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I am indebted to my supervisor Professor Leslie Zines and to my colleague Geoffrey Lindell for rigorous criticism and for patient and wise counsel.

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Dedicated to spending more time in the future with someone who is 5'4", aggressive, self-assertive, stubborn and female – my wife Dolores.
Sir Garfield Barwick and the Commonwealth Constitution were closely associated for some forty years. This thesis examines Barwick's contribution, as counsel and as Chief Justice of the High Court, to the exegesis of the Constitution.

The thesis commences by outlining the doctrinal basis for the High Court's position as interpreter of the Commonwealth Constitution and for its place in the distribution of governmental power. Then Barwick's involvement in the major constitutional issues of Federal Parliament, Commonwealth legislative power, Commonwealth spending power, intergovernmental immunity, section 90's denial of power to the States to levy excise duties and s92's declaration of freedom for inter-State trade is examined in depth.
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INTRODUCTION
INTRODUCTION

The Commonwealth Constitution was enacted as section 9 of the Commonwealth of Australia Constitution Act, an Act of the Imperial Parliament. The problems of the Commonwealth Constitution are therefore, problems of statutory interpretation and application. The Constitution is of course an unusual statute. It is expressed in general and imprecise language, it is difficult to amend and it has as its subject matter, the division of governmental power within Australia.

The Constitution's generality and imprecision allow, even demand that judicial choice be made in selecting from a range of possible constructions and/or implications. The difficulty of amending the Constitution means that the main source of change in constitutional law is change in the Judiciary's interpretation and application of the Constitution. The governmental subject matter of the Constitution means that beneath the constructional issues are powerful undercurrents. Principles and perceptions of national union and need, State autonomy, Parliamentary sovereignty, responsible government, democracy, separation of powers, constitutionality, stare decisis and individual liberty tug in their various directions.¹ The undercurrents inherent in the fact that the document deals with government become a positive turmoil when one adds to them the undercurrents inherent in the analytical frameworks, philosophies, values and idiosyncracies of the human beings, the judges, who decide what the Constitution means for the purposes of settling a dispute between specific parties about specific government action.

The Constitution of the Commonwealth came into operation in 1901. Garfield Edward John Barwick was born in 1903. Unlike the Commonwealth, however, Barwick did not spring fully armed and of full stature from the brain of his begetters.² There were about forty years of precedents in the reports before Barwick was of sufficient

¹ One of the most lucid discussions of the nature of the problem of interpreting the Constitution is provided by LJM Cooray in the first 16 pages of his book, Convention, The Australian Constitution and the Future.
² Apologies to Sir Owen Dixon. See p.191.
stature as a barrister to be involved in constitutional litigation. The first reported case I can discover involving Barwick in a constitutional case in the High Court is the 1938 case of *R v Federal Court of Bankruptcy; Ex p Lowenstein*.¹ He does not seem to have had another such appearance until the later years of the second world war.² When he took silk in 1941 at the age of 38 his involvement in constitutional law was only just beginning. From the middle of the 1940's, however, until the end of the 1950's when he entered Federal Parliament as a Liberal member of the coalition government, Barwick was involved as counsel in almost every High Court and Privy Council case raising a significant constitutional issue.³ Barwick was Commonwealth Attorney-General from 1961 until his appointment to succeed Sir Owen Dixon as Chief Justice of the High Court in 1964. Barwick was Chief Justice from 1964 to 1981, a record period for Chief Justice of the High Court. In those different capacities then, Barwick was closely associated with the issues of constitutional interpretation and application, from the end of World War II to the start of the 1980's, a period of almost forty years covering half the life of the federation.

It is the purpose of this thesis to examine Sir Garfield Barwick's approach to significant constitutional issues. I examine Barwick's approach both as counsel and judge but acknowledge immediately that the submissions of counsel unlike the judgments of a judge, are not necessarily expressions of the opinion of their formulator. (For reasons of time and space I do not examine Barwick's years as Attorney-General).

¹ (1938) 59 CLR 556. Discussed below pp.30ff.
² Reid v Sinderberry (1944) 68 CLR 504.
³ If one pages through the Commonwealth Law Reports of the 1950's, one will see that Barwick was engaged in many other important cases as well.
At one level the thesis will describe Barwick's solutions for specific constitutional issues and will relate those solutions to alternative solutions. At another level I will seek to identify dominant themes in Barwick's approach. The task of identifying the themes of any judge's approach to the Constitution is difficult enough. The task of identifying the essence of the approach of Sir Garfield Barwick is made more difficult by the fact that he regularly asserted that all he ever took into account as Chief Justice when deciding a constitutional case was the text of the Constitution.¹

Shortly before his retirement from the Court, Barwick CJ put his position uncompromisingly when he wrote a review of LR Zines', The High Court and the Constitution for the University of New South Wales Law Journal.² Barwick CJ took issue with Zines' fairly mild proposition that High Court constitutional decisions are affected by unacknowledged values of High Court Justices. Barwick CJ wrote "This assertion should not go unchallenged. I do not think that members of the Court would accept that the expressed reasons for judgment were not the reasons actually leading to the result or that any case was decided on any undisclosed ground, and particularly on any undisclosed social-economic ground of the kind adumbrated by the Professor."³ Developing this position further Barwick CJ sought to deny that there was any role for judicial choice. "Thus, it is the Constitution itself which has decided the extent and content of State power. That is not a question left to the decision of the Court, though of necessity the Court decision on the extent of a Commonwealth power may result in the States having more or less power than had theretofore been thought."³ (Barwick CJ made no attempt to reconcile this

¹ Contrast the relative openness, as Justices of the High Court, of HV Evatt (LR Zines, "Mr Justice Evatt and the Constitution" (1969) 3 FL Rev 153) and of LK Murphy (P Bickovskii, "No Deliberate Innovators: Mr Justice Murphy and the Australian Constitution" (1977) 8 FL Rev 460.


³ Id. 133. Speaking on the occasion of his retirement 11 February 1981 Barwick repeated these views commenting inter alia: "There is no room for the Court to change the constitution" and "the truth is [the judge deciding the extent of Commonwealth power] has no choice."
notion of the Constitution as having a fixed objective meaning with
the fact upon which he also commented that there was a "comparative
rarity of a decision of the Court either grounded on a course of
reasoning unanimously expressed or on a course of reasoning common to
a majority of participating Justices, but individually
expressed").

Statements to the effect that the Constitution has a fixed
objective meaning were made by Sir Garfield with such frequency and
earnestness that one can almost accept that, for him, the Constitution
was, despite its generality and its government subject matter, on the
same level as a Dog Act. At other times Barwick CJ seemed to
acknowledge that High Court judges are not just passive conduits. On
6 April 1979 I attended a luncheon addressed by Barwick CJ. On
that occasion Barwick CJ asserted that when reaching its decisions the
High Court was sensitive to their social implications. His Honour
then made reference to the current truck drivers' blockade of major
highways in protest against road taxes. According to Barwick CJ, no
court sensitive to the social implications of inserting the tax as a
cost into "the base of the structure" would have upheld the validity
of the tax. In a more mystical mood, Barwick is reported to have
commented in 1959 when Commonwealth Attorney-General that even though
there was no crude political content to important legal decisions,
such decisions were affected by the juristic climate which was itself
affected by the political climate. In 1979 Barwick CJ spoke of the
"advantage in the constitutional work of the Court of political


2 Id. 133. Consistently with this view that the law has a fixed
objective content, Barwick CJ argued for appointments to judicial
office to be brought under the influence if not control, of
lawyers and others "better" able to assess suitability for
judicial office than a Minister of State. "The State of the
Australian Judicature" (1977) 51 ALJ 480, 494.

3 The luncheon organized by the Australian National University
(Student) Law Society and held at University House Canberra was
attended by a large number of people.

4 The Times "People to watch" 9 November 1959.
experience”¹ and suggested that Barton J had been a great judge because of his recognition of the value of inter-State free trade and because of his ability to express that recognition in a forceful and logical judgment.² In 1980 Barwick CJ argued that part of the genuis of the common law approach to the interpretation of statutes (including apparently, written Constitutions) was that the judiciary could “make law” by interpreting legislative language on the assumption that the legislature would only intend to make rules acceptable to the community's sense of fairness and justice.³

I will try to refrain from judging as good or bad according to my prejudices Barwick's responses to specific issues and (in so far as they can be identified) Barwick's dominant themes. I will, however, evaluate Barwick's reasoning and doctrine against criteria of coherency and consistency.

The materials upon which I concentrate are the reported judgments and the reports of argument in the High Court and Privy Council in constitutional cases. Again for reasons of time and space I do not pursue material such as extra-curial addresses, Hansard reports and Ministerial statements.

I organize the thesis around constitutional issues with the result that the three levels of my examination of Barwick - analysing responses to specific issues, identifying themes and evaluating - are run together.

I start with the constitutional relationship of the Courts to Parliament and the Executive. In Chapter I under the topic of "Constitutionality" I discuss the decision in the Communist Party

¹ His Honour went on "... when over laid on high professional knowledge and experience." Foreword in republication of J Reynolds, Edmund Barton v, ix.

² Id. viii-ix.

a loss for Barwick as counsel, and a vigorous reaffirmation of the High Court's position as guardian of the Constitution. The doctrine of Separation of Powers is outlined in Chapter II for another aspect of the constitutional relationship of the Courts to Parliament and the Executive.

Chapter III turns to the constitutional law about the Federal Parliament itself. The cases dealing with that topic continue to have the principle of constitutionality to the fore. Arguments drawn from the concept of federalism however, become more important. The "federalism" arguments here are concerned with the position of the States' house, the Senate, within the Commonwealth Parliament.

Federalism, in the sense of the distribution of governmental power between the Commonwealth and the States, is the link to Chapter IV's group of topics where I consider the pre-Engineers' Case doctrines of reserved powers and intergovernmental immunities, the Engineers' Case explosion of these doctrines and the post-Engineers' Case development of law and principle about the extent of Commonwealth legislative power and about intergovernmental immunities.

In the final two substantive Chapters, I examine in detail two sections, section 90 and section 92, which prohibit government action. These two sections were considered by the founders to be essential to the establishment and survival of the federated nation. These sections have raised some of the most difficult and complex issues of constitutional law.

Important topics which I am not able to include within the prescribed word length are federal jurisdiction under Chapter III of the Constitution and the guarantee of just terms in section 51 (xxxi) and the frequently litigated provision, s51(xxxv). I also make no attempt to discuss Barwick's position on broader "constitutional" issues such as stare decisis and the role of the Privy Council in the Australian judicial hierarchy.

1 (1951) 83 CLR 1.
Chapter I

CONSTITUTIONALITY
Chapter I: Constitutionality

It is an axiom of the Australian system of government that the Commonwealth Constitution binds the Commonwealth and State governments and defines and limits their respective spheres of authority.

The statute which is the Constitution is an extension of, and intended to operate in, a context of British principles of government. The Constitution is also, however, intended to adopt some features and principles of the American Federal Constitution. The British principle of sovereignty of the Imperial Parliament provides the ultimate or at least the original rationale for the authority of the Constitution. The British background also delivers the axiom that it is for the Courts to interpret and declare the meaning of statutes and the Commonwealth Constitution, enacted by the Imperial Parliament as s9 of the Commonwealth of Australia Constitution Act, is a statutory provision. The American federal tradition also allocates the function of interpreting the Constitution to the Judiciary and according to Galligan it was that background of American experience which was the main reason, historically, for the Australian High Court acquiring its analogous role. Because of the principle of constitutionality, the principle that government action in Australia is subject to the Constitution, governments are in an important sense, subject to the Courts especially the High Court and, formerly, the Privy Council.

1 RCL Moffat "Philosophical Foundations of the Australian Constitutional Tradition" (1965) 5 SLR 59.
2 GJ Lindell explores the question whether the High Court has a duty as well as a right to enforce the Constitution in "Duty to Exercise Judicial Review" at pp.150 ff in Zines (ed), Commentaries on the Constitution.
3 63 &64 Victoria c12.
Another important principle with both British and American experiences to provide potential models for the Commonwealth Constitution is the principle of the separation of the powers of the legislature, executive and judiciary. At one level, that principle has carried through to provide constitutional limitations on government action. At that level the doctrine reinforces the independent status of the Courts and reemphasises the subjection of legislatures and executives to the Courts. (That level of the doctrine is outlined in Chapter II). At another level, however, British assumptions attributing certain functions to one branch of government rather than another, limit the reviewing role of the Courts. First, because it is axiomatic that the Courts are confined to reviewing the validity of government action and not the merits of government action which are for the legislature and the executive, and, thus basally, for the people to whom the legislature and the executive are answerable. Secondly, because when the Courts are interpreting and declaring the meaning of the Constitution that process may be affected by the notion that some inquiries and decisions are inappropriate for Courts and/or are only appropriate for legislatures and executives.

