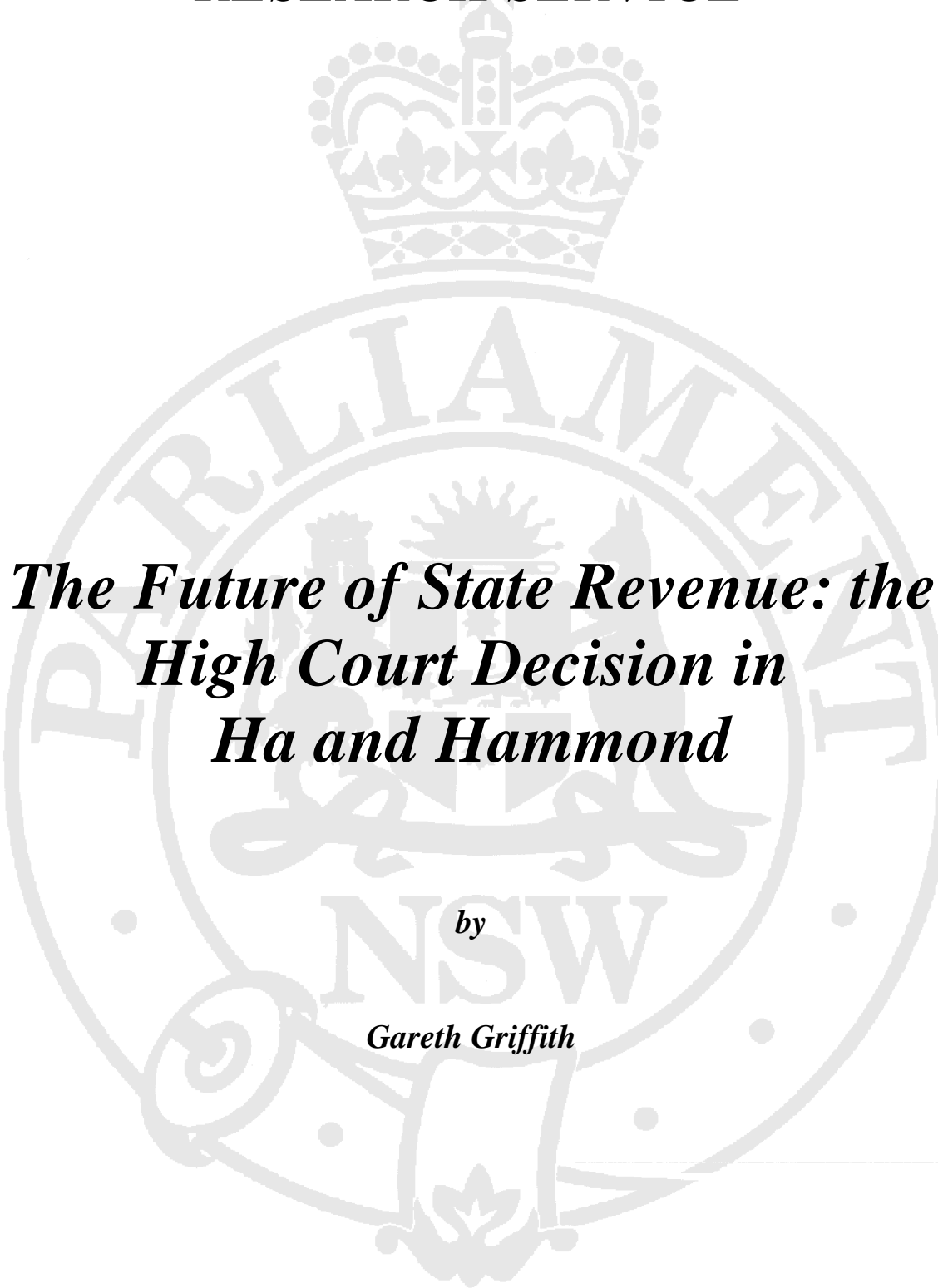


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***The Future of State Revenue: the
High Court Decision in
Ha and Hammond***

by

Gareth Griffith

Briefing Paper No 16/97

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EXECUTIVE SUMMARY

The purpose of this paper is to present an account of the recent High Court decision in *Ha and Hammond*, a ruling which promises to be a landmark in the development of State-Federal financial relations. Its main findings are as follows:

- the decision has the effect of preventing the States from levying business licencing fees on alcohol (and, by extension, tobacco and petrol) (page 3);
- *Ha and Hammond* has the potential to exacerbate the already severe fiscal imbalance between the States and the Commonwealth (page 3);
- the financial dependence of the States on the Commonwealth was founded on the ‘twin rocks’ of: (1) the 1929 financial depression, when the States were persuaded to sign the Financial Agreement under which they effectively surrendered their capacity to borrow on the international capital market; and (2) the Second World War, when the Commonwealth centralised the imposition and collection of income tax, thereby denying the States access to this most significant tax base. That move was endorsed by the High Court in 1942 in the First Uniform Tax case (page 4);
- the key constitutional provision relating to excise duties is section 90, notably the first paragraph which prevents the States from levying excise duties (page 5);
- an excise duty is ‘an inland tax on goods’ (page 6);
- however, opinion on the High Court has differed markedly on the scope of the term ‘excise duties’. In particular, there is a narrow interpretation which defines an excise as a tax on goods *produced or manufactured* in Australia. Against this, there is the broader interpretation which identifies an excise duty with the *production, manufacture, sale or distribution* of goods. In a practical sense the difference is far-reaching, for the obvious reason that the narrower view would permit States to levy taxes on the sale and distribution of such goods as tobacco or alcohol (as long, that is, as the tax did not single out goods produced in Australia), whereas the broader interpretation does not (page 7);
- the broad interpretation has been in the majority on the High Court since *Parton’s* case in 1949. That interpretation maintains that the chief purpose of section 90 is to ensure internal free trade. For the minority view, on the other hand, excise duties are analogous to customs duties and the focus of section 90 is on the common external tariff policy (page 10);
- under the *Dennis Hotels* formula a loophole was created which permitted the States to levy business licencing fees, notably with respect to alcohol, tobacco and petrol. These fees have increased dramatically in magnitude over the years, to a rate of 100% in 1996 (page 9);

- in essence, the majority opinion of Brennan CJ, McHugh, Gummow and Kirby JJ was a restatement of the broad definition of excise based on the 1949 decision of Dixon J in *Parton*. In doing so it rejected the two key arguments of the States and Territories: that, for a tax to be an excise, it must make local (Australian) production or manufacture the ‘discrimen of liability’; and, secondly, that the imposts under the NSW Act were merely fees for a licence to carry on the business of selling tobacco and not a tax on the tobacco sold (page 17);
- the minority opinion of Dawson, Toohey and Gaudron JJ was, in essence, a restatement of the narrow definition of excise (as a tax that falls selectively on the local production or manufacture of goods) in *Peterswald v Bartley*(page 21);
- in terms of the ‘clash of federal and national images’ of the Australian polity created under the Constitution, the High Court has more or less consistently emphasised the national against the federal image, with significant consequences for the expansion of the powers of the Commonwealth Government (page 24);
- the NSW Treasurer, the Hon Michael Egan MLC, is reported as saying that ‘The Commonwealth doesn’t have to abolish the States; it just lets them wither on the vine’. As a result of *Ha and Hammond*, this year’s State Budget outcome has been revised down from a forecast surplus of \$26 million to a \$300 million deficit. Matters are made worse by another recent High Court judgment, *Alders International Pty Ltd v Commissioner of State Revenue*, in which the High Court found that the States could not tax businesses located on property owned or controlled by the Commonwealth (page 31).

1. INTRODUCTION

The purpose of this paper is to present an overview of the recent landmark decision of the High Court in *Ha & anor v NSW; Walter Hammond & Associates v NSW & ors* (henceforth, *Ha and Hammond*).¹ That decision, which has the effect of preventing the States from levying business licencing fees on alcohol (and, by extension, tobacco and petrol) is perhaps the most significant for Federal-State financial relations since the *First Uniform Tax Case* of 1942.² One commentator, George Williams, a Senior Lecturer in Constitutional Law at the Australian National University, has said that the decision ‘will fundamentally shift the tax balance between the Commonwealth and the States’ and that it will ‘further marginalise the States within the Australian Federal system’.³

It is too early at this stage to talk of precise outcomes. Indeed, it may take many years for the full implications of the decision to be realised. Nonetheless, as Williams suggests, it is clear that the decision in *Ha and Hammond* has the potential to exacerbate the already severe fiscal imbalance between the States and the Commonwealth. This refers to the fact that the Commonwealth raises far more revenue than is required for its own purposes, while the States raise far less than they need. What is immediately apparent, therefore, is that the decision has the capacity to make the States more dependent still on the financial power of the Commonwealth and, with that, yet more vulnerable to changes in government and policy at the Federal level.

In the short term, however, a ‘rescue’ plan has been formulated, based on the Federal Government imposing a uniform national tax on alcohol and the other goods in question. The tax would be set at the highest State rate, with the proceeds of the tax then being returned to the States to shore up the \$5 billion gap in their revenue base.⁴ A package of nine Bills was introduced into Federal Parliament for this purpose on 28 August 1997.

For the medium term, on the other hand, business groups and some State politicians have urged that the decision be used as the basis for ‘wide-ranging tax reform and a fundamental review of Federal-State financial arrangements’.⁵ This includes calls for the

¹ The text of the decision is to be found at the following Internet address - http://www.austlii.edu.au/au/cases/cth/high_ct/unrep.332.html. References to the transcript of proceedings for the case are also based on the text available on the Internet. In *Ha v NSW*(1996) 70 ALJR 611 Kirby J decided that there were grounds for the application to proceed.

² *South Australia and others v The Commonwealth and Another* (1942) 65 CLR 373 (The First Uniform Tax Case).

³ G Williams, ‘Ruling makes States more dependent on Commonwealth’, *The Sydney Morning Herald*, 6 August 1997.

⁴ ‘New GST push after tax verdict’, *The Sydney Morning Herald*, 6 August 1997; ‘It’s a deal: the \$5bn tax pact’, *The Australian Financial Review*, 6 August 1997.

