

Taxation

Section 51(ii) power to make laws **with respect to:**

“Taxation; but so as not to discriminate between States or parts of States.”

Taxation power is a concurrent power shared by states and

Cth, except for two types of taxes: **(s 90)**

- Excise duties;
- Customs duties

Is it a tax?

Positive indicia

Matthews and Chicory Marketing Board:

- Compulsory exaction of money;
- By the public authority;
- For public purposes.

Air Caledonie: Not all three are essential attributes.

Compulsory levy

- No choice, but to pay is sufficient: **Vic v Cth**
- Even if there is a technical choice, it will still constitute a compulsory levy: **Homebush Flour Mills**

Public authority and public purposes

Australian Tape v Cth: Cth imposed a blank tape royalty on vendors of blank tapes who paid the royalties to a collecting society who distributed them to the copyright owners.

Held: it was a solution to a complex problem of public importance and was of necessity a public purpose.

s 81 Constitution - All revenues or moneys received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth...”

Negative Indicia

Even if a charge has all three positive attributes, it may still not be a tax if it is:

- A payment/fee for services rendered, including fees for privileges and statutory licenses
- A penalty
- An arbitrary tax

I. A payment/fee for services rendered is not a tax

Air Caledonie: It needs to be ‘a charge exacted for particular identified services provided or rendered individually to, or at the request or direction of, the particular person required to make the payment.’

- Fee charged for people coming into Australia (non-citizens and citizens alike) and it was collected by the airline. Held to be a tax as citizens have the right to enter Australia and it was not a privilege. If the levy is only imposed on non-citizens it may constitute a payment for services rendered.
- The court said that even though it is unconstitutional for a taxation legislation to include any other head of powers other than the tax power (it was a section amended in the Migration Act), they were going to interpret the constitution in such a manner that when a legislation includes something other than tax but only in the amending act/section then it will only be the amending act/section that is invalid.

Harper v Vic (egg case): The government charged a fee for eggs to be graded, tested and marked by a government agency (which was compulsory). Held not to be tax as it was a fee for services rendered. **Note:** Victoria, as the state government, cannot enforce taxes on goods (s 90), so this legislation is valid.

Parton v Milk Board: Vic government charged dairy distributors to fund a government agency that promotes milk consumption. Held: no particular service for the dairy distributors provided; was imposed for public purposes>constitutes tax>state government has no power to tax on goods (s 90)>legislation invalid

Northern Suburbs v Cth: CTH Training Guarantee Act imposed a levy, which was intended to be used by states to provide training programs for those employers who had paid the levy. HC held the terms of legislation did not ‘establish any sufficient relationship’ between the fee and the service, therefore not a fee for service, and a tax.

- Fees for privileges and statutory licenses?

General: if the fees are not reasonably related to the services or privilege or the amount is burdensome, then likely to be a tax.

Harper v Minister for Sea Fisheries: HC held licence fee for the right to take abalone was not a tax, but a fee for the acquisition of ‘a right akin to property’ as abalone was considered finite resources.

However, said must be discernible relationship between fee and privilege, otherwise it will be tax.

Hematite Petroleum Pty Ltd v Victoria: Fee for a licence to operate an oil pipeline held to be a tax because it was an ‘enormous’ impost on the production of oil. Held fee must be ‘reasonably related’ to service/privilege.

Ha v New South Wales: HC held revenue from state tobacco franchise licence fees far exceeded amount spent on regulating the tobacco industry. The fees were not reasonably and appropriately adapted to a permissible regulatory purpose.

2. A penalty is not a tax

In order to be characterised as a penalty, there must have been a failure to comply with an antecedent obligation.

Re Dymond: Section 46 of Sales Tax Assessment Act provided that any person who failed to provide a proper sales tax return would be liable to pay additional tax.

Court said additional ‘tax’ was a penalty and not a tax because it was “directly punitive, and only indirectly fiscal”

3. A tax must not be arbitrary

DFCT v Truhold Benefit: Tax can only be imposed by reference to ascertainable criteria with a sufficient general application, not an administrative decision based on individual preference unrelated to any test laid down by the legislation.

MacCormick v FCT: Held a conclusive certificate of the CT be invalid as an “incontestable tax”.

Consequences		
	COMMONWEALTH	STATE
If the fee is not a tax	Need to find another head of power to support the legislation	PWGG – plenary power (Union Steamship). Just make sure hasn’t breached other restrictions.
If the fee is a tax	Check if it breaches any of the restrictions relating to tax legislation. For example: s55; s51(ii) (discriminate); s99 (preference)	Check if it is a tax ON GOODS. If so, it will be an excise duty in breach of s 90.

Restrictions

1. s 51(ii): Taxation; but so as not to discriminate between States or parts of States.

2. s 99: ‘The Cth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.’

A preference = discrimination + benefit; Elliott v Cth

3. s 114: Cth and States cannot tax each other’s property

4. s 88: customs duties must be uniform throughout the Cth.

5. s 55: “Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.”

s 90

s 90 - States and territories have no taxation power on:

1. Excise duties (taxes on goods, GST)
2. Customs duties

Structure

1. **State laws prima facie valid** ... Peace, welfare and good government (**Union Steamship**)

2. But does the law breach section 90?

(a) Is it a tax?

- Positive indicia
- Negative indicia

(b) If so, is the tax on goods?

- A substance test: **Hematite Petroleum v Victoria; Capital Duplicators v ACT**

- Excise duties include:

- ✚ A tax in respect of goods at any step in the production or distribution to the point of consumption: **Capital Duplicators v ACT**
- ✚ An inland tax on a step in production, manufacture, sale or distribution of goods’: **Ha v NSW**

Case authorities

The court seems to allow exceptions on state government’s levy on tobacco and alcohol: **Dennis Hotels; Dickenson’s Arcade**

Dennis Hotels

- *Licensing Act 1958 (Victoria)* prohibited sale of liquor without license. Two fees in dispute
- Annual License fees calculated on the volume of liquor sold in previous year (6%) – held not to be an

excise because fee did not relate to the same year in which licence was held (4-3)

- Temporary licence fee calculated on sales during period licence held – held to be invalid as an excise fee

Dickenson's Arcade

- *Tobacco Act 1972 (Tasmania)* imposed tax on consumption of tobacco calculated on retail value, and collected at time of purchase by consumer. It also imposed a licence fees calculated on value of tobacco sold by licensee in last 6 months.
- Held – licence fee was valid (based on decision in *Dennis Hotels*), but the way in which the tax was collected turned the tax into an excise duty. So, licence fee valid, tax invalid excise.

Gosford Meats

- Fee calculated on basis of animals slaughtered in previous year invalid as an excise.
- The court held that the doctrine of *Dennis Hotels* does not extend to a general principle that can be applied to a tax made payable, in the form of a licence fee, by a manufacturer or producer of goods.

Capital Duplicators v ACT

- Capital Duplicators sought declaration that licence fees were invalid duty of excise, contrary to section

90. License fee calculated by reference to value of videos supplied during period of licence.

- **HC held:** licence fee was an excise duty, and therefore invalid under s90. Majority said was an excise as not merely regulatory, and the size of the fee exceeds the cost of the scheme. Said *Dennis Hotels* only applies to alcohol and tobacco.