Chapter Four

The High Court and the States

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Introduction

It might be thought by some that the topic of The High Court and the States sits somewhat oddly in a Conference session devoted to Federalism and State Finances: a little like coming to a seminar on great cathedrals of Europe, and in between Chartres and Rheims, receiving a dissertation on the black-bellied albatross. I have to confess that this lack of thematic symmetry is entirely my fault. When first asked to speak at this Conference, the subject allotted to me was the classically financial one of section 90 of the Constitution, the notorious excise provision. In the great tradition of lawyers, however, I chose to be difficult, and proposed that I should speak on the wider subject of the relationship between the High Court and the States, using section 90 as a particularly grisly case study. This was agreed to by the organizers, and so the Conference's discussion of section 90 finds itself embedded in a wider consideration of the High Court's treatment of the States.

In fact, I consider this to be entirely appropriate, and for at least three reasons. First, as a vital restraint on State legislative and financial power, the Court's interpretation of section 90 naturally falls to be considered within the broader context of its performance in relation to the States. Second, as will be seen, the High Court's interpretation of section 90 has in fact been typical of its approach to the interpretation of constitutional provisions affecting State interests, and a discussion of the interpretative history of section 90 thus sheds valuable light on the continuing experience of the States before the High Court. Finally, now is the time--as never before--when the record of the High Court in relation to the States, and thereby in relation to federalism itself, should be subjected to the most rigorous scrutiny. In the constitutional disorder that is inevitably being produced by the Court's recent enthusiastic abandonment of its old methodologies of interpretation, it is vital that those who value federalism maintain a strict vigilance over the Court's discharge of its functions.

Thus, the basic approach of this paper will be to engage in a general discussion of the High Court's relationship with the States, and to follow this with a specific examination of the Court's interpretation of section 90. I note that it is often suggested that the Court has come to a cross-roads in its interpretation of section 90, and I will try to perform that least-favoured trick of constitutional lawyers--crystal ball gazing--with a view to predicting future directions which the judicial explication of section 90 might take.

In considering the general relationship between the Court and the States, I will first isolate the position that the Founders intended should be held by the States under the Constitution. I will then consider the role envisaged for the Court in relation to the States, and the role that has in fact been played by the Court in the years since Federation, particularly in relation to the crucial area of State finances. I will also attempt to isolate some general themes emerging from the Court's interpretation of the Constitution as it touches upon the States. As regards section 90, I shall examine the history of its interpretation by the Court; the point which that interpretation has

reached at the present time; and future directions which might be pursued by the Court in relation to that provision.

The Founders and the States

The starting point for any discussion of the relationship between the High Court and the States must be an identification of the position which the Founders intended that the States should hold within the Australian Federation. Only after this has been done can any intelligent assessment be made as to the performance of the High Court in relation to the States.

There is a school of constitutional history in Australia which is fond of down-playing the significance of the preservation of the States as a key objective of the Founders of the Australian Federation. These adherents to what might be referred to as the Manning Clark-Don Watson theory of constitutional history determinedly identify the single significant object of Federation as having been the creation of one great Antipodean nation, within which the old encumbering colonial boundaries would be swept away. They are adept at isolating the more soaring nationalist rhetoric of the Founders, ripping that rhetoric ruthlessly out of context, and parading it as proof of Australia's envisaged unitary destiny.

While, contrary to Henry Ford's much quoted observation, not all history is bunk, this history certainly is bunk. Any reading of the contemporary Federation material will quickly reveal that, yes, the Founders did indeed intend to bring into being a great new nation, but that they intended to do so on strictly limited terms. In particular, the creation of the new Commonwealth was to be subject to the absolute condition that the colonies (thereafter States) should survive, within the limits of the Constitution, territorially, politically and constitutionally intact.

Still more inconveniently from the point of view of Federation revisionists, there is no doubt that the Founders had the clearest and firmest views as to the nature of the on-going balance of power that should prevail under the Constitution of the newly created Federation. They were--with insignificant exceptions--united behind the proposition that the States should be the dominant entities within the Commonwealth. Thus, to say merely that the Founders intended Australia to be a federal nation is to speak only half the truth. What they in fact intended was not merely that Australia be a federal nation, but that it be a very specific type of federal nation: namely, one in which the powers of the regions heavily outweighed those of the centre. The truth is that, in today's intellectually impoverished parlance of "centralists" and "States-righters", the most centrally inclined Founder of the 1890s would most probably be regarded today as a rabid proponent of States' rights.

The fundamental point to be made, therefore, concerning the Founders' much-vaunted desire to create a nation must be that they saw the achievement of this purpose as being strictly dependent upon their capacity to produce an enduring constitutional settlement which would preserve the independence, within their sphere, of the States. To put the matter at its simplest, it is abundantly clear that had the Founders been given their choice between the achievement of national unity at the cost of dispensing with the independence of the States, and no unity at all, a large majority would have chosen the latter.

After decades of High Court jurisprudence in which the powers of the Commonwealth have been amplified relentlessly, it is easy to forget just how strong was this preference of the Founders for the loosely federal construct which they believed they had embodied in the Constitution. It is perhaps, therefore, useful to ponder two aspects of the federating process during the 1890s. The first very minor, but telling point, is that when at the Great Conventions one of the delegates referred to the Dominion of Canada, the example was usually derided as referring to a federation

so centralised that it was scarcely worthy of the name. Today, of course, and with much constitutional irony, Canada is a vastly less centralised polity than Australia.