⁵ ‘It’s a deal: the \$5bn tax pact’, *The Australian Financial Review*, 6 August 1997.

urgent consideration of a goods and services tax, the introduction of which, for some commentators at least, now seems 'inevitable'.⁶ Whatever arrangements do emerge, the decision in *Ha and Hammond* puts the power to change the financial relationship between the different levels of government in Australia even more firmly in the hands of the Commonwealth. As another academic commentator, John Waugh, Lecturer in Constitutional Law at the University of Melbourne, has said, if there is now to be a review of the worsening vertical fiscal imbalance, the Commonwealth will go into it 'holding most of the cards and most of the cash'.⁷

This paper concentrates on the judgment in *Ha and Hammond*, setting out in summary form the basis for the decision which was arrived at by a majority of 4 to 3. It begins, however, with a very brief historical note on the financial relations between the levels of Australian governments, followed by an account of the relevant constitutional provisions. Presented next is an overview of the High Court's interpretation of section 90 of the Commonwealth Constitution which, among other things, prohibits the States from levying excise duties. The paper ends with a commentary section, which includes a note on two further decisions of the High Court, namely, *Allders International Pty Ltd v Commissioner of State Revenue*⁸ and *Re the Residential Tenancies Tribunal of NSW v Henderson and anor; ex parte The Defence Housing Authority*.⁹

The revenue sources available to NSW for the year 1997-1998, as forecasted in Budget Paper No 2, are set out at Appendix A.

2. **FEDERAL-STATE FINANCIAL RELATIONS - AN HISTORICAL NOTE**

Peter Hanks has said that the financial dependence of the States on the Commonwealth was founded on the 'twin rocks of the 1929 financial depression and the Second World War'.¹⁰ He goes on to explain that in the Great Depression the States were persuaded to sign the Financial Agreement, afterwards endorsed by the addition of section 105A to the Constitution, under which they effectively surrendered their capacity to borrow on the international capital market. In the Second World War, on the other hand, the Commonwealth centralised the imposition and collection of income tax, thereby denying the States access to this most significant tax base. That move was endorsed by the High

⁶ 'Move towards a GST now seems "inevitable"', *The Sydney Morning Herald*, 6 August 1997.

⁷ J Waugh, 'Commonwealth left with the cards and the cash', *The Age*, 6 August 1997.

⁸ (1996) 140 ALR 189.

⁹ [Http://www.austlii.edu.au/au/cases/cth/high_ct/unrep336.html](http://www.austlii.edu.au/au/cases/cth/high_ct/unrep336.html) - the decision was handed down on 12 August 1997.

¹⁰ P Hanks, *Australian Constitutional Law, Materials and Commentary*, Fifth Edition, Butterworths 1994, p 8.

Court in 1942 in the First Uniform Tax case.¹¹

This is not the place to set out the political and legal repercussions of that decision in any detail. It is enough to say that conflict with the Commonwealth over financial relations continued unabated throughout the 1950s, with the Premier of NSW, JJ Cahill, playing a leading part in that debate. One manoeuvre in this conflict was the establishment after the 1956 election of a Joint Select Committee of the NSW Parliament into the operation of the Commonwealth Constitution. In its first report the Committee concluded that uniform tax was ‘a threat to the fundamental structure of the Federal System’ which, if continued, would ‘ultimately destroy it’.¹²

The States also engaged the Commonwealth on the legal front, scoring in 1957 something of a pyrrhic victory in the Second Uniform Tax case.¹³ In that case it was held that the power of the Federal Parliament did extend to making it a condition of revenue reimbursement to the States that a State had not itself imposed an income tax. On the other hand, the Commonwealth was denied the power to insist that its income tax be paid before that levied by the States. However, this proved of no real practical value to the States. Commonwealth supremacy was achieved by the Federal Government imposing a high rate of income tax, which left little or no room for the States to levy a similar tax.

Thus, the States have not levied any general income tax since the introduction of the uniform tax scheme. This was despite the *Income Tax (Arrangement with the States) Act 1978* (Cth) under which a State which met the requirements of the Act, including the adoption of the bases of assessment for federal income tax, could impose an income tax surcharge (or grant a rebate) which would be collected or administered by the Commonwealth. That Act was repealed in 1989. It has been said that this was to prevent the States from threatening ‘the Commonwealth’s monopoly control in the field of income tax, and its policy of forcing restrictions on State expenditure’.¹⁴

3. **RELEVANT CONSTITUTIONAL PROVISIONS**

The key provision at issue in the excise duty cases is section 90 of the Commonwealth Constitution. In particular, the first paragraph of that section provides:

On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant

¹¹ *South Australia and others v The Commonwealth and Another* (1942) 65 CLR 373.

¹² D Clune, *The Labor Government in New South Wales 1941-1965: A Study in Longevity in Government*, unpublished PhD thesis, University of Sydney 1990, p 114.

¹³ *Victoria and NSW v The Commonwealth* (1957) 99 CLR 575.

¹⁴ C Sharman, ‘Changing federal finance’ from *Vertical Fiscal Imbalance and the Allocation of Taxing Powers* edited by DJ Collins, Australian Tax Research Foundation 1993, p 131.

bounties on the production or export of goods, shall become exclusive.

That section is found in Chapter IV of the Constitution which is headed 'Finance and Trade'. Professor Cheryl Saunders explains that Chapter IV has two broad purposes: to provide a framework for Australian economic union, although views differ as to the extent and nature of that union; and to provide a basis for the redistribution of revenue from the Commonwealth to the States after Federation.¹⁵ Transitional arrangements were set in place under Chapter IV for such redistribution (the Braddon clause). However, the long term question of State-Commonwealth financial relations remained unresolved, leaving the ultimate adjustment to be determined in later years. As formulated by Harrison Moore in 1910, the conundrum was that the principal sources of State revenue (customs and excise duties) had been withdrawn, yet the States had to provide 'the greater number, if not the more important services of government'.¹⁶

With that background note in place, it can be added that duties of excise are referred to elsewhere in Chapter IV: *section 86* secures the collection and control of customs and excise duties to the Commonwealth; *section 87* provides a formula for the distribution of net revenues from customs and excise duties to the States and the Commonwealth in the first ten years after Federation; *the second paragraph of section 90* provides that State laws imposing customs and excise duties (as well as most bounties on the production or export of goods) shall cease to have effect upon the imposition of uniform customs duties; and, most significantly of all perhaps, under the transitional arrangements in *section 93* establishes for accounting purposes the point of collection for certain customs and excise duties. Importantly, it is there (and only there) that excise duties are specifically linked with taxes '*on goods produced or manufactured in a State*', words which go to the heart of the debate about how broadly or narrowly excise duties are to be defined for constitutional purposes.

Outside Chapter IV, excise duties are only mentioned in *section 55*, a provision on 'Tax Acts' found in that part of the Constitution which defines the powers of the two Houses of the Federal Parliament. Section 55 provides that 'laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only'.

4. EXCISE DUTIES AND THE PURPOSE OF SECTION 90

Excise duty - an inland tax on goods: For the interpretation of the relevant aspects of section 90 of the Commonwealth Constitution much depends on how the term 'excise duty' is defined. It is agreed that an excise is a tax on goods. Moreover, following Professor PH Lane, it can be said that the elements in an excise duty boil down to - 'an

¹⁵ C Saunders, 'The High Court, Section 90 and the Australian Federation', *Paper presented at the Reshaping Fiscal Federalism in Australia Conference*, 11 June 1997, p 4.

¹⁶ W Harrison Moore, *The Constitution of the Commonwealth of Australia*, Second Edition, Charles F Maxwell 1910, p 530.

inland tax on goods'.¹⁷ That much is clear, more or less.¹⁸

The reference to 'inland tax' in the definition of excise duties is to distinguish them from import-export taxes (or, to use the terminology of the Constitution, customs duties).¹⁹

A tax on goods - a question of scope: It is with respect to the question of the scope of the term 'excise duties' that things become decidedly unclear. This is because opinion differs markedly on this point. In particular, there is a narrow interpretation which defines an excise as a tax on goods *produced or manufactured* in Australia. Against this, there is the broader interpretation which identifies an excise duty with the *production, manufacture, sale or distribution* of goods. In a practical sense the difference is far-reaching, for the obvious reason that the narrower view would permit States to levy taxes on the sale and distribution of such goods as tobacco or alcohol (as long, that is, as the tax did not single out Australian goods),²⁰ whereas the broader interpretation does not. Under this broad view excise duties are not restricted to taxes at the point of production, nor are they limited to taxes imposed only on locally-produced goods. It is of course that broader view which was adopted by a majority of the High Court in *Ha and Hammond*, with excise duties encompassing all taxes on commodities except,

¹⁷ PH Lane, *Lane's Commentary on the Australian Constitution*, Second Edition, LBC Information Services 1997, p 661.

¹⁸ *WA v Hamersely Iron Pty Ltd (No 1)* (1969) 120 CLR 42 raised a particular problem, namely, where a tax is levied on a range of transactions, only some of which involve a dealing in goods, is the tax nevertheless a tax upon goods and therefore an excise. Hanks goes on to explain that the same problem was raised more directly in another case concerning the validity of certain provisions under the *Stamp Act 1921* (WA), *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1, as well as in *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 where it was held that there can be an excise duty in a *Stock Act*. Hanks states that the last two cases 'suggest that any tax, no matter how broad and general its legal incidence, will be invalid as an excise duty to the extent that it falls on or adds to the cost of the production or distribution of goods' - P Hanks, *Australian Constitutional Law: Materials and Commentary*, Fifth Edition, pp 527-533.

¹⁹ *Capital Duplicators Pty Ltd v ACT (No 2)* (1993) 178 CLR 561 at 590. The majority in that case, operating with a wide view of excise, explained that it is preferable to regard 'the distinction between duties of customs and duties of excise as dependent on the step which attracts the tax: importation or exportation in the case of customs duties; production, manufacture, sale or distribution - inland taxes - in the case of excise duties'.

²⁰ Or, perhaps, goods produced or manufactured within a State. Murphy J in *HC Sleight Ltd v South Australia* (1977) 136 CLR 475 at 526 took the view that excise duties are taxes upon goods produced or manufactured within a State. On the other hand, in *Phillip Morris Ltd v Commissioner of Business Franchises (Vic)* (1989) 167 CLR 399 at 479 and *Capital Duplicators (No 2)* Toohey and Gaudron JJ preferred the view that excise duties extend to States taxes imposed on goods produced in Australia. In *Capital Duplicators (No 2)* Dawson J queried whether 'an excise duty is confined to a tax upon production within the relevant State' (at 616-617), but said the question could be left for 'another day'. In *Ha and Hammond* the minority said it was 'unnecessary for present purposes to pursue that matter' (at 16).

perhaps, taxes on consumption.²¹

The narrow definition of excise duties as taxes relating to the local manufacture or production of goods can be traced back to *Peterswald v Bartley* in which Griffith CJ in 1904 defined an excise duty to be: ‘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’.²² An excise duty had five elements, therefore: a tax; on goods; referable to quantity or value; when produced or manufactured; and indirect. For the moment, the key element in that decision was that excise duties were ‘limited to taxes imposed upon goods in process of manufacture’.²³

The broader definition is associated with the decision of Dixon J in *1949 in Parton v Milk Board (Vic)*²⁴ and, as is the case with its rival interpretation, it is linked to a particular view of the purpose of section 90, an issue which is discussed later.

