

# SECTION 90 OF THE CONSTITUTION AND VICTORIAN STAMP DUTY ON DEALINGS IN GOODS

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*This article reviews key decisions of the High Court of Australia on the interpretation of s 90 of the Commonwealth Constitution and examines the implications of the High Court judgment in *Ha v New South Wales*; *Walter Hammond & Associates Pty Ltd v New South Wales* on the validity of provisions in the recently enacted *Duties Act 2000 (Vic)* that relate to the imposition of stamp duty on certain dealings in goods.*

## 1. INTRODUCTION

Section 90 of the *Constitution of the Commonwealth of Australia* ("Constitution") vests in the Commonwealth Parliament the exclusive power to impose duties of custom and of excise. Consequently, this provision constitutes a constraint on the revenue raising capacity of state governments and never more so than in the aftermath of the judgment of the High Court of Australia in *Ha v New South Wales*; *Walter Hammond & Associates Pty Ltd v New South Wales* ("*Ha*").<sup>1</sup>

The aim of this article is to review key decisions of the High Court on the interpretation of s 90 and to consider the impact of *Ha* upon the validity of provisions in the *Duties Act 2000 (Vic)* ("*DA*") that charge stamp duty on certain dealings in goods.

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<sup>1</sup> 97 ATC 4674.

Section 90 is found in Ch IV of the Constitution which relates to "Finance and Trade". So far as relevant, it 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 bounties on the production or export of goods, shall become exclusive.

The judicial pronouncements relating to s 90 have been primarily concerned with the meaning of a key term in that provision, namely "duties of excise". This term is not defined and the Convention Debates, generally the prime source of meaning and purpose for many of the provisions in the Constitution, afford little assistance.

Commentators are quick to point out, and not with exaggeration, that much of the case law on s 90 is riddled with confusion and uncertainty.<sup>2</sup> An examination of the cases suggests that the differing positions adopted by members of the judiciary are attributable mainly to the differences of opinion between them about the perceived constitutional purpose of s 90 and the appropriate test to be applied in determining the nature of a tax as a duty of excise.

## **2. THE SCOPE OF SECTION 90<sup>3</sup>**

### **2.1 The Early Views**

The appearance of the terms "customs and excise" in other Ch IV provisions, namely, ss 86, 87 and 93, was thought to support the contention that s 90 operated to protect the creation of a customs union within the Commonwealth. The express wording of s 93, which provides for payments to be made to the states for 5 years after the imposition of uniform duties of customs in relation to "duties of excise paid on goods produced or manufactured in a state",

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<sup>2</sup> See, for instance, C Caleo, "Section 90 and Excise Duties: Crisis of Interpretation" (1987) 16 *Melbourne University Law Review* 296.

<sup>3</sup> See P Hanks, *Constitutional Law in Australia* (2<sup>nd</sup> ed, 1996) 296-319.

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lent support to the view that an excise was intended to be a tax confined to locally produced goods.<sup>4</sup>

The traditional view of the purpose of s 90 was that it was intended to secure the customs union to which the states had agreed at the time of federation by giving the Commonwealth effective control of tariff policy. The first decision on s 90, *Peterswald v Bartley* ("*Peterswald*"),<sup>5</sup> broadly reflected this narrow conception of the term duties of excise in s 90 and was consistent with the perceived objective of the provision as a measure to protect the federal tariff.<sup>6</sup>

*Peterswald* concerned the nature of a brewer's licence fee of £30 a year imposed under relevant New South Wales legislation. The amount of the fee was not calculated by reference to the amount of beer brewed or sold by the brewer. The majority of the Court held that the flat fee was not a duty of excise. Griffith CJ, in delivering the judgment of the majority, said that the word "excise" when used in the Constitution denoted goods produced or manufactured and was 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 or personal tax.<sup>7</sup>

### 2.2 The Progressive Broadening

The concept of an excise was radically expanded in 1938 in *Matthews v Chicory Marketing Board (Vic)* ("*Matthews*").<sup>8</sup> The High Court there held that a levy of £1 imposed on producers for every acre of land planted with chicory was a duty of excise. The Court departed from its earlier view that to be an excise a tax must be imposed upon the production or manufacture of goods (as distinct from the distribution and sale of goods) and that the tax must be

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<sup>4</sup> Ibid 297-298.

<sup>5</sup> (1904) 1 CLR 497.

<sup>6</sup> Hanks, above n 3, 298-299.

<sup>7</sup> (1904) 1 CLR 497, 509.