The second, far more important point, is that an unjaundiced reading of the language in which the Founders chose to express the powers of the Commonwealth, excluding assumptions generated by the course of subsequent judicial interpretation, quickly dispels any impression that the Founders were attempting to create some omni-competent, unrestricted national authority. The corporations power is as good an example as any. Today, even the short-hand way in which we commonly refer to it--the "corporations" power--tends to suggest that it is a sweeping power over corporate entities. In fact, its text reveals that it is a power which is heavily hedged about by internal restrictions, extending only to "foreign" corporations, and "trading" and "financial" corporations, and in the case of the latter two, only if they are "formed within the limits of the Commonwealth". These words, in common with the words of many of the other key Commonwealth powers contained in section 51 of the Constitution, are hardly those of unstinting trust and unreserved endowment. Rather, even after their on-going subversion by the High Court, they remain textually redolent of the fundamental intention of the Founders, that the Australian Federation was to be a loose one, in which the balance of power would lie decidedly with the States.

The States: The Role of the High Court

There recently has been some academic controversy over the role which the Founders intended the High Court to play vis-a-vis the States, and indeed, in relation to the constitutional role of the High Court generally. In particular, two very different views have been put forward.

The first view might be described as the "classical" or "traditionalist" position. According to this view, as it applies specifically in relation to the States, the High Court was intended to operate as the protector of the States. The argument runs that, just as the Founders intended to safeguard the States from the Commonwealth by ensuring that the Commonwealth was a government of limited powers, so they intended that the Commonwealth should be confined effectively within those powers by the operations of a federal supreme court wielding the power of judicial review. It was for this reason that the High Court was to be regarded as the keystone of the federal arch.

The alternative view of the projected role of the High Court is most often put forward by apologists for the role it has played in securing the massively enhanced power of the Commonwealth at the expense of the States. This view forms part of a school of thought which is probably best described as "political federalism, and which is heavily influenced by constitutional developments in the United States". As relevant for present purposes, the argument essentially runs that the High Court was never intended to protect the States, nor to patrol the borders of the federal division of powers. Rather, this was a political function to be discharged by the States' House of the federal Parliament, the Senate. While the political federalists cheerfully admit that the Senate has never done and is never likely to do any such thing, they with equal equanimity deny a role to the High Court. Thus, the basic argument of the political federalist is that if the States for whatever reason cannot secure their due as part of the political process, then they have no business flying to the Court. It is a position which would have appealed about equally to Sir John Latham and at least one first century procurator of Judea.

The only problem with the political federalism theory as a description of the intended role of the High Court under the Australian Constitution is that it is controverted by every known historical fact. The Convention Debates and the writings of the Founders make it clear time and time again that the delegates intended the High Court to operate in precisely the way posited above as the "traditional" understanding of the Court's function, namely, as a constitutional court which would

enforce the Constitution and strike down any attempt by the Commonwealth to legislate beyond its capacities. The fact that the Senate was a further, vital protection for the interests of the States indicates not that the Court was precluded from playing such a role, but just how critical to the Founders was the comprehensive protection of States' rights.

In fact, it is important to understand the exact place occupied by the High Court in the Founders' constitutional scheme for the protection of the States. Given the course of Australia's constitutional history since Federation, there are many who are inclined to deride the Founders as constitutional planners, and to argue that the decline of the States was an inevitable and predictable consequence of the grossly deficient constitutional arrangements which they set in place. The reality, however, is that the Founders erected within the Constitution a carefully thought out scheme for the protection of the States, which included but was not limited to the functioning of the High Court.

This scheme had three features. The first mechanism for the protection of the States was to be the conferral upon the Commonwealth of strictly limited powers. The brutally simple idea here was that even if the central government wanted to invade the spheres of the States, it would lack the legislative artillery necessary to support such a purpose. The second States-protective mechanism was indeed the Senate. If the popularly elected House of Representatives dominated by the larger States sought to have the Commonwealth strain against the limits of its legislative power, the States' House would intervene in the federalist interest. Finally, in the event that both these protective devices failed to prevent the Commonwealth from seeking to implement its designs upon the States, the High Court was to descend like a constitutional deus ex machina, and send it whimpering back within the proper bounds of its authority.

For present purposes, there are two things worth noting of this scheme. The first is that it by no means represents the laughably inept attempt to safeguard the States sometimes portrayed by contemporary constitutionalists. As the authors of a carefully articulated three-pronged constitutional strategy, the Founding Fathers deserved better of the constitutional fates. Secondly, and crucially, the pivotal role of the High Court in the Founders' scheme for the protection of the States is immediately apparent. The Court sits at the very apex of the federal structure embodied in the Constitution, drawn up as the last line of defence for the States against the potential ravages of the Commonwealth. Consequently, there can be little doubt that the Founders would have regarded as the basic determinant of the Court's efficacy its capacity to maintain effectively the federal division of power.

The Performance of the High Court

From the avowedly federalist perspective of the Founders, it would be difficult to find words which would aptly describe the performance of the High Court as a protector of the States. This is because asking the question, "How well has the High Court safeguarded the interests of the States?" is a little like posing the query, "What was the contribution of Attilla the Hun to Western civilisation?": the mismatch between the question's premise and the reality which underlies its answer is positively grotesque.

In general terms, the High Court has been an utter failure as the protector of the States, and even this conclusion does less than justice to the depth of the Court's dereliction of its intended constitutional duty. The reality is that the Court has not merely failed to protect the States, but for most of its constitutional history has been the enthusiastic collaborator of successive Commonwealth governments in the extension of central power. Indeed, the enthusiasm of the Court for this centralising enterprise has not uncommonly exceeded the appetite of the federal government itself.

