

What is an Excise Duty? Nineteenth Century Literature and the Australian Constitution

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One of the most vexed questions posed by the terms of the Australian Constitution is the meaning of the phrase "duty of excise". According to Section 90, the Commonwealth has exclusive power to levy such duties, and the precise scope of the revenue raising devices from which the States are excluded thereby has been the subject of repeated litigation. The findings of the judiciary on the matter have varied markedly over the decades, and currently the position appears to be one of stalemate. In March 1989, the High Court decided that it would not even hear a challenge to three of its decisions bearing on this issue.

The main object of this paper is to endeavour to establish the understanding of "excise duty" in economic writings that were authoritative in the latter decades of the nineteenth century, i.e., in the years leading up to the formulation of the Australian Constitution. Such a study may throw some light on the intentions of the founders of the Constitution with respect to the relative taxation powers of the Commonwealth and the States. It might be presumed that some members of the High Court regard those intentions as relevant to their present-day deliberations.

In the paper, the economists cited are J.S. Mill, C.F. Bastable, Antonio de Viti de Marco, Henry Sidgwick, Richard T. Ely, E.R.A. Seligman, and contributors to *Palgrave's Dictionary of Political Economy*. The first section of the paper offers a brief review of the status of these writers and their publications. The second section takes up the question of whether or not, for these authors, an excise duty is something other than a tax on production. The third section establishes that, according to the writers in question, an excise duty does not include the point of sale of a commodity. A fourth section remarks on the growing disquiet among the economists concerning the confusion which could surround a distinction between "direct" and "indirect" taxation. The paper then turns to a survey of some of the decisions of the Australian judiciary concerning

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the meaning of "duty of excise". It is shown that in some instances, these fly in the face of the views of the nineteenth century economists. In conclusion, it is suggested that for those who framed the Australian Constitution, "duty of excise" had a quite limited meaning. That meaning emerges when the allocation of exclusive excise power to the Commonwealth is understood to be simply a necessary element in ensuring sure Commonwealth control of tariff policy. The underlying reasoning is entirely explicable in terms of the then-prevailing economic thought.

The Literature

John Stuart Mill's *Principles of Political Economy* was first published in 1848. Thereafter, it underwent successive editions and was constantly reprinted after Mill's death. During the latter part of the 1890s, the treatise began to give way to Alfred Marshall's *Principles of Economics* for purposes of university teaching. The commanding status of Mill's *Principles*, over an extraordinary span of time, has been observed by Donald Winch. He writes:

From the moment of its first publication in 1848, John Stuart Mill's *Principles of Political Economy, with some of Their Applications to Social Philosophy* established itself as a classic. For almost half a century and long after many of its component ideas had been controverted, it had no equal in terms of scope and stature. Considered simply as an economics textbook, it enjoyed a longer active life than any comparable work either before or since. Unlike its successors, including the work which replaced it as the bible of English economics, Alfred Marshall's *Principles of Economics*, published in 1890, it was read by the serious-minded general public as well as by dedicated students and those who merely wished to pass examinations.¹

As Winch remarks, Mill was much more widely read than Marshall, even as the century closed, and to this it can be added that the latter did little to disturb the general reader's perception of economic orthodoxy concerning taxation. Marshall's *Principles*, unlike Mill's book, had "no connected discussion of the problems of taxation."²

The fact that Marshall did not attempt to be comprehensive in the Mill manner on taxation was no accident. The division of intellectual labour had begun to assert itself in economics by Marshall's time, and the study of public finance issues was emerging as a distinct branch of the discipline. The major manifestation of that emergence in book form in Britain was the appearance of

C.F. Bastable's *Public Finance*. First published in 1892, this textbook marked a new era of growing specialisation in research. Its author, Charles Francis Bastable, held the Whately Chair in Political Economy at Trinity College, Dublin. He was also a member of the Irish Bar and occupied the Regius Chair of Laws at Trinity (1908-1932). Bastable was elected a Fellow of the British Academy in 1921. Of the treatise in question, John Bristow writes:

Bastable's largest single work, *Public Finance*, was written explicitly as a textbook and, for its scope and clarity, deserves an honoured place in any history of that *genre*. The theory is, again, English classical, but the work as a whole, is impressively eclectic, covering expenditure, taxation and debt with a wealth of institutional detail and juxtaposing arguments and examples from a large range of European and American sources.³

The book went through a second edition in 1895, and a third in 1903. It remained the leading British work of its kind until it was replaced by Hugh Dalton's *Principles of Public Finance* (1922).⁴

Shortly after the publication of the first edition of Bastable, *Palgrave's Dictionary of Political Economy* was issued (1894). This three-volume compilation set out to be the major source of reference to current wisdom on all matters pertaining to economics. The compilation was accepted as such, and it continued to hold its place into the 1930s and even beyond. Any survey of the state of thought on a particular economic question at the turn of the century must take *Palgrave's* into account.