The interaction and conflict between the principle of constitutionality and the looser notions of the "appropriate" relationship of the Courts to Parliament and the Executive can be seen in the Communist Party Case which involved Barwick as counsel.

The Communist Party Case

In this case Barwick KC had one of his few briefs as a defender of government action. The Commonwealth Act in issue, the Communist Party Dissolution Act 1950 had been enacted by the recently installed conservative coalition. The Act commenced with a long series of recitals.

1 Australian Communist Party v The Commonwealth (1950) 83 CLR 1.
The first group of recitals noted the existence of three sources of Commonwealth power expressly granted by the Constitution;

(i) the power in s 51(vi) to make laws with respect to the defence of the Commonwealth;

(ii) the executive power of the Commonwealth declared by s 61 to be vested in the Queen and exercisable by the Governor-General and further declared by s 61 to extend to the execution and maintenance of the Constitution and of the laws of the Commonwealth;

(iii) the power in s 51(xxxix) to make laws with respect to matters incidental to the execution of any legislative or executive power of the Commonwealth.

The rest of the recitals declared the existence of certain facts. It was declared inter alia that the Australian Communist Party, was involved in espionage, sabotage, treason and subversion and in activities designed to lead to revolution against the established system of government in Australia and against the established systems of government in other countries. The recitals further declared that there were some industries vital to the security and defence of Australia. Six industries were identified as being examples of vital industries. The Australian Communist Party its officers and members were declared to be engaged in activities designed to cause disruption of work in vital industries. The recitals concluded by declaring that it was necessary for the security and defence of Australia and for the execution and maintenance of the Constitution and of the laws of the Commonwealth, that action be taken along the lines of that set out in the operative provisions of the legislation.

The legislation in its main operative provisions;
(a) declared unlawful and dissolved the Australian Communist Party (s4);

(b) made liable to being declared by the Governor-General to be unlawful and to being dissolved after such declaration, bodies of persons having a connection with the Australian Communist Party, communism or communists (ss 5 & 6);

(c) made any person, who was either a member of the Australian Communist Party or was a communist, liable to being declared to be a person subject to certain provisions of the Act (s 9) with consequential exclusion of that person from having contracts for reward with the Commonwealth or its instrumentalities and from holding office with the Commonwealth or its instrumentalities or with any industrial organization considered by the Governor-General to have a substantial number of its members engaged either in one of the six industries designated by the Act as being vital or in any other industry which the Governor-General considered to be vital to the security and defence of Australia. (ss 10 & 14).

The Governor-General could only make a s5 declaration about a body of persons or a s9 declaration about an individual if he held the opinion - in relation to a body of persons - that the continued association of the body of persons would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth (s5(2)) - or, in relation to an individual - that the person was engaged in or was likely to engage in activities prejudicial to the security and defence of the Commonwealth, or to the execution and maintenance of the Constitution or of the laws of the Commonwealth (s9(2)). The Executive Council could only advise the Governor-General to make a s5 or a s9 declaration if the material upon which the advice was founded had first been considered by a committee "consisting of the Solicitor-General, the Secretary to the Department of Defence, the
Director-General of Security, and two other persons appointed by the Governor-General" (ss5(3) and 9(3)).

This outline of the legislation demonstrates, albeit in tortured and ungainly language, how the recitals of power, the recitals of facts and the subject matters for the Governor-General's satisfaction were all drafted to create a correlation in the language describing the Commonwealth powers and the language associated with the operative provisions.

The main basis for challenge to the legislation appears in this passage from the report of the submissions of HV Evatt KC, representing unions in the case.

The solution of the case depends upon an undeviating application of some of the fundamental principles of Federalism in Australia, as authoritatively laid down by the courts. The Parliament of the Commonwealth is empowered to make laws only with respect to specified subject matters, and it is therefore constitutionally impossible either for Parliament itself or for the executive Government to enlarge in any respect whatever, and whether directly or indirectly, the scope or ambit of Commonwealth legislative authority.¹

This was an assertion of the principle of constitutionality. Its application led Evatt KC to these submissions about the specific provisions of the legislation.

First, the operation of the direct legislative outlawing and dissolution of the Australian Communist Party (s4) was not dependent on the existence of any fact or matter which provided a connection of the legislation with any Commonwealth head of power.² The recitals attributing certain behaviour to the Australian Communist Party "irrespective of the true facts" could not provide the connection with

1  Id. 45.
2  Id. 49.
heads of power.\(^1\) The Parliament had no authority to create "constitutional power which would not otherwise exist". The Parliament could not "trespass beyond the area of its specified subject matters...."\(^2\)

As for the provisions which were dependent on the Governor-General forming opinions about subject matters relevant to Commonwealth heads of power and making declarations about individuals and bodies of persons (ss5, 6, 9 and 10), the offence here, in the submission of Evatt KC, was that

... all questions of fact and/or law as to which the Governor-General becomes 'satisfied' are remitted for the final decision to the Governor-General himself. ... It is evident that this 'satisfaction' of the Governor-General is not examinable by any court for the purpose of determining whether in fact and/or law the body or the person has been concerned in any activities, whether they are related to defence or the maintenance of the Constitution or whether they are injurious to the defence of the country or the maintenance of the Constitution or of the laws of the Commonwealth.\(^3\)

Despite the references in the operative sections to matters relevant to Commonwealth heads of power, the sections were not laws with respect to these matters, they were rather laws with respect to Executive opinion on those matters.\(^4\)

These arguments were drawn directly from the principle of constitutionality. Parallel submissions were also derived from the doctrine of separation of powers.\(^5\) Sections 5 and 9, it was submitted, amounted to attempts by the Parliament to "vest the Governor-General with the power of determining matters arising under

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1 \(^{\text{Id. 50.}}\)
2 \(^{\text{Id. 50.}}\)
3 \(^{\text{Id. 55.}}\)
4 \(^{\text{Id. 57.}}\)
5 \(^{\text{Id. 35-36 per FW Paterson. Also id. 84 per M Ashkanasy KC and 87 per Webb KC.}}\)
13.

the constitution and involving its interpretation. The doctrine of separation of powers receives some discussion in a separate section below and will not be pursued here. Nor will other subsidiary arguments. The discussion will concentrate on the principle of constitutionality which turned out to be determinative of the case.

Barwick KC attempted to meet the arguments drawn from the principle of constitutionality by building on the frequent statements in the cases emphasising the wide discretion which must be left to the Parliament and Executive in defence matters. Barwick KC argued that the subject matter of "defence" involved a notion that certain issues were matters only for Parliament and the Executive to the exclusion of the Judiciary. Included within that group of issues, Barwick KC submitted, was the issue of whether or not the continued existence of a body of persons or the behaviour of an individual, was in fact prejudicial to the defence of the Commonwealth. The exclusion of the Judiciary followed from the fact that a decision would be affected by matters "peculiarly within the knowledge of the Executive". If it was within Parliament's power to delegate to the Executive such a decision (as it had done with ss 5 and 9), then it must be within Parliament's power to make such decisions itself (as it had done with s4). Barwick's final proposition - that Parliament must itself be able to do what it can authorise the Executive to do - did not sit

1 Id. 57 per HV Evatt KC. Also id. 84 per Ashkanasy KC and 89 per Webb KC.
2 Id. 23-24.
3 Id. 23.
4 Id. 24.
5 Id. 97.
6 Id. 98.
particularly well with his point that the Executive had special knowledge. The Executive is, of course, drawn from and answerable to the Parliament but it is not clear that it would be any easier to inform Parliament than it would be to inform the High Court, of the Executive's special knowledge.

Barwick KC was able to cite the cases of *Lloyd v Wallach*¹ and *Exp Walsh*² where the High Court allowed orders for detention for the duration of the war to be made against individuals where the sole connection with the defence of the Commonwealth seemed to be the formation of an unreviewable administrative opinion about the individual's loyalty or about the threat the individual presented to the defence of the Commonwealth. Neither of these cases was particularly satisfactory. The judgments in *Lloyd v Wallach* did not discuss the constitutional issues and the party who might have raised those issues did not participate in argument in the High Court. In *Exp Walsh*, an attempt to have an order for detention reviewed before the High Court failed at the point of making an application for special leave. The application was rejected on the basis that *Lloyd v Wallach* constituted a binding precedent. Again the latent constitutional issues seem to have gone by default. Despite these aspects, the decisions were consistent with Barwick KC's submission about the content of the defence power. (Barwick also argued that there was an analogous arm of the legislative power associated with the execution and maintenance of the Constitution and of the laws of the Commonwealth and that, therefore, the existence of a threat to the execution and maintenance of the Constitution and of the laws of the Commonwealth were matters for the Executive and the Parliament.)³

¹ (1915) 20 CLR 299.
² [1942] ALR 359.
³ (1951) 83 CLR 1, 26, 105.
Barwick KC presented this line of argument as being a matter of the inherent content of the subject matters of power, that is, as being a matter of determining the constitutional limits on Commonwealth action rather than as being a repudiation of, or exception to, the principle of constitutionality. The distinction seemed to be little more than semantic when it became:

A law, the criterion for which is a matter for defence, made by Parliament is a defence law. If Parliament makes the opinion of the Governor-General as to a matter of defence the criterion of its operation then that equally is a law with respect to defence, as Parliament has full power over the subject matter. The nature of the provision as to the subject matter which Parliament makes is for Parliament and not for the Court.¹

The central provisions of the legislation were held to be invalid by Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ. Only Latham CJ was in favour of upholding the main provisions of the legislation.

As reported, Barwick KC did not present his case particularly vigorously. It was left to the dissenting judge, Latham CJ to expand points which Barwick KC's submissions seemed merely to suggest. Latham CJ acknowledged the general principle "that the opinion of a Government or a Minister or a Parliament - on either fact of law - cannot provide any link between a law and a subject of legislative power"² but considered there was an exception founded in the necessity of allowing the Government a wide discretion to act without "a cloud of legal doubt" to meet threats to the Commonwealth.³ Latham CJ considered that the determination of who or what constituted a threat (to be met with action under s51(vi)) was a matter for the Executive, which was answerable to the Parliament and thus to the

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¹ Id. 24.
² Id. 162.
³ Id. 164.
people,\textsuperscript{1} to the exclusion of the Courts. This exclusion of the
Courts arose, according to Latham CJ, from the nature of the material
to be used to make such a determination itself. Barwick KC had
referred in his submission to matters "peculiarly within the knowledge
of the Executive".\textsuperscript{2} Latham CJ, a former Commonwealth Attorney-
General, Minister for External Affairs and envoy to Japan,\textsuperscript{3}
commented that special knowledge available to the Executive could very
often not be produced in a court to determine an issue such as whether
or not another country constituted a threat to the Commonwealth.

The responsible authorities, in making up their minds upon these
matters, will act upon diplomatic reports, intelligence reports
from many countries, security reports, rumour, suspicion — upon
such information which is necessarily secret — and upon other
material which is highly relevant but which could not possibly be
proved or used in any way in accordance with legal rules of
evidence. No Government could produce such material in a court.
Much of it would be derived from friendly foreign chancelleries
and would necessarily be highly confidential. Reports from its
own representatives and officers would, in the interest, of public
safety, also necessarily be confidential, and the identity of the
security officers who made the reports could not be disclosed.
Publication of such reports might well bring about a situation of
aggravated danger which they were designed to prevent or
forestall.\textsuperscript{4}

It followed as a matter of necessity, according to Latham CJ, that the
decision of who or what constituted a threat to the Commonwealth, had
to be left to the Executive which had access to the relevant
information. There could, otherwise, be no effective defence.\textsuperscript{5}

\begin{flushleft}
\textsuperscript{1} Id. 143.
\textsuperscript{2} Id. 97.
\textsuperscript{3} Latham CJ's full title in the Japan posting was "Envoy
Extraordinary and Minister Plenipotentiary for the Commonwealth of
Australia in Japan". (1940) 14 ALJ 205.
\textsuperscript{4} (1951) 83 CLR 1, 144-145.
\textsuperscript{5} Id. 145.
\end{flushleft}
Furthermore the very nature of the decision of who or what constituted a threat was, according to Latham CJ, a matter of policy not a matter of fact. Policy decisions were for the Executive, Parliament and the people, not the courts.¹

Latham CJ agreed with the submission of Barwick KC² that the power derived from s51(vi) for the Executive and Parliament to identify the sources of external threat to the Commonwealth, had its analogy in a similar power in the Executive and Parliament to identify the internal enemy. Latham CJ considered that the defence power in s51(vi) included the power to identify, and defend against, internal as well as external enemies. Latham CJ also considered that the power to identify and deal with internal enemies might equally be drawn from "the power to make laws to protect the existence of constitutional government".³

The key to the matter was, for Latham CJ, that the powers involved were "essentially different" from other Commonwealth powers.