A tax on goods - a question of form or substance: Having decided on the scope of the term ‘excise duties’, the question remains as to how to determine when a tax is ‘upon goods’? In the 1980s the High Court formulated a test of ‘substance’ not ‘form’,²⁵ thus discarding what had been called the ‘criterion of liability’ test which had involved a more legalistic or formalistic analysis of the taxing statute itself. To be an excise the criterion of liability had to be ‘the taking of a step in a process of bringing goods into existence or to a consumable state, or passing them down the line which reaches from the earliest stage in production to the point of receipt by the consumer’.²⁶ In other words, in recent years the High Court has adopted an approach to interpretation which made it permissible to ask whether ‘in substance’, or as a matter of practical effect, a tax was levied on goods or on a step in dealing with goods.²⁷

²¹ The prevailing view in *Dickenson’s Arcade v Tasmania* (1974) 130 CLR 177 was that a tax on consumption was not an excise. In the above case of *Capital Duplicators (No 2)* the majority observed, ‘It is unnecessary in this case to consider taxes on the consumption of goods’ (at 590). The same observation was made by the majority in *Ha and Hammond* (at 9-10). But note the comment of McHugh J during the hearing: ‘I must say that the limitation about consumption may be something that has got to be re examined’ - Transcript of proceedings for 11 March 1997 at 23.

²² (1904) 1 CLR 497 at 509 (Griffith CJ speaking for himself and Barton, O’Connor JJ).

²³ Ibid.

²⁴ (1949) 80 CLR 229.

²⁵ The test dates back to *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599.

²⁶ *Bolton v Madsen* (1963) 110 CLR 264 at 273.

²⁷ The ‘criterion of liability’ test was discounted in *Capital Duplicators (No 2)* at 583 and in *Philip Morris Ltd v Commissioner of Business Franchises* (1989) 167 CLR 399. In both the ‘in substance’ or ‘practical operation’ test was favoured.

For the States, this move towards a test of practical effect was very dangerous, especially as the majority of the Court continued to operate with a broad definition of excise duties. The point to make is that, while the ‘criterion of liability’ test resulted in much difficult and even convoluted case law, it did offer a legalistic means by which the Court could preserve the taxing power of the States. Combining a practical effect approach with a broad definition of excise duties made any attempt at such preservation far more difficult.²⁸

Business licencing or franchise fees - an exception to the rule: In effect, the criterion of liability test was used after the decision in *Dennis Hotels*²⁹ in 1960 to construct a loophole for the States with respect to certain licencing or franchise fees, notably in relation to alcohol, tobacco³⁰ and petrol³¹. A common theme of these decisions was that the fee in question was imposed for the right to carry on a business through the renewal of a licence. Thus, for the purposes of the criterion of liability test the fee was not so directly related to goods as to constitute an excise, especially as a retrospective or ‘back-dating’ element was involved in the calculation of the fee.³² Over time these fees increased as the States came to rely more heavily on them as independent sources of revenue, a tendency which had the effect of making them seem more and more like taxes on goods and less like license or franchise fees. In summarising the arguments of the respondents in *Ha v NSW*, Kirby J presented the following overview of the development of these fees:

What began as a rate of 0.4 per cent and 6 per cent respectively in *Dickensons’ s Arcade Pty Ltd v Tasmania* and *Dennis Hotels Pty Ltd v Victoria*, became 25 per cent to 30 per cent in *Philip Morris Ltd v Commissioner of Business Franchises (Vic)*, 40 per cent in *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)*, and has now escalated to 75 per cent in the case before the Court. It has since been increased by New South Wales...to 100 per cent.³³

Not surprisingly, therefore, the ‘in substance’ or practical effect approach to the

²⁸ P Hanks, *Australian Constitutional Law, Materials and Commentary*, Fifth Edition, Butterworths 1994, p 548. Hanks states that, ‘while the adoption of a broad definition of excise duties places the States’ taxing powers at risk, the real threat to those powers materialises only when that definition is applied to legislation in a way which takes account of the legislation’s practical effect’.

²⁹ (1960) 104 CLR 529. The case upheld the validity of a Victorian liquor licensing fee.

³⁰ *Dickenson’s Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177.

³¹ *HC Sleigh Ltd v SA* (1977) 136 CLR 475.

³² In *Dennis Hotels* it was held that an annual fee for a licence to sell liquor, fixed as a proportion of the value of liquor purchased for sale in the business over the preceding 12 months, was not an excise duty.

³³ (1996) 70 ALJR 611 at 612.

definition of excise placed these arrangements in jeopardy. In *Ha and Hammond* their validity was undermined altogether. Before then, however, various compromise arrangements were accepted. Notably, in *Philip Morris*³⁴ in 1989 Mason CJ and Deane J upheld the licence fee on tobacco (and alcohol) as ‘an element in regulatory legislation controlling the sale and distribution of a particular commodity, which is designed to protect the public interest in the light of the characteristics of that commodity’.³⁵

One major difficulty was that this argument, based on the regulation of certain commodities in the public interest, could not apply to fees relating to petrol, thus placing that element of State revenue at risk. Moreover, with the advent of the practical effect test any scheme which was in fact revenue-driven and not regulatory in nature would be classified as an excise in any event. In *Capital Duplicators (No 2)* the ACT’s licensing fees with respect to X-rated videos were found to be revenue-driven excise duties and not regulatory fees, a conclusion based largely on the sheer magnitude of the fees involved.³⁶

The validity of tobacco, alcohol and petrol franchise fees was not raised by any of the parties in *Capital Duplicators (No 2)*. However the majority made it clear that they were not prepared, in any event, to reopen the earlier decisions on tobacco and alcohol, partly on the ground of precedent but largely for reasons of policy, having regard to the long-standing Federal-State fiscal arrangements based on those earlier decisions. Reference was also made to the special regulatory purpose served by tobacco and alcohol fees, perhaps leaving greater scope for fees of considerable magnitude in these limited areas.

In hindsight it is clear that the combination of the practical effect approach to the interpretation of section 90, with the broad definition of excise duties in *Capital Duplicators (No 2)*, as well as the sheer magnitude of the fees in question, had placed State franchise fees and the revenue raised from them on borrowed time. Writing in 1994, Neil McLeod, Associate Professor in Law at Murdoch University, said that perhaps ‘the only road to salvation’ is the ‘path that leads to the narrow interpretation of excise in s.90’.³⁷ But to follow that path the High Court would first have to be persuaded to take a different direction in its interpretation of the purpose of section 90 itself. In a sense, in the absence of any agreed definition of excise, that is the threshold question at issue here.

The purpose of section 90 - overview: There are basically two interpretations of the purpose of section 90. Both agree in effect that Federation was intended to achieve a

³⁴ (1989) 167 CLR 399.

³⁵ Ibid at 439.

³⁶ A basic fee of \$50 plus 40 per cent of the wholesale value of the videos dealt with. This is despite that fact that the fee involved a back-dating device (a bare month-to-month licence was issued) and it fell on selling, not manufacturing.

³⁷ N McLeod, ‘State taxation: unrequited revenue and the shadow of s. 90’ (1994) 22 *Federal Law Review* 476 at 492.

customs union based on a single tariff policy, as well as free trade within Australia itself. For the broad view, which has been in the majority on the High Court since 1949, section 90 is concerned primarily with ensuring internal free trade; on this understanding, excise duties are not analogous to customs duties. For the narrower minority view, on the other hand, excise duties are analogous to customs duties and the focus of section 90 is very much on the common external tariff issue. For the minority, it is section 92 that is the chief means by which an internal free trade area is to be achieved.³⁸

It can be noted that during the hearing in *Ha and Hammond* McHugh J, in particular, raised the problems involved in identifying the ‘purpose’ of any constitutional provision. Dawson J suggested that, in the context of the debate concerning section 90, the concept of ‘purpose’ was being used in the sense of the ‘mischief’ the provision was designed to address.³⁹

The purpose of section 90 - the ‘customs union’ view: Thus, one view, associated with the narrow interpretation of excise duties, holds that section 90 has as its purpose the establishment and maintenance of the Australian federation as a ‘customs union’ in which the integrity of the Commonwealth’s tariff policy is of paramount importance. From this standpoint, excise duties are to be understood as the reverse side of the coin to customs duties. In effect, as Professor Cheryl Saunders explains, the object of preventing the States from imposing duties of excise is ‘to preclude State taxation which would negative or reduce the effect of a Commonwealth decision to tax (or not to tax) imported goods’.⁴⁰ A federal government could have a protectionist customs tariff negated or impaired by a State tax on locally produced goods. Likewise, a federal policy of free trade would be defeated by a State bounty on production or exports. On this view, section 90 achieves its ‘purpose by defining excise duties as taxes on the production or manufacture of Australian goods or, in other words, as taxes which single out Australian goods’.⁴¹

Again, this ‘customs union’ view of the purpose of section 90 and, with it, the narrow definition of excise duties, can be traced back to *Peterswald v Bartley*, notably to the idea that an excise duty is ‘analogous to a customs duty’.

Professor Saunders comments that the narrow ‘customs union’ interpretation finds support from: the text of the Constitution; the association of duties of excise with duties

³⁸ *Ha and Hammond* at 13.

³⁹ Transcript of hearing for 13 March 1997 at 7-8

⁴⁰ C Saunders, ‘The High Court, Section 90 and the Australian Federation’, *Paper presented at the Reshaping Fiscal Federalism in Australia Conference*, 11 June 1997, p 12.

⁴¹ *Ibid.* As noted, Murphy J in *HC Sleight Ltd v South Australia* (1977) 136 CLR 475 at 526 took the view that excise duties are taxes upon goods produced or manufactured within a State. See Footnote 20.

of customs in section 90; some observations in the Constitutional Conventions of the 1890s; and colonial practice.⁴² Elaborating on this, Peter Hanks has emphasised the centrality of the debate concerning international free trade versus protectionism in the years leading up to federation. As well, looking to the constitutional text he has stated:

The argument that s. 90 is concerned to ensure Commonwealth control of tariff policy, is reinforced by the context in which it appears: s. 88, requiring uniform customs duties, the juxtaposition in s. 90 of ‘bounties on the production or export of goods’ with ‘duties of customs and excise’; and the spelling out in s. 93 that ‘duties of customs’ are paid on goods imported into a State and ‘duties of excise’ are ‘paid on goods produced or manufactured in a State’. It is this context and the background of s.90 which, in combination, make a very strong case for the argument that the taxes forbidden to the States by that section were taxes which, because of their application to imported or locally-produced goods, would interfere with the Commonwealth’s tariff policies: that is, taxes which in their application discriminated between imported and locally-produced goods.⁴³

It is worth noting that most of the leading commentators favour this narrow ‘customs union’ view of section 90. Professor Lane remarked in this respect that the Founding Fathers, now on the bench in *Peterswald v Bartley*, ‘might be allowed to have a better understanding of an excise duty than later justices’.⁴⁴ However, with a few exceptions (Fullagar J⁴⁵ and Murphy J⁴⁶ in the past, as well as the present minority of Dawson, Toohey and Gaudron JJ in *Ha and Hammond* and *Capital Duplicators (No 2)*), that has not deterred subsequent members of the High Court from formulating an alternative interpretation of section 90.