The impact of Continental economic thought on that within the British Empire in the 1890s is difficult to gauge, as far as general opinion is concerned. However, in terms of contemporary intellectual status it is relevant to refer to the work of Antonio de Viti de Marco who was the renowned Professor of Public Finance at Rome for over forty years. A member of the group of economists which included Pareto, Pantaleoni, and Barone, de Viti was an extremely influential lecturer, whose lectures on public finance appeared first in 1886-87.⁵ Later, as his work became known to British economists in the orthodox tradition it was greeted warmly. Fredrick Benham, for example, wrote: "This is probably the best treatise on the theory of Public Finance ever written. In its more restricted sphere, it is comparable to the *Principles* of Marshall."⁶

It is also difficult to gauge the degree of influence of American economic thought on British intellectuals in the homeland and colonies. Nevertheless, in matters of public finance, both United States and Canadian experience were of

interest within the Empire. Hence, it may be relevant to cite such notable North American authorities as Richard T. Ely and Edwin Seligman. Both of these were highly respected writers on taxation issues within federal political systems at the turn of the century.

A Tax on Production

In Book V, Chapter III of his *Principles* Mill wrote:

Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who, it is intended or desired, should pay it. Indirect taxes are those which are demanded from one in the expectation and intention that he shall indemnify himself at the expense of another: *such as the excise or customs. The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount of by means of an advance in price.*⁷

Mill's understanding of "excise" is further illumined by his discussion of "Taxes on Commodities" (Book V, Chapter IV). There he states:

By taxes on commodities are commonly meant, those which are levied either on the producers, or on the carriers or dealers who intervene between them and the final purchasers for consumption. Taxes imposed directly on the consumers of particular commodities, such as a house-tax, or the tax in this country on horses and carriages, *might be called taxes on commodities, but are not*; the phrase being, by custom, confined to indirect taxes — those which are advanced by one person, to be, as is expected and intended, reimbursed by another. *Taxes on commodities are either on production within the country, or on importation into it, or on conveyance or sale within it and are classed respectively as excise, customs, or tolls and transit duties.*⁸

Here, there is a firm distinction between "excise", on the one hand, and "taxes imposed directly on the consumers of particular commodities", on the other. Further, it is made quite clear that: **AN EXCISE DUTY IS A TAX ON PRODUCTION OF COMMODITIES.**

This treatment of the distinctions between types of taxation is reinforced in *Palgrave's Dictionary*. On the subject of "The Excise" it is stated:

An excise duty properly so-called belongs to the category of indirect taxes, *because though levied on the producer, its burden really falls on the consumer.*⁹

Palgrave's goes on to further clarify the meaning of "excise" by distinguishing between "excise duty" and "excise revenue". This latter, it is explained, includes a number of items derived from forms of taxation which are not excise duties. Those taxes comprise "the railway duty on passengers, a direct tax; of which the real as well as the apparent incidence generally falls on the railway companies; and a large group of *assessed* taxes, being license duties paid to the state in return for permission to practise or follow certain sports, trades, or occupation; e.g., the dog, game, and gun licenses and the licenses on brewers, auctioneers, and pawnbrokers."¹⁰

The need to distinguish between "excise duty" and "excise revenue" at the stage that *Palgrave's* was published, is attributable to the changing character of the tasks of the Excise Department in the era of freer trade from 1840 onwards. During that era, many of the long-standing excise duties which the Department had been obliged to collect were abolished. In their place, the Department was made responsible for the collection of other types of tax. One of the most unusual of these was railway passenger duty which was administered from 1832 by the Commissioners of Stamps but was passed on to the Excise in 1847.¹¹ Other non-excise duty taxes collected by the Excise included: assessed taxes on playing cards and patent medicines; licences for pawnbrokers; and dog licences. In 1866, the Excise was obliged to be even more versatile, and extend its activities outside the field of taxation. From that year it undertook the collection of agricultural statistics of livestock and crops!¹²

Hence, it came about that "excise revenue" (in the sense of revenue collected by the Excise Department) was a much wider term than "excise duty". Thus *Palgrave's* (as quoted above) is careful to distinguish "an excise duty properly so-called."