These powers are perhaps the most important powers entrusted to the Parliament of the Commonwealth. The continued existence of the community under the Constitution is a condition of the exercise of all other powers contained in the Constitution, whether executive, legislative or judicial. The preservation of the existence of the Commonwealth takes precedence over all other matters with which the Commonwealth is concerned.⁴

The majority judges all considered that neither the opinion of Parliament nor the opinion of the Executive about defence considerations or about considerations relevant to any other head of power put forward, could suffice to provide constitutional

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¹ Id. 142-143.
² Id. 105.
³ Id. 141-143.
⁴ Id. 141.
justification for the Communist Party Dissolution Act's action against associations and individuals. Fullagar J stated the essence of the matter thus:

The validity of a law or of an administrative act done under a law can not be made to depend on the opinion of the law-maker, or the person who is to do the act, that the law or the consequence of the act is within the constitutional power upon which the law in question itself depends for its validity. A power to make laws with respect to lighthouses does not authorize the making of a law with respect to anything which is, in the opinion of the lawmaker, a lighthouse. A power to make a proclamation carrying legal consequences with respect to a lighthouse is one thing: a power to make a similar proclamation with respect to anything which in the opinion of the Governor-General is a lighthouse is another thing.¹

The same principle was recognized in the other majority judgments and founded the conclusion of invalidity.²

The strongest aspect of Barwick KC's case had been the support he drew from Lloyd v Wallach and Exp Walsh. No member of the Court questioned the authority of those decisions. All members of the majority considered, however, that those decisions did not apply in the current international situation and would only apply in time of war or grave emergency.⁴

Dixon J recognized that the possibility in time of war or grave emergency, of action based upon opinion about individuals or bodies,
represented an exception to the principle of constitutionality. This exception had to be admitted as a matter of necessity.\(^1\) Dixon J quoted with approval\(^2\) this passage from the judgment of Williams J in the case of *Victorian Chamber of Manufactures v The Commonwealth*.\(^3\)

The paramount consideration is that the Commonwealth is undergoing the dangers of a world war, and that when a nation is in peril, applying the maxim *salus populi suprema lex*, the courts may concede to the Parliament and to the Executive which it controls a wide latitude to determine what legislation is required to protect the safety of the realm.

(It should be noted that even when the circumstances were such that *Lloyd v Wallach* would apply, the Court would not allow Government action against individuals to be completely immune from Court review for sufficiency of connection with power. Thus although in wartime the formation of an unreviewable opinion might be sufficient link with defence to support preventive detention, the formation of such an opinion might not justify other action against individuals or associations.)\(^4\)

The majority judges (one of whom, Dixon J, had also had experience of diplomatic affairs as Minister to the United States during World War II)\(^5\) did not see that the necessities of defence led to Latham CJ's conclusion of the exclusion of the judiciary for all time. The wartime exclusion of the judiciary which *Lloyd v Wallach* involved, was

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1. Id. 202.
2. Ibid.
3. (1943) 67 CLR 347, 400.
4. *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116. Compare the submissions of Barwick KC (1951) 83 CLR 1, 103; "... the Act is within the defence power ... because on the narrowest view of such cases as *Lloyd v Wallach* and *Exp Walsh* ... it makes provisions not inappropriate to such an emergency conditioned upon the opinion of the Executive". Also id. 227, 229 per Williams J; 282 per Kitto J.
5. (1942) 16 ALJ 34.
based on necessity and could only operate when there was in fact a necessity. For all of the majority judges the extent of the current threat to the Commonwealth was a matter of fact to be determined by the Court.¹

The majority judges either expressly rejected² the proposition that the power in s51(vi) went beyond defence against external enemies to defence against internal enemies, or impliedly rejected the proposition by discussing s51(vi) solely in terms of external threat. Some of the majority judges were also at variance with Latham CJ and Barwick KC when they took the view that the Commonwealth power to protect constitutional government from internal subversion was, unlike s51(vi), an incidental power and not likely to justify extreme measures such as Lloyd v Wallach allowed under s51(vi).³

In a submission in the alternative Barwick KC had conceded that the opinion of Parliament and the Executive might not suffice to link the legislation with the subject matter of power and that the legislation could be subjected to an objective test.⁴ Barwick KC pointed out, however, that all that the cases required was that the legislation could possibly aid defence and need not be shown to be in fact aiding defence.⁵ That objective test could readily be satisfied, in Barwick KC's submission, if the Court would take judicial notice of various general facts about the uneasy state of

¹ (1951) 83 CLR 1, 195 per Dixon J; 207-208 per McTiernan J; 222-225, 230 per Williams J; 244 per Webb J; 255 per Fullagar; and 276 per Kitto J.
² Id. 194 per Dixon J; 259 per Fullagar J.
³ Id. 192-194 per Dixon J; 261 per Fullagar J; 274-275 per Kitto J.
⁴ Especially id. 99.
⁵ Id. 24-25, 96.
international relations between Australia's allies and communist powers and of various specific facts about the likelihood of communists within Australia sympathizing with the aims and ambitions of communist powers and of the potential for espionage and industrial disruption to interfere with success in warfare. Barwick KC submitted that once the Court had taken judicial notice of these matters then the provisions of the legislation operating by reference to people being communists could be supported as being, laws with respect to the defence of the Commonwealth and/or (analogously) as being laws relevant to maintaining the Constitution and the laws of the Commonwealth, in the sense that the legislative measures taken could rationally be thought to be relevant to these concerns. Barwick KC further indicated that the Commonwealth would not be offering specific evidence to support its legislation.

As for the issue of the extent of the current external threat - the majority judges considered that the international circumstances, albeit disturbed, were in fact closer to peace than were the circumstances associated with the decision in Lloyd v Wallach.

It was implicit in the majority's answers to the questions around which the case was argued, that even if the Commonwealth had been ready to offer specific evidence, specific evidence could not have assisted in determining the external threat. Only Fullagar J offered an explanation of why it should be that specific evidence would not be relevant to that inquiry and he seemed to base that exclusion of evidence on the very points of admissibility and confidentiality to which Latham CJ had referred to indicate how unrealistic it was to think that the Court was in a position to assess the external threat.

1 Id. 21-22.
2 Id. 22-23, 102-104.
3 Id. 25, 103.
4 Id. 196 per Dixon J; 208-209 per McTiernan J; 223, 227 per Williams J (implicitly); 244-245 per Webb J; 267-268 per Fullagar J; 282 per Kitto J.
5 Id. 256.
McTiernan J gave some recognition to the special position of the Executive in such matters when he commented that he would have given great weight to "a formal statement made by the Executive Government of its appreciation of the international situation". Latham CJ had pointed out the difficulties for the Executive of carrying out the defence of the Commonwealth if it was required to put before the Court sensitive material about other nations. McTiernan J pointed out that the Executive could also be compromised by a High Court decision which implied that, for the purposes of constitutional action, a nation, against which no declaration of war had been made by the Executive, was an enemy.

All members of the majority were agreed that judicial notice about communism and communists did not reveal any basis to justify the legislation. Webb J considered that it was open to the Commonwealth to attempt to establish the constitutionality of its legislation dealing with communists by adducing evidence to prove the truth of the allegations which the recitals made about communists. It was the absence of any attempt by the Commonwealth to adduce such evidence which was, for Webb J the final determinant of invalidity.

Dixon, McTiernan, Williams, Fullagar and Kitto JJ considered that even if the Commonwealth had been willing to offer evidence, about communists and communism, it could not have established the validity of the legislation. These judges considered that legislation operating on people because of their beliefs rather than their actions would be beyond any Commonwealth power in peacetime. This conclusion that evidence about communists would be immaterial was

1 Id. 208.
2 Id. 209.
3 Id. 196-197 per Dixon J; 210 per McTiernan J; 226 per Williams J; 262 per Fullagar J; 277-278 per Kitto J.
4 Id. 242-248.
5 Id. 201 per Dixon J; 206 per McTiernan; 225 per Williams J; 266 per Fullagar J; 278 per Kitto J.
derived primarily from the notion that the legislation took measures which were "extreme", in the sense that the legislation affronted the underlying assumption of the rule of law by proscribing individuals instead of prescribing rules of action, in the sense that it intruded into the State domain by dealing with associations and their property and in the sense that it interfered with civil liberties. (Not all considerations were given the same emphasis by each of these majority judges). (Fullagar J also added that the recitals only made assertions of a general character not susceptible of proof by specific evidence.) Kitto J attempted to explain the exclusion of evidence by drawing a distinction between "the legal operation of the law" and "the practical results likely to follow in the train of its operation". (Apparently evidence showing that taking action against communists would curtail activities threatening constitutional government would be merely demonstrating the practical result not the legal operation.)

When Barwick KC had put his submissions in reply he had modified and, to an extent, merged his lines of argument, in so far as they related to ss 5 and 9. Sections 5 and 9 were preconditioned on the formation of Executive opinion. Barwick KC submitted that the Executive "satisfaction" involved was subject to administrative law remedies. Barwick KC argued that the administrative law remedies

1 Id. 193, 198, 201 per Dixon J; 206 per McTiernan J; 220, 226 per Williams J; 261, 266 per Fullagar J.
2 Id. 202-203 per Dixon J; 207, 209 per McTiernan J; 226 per Williams J.
3 Id. 195, 198 per Dixon J; 206-207 per McTiernan J; 227, 229 per Williams J.
4 Id. 267.
5 Id. 228.
6 I would have thought that whenever the criterion of power was the relevance of a law to achieving an effect that the likely practical effect of the law would have to be relevant. Compare the discussion of the Commonwealth controls of intra-State air navigation safety in Airlines of New South Wales Pty Ltd v New South Wales [No2] (1965) 113 CLR 54, discussed below pp139ff.
would allow a review of any particular decision to see whether the facts were such that the decision could be seen to be irrational or based on a misunderstanding of law. As Barwick KC pointed out, the Court had never required that legislation under the defence power be shown to be in fact aiding the defence of the Commonwealth. It was enough if there were reasonable grounds for the view that the legislation might aid the defence of the Commonwealth.¹ There was a correspondence in the administrative law and the constitutional law tests of validity. The availability of administrative law remedies to test exercises of the delegated authority therefore sufficiently linked to the head of power the legislation making the delegation.²

This late attempt by Barwick KC to save sections 5 and 9 by connecting administrative law remedies with constitutional law requirements, was defeated by the decision of Dixon, McTiernan, Williams, Fullagar and Kitto JJ³ that the formation by the Governor-General of an opinion (about the tendency of some association or individual to prejudice the defence of the Commonwealth or the execution and maintenance of the Constitution and laws made thereunder) was unexaminable. Only Webb J considered that "the satisfaction of the Governor-General under ss5(2) and 9(2) would be examinable to see whether in the particular case there is a real connection with the power".⁴

In a sense the fundamental point of the Communist Party Case—that the Constitution as interpreted by the High Court, is binding law—went by default. The argument of Barwick KC was that the special

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1 (1951) 83 CLR 1, 96.
2 Id. 100-102. Compare Reid v Sinderberry (1944) 68 CLR 504, 512 Latham CJ and McTiernan J. LR Zines "Executive Discretion and the Adequacy of Judicial Remedies to uphold the Constitution" (1971) 4 F L Rev 236.
3 (1951) 83 CLR 1, 178-180; 211; 221; 257-258; 279-280 respectively. Latham CJ considered that the Governor-General's satisfaction was unexaminable but that the delegation of authority was, for the reasons discussed above, valid nevertheless. Id. 161-162.
4 Id. 243. (Emphasis added)
problem of national security in its very nature and a fortiori in the current circumstances, justified on exception to the general principle. The fact that Barwick KC tried to set up an exception to the general principle and made no attempt to challenge the general principle itself, and the fact that, even in the face of widespread anti-communist feeling amongst the community, the Court by a majority of six to one refused to allow the exception, demonstrate just how entrenched is the general principle. No member of the Court in the Communist Party Case felt obliged to explore at any length the question of exactly why it is that the Constitution is binding law.¹ Fullagar J had most to say and this is what he said.

