CONSTITUTIONAL LAW: SECTION 90 THE DEFINITION OF "EXCISE" REVISITED

LOGAN DOWNS PTY. LTD. V THE STATE OF QUEENSLAND

Although the power to make laws with respect to taxation is concurrently shared by the States and the Commonwealth, s. 90 of the Constitution reserves the power to impose taxes having the character of duties of excise exclusively to the Commonwealth. The denial of such a power is frustrating to the States in their continuing search for new sources of revenue and for that reason s. 90 is a contentious issue in federal financial relations.

The difficult question whether a particular tax, levied by a State in a way that has an impact on the process of production and commercial distribution of goods, is an excise, and the grounds on which that question is to be determined, has troubled the High Court of Australia since its first decision on the scope of s. 90 of the Constitution, in *Peterswald v Bartley*[1] in 1904. In that case, the High Court, faced with the problem that s. 90 merely refers to the imposition of "duties of excise" without further explication of the word "excise", defined "duty of excise" as:—

> A duty analogous to a customs duty imposed upon goods either in relation to quantity or value when produced or manufactured, and not in the sense of a direct tax or personal tax.[2]

To say that excise duties are imposed "upon goods" disguises, however, the complexity of the relationship that must exist between the tax and goods. Despite more than seven decades of wrestling with the problem of providing a more reliable guide as to what is entailed in the concept of excise, the High Court has failed to give an exposition of that relationship that can be used, with some degree of confidence, to predict whether a particular tax affecting goods infringes the constitutional prohibition.

1 (1904) 1 C.L.R. 497.
2 Id. at 509.

Throughout this period, the inability of the Court to arrive at a concensus on the meaning of excise has been evidenced by the narrowness with which various excise cases have been decided. In *Western Australia v Hamersley Iron Pty. Ltd. (No. 1)*,[3] for example, State stamp duty, imposed on receipts tendered in respect of the payment of monies for iron ore shipments, was held to be an excise only by a statutory majority.[4] Even with individual Justices, lack of logical consistency has been evident. Most notable in this respect have been the judgments of Menzies J.; although in *Hamersley* he was in the statutory minority, in *Western Australia v Chamberlain Industries Pty. Ltd.*[5] he joined with the Justices who had formed the majority in *Hamersley* in holding that a slightly varied form of stamp duty did amount to an excise, though the variation between the two forms of stamp duty was not significantly different. Another classic example of the judicial schizophrenia that has infected the High Court over the meaning of excise was the troublesome decision *Dennis Hotel Pty. Ltd. v Victoria*.[6] In that case, finding himself in a court that was otherwise evenly split with three Justices on either side, Mendies J.; in the determinative judgment, held that a tax imposed upon hoteliers for the right to carry on business (a business franchise tax) was not an excise levied "upon" beer, where the quantum of tax was calculated by reference to a percentage of beer sold on the premises in a period *prior* to the period for which the licence was issued, whereas a similar tax calculated by reference to a percentage of beer sold during the currency of a licence was. In the end, surveys of excise decisions prior to 1977[7] reveal a picture of considerable judicial turbulence and uncertainty of principle characterized by finely balanced decisions.

Against this, it is fair to say that for a brief period subsequent to 1964, expectations were held that the High Court had at last settled on a universally acceptable definition of excise. In its decision in *Bolton v Madsen*[8] a decision which, atypically, was notable for the unanimity amongst the Justices who decided it, a principle emerged

3 (1969) 130 C.L.R. 42.

4 That is by virtue of s.23 (2) (b) of the Judiciary Act 1903 (Cwlth) the opinion of the Chief Justice prevailed, the Court being evenly divided.

5 (1970) 121 C.L.R. 1.

6 (1960) 104 C.L.R. 529.

7 E.g., Howard *Australian Federal Constitutional Law* (2nd ed. 1972) 373; Cremean, "Consumption Taxes, Licence Fees and Excise Duties" (1974) 9 *Melb. U.L. Rev.* 735; Coper, "The High Court and Section 90 of the Constitution" (1976) 7 *Fed. L. Rev.* 1.

8 (1963) 110 C.L.R. 265.

that appeared to settle the essential feature of a duty of excise. The Court sought to define the relationship between an excise duty and goods as arising where the legislation took as the "criterion of liability" some step in the production, manufacture or distribution of goods.[9] According to this thesis, the "criterion of liability" selected by a State taxing Act was determinative of the question whether that tax was an excise duty or not.