In his general classification of types of tax, C.F. Bastable begins by denoting excise duties as "taxes on commodities". Bastable writes:

The primary taxes comprise those on land, on business and capital, on persons and on labourer's earnings. The combination of these primary forms gives us the general income and property taxes which come next in order. Passing to the secondary forms of taxation we find (1) taxes on commodities, *including both excises and customs*, (2) taxes

on communication and transport, (3) the remaining taxes on commerce and legal transactions, (4) taxes on transfer of property, (5) succession duties.¹³

Subsequently, Bastable treats excise duties as taxes on the *production* of commodities. For example, he refers to "the development of the excise, under which most commodities are taxed in the hands of the producer or trader."¹⁴ Again, in his discussion of the economic consequences of this form of taxation, the entire emphasis is on its impact on production functions and entrepreneurship. He states:

By far the most formidable objection to the indirect taxation of commodities is the loss to the society through the disturbance of industry ... The excise system is injurious to the industries under its supervision, as it controls the processes to be employed, and hinders the introduction of improvements. Routine is necessary for effectual regulation, but it is fatal to the spirit of enterprise that is the main cause of industrial advance.¹⁵

Excluding Point of Sale

We have seen thus far, that the economists regarded an excise duty as a tax on the production of commodities. However, was the point of sales of the commodities included in the idea of "the production of commodities"? In this section, we show that point of sale was certainly *not* included.

John Stuart Mill classifies an excise duty as an indirect tax. Hence it is to be distinguished from a direct tax on expenditure by consumers. Mill writes:

Direct taxes are either on income, or on expenditure. Most taxes on expenditure are indirect, but some are direct, being imposed *not on the producer or seller of an article*, but immediately on the consumer. A house-tax, for example, is a direct tax on expenditure, if levied, as it usually is, on the occupier of the house. *If levied on the builder or owner, it would be an indirect tax.* A window-tax is a direct tax on expenditure; so are the taxes on horses and carriages, and the rest of what are called the assessed taxes.¹⁶

From this, it is clear that producers, sellers, builders, and owners are those who are legally and administratively required to pay taxes such as excise duties. This type of taxation is not demanded of persons in their capacity as consumers (or occupiers). Hence, it may be asked: how can an excise duty be said to apply

at the point of sale? A SALE IS A TWO-PARTY TRANSACTION INVOLVING THE CONSUMER. AN EXCISE DUTY IS NOT A TAX IMPOSED ON THE CONSUMER. THEREFORE, HOW CAN THAT DUTY BE BOUND UP WITH THE TRANSACTION?

That Mill dissociates excise duty and sale emerges explicitly in his discussion of "Taxes on Commodities" (see above). There, he states:

Taxes on commodities are either on production within the country, or on importation into it, or on conveyance or sale within it; and are classed respectively as excise, customs, or tolls and transit duties."¹⁷

In this sentence, "excise" involves "*production within the country*", but it is "tolls and transit duties" which apply to "*conveyance or sale*".

Bastable is in no doubt that an excise duty is a tax which precedes sale. Hence, in his treatment of consumption taxes, Bastable describes these latter as "stray remains, either of the older property taxes or of sumptuary enactments. With one doubtful exception their financial value is slight. No modern country derives any noteworthy revenue from their use. The reasons for this small return are to be found partly in the development of the excise, under which most commodities *are taxed in the hands of the producer or trader.*"¹⁸

In fact, Bastable may be said to go further than Mill in dissociating the consumer from the payment of excise duty. With Mill, as we saw, the consumer is dissociated both *administratively and legally*. However, Mill implies that the consumer will almost always be associated *economically* in that the incidence of the tax will be shifted to the consumer after its payment by the producer. Bastable questions this latter. He writes:

But before we assert that a tax on a particular commodity comes out of the pockets of the consumers of that community, we must be satisfied of three things—viz. (1) that none of the burden remains on the producer who pays the tax immediately, (2) that none of it is thrown back on other producers or owners of land or capital who contribute to the production, and (3) that the consumer has no way of passing on the burden to another set of persons. *But these conditions are not always to be found.*¹⁹

The authoritative Italian economist de Viti de Marco is even more clear than his British counterparts that an excise duty precedes the point of sale. He finds

that a condition "which must be satisfied by the group of goods chosen as the basis for indirect taxes on consumption is expressed by saying that these taxes should strike the goods as near as possible to the consumer. It goes without saying that what is meant is economic nearness in the sense that it is necessary (a) to strike the article *at the moment that it is finally transformed into a direct good*; and (b) to avoid phenomena of repercussions and friction between the consumer, on the one hand, and the producer or the middleman, on the other, by avoiding, so far as possible, compelling the latter to pay instead of the former."²⁰

De Viti elaborates on this point by distinguishing between those aspects of indirect taxation which, in the British system, were classified as licences (dogs, servants, motor vehicles, etc.) and those which were classified as duties of excise. These last involve taxing the producer before the point of sale. De Viti explains:

Now, according to the principle already expounded, the most convenient moment [for collection of tax] is that at which the commodity is nearest the consumer. Hence, the group that best satisfies this criterion is that in which the indirect taxes are collected directly from the consumer: this is the case with respect to taxes on servants, bicycles, horses, dogs, automobiles, pianofortes, and so.