The fundamental point to grasp concerning the impact upon the States of the High Court's exegesis of the Constitution, is that since the 1920s, the Court has deployed in division of powers cases an interpretative methodology which was consciously developed by such judges as Sir Isaac Isaacs for the specific purpose of facilitating an on-going transfer of power from the States to the Commonwealth. This is the approach most commonly referred to as "literalism"--but more accurately described as ultra-literalism--and which was first endorsed in the Engineers' Case.

Briefly, the main feature of Australian constitutional literalism is that it focuses obsessively upon the terms of the specific legislative powers conferred upon the Commonwealth Parliament in section 51 of the Constitution.

Despite the fact that these powers are conferred within the crucial context of a strongly decentralised federal Constitution, literalism holds that they are to be interpreted with all the generality that their words allow, and without regard being had to the necessity to maintain any federal division of power as between the States and the Commonwealth. The practical result is that the powers contained in section 51 become constitutionally privileged "super powers", operating to indefinitely contract the notional residue of power theoretically preserved for the States under section 107. Consequently, it is literalism which renders such provisions as the external affairs power [i.e. section 51 (xxix)] so profoundly dangerous to Australia's federal character, by insisting that they be interpreted in the widest fashion possible, without regard being had to any federal considerations.

As if this were not bad enough, the High Court has in recent times extended its repertoire beyond literalism, in a manner which further threatens the legislative capacities of the States. The High Court's recent implausible forays into the area of "implied" rights are risible enough in relation to the Commonwealth Parliament, which is at least the creature of the Constitution from which the Court purports to derive those rights. However, in the Stephens Case, the Court decided that the implied right of political free speech flowing from the Commonwealth Constitution also operated to restrict State legislative power. Implied rights theory as practised by the Mason Court thus has the same almost open-ended potential to circumscribe the powers of the States as it possesses in relation to the Commonwealth.

The result is that in the High Court's interpretation of the Constitution, the States are now caught both ways. In the context of the division of power, a rigid literalism operates to expand the legislative competence of the Commonwealth at their expense. As regards implied rights, a free-wheeling implicationism--which the Court would not dream of applying in relation to the concept of federalism--further restricts their powers.

There is little, if any, sign of the Court departing from the path of centralism upon which it commenced with Engineers. Indeed, one way of viewing the Court's present obsession with rights is that it regards the issue of federalism as having been concluded finally in the Commonwealth's favour, and is sighing for new fields of constitutional jurisprudence to conquer. If this view is correct, then the High Court has ceased to regard the States as constitutional obstacles, and now considers them constitutional irrelevancies.

The High Court and State Finances

It is important to appreciate that the Court's facilitation of the dominance of the Commonwealth over the States has not occurred solely through its construction of the provisions of the Constitution dealing with the legislative power of the Commonwealth. The Court exercised a similarly baleful influence over the States through its interpretation of those constitutional provisions which affect the financial relationship between the central government and the States.

Broadly, the position here is that from its earliest history, the High Court has interpreted the financial provisions of the Constitution--which indisputably were among the least satisfactory products of the Founders' labours--in a manner inimical to the interests of the States. Perhaps surprisingly, this process began well before the Engineers' Case, with the decision of the first High Court in the Surplus Revenue Case.

That case concerned section 94 of the Constitution, the centre-piece of the extremely shaky financial settlement agreed upon by the Founders. This section provided that, from a point five years after the imposition of the federal tariff, the "surplus revenue" of the Commonwealth should be distributed among the States on a monthly basis in the manner prescribed by the federal Parliament. Admittedly, section 94 was so indifferently drafted in an attempt to conceal a multiplicity of different views as to how it should operate that any reasonable lawyer would have been able to drive a truck through it. That the strongly federalist Sir Samuel Griffith and his like-minded colleagues on the first High Court should have been behind the wheel is, however, undeniably singular.

Briefly, the Court held that it was perfectly permissible for the Commonwealth to avoid entirely the operation of section 94 by allocating, before the end of the financial year, any available surplus revenue to what were in effect special holding accounts. The funds concerned having been duly "appropriated" by being lodged in these accounts, there ceased to be any surplus revenue upon which section 94 could operate. Thus, with reasoning that surely would have appealed to the corporate sharks of the 1990s, the High Court--comprising three of the leading figures at the Great Conventions--obliterated the key feature of the financial settlement haggled over for so long by themselves and their colleagues.

Much worse was to follow. If the Surplus Revenue Case sounded a shrill warning note for the States, the First Uniform Tax Case in 1942 set their financial death knell tolling in earnest. The facts of this case are too well-known to bear rehearsing here. In what still remains after fifty years the greatest judicial blow to the economic independence of the States, the Court upheld a Commonwealth legislative scheme which had the practical effect of excluding the States entirely from the field of income tax.

This scheme had two essential features. The first was the use of the Commonwealth taxing power (section 51 (ii)) to impose an income tax at a rate equal to that previously represented by both State and federal income tax combined, thus placing the government of any State which wished to impose such a tax in a politically untenable position. The second, and probably more constitutionally significant feature of the scheme, was the use of the grants power contained in section 96 of the Constitution to grant to each State an amount of money approximately equal to that which it would have raised through the imposition of its own income tax, but on the condition that the State itself imposed no such tax. The scheme in the First Uniform Tax Case was thus avowedly aimed against the revenue raising capacities of the States, with its use of the taxation power to create a need in the States, followed by the crocodilian deployment of the grants power to supply that need, on the condition that State taxation policy conformed to the desires of the Commonwealth.