<sup>8</sup> (1938) 60 CLR 263. See Hanks, above n 3, 299.

calculated by reference to the quantity or the value of the goods. Dixon J emphasised that to be an excise, a tax must be levied upon goods. His Honour added:

The tax must bear a close relation to the production or manufacture, the sale or the consumption of goods and must be of such a nature as to affect them as the subjects of manufacture or production or as articles of commerce. But if the substantial effect is to impose a levy in respect of the commodity, the fact that the basis of assessment is not strictly that of quantity or value will not prevent the tax falling within the description, duties of excise.<sup>9</sup>

The progressive widening of the concept of a duty of excise continued and reached its high water mark in *Parton v Milk Board (Vic) & Anor ("Parton")*.<sup>10</sup> There the High Court concluded that Victorian legislation levying a tax on dairy distributors of one eighth of a penny per gallon of milk sold or distributed in Melbourne was an excise. Rich, Dixon and Williams JJ examined the history of s 90 and unequivocally rejected the view that excise duties related to taxes of local production or manufacture. They held that an excise duty was a tax upon a commodity at *any step* in the distribution of goods before they reached the hands of the ultimate consumer.<sup>11</sup> In the view of the majority, a tax upon steps in the distribution process had the same capacity to burden the price of the finished product as a tax upon manufacture or production. It was also clear that this extension of the concept of an excise was closely aligned with a shift in the perceived purpose of s 90:

In making the power 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 commodities, and to ensure that the execution of whatever policy it adopted should not be hampered or defeated by state action.<sup>12</sup>

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<sup>9</sup> (1938) 60 CLR 263, 304.

<sup>10</sup> (1949) 80 CLR 229. See Hanks, above n 3, 300.

<sup>11</sup> (1949) 80 CLR 229, 260.

<sup>12</sup> *Ibid.*

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The minority justices, Latham CJ and McTiernan J, maintained the view that excise duties were confined to taxes upon goods in the process of manufacture and production only, and that taxes on the sale of goods, independently of the fact of local production or manufacture, did not contravene s 90.<sup>13</sup>

This division of judicial opinion regarding the scope and purpose of s 90 dominated the jurisprudence of the Court for a number of years. However the wide view established by the majority in *Parton* became prominent in the Court's interpretation of s 90 and seriously diminished the ability of state governments to raise revenue through the taxation of commodities.<sup>14</sup>

### 2.3 Limits on the Broad View

As was highlighted by Hanks, the damaging effect of the *Parton* view as to the scope of s 90 on the taxing powers of the states was curbed by two main judicial developments.<sup>15</sup>

The first was the judicial proposition that s 90 did not extend to taxes on consumption and that states were therefore not prohibited from imposing such taxes. The second was the emergence of a test which concentrated on the statutory criterion of liability in determining a duty of excise. This test provided that to constitute an excise, a tax must be directly imposed on goods and that the nature of a tax as an excise was to be determined by reference to the legal form of the legislation imposing the tax, not its practical operation or substantial effect.

#### 2.3.1 *The Consumption Exception*

In *Parton*, the Court expressly affirmed that a tax upon consumption was excluded from the concept of an excise. This

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<sup>13</sup> See Hanks, above n 3, 300.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid* 300-301.

proposition was later upheld in *Dickenson's Arcade Pty Ltd v Tasmania*<sup>16</sup> ("*Dickenson's Arcade*") where an Act purporting to tax the consumption of tobacco was held not to be a duty of excise. However, in the same case, regulations providing for the collection of the tax by tobacco retailers at the point of retail sale were held to be an invalid duty of excise as their effect was to levy the tax at a stage before the tobacco passed to the consumer. The result in *Dickenson's Arcade* has demonstrated the limited use which the states, in practical terms, can make of the right to impose taxes on the consumption of goods.<sup>17</sup>

### 2.3.2 *The Criterion of Liability*

The criterion of liability was a test formulated in *Dennis Hotels Pty Ltd v Victoria* ("*Dennis Hotels*")<sup>18</sup> which concerned the validity of a victualler's annual licence fee to sell liquor. The fee, which was imposed by the Victorian Government, was calculated by reference to the amount of liquor purchased for sale during a period preceding the start of the licence. The Court, by a 4-3 majority,<sup>19</sup> determined that the fee was not a duty of excise, but a fee for the privilege of carrying on the business of a liquor retailer. The reasons for the decisions of the justices in the majority were varied and diverse. Kitto J held that to constitute a duty of excise, the criterion of liability of the tax must be the taking of a step in the process of producing or distributing goods:

A tax is not a duty of excise unless the criterion of liability is 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

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<sup>16</sup> (1974) 130 CLR 177.

<sup>17</sup> DF Jackson, "Stamp Duties – An Unconstitutional Excise?" (paper presented at the 1997 IBC Stamp Duties Symposium) 7-8.

<sup>18</sup> (1960) 104 CLR 529.

<sup>19</sup> Kitto, Menzies, Taylor and Fullagar JJ; Dixon CJ, McTiernan and Windeyer JJ dissenting.

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the earliest stage in production to the point of receipt by the consumer.<sup>20</sup>

Taylor<sup>21</sup> and Menzies JJ<sup>22</sup> were also influenced in their decisions by the technical form of the legislation imposing the backdated licence fee.