This method of collection is the most direct and the least expensive; but it can be applied only to goods which are used more than once, and not even to all of these, for it would require inquisitorial investigations into domestic life which would not be tolerated. In order to strike at other goods, therefore, it is necessary to ascertain *their existence and their value while they are in the hands of the producer and the merchant, who, as we have already pointed out, will pay the tax in advance on behalf of the consumer.*²¹

Payment of excise duty, then, is something which quite unequivocally is not associated with the point of sale. Excise duty is calculated on estimated value *before* value is established in the sale transaction.

Direct and Indirect Taxation

An interesting feature of Bastable's *Public Finance* is its reservations regarding use of the terms "direct" and "indirect" taxation. At one point, he refers to J.S. Mill's employment of the distinction between the two types of taxation, and then goes on to comment as follows:

The difference is here made to turn on the mode of incidence, a matter often very difficult to determine, and changing with the special circumstances of each case. Whatever be its economical importance, *it is evidently useless for administrative purposes*, and probably owes its origin to the peculiar theory of the Physiocrats respecting the 'source' of taxation.

A natural result has been that practical financiers have adopted a different basis of distinction, and regard those taxes as direct which are levied on permanent and recurring occasions, while charges on occasional and particular events are placed under the category of indirect taxation. On either method the income tax would be 'direct', and the excise or customs 'indirect': The 'death duties' would be 'direct' from Mill's point of view, and 'indirect' in the administrative sense.²²

One ground for Bastable's reservations concerning the Millian distinction appears to be the doubts which he entertains concerning the incidence of tax (see above). Hence, he writes; "Whether a duty is assessed directly on the ultimate bearer or is passed through various intermediaries before reaching him, may not be capable of being precisely determined in all cases. There are no hard and fast lines in fact, and the instances on the margin may be numerous ..."²³ The other ground related to American constitutional experience. Bastable notes:

The use of the term 'direct' in the Constitution of the United States has given rise to much controversy, culminating in the decision of the Supreme Court on the income tax of 1894, pronouncing it invalid as being 'direct'.²⁴

Other leading authorities, in both Britain and the United States, expressed reservations akin to that of Bastable's. One of these authorities was Henry Sidgwick of Cambridge. He wrote:

we can only partially succeed in making the burden either of 'direct' or 'indirect' taxes fall where we desire; the burden is liable to be transferred to other persons when it is intended to remain where it is first imposed; and, on the other hand, when it is intended to be transferred the process of transference is liable to be tardy and incomplete.²⁵

Sidgwick added: "The common classification of taxes as Direct and Indirect appears to me liable to mislead the student, by ignoring the complexity and difficulty of the problem of determining the incidence of taxation."²⁶ The

Cambridge economist's view was repeated by *Palgrave's Dictionary of Political Economy* (1894), and *Palgrave's* went on to observe that "A distribution of taxes subject to change with every new theory of incidence must necessarily, whatever may be its value in economy, be almost useless for administrative purposes."²⁷

United States experience gave economists even more cause to pause, especially since the Supreme Court, as a wartime expedient, *had gone so far as to classify an income tax as an indirect tax!* Hence, Richard T. Ely, of Johns Hopkins University, wrote:

Taxes are in official statements frequently divided into direct and indirect taxes, but the classification has generally been governed by motives of convenience rather than by scientific principles ... Each country will be found to have its own peculiarities, and it will probably be found everywhere that the grouping has been more or less haphazard. The American federal classification is indeed a strange one. The constitution provides that 'representatives and direct taxes shall be apportioned among the several states in proportion to population.' It has been held that by direct taxes are meant only taxes on real estate and on slaves; consequently an income tax was imposed by Congress during the late Civil War, and was regarded as an indirect tax!²⁸

Even more sceptical concerning the distinction between direct and indirect taxation was Edwin Seligman. A voluminous writer on tax matters, Seligman occupied the McVickar chair in Political Economy at Columbia University. He declared:

In common parlance the distinction between direct and indirect taxes is practically relegated to the mind of the legislator: what he wishes to have borne by the original taxpayer is called a direct tax, what he intends to have borne by someone else than the original taxpayer is called indirect. Unfortunately the intention of the legislator is not identical with the actual result. We must, then, either revise our nomenclature or declare the present distinction of little value.²⁹

It is clear then that by the 1890s informed students of public finance were well aware of the ambiguities surrounding the terms "direct" and "indirect". Their writings suggested, in a strong fashion, that the inclusion of such terms in the constitution of a new political federation was not a course of action to be recommended. There was good reason, for example, for preferring a phrase like "duty of excise" to one such as "indirect taxation".