If, however, it was thought that resort to the criterion of liability test would dissolve excise questions, it was soon evident that the unanimity achieved in *Bolton v Madsden* was illusory.[10] Irrespective of the difficulties in applying such a test, it never commanded the respect of all the High Court Justices.[11] The chief protagonist of an alternative approach to excise is Barwick C.J., though he is by no means isolated in his views. Broadly speaking, the alternative is to identify the *substantial operation* of a State taxing Act in order to determine whether a tax can be seen to operate by reference to the commercial process of production and distribution of goods. On this approach, whilst it is permissible to have regard to the "criterion of liability" indicated in a statute, that is not to be taken as conclusive. Other factors such as the practical, factual and economic context in which a tax is imposed must also be taken into account.[12] In some instances this may lead to the conclusion that an excise duty has been imposed, even though strictly speaking, the criterion of liability, considered by itself, would suggest otherwise.[13]

It is against this background of judicial ambivalence that a decision of the High Court was handed down in early 1977, namely *Logan Downs v Queensland*.[14] The bare facts of that case were that under s. 7 of the Stock Acts 1915-1965 (Qld.) owners of stock were required to pay an annual sum levied at a fixed amount per head of stock owned on a particular day. All such sums were, by s. 6(3) of the Act, to be paid into a "stock fund" which was to be applied for the pur-

9 Id. at 273, adopting the notion from the earlier judgment of Kitto, J. in Dennis Hotels, supra note 6 at 559.

10 Coper, supra note 7 at 4.

11 Id. at 16.

12 See e.g., Barwick, C.J. in Chamberlain, supra note 5 at 15.

13 In Dickenson's Arcade Pty. Ltd. v Tasmania (the Tobacco Tax case), (1974) 130 C.L.R. 177, if Barwick, C.J. had had to nominate the criterion of liability he would probably have had to say it was the consumption of tobacco, yet in looking at the substantial operation of the Tasmanian Act under challenge he was able to say a tax was imposed at the point of sale of the tobacco and thus an excise.

14 (1977) 12 A.L.R. 484.

poses of the Act, such as the provision of husbandry services to the stock industry. The plaintiff claimed that s. 7 infringed s. 90 of the Constitution.

By a statutory majority consisting of Barwick C.J., Stephen and Mason J.J. (Gibbs, Jacobs and Murphy J.J. dissenting) the Court held that s. 7 of the Act imposed a duty of excise. The provision was invalid insofar as it authorised the imposition of a duty in respect of stock used for production. The tax was not, however, totally invalid insofar as it created a liability to pay tax on beasts such as horses which were not intended for sale and consumption.

In supporting the validity of the tax, the defendant argued that the criterion of liability to pay tax was the ownership of stock irrespective of whether or not that stock was intended for commercial productive ends. The majority nevertheless was of opinion that where the tax was imposed upon stock in the course of production, it was an excise duty. The principle majority judgment was delivered by Mason J.,[15] with whom Barwick C.J. concurred. Of primary interest was his attitude to the criterion of liability test; he was not prepared to concede a universal application to it.[16] In his judgment it is apparent that he was concerned that if the criterion of liability was taken to be the sole consideration in deciding whether the tax was an excise, it would lead to the evasion of s. 90 by resort to fine linguistic distinctions. In *Logan Downs,* Mason J. and Barwick C.J. therefore adhered to the substantial operative effect test which is, in reality, a factorial approach, in the sense that regard may be had to a cluster of different factors, including the criterion of liability, in deciding what is an excise.

In the course of his judgment[17] Mason J., referred to the judgment of Dixon J. in *Mathews v Chicory Marketing Board (Victoria)*[18] in support of his view that the stock tax was an excise duty because it had a *natural* relation to the quantity or value of the commodity ultimately produced. This in fact touches on the heart of the dispute between the Justices in *Logan Downs.* For the crux of the matter was that whilst an owner may be assessed for tax on the number of stock that he owns, there is no *necessary* connection between any one beast and an ultimate productive purpose. The relation between stock owned and stock commercially sold or slaughtered, as part of the productive process, is, at the most, only contingent. Some beasts owned by a

15 Id. at 494.
16 Id. at 497-498.
17 Id. at 496.
18 (1938) 60 C.L.R. 263.

particular person may end up in an abattoir or in a sale-yard but there is no way, in advance, of definitely identifying which animals will do so. In relying on the opinion of Dixon J. in *Mathews* case, Mason J. was equating the situation in that case where a tax was imposed on the amount of chicory sown for production (which bears no relationship to the amount of chicory actually harvested and sold) with the tax on the number of stock owned (some of which may not in fact, be in the course of commercial production).