The purpose of section 90 - economic union and federal control of the taxation of commodities: The second view of the purpose of section 90 crystallised in the judgment of Dixon J in *Parton v Milk Board (Vic)* in 1949 where it was said:

In making the power of the Parliament of the Commonwealth to impose duties of customs and of excise exclusive it may be *assumed* that it was *intended to give the Parliament a real control of the taxation of*

⁴² C Saunders, ‘The High Court, Section 90 and the Australian Federation’, *Paper presented at the Reshaping Fiscal Federalism in Australia Conference*, 11 June 1997, p 13.

⁴³ P Hanks, *Australian Constitutional Law, Materials and Commentary*, Fifth Edition, p 508.

⁴⁴ PH Lane, *Lane’s Commentary on the Australian Constitution*, Second Edition, p 660.

⁴⁵ *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 555.

⁴⁶ *HC Sleigh Ltd v SA* (1977) 136 CLR 475; *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59.

commodities and to ensure that the execution of whatever policy it adopted should not be hampered or defeated by State action (emphasis added).⁴⁷

For Dixon J, therefore, that purpose could be ‘assumed’. On a more practical note, he went on to explain 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. If the exclusive power of the Commonwealth with respect to excise did not go past manufacture and production it would with respect to many commodities have only a formal significance’.⁴⁸ In other words, the States would, by ‘easy subterfuges and the adoption of unreal distinctions’,⁴⁹ subvert what the majority in *Capital Duplicators (No 2)* described as the Federal Parliament’s ‘effective control over economic policy affecting the supply and price of goods throughout the Commonwealth’ (emphasis added).⁵⁰

But the underlying question remains - for what purpose does the Federal Parliament require that ‘effective control’? Peter Hanks has said that the purpose behind granting the Commonwealth ‘real control of the taxation of commodities’ is to concentrate in its hands ‘all power to implement tariff, revenue, social and economic policies through commodity taxes’.⁵¹ Indeed, Barwick CJ had written that section 90 was intended to give the Federal Parliament ‘the control of the national economy as a unity which knows no State boundaries’.⁵² That may be overstating the case. In the majority decision in *Capital Duplicators (No 2)* it was said that ‘ss.90 and 92, taken together, with the safeguards against Commonwealth discrimination in s.51(ii) and (iii) and s.88, created a Commonwealth economic union, not an association of States each with its own separate economy’.⁵³ In other words, the purpose of section 90 was not restricted to establishing a customs union under a common external tariff (as in the minority view). Rather, as Professor Grewal has explained, for the majority it had to do with the creation and maintenance of a free trade area throughout the Commonwealth, something ‘which would not have been achieved if the States had retained the power to tax goods’.⁵⁴

⁴⁷ (1949) 80 CLR 229 at 260. This built on an earlier judgment of Dixon J in *Matthews v Chicory Marketing Board* (1938) 60 CLR 263.

⁴⁸ (1949) 80 CLR 229 at 260.

⁴⁹ *Matthews v Chicory Marketing Board* (1938) 60 CLR 263 at 304 (per Dixon J); cited with approval in *Capital Duplicators (No 2)* at 586.

⁵⁰ *Capital Duplicators (No 2)* at 586.

⁵¹ P Hanks, *Australian Constitutional Law, Materials and Commentary*, Fifth Edition, p 509.

⁵² *Western Australia v Chamberlain Industries Ltd* (1970) 121 CLR 1 at 17.

⁵³ *Capital Duplicators (No 2)* at 585.

⁵⁴ B Grewal. ‘New light in High Court ruling’, *The Australian Financial Review*, 12 August 1997.

According to Mason CJ, Brennan, Deane and McHugh JJ in *Capital Duplicators (No 2)*, the purpose of section 90 was ‘to ensure that differential taxes on goods and differential bonuses on the production or export of goods should not divert trade or distort competition’.⁵⁵ It was in this context, therefore, that they referred to the Federal Parliament’s ‘effective control over economic policy affecting the supply and price of goods throughout the Commonwealth’

What can be said about this view of section 90 is that it combines an interpretation based on the intention to create free trade between the former colonies, as a largely negative mechanism designed to prevent the newly-formed States from discriminating against one another, with (in some accounts) a more positive interpretation of the implications of the ‘economic union’ for the Federal Parliament in terms of its management of the national economy, at least with respect to goods. Professor Zines has said in this regard that ‘the image of the Commonwealth as the regulator of the national economy by fiscal means was fundamental to the wide construction of the concept of “excise” in section 90’.⁵⁶

The purpose of section 90 - a question of original intention: To a considerable extent these difficulties of interpretation flow from the lack of clarity in the Convention debates concerning section 90. Basically, there was confusion both about the meaning of the term ‘excise’ and concerning the role it should play in section 90 generally.⁵⁷ On this point, McHugh commented in the hearing in *Ha and Hammond*, ‘They did not seem to understand, really, what they were about’.⁵⁸ Cheryl Saunders summed up the situation thus:

The seeds of the difference over the meaning and purpose of excise, in the Conventions and after federation, are obvious enough. The definition of excise was as unsettled in the 1890s as it is now. Excise was added to section 90 on the assumption that it was the natural companion to duties of customs, without careful analysis of the role it was to play and why. There was little incentive to more careful scrutiny because excise was a relatively insignificant source of State taxation at the time. The conclusion that, nevertheless, exclusive power over excise duties was part of the constitutional framework of a national tariff policy was complicated by what appears to be disguised disagreement between the framers on the intended depth of internal free trade.⁵⁹

⁵⁵ *Capital Duplicators (No 2)* at 585.

⁵⁶ L Zines, ‘The Commonwealth’, from *Australian Federation: Towards the Second Century* edited by G Craven, Melbourne University Press 1992, p 96.

⁵⁷ For a detailed discussion of this issue see - M Coper, ‘The High Court and Section 90 of the Constitution’ (1976) 7 *Federal Law Review* 1.

⁵⁸ Transcript of proceedings for 13 March 1997 at 38.

⁵⁹ C Saunders, ‘The High Court, Section 90 and the Australian Federation’, *Paper presented at the Reshaping Fiscal Federalism in Australia Conference*, 11 June 1997, p 6..

That the definition of the term excise was not entirely clear was noted by Quick and Garran in their 1901 commentary on the Constitution, with reference being made in this regard to the English usage of treating certain business licences as excises. Lining up, seemingly, on the side of the narrow interpretation of excise, Quick and Garran observed:

In the taxation of such articles of luxury, as spirits, beer, tobacco and cigars, it has been the practice to place a certain duty on the importation of these articles and a corresponding or reduced duty on similar articles produced or manufactured in the country; and this is the sense in which excise duties have been understood in the Australian colonies, and in which the expression was intended to be used in the Constitution of the Commonwealth.⁶⁰

The purpose of section 90 - a question of policy and value judgments: What is often said is that, in the light of these uncertainties, the decision as to which is the ‘correct’ purpose of section 90 ‘can be affected to a large degree by considerations of policy, value judgments and social consequences’. Professor Zines adds to this the comment that, in fact, the tendency has been to state the purpose of section 90 ‘dogmatically’: ‘There has been little rational argument or discussion as to which was the best approach. Nearly all judges shied away from examining the conflicting interests involved’.⁶¹

As noted, in *Capital Duplicators (No 2)* the majority took a pragmatic approach to business franchise fees on alcohol and tobacco, having regard to considerations of precedent and Federal-State financial arrangements. The majority declared:

In refusing to reconsider the franchise decisions relating to liquor and tobacco, the Court has recognized the fact that the States (and the Territories) have relied upon the decisions in imposing licence fees upon vendors of liquor and tobacco in order to finance the operations of government. Financial arrangements of great importance to the governments of the States have been made for a long time on the faith of these decisions. If the decisions were to be overruled, the States and the Territories would be confronted with claims by the vendors of liquor and tobacco for the recoupment of licence fees already paid...Hence, considerations of certainty and the ability of legislatures and governments to make arrangements on the faith of the Court’s interpretation of the Constitution are formidable arguments against a reconsideration of

⁶⁰ J Quick and RR Garran, *The Annotated Constitution of the Australian Commonwealth*, H Clark Pty Ltd 1901, p 837.

⁶¹ L Zines, *The High Court and the Australian Constitution*, Fourth Edition, Butterworths 1997, p 451. Zines suggested that judges should undertake the sort of inquiry conducted by Gibbs CJ in *Hematite* (1983) 151 CLR 599. Gibbs CJ concluded there that a broad construction of section 90 ‘gravely hampered the States without conferring any great benefit on the Commonwealth’.

Dennis Hotels and Dickenson's Arcade.⁶²

Such policy considerations were swept aside in *Ha and Hammond*.

5. HA AND HAMMOND - THE FACTS

Two matters were heard together, the first involving Ngo Ngo Ha and another plaintiff, Sokhieng Lim, the second involving Walter Hammond and Associates Pty Ltd. In the first matter the two plaintiffs sold tobacco in a duty free store in suburban Sydney in 1994. In the second matter the plaintiff carried on the business of selling tobacco for resale in NSW in 1996. Under the *Business Franchise Licences (Tobacco) Act 1987 (NSW)*, each plaintiff was prohibited from selling tobacco, whether by retail or wholesale, without a licence. Such licences were issued on application for periods of not more than a month. At the time the amount payable for a retailer's licence was calculated under section 41(1)(c) of the Act and, with respect to Ha and her co-plaintiff, Lim, it would have involved a fee of \$10 plus an amount equal to 75 per cent of the value of the tobacco sold by retail during the 'relevant period' (but disregarding any tobacco purchased from another licensee). The amount payable for a wholesaler's licence was calculated according to section 41(1)(a) and for Walter Hammond Pty Ltd it would have involved a fee of \$10 plus an amount equal to 100 per cent of the value of the tobacco sold by the firm at wholesale during the 'relevant period' (but not including tobacco sold to another person holding a wholesaler's licence). Under section 3(1) of the Act the 'relevant period' is defined to be 'the month commencing 2 months before the commencement of the month in which the licence expires'.

By legislative amendment, the percentage rate specified in paragraphs (a) and (c) of section 41(1) of the relevant Act were increased over the years. The rates were as follows: until 28 August 1989 - 30 per cent; 28 August 1989 to 28 August 1991 - 35 per cent; 28 August 1991 to 28 July 1992 - 50 per cent; 28 July 1992 to 28 June 1995 - 75 per cent; and after 28 June 1995 - 100 per cent.