Australian Judicial Opinion

In this section we review some of the decisions of the Australian judiciary concerning the meaning of "duty of excise". It is shown that whereas many of these are in accord with the understanding of the economists surveyed above, some individual judges and some particular judgements have moved away from the view prevailing around the time of Federation in orthodox economic thought.

An early case was that of *Peterswald v Bartley* (1904) 1 CLR 497. In this instance:

The question was whether a State licence fee for carrying on the business of a brewer was a duty of excise and hence outside the power of the State to impose. In English revenue legislation, the term was used to cover such imposts. However, it was held that it had a more restricted meaning in Australian usage and in the context of the Constitution. "Bearing in mind that ... when used in the Constitution it is used in connection with the words 'on goods produced or manufactured in the States' the conclusion is almost inevitable that, whenever it is used, it is intended to mean a duty analogous to a customs duty imposed upon goods either in relation to quantity or value when produced or manufactured, and not in the sense of a direct tax or personal tax": at 509 (per Griffith C.J.).³⁰

This finding is entirely in accord with the distinction between "excise duty" and "excise revenue" which *Palgrave's Dictionary* had made clear (see above). It can be remarked also, that not only "in Australian usage" but in British usage too, properly understood, there were no grounds for confusing a licence fee with a duty of excise.

This understanding appears to have been maintained in *Commonwealth Oil Refineries Ltd v South Australia* (1926) 39 CLR 408; *John Fairfax and Sons Ltd v New South Wales* (1926) 39 CLR 139; and *Attorney-General (NSW) v Homebush Flour Mills Ltd* (1937) 56 CLR 309.³¹ However, there was a marked departure from the doctrine of the nineteenth century economists by Dixon J. in 1938. In *Matthews v The Chicory Marketing Board of Victoria* (1938) 60 CRL 263 at 293, Dixon J. stated:

it should not be overlooked that there is no direct decision inconsistent with the view that a tax upon commodities may be an excise although it is levied not upon or in connection with the production,

manufacture or treatment of goods or the preparation of goods for sale or consumption but upon the sale, use or consumption and is imposed independently of the place of production.³²

For the economists, as we have seen, an excise duty is not to be confused with a sales or consumption tax.

The view of the economists was reasserted in *Atlantic Smokeshops Ltd v Conlon* (1943) AC 550. There it was held that a tax on consumers or consumption cannot be an excise.³³ This case was followed by that of *Parton v Milk Board of Victoria* (1949) 80 CLR 229. Here, Dixon J. appears to have modified his stance somewhat, in that he "considered a tax upon a commodity at any point in the course of distribution before it reached the consumer was a duty of excise."³⁴ This understanding of "duty of excise", however, is still broader than that of the economists.

In *Browns Transport Pty Ltd v Kropp* (1958) 100 CLR 117, the question of excise duty versus licensing fees was addressed again, and the distinction between the two maintained. Nevertheless, *Dennis Hotels Pty Ltd v Victoria* (1960) CLR 529 found the Court divided on a similar issue. Particularly notable is the fact that some members of the Court took the view that it "was not necessary for the tax to be imposed on the production of the goods to qualify as a duty of excise."³⁵ Yet, the economists had been clear that an excise is a tax on production of commodities.

Three years later, the Court swung back towards the nineteenth century analysts. In a unanimous decision (*Bolton v Madsen* (1963) 100 CLR 264) it was stated:

It is now established that for constitutional purposes duties of excise are taxes directly related to goods imposed at some step in their production or distribution before they reach the hands of consumers ... The tax is a duty of excise only when it is imposed directly upon goods or, to put the same thing another way, when it directly affects goods, and to establish no more than that its imposition has increased the cost of putting goods upon the market by a calculable amount falls short of establishing the directness of relation between the tax and the goods that is the essential characteristic of a duty of excise. (CLR at 271; ALR at 520-1).³⁶

In the wake of this decision, it was found that a State stamp duty on hire-purchase contracts was not an excise duty (*Anderson's Pty Ltd v Victoria* (1964)

111 CLR 353). Nevertheless, it is notable that in the course of this judgement Barwick C.J. stated (at 364):

it ought now be taken as settled that the essence of a duty of excise is that it is a tax upon the taking of a step in the process of bringing goods into existence or to a consumable state, or of passing them down the line which reaches from the earliest stage of production to the point of receipt by the consumer ... I would merely add expressly what I think is implicit in His Honour's expression (a) namely that the step which puts the goods into consumption is still in the line, albeit at the end of the line, to which His Honour refers.

On this view, there is no important distinction to be made between "receipt by the consumer" of the goods in question and the prior stage of their being offered by the producer in the hope of sale. Yet, there is no necessary continuum between the two. Sale is not an automatic consequence of willingness to supply. The thought of the economists incorporates this basic economic reality, and hence they did not find point of sale relevant to duty of excise.