The adoption of the criterion of liability, as a definitive test to determine the character of a tax as a duty of excise, for the purposes of s 90, was unanimously approved by the High Court in *Bolton v Madsen* ("*Bolton*").<sup>23</sup>

As a result of the "backdating device" in *Dennis Hotels*, state and territory governments began to develop schemes to raise revenue by the technique of imposing statutory licence fees for the right to sell various products, calculated by reference to the value of the product sold or purchased during a period preceding the licence.<sup>24</sup>

The unanimous support for the criterion of liability as an exclusive test to determine an excise began to wane in subsequent cases. The principal criticism of the test was its focus on technical form rather than the practical operation or substantial effect of the statute imposing the tax.<sup>25</sup>

In *Hematite Petroleum Pty Ltd v Victoria*,<sup>26</sup> the Court held that a duty of excise was imposed by Victorian legislation which prohibited the use of a pipeline conveying hydrocarbons without the grant of a licence attracting a fee of \$10 million. In *Gosford Meats Pty Ltd v New South Wales*,<sup>27</sup> legislation imposing payment of an abattoir

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<sup>20</sup> (1960) 104 CLR 529, 559.

<sup>21</sup> *Ibid* 577-578.

<sup>22</sup> *Ibid* 590-591.

<sup>23</sup> (1963) 110 CLR 264.

<sup>24</sup> Hanks, above n 3, 313.

<sup>25</sup> See, for instance, *Western Australia v Hamersley Iron Pty Ltd* (1969) 120 CLR 42, 56 (per Barwick CJ) ("*Hamersley*").

<sup>26</sup> (1983) 151 CLR 599.

<sup>27</sup> (1985) 155 CLR 368.

licence fee calculated by reference to an amount for each animal slaughtered during a preceding period, was found to be a duty of excise. In these two cases, the Court declined to determine the nature of the imposts by a reference to the criterion of liability and found that the fees in each case were in substance, if not in form, a tax on a step in the production or distribution of goods before consumption and therefore a duty of excise contrary to s 90.

Furthermore, in *Phillip Morris Ltd v Commissioner of Business Franchises (Vic)*,<sup>28</sup> Mason CJ and Deane J decisively rejected the application of the criterion of liability as the sole test to determine a duty of excise:

the characterisation of a law by reference exclusively to its strict legal operation, without regard to its practical or substantial operation, is bound to yield at least, in some instances, highly artificial results. In the field of excise duties under section 90, where the Constitution is concerned with substance, not form, there is no reason at all for contemplating artificial results.<sup>29</sup>

The immediate effect of these decisions was to remove the rationale for the "backdating device" in *Dennis Hotels*. This device had become a major vehicle by which state and territory governments attempted to circumvent the wide operation of the *Parton* view of a duty of excise, and from the mid-1970s led to a proliferation of legislative regimes closely paralleling the successful licence fee arrangements in *Dennis Hotels*.<sup>30</sup>

A number of these schemes survived further challenges to their validity due to the decision of the High Court not to reconsider the franchise decisions relating to tobacco and alcohol because of the significance of these decisions to the financial arrangements of the

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<sup>28</sup> (1989) 167 CLR 399.

<sup>29</sup> *Ibid* 433.

<sup>30</sup> Jackson, above n 17, 2.

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states.<sup>31</sup> This was at least until the landmark decision of the High Court in *Ha*.<sup>32</sup>

### 2.4 *Ha v New South Wales; Walter Hammond & Associates v New South Wales*<sup>33</sup>

*Ha* concerned a challenge by a tobacco retailer and a tobacco wholesaler to notices of assessment raised under provisions of the *Business Franchise Licences (Tobacco) Act 1987* (NSW) ("NSW Act"). The NSW Act imposed a licence fee of \$10 on the retail and wholesale sale of tobacco and an additional fee calculated by reference to a prescribed percentage of the value of tobacco sold in a period preceding the licence period. The prescribed percentage was 30% at the start of operation of the NSW Act and had over time risen to 100%.

The matter was defended by New South Wales but the attorney-generals of all of the Australian states and territories intervened and invited the Court to reconsider the wide view of the concept of excise which had prevailed since *Parton*. Alternatively, the Court was asked to uphold the schemes under challenge on the authority of the decision in *Dennis Hotels*.

The majority of the Court, consisting of Brennan CJ, McHugh, Gummow and Kirby JJ, rejected the principal submission of the states that local production or manufacture is the discrimen of a tax in the nature of a duty of excise. Their Honours instead reaffirmed the broad delineation of the concept of a duty of excise enunciated in *Parton*:

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<sup>31</sup> See, for instance, *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311.

<sup>32</sup> 97 ATC 4674.