The amount claimed to be payable by Ha in the first matter was \$1,422,174.90; by the second plaintiff, Lim, in the same matter \$927,548; and by the plaintiff in the second matter \$20,432,928.39.

All the plaintiffs claimed that the amounts payable under section 41 of the Act were duties of excise which the State did not have the power to impose.

On the other side, the State of NSW, with the support of all the other States, the Northern Territory and the ACT, submitted that the fees were not excise duties and did not, therefore, contravene section 90 of the Constitution. In what has been called a 'high risk strategy',⁶³ the High Court was invited by the States and Territories to reopen the cases, based on the authority of *Parton v Milk Board (Vic)*, adopting the broad

⁶² (1993) 178 CLR 561 at 593.

⁶³ Transcript of proceedings for 12 March 1997 at 9 (per McHugh J).

interpretation of excise, in the hope that it would be overturned.

The Commonwealth also intervened in the case, but its submission was essentially in support of the status quo as it had existed before *Ha and Hammond*. In other words, the wide interpretation of excise should be maintained, the Commonwealth argued, but so should the anomalous and pragmatic arrangement defined in *Capital Duplicators (No 2)* with respect to the validity of certain licence fees (the *Dennis Hotels* doctrine).⁶⁴

6. THE HIGH COURT'S DECISION IN HA AND HAMMOND

The majority opinion: In essence, the majority opinion of Brennan CJ, McHugh, Gummow and Kirby JJ was a restatement of the broad definition of excise based on the 1949 decision of Dixon J in *Parton v Milk Board (Vic)*. In doing so it rejected the two key arguments of the States and Territories: that, for a tax to be an excise, it must make local (Australian) production or manufacture the 'discrimen of liability'; and, secondly, that the imposts under the NSW Act were merely fees for a licence to carry on the business of selling tobacco and not a tax on the tobacco sold.

In rejecting the view that excise duties should refer only to an impost on goods produced or manufactured in Australia and that, therefore, a tax imposing a duty indifferently on all goods (whether imported or locally produced or manufactured) is not an excise, the majority pursued the following line of reasoning:

- **Precedent:** that the same submission had been firmly rejected by Dixon CJ in *Dennis Hotels*⁶⁵, where it was described as 'ridiculous', and had been rejected again in *Capital Duplicators (No 2)*. The majority noted, with reference to *Parton v Milk Board (Vic)* and several other cases, that 'The principle that an inland tax on a step in production, manufacture, sale or distribution of goods is a duty of excise has been long established'.⁶⁶

On this issue, the significance of precedent for McHugh J was made very clear in the hearings where he told the Solicitor General for Queensland: 'if I had been sitting in this Court in 1949 I might have gone along with the view of Chief Justice Latham in [*Parton's* case], but almost 50 years has gone by and you can put your submissions as forcefully as you can but there is a great deal of authority in this Court which accepts the *Parton* definition, just as there is authority which accepts the franchise cases, and minds differ as to what is the true view of excise. That being so, why should not the Court maintain the doctrine that was enunciated in *Capital Duplicators?*'⁶⁷

- **The purpose of section 90:** an interesting feature of the majority decision is that it tends not to address the question of the purpose of section 90 directly.⁶⁸ That

⁶⁵ (1960) 104 CLR 529 at 540.

⁶⁶ *Ha and Hammond* at 6.

⁶⁷ Transcript of proceedings for 12 March 1997 at 27 and 29.

⁶⁸ In the hearing McHugh J, in particular, was keenly aware of the problems involved in trying to establish the 'purpose' of any provision of the Constitution. He explained that the difficulty is in deciding who is the author for interpretative purposes. The drafters of the Constitution were not those who approved it, a fact which led McHugh J to observe 'If we look at any operative minds here, surely it is those of the people. The only way you can look at this is by looking at the language that is used in the Constitution, guided by historical facts that perhaps are at the background' - Transcript of proceedings for 12 March at 46 and 13 March at 7-8. For a critical commentary on this line of reasoning see -

is not to say that a view was not expressed on this issue, but that it was achieved by somewhat circuitous means. In fact, in its discussion of past authority, the majority had endorsed the interpretation of Dixon J from *Parton's* case as to the assumed purpose of section 90 itself, not only as a matter of precedent but also as the right interpretation of the provision. That endorsement, however, came chiefly in the guise of a quotation from the majority decision in *Capital Duplicators (No 2)*.

More expressly, however, the majority directed its attention towards an analysis of section 90 within the context of Chapter IV of the Constitution, this being a textual analysis which took as its framework the objective of that Chapter understood against its historical background.⁶⁹

- ***Adherence to the text of the Constitution:*** thus, having dealt with the issue of precedent, the majority went on to say that ‘To support the overturning of such long and consistent line of authority, the defendant’s submissions needed to show a clear departure from the text of the Constitution’. Reference was made in this regard to the various submissions of the States as to the meaning of sections 90, 93 and 55 of the Constitution. The fact that section 93 specifically applies duties of customs to ‘goods imported into a State’ and duties of excise to ‘goods produced or manufactured in a State’ was of particular note here.
- ***Purpose of Chapter IV of the Constitution:*** from this point the majority moved immediately to say that the validity of these arguments could only be determined by inquiring into the purpose of section 90 viewed in the context of Chapter IV of the Constitution generally.

On looking at the question of the purpose of Chapter IV, the majority stated that one of its chief objects was to ‘provide for the financial transition of the Colonies into the States of the Commonwealth and for the revenues required by the Commonwealth’. They then proceeded to outline the transitional scheme of finance established under Chapter IV to achieve this object, quoting in some detail from a book by Stephen Mills entitled, *Taxation in Australia*. Why that work was favoured in this way was not explained.⁷⁰ The role of section 93 in this

J Goldsworthy, ‘Originalism in constitutional interpretation’ (1997) 25 *Federal Law Review* 1 at 25-27.

⁶⁹ Note that Brennan CJ had said in the hearings that, as the word ‘excise is not self-defining, the definition of excise must be found elsewhere, notably by reference to the ‘economic objective’ that Chapter IV was designed to achieve - Transcript of proceedings for 11 March 1997 at 30.

⁷⁰ In fact, this was the work referred to by Dixon J in *Matthews v Chicory Marketing Board (Vic)* at 299 in his discussion of excise duties in the Australian colonies. Notably, it was Mills who had uncovered the fact that ‘in Tasmania the duties imposed in 1829 under the name of “excise” covered spirits distilled in Van Dieman’s Land or in New South Wales and imported therefrom’. There was at least one example to bolster the argument that in the

transitional scheme was then explained for the purpose of concluding in a negative vein that, viewed in its proper context, 's 93 throws no light on the connotation of the term "duties of excise" in s 90'.⁷¹ The point therefore was that the linking of excise with 'goods produced or manufactured in a State' in section 93 could be reconciled with the broad interpretation of excise duties in section 90, thus denying to the States the most obvious textual support for their alternative interpretation.

- **Section 90, Chapter IV and inter-State free trade:** in a more positive vein, the majority made it clear that a major objective of Federation, the creation of inter-State free trade on the basis of a uniform tariff, would have been frustrated if the States had retained the power to place a tax on goods within their borders. The remarks of Dixon J in *Parton's* case were cited with approval in this regard and later it was said: 'So far as it goes, it can be accepted that a purpose of s 90 is to give the Commonwealth fiscal control over imports, domestic production and exports. But free trade within the Commonwealth would not have been ensured by exclusive fiscal control of imports, domestic production and exports...the imposition of State taxes upon other inland dealings with goods as integers of commerce, even if those taxes were not protectionist, would have created impediments to free trade throughout the Commonwealth. Why should s 90 be construed so as to subvert an objective which Federation was designed to achieve?'

Responding to the criticism that federal control over excise duties is a very imperfect mechanism for achieving internal free trade, the majority added: 'It is immaterial that the States retain taxing and other powers the exercise of which might affect the overall costs of production, sale or distribution of goods and ultimately be shared by consumers: what is material is that the States yielded up and the Commonwealth acquired to the exclusion of the States the powers to impose taxes upon goods which, if applied differentially from State to State, would necessarily impair the free trade in those goods throughout the Commonwealth'.

- **Practical and definitional considerations:** the majority had already confronted the obstacle that, as a matter of fact, in the Australian colonies in the 1890s 'duties of excise were in practice levied on goods of local production or manufacture', that is, in a way consistent with the narrow interpretation favoured by the States in *Ha and Hammond*. Undeterred, the majority pointed to the

Australian experience excise duties were not confined to goods produced in the colony.

⁷¹ By way of explanation, it was said: 'Section 93 prescribed the basis of accounting to the respective States for the duties which were collected by the Commonwealth...Section 93 was not concerned with duties of excise imposed otherwise than on production or manufacture in another State since, in practice, the agreed allocation of revenue was in respect only of customs duties or duties of excise on production or manufacture collected in the other State'.

different meanings of the term ‘excise duties’ in the 1890s, referring in their argument to subsequent judicial comments on the range of usages in England and the United States. In other words, notwithstanding the practice of the times, the term ‘excise’ had a wider range of potential connotations, with the result that there was no common use of it in the Convention Debates or beyond. Indeed, the only conclusion to be drawn, ‘with respect to the financial position of the Colonies, is that it was understood at the time that in becoming States what had been their principal sources of revenue would be withdrawn’, that is, the taxes the colonies had imposed on the production or manufacture of beer, spirits and tobacco within the colony.

- ***The Convention Debates of the 1890s:*** the majority had also said that the history of section 90 denies the hypothesis that it was ‘designed merely to protect the integrity of the tariff policy of the Commonwealth’ (that is, the ‘customs union’ interpretation favoured by the States). They conceded that that may have been the intention originally at the 1891 Convention but argued that subsequent amendments at the Adelaide Convention in 1897 denied any ‘*necessary linkage* between the exclusivity of the power to impose duties of excise and Commonwealth tariff policy’ (emphasis added). Reference was made in this regard to the agreement of Mr McMillan to remove the words ‘upon goods the subject of customs duties’ on the basis that ‘it would be as well not to do anything that would restrict the power of the Federal Parliament’. However, it is fair to say that that statement needs to be read in its proper context, for it was preceded by the comment from Mr McMillan that, in his view, ‘under almost every conceivable circumstance an excise duty would be a sort of counterpoise to an import duty’.⁷² Nonetheless, as far as it goes, the ‘necessary’ linkage between ‘goods the subject of customs duties’ and excise duties was severed, albeit in decidedly equivocal circumstances. Whether that is quite the same thing as going as far as saying that there was no *necessary linkage between the power to impose duties of excise and Commonwealth tariff policy* may be another matter.