The approach of Barwick C.J. was reflected later in the judgement in *Western Australia v Hamersley Iron Ltd* (1969) 120 CLR 42. Here, Windeyer J. stated: "A tax calculated directly by reference to the price at which goods are sold by the producer of them to a buyer answers directly, I think, to the description of a duty of excise in s.90 of the Constitution. It seems to me then to be indistinguishable from a sales tax."³⁷ This conflation of excise duty and a tax on sale (so foreign to the thought of J.S. Mill and his successors) was also undertaken by Owen J. The latter took the view that "to impose a tax upon the receipt of the price for which a commodity is sold by its producer is, in my opinion, to tax a dealing with the commodity and such a tax is in reality a sales tax notwithstanding the fact that it takes the form of a duty upon an instrument which the recipient of the price of the commodity is required to bring into existence."³⁸

Following these findings, there were those of *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1, and *M.F. Kailis Pty Ltd v Western Australia* (1974) 130 CLR 245. In the first of these it was adjudged that "if the practical effect of a levy was to place a tax upon goods, the levy was a duty of excise", and in the second, "a business franchise tax related to production in a period different from that in which the business is conducted is a duty of excise."³⁹ Somewhat against the trend to an expanding interpretation of "duty of excise" was the finding in *Dickenson's Arcade v Tasmania* (1974) 2 ALF 460. In this case, "all members of the High Court except McTiernan J. accepted that a tax

on consumption in the sense of a tax imposed on goods after they had passed into the hands of a consumer, was not an excise."⁴⁰

Two relevant cases from 1977 were *H.C. Sleight Ltd v South Australia* 12 ALR 449, and *Logan Downs Pty Ltd v Queensland* 57 ALJR 377. Of particular note in these, was the position taken by Murphy J. Michael Crommelin observes that Murphy J. stated " that the duties of excise which section 90 forbids a State to impose are taxes on goods produced or manufactured in the State ... A corollary of this view is that a State tax imposed on goods without reference to their place of production or manufacture (such as a sales tax or licence fee for sale or distribution, or a consumption tax which applied to all goods whether from inside or outside the State) is neither a customs duty as regards goods imported into the State nor a duty of excise as regards goods produced locally. This approach, of course, greatly narrows the restriction imposed by section 90 on State legislative power."⁴¹

Excise as a Revenue Category

Amidst the foregoing judicial confusion, and in the light of later nineteenth century thought, what might be affirmed with some confidence about the meaning which the framers of the Constitution attached to "duties of excise"?

Contemporary Australian sources indicate that the phrase had a well understood and limited meaning. For example, the *Statistical Survey of New South Wales* which was published in 1895 is quite unambiguous. There, the Government Statistician, T.A. Coghlan, distinguished the sources of taxation revenue, as follows:

- (1) Customs;
- (2) Excise;
- (3) Licenses;
- (4) Stamp Duties.⁴²

This categorisation, it should be noted, quite clearly differentiates excise from license fees and stamp duties. Further, within the category "excise", the overwhelming items in monetary terms are duties on alcohol and tobacco product. In 1893, these latter accounted for 92.6% of all revenue under the head "excise". Another notable feature is the relative unimportance of excise as a source of that State's revenue. Excise contributed only 0.95% to total net revenue from taxation. Even stamp duties contributed more. The vast bulk of taxation revenue was derived from customs duties.

The limited meaning of "duties of excise" in both qualitative and quantitative terms is brought out again in the seminal commentary on the Constitution which was compiled by Sir John Quick and Sir Robert Garran, and was published in 1901. Of "excise" they wrote:

The fundamental conception of the term is that of a tax on articles produced or manufactured in a country. In the taxation of such articles of luxury, as spirits, beer, tobacco, and cigars, it has been the practice to place a certain duty on the importation of these articles and a *corresponding or reduced duty on similar articles produced or manufactured in the country; and this is the sense in which excise duties have been understood in the Australian colonies, and in which the expression was intended to be used in the Constitution of the Commonwealth. It was never intended to take from the States those miscellaneous sources of revenue, improperly designated as 'excise licenses' in British legislation.*"⁴³

Quick and Garran return to this same theme in connection with commentary on section 92 of the Constitution. They stated:

In our notes to sec.90, the various meaning of 'excise' have been referred to: the first and original one being that in which it is restricted to duties on the manufacture and production of commodities in a State; whilst in another sense it has been extended to cover a host of additional imposts ... *The bulk of authority is in favour of the limited connotation of the term; and if that view be correct the States of the Commonwealth will retain almost the same powers of taxation as those of the American Union ... On the other hand, if 'excise' were held to be capable of the wider signification alluded to, including all kinds of inland licenses, then the States of the Commonwealth would be deprived of vast powers and sources of local revenue, not contemplated by the framers of the Constitution.*"⁴⁴

If Quick and Garran are correct, then the framers of the Constitution were at one with leading economists of the day in their understanding of the meaning of "duties of excise". This form of taxation did not have the "wider signification" that the High Court of Australia has chosen at times to give it. Exclusive Commonwealth power in this sphere did not mean the restriction of States' discretion to the extent that now pertains in Australia. Why has the Court moved so far from the intention of the Constitution?