<sup>33</sup> See S Stevens, "Hiring, Hire Purchase and Leases – Hire Purchase and Leases - Hire of Goods: Chapter 6 of the NSW Duties Bill 1997" (paper presented at the 1997 IBC Stamp Duties Symposium) 17-22; RA Dick, "A Loss of State Autonomy: Implications of the *Ha* and *Hammond* Decisions" (1998) 27 *Australian Tax Review* 30; and V Morabito and N Bellamy, "State Licence Fees, the Constitution and the High Court" (1997) 71(10) *Law Institute Journal* 60.

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. As a criterion of a duty of excise, it was expressed by Kitto J in *Dennis Hotels* and adopted by a unanimous Court in *Bolton v Madsen*. It can be traced back to the judgments in *Parton* and, before that, to the judgment of Dixon J in *Matthews v Chicory Marketing Board (Vic)* ...

The correctness of the doctrine they establish must now be affirmed. Therefore we reaffirm that duties of excise are taxes on the production, manufacture, sale or distribution of goods, whether of foreign or domestic origin. Duties of excise are inland taxes in contradistinction from duties of customs which are taxes on the importation of goods. Both are taxes on goods, that is to say, they are taxes on some step taken in dealing with goods.<sup>34</sup>

The majority also approved the following statements from *Capital Duplicators Pty Ltd v ACT (No 2)* ("*Capital Duplicators (No 2)*"):<sup>35</sup>

More importantly, ever since *Parton*, it has been accepted in the subsequent cases that the exaction of a tax, whether called a licence fee or not, on the sale or distribution of goods by a person other than the manufacturer of the goods will or may constitute an excise. ... [I]n *Bolton v Madsen* it was decided unanimously that a tax on the taking of a step in the process of the production or distribution of goods before they reach consumers is an excise.

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Indeed, since *Parton*, there has been little support for the view that an excise is confined to a tax on, or by reference to, the local production or manufacture of goods.<sup>36</sup>

Brennan CJ, McHugh, Gummow and Kirby JJ rejected the textual significance of s 90 and s 93 and the narrow interpretation of s 90 as a mechanism to protect the federal tariff. They were of the view that

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<sup>34</sup> 97 ATC 4674, 4679 and 4684 (per Brennan CJ, McHugh, Gummow and Kirby JJ).

<sup>35</sup> 93 ATC 5053.

<sup>36</sup> *Ibid* 5058 (per Mason CJ, Brennan, Deane and McHugh JJ).

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the exclusive power to impose duties of excise was conferred on the Commonwealth Parliament as a free standing power. They also unequivocally endorsed Dixon J's wide view that the purpose of s 90 was to give the Commonwealth a real control of the taxation of commodities and to ensure that the execution of whatever policy it adopted would not be obstructed by state governments.

The majority justices also gave clear support to the proposition that the question of whether a tax was a duty of excise was a matter of substantive operation rather than form:

The proposition that was not clearly established before *Philip Morris* was that the character of a tax required a consideration of the substantive operation as well as the text of the statute imposing the tax ...

When a constitutional limitation or restriction on power is relied on to invalidate a law, the effect of the law in and upon the facts and circumstances to which it relates - its practical operation - must be examined as well as its terms in order to ensure that the limitation or restriction is not circumvented by mere drafting devices. In recent cases, this Court has insisted on an examination of the practical operation (or substance) of a law impugned for contravention of a constitutional limitation or restriction on power.<sup>37</sup>

It was also held that *Dennis Hotels* could not be relied on to support legislative schemes which were in substance revenue raising inland taxes on goods, and that the decision could not apply, exceptionally, to licences to sell alcohol and tobacco. On this principle, the Court declared that the challenged provisions of the NSW Act imposed duties of excise and were therefore beyond power. Finally, the majority justices decided not to overrule *Dennis Hotels* or *Dickenson's Arcade*, but to confine the authority of these decisions to their own facts.

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<sup>37</sup> 97 ATC 4674, 4679 and 4683.

## 2.5 The Implications of *Ha*

The majority decision in *Ha* established the broad conception of an excise as a tax on goods at any step in their passage from manufacture to consumption and the pre-eminence of the test of substantial or practical operation rather than form to determine the character of a tax as a duty of excise.

The decision in *Ha* dealt an immediate and decisive blow to state franchising fees closely resembling the imposts invalidated in *Ha* and very quickly led to the states and territories ceasing to collect licence and franchise fees on cigarettes, petrol and tobacco.<sup>38</sup>

What is less clear is the extent to which the broad principles established in *Ha* threaten the viability of other state taxes which apply to dealings in goods. Part 3 examines the implications of the prevailing judicial view of the scope of s 90 upon the validity of provisions in new stamp duty legislation in Victoria which charge stamp duty on certain dealings in goods.