Section 55: As noted, section 55 of the Constitution requires that Federal taxation laws imposing duties of customs ‘shall deal with duties of customs only’ and that excise laws deal only with ‘duties of excise’. Basically, for reasons of certainty the majority said it favoured the broad interpretation of excise, stating ‘Section 55 does call for a classification of taxing laws by reference to the criteria of liability that they express. The criterion of inland taxes on goods serves to identify clearly duties of excise for the purpose of s. 55’.

- ***Excise duties defined:*** closing this part of their judgment, the majority affirmed the correctness of the doctrine established in *Parton’s* case and offered the following authoritative definition of excise duties as: ‘taxes on the production, manufacture, sale or distribution of goods, whether of foreign or domestic origin.

⁷² *Official Report of the National Australasian Convention Debates*, Adelaide 1897, pp 835-836.

Duties of excise are inland taxes in contradistinction from duties of customs which are taxes on the importation of goods'.⁷³

In rejecting the second major submission of the States, namely, that the imposts under the relevant NSW Act were merely fees for a licence to carry on the business of selling tobacco and not a tax on the tobacco sold, the majority pursued the following line of reasoning:

- ***Magnitude of the fee involved:*** the increasing costs of the business franchise fees under the NSW Act since the decision in *Coastace*⁷⁴ in 1987 (rising from 30% to 100% of the value of the tobacco sold in a relevant period), plus the quantity of revenue raised by NSW from tobacco licence fees between 1986 and 1996, showed clearly that the fee at issue in *Ha and Hammond* was 'manifestly a revenue-raising tax'. On any realistic view of 'form' and 'substantial result' the States and Territories had 'far overreached their entitlement to exact what might properly be characterised as fees for licences to carry on businesses'. The fee in question, therefore, could not be saved by reference to the *Dennis Hotels* formula.
- ***The special case for alcohol and tobacco fees rejected:*** in rejecting the view that alcohol and tobacco are in a special 'regulatory' category for section 90 purposes, the majority found that *Philip Morris* and *Coastace* were wrongly decided. The argument of precedent did not impress them in this context.⁷⁵ Interestingly, scant mention was made of the decision in *Capital Duplicators (No 2)* where the majority (which included Brennan and McHugh JJ) agreed that 'there are some grounds for treating tobacco and alcohol products as constituting a special category of goods for the purpose of considering whether what purports to be a licence fee under a regulatory regime should be characterized as a duty of excise'.⁷⁶ Very strong practical reasons for adhering to the rule of *stare decisis* were also mentioned in that case, as was the point that the diversity in the reasoning in earlier cases was not an adequate ground for disregarding precedent.⁷⁷ All this was swept aside in *Ha and Hammond*. The idea that the States could exploit the loophole offered under the *Dennis Hotels* formula to impose massive taxes on tobacco and alcohol, ironically the very goods subject to excise duty at the time of Federation, could not survive any practical test of the substantive effect of those taxes on commodity prices.

⁷³ They added that it was 'unnecessary' to consider whether consumption taxes should be classified as duties of excise (at 10).

⁷⁴ (1989) 167 CLR 503.

⁷⁵ Both Brennan J and McHugh J had dissented in *Philip Morris*.

⁷⁶ (1993) 178 CLR 561 at 591-592.

⁷⁷ *Ibid* at 593.

The minority opinion: The minority opinion of Dawson, Toohey and Gaudron JJ was, in essence, a restatement of the narrow definition of excise (as a tax that falls selectively on the local production or manufacture of goods) in *Peterswald v Bartley*.⁷⁸ It took as its foundation stone the following statement from Griffith CJ in that case:

⁷⁸ However, as Dawson J observed in *Capital Duplicators (No 2)* at 616, it seems it can no longer be said that 'an excise duty must be imposed in relation to the quantity or value of goods'

Bearing in mind that the Constitution was framed in Australia by Australians, and for the use of the Australian people, and that the word ‘excise’ had a distinct meaning in the popular mind, and that there were in the States many laws in force dealing with the subject, and that when used in the Constitution it is used in connection with the words ‘on goods produced or manufactured in the States’ [section 93], the conclusion is almost inevitable that, whenever it is used, 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. Reading the Constitution alone, that seems to be the proper construction to be put upon the term.⁷⁹

On this basis, the minority went on to make the following key points:

- **Section 93:** the terminology used in that section is ‘plainly intended to be descriptive of what is meant by the term “duties of excise” as it is used in the Constitution’.
- **The purpose of sections 90 and 92 contrasted:** with respect to the principal objectives of federation section 90 was said to be ‘central to the achievement of a common external tariff’, whereas ‘Section 92 was the chief means by which an internal free trade area was to be achieved’.
- **Customs duties and excise duties:** for the minority the correlation between the two is ‘made manifest by section 90’ and, further, the correlation is seen throughout the Constitution - ‘nowhere is excise mentioned in the text without an adjacent reference to customs’.
- **The flaws in Parton’s case:** the propositions underlying Dixon J’s views in that case have been questioned in both subsequent cases and academic commentary ‘with such force that they cannot now...be accepted’. Even taking a broad view of excise, section 90 would only deliver to the Commonwealth a ‘limited power’ to implement policy with respect to the production and manufacture of goods. It was also said that ‘it is plainly incorrect to assert that a tax upon a commodity at any point in the course of distribution before it reaches the consumer has the same effect as a tax upon its manufacture or production’.
- **A customs union not an economic union:** after Federation the States were to retain considerable power to influence the economy within their boundaries and, with this in mind, the minority contended that the purpose of section 90 was to achieve ‘a customs union, not an economic union if what is meant by that term is a single economy’.
- **The Convention Debates:** far from severing the linkage between the exclusivity

⁷⁹

(1904) 1 CLR 497 at 509.

of Commonwealth power to impose excise duties and its external tariff policy, the amendments made to the provision at the 1897 Adelaide Convention ‘served to emphasise it’.

- ***Review of authorities justified:*** past divergence of opinion as to the meaning of excise would justify such a review as occurred in *Cole v Whitfield* on the related issue of section 92.
- ***Section 90 and revenue:*** section 90 was not designed to operate as a revenue base for the Commonwealth (that is the function of section 51(ii)), still less to restrict the revenue raising capacity of the States. It excludes the States from a particular area for a particular purpose, namely, the maintenance of the integrity of the external tariff.
- ***Licence fees not duties of excise:*** in the present case the fees fall indiscriminately on tobacco products regardless of whether they are locally manufactured or produced, on one side, or imported, on the other. For the minority, it is the nature of the impost and not the magnitude of the revenue raised which is at issue and, in deciding where a fee and not an excise is levied, ‘it is the fact that the impost falls upon domestic and imported goods alike which is the substance of the matter’. That only a small proportion of tobacco is in fact imported is not to the point, so long as the level of protection (if any) ‘which the Commonwealth has chosen to give tobacco products produced or manufactured in Australia remains unaffected’.

7. COMMENTARY

The High Court and the States: At the Adelaide Convention in 1897 Alfred Deakin asserted that it had to be remembered by the delegates that ‘the States are only parting with a small part of their powers of self-government, and that the Federal Government has but a strictly defined and limited sphere of action’.⁸⁰ As an explanation of the intentions of the Founding Fathers, the assertion has considerable merit; as an explanation of how the proposed Constitution would operate in practice, however, it is hopelessly inaccurate. For that reason it has long since been eclipsed by Deakin’s famous prediction from 1902 that ‘The rights of self-government of the States have been fondly supposed to be safeguarded by the Constitution. It left them legally free, but financially bound to the chariot wheels of the central Government’.⁸¹

What is indisputable is that the failure of the Founding Fathers to answer the long-term question of State-Commonwealth financial relations left the States in a decidedly vulnerable position. That is the nub of Deakin’s 1902 prognostication, that the power of the purse must prevail. So it has, but not, many would argue, without some considerable

⁸⁰ *Official Report of the National Australasian Convention Debates*, Adelaide 1897, p 292.

⁸¹ JA La Nauze editor, *Federated Australia*, Melbourne University Press 1968, p 97.

assistance from the High Court, which over the years has added its own unique contribution to the centralisation of power in Australia. The landmark decision in this regard was the *Engineers* case⁸² where it was decided that the powers of the Federal Parliament were to be interpreted broadly, with all the liberality that the words would allow. As Gregory Craven explains:

Correspondingly, and disastrously for the States, the High Court emphatically overturned the doctrine of reserved powers, whereby the powers of the Commonwealth essentially were to be interpreted narrowly so as to leave the greatest possible residue to the States.⁸³

Fundamental to Craven's argument is that the Founding Fathers were 'strongly and prevalently' concerned to maintain the autonomy of the States but that, for different reasons, the institutions they set in place to protect the interests of the States, the Senate and the High Court, have failed miserably in their appointed task. Craven commented in 1990:

That the High Court has not functioned as any sort of protector of the States is so absolutely beyond dispute that to seriously query the proposition in knowledgeable company would be more likely to provoke hilarity than any other reaction.⁸⁴

This is not the place to inquire why this is so. It may be enough to say, following a suggestion made by Professor Zines, that in terms of the 'clash of federal and national images' of the polity created under the Constitution, the High Court has more or less consistently emphasised the national against the federal image, with significant consequences for the expansion of the powers of the Commonwealth Government.⁸⁵ Would Deakin still maintain in 1997 that the Constitution, as interpreted by the High Court, left the States 'legally free'?

A rare victory for the States: That is not to say that the States have not recorded the occasional victory in the High Court, it is just that these have been rare and limited in scope. Since 1920, the striking down of a Commonwealth law by reference to the federal nature of the Constitution, on the ground that it violated the States impliedly enjoyed, occurred in 1947, in the *Melbourne Corporation* case,⁸⁶ then in 1985, in the

⁸² (1920) 28 CLR 129.

⁸³ G Craven, 'The States - Decline, Fall or What?', from *Australian Federation: Towards the Second Century* edited by G Craven, Melbourne University Press, p 63. The article was based on a 1990 conference paper.

⁸⁴ *Ibid.*

⁸⁵ L Zines, 'The Commonwealth', from *Australian Federation: Towards the Second Century* edited by G Craven, Melbourne University Press 1992, p 95.

⁸⁶ (1947) 74 CLR 31.

Queensland Electricity Commission case⁸⁷, and again in the *Australian Education Union* case⁸⁸ a decade later. It is said that the doctrine of ‘federal implications’ (known as the Melbourne Corporation principle)⁸⁹ on which these decisions are based is ‘merely a pale shadow’ of the reserved powers doctrine.⁹⁰

Re the Residential Tenancies Tribunal of NSW v Henderson and anor; ex parte The Defence Housing Authority,⁹¹ the decision in which was handed down on 12 August 1997, can be added to the short list of States victories.⁹² The case concerned the extent to which the NSW Residential Tenancy Tribunal had jurisdiction over the federal Defence Housing Authority. Among the arguments submitted by the Defence Housing Authority was that the legislative power of the NSW Parliament does not extend to the federal Authority by reason of the principle expounded in the controversial *Cigamatic*

⁸⁷ (1985) 159 CLR 192.