Excise and Commercial Policy

In the 1890s, as the New South Wales revenue figures quoted above indicate, excise duty revenue was a very small item in the total. Clearly, the financial viability of the Federal-government-to-be did not require its monopolising returns from this minor source. Yet section 90 conferred this monopoly. The reason for this was not financial but rather was one of commercial policy perception. As Professor H.W. Arndt has pointed out:

The object of this section [sec.90], as the records of the Convention Debates show, was to assure to the Commonwealth Government firm control of tariff policy; and in particular, *to prevent State Governments with free-trade inclinations from obstructing Commonwealth protection policies by the imposition of 'countervailing' excise duties.* It was considered essential that the two correlative powers of customs and excise, properly so called—conceived as instruments of commercial policy, rather than as sources of revenue—should run together.⁴⁵

Hence, the excise power of section 90 had its rationale in the context of tariff policy and the desire to ensure its effectiveness should the Commonwealth choose to protect certain local industries by use of the customs power. The then prevailing understanding of the relationship of customs and excise in this respect was outlined in *Palgrave's Dictionary of Political Economy*, as follows:

An excise on similar commodities produced within the country should, *unless protection rather than revenue is aimed at* or unless there are insuperable practical difficulties, accompany the imposition of customs duties at the ports or frontier. Thus in England each customs duty has its countervailing excise duty if the article taxed is capable of production in this country, except indeed, as is the case with tobacco, its production here is forbidden. On the other hand, if it is intended to raise revenue by the taxation of commodities produced at home, a corresponding customs duty must be charged on the same commodity if imported.⁴⁶

Free trade orthodoxy demanded the use of countervailing excise duties when customs duties were imposed.⁴⁷ On the other hand, the proponents of protection could find their policy subverted by use of excise.

The obvious and specific policy intent of the Founding Fathers with respect to "duties of excise" in section 90 does not appear to have been pursued by the

High Court in its judgements. This, in the opinion of Professor Arndt, has blocked one avenue of potential progress towards a narrow and practicable definition of excise. He writes:

Had it not been for the reluctance of the Court to take notice of the intentions of the founders of the Constitution, the Court might have been able to develop a narrow definition of taxes liable to interfere with Commonwealth tariff policy, for instance, 'taxes on goods currently subject to tariffs or other import restrictions.' Such a definition would, it seems, have been quite practicable. It would certainly have had the advantage of preventing the unforeseen restrictive effect of s.90 on State taxing powers.⁴⁸

It would appear then, that if the Court had undertaken to interpret "duties of excise" in the policy context which shaped section 90, the Court would have been able to remain truer to the limited meaning of excise as a revenue category which the Constitution intended. There would have been less scope, for example, to identify "excise duties" with "indirect taxes", a tendency which began with the judgement in the *Petrol Case* of 1926 despite the fact that the Constitution (for good reasons, as noted above) avoided use of the direct *versus* indirect dichotomy.⁴⁹

Professor Lane has observed that "the ebb and flow in s.90 law, as in s.92 law, is related to the substance v. form antithesis, the practical operation v. legal criterion antithesis, or the liberal v. literal antithesis."⁵⁰ Yet, these antitheses may have been less sharp (and the ebb and flow less disruptive in economic term) if the Court had adhered to the substance and form of the Constitution. The *substance* was that, to paraphrase Professor Arndt, duties of excise are commodity taxes that interfere with Commonwealth tariff policy. The *form* was that, given the clear late nineteenth century understanding, duties of excise are taxes levied on domestically produced commodities at some point before those commodities are sold. Hence, any tax on domestically produced commodities at some point before those commodities are sold which interferes with Commonwealth tariff policy is a tax forbidden to the States under section 90. Otherwise, the States are free in term of that section as it relates to the term "excise". Quite clearly, the States are free to impose both licence fees and sales taxes, in the normal course of events.