## 3. THE DUTIES ACT 2000

The DA, which came into force in Victoria on 1 July 2001, was originally developed under the Stamp Duties Rewrite project undertaken by NSW, Victoria, South Australia, Tasmania and the ACT. One of the main aims of the DA is to depart from the traditional scheme of stamp duty as a tax on instruments and to impose the liability on transactions, whether or not reduced to writing.

### 3.1 The Nature of Stamp Duty as a Tax

Since an excise duty is a tax, for s 90 to apply, an impugned exaction must be capable of classification as a tax. In *Matthews*,<sup>39</sup>

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<sup>38</sup> Jackson, above n 17, 1.

<sup>39</sup> (1938) 60 CLR 263, 270.

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Latham CJ described a tax as a compulsory exaction of money by a public authority for public purposes, enforceable by law, and not a payment for services rendered.<sup>40</sup>

The expressed purpose of the DA is to create and charge a number of duties.<sup>41</sup> The DA is primarily directed to the raising of revenue for the public purposes of the state and there is no question that the number of duties imposed under the DA are in each case a "tax" under the Latham formulation. The nature of stamp duty as a tax was also confirmed by Menzies J in *Western Australia v Chamberlain Industries Pty Ltd* ("*Chamberlain*").<sup>42</sup>

### 3.2 Particular Provisions of the Duties Act which Charge Duty on Dealings in Goods

#### 3.2.1 Chapter 2 - Transactions Concerning Dutiable Property

Chapter 2 of the DA charges duty on a transfer of dutiable property and certain specified transactions,<sup>43</sup> including any transaction that results in a change in beneficial ownership of dutiable property.<sup>44</sup> A "transfer" relevantly includes an assignment, conveyance or an exchange<sup>45</sup> and the term "transaction", though not defined, clearly contemplates a wide range of dealings in dutiable property, including sale.

Dutiable property is relevantly defined in s 10 of the DA to include goods in Victoria held or used in connection with a dutiable transaction in respect of any estate in land and also goods used in connection with a business carried on or in connection with the land, but not the following:

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<sup>40</sup> See Jackson, above n 17, 9-10; and V Morabito and S Barkoczy, "What is a Tax? – The Erosion of the 'Latham Definition'" (1996) 6 *Revenue Law Journal* 43.

<sup>41</sup> *Duties Act 2000* (Vic), s 1 ("DA").

<sup>42</sup> (1970) 121 CLR 1, 25.

<sup>43</sup> DA, s 7(1)(a) and (b).

<sup>44</sup> *Ibid* s 7(1)(b)(vi).

<sup>45</sup> *Ibid* s 3.

- (i) goods that are stock-in-trade;
- (ii) materials held for use in manufacture;
- (iii) goods under manufacture;
- (iv) goods held or used in connection with land used for primary production; and
- (v) livestock.

The nature of the items specifically excluded from the definition of goods suggests that there will be limited situations where the duty charged under Ch 2 of the DA on a transfer or transaction relating to goods, may amount to an unconstitutional duty of excise.

### 3.2.2 Chapter 9 - Motor Vehicle Duty

Chapter 9 of the DA relevantly charges duty on:

- (i) an application for registration of a motor vehicle under the *Road Safety Act 1986* (Vic); and
- (ii) an application for transfer of registration of a motor vehicle under that Act.<sup>46</sup>

Duty on an application for registration of a motor vehicle is payable by the applicant for registration and duty on an application for transfer of registration of a motor vehicle is payable by the acquirer of the motor vehicle.<sup>47</sup>

Broadly, the DA obliges a person required to make or lodge an application for registration or transfer of registration of a motor vehicle to lodge with the application, a statement of the dutiable value of the vehicle.<sup>48</sup> Where no exemptions apply, duty is payable at *ad valorem* rates on the dutiable value of the motor vehicle, which is

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<sup>46</sup> Ibid s 214.

<sup>47</sup> Ibid s 216.

<sup>48</sup> Ibid s 215.

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essentially the greater of the consideration for the acquisition of the motor vehicle or its market value.<sup>49</sup>

It is not likely that stamp duty chargeable on an application for transfer of registration of a second hand or used motor vehicle will be regarded as a duty of excise and therefore contrary to s 90.<sup>50</sup> In *Chamberlain*,<sup>51</sup> Menzies J expressed the clear view that an excise was a tax on *new* goods:

It is, I think, no longer open to question that [a] tax upon the sale of new goods manufactured in Australia and sold in retail sale, or at any point anterior thereto, is a tax upon or in relation to, the goods sold, and is therefore a duty of excise.<sup>52</sup>

More recently, in *Commissioner for ACT Revenue v Kithock Pty Ltd ("Kithock")*,<sup>53</sup> the Full Federal Court considered whether stamp duty imposed on sales of used motor vehicles by a licensed vehicle dealer was a duty of excise and therefore within the exclusive power of the Commonwealth. All members of the Court and the parties themselves, agreed that a tax on the sale of motor vehicles previously acquired by a member of the public was in substance a tax on the sale of second hand (or laterhand) motor vehicles. The Full Court referred to statements by some members of the High Court in *Ha* and *Capital Duplicators (No 2)* as to whether an excise may extend to include a consumption tax, but held that a tax on a step taken in a dealing in goods *after* those goods had reached the hands of consumers did not impose a duty of excise:

While there are statements in *Ha*, and *Capital Duplicators (No 2)* suggesting some reservations by at least some judges of the High Court as to "whether a consumption tax would be classified as an excise", in our respectful view, each of the decisions in *Bolton v Madsen*, *Anderson's Pty Ltd v Victoria ...* and *Dickenson's Arcade*

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<sup>49</sup> Ibid ss 218 and 219.