⁸⁸ *Re Australian Education Union* (1995) 184 CLR 188. As Zines notes, in this case the High Court held invalid, for the first time, a Commonwealth law on the ground that it impairs the capacity of a State to function as an independent government. The case was followed in *Victoria v The Commonwealth* (1996) 138 ALR 129 - L Zines, *The High Court and the Constitution*, Fourth Edition, p 332. Zines also notes that implied federal restrictions were relied on directly by Brennan J in *Australian Capital Territory Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 162-164.

⁸⁹ The principle has two elements: (1) The prohibition against discrimination which involves the placing on the States of special burdens or disabilities; and (2) the prohibition against laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments’ - (1985) 159 CLR 192 at 217 (per Mason J); followed in *Re Australian Education Union* (1995) 184 CLR 188 at 231; *Victoria v The Commonwealth* (1996) 138 ALR 129 at 155.

⁹⁰ G Craven, ‘The States - Decline, Fall or What?’, from *Australian Federation: Towards the Second Century* edited by G Craven, Melbourne University Press, p 64.

⁹¹ [Http://www.austlii.edu.au/au/cases/cth/high_ct/unrep336.html](http://www.austlii.edu.au/au/cases/cth/high_ct/unrep336.html) - the decision was by a majority of six to one, with Kirby J dissenting.

⁹² Other victories for the States in recent years include: *South Australia v Commonwealth* (1992) 174 CLR 235 (it was held that, as result of section 114 of the Constitution, the South Australian Superannuation Fund Investment Trust was not liable to pay Commonwealth taxation on net capital gains earned in respect of its assets); and *Deputy Commissioner of Taxation v State Bank of NSW* (1992) 174 CLR 219 (it was held, again as a result of section 114, that the State Bank of NSW was not liable to pay Commonwealth sales tax on goods which it manufactured for its own use. The ‘State’ was defined to include State instrumentalities). Commenting on these cases, Lindell has stated, ‘Although these cases were further losses for the Commonwealth it is possible to view them as providing corresponding protection to the Commonwealth since s. 114 works in reverse and prevents the States from imposing taxation upon the property of the Commonwealth’ - GJ Lindell (ed), *Future Directions in Australian Constitutional Law*, p 11.

case,⁹³ at issue in which was the relationship of State laws to the Commonwealth.⁹⁴

In brief, the interest of the decision in *Re the Residential Tenancies Tribunal of NSW v Henderson and anor; ex parte The Defence Housing Authority* in this context is threefold. First, in the discussion of the Melbourne Corporation principle in the joint judgment of Dawson, Toohey and Gaudron JJ, although at the same time their decision to uphold the validity of the NSW legislation in question was not dependent on that principle.⁹⁵ Secondly, there are McHugh J's observations on the correctness of the decision in *Engineers*, as well as on the 'necessary implication' from federation 'that no polity can legislate in a way that destroys or weakens the legislative authority of another polity within that federation'. Thirdly, there are the practical implications of the decision, with one commentator suggesting that 'the decision leaves open the likelihood that State environmental and planning laws, among many others, apply to federal governmental bodies'.⁹⁶ It would seem to be the case that the decision makes federal bodies established under statute subject to State laws,⁹⁷ but note that those laws are themselves made subject to section 109 of the Constitution which permits federal legislation to prevail in the event of inconsistency.

The point to make is that, reluctant though the High Court has been since 1920 to invoke the 'federal' image of the Constitution, careful and qualified use of it has still been made

⁹³ (1962) 108 CLR 372.

⁹⁴ As formulated by the Commonwealth Solicitor General, the *Cigamatic* principle maintained that State laws cannot by their own force bind the Crown in right of the Commonwealth. In their joint judgment, Dawson, Toohey and Gaudron JJ held that that 'represents a basic misconception of what was decided' in *Cigamatic*. In upholding the validity of the relevant sections of the *NSW Residential Tenancies Act 1987* they made two distinctions: (1) between the capacities of the Crown and the exercise of those capacities; and (2) between legislation which purports to modify the nature of the executive power vested in the Crown (its capacities) and 'legislation which assumes those capacities and merely seeks to regulate activities in which the Crown may choose to engage in the exercise of those capacities'. With these distinctions in place, they then went on to say that in *Cigamatic* it was held that 'a State legislature had no power to impair the capacities of the Commonwealth executive, but at the same time it was recognised that the Commonwealth might be regulated by State laws of general application in those activities which it carried on in common with other citizens'. *Cigamatic* was not overruled therefore, but it was interpreted in such a way as to conclude that, under its principle, 'the Commonwealth executive is not above the law and where a State statute is applicable it forms part of the law'. Both McHugh and Gummow JJ said they disagreed with the distinction between capacity and its exercise.

⁹⁵ Note that for Brennan CJ (at 3) the same principle was irrelevant to the case.

⁹⁶ R Campbell, 'Judgment increases powers of the States', *The Canberra Times*, 13 August 1997.

⁹⁷ Note McHugh J's comment that 'when a prerogative power of the Executive Government is directly regulated by statute, the Executive can no longer rely on the prerogative power but must act in accordance with the statutory regime laid down by the Parliament'. For this reason, the Defence Housing Authority was not entitled to the benefit of the *Cigamatic* doctrine.

from time to time, at least in the truncated form embodied in the Melbourne Corporation principle. On the other hand, the issues in question in *Ha and Hammond* lay outside that principle and, for the majority at least, beyond any notion of the ‘necessary implications of a federation’.

Excise duties - moderate expectations: Nonetheless, in recent years there had been some expectation that the High Court might be prepared to alter course in its interpretation of excise duties. For example, in 1993 Cheryl Saunders suggested that if the definition of excise was reopened, ‘it is likely that it would be narrowed’.⁹⁸ Likewise, in 1990 Michael Coper, another noted commentator on this area of constitutional law, said that the High Court was ‘poised to do for section 90, given the right case, what it did for section 92 in *Cole v Whitfield*’. Specifically, he thought that a combination of what he called ‘plausible hypothetical history, boosted by substantial ‘considerations of context and symmetry,⁹⁹ plus the ‘evident understanding of the early High Court’, together with the tendency in recent years to uphold taxes on the sale, distribution or consumption of goods, were all factors in favour of a narrow interpretation of section 90. In addition, there were the considerations of policy, associated mainly with the problem of fiscal imbalance, which led Coper to call for ‘a fresh start’, stating: ‘To reduce the reach of section 90 to a core meaning for excise of taxes on production of [sic] manufacture would do no more than transfer a little more of the responsibility for the national economy from the judicial to the political process’.¹⁰⁰

The balance of a cademic opinion and judicial precedent: That expectation of change may have been tempered somewhat by the 1993 decision in *Capital Duplicators (No 2)*, but still the balance of academic opinion favoured the narrow approach.¹⁰¹ Indeed, section 90 is unusual in that we find a formidable body of opinion, including the leading academic commentators, on one side, and only a bare majority of High Court judges, in the company of the not entirely disinterested Commonwealth Solicitor General, on the other. During the course of the hearing in *Ha and Hammond* the Commonwealth Solicitor General raised this issue, noting at first that in ‘almost all areas of current constitutional controversy, academic writings seem to follow in arrears the development of jurisprudence in this Court’, and then stating:

Your Honours, when one looks to the comment or analysis, it seems to consist of little more than a plea for deference to the fiscal imbalance and not as we read the articles, any effective argument for some alternative

⁹⁸ C Saunders, ‘Vertical fiscal imbalance: constitutional origins’ from *Vertical Fiscal Imbalance* edited by DJ Collins, Australian Tax Research Foundation 1993, p 57.

⁹⁹ Coper had in mind symmetry with ‘the new and improved section 92’.

¹⁰⁰ M Coper, ‘The Economic Framework of Australian Federation: A Question of Balance’, from *Australian Federation: Towards the Second Century* edited by G Craven, Melbourne University Press 1992, pp 144-147.

¹⁰¹ For example, see GJ Lindell, ‘Recent developments in the judicial interpretation of the Australian Constitution’ from *Future Directions in Australian Constitutional Law* edited by GJ Lindell, The Federation Press 1994, pp 41-44.

conclusion based on demonstrated history, context or purpose.¹⁰²

Special pleading aside, during the course of the hearing the Court itself acknowledged the lack of academic support for the Court's jurisprudence on excise. However, the majority did not address that critical body of work in any way in its judgment, preferring instead to stand behind the doctrine of precedent. As McHugh J said in the hearing in this regard, 'at least there is a long string of cases which apply the *Parton* definition'.¹⁰³ Thus, the majority grounded its decision on the judgment of Dixon J in *Parton*. In fact, that judgment had gone against the established precedent of the day and it did so on the basis of an 'assumed' and only half-articulated purpose, largely unsupported by history or context.¹⁰⁴ The minority opinion in *Ha and Hammond* commented to this effect, stating that 'no justification for the assumption is to be found either in s. 90 or elsewhere in the Constitution, or in history, and it has not gained in force by its conversion from an assumption to an assertion'.

Issues in constitutional interpretation: In effect the decision in *Ha and Hammond* raises a whole range of questions which go to the heart of constitutional interpretation, including the use that is to be made of historical material generally and the Convention Debates, in particular. We are at an interesting juncture in this regard, for there is a sense in which the High Court opened fully the Pandora's Box of history in *Cole v Whitfield*¹⁰⁵ and it is now struggling with the demons which escaped from it.

On this issue, it has been noted that during the course of the hearing in *Ha and Hammond* McHugh J made it clear that in his view the Founding Fathers did not know 'what they were about' when they were discussing excise.¹⁰⁶ From this, it would seem that the

¹⁰² Transcript of proceedings for 18 March 1997 at 32.

¹⁰³ Transcript of proceedings for 13 March 1997 at 9.

¹⁰⁴ Dixon J had examined the history of the word 'excise' in considerable detail in *Matthews v Chicory Marketing Board (Vic)* at 297-303 and in *Parton* at 261 he noted that he would not go over the same ground again. Two points can be made here. First, Dixon J's discussion of excise in *Matthews* concentrated on its past usage in an English context and on its modern application in Canada. Australian sources were noted, including Quick and Garran, but the examination was hardly exhaustive, with no reference being made to the Convention Debates. Secondly, although the meaning of the word 'excise' was examined, this was not linked to a discussion of the purpose of section 90. In other words, Dixon J did not consider the context in which the term 'excise duty' was intended to be used in the Constitution.

¹⁰⁵ (1988) 165 CLR 360. The case rejected the 'individual right' theory of section 92 and found that the object of the section is the elimination of protection. Zines has explained, 'The section only prohibits measures which discriminate against interstate trade and commerce and which have the purpose or effect of protecting the interstate trade or industry of a State against competition from other States' - *The High Court and the Constitution*, Fourth Edition, p 136.