Footnotes

1. Introduction to Mill, J.S. 1970. *Principles of Political Economy* (1848), Books IV and V. Penguin, Harmondsworth, p.11.
2. Prest, A.R. 1960. *Public Finance in Theory and Practice*. Weidenfeld and Nicolson, London, p. 14,
3. Bristow, J.A. 1987. "Charles Francis Bastable", in John Eatwell et al., eds, *The New Palgrave*, Vol. I. Macmillan, London, p. 203.
4. Cf. A.R. Prest, *ibid*. Indicative of the status of Bastable's book is the imprint on the copy which I have to hand. The imprint reads: "Commonwealth of Australia, Accounts Branch , High Commissioner's Office, London."
5. For further background, see de Viti de Marco, A. 1936. *First Principles of Public Finance*. Cape, London, pp.19-30.
6. *Economica*, August 1934, p. 364.
7. Mill, J.S., *op. cit.*, p. 175. Italics added.
8. *Ibid.*, p. 190. Italics added.
9. Higgs, H., ed. 1963. *Palgrave's Dictionary of Political Economy*, Vol. I, 1894-97, revised 1925-26, reprinted Kelley, New York, p. 787. Italics added.
10. *Ibid*.
11. For detail, see Smith, G. 1980. *Something to Declare: 1000 years of Customs and Excise*. Harrap, London, p. 110.
12. *Ibid.*, p. 120.
13. Bastable, C.F. 1903. *Public Finance* (1892) Macmillan, London, p. 280. Italics added.
14. *Ibid.*, p. 498.

15. Ibid., p. 354.
16. Mill, J.S., op. cit., p. 175. Italics added.
17. Ibid., p. 190.
18. Bastable, C.F., op. cit., p. 498. Italics added.
19. Ibid., p. 548. Italics added.
20. de Viti, op. cit., pp. 317-18. Italics added.
21. Ibid., p. 320. Italics added.
22. Bastable, C.F., op. cit., p. 271. Italics added.
23. Ibid., p. 348.
24. Ibid., p. 272.
25. Sidgwick, H. 1883. *The Principles of Political Economy*. Macmillan, London, p. 567.
26. Ibid.
27. Higgs, H., op. cit., Vol. II, p. 388.
28. Ely, R.T. 1888. *Taxation in American States and Cities*. Crowell, New York, pp 76-7.
29. Seligman, E.R.A. 1899. *The Shifting and Incidence of Taxation*, p. 311.
30. Lumb, R.D. and Ryan, K.W. 1981. *The Constitution of the Commonwealth of Australia, Annotated*. Butterworths, Sydney, pp. 317-18.
31. Ibid.
32. From Cooper, E.J. 1984. *Customs and Excise Law*. Legal Books, Sydney, p. 29.
33. Ibid.

34. Lumb R.D. and Ryan K.W., op. cit., p. 318.
35. Ibid., p.319.
36. Ibid.
37. From Cooper E.J., op. cit., p. 30.
38. From Lumb, R.D. and Ryan K.W., op. cit., p. 320.
39. Saunders C. et al. 1982. *Current Constitutional Problems in Australia*. Centre for Research on Federal Financial Institutions, Canberra, p. 41.
40. Lumb, R.D. and Ryan, K.W., op. cit., p. 320.
41. Saunders C. et al., loc. cit.
42. Coghlan, T.A. 1895. *A Statistical Survey of New South Wales, 1893-4*. Government Printer, Sydney, p. 299.
43. Quick J. and Garran R.R. 1976. *The Annotated Constitution of the Australian Commonwealth* (1901). Legal Books, Sydney, p. 837. Italics added.
44. Ibid., pp. 854-5. Italics added. Consistent with this view is the decision in *Peterswald v Bartley* (1904) 1 CLR 497. Concerning that decision Professor Lane comments: "The Founding Fathers, now on the bench in *Peterswald*, might be allowed to have a better idea of a s.90 excise duty than later Justices". (Lane, P.H. 1979. *The Australian Federal System*. Law Book Company, p. 720).
45. Arndt, H.W. 1952. "Judicial Review under Section 90 of the Constitution: an Economist's View", *The Australian Law Journal*, 25: 667. Italics added. Cf. Quick J. and Garran R.R., op. cit., p. 837.
46. Higgs H., op. cit., Vol. III, p. 522. Italics added. See also Vol. I, p. 443.
47. "Free trade meant the absence of tariff protection, and a revenue tariff could be a free trade tariff provided either that the imports taxed were not, and could not, be produced in the country concerned, or that equal excise duties were imposed on similar goods produced there. This point is well illustrated in a widely-read contemporary *History of the Free Trade Movement in England*, written for general readers." J.A. La Nauze, "A Little Bit of

Lawyers' Language: the History of 'Absolutely Free', 1890-1900", in Martin, A.W., ed. 1969. *Essays in Australian Federation*. Melbourne University Press, Melbourne, p. 76. The work referred to was written by Augustus Mongredien, and published in London in 1881.

48. Arndt, H.W., op. cit., p. 677. Italics added. See also p. 673.
49. The case in question is *Commonwealth and Commonwealth Oil Refineries Ltd v South Australia*, (1926) 38 CLR 408.
50. Lane, P.H., op. cit., p. 722.