<sup>50</sup> Jackson, above n 17, 12.

<sup>51</sup> (1970) 121 CLR 1.

<sup>52</sup> Ibid 25.

<sup>53</sup> 2000 ATC 4559.

determines that a tax on goods after they have reached the hands of consumers is not an excise.<sup>54</sup>

The position is less certain in relation to stamp duty that is chargeable under the DA on an application for registration of a new motor vehicle. Section 220 of the DA expressly prohibits the registration authority from registering a motor vehicle unless a statement of the dutiable value of the vehicle is lodged and duty is duly paid.

There is ample authority<sup>55</sup> that a tax on the last step in the process of passing goods to the consumer is within the scope of a duty of an excise. Therefore, as was noted by Jackson, stamp duty charged upon the right to use a new motor vehicle on the roads may be held to operate in substance as a compulsory exaction upon a final step in the distribution of such a vehicle to the consumer and therefore a duty of excise contrary to s 90.<sup>56</sup>

### **3.2.3 Chapter 6 - Hiring Duty**

Chapter 6 of the DA charges duty on the hire of goods as a business. Goods are relevantly defined in s 128 to include all chattels personal and fixtures severable from land.

Broadly, the DA imposes duty on the ordinary hire of goods and on hire purchase agreements. A hire purchase agreement is broadly defined under the DA as a letting of goods with an option to purchase and an agreement for the purchase of goods by instalments. It is expressed not to include any agreement by which the property in

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<sup>54</sup> Ibid 4565 (per Spender, Mathews and Sundberg JJ).

<sup>55</sup> See *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353; *Chamberlain* (1970) 121 CLR 1; and *Dickenson's Arcade* (1974) 13 CLR 177.

<sup>56</sup> Jackson, above n 17, 13. See also M Richmond, "Recent Cases Concerning Duties of Excise, Commonwealth and Crown Immunity" (paper presented at the 2000 IBC Stamp Duties Symposium) 5.

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the goods passes at the time of the agreement or at any time before the delivery of the goods.<sup>57</sup>

*Kithock* suggests that stamp duty that is chargeable on the ordinary hire of goods will not amount to a duty of excise as the goods that are the subject of a hiring arrangement of this kind may be regarded as having passed into consumption and should therefore be beyond the reach of s 90. A different position may exist in relation to stamp duty on hire purchase agreements that do not relate to second hand goods.<sup>58</sup>

The DA specifies that a hire of goods may take any form and that it is immaterial whether or not a hire of goods is effected or evidenced by an instrument in writing.<sup>59</sup>

In *Anderson's Pty Ltd v Victoria ("Anderson's")*,<sup>60</sup> the High Court considered the validity of provisions of the former *Stamps Act 1958* (Vic) which imposed duty on hire purchase agreements and certain credit purchase agreements relating to goods. The duty under that Act was essentially imposed on instruments recording or evidencing these agreements and the vendor liable for the duty was prohibited by the Act from passing the duty onto the purchaser or otherwise recovering the duty. The Court unanimously held that the duty imposed by the legislation under review was not in substance a tax upon a step in the passage of goods into consumption, but on the instrument regulating the rights and obligations between the parties with respect to the payment of the goods after delivery.

While there is no common thread of reasoning in the conclusion reached by the Court, it is clear that, as has been argued by Stevens,<sup>61</sup> a number of factors that influenced the decision of the judges in *Anderson's* do not apply to the new stamp duty provisions now in

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<sup>57</sup> DA, s 130(2).

<sup>58</sup> Under *Kithock*, a sale of second hand goods would not be contrary to s 90.

<sup>59</sup> DA, s 131.

<sup>60</sup> (1964) 111 CLR 353.

<sup>61</sup> Stevens, above n 33, 18.

force in Victoria in relation to hire purchase agreements, or for that matter reflect the present state of the authorities on the scope of the interpretation of s 90.

Firstly, the duty in *Anderson's* was in the form of a tax on instruments. The DA generally, and the hire duty provisions specifically,<sup>62</sup> express a clear intention to impose duty on transactions whether or not effected or evidenced in writing. This means that there is greater scope for these provisions to be interpreted as being in substance a transaction tax on the sale of goods.