It might have been thought, therefore, that if ever the High Court were to see the wood of federalism behind the trees of the constitutional text, it would have been in connection with the legislation comprising the uniform tax scheme. Such was not the case, however, with a majority of the Court upholding all aspects of the scheme. Indeed, Chief Justice Latham, in dismissing the arguments of the States based upon the potential misuse of section 96 to subvert the federal division of power, cheerfully remarked that "the remedy for the alleged abuse of power.....is to

be found in the political arena and not in the Courts." So much for the key-stone of the federal arch.

The First Uniform Tax Case thus established that the Commonwealth grants power could be exercised subject to whatever conditions the Commonwealth saw fit, and towards objects entirely outside the competence of the Commonwealth Parliament. This is a position from which the Court has never departed over the years.

In summary, the Court's performance in the interpretation of the financial provisions of the Constitution essentially mirrors that which we have already examined in the context of the legislative division of power. The Court has consistently adopted an interpretation that has favoured the Commonwealth over the States, and in so doing has set its face resolutely against interpreting the Constitution in the light of the federal spirit which suffuses that document.

The High Court and the States--Themes

It is worth pausing very briefly at this point, before proceeding to a detailed discussion of section 90, in an attempt to isolate the major themes which emerge from the High Court's interpretation of those provisions of the Constitution which are of importance to the States.

The first is that through most of the history of the Court, most of its members have displayed an indifference bordering on disdain for the intentions of those who framed the Constitution, and indeed, for the understanding of those who voted to approve that document at the Federal Referenda of the 1890s. Few High Court judges, particularly in recent years, have seen their task as being to glean the intention of the Founders behind the Constitution. Rather, the judges of the Court have come increasingly to see the Constitution as a canvas upon which their own constitutional vision is to be portrayed, whether in the form of a greater centralisation of power, or as more recently, in the garish abstractions of the Mason Court's implied rights theories.

Correspondingly, there has been a profound reluctance on the part of the Court to focus too closely upon the history of the Constitution in seeking to interpret that document. The obvious reason for this is that the Constitution's history is a profound embarrassment to the Court, revealing as it does the Founders' commitment to precisely that form of strongly decentralised federalism that the Court has devoted its institutional life to undermining. Interestingly, during the mid-1980s the Court to some extent re-discovered history, as part of its attempt to re-interpret the chaotic section 92. Predictably, however, this has not led to a general reappraisal by the Court of its more profoundly unhistorical decisions on the federal division of power. Instead, some of the judges who have done greatest violence to the historical spirit of the Constitution--most notably Sir William Deane--are particularly fond of advancing wildly improbable versions of constitutional history in order to support equally implausible constitutional interpretations.

Finally, and fundamentally, it must be clear to any observer of the Court that over the course of its history it has shown virtually no commitment to federalism, the corner-stone of the Australian Constitution. Indeed, the Court has tended to regard the concept itself with some disdain, and to haughtily dismiss any argument seeking to proceed from first-principles based on federalism as "vague", "political", or "illogical". True, the States have had their occasional constitutional "wins", but these have been few and far between, and are simply overwhelmed by the weight of the Court's decisions amplifying and extending the power of the Commonwealth. Desultory attempts have been made by some members of the Court to erect certain limited constitutional protections for the States, but these feeble barriers have proved no real defence against the Commonwealth juggernaut, facilitated as it is by the literalism of Engineers. The fundamental difficulty, of course, is that since the 1920s the Court has seen its central constitutional role not as being to foster federalism, but to dismantle it. In this, it has achieved considerable success.

The History of Section 90

At this point, we may turn to a consideration of the excise provision of the Constitution, section 90. As indicated earlier in this paper, the approach adopted here will be to examine that provision as a case-study of the High Court's treatment of the States in the process of constitutional interpretation. The appropriate point at which to commence this study is with an examination of the history of the Court's jurisprudence on section 90.

It can be argued that section 90 is striking as an important Australian constitutional provision in at least two senses. The first is that its key term is vague to the point of incomprehensibility. Years of futile research by historians and lawyers have revealed no clear meaning of the term "excise" as employed in section 90 by the Founders during the last decade of the nineteenth century. The most that can be said is that there seem to have been two meanings of the word. Under one meaning, current particularly within the Australian colonies at the time of Federation, "excise" had the quite narrow connotation of a tax on the production or manufacture of internally produced goods. An even narrower variant of this local understanding of excise would have contracted the concept still further to imposts upon the production of tobacco and alcohol.

An altogether different vision of excise, however, may be culled from historic and contemporary English authorities, which seemed to regard the term "excise" as a catch-all for virtually any indirect tax--a sort of compendious expression for "fiscal plague", if you like. Which of these versions of excise was upper-most in the minds of the Founders it is impossible to say with certainty on the basis of contemporary evidence, for the Founders were as vague in their use of the term as anyone else. However, in light of the discussion which appears below, it seems most likely that they were utilising the expression in its narrower sense.

The second striking thing about section 90 is that however obscure may be the exact meaning of its central term, the general purpose behind the provision is at least relatively clear, both from the provision's documentary context within the Constitution, and from contemporary material surrounding its drafting. As a matter of documentary context, section 90 is clearly bound up with the federal tariff: on its own terms, its operation commences only upon the imposition of a uniform tariff, while it is located in the Constitution in close conjunction with those other key constitutional provisions concerning the tariff, sections 92 and 93.