Such a law as the Communist Party Dissolution Act could clearly be passed by the Parliament of the United Kingdom or of any of the Australian States. It is only because the legislative power of the Commonwealth Parliament is limited by an instrument emanating from a superior authority that it arises in the case of the Commonwealth Parliament. If the great case of Marbury v Madison² had pronounced a different view, it might perhaps not arise even in the case of the Commonwealth Parliament; and there are those even to-day, who disapprove of the doctrine of Marbury v Madison, and who do not see why the courts, rather than the legislature itself, should have the function of finally deciding whether an Act of a legislature in a Federal system is or is not within power. But in our system the principle of Marbury v Madison is accepted as axiomatic, modified in varying degree in various cases (but never excluded) by the respect which the judicial organ must accord to opinions of the legislative and executive organs.³

The reference to "a superior authority" is presumably a reference to the Imperial Parliament. Notwithstanding the fact that the

¹ PH Lane "Judicial Review or Government by the High Court" (1966) 5 SLR 203 argues that nothing in the express wording of the Constitution establishes the High Court's role as the authoritative interpreter of the Constitution. GJ Lindell "Duty to Exercise Judicial Review" in LR Zines(ed), Commentaries on the Australian Constitution 150, 183-184 responds that express wording is not necessary in a system where it is the function of Courts to interpret laws and where a law, the Constitution, defines and limits government power.

² (1803) 1 Cr 137; 2 Law Ed 118.

³ (1951) 83 CLR 1, 262-263.
Commonwealth Parliament is exercising power derived at least originally from the will of the Imperial Parliament it might have been possible to construe Commonwealth authority in the light of the British background of unlimited Parliamentary sovereignty. (Indeed in the application to the Privy Council for leave to appeal to the Privy Council\(^1\) from the High Court decision in Baxter v The Commissioners of Taxation\(^2\) the transcript of proceedings reports the Earl of Halsbury as saying that he did not understand the suggestion that an Act of Parliament could be invalid because unconstitutional.) As Fullagar J pointed out, the fact that the United States Supreme Court had, in Marbury v Madison established the binding force of the United States Constitution was undoubtedly a significant factor in the establishment of the same proposition in the Australian federation.

The proposition of constitutionality is the foundation of the High Court's position of power and importance in Australian Government. This proposition underlies all the case law discussed in the remainder of this thesis.

The next topic - The Doctrine of Separation Powers - and the next one after that - Federal Parliament - fill out the main aspects of constitutional law which contribute to the determination of the relationship of the High Court to Parliament and the executive.

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1. (1907) 5 CLR 398.
2. (1907) 4 CLR 1087.
Chapter II

SEPARATION OF POWERS
Chapter II: Separation of Powers

Early in the life of the Constitution, the proposition was established that the doctrine of separation of powers - the notion that the legislative, executive and judicial arms of government should be kept separate from one another - provided a constitutional limitation to Commonwealth action. The doctrine reinforced decisions of the High Court\(^1\) and the Privy Council\(^2\) which invalidated attempts to vest judicial power in bodies which were not judicial bodies within the meaning of Chapter III of the Constitution.

In Dignan's case\(^3\) decided in 1931, Dixon J brought together the arguments for incorporating the doctrine into Australian constitutional law. Dixon J first asserted that the Constitution of the United States of America was meant to embody the doctrine of separation of powers as expounded by Montesquieu in his writings on the merits of the British system of government.\(^4\) Dixon J quoted\(^5\) this passage from the American Madison to indicate the importance of the principle. "No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty ... The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be

1 Waterside Workers' Federation of Australia v JW Alexander Ltd (1918) 25 CLR 434.
2 Shell Co of Australia Ltd v Federal Comissioner of Taxation (1930) 44 CLR 530.
3 Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan (1931) 46 CLR 737. As counsel Dixon had also formulated such arguments in the case of Roche v Kronheimer (1921) 29 CLR 329, 331-332.
4 (1931) 46 CLR 73, 89.
5 Id. 90.
pronounced the very definition of tyranny". Dixon J pointed out that the doctrine was recognized by the United States Supreme Court very early in the history of that Federation.¹

The fact that the Commonwealth Constitution followed the same structure as the American Constitution with Chapter I relating to the legislature, Chapter II to the executive and Chapter III to the judiciary, could itself have indicated an intention to draw on the American experience.² Dixon J considered that even in the absence of any knowledge of the American background, the doctrine of separation of powers would be discovered in the Commonwealth Constitution on an independent consideration of the arrangement of the Constitution, the emphatic wording of ss 1, 61 and 71 and the detailed provisions constituting and/or defining the respective repositories of power.³

Dixon J believed that these considerations justified judicial recognition of the proposition that "The Parliament is restrained both from reposing any power essentially judicial in any other organ or body, and from reposing any other than judicial power in such tribunals. The same or analogous considerations apply to the

1 Id. 90. See also Latham CJ addressing the First Conference of Australian Legal Studies on the Topic "Duties and Opportunities of the Legal Profession in Australia" (1933) 7 ALJ 15, 18. "The independence of the profession and the independence of the Bench are the safeguards on which the independence and liberty of the community depend".

2 Id. 95.

3 Id. 96. Section 1 which is the first section of Chapter I, "The Parliament", commences -"The legislative power of the Commonwealth shall be vested in a Federal Parliament ...". Section 61 which is the first section of Chapter II, "The Executive Government", commences - "The executive power of the Commonwealth is vested in the Queen ...". Section 71 which is the first section of Chapter III, "The Judicature", commences - "The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction ...".
provisions which vest the legislative power of the Commonwealth in the Parliament, describe the constitution of the legislature and define the legislative power".1

Dixon J went on, however, to conclude (as did other members of the Court) that the doctrine of separation of powers did not generally preclude the delegation of legislative power to the executive so long as there was not a complete abdication of legislative function.2 In the passage set out in the preceding paragraph, Dixon J had acknowledged that in so far as the doctrine of separation of powers depended on the terms and structure of the Constitution itself, those considerations applied equally to the confining of legislative functions to the legislature as they did to the confining of judicial functions to the judiciary. "It may be acknowledged that the manner in which the Constitution accomplished the separation of powers does logically or theoretically make the Parliament the exclusive repository of the legislative power of the Commonwealth".3 How then was the tolerance of the vesting of legislative function in the executive to be explained? "The existence in Parliament of power to authorize subordinate legislation may be ascribed to a conception of that legislative power which depends less upon juristic analysis and perhaps more upon the history and usages of British legislation and the theories of English law".4

Dixon J's comments in Dignan's case about the vesting of non-judicial power in judicial bodies were dicta. The issue of vesting non-judicial functions in judicial bodies arose in 1938 in the case

1 Id. 97.
2 Id. 101-102.
4 (1931) 46 CLR 73, 101-102.
of The King v The Federal Court of Bankruptcy; Exp Lowenstein, the first case reported in the Commonwealth Law Reports of Barwick appearing in the High Court as counsel in a case with a constitutional issue.\(^1\) Section 209 of the Commonwealth Bankruptcy Act made it an offence for any person being a bankrupt to omit to keep books of account detailing his business and financial transactions for the five years immediately preceding his bankruptcy. Section 217 provided that if during an application for discharge from bankruptcy the court had reason to believe that the bankrupt had committed a breach of s209 then the court could charge the bankrupt, set down a time for hearing the charge and then hear the charge at the appointed time.

Barwick submitted that the Constitution required that judicial and non-judicial functions not be vested in the same body, that the decision to prosecute was a function of the executive, both in its very nature and because the express terms of s61 entrusted to the executive the function of maintaining the laws of the Commonwealth, and that the notion of judicial power necessarily precluded any possibility of a judge being at the one time a party to proceedings and the judge presiding therein.\(^2\)

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1 (1938) 59 CLR 556. At the Australian National University Law Society luncheon to which reference has already been made (above p.4) Barwick CJ told those present that after Lowenstein had been sentenced to gaol by a judge in bankruptcy, a solicitor sought Barwick's advice on possible ways for overturning the sentence or at least delaying its commencement. Barwick's first response was to say that there was no viable ground for attacking the sentence. On being pressed by the solicitor whose client was particularly keen to avoid spending winter in gaol, Barwick suggested that it might be possible to raise a question of separation of powers for High Court consideration. That argument would, in Barwick's opinion, be unlikely to succeed but it should at least delay the commencement of the serving of the sentence until winter was over. In the event the bankruptcy judge declined to state questions for the High Court and by the time an order had been obtained to have them stated and the questions had been considered by the High Court and the sentence upheld, the seasons had come around to winter again.

2 Id. 559.
Barwick also submitted that the offence provision was itself insufficiently connected with s51(xiv) as the section had the effect of punishing deeds committed before the individual had become bankrupt. The Court did not require counsel defending the legislation to address on the s51(xiv) argument.

Four members of the Court, Latham CJ, Rich (concurring with Latham CJ), Starke and McTiernan JJ held that even though the Constitution did require some separation of judicial and non-judicial functions, the Constitution did not require a complete separation of such functions. The function vested in the Bankruptcy Court by s217 was according to these judges, compatible with the judicial function of that body. (Starke J commented that the separation required was not as rigorous as that required in America.)

Dixon J and Evatt J gave a joint dissenting judgment. Absent from this joint dissenting judgment was the grandiloquence and sweeping endorsement of generalities which had characterised Dixon J's discussion of separation of powers in Dignan's case. Their Honours considered that s51(xxxix) in its application to matters incidental to the execution of judicial power was the only possible source of power to support s217. Zines comments that "Having regard to the fact that Evatt J was one of the authors of the judgment [the

1 Id. 560.
2 Id. 563.
3 Id. 567 per Latham CJ; 577 per Starke J, and 591 per McTiernan J.
4 Id. 565-566 per Latham CJ; 576-577 per Starke J.
5 Id. 567-569 per Latham CJ; 577 per Starke J; 590-591 per McTiernan J.
6 Id. 576-577.
7 Id. 585-587.
8 The High Court and the Constitution 141.
interpretation of the judgment of Dixon and Evatt JJ which I have set out] is an unlikely interpretation”. Zines probably had in mind the comments of Evatt J in Dignan's case. There Evatt J said

"But it does not follow from these decisions that the only function which may lawfully be assigned by the Commonwealth Parliament to the three kinds of tribunals mentioned in s71 is the exercise of the judicial power of the Commonwealth. For instance there is a Federal Court created by the Commonwealth Conciliation and Arbitration Act. Such Court has for some years performed functions which are not the exercise of judicial power at all. So much was decided by this Court in Alexander's Case. The exercise of 'arbitral' functions in relation to industrial disputes is lawful because the Commonwealth Parliament has made a valid law in the exercise of its power under s51(xxxv) of the Constitution. This also shows that it is not possible to infer from the fact that an organ for the exercise of one of the three Commonwealth powers is lawfully acting, that it must be exercising the power associated with it as an organ in s11, 61 & 71 of the Constitution."

It is indeed difficult to reconcile those words from Evatt J in Dignan's case with the interpretation which I place on the joint judgment of Dixon and Evatt JJ in Lowenstein. That interpretation does seem to me, however, to be compelled by the language used in that Lowenstein dissent.

In Lowenstein Dixon and Evatt JJ concentrated on the word "incidental". Section 51(xxxix), they considered, would not support provisions "at variance" with judicial power, and, in so far as it was used to vest functions in the judicature, would only support laws dealing "with something arising in the course of exercising judicial power, something attendant upon or incidental to the fulfilment of

2 (1918) 25 CLR 434.
3 (1931) 46 CLR 73, 116-117.
powers truly belonging to the judicature". Then Dixon and Evatt JJ took up an argument of Barwick. For these judges the maxim nemo potest esse simul actor et judex "epitomizes part of the English notion of the judicial function. A long course of development produced a conception of judicial process which placed the court in the position of a detached tribunal entertaining and determining civil and criminal pleas brought before it". Section 217 was not incidental to judicial power because it was at variance with judicial power.

In Lowenstein's case the majority judges reinforced their conclusion that the particular mix of judicial and non-judicial functions involved was compatible with the constitutional requirement of separation of powers, by referring to the mixing of arbitral and judicial functions in the Commonwealth Court of Conciliation and Arbitration. That issue of the validity of the mixing of functions in the Court of Conciliation and Arbitration and the more general issues raised by the submissions of Barwick in Lowenstein's case came up for consideration in the Boilermakers' Case where challenge was made to the vesting in the Court of Conciliation and Arbitration of both arbitral and judicial functions. (The judicial function had been exercised to impose a fine for breach of an industrial award made in exercise of the arbitral function).