Secondly, the regime in *Anderson's* specifically prevented the passing on of duty to the purchaser. There is no similar prohibition in the DA to prevent the duty entering into the total cost of the goods.<sup>63</sup>

Thirdly, a number of the members of the Court, namely Kitto, McTiernan, Taylor and Windeyer JJ, based their conclusion on the view that the stamp duty provisions considered in *Anderson's* were not designed to tax goods of home production only and was therefore not an excise. This narrow view of a duty of excise was decisively rejected by the majority in *Ha*.

A hire-purchase generally involves the owner hiring the goods to another who, in addition to obtaining possession of the goods, is given an option to purchase. In the DA, a hire purchase agreement is also expressed to include an agreement for the purchase of goods by instalment. *Ha* has clearly established that a tax on the sale of goods is an excise<sup>64</sup> and a number of cases after *Anderson's* have confirmed that the last sale or act of placing goods in the possession of the purchaser is an area in which a duty of excise may be found to operate.<sup>65</sup>

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<sup>62</sup> DA, s 131.

<sup>63</sup> Stevens, above n 33, 21.

<sup>64</sup> 97 ATC 4674, 4679 (per Brennan CJ, McHugh, Gummow and Kirby JJ).

<sup>65</sup> *Hamersley* (1969) 120 CLR 42; and *Dickenson's Arcade* (1974) 130 CLR 177.

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Section 136 of the DA expressly provides that no duty is chargeable on a payment by the hirer under a hire of goods if title to the goods passes to the hirer as a consequence of the payment. It would seem that this provision is aimed at reducing the scope for duty that is imposed on hire purchase arrangements generally, from contravening the prohibition in s 90. However, in *Ha*, the majority of the High Court clearly asserted that legislative devices to circumvent constitutional restrictions on state powers would be closely examined to determine their substantive effect or practical operation.<sup>66</sup> In this regard, it is relevant that s 138 of the DA, an anti-avoidance provision, confers a discretion on the Commissioner to impose duty on amounts excluded from duty by virtue of s 136 of the DA if the Commissioner is satisfied that those amounts have been inflated in order to minimise hiring duty. This provision may reinforce the sense that s 136 is a technical form employed to circumvent the operation of s 90 and that the duty imposed on hire purchase agreements that do not relate to second hand goods is, in substance, a tax upon the sale of goods and therefore contrary to s 90.

### 3.2.4 Chapter 10 - Livestock Duty

Chapter 10 of the DA charges duty on the sale of specified livestock. Duty at differing rates is essentially payable on any statement written out or caused to be written out under relevant provisions of the *Livestock Disease Control Act 1994* (Vic) ("LDCA") by the owner (or the owner's agent) of cattle, sheep, goats or pigs on the sale of these items of livestock or their carcasses.

The main purpose of the LDCA is to provide for the monitoring and control of livestock diseases and to provide compensation for losses caused by certain livestock diseases.<sup>67</sup> The LDCA establishes separate compensation funds for cattle, sheep, goats and swine and provides that there is to be paid into each of these funds, stamp duty received by or from the Victorian Commissioner of State Revenue

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<sup>66</sup> 97 ATC 4674, 4683 (per Brennan CJ, McHugh, Gummow and Kirby JJ).

<sup>67</sup> *Livestock Disease Control Act 1994* (Vic), s 1 ("LDCA").

("Commissioner") on statements relating to the sale of specified livestock under the DA.<sup>68</sup> There is also to be paid into each of these funds any money paid by the Commonwealth for the compensation for livestock suffering from disease. The funds are to be applied to the payment of claims of compensation by an owner of any destroyed livestock.<sup>69</sup> No compensation is payable if the owner of the specified livestock has failed to pay the stamp duty under the DA in respect of all of that owner's livestock.<sup>70</sup>

Part 6 of the LDCA obliges the owner (or owner's agent) of the specified livestock to write out a statement setting out the number of items of particular livestock sold and to affix to that statement duty stamps to the amount of stamp duty payable under the DA. A failure to comply with Pt 6 of the LDCA attracts a fine of 10 penalty units. An owner's liability to an offence under the LDCA does not affect the owner's liability to pay the amount of any unpaid duty.

The Commissioner may also declare any person carrying on a business as a stock and station agent, an abattoir operator, a feedlot operator, a cattle scale operator, a calf dealer or any other prescribed business dealing with the buying or selling of livestock or the carcasses of livestock to be an approved agent.

An approved agent must not later than the 21<sup>st</sup> day of each month furnish to the Commissioner, returns of sales of items of specified livestock or their carcasses and pay in cash on any such return stamp duty payable under the DA.<sup>71</sup>

An approved agent who contravenes any of these requirements is guilty of an offence and liable to penalties and the imposition of double the amount of duty ordinarily payable.<sup>72</sup>

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<sup>68</sup> Ibid ss 71, 79A(2) and 80.