This textual relationship between section 90 and the tariff is more or less elucidated by a detailed reading of such contemporary sources as the Convention Debates themselves, and Quick and Garran. What emerges from these sources as easily the most convincing view of the purpose behind section 90 is that it was intended to operate, not so much as a primary constitutional provision in its own right, but as a protection for the federal tariff to be imposed and implemented under other sections of the Constitution. The idea appears to have been that a State potentially could negative the protective effect of the tariff by the simple expedient of placing a corresponding duty on the relevant class of locally produced goods. To prevent this from occurring, section 90 was intended to prohibit a State from imposing such imposts analogous to customs duties on local goods, these imposts being all too loosely described as "duties of excise".

The crucial point here is that, on this understanding of the purpose behind section 90, the only tax which could conceivably be regarded as constituting an excise would be one which discriminated between overseas and locally produced goods. This would follow inevitably from the fact that it would be only these taxes which could have the effect of undermining the federal tariff. For the purposes of discussing the High Court's interpretation of section 90, it is worth noting at this stage two things concerning this postulated rationale behind the excise provision.

The first is that it is by no means difficult to discern: a careful reading of the Constitution and accompanying contemporary sources, and an understanding of the historical circumstances surrounding Federation, virtually impel one to the conclusion that this was the purpose underlying section 90. The second is that, construed in this way, section 90 clearly represents a very limited restraint upon the legislative and economic capacities of the States.

Unsurprisingly, the High Court's early decisions on section 90 broadly reflected this view of its function. In Peterswald v. Bartley, the first High Court--consisting of three leading Founders, Griffith, Barton and O'Connor--held that an excise for the purposes of section 90 was a tax on locally produced goods in respect of their production or manufacture, imposed in relation to the quantity or value of the goods concerned. This narrow conception of section 90 was entirely consistent with the suggested historical purpose of the provision as a measure to protect the federal tariff. Moreover, nothing in the interpretation of the excise provision in Peterswald v. Bartley posed any threat to the capacity of the States to manage their economic and financial affairs.

This was to come, by successive instalments, in later decisions of the Court. In a paper delivered to the previous Conference of this Society, Sir Harry Gibbs traced in some detail the decline and eventual eclipse of the test enunciated in Peterswald v. Bartley, and it would be inappropriate to do more than sketch the most modest of pictures here.

Briefly, the Court had by the late thirties begun a process of progressively widening the operation of section 90. That process intensified in 1949, when in the case of Parton v. Milk Board, the Court held that the concept of an excise extended beyond taxes on the manufacture and production of goods, and included any tax on goods before those goods reached the hands of consumers. Worse from the point of view of the States, in justifying this decision, Sir Owen Dixon identified behind section 90 a purpose completely at variance with that narrow object relating to the protection of the federal tariff which previously has been outlined in this paper. To Sir Owen, section 90 was not an incident to the customs union effected by section 92, but a vital element in the grand economic scheme of the Constitution, intended to confer upon the Commonwealth economic control over the supply of goods and services throughout the nation. This wide, and quite unhistoric view of the object of section 90, was to prove irresistible to subsequent High Court judges, and it is to Parton that much of the mischief wrought upon State finances by the High Court's interpretation of section 90 may be traced.

Subsequent cases, such as Bolton v. Madsden, while affirming the general approach adopted in Parton, sought to limit its application by means of the so-called "criterion of liability" test. This test posited that in order for a tax to constitute an excise, it was necessary that the tax be "directly imposed on goods". Moreover, this issue of the relationship between the tax and the relevant goods was to be determined not through an examination of the economic effects of the charge in question, but by reference to the legal operation of the statute imposing it. Consequently, the criterion of liability test enabled both the States and the High Court to avoid the more extreme consequences of the wide view of section 90 taken in Parton, through the use of such entirely artificial devices as franchise fees and licences in preference to more immediate taxes on goods.

However, this uneasy compromise began to unravel in 1983 with the decision of the High Court in Hematite. In that case, the Court abandoned the criterion of liability test. It decreed that henceforth, the test of whether or not a tax was an excise would be one of substance, not form, and would essentially turn upon the question of that tax's economic effect. Here, the crucial issue would be whether the tax ultimately entered into the price of the relevant goods: if so, it would comprise an excise. The immediate effect of Hematite, as confirmed by subsequent cases such as

Philip Morris, was to remove all logical justification for the exemption of State franchise and business licence fees from the scope of section 90. While the High Court has so far hesitated to take the final step on the path laid down in Hematite, and draw these taxes within the grim embrace of the excise provision, their constitutional basis can never be more than dubious so long as the Court's present broad interpretation of section 90 prevails.

The picture presented by the High Court's interpretation of section 90 thus conforms in every way with the general history of the Court's interpretation of the Constitution as it touches upon the States. Most notably, one may again observe the progressive widening of the scope of a provision by the Court in a manner calculated to intrude upon the independence of the States. As was the case in the context of the legislative division of power, the Court has shown scant or no interest in seeking to ensure that its construction of a provision conforms with the wider federal purpose of the Constitution. Likewise, the Court has shown as little empathy with the original intention of the Founders in connection with section 90 as it has in relation to the legislative powers of the Commonwealth contained in section 51. Just as the limited powers conferred upon the Commonwealth by that section were elevated by the Court into an almost open-ended charter of legislative action, so at the hands of the Court has section 90 mutated from a relatively inoffensive provision designed to protect the federal tariff, into the constitutional equivalent of the feral goat, deeply destructive of State economic policy, and serving no obvious economic purpose of its own.