¹⁰⁶ Transcript of proceedings at 13 March 1997 at 38. In full, McHugh J said: 'One of the problems about the debates is that although some of the delegates manifest an awareness the section 90 was intended to prevent Commonwealth tariff policy being frustrated, when

Debates can only be of very limited (if any) value in elucidating the meaning of ‘excise’ in section 90. In fact, the majority’s use was limited to denying a ‘necessary linkage’ between the exclusive power of the Federal Government to impose excise duties and Commonwealth tariff policy; that denial just happened to remove a central plank in the argument of the States. It is also the case, of course, that actual debates on complex themes are rarely tidy enough to throw up the ‘necessary linkages’ of legal reasoning, if what is meant by this is a strict logical relationship between interdependent concepts.

Another observation to make is that the majority had used the confused discussion in the Convention Debates to help set aside the submission that the meaning of ‘excise’ should be informed by the fact that, in the Australian colonies of the 1890s, ‘duties of excise were in practice levied on goods of local production or manufacture’. It seems then that, for the majority, the Founding Fathers had sufficient understanding of the issues to agree that excise duties were not connected, of necessity, to tariff policy, on one side, but insufficient understanding to agree on what they actually meant by the term ‘excise’, on the other.¹⁰⁷

McHugh J has said that the Constitution must ‘be interpreted by late twentieth century Australians according to the ordinary and natural meaning of its text, read in the light of its history, with such necessary implications as derive from its structure’.¹⁰⁸ *Ha and Hammond* suggests the difficulties involved in applying that formula by showing the extent to which opinion can diverge both on questions of history as well as the ‘ordinary and natural meaning’ of the text. Following on from this, it can be suggested that it is precisely where the meaning or connotation of a term is in dispute that the interpretation of the Constitution will be guided by extra-legal factors. In particular, it can be suggested that the purpose of the provision at issue will come to play a decisive role in constitutional interpretation,¹⁰⁹ the discovery of which ‘is inescapably related to social values and policies’.¹¹⁰ In this way, conflicting ‘images’ of the Constitution become relevant again.

Vertical fiscal imbalance: In any event, in *Ha and Hammond* the High Court has

you look at the debates their central concern was to avoid any limitation on the powers of the Federal Government. That seems to have been the real concern. They did not seem to understand, really, what they were about’.

¹⁰⁷ Note that in *Cole v Whitfield* (1988) 165 CLR 360 at 385 the High Court said that ‘Reference to the history of s. 92 may be made...for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged’.

¹⁰⁸ *McGinty v WA* (1996) 186 CLR 140 at 230-231 (per McHugh J).

¹⁰⁹ L Zines, ‘Characterisation of Commonwealth laws’ from *Australian Constitutional Perspectives* edited by HP Lee and G Winterton, The Law Book Co Ltd 1992, p 41; for a comment on this see J Goldsworthy, ‘Originalism in constitutional interpretation’ at 32.

¹¹⁰ L Zines, *The High Court and the Constitution*, Fourth Edition, Butterworths 1997, p 449.

intensified still further the financial subservience of the States to the Commonwealth, thereby adding, by degree, to the already severe vertical fiscal imbalance which has been the subject of such widespread criticism over the years.¹¹¹ In its 1984 report the Fiscal Powers Sub-Committee to the Australian Constitutional Convention summed up its reservations by noting that the principal sources of taxation available to the States (payroll tax, stamp duties, property taxes, motor taxes, gambling taxes, business franchise fees and death and gift duties) were ‘complex and artificial’; it questioned the effect of payroll tax on employment and criticised stamp duties on grounds of equity and efficiency.¹¹² Four years on, the Constitutional Commission, which recommended that the Constitution be altered to permit the States to raise excise duties, referred to the policy question at issue in these terms:

The present situation in which the States are not responsible for the raising of most of the funds they spend has an obvious serious effect on the accountability and responsibility of those Governments. Expenditure decisions cannot in those circumstances take full account of the tax cost of the decisions. So, not only does the high fiscal imbalance impair the functioning of the State as an independent unit of the federation, it tends to sap at least some of the duties of responsibility and sound decision-making that are the concomitants of governmental power. This in turn severs the link between policy making and electoral control.¹¹³

More even-handedly, the Fiscal Powers Sub-Committee to the Australian Constitutional Convention had stated in this regard:

Although it is difficult to quantify, it is clear that the separation of revenue raising from expenditure decisions which is involved in any system of intergovernmental fiscal transfers detracts from the responsibility of both levels of government.¹¹⁴

However it is formulated, there can be little doubt that the level of fiscal imbalance in Australia today, said to be the highest among the major federations in the Western world, is problematic. Whether the mooted reform of the tax system after *Ha and*

¹¹¹ The full range of critical opinion was gathered in the *Report of the Trade and National Economic Management Committee to the Constitutional Commission*, 1987, pp 151-166.

¹¹² Proceedings of the Australian Constitutional Convention, Volume 2, *Fiscal Powers Sub-Committee Report*, Brisbane 1985, p 12. The Convention resolved to amend the Constitution by removing the words ‘and of excise’ from section 90, thereby enabling the States to impose excise duties (Volume 1, p 418). The Royal Commission on the Constitution, in 1929, recommended that the States be given concurrent power to impose excise duties on goods not the subject of customs duties (1929 Report, p 259-260).

¹¹³ *Final Report of the Constitutional Commission*, Volume 2, 1988, p 826.

¹¹⁴ Proceedings of the Australian Constitutional Convention, Volume 2, *Fiscal Powers Sub-Committee Report*, Brisbane 1985, p 13.

Hammond will alter matters greatly remains to be seen.

The future of State revenue, with a note on the Alders case: In an article in the 23 August 1997 edition of *The Sydney Morning Herald* the NSW Treasurer, the Hon Michael Egan MLC, is reported as saying that ‘The Commonwealth doesn’t have to abolish the States; it just lets them wither on the vine’. The article noted that, as a result of *Ha and Hammond*, this year’s State Budget outcome has been revised down from a forecast surplus of \$26 million to a \$300 million deficit. However, the article’s main focus was not that case but another recent High Court judgment, *Alders International Pty Ltd v Commissioner of State Revenue*.¹¹⁵ The article went on to say that the revised Budget estimate does not include the effects of that second ruling which found that the States could not tax businesses located on property owned or controlled by the Commonwealth. In the *Alders* case itself a duty free operator challenged the Victorian Government’s right to levy stamp duty on a lease at Melbourne’s Tullamarine Airport, this being a Commonwealth place under section 52 (I) of the Constitution. The legislative power under that section was said to be plenary (and in addition to the powers conferred by section 51), so that only Federal laws may be enacted with respect to places acquired under it by the Commonwealth for public purposes.

In *Alders*, Dawson J (with Toohey J) was again in the minority. His judgment included the observation that ‘Taxation is an essential attribute of government because it provides the most important means of raising the revenue required for its functioning’.¹¹⁶ The full impact of the ruling on capacity of the States to raise revenue for their purposes is not known as yet. It is reported that Ansett has demanded \$75 million repayment of payroll tax for airport based employees and that there is the danger that businesses will seek to exploit the loophole by using Commonwealth places as tax havens. Of the failure to date to arrive at an arrangement with the Federal Government, one NSW official is quoted as saying ‘They’re hanging us out as long as possible to extract interjurisdictional tax agreement from the States’.¹¹⁷

Consumption taxes: It may be that, by widening the scope of excise duties still further, the High Court will again restrict the range of taxes available to the States. The prevailing view to date has been that consumption taxes are not excise duties. In *Ha and Hammond*, as in *Capital Duplicators (No 2)*, on the other hand, the majority adopted a non-committal tone, stating ‘It is unnecessary in this case to consider taxes on the consumption of goods’.¹¹⁸ More ominously, McHugh J during the hearing in *Ha and Hammond* commented: ‘I must say that the limitation about consumption may be something that has got to be re-examined’.¹¹⁹

¹¹⁵ (1996) 140 ALR 189.

¹¹⁶ *Ibid* at 204.

¹¹⁷ ‘State coffers face second king-hit from tax loophole’, *The Sydney Morning Herald*, 23 August 1997.

¹¹⁸ (1993) 178 CLR 177 at 590.

¹¹⁹ Transcript of proceedings for 11 March 1997 at 23.

Presumably, the NSW bed tax would not be affected in any event, as this is a tax on services and not ‘upon goods’, that being a key characteristic of an excise duty.

8. CONCLUSION

There are sure to be conflicting opinions concerning the future of State revenue and, indeed, concerning the future status of the States within the Australian federation. In particular, it can be argued that the case for the national management of the economy is growing more persuasive as Australia finds itself competing in the global economy. One thing is certain, without a viable revenue base the States may not completely wither away as such, but their role and status must be much less than that envisaged by the Federation Fathers.

Introducing the Judiciary Bill in 1902, Alfred Deakin, by then the Federal Attorney General, called the High Court ‘the keystone of the federal arch’ and explained ‘The Constitution is to be the supreme law, but it is the High Court which is to determine how far and between what boundaries it is supreme’.¹²⁰ A theme of this paper has been the importance of history and context in establishing those boundaries, as well as the difficulties involved in that enterprise. Deakin acknowledged that the Constitution, ‘large and elastic as it is, is necessarily limited by the ideas and circumstances which obtained in the year 1900’. However, he went on to observe:

But the nation lives, grows, and expands. Its circumstances change, its needs alter, and its problems present themselves with new faces. The organ of the national life which preserving the union is yet able from time to time to transfuse into it the fresh blood of the living present, is the Judiciary[,] the High Court of Australia....¹²¹

As Kirby J said in the hearing in *Ha and Hammond*, the ‘Constitution is to be interpreted not in a rigid or frozen way’.¹²² Yet, problematic though it may be, the significance of history and context for constitutional interpretation remains. On this theme, the first members of the High Court, Chief Justice Griffith and Justices Barton and O’Connor, observed in 1907:

It is true that what has been called an ‘astral intelligence’, unprejudiced by any historical knowledge, and interpreting a Constitution merely by the aid of a dictionary, might arrive at a very different conclusion as to its

¹²⁰ Cited in B Galligan, *Politics of the High Court*, University of Queensland Press 1987, p 70.

¹²¹ Cited in JA La Nauze, *Alfred Deakin, A Biography*, Volume 1, Melbourne University Press 1965, p 291.

¹²² Transcript of proceedings for 13 March at 6.

meaning from that which a person familiar with history would reach.¹²³

¹²³ *Baxter v Commissioner of Taxation (NSW)* 4 CLR 1087 at 1106 (per Griffith CJ, Barton and O'Connor JJ).