Stephen J., the other member of the majority, likewise relied on *Mathews* case in support of his view that a tax upon an owner of live-stock by reference to beasts which were grown in order to be sold for their meat or other products, was a duty of excise. He saw the tax having a natural relationship to the quantity of commodities produced so that the tax was imposed upon an essential step in production. He conceded however, that the relationship would not always be a necessary one.[19] What to hime was critical was that a number of beasts owned were certainly part of what he described as "the stream of production"[20] in the sense that many of them would be ultimately converted into beef or other products and were therefore articles of commerce. The commercial context seems to have been predominant in his view: certainly he does not explicitly advert to the criterion of liability test anywhere in his judgment.

Taking an overall view, it is apparent that for the three majority judges, it was the effective impact of the tax that mattered, not the factor chosen in the Act as the occasion of liability.

For two of the minority Justices, the statutory framework of the tax was predominantly important. Gibbs J., continued to adhere to the test of the criterion of liability though he conceded that the name given to a tax by a taxing statute, or the form of a provision of that statute, would not be decisive; it would still be necessary to determine what he called the "legal effect" of the provisions according to their proper construction. In his view the criterion of liability under the Stock Acts was the ownership of cattle so that they were taxed because they existed and not because of any feature that they had in relation to production or distribution[21]

Jacobs J. similarly was not prepared to regard the question simply as one of form but sought to characterize the tax by looking at the 'basis' or 'nature' of the levy, which he appears to equate with the

19 Supra note 14 at 493.
20 Id. at 491-492.
21 Id. at 488.

criterion of liability.[22] This led him to the same conclusion as Gibbs J. in relation to the Stock Acts. What was particularly significant to him was the fact that the tax was an annual, that is a periodic, tax. It is certainly arguable that the periodic nature of a tax is evidence that it is not essentially related to the productive process.

Both Gibbs and Jacobs J.J. placed importance on the contingent relationship between the ownership of the beasts and their ultimate fate. Neither Judge was prepared to concede the relevance of *Mathews* case to the situation before them.[23] Whilst it is not explicit in their judgments, it is possible to distinguish a tax upon the planting of a crop, as in *Mathews,* from a tax on ownership of stock as in *Logan Downs,* on the basis that the former relates to a positive *action* whilst the latter is directed to a *status.* The importance of this distinction is that an action requires a clear decision subsequent to which a crop will be destined for market, except for a proportion for domestic usage or seeding. The status of ownership, on the other hand, provides no evidence, on itself, that a commercial intention has been formed in relation to the stock. Such a distinction, however, would not counter the view of Stephen J., insofar as he looked simply to the temporal situation so that if in reality the tax became effective during the "stream of production" nothing more needed to be established.

The final judgment, that of Murphy J., is remarkable for the fact that it was somewhat novel and outside the main stream of judicial opinion about excise over the last 50 years. In a judgment that sought to identify the purposes of s. 90 in its original constitutional context, Murphy J. decided the Stock tax was not an excise because it did not discriminate between local production of stock and stock produced outside of the State; that distinction being the basis of section 90 as he saw it.[24] State governments must surely be delighted at his comments that "the meaning of excise may be elastic but it has been stretched too far".[25] The consequence of his views, if accepted, would be that those governments would have much greater access to sources of revenue.

In the result, *Logan Downs* has demonstrated that Barwick C.J., Stephen and Mason J.J. now clearly constitute one judicial block with respect to s. 90. Jacobs J. for his part has moved close to Gibbs J., who in turn continues to stand in the stream of judicial opinion which

[22] Id. at 501.
[23] Id. at 489 (Gibbs, J.), 502 (Jacobs, J.).
[24] Id. at 504.
[25] Id. at 505.

regards the criterion of liability as critical. For purposes of theory, the views of Murphy J. may probably be discounted, but arithmetically his presennce among the dissentients in *Logan Downs* is significant. In the light of such judicial schizophrenia, the arrival of Aickin J. in this as in other matters, provides an element of uncertainty. Given that uncertainty, State governments may be encouraged to avail themselves of certain suggestions thrown out in the course of judgments of Gibbs and Jacobs J.J.; Gibbs J.[26] mentioned that a tax on plant or tools of trade by manufacturers or their employees, or on agricultural implements owned by farmers, would not be an excise. Likewise, Jacobs J. suggested[27] that a tax on capital equipment may not be an excise duty. Whilst such taxes may not be practically feasible, it may be that a tax on large industrial concerns such as steel works may prove attractive. On the other hand, *Logan Downs* may create some concern amongst State governments since it may encourage a closer scrutiny of fees and taxes in the agricultural area.

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[26] Id. at 488.
[27] Id. at 502.

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