Section 90 Today

The High Court's present position on the interpretation of section 90 is represented by Capital Duplicators Pty. Ltd. v. Australian Capital Territory. That case concerned a challenge to imposts levied in connection with the sale of pornographic video tapes pursuant to legislation of the Australian Capital Territory.

In holding these imposts to constitute an excise, the majority--Mason CJ., Brennan, Deane and McHugh JJ.--adopted a classically expansive interpretation of section 90. Their starting point was to discern a suitably grand historical purpose behind that provision. In line with the views of Sir Owen Dixon in Parton, section 90 was regarded as having been intended not merely to protect the federal tariff, but also to serve as a key weapon in the economic armoury of the Commonwealth, by conferring upon it "effective control over economic policy affecting the supply of goods and services throughout the Commonwealth".

Consistently with this sweeping vision of the purpose underlying section 90, the majority took a wide view of the scope of that section. An excise was any tax on goods before they reached the hands of the consumer, and included not only taxes on the production or manufacture of goods but also charges levied in respect of distribution, and (it would appear) sales taxes. Moreover, the question of whether a charge is a tax on goods was a question of substance, or in other words, of the economic effect of the tax. Here, the majority adhered to the view taken in such cases as Philip Morris, that if a charge had the "same effect" as an excise by ultimately entering into the price of the goods concerned, then it was as a matter of economic substance (and therefore law) an excise for the purposes of section 90.

Somewhat ironically for the Court which decided the Mabo case, the majority Justices piously opined that the doctrine of precedent precluded a general re-opening by the Court of the whole question of the interpretation of section 90. The only crumb of comfort for the States was that the majority declined to countenance the final extinction of the franchise fees anomaly, which had been clinging precariously to constitutional life ever since the discarding of the criterion of liability test in Hematite.

As an exercise in logic (legal or otherwise), the judgment of the majority in Capital Duplicators is profoundly unconvincing. In particular, its purported identification of a grand historical design behind section 90 simply does not hold water. No attempt is made by the majority to provide actual historical evidence of this design, one would suggest for the very basic reason that none is available. Moreover, even were one inclined, in defiance of all available data, to accept that section 90 was indeed intended to serve as the constitutional flagship of the Commonwealth's internal economic policy, one would need to base that acceptance upon the supposition that the drafters of the Constitution were economically illiterate to an extent uncommon even among lawyers.

This follows from the fact that only an economic simpleton could suppose that the mere granting to the Commonwealth of power over duties of excise could possibly give it, in the words of the majority, "effective control over economic policy affecting the supply of goods and services throughout the Commonwealth." So long as the States maintain their ability to impose a host of other charges which ultimately will affect the price of goods, such as pay-roll tax and land tax (to name just two), as well as their general legislative capacity which can be utilized to influence the production, supply and distribution of goods in a myriad of different ways, the "effective control" expounded by the majority is sheer fantasy.

In terms of practical federal economics, the majority judgment displays no awareness of (or at least no interest in) the fact that the interpretation of section 90 which it propounds involves the continuation of major difficulties in the field of federal finance. The most that the majority are prepared to venture in this direction is the grudging concession that the franchise exemption, while clearly anomalous, should not be disturbed. Similarly unimpressive from both a legal and an economic point of view is the majority's definition of an excise as a tax which enters into the price of goods. If this ridiculously wide definition is correct, it follows that a vast range of implausible taxes with little or no real connection with goods, but which undoubtedly are passed on to consumers in the form of increased costs for goods, are excises. Such taxes presumably would include pay-roll tax, some stamp duties and even potentially workers' compensation levies, none of which could conceivably be regarded as constituting an excise according to any accepted historical, economic or legal understanding of the term. The minority judgments in Capital Duplicators are those of Dawson J., and of Toohey and Gaudron JJ. There are differences of emphasis and expression between the two judgments, but as they are essentially to the same effect, they will be treated here together.

Both judgments proceed directly from an identification of the historical purpose behind section 90. Consequently, each is vitally concerned to interpret section 90 in light of that purpose, and to accord to the section an operation that is consistent with the object of the Founders in including it in the Constitution. The purpose identified by each of the minority judges is that referred to previously as constituting the most historically plausible explanation for the appearance of section 90 in Chapter IV of the Constitution; namely, that section 90 was intended to prevent a State from undermining the federal tariff by imposing a discriminatory tax upon locally produced goods, thus cancelling out the protective effect of the tariff.

For the minority judges in Capital Duplicators, it followed inevitably from this that an excise for the purpose of section 90 was not constituted by a tax which merely entered into the ultimate price of goods. Instead, the only tax which would answer the description of an excise within the meaning of that section would be one which discriminated between locally and externally produced goods. All three judges comprising the minority seem to have accepted that the

question of whether a tax did discriminate against local goods would be a matter of substance rather than legal form.