1 Id. 587.
2 Id. 588.
3 Id. 589.
4 Id. 566-566 per Latham CJ, 576-577 per Starke J.
5 Attorney General (Commonwealth) v The Queen; Exp The Boilermakers' Society of Australia. (1956) 94 CLR 254 (High Court) (1957) 95 CLR 529 (Privy Council). The propriety of that particular mixing of non-judicial and judicial functions had been challenged in the Australian Law Journal back in 1930, before even Lowenstein had been decided. "The New Despotism in Relation to the Constitution of the Commonwealth" (1930) 3 ALJ 357, 358.
The majority view in the High Court, upheld on appeal to the Privy Council, was that the doctrine of separation of powers precluded the mixing of judicial and arbitral function in the Conciliation and Arbitration Court. The Privy Council's explanation of the doctrine was similar in its essential points to the discussion of Dixon J in Dignan's case, which was expressly endorsed in some of its aspects. The Commonwealth Constitution was to be interpreted in the light of the drafters' knowledge of the political systems of the United States of America and the United Kingdom. The principle had force as constitutional law in the United States. The British background and practice meant that the doctrine would not, however, be as strict in the Australian Constitution as it was in the United States. Apart from the historical background to the Australian Constitution, the structure and terms of the document itself indicated the embodiment of the principle of separation of powers.

Their Lordships followed the model of the dissenting judgment of Dixon and Evatt JJ in Lowenstein's case and stated that the only sources of power for vesting functions in Courts were in Chapter III and s51(xxxix) and that therefore only judicial functions and functions forming incidents in the exercise of strictly judicial functions could be vested in Courts. Their Lordships sought to support the proposition that non-judicial functions (other than those merely incidental to judicial powers) could not be vested in Courts with the non sequitur that because Chapter III (with s51(xxxix)) was an exhaustive statement of the kinds of judicial power which could be vested in Courts it was also an exhaustive statement of the kinds of

1 WA Wynes "The Decision in the Boilermakers' Case" (1957) 30 ALJ 614.
2 (1957) 95 CLR 529, 540, 546.
3 Id. 536-537.
4 Id. 536-537.
5 Id. 537-538.
6 Id. 543.
7 Id. 544.
non-judicial function which could be vested in Courts. Their Lordships also offered other reasons not involving any non sequitur which at once supported the separation of non-judicial from judicial functions and which explained why that separation was stricter than was the separation of legislative from executive functions. First, the elaborateness of the provisions in Chapter III dealing with the vesting of functions in Courts itself indicated that these provisions were meant to be an exhaustive statement of the vesting of functions in Courts.\(^1\) Secondly, the background of "the history and usages of British legislation and the theories of English law" showed the "special nature" of judicial power.\(^2\)

... the executive body is at all times subject to the control of the legislature. On the other hand in a federal system the absolute independence of the Judiciary is the bulwark of the Constitution against encroachment whether by the legislature or by the executive. To vest in the same body executive and judicial power is to remove a vital Constitutional safeguard.\(^3\)

This then was the judicial justification for incorporating the doctrine of separation of powers and for incorporating the doctrine in this particular form. The constructional arguments based on the express terms of the Constitution were, apart from the point of the extent of detail in Chapter III, as strong (or weak) for separating legislative and executive function from one another as they were for separating judicial from legislative and executive functions. The difference in the application of the doctrine and perhaps even the fact that the doctrine was incorporated at all seem to be traceable to the background of political theory and to the "special nature" of

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1 Id. 546.
2 Id. 546 quoting from Dixon J in Dignan's case.
3 Id. 540-541.
judicial power rather than to any compulsion in the text of the Constitution.¹

The societal value of the doctrine of separation of powers has been said in these cases to be

- the protection of the liberty of the individual

- the protection of the federal Constitution.

The latter effect of the doctrine is at first sight coextensive with the effect of the principle of constitutionality and might be said, therefore, to be subsumed by and superfluous to, that principle. The point of the doctrine of separation of powers goes further here, however, in that the doctrine requires not only that decisions of the constitutionality of government action be left to the Courts, but also that the Courts not be involved in activities which may prejudice their independent status and reputation when making such decisions. Any law depends very much for its binding force on its acceptance by the community as law and the independent reputation of the law interpreters conduces to community acceptance of their authoritative interpretations.

The significance of the doctrine to the liberty of the individual is a large topic which it is not possible to explore in this paper. It is possible, however, to identify two main ways in which the doctrine may tend to protect the liberty of the individual. There is first the simple fact that it divides power, as does federalism itself,² and thus reduces the potential for action by any one branch

¹ R Anderson, "Exclusiveness of the Judicial Power of the Commonwealth" (1956-1959) 3 UQLJ 71, 72 saw the decision in the Boilermakers Case as being based "on an a priori conception of the nature of the judicial power and its segregation in Chapter III of the Constitution".

² In an interview with The Times on 9 November 1959, Barwick, then Attorney-General, commented that he considered the federal system to be "one guarantor of individual freedom".
of government and introduces the potential for any one branch of government to restrain and interfere with action by any other branch of government. (The "benefit" here for individual liberty depends on the making of an assumption that government action will seldom itself be a protector of individual liberty). The other main level at which the doctrine tends to protect individual liberty, comes in its operation to prevent individual liberty or property being interfered with other than as a consequence of breach of clear prospectively prescribed rules of conduct, with the fact of breach being a matter for determination by a judiciary, independent of law maker and law enforcer. In this "rule of law" aspect, the doctrine again has some overlap with the principle of constitutinalty.

The direct effect of the Boilermakers' Case was to compel the separation of the body making industrial awards from the body enforcing industrial awards. The decision thus excluded from the process of enforcement, the arbitrators' special industry knowledge and familiarity with the problem of maintaining industrial peace. The learned editors of the Australian Law Journal\(^1\) commented:

"An efficient and powerful arbitration system of Commonwealth operation is one of the basic requirements of a progressive and developing economy and the deficiencies in the Commonwealth's powers under s51(XXXV) are only too well known. It is a matter of regret that the probable consequence of the decision will be that the Arbitration Court as a judicial tribunal has now been emasculated."\(^2\)

Five years after the division of the arbitral and judicial functions one respected practitioner in the area, CI Menhennitt QC found strong

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1 NH Bowen QC and R Else-Mitchell QC assisted by RW Fox (as they then all were before their judicial appointments).

2 "Judicial power of the Commonwealth Arbitration Court" (1956) 29 ALJ 623. See also R Anderson, "Exclusiveness of the Judicial power of the Commonwealth" (1956-1959) 3 UQLJ 71, 73.
advantages in that division. He thought it particularly valuable for preventing confusion in the minds of parties between arbitral and judicial function.¹

As Chief Justice, neither Barwick nor any of his Courts showed any enthusiasm for applying the doctrine of separation of powers so as to hold invalid particular mixes of functions.² In the case of Giris Pty Ltd v Federal Commissioner of Taxation³ challenge was made to the vesting in the Commissioner of Taxation of a power to determine, according to his opinion of what was reasonable, that one rate of tax rather than another should apply to particular taxpayers. It was argued that this legislation amounted to an abdication of legislative function and thus offended the principle of separation of powers.⁴ Barwick CJ accepted that "... whilst Parliament may delegate legislative power it may not abdicate it."⁵ Neither Barwick CJ, however, nor any other member of the Court considered that the legislation went too far. In the case of R v Quinn; Exp Consolidated Foods Corporation⁶ Barwick CJ joined in a unanimous decision upholding the vesting in a non-judicial body of a function which might more typically have been vested in a judicial body. In Talga Ltd v MBC International Ltd,⁷ R v Joske; Exp Australian Building Construction Employees and Builders' Labourers Federation⁸ and R v


2 PH Lane, "The Decline of the Boilermakers Separation of Powers Doctrine" (1981) 55 ALJ 6. This article, inter alia, contrasts the fate of mixtures of functions in Barwick CJ's court with the fate of similar mixtures in earlier courts.


4 Id. 367.

5 Id. 373.


7 (1976) 133 CLR 622.

Joske; Exp Shop Distributive and Allied Employees' Association

Barwick CJ joined in unanimous decisions upholding the vesting in judicial bodies of powers which might more typically have been vested in administrative bodies.

There was, during Barwick's Chief Justiceship, no direct challenge to the proposition that the doctrine of separation of powers has the force of constitutional law. Given the imprecise nature of the doctrine it was susceptible to being redirected and it was at the point of working out the operation of the doctrine that Barwick CJ and his Courts drew back from the possible line which might have been developed from the mystical sweep of the language in the Boilermakers Case. On the question of the particular application of the doctrine in the Boilermakers Case itself Barwick CJ even went so far as to indicate in dicta that while it might be "proper" to continue to follow the decision in the Boilermakers Case, it might well be that the decision should be rejected.

"The principal conclusion of the Boilermakers' Case was unnecessary, in my opinion, for the effective working of the Australian Constitution or for the maintenance of the separation of the judicial power of the Commonwealth or for the protection of the independence of courts exercising that power. The decision leads to excessive subtlety and technicality in the operation of the Constitution without, in my opinion, any compensating benefit."

Barwick CJ did not deny that the doctrine of separation of powers is part of Commonwealth constitutional law. Nor did His Honour deny that the doctrine has value. The fact that His Honour indicated sympathy for the proposition that arbitral and judicial function could be mixed might lead one to infer that Barwick CJ was more interested in the

1 (1976) 135 CLR 194.

2 G Sawer, "The Judicial Power of the Commonwealth "(1948) 1 Annual Law Review 29, 29 "... the delimitation of the frontiers of the judicial power ... is never likely to be reduced to a deductive system of propositions."

3 R v Joske; Exp Australian Building Construction Employees (1974) 130 CLR 87, 90. Also id. 102 per Mason J.
strength of the judiciary than in the independence of the judiciary. Barwick CJ also held the view however, that arbitration under s51(xxxv) must, by definition, be independent.1 A mixing of arbitral and judicial function should not therefore identify the judiciary with legislative or executive interests.

In the passage set out Barwick CJ makes no reference to the value which some see in the doctrine of separation of powers, of protecting the liberty of the individual. Barwick CJ did, in Giris, couple his acceptance of the vesting in an administrative officer of what was "in truth a function of the legislature, rarely delegated to an official"2 with a conclusion that the administrative officer would be subject to fairly rigorous judicial control.3 The decline in judicial enthusiasm for the separation of powers does not necessarily mean a plunge into tyranny. There has been a contemporaneous and arguably offsetting widening of the scope of judicial review of government action. That widening of the scope of judicial review has come about both from developments of judge made law and from statutory introduction of new administrative law.4

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3 Id. 374.
Chapter III

FEDERAL PARLIAMENT

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Chapter III: Federal Parliament

In the middle of the 1970's the High Court considered a series of constitutional cases relating to the Commonwealth Parliament itself. Also on the public record are Barwick CJ's November 1975 advice to the Governor-General relating to the 1975 conflict between the House of Representatives and the Senate over supply and Barwick CJ's statements about the advice at a National Press Club Luncheon in 1976. The principles interacting through this section are - the principle of constitutionality, the principle of the non-involvement of the Judiciary in political issues, the principle of democracy and the principle of federalism.

The Assertion of High Court control over the Parliament based on the principle of constitutionality.

In some of the Parliamentary cases Barwick CJ emphasised the right and duty of the High Court to enforce constitutional provisions, even those relating to the Parliament itself. The cases in which this emphasis was made related to s57 of the Constitution, the provision relating to disagreement between the Houses.

In the first of these cases, Cormack v Cope the Court considered, inter alia, an application for an interlocutory injunction to stop proposed laws being dealt with by a joint sitting of the Houses of Parliament purporting to act under s57. The basis for the application was an alleged absence of preconditions for action under s57. The case was argued and the judgments delivered within a space of four days. All members of the Court agreed that the interlocutory injunction should be refused. The routes to this conclusion varied.

At one extreme McTiernan J took the view that it was not within the judicial power of the Commonwealth to inquire into the existence of the preconditions for action under s57, which related to
political matters, events in Parliament. Menzies J and Stephen J considered that the proceedings in Parliament could be inquired into and a failure to comply with s57 would result in any purported law being invalid but that the Court had no jurisdiction to interfere in the Parliamentary proceedings.

None of these three judges made plain in their own judgments and nor is it made plain in the cases cited by Menzies J and Stephen J what the precise reason for this absence of jurisdiction was, but British notions of the dignity and privilege of Parliament can be discerned. Attorney-General Murphy had submitted, inter alia, that the immunity of Parliamentary proceedings from Court intervention was a matter of privilege in the British House of Commons and as such was attracted to the Australian Parliament by the terms of s49 of the Constitution.