<sup>69</sup> Ibid ss 72, 79B and 81.

<sup>70</sup> Ibid ss 76, 79F and 84.

<sup>71</sup> Ibid ss 94 and 95.

<sup>72</sup> Ibid s 96.

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Livestock and carcasses of livestock are goods at general law. In *Logan Downs Pty Ltd v Queensland* ("*Logan Downs*")<sup>73</sup> the High Court held, by a statutory majority,<sup>74</sup> that a tax on the owners of livestock (specifically cattle, sheep and pigs) by reference to the number and type of stock owned was a duty of excise.

The tax in *Logan Downs* was levied under the *Stock Act 1915* (Qld) ("Qld Act") which, like the LDCA, was a legislative measure designed to prevent stock diseases and to compensate owners of stock for the loss of livestock as a result of disease. The tax was paid into the Stock Diseases Compensation Fund which was also supplemented by funds from Consolidated Revenue.

The Court dismissed the argument by the State of Queensland that the exaction was a fee for services and therefore outside the judicial definition of a "tax" as formulated by Latham CJ in *Matthews*:<sup>75</sup>

The amounts which have been assessed are neither charges for services rendered or to be rendered nor are they in the nature of licence fees exacted as the price of being permitted to engage in a particular business. They are exactions having the character of a tax and they are levied upon the plaintiff as the owner of stock, being computed by reference to the number and type of stock which it owns. They are thus directly related to the plaintiff's stock and are in this sense a tax upon those stock. All this suggests, consistently with the authorities in this Court, that the amounts are indeed duties of excise, as the plaintiff contends.<sup>76</sup>

Three members of the Court held that the tax imposed by the Qld Act was not an excise. Murphy J held that the tax in question did not discriminate between local and other production. Despite the authority of *Parton*, his Honour adhered to the narrow conception

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<sup>73</sup> (1977) 137 CLR 61.

<sup>74</sup> Barwick CJ, Stephens and Mason JJ.

<sup>75</sup> (1938) 60 CLR 263.

<sup>76</sup> (1977) 137 CLR 61, 68 (per Stephen J).

that taxes imposed without regard to the place of production or manufacture were not duties of excise.<sup>77</sup>

Gibbs J and Jacob J<sup>78</sup> adopted the view that a tax on the passive ownership of stock did not amount to an excise. As was explained by Gibbs J:

Equally, in my opinion, a tax on the ownership of goods which are intended to be sold will not, at least as a general rule, be an excise. If on the proper construction of the statute the tax is imposed by reference to the ownership and not by reference to any sale or intended sale or distribution of the goods, it cannot be said that the tax is attracted by the taking of any step to bring the goods into existence or to move them along the line from production to consumption, and such a tax would affect the goods, not as the subjects of manufacture or production or as articles of commerce, but simply as the subjects of ownership.<sup>79</sup>

While there may be an issue as to whether a tax on the ownership of livestock is a duty of excise, it is clear from *Logan Downs* and *Ha* that a tax upon the sale of livestock would be contrary to s 90. Chapter 10 of the DA charges such a duty. The duty is clearly a compulsory payment of money exacted by a public authority on a step taken in a dealing with goods before they reach the consumer. The duty is not a fee for any particular service and the fact that it is paid into a fund to compensate the owners of livestock for the destruction of livestock does not alter the character of the payment as a potential duty of excise.

#### **4. CONCLUSION**

The wide concept of a duty of excise, affirmed by the majority of the High Court in *Ha*, and the unqualified support by all members of the Court for the test of substantive operation and practical effect to

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<sup>77</sup> Ibid 83-85.

<sup>78</sup> Ibid 80-83.

<sup>79</sup> Ibid 65.

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determine the nature of a tax as a duty of excise, present some risk to certain provisions of the recent DA which impose duty on particular dealings in goods. Specifically vulnerable are duties which apply to the registration of new motor vehicles, hire purchase and instalment purchase agreements that relate to new goods, and the sale of livestock. The fact that a majority of the duties charged by the DA do not contravene s 90 does not diminish the risk and exposure of challenges to the constitutional validity of those duties that do. This has been clearly established in a number of cases that have involved constitutional challenges to particular provisions of stamp duty legislation in various Australian jurisdictions.<sup>80</sup> Finally, it is pointed out that the DA is similar in many respects to the legislation of other Australian states and territories.<sup>81</sup> In this respect, the comments which are expressed in this article in relation to the potential invalidity of particular provisions of the DA would apply with equal force to comparable stamp duty regimes in other Australian states and territories.

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<sup>80</sup> *Anderson's* (1964) 111 CLR 353; *Logan Downs* (1977) 137 CLR 61; and *Chamberlain* (1970) 121 CLR 1.

<sup>81</sup> Notably NSW, Tasmania, and the ACT.