The constitutional implications of the minority judges' reasoning are both profound and obvious. The States would be able to impose any tax in relation to goods, so long as that tax did not discriminate between internally and externally produced articles of manufacture and production. While there would be some practical limits on the application of this principle, its most immediately obvious effect would be to permit the levying of a general State sales tax, the constitutionality of which has been at least highly dubious since such cases as Hematite and Philip Morris. Likewise, while under the minority view State taxes on the internal manufacture or production of goods obviously would continue to be excises within the meaning of section 90, taxes on such secondary steps as the distribution would not be excises unless they operated to discriminate between locally and externally produced goods, which would by no means necessarily be the case. There can be little doubt that the reasoning of the minority judges in Capital Duplicators is vastly superior to that contained in the joint judgment of the majority. As a matter of history, it is plain that the purpose discerned by the minority as underlying section 90 more accurately reflects the historical intention behind that provision. On this point, the careful analysis in the judgment of Sir Daryl Dawson, in particular, stands in stark contrast to the sweeping assertions of the majority relating to economic unity. Critically, as a consequence of its plausible historical basis, the minority's reasoning would accord to section 90 an operation fundamentally consistent with the legislative intent behind that section. In so doing, that reasoning would keep faith not only with the Founders themselves, but also with the most basic principles of statutory and constitutional interpretation.

The minority's reasoning also is persuasive in terms of federal financial arrangements and economic logic. The discrimination test which it poses would preserve the maximum State taxing capacity consistent with the operation of section 90 as a mechanism to protect the federal tariff. It would allow the States to broaden their tax bases without resorting to such regressive taxes as pay-roll tax, or to artificially constructed fiscal monstrosities like the much-abused business franchises. At the same time, the minority's narrower understanding of excise would avoid the logical absurdities of the definition adopted by the majority, whereby every tax which enters into the price of goods, however remotely and incidentally, is analytically to be regarded as an excise. All in all, there can be little doubt that the minority had the best of the arguments--if not the numbers--in Capital Duplicators.

Section 90 - The Future

When I was asked to prepare this paper, it was made clear by the organizers of the Conference that it was the question of possible future directions in the interpretation of section 90 that excited them most, and in particular, whether some as yet inchoate majority of the Court could be persuaded to adopt the narrow version of excise endorsed by the minority in Capital Duplicators. Indeed, such was the excitement at the rare spectacle of three High Court judges speaking sense at the one time, that it was thought that a little crystal ball-gazing might well reveal the States and the High Court, hand in hand, gambolling towards the sun-lit pastures of responsible fiscal federalism.

This vision is made all the more tantalising by the recent departure from the Court of two members of the majority in Capital Duplicators. Sir Anthony Mason has retired, while Sir William Deane--a judge of ferociously anti-federal sentiments--has left the Court to serve as Governor-General. Consequently, the technical state of the Court on section 90 at present is as follows. Three judges--Dawson, Toohey and Gaudron JJ. (the minority in Capital Duplicators)--

favour a revision of section 90 to the effect that it would only prohibit the imposition by the States of taxes discriminating against goods of local production or manufacture. Two judges--Brennan CJ. and McHugh J. (the survivors of the majority in the same case)--adhere to the old, wide view of excise as enunciated in such cases as Philip Morris.

Finally, two judges--Gummow J. and the as yet unappointed successor to Sir William Deane--are closed books on the subject of section 90. The crucial question is thus whether the Court will take the opportunity presented by its change in composition to re-appraise the trend of its decisions on excise, and to opt instead for some version of the narrow test proposed by the minority in Capital Duplicators.

The starting point here must be to note that, for all the reasons previously adverted to in this paper, such a reappraisal would be highly desirable. The present doctrine of the High Court on section 90 is untenable as a matter of history, legal logic and federal economic reality. A revision along the lines suggested by the minority in Capital Duplicators, by way of contrast, would see section 90 operate not only in the manner which appears to have been intended by the Founders, but in a manner which would be consistent and legally predictable, and which would promote rather than hinder the capacity of the States to engage in intelligent revenue raising and financial planning. Such a re-casting of the interpretation of section 90 would be very much the companion piece to the Court's historic re-invigoration of section 92 achieved in Cole v. Whitfield.

However, the very desirability of an alteration in direction by the High Court on the question of section 90 may tempt one to exaggerate the chances of such a change occurring. As stated earlier, the historic trend of the decisions of the Court over the last seventy years has been one of a consistent amplification of the powers of the central government over those of the States. While there have been variations in the intensity of the High Court's enthusiasm for the constitutional diminution of the States, the Court's basic direction has remained remarkably constant.

Thus, one must view with considerable scepticism any suggestion that the High Court will make a radical departure from established constitutional doctrine in favour of the States. Indeed, were the High Court to follow such a course in relation to section 90, this would undoubtedly constitute the only occasion when the Court would have undertaken a major revision of the Constitution's interpretation working to the advantage of the States. For this reason, if for no other, the hopes raised by the minority in Capital Duplicators should not be allowed to run too high.

Putting aside such wide issues as the historic trend of High Court decisions, it is obvious enough that the immediate practical question in relation to section 90 is how the two new appointments to the Court will position themselves on the question of its re-interpretation. Will they adhere to the present constitutional orthodoxy, or will one--for this is all it would take--join Justices Dawson, Toohey and Gaudron in adopting a narrow view of excise? The prediction of individual judicial form being a notoriously inexact science, the best approach is probably to consider first the type of judge who might be attracted by the Dawson-Gaudron-Toohey thesis in section 90.

Broadly, there would seem to be three types of judge who might be tempted to take a restrictive view of section 90. The first would be a careful legal historian, who was impressed by the weight of contemporary and contextual evidence suggesting that section 90 should be given a circumscribed operation. An example of such a judge presently on the Court is clearly Sir Daryl Dawson. A second species of judge who would be propelled in the same direction would be one who believed that the interpretation of the Constitution requires, within the limits of its text,

adherence to the intentions of the Founders, and that this in turn necessitates the maintenance of a strongly federal polity in Australia. Again, Sir Daryl Dawson would be the relevant example. Finally, and perhaps more exotically, a judge who was neither a historian nor a federalist, but who had served at a sufficiently high level within the government of a State to observe the fiscal havoc wreaked by section 90, might well be a convert of necessity to the cause of taming the excise provision. Such may be the case with Justice Gaudron, who served as Solicitor-General for New South Wales for some years.