Both Barwick CJ and Gibbs J, without there being any necessity to do so for the purposes of their decisions, asserted that the Court did have jurisdiction to intervene in s57 proceedings. Both rested that jurisdiction on the fact that s57 "constitutionally required"

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2 Id. 464, 472 respectively.


5 Section 49 "The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth".

6 Id. 453-454, 466 respectively.
a specified process of law-making. Neither judge gave an unambiguous answer to Murphy's submission that s49 was also part of the Constitution and required that the Commonwealth Parliament have, inter alia, the privileges of the British House of Commons. Neither would say flatly that the British House of Commons had had no relevant privilege in 1901.

Barwick CJ did say in response to the s49 submission: "We are not here dealing with a Parliament whose laws and activities have the paramountcy of the Houses of Parliament in the United Kingdom". In the context of determining the operation of s49, this was, with respect, a very strange thing to say. Section 49 said directly that the activities within the Houses of the Australian Parliament were to have the same paramountcy which activities within the House of Commons had had in 1901.

The essence of the attitude of Barwick CJ and Gibbs J seemed to be that whatever privilege might be attracted by s49, the text of s49 would have to give way to their assertion of the High Court's right to ensure compliance with the text of s57. It is to be noted that Barwick CJ in expressing his conclusion that the Court did have jurisdiction said not that there was no privilege but instead that "there is no parliamentary privilege which can stand in the way of this Court's right and duty to ensure that the constitutionally provided methods of law-making are observed".

1 Id. 453 per Barwick CJ, Similarly 466 per Gibbs J.
2 Id. 452.
3 Id. 454, similarly 466 per Gibbs J.
The weakness in the logic supporting Barwick CJ and Gibbs J's assertion of jurisdiction to intervene in s57 proceedings was that it failed to acknowledge that the assertion of the High Court's right to enforce compliance with the law-making steps prescribed by s57 did not lead inexorably to a conclusion of jurisdiction to intervene in Parliamentary proceedings. The terms of s57 could be vindicated by declaring invalid, laws the enactment of which did not comply with those prescribed steps. The availability of that reconciliation of the principles of immunity for Parliamentary proceedings and constitutionality was, of course, made abundantly clear by the judgments of Menzies J and Stephen J, already discussed, and Mason J. Mason J reserved the issue of jurisdiction and decided that it was not an appropriate case to exercise any jurisdiction that the Court might have as there would be opportunity to challenge any laws relying on s57 procedures after their purported enactment.¹ That reconciliation was also, paradoxically, recognized by Barwick CJ and Gibbs J themselves in a different form. Having asserted jurisdiction (and, in Barwick CJ's case, a duty)² to intervene to ensure observance with s57's process, Barwick CJ and Gibbs J then exercised their discretion not to grant an interlocutory injunction³ noting as they did so that laws could be challenged after their enactment.⁴

1 Id. 473-474.
2 Id. 452-454.
3 Id. 460, 466-468 respectively.
4 Id. 460, 466 respectively. This "reconciliation" is only completely acceptable if one assumes that persons with standing to seek orders to prevent double sittings taking place other than in compliance with s57 would also be amongst those with standing to challenge laws enacted in purported reliance on s57.
The Structure of Parliament - Federalism and Democracy

(i) Section 57 - Deadlock between the Houses constituted by the Senate's failure to pass a law proposed by House of Representatives

In Cormack v Cope itself and in the PMA Case and the First Territories Representation Case (Western Australia v The Commonwealth) perceptions of the appropriate position of the Senate and House of Representatives relative to one another were taken into account to determine the meaning of certain parts of s57.

Section 57 of the Constitution providing for the resolution of deadlocks between the Houses by double dissolution and joint sitting, includes among its conditions a condition that the Senate "rejects or fails to pass" a law proposed by the House of Representatives and another condition that "after an interval of three months" and another passing of the proposed law by the House of Representatives the Senate again "rejects or fails to pass" the proposed law.

McTiernan J and Jacobs J approached the problem of s57's meaning by reference to the desirability of having certain and unambiguous events from which to measure the interval of three months. McTiernan

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2 Victoria v The Commonwealth (1975) 134 CLR 81.

3 (1975) 134 CLR 201.
J concluded that whatever "fails to pass" meant, when the section said "after an interval of three months", it meant "after an interval of three months after the passing of the proposed law by the House of Representatives".¹

Jacobs J considered that the interval of three months ran from the time of failure to pass.² His Honour construed "fails to pass" to mean "does not pass the proposed law when it [The Senate] might have passed it".³ For Jacobs J it was obvious that the Senate could not pass the proposed law until the law had been passed by the House of Representatives and sent to the Senate.⁴ Sawer finds this interpretation unacceptable because no provision in the Constitution expressly speaks of or regulates the transmission of Bills from the Lower to the Upper House.⁵ Admittedly Jacobs J's judgment is weak in that it simply assumes that the Senate would not be able to pass a Bill until the Bill had been sent to the Senate by the House of Representatives. (Sawer's comment seems to imply that the only possible relevant source of control on the transmission of Bills would be the express terms of the Constitution. Section 50 of the Constitution enables the House of Parliament to make procedural rules and orders and it may be that Jacobs J had in mind such a source of constraint on the Senate's power to pass Bills.)⁶ For me, Jacobs

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¹ The PMA Case (1975) 134 CLR 81, 133. It seems that McTiernan J was inclined to construe "fails to pass" in the same way that the majority judges did but treated the decision of whether or not there had been a failure to pass as a non-justiciable issue.

² Id. 192-193.

³ Id. 194.

⁴ Id. 194, 199.

⁵ Federation Under Strain 49.

⁶ House of Representatives Standing Order, SO 243 "After a passed bill has been certified by the Clerk, it shall be sent to the Senate with a message desiring the concurrence of that House."
J's essential point - that the word "fails" can mean "omits to do something that could have been done" - is not destroyed by His Honour's failure to explain why the application of that definition to s57 would mean that the Senate could not be said to have failed to pass a Bill until it had received the Bill.

The real difficulty with Jacobs J's definition of "fails" is that it would mean that after the second passing of the Bill by House of Representative, the instant that the Senate received the Bill it would be liable to a s57 dissolution. Jacobs J sought to deprive that point of its force with three mitigating circumstances. First, that the Senate's "failing to pass" would cease to exist to provide a condition precedent for a s57 dissolution if the Senate passed the Bill. Secondly that the Governor-General might exercise a discretion to delay a double dissolution if the government did not allow the Senate any time to consider the Bill. Thirdly, that when construing the Constitution, it was permissible to assume that Ministers of the Crown would only give advice compatible with the spirit of the Constitution.¹

The majority judges Barwick CJ, Gibbs, Stephen and Mason JJ found that there had not been the lapse of time required by s57. This conclusion turned on their decision (a) that the phrase "after an interval of three months" meant "after an interval of three months after the Senate fails to pass (or rejects or passes with amendments unacceptable to the House of Representatives)" and (b) that the expression "fails to pass" be construed so as to give the Senate an opportunity to consider the proposed law before the three months began to run.

¹ (1975) 134 CLR 81, 197.
Although the reasoning of all the majority judges was similar, the judgment of Barwick CJ was particularly vigorous. The points he made were these.

The Senate was intended by the Constitution to be co-equal with the House of Representatives except in the ways specified in s53 relating to money Bills.\(^1\) It is apparent on the face of the Constitution that the Senate was intended to represent the States and might therefore be considering a law "from a standpoint different from that which the House of Representatives may have taken."\(^2\) Taking account of the status and role of the Senate "the Constitution can not be read as if laws ought to be passed by the Senate without debate, or as if the House of Representatives may in any respect command the Senate in relation to a Bill."\(^3\) (No one in fact suggested any construction of s57 which would have required the Senate either to pass a law "without debate" or to become subject to the possibility of being sent to the electors. On any of the suggested constructions, section 57 guarantees the Senate at least three months for debate and/or deliberation.) This course of reasoning led Barwick CJ (and the other majority judges) to adopt a very vague concept of "fails to pass". For Barwick CJ "The word 'fails' in s57 involves the notion that a time has arrived when, even allowing for the deliberative processes of the Senate, the Senate ought to answer whether or not it will pass the Bill or make amendments to it for the consideration of the House: That the time has arrived for the Senate to take a stand with respect to the Bill."\(^4\)

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1 Id. 121 per Barwick CJ. Similarly at 143 per Gibbs J, 168 per Stephen J and 185 per Mason J.

2 Id. 122. The Senate in fact reviews legislation by reference to considerations other than parochial State interest. The Senate's function as a general House of Review is not recognized on the face of the Constitution and was not referred to to support the majority construction.

3 Id. 122.

4 Id. 122. Similarly (though not to exactly the same effect) 148 per Gibbs J, 171 per Stephen J and 186 per Mason J.
Barwick CJ's proposition (upon which he built his interpretation of the word "fails") that the Constitution intended the Houses of Parliament, apart from the s53 provisions, to be co-equal requires examination. First the fact that s53 creates that difference in relation to money bills is a clear indicator that the House of Representatives is the House of Government. Consistent with that indicator is the fact that members of the House of Representatives are elected on a more democratic basis than are Senators. Section 57 itself indicates that the will of the "House of the Commonwealth" is more important than the will of the "States' House". It is only when there is a deadlock over laws originating in the House of Representatives that s57 can operate. If s57 does operate and there is a joint sitting to resolve a conflict between the Houses, then the will of the electorate of the more numerous House, the House of Representatives, is likely to prevail. These factors indicate that the Constitution intended the House of Representative to be more important than, rather than co-equal with, the Senate.

One must next query whether the majority interpretation of the word "fails" would allow the House of Representatives even "co-equal" let alone superior or dominant status in the Parliament. The majority interpretation puts the Senate in a very strong position to frustrate the will of the House of Representatives.

According to the majority interpretation the Senate could delay the taking of any legislative action, delay incurring the risk of being required to answer to its electorates and delay a joint sitting

1 Section 24 requires the members of the House of Representatives to be chosen directly by the people of the Commonwealth. Section 7 requires the Senators for each State to be chosen by the people of the State. These sections are discussed below.

2 Compare Stephen J at 170.
of both Houses first by holding the proposed law for the "reasonable" period of Senate deliberation before the three months even began and then by holding the proposed law for the same period after a second passing by the House of Representatives. The blocking period could be extended by the Senate by waiting each time until near the end of the period of deliberation and then passing the law with amendments. According to Barwick CJ the interval of three months would not commence after the first passing with amendments by the Senate, and the option of double dissolution would not be available after the second passing with amendments by the Senate, until the House of Representatives had not only expressed its attitude to the amendments on each occasion, but had also explored the usual parliamentary procedures of negotiation with the Senate about amendments.¹

On the majority approach, and in particular on Barwick CJ's approach, it is not inconceivable that the House of Representatives would have to wait for over a year before it obtained a resolution of a deadlock. It is no doubt still open to argue that when assessing the reasonableness of the time taken by the Senate for deliberation, the High Court should take into account the urgency attached to the matter by the House of Representatives.² That possible argument is not barred by the majority judgments in the PMA Case. It was, however, plain that the status of the House of Representatives as the democratically elected House of government, was given little weight in the majority's approach to s57.

The majority interpretation involved a large extension of the declaration in Cormack v Cope of the High Court's willingness to inquire into Parliamentary proceedings. Now Barwick CJ and the other majority judges declared their readiness to inquire into the substance

¹ Id. 125.

² Barwick CJ noted that the House of Representatives had not sent any message to the Senate attaching urgency to the bill in issue. Id. 114, 149.
of proceedings in the Senate and to judge whether the Senate had finished its deliberative processes and "ought" to take a stand. On the facts the majority concluded that the Senate could not be said to have failed to pass the proposed law at the relevant time. If there ever were a borderline case the High Court could find it an extremely uncomfortable and politically controversial matter to examine the proceedings of the Senate with a view to declaring those proceedings either bona fide deliberation or insincere obstruction. Such possible problems, implicit in the majority approach, indicate just how great was the assertion of High Court control over the Parliament itself.

(ii) Parliamentary Representation for the Territories

In the First Territories Representation Case (Western Australia v The Commonwealth)\textsuperscript{1} the issue was the sufficiency of s122 to support legislation providing for full voting representation in the Senate for the Northern Territory and the Australian Capital Territory. Section 122 was held to be sufficient to support such legislation by McTiernan, Mason, Jacobs and Murphy JJ with Barwick CJ, Gibbs and Stephen JJ dissenting. McTiernan J retired from the Court shortly afterwards and was replaced by Aickin J.