Correspondingly, there are at least three types of judge who would incline naturally towards the Mason view of excise. The first would be a judge who was a committed centralist, and who saw his or her task as being to interpret the Constitution in such a way as to advance the cause of central government at the expense of the powers of the States, regardless of the possible views of the Founders on the matter at hand. Sir Anthony himself was an example of such a judge. The second type of judge likely to take a wide view of excise would be an old-style literalist with a general disinclination towards the use of history in the interpretation of the Constitution. There are (some) elements of this in Justice McHugh's judicial personality. Finally, a radical implicationist who regarded the Constitution merely as a canvass for their own judicial creativity would very probably take a broad view of the prohibition contained in section 90, if only because the creativity of such adventurist judges ordinarily has a centralising, rather than a decentralising bent. Sir William Deane is the perfect example of this species of judge.

The undeniably difficult question, therefore, is into which category the two new appointments to the Court are likely to fit. In the case of Justice Gummow, the relevant facts (or suppositions) seem to be as follows. He is a New South Welshman, hailing from the largest and dominant State of the Federation, and one whose inhabitants often seem to display less federalist feeling than citizens of other States. He was formerly a Federal Court Judge, thus coming from a background where his institutional attachment was to the Commonwealth, rather than to a State. He is reputed to have been chosen for appointment to the High Court by the Commonwealth Government because he is a "lawyer's lawyer", and temperamentally opposed to the implicationist fancies which presently so divert his brethren. Finally, one reasonably may suppose that so authoritarian a central government as the present one would not have made the appointment without some belief that the new Justice did not hold unacceptably federalist views on division of powers issues.

Thus, at the obvious risk of committing an indelible blunder, it would seem unlikely (on the scant information available) that Justice Gummow is a good prospect for conversion to the narrow view of the excise power. Viewing him admittedly as a mere judicial embryo, he emerges most plausibly as a conservative, centralist, probably literalist lawyer. While none of these things will send him down the rights path so beloved of Sir William Deane, nor are they characteristics likely to predispose him towards a history-and-federalism fuelled reconsideration of section 90.

If a majority is to be formed for the narrow view of excise in Capital Duplicators, therefore, it presumably will have to include the forthcoming appointment to the Court. Here, the only thing that intelligently can be said is that if Justice Gummow appealed to the Federal Government in connection with the last vacancy, it is highly likely that a similar candidate will be chosen to take Sir William Deane's place on the Court. On this basis, there seems no particular reason for confidence that the new appointment will side with Justices Dawson, Toohey and Gaudron on the question of excise.

One thing which clearly should be appreciated is that if the new appointments to the High Court do bring with them a reappraisal of section 90, many questions will remain to be answered

concerning the future operation of that section, even if the minority position in Capital Duplicators is adopted virtually intact. For example, what will be the position where a tax is imposed on distribution or some analogous step in relation to goods, in circumstances where the particular class of goods is produced only in the State concerned? Will the discriminatory operation of the tax mean that it constitutes an excise (as seems to be suggested by Justice Dawson in Capital Duplicators), or will it be saved by its undifferentiated application to all goods of that class? Either way, considerable refinement of the position enunciated by the minority in Capital Duplicators will be required. Moreover, will the resurgence of Peterswald v. Bartley stop with the reinstatement of the discrimination test, or will the Court carry it so far as to question the Parton view that the concept of excise extends beyond imposts on manufacture and production and into such fields as sales and distribution? One's guess would be not, but the one thing that is amply demonstrated by the Court's on-going reappraisal of section 92 is that even after a new constitutional doctrine has been formulated successfully, its elaboration and application to novel circumstances require considerable judicial effort.

Of course, the real difficulty for both litigants and commentators at the present time is that the chaotic state of the High Court's constitutional jurisprudence makes it almost impossible to predict with confidence the outcome of any complicated case, and this obviously includes cases concerning the interpretation of section 90. The Court is currently a confused jumble of competing constitutional theories and their application to particular questions, and in any given month the balance of judicial opinion may swing, depending on the subject matter of the case, from a stuffy and pedantic literalism to an uninhibited determination to re-write the relevant section of the Constitution. In this atmosphere, the meaning that will be given to section 90 in six months time can never be more than an open question.

Conclusion

The conclusions which emerge from this paper are clear. The Founders believed that they had created a federation in which the balance of power would lie decidedly with the States. The fundamental role of the High Court was to preserve that balance. Instead, the Court has consciously presided over an on-going transfer of power from the States to the Commonwealth. This has occurred not only in the obvious context of the federal division of power, but also in the area of fiscal federalism, where the High Court has played a crucial part in reducing the States to financial captivity. Nowhere has this been more obvious than in relation to section 90, where the Court has transformed what was intended as an important but ultimately secondary mechanism for the protection of the federal tariff into a potent weapon against the financial independence of the States.

While there are reasons to hope that the Court may be moving towards a reassessment of its position on section 90, it must be remembered that its historical record is one of relentless centralisation. A recantation of the dimensions that would be involved in the reinterpretation of section 90 would be unprecedented.