In the case of Attorney-General of New South Wales (ex rel. McKellar) v Commonwealth, Barwick CJ stated that he considered it unfortunate that although two States had during argument questioned the correctness of the decision in the First Territories Representation Case, neither State had proffered any argument to support that questioning.\textsuperscript{2}

\textsuperscript{1} (1975) 134 CLR 201.
\textsuperscript{2} (1977) 139 CLR 527, 532.
... if the decision is to be reconsidered, that reconsideration should take place before what, with due respect to the opinion of others, appears to me to be a serious departure from the federal nature of the Constitution, becomes entrenched in constitutional practice by the mere passage of time.¹

It was not surprising that shortly afterwards Queensland asked the High Court to reconsider the question of representation for Territories in the Senate, and Western Australia asked for a consideration of the validity of the legislation giving the Northern Territory and the Australian Capital Territory representation in the House of Representatives. In the outcome in this Second Territories Representation Case, (Queensland v The Commonwealth)² the new judge, Aickin J held s122 to be insufficient to support full voting representation in either House.³ This did not, however, result in a majority for invalidity. Two of the judges who had been in dissent in the First Territories Representation Case, Gibbs and Stephen JJ now upheld the legislation. Their Honours had not changed their view of the merits of the case. They could see, however, no sufficient reason for reviewing the decision made in the First Territories Representation Case such a short time before and could, furthermore, see no relevant distinction between the issue of Senate representation decided in the First Territories Representation Case and the issue of representation in the House of Representatives raised for the first time in the Second Territories Representation Case.⁴

¹ Ibid. Sir Arnold Bennett QC of the Queensland Bar placed the First Territories Representation Case at the head of his list of "wrong turnings" which if not reversed would lead, in his opinion to the destruction of the States. "The High Court of Australia—Wrong Turnings" (1977) 51 ALJ 5, especially at 14.

² (1977) 139 CLR 585.

³ Id. 619.

⁴ Id. 601, 605 respectively. Editorial comment in the Australian Law Journal suggests that this decision may have been affected by the fact that the people of the Commonwealth had, in a referendum of 21 May 1977, indirectly indicated their approval of the First Territories Representation Case by giving the support required by s128 to a proposal to amend s128 itself to allow Territory electors to vote in referendums. "Current Topics - The Territories Representation Case" (1978) 52 ALJ 57.
The constructional issue involved the conflict between the unreserved generality of the Parliament's power in s122 to make laws, *inter alia*, allowing "the representation of such territory in either House of the Parliament to the extent and on the terms which it [the Parliament] thinks fit" and the specific provisions providing for the composition of the Senate (s7) and of the House of Representatives (s24). Section 7 commences with the declaration that

The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides as one electorate ...

Other clauses in s7 itself and other sections in the Constitution\(^1\) seem to assume that the Senate shall be composed *only* of State representatives. The conflict with s122 is not so marked in the case of s24 which starts with the declaration:

The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth ...

Section 24 goes on, however, to create a nexus between the number of representatives and the number of senators ("the number of such members shall be, as nearly as practicable, twice the number of the senators") and to make specific provision for the fixing of the number of members to be chosen from each State.

For McTiernan, Mason, Jacobs and Murphy JJ the word "representation" usually included, and was used elsewhere in the Constitution to include, full membership and there was no reason to restrict the meaning of the term where it appeared in s122.\(^2\) Any conflict between the wide power to provide for Territories' representation in s122 and the specific provision for the composition of the Houses in ss7 and 24 was to be reconciled by regarding ss7 and 24 as provision for the original composition of the Parliament with

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1 Sections 15, 21.

2 First Territories Representation Case (1975) 134 CLR 201, 267-272 per Mason J (with McTiernan J concurring 234); 272-275 per Jacobs J; 280-287 per Murphy J. Second Territories Representation Case (1977) 139 CLR 585, 606-607 per Mason J; 608-609 per Jacobs J; 611-612 per Murphy J.
the possibility of a later need for the Territories to be represented being provided for by s122. At Federation the existing condition of Australian Territories was not likely to call for immediate representation but there was no reason to think that the possibility of later development in the Territories should go unprovided for.¹ There was also a very real possibility at the time of Federation of other British colonies in the Pacific region becoming Territories of the Commonwealth. Of these Fiji already had a form of representative government and it was by no means unthinkable that acquisition of such a Territory would be accompanied by full representation in the Parliament.² Murphy J reinforced his conclusion by reference to the principle of democratic government which was part of the historical background, both British and American, for the framers of the Constitution. Disenfranchisement of Territories would be contrary to the democratic theme of the Constitution.³

Barwick CJ, Gibbs and Stephen JJ in the First Territories Representation Case and then Barwick CJ and Aickin J in the Second Territories Representation Case considered that the word "representation" in s122 should be given a restricted meaning not extending to full voting membership.⁴

All these minority judges pursued the same general line of argument.⁵ Barwick CJ developed the argument this way. The Constitution was federal not only in the way it distributed

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1 First Territories Representation Case (1975) 134 CLR 201, 270 per Mason J.
2 Id. 273-274 per Jacobs J.
3 Id. 283-286.
5 First Territories Representation Case 134 CLR 201, 243-250 per Gibbs J; 255-263 per Stephen J. Second Territories Representation Case (1977) 139 CLR 585, 616-620 per Aickin J.
governmental powers but also in the way it structured Parliament as a bi-cameral system with a States' House. The federal principle permeated the whole Constitution and was particularly evident in the amendment section, s128, both in its general requirement of a majority of voters in a majority of States (as well as an overall majority of voters) and also in its specific provision giving the voters of any one State the power to veto by their majority vote any amendment diminishing their State's proportionate representation in either House.

Territories were merely peripheral dependencies attached to but not part of the federation. It was unthinkable that the balance of power within the Parliament should be subject to disruption by the intrusion of Territorial members. The power in s122 should be read down so as only to extend to non-voting membership in either House of the Parliament. Barwick CJ pointed out that if no such limitation were put on s122 then Parliament might give representation to small Territories.

Again Barwick CJ's approach is that the Court should construe the Constitution on the assumption that Parliament is to be closely controlled by the Constitution where the status of the States is in issue. Barwick CJ's position seems to ignore that the Founders had provided for the protection of State interests by giving the States' House "co-equal" status in the legislature.

1 First Territories Representation Case (1975) 134 CLR 201, 226-227, 233.
2 Id. 227-228.
3 Id. 229. Second Territories Representation Case (1977) 139 CLR 585, 592.
4 First Territories Representation Case (1975) 134 CLR 201, 232 per Barwick CJ.
5 Id. 230. Also in argument at 214 "If this Act is good, then an Act which appoints six senators for each Territory would be good".
As majority judges pointed out, "swamping" the Parliament would require the cooperation of the Houses of Parliament themselves to enact the legislation.¹

(iii) Adult Voting

Early in the 1970's the Court had, in the case of King v Jones considered whether the word "adult" appearing as one of the qualifications in s41's guarantee of voting rights in Federal elections, extended to eighteen year olds.² It was argued by Senator Murphy, shadow Attorney-General at the time, that "adult" meant "a mature person"³ and that in fact persons of eighteen years of age and upwards are mature persons.⁴ Murphy pointed out that society regarded eighteen year olds as mature persons for many purposes.

... persons above the age of eighteen can marry, are fully responsible under the criminal law, they are liable to be sentenced to death under Commonwealth law and they are liable for service in the armed forces.⁵

Murphy was prepared to bring expert sociological evidence to establish that "persons of eighteen years of age and upwards in Australia are mature persons".⁶

1  First Territories Representation Case (1975) 134 CLR 201, 271 per Mason J; 275 per Jacobs J.
2  (1972) 131 CLR 221. Noted by PH Lane at (1972) 46 ALJ 590.
3  (1972) 131 CLR 221, 222.
4  Id. 224.
5  Id. 223.
6  Id. 224. RR Millhouse offered an alternative avenue to bring eighteen year olds within s41. He submitted that being or not being an "adult" was a matter of status in law. Id. 224. In 1901 the common law (and in some cases and for some purposes, statute law) fixed adulthood at twenty-one years of age. Id. 225. In the State, South Australia, in which Millhouse's client resided, statute law had changed the age of adulthood to eighteen years of age. Ibid.
Murphy's case had a certain emotional appeal. It seemed to many young people to be not only unfair but also undemocratic to subject young people to politically controversial liability for military conscription with a possibility of service in politically controversial actions like Vietnam while denying to young people the vote which might influence the outcome of political decisions. Despite that emotional appeal, Murphy's case had the significant weakness that it offered a vague definition — "mature person" — for the word "adult". The logical result of accepting Murphy's proposed definition would have been a person by person assessment of maturity.¹

Barwick CJ and all his brethren, McTiernan, Menzies, Walsh, Gibbs and Stephen JJ, concluded that the word "adult" where appearing in s41 meant "of or above the age of twenty-one".² That conclusion was affected inter alia by the assumption that the framers would have intended to create a voting qualification which would be precise in its application.³

This conclusion was neither unexpected (there were other good arguments to support this construction unanimously endorsed) nor particularly oppressive. Section 41 was only a minimum guarantee. It did not prevent Parliament legislating to extend voting rights to (non-adult) eighteen year olds and in time voting rights were so extended.

¹ Cf. Ellicott, Solicitor General for the Commonwealth; id. 226.

² Id. 239 per Barwick CJ. Similarly 249 per Menzies J; 254 per Walsh J; 265 per Gibbs J; 272 per Stephen J.

³ Id. 237 per Barwick CJ; 244 per McTiernan J; 240-249 per Menzies J; 254-255 per Walsh J; 262 per Gibbs J; 271 per Stephen J.
(iv) **One vote, one value**

A more debatable issue than that of the preceding topic was that dealt with in *Attorney-General (Commonwealth) (Ex rel McKinlay) v Commonwealth*\(^1\) relating to the words of s24 of the Constitution which provide

> The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth ...

It was argued that the phrase "directly chosen by the people" imported a democratic principle of equality, that each "choice" should "carry the same weight" and should (as nearly as possible) be made either by or on behalf of the same number of electors or, in the alternative, people, and that therefore electoral subdivisions should have similar numbers of electors or people in them.\(^2\) (The development of a similar principle in the United States was referred to to support this argument.)\(^3\) The *Commonwealth Electoral Act* tolerated divergences in numbers of one-tenth either side of the quota figure when Distribution Commissioners were proposing electoral divisions and wider divergences in fact existed.\(^4\)

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2 (1975) 135 CLR 1, 6-7 per Cox Solicitor-General for South Australia and 4-5 per KM Marks QC.

3 Id. 5-6.

4 A tolerance of 1/10 either side should mean that the division with the least number of people has never less than 9/11 the number of people of the division with the greatest number of people. According to figures quoted by Murphy J (id. 63-64) much wider divergences had come to exist with the ratio of the number of people in the division with least number of people relative to the number of people in the division with the greatest number of people falling towards 1/2 in Victoria and below 1/2 in Queensland. See the slightly different proportions referred to by McTiernan and Jacobs JJ at 39.
Four members of the Court, McTiernan, Stephen, Jacobs and Murphy JJ accepted the basic argument of those challenging the electoral divisions that the phrase "directly chosen by the people" did incorporate a democratic principle of popular government as a legal requirement.¹

McTiernan, Jacobs and Murphy JJ (with Stephen J not commenting) also considered that what would be required to comply with the principle would vary and had varied since Federation according to "the common understanding of the time" of what constituted choice by the people (per McTiernan and Jacobs JJ jointly)² or "Because of the silent operation of constitutional principles" (per Murphy J).³

Murphy J went on to conclude that the Constitution did require equality and that what it required was equality in the number of electors (rather than people) in each electorate.⁴ On the other hand McTiernan, Stephen and Jacobs JJ considered that an election could answer the description of choice by the people even if the choice were made on the basis of unequal electoral distributions. The degree of divergence from equality was only one factor to be taken into account in the overall question of degree - did the method of election answer (as a matter of degree) the description "choice by the people".⁵

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¹ Id. 36 per McTiernan and Jacobs JJ; 56 per Stephen J; 71 per Murphy J.

² Id. 36.

³ Id. 69.

⁴ Id. 75.

⁵ Id. 36-37 per McTiernan and Jacobs JJ jointly. Similarly 57 per Stephen J.
The authorisation of an Electoral Act's margin of one-tenth departure from the quota was not, in the circumstances, incompatible with s24 of the Constitution and some divergence might even be necessary to avoid gerrymanders.¹ (Pending a redistribution) an election based on the current electoral divisions albeit with the current high level of divergence in some instances, could not be said in all the circumstances to be other than a choice by the people as required by s24.²

Mason J simply concluded that an election based on electorates with some variation even with a marked variation in size still answered the description of a choice by the people.³ By reserving the question of variations leading to gross disproportions between the electorates,⁴ Mason J may be taken to have reserved the question of the political content of the formula.

It had been submitted that the function of the word "directly" was to preclude "indirect" election by, for example, an electoral college system. Only Barwick CJ and Gibbs J were willing to commit themselves to the proposition that the formula "directly chosen by the people of the Commonwealth" did not import any other principle. Central to the supporting reasoning offered by Barwick CJ and Gibbs J was the distinction between the history of the American colonies and Australian colonies and in particular the different experiences in relation to the British principle of sovereignty of Parliament.⁶

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¹ Id. 37 per McTiernan and Jacobs JJ jointly.
² Id. 40-41 per McTiernan and Jacobs JJ; 57 per Stephen J.
³ Id. 61.
⁴ Ibid.
⁵ Id. 9 per TEF Hughes QC.
⁶ Id. 22-24 per Barwick CJ, 46-47 per Gibbs J.
There was, in Australia, not the same antagonism to Parliamentary power as there was in America, and it was, therefore, for these judges, quite appropriate to conclude that Parliament had been entrusted with a wide discretion relating to electoral boundaries.

Barwick CJ put it thus

The contrast in constitutional approach is that, in the case of the American Constitution, restriction on legislative power is sought and readily implied whereas, where confidence with parliament prevails, express words are regarded as necessary to warrant a limitation of otherwise plenary powers. Thus, discretions in parliament are more readily accepted in the construction of the Australian Constitution.¹

The point hardly needs to be stated. Barwick CJ trusted Parliament with democracy but not with federalism.

The Disqualification of members of Parliament on account of pecuniary interest

In 1975 the question arose of whether a member of the coalition opposition, one Senator Webster was disqualified from sitting in Parliament by s44(v) of the Constitution which provides

Any person who –

(v) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons: shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

¹ Id. 24 per Barwick CJ, similarly 46 per Gibbs J.
The facts which brought Senator Webster's position into doubt were that he was managing director, secretary, manager and one of only nine shareholders in a timber merchant company which had an arrangement with the Commonwealth Department of Housing and Construction whereby it (the company) agreed to supply timber, sometimes with the prices specified in advance and sometimes not, to the Department according to its orders from time to time. During the relevant period orders were made by the Department and filled by the company.¹

Barwick CJ, saying that the case did not involve any "constitutional matters of great moment" declined the application of TEF Hughes QC appearing for the Commonwealth Attorney-General to refer the matter to the Full Court and sat alone to deal with the case as a Court of Disputed Returns.² Given the political sensitivity of the issue, one would have expected the Chief Justice of Australia to avoid the possibility of having his actions construed or represented as an abuse of his position as Chief Justice for partisan or personal purposes.³ The case was far from routine and it was most unusual for the Chief Justice to roster himself to deal with single Justice matters. To say that the case did not involve any "constitutional matters of great moment" could only mean either that Barwick CJ had prejudged the constitutional question, not previously considered by the High Court, of the meaning of s44(v) or that he did not think the constitutional requirements of proper conduct for Parliamentarians were very important.⁴

² D Marr op cit 280.
³ Cf D Marr op cit 280-281.
⁴ It was not exactly clear what the effect of a disqualification of Senator Webster would have been for the composition of the Senate and Barwick CJ did not intend to hear argument on that matter until he had considered whether s44(v) applied. (1975) 132 CLR 270, 272. On that issue see G Evans, "Pecuniary Interests of Members of Parliament Under the Australian Constitution" (1975) 49 ALJ 464.
It was almost inevitable that the sweeping terms of s44(v) would be read down. The question was - what limitations should be read into the provision. Marr reports that Barwick as counsel in the early 1950's had prepared an opinion on the meaning of s44 which considered that the section should be read as intended to meet the mischief - at which its seventeenth and eighteenth century legislative predecessors had been aimed - of securing the independence of Parliamentarians from influence by the Executive. Now as Chief Justice Barwick adopted that approach as the basis for construing s44(v) and rejected a more "modern" approach discernible, in inter alia, the Convention Debates which would treat s44(v) as a provision for preventing members of Parliament from abusing their position or from being open to suspicion of abusing their position. Barwick CJ further indicated his attitude for approaching the section when he remarked that in 1869 Montague Smith J had said

"I can not help thinking that it would be very desirable that this Act should be revised, because it certainly appears to me to be totally inapplicable to the present state of commerce, and that it really provides a pit-fall into which men who wish to walk uprightly and according to the law may unwittingly tumble."

1 Cf G Evans, op cit 464-465, 476.
2 Op cit 281.
3 (1975) 132 CLR 270, 277-278.
4 Id. 278-279. Barwick CJ acknowledged that there were indications of concern with that "mischief" in the National Australasian Convention Debates, (Adelaide) 1897, 736-738 and Australasian Federal Convention Debate (Sydney) 1897, 1022-1028 but made no comment on the relevance of that material. Cf G Evans, "Pecuniary Interests of Members of Parliament Under the Australian Constitution (1975) 49 ALJ 464, 467.
5 (1975) 132 CLR 270, 278.
6 22 Geo III C45.
7 Royse v Birley (1869) LR 4 CP 296, 319.
Barwick CJ commented, "However, the provision is part of the Constitution and, however vestigial, must be enforced". Construing s44(v) in the light of what he considered to be its purpose and in the light of established constructions of similar legislation in England, Barwick CJ considered that for any agreement to come within s44(v) it "must have a currency for a substantial period of time, and must be one under which the Crown could conceivably influence the contractor in relation to parliamentary affairs by the very existence of the agreement, or by something done or refrained from being done in relation to the contract or its subject matter, whether or not that act or omission is within the terms of the contract ... Further, it seems to me that the interest in the agreement of the person said to be disqualified must be pecuniary in the sense that through the possibility of financial gain by the existence or the performance of the agreement, that person could conceivably be influenced by the Crown in relation to Parliamentary affairs".

That construction went beyond simply construing the provision in the light of the mischief at which Barwick CJ thought it was aimed. It effectively elevated the original mischief aimed at by such disqualification provisions to a condition for the operation of s44(v). The limitations which Barwick CJ implied into the general words of s44(v) left that provision with a very narrow range of operation. The limitations were such also that their application could lead the judiciary into political controversy and examination of internal Parliamentary proceedings.

1 (1975) 132 CLR 270, 278.
2 Id. 280.
3 There was support for Barwick CJ's approach in nineteenth century English cases he cited. Contrast however, the attitude of the Tasmanian Law Officers who gave a wide construction to similar provisions in the Tasmanian constitutional provisions in 18 Vic 17, s19 and 34 Vic 42, s6. AN Lewis, "The Tasmanian Members' Case. Contracts Between Members of Parliament and Government Trading Departments" (1935) 6 ALJ 322, 365 especially at 367-368.
Applying his construction to the facts, Barwick CJ came to these conclusions. Even where the arrangement between the company and the Department of Housing and Construction should be analysed as constituting a standing offer from the company to supply specified timber at specified prices\(^1\) a separate contract would come into existence each time the Department made an order (accepted that offer.) There was therefore no single continuing agreement. There was only a casual and transient arrangement.\(^2\)

The conclusion that the arrangement was casual and transient was reinforced by Barwick CJ's belief that it was inconceivable that "in these days, the Crown could exert influence in Parliamentary affairs by anything it could do, properly or improperly, in relation to such an agreement".\(^3\)

Barwick CJ commented that he regreted that the application of s44(v) should depend on "technical concepts of the law of contracts".\(^4\) Also "The distinction is a nice one, and as I have said, it is more than unfortunate that the answer to the Senate's questions could turn upon it."\(^5\) At one level there is inconsistency between Barwick CJ's approach to the construction of s44(v) which emphasises the spirit and purpose of the provision rather than its literal terms and his approach to the application of s44(v) which allows the technical analysis rather than the substance of a transaction to be the determining consideration. The common factor at both levels was Barwick CJ's clear belief that s44(v) is anachronistic and unnecessary.

\(^1\) In the cases where no price was quoted there was not even an offer and the transactions were even further removed from s44(v). Id. 284.

\(^2\) Id. 283-286.

\(^3\) Id 286.

\(^4\) Id. 277.

\(^5\) Id. 283.
The Advice to the Governor-General - Federalism and Constitutionality
working together to bring down Governments.

In an interview with The Times in his first months as Attorney-General in 1959, Barwick explained for the British reader the importance of the law in Australian politics. Governments in Australia are, as Attorney-General Barwick explained, subject to the Constitution. A-G Barwick introduced the further proposition that it had been the decisions of the High Court and Privy Council, holding unconstitutional attempts by the Chifley Labour Government to exercise more power than the Commonwealth had, which had caused that Government to lose office. A-G Barwick considered federalism to be a very important check to government power and a "guarantor" of individual liberty.

There were parallels in Barwick CJ's advice of 10 November 1975 to the Governor-General. (I reproduce the full text of the letter in an appendix). Barwick CJ gave the advice without consulting or even informing the other members of the High Court. The day after that advice was given, Governor-General Kerr dismissed the Whitlam Labor government. The Governor-General also commissioned the Fraser-led Opposition as a "caretaker" government and dissolved both Houses of Parliament. At the ensuing general election the caretaker government won by a landslide.

In Barwick CJ's advice to the Governor-General there was the assertion of the principle of constitutionality, the subordination of the government to the supreme law, the Constitution. Again also there was the assertion of the importance of federalism. Now, however, the

1 9 November 1959 under the ambiguous heading "People to Watch".
2 Most of the documents relating to the dissolution are collected under the heading "Current Topics - The Fourth Double Dissolution, 11th November 1975" (1975) 49 ALJ 645.
The essential elements of Barwick CJ's advice were these.

1. He could give the advice because the situation was unlikely to come before the Court.

2. The constitution of Australia is a federal constitution which embodies the principle of ministerial responsibility. The parliament consists of two Houses, the House of Representatives and the Senate, each popularly elected, and each with the same legislative power, with the one exception that the Senate may not originate or amend money bills.

3. The Senate has constitutional power to refuse supply to the government of the day.

4. A Prime Minister who does not have the confidence of both Houses of the Australian Parliament is in a position analogous to that of a Prime Minister who does not have the confidence of the House of Commons in the United Kingdom. The analogy (or part of the analogy - the advice is ambiguous) is that a Prime Minister who cannot ensure supply to the Crown owes a duty to the Crown either to resign or to advise a general election.

5. If a Prime Minister who is unable to secure supply, refuses to take either step then the Governor-General has the constitutional authority and, duty to dismiss that Prime Minister and invite the leader of the Opposition, if he can undertake to secure supply, to form a caretaker government pending a general election, "whether of the house of representatives, or of both houses of Parliament, as that government may advise".

On 10 June 1976 a few months after he had given his advice to the Governor-General, Chief Justice Barwick was the guest speaker at a National Press Club luncheon. His address did not relate to the events of November 1975 but most of the questions he received afterwards did.
Various conspiracy theories were abroad after the dismissal of the Government. At the Press Club Luncheon\(^1\) Barwick CJ attempted to allay the suspicions aroused by the fact that his advice bore a close resemblance to the opinions published on 16 October 1975 by his relative RJ Ellicott QC, at the time a shadow Minister.\(^2\) Barwick CJ made these points. First he had no close relationship of friendship with Ellicott. Secondly, Barwick CJ had no contact with Ellicott. Thirdly, although Barwick CJ was in the habit of reading the questions on notice in Hansard, he was not aware until a "long time after" that Ellicott had made a speech in Parliament relating to the matter. A point which Barwick CJ did not address was whether or not he was aware of the press reports of the opinion which Ellicott had released to the press on 16 October. The similarity between Ellicott's opinion and Barwick CJ's advice about the Governor-General's proposed course of action could of course be explained by the fact that Governor-General Kerr had taken the Ellicott opinion into account when forming his own opinion upon which he sought comment from Barwick CJ.\(^3\)

Many Australians saw and continue to see the fact that Barwick gave the advice he did as being an improper use of his status as Chief Justice to assist the Opposition parties to force the Labor Government from office. At the luncheon Barwick CJ was asked\(^4\)

"Now with hindsight do you have any regrets about your letter of November 10th...?"

Barwick CJ replied

"... I have none whatever. And for my part I am quite content to abide by history when it is written by informed people who have no bias party political wise at all and that won't be perhaps for

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1 When answering a question from Allen Lloyd.
4 By Allen Lloyd.
twenty or thirty years. And when somebody writes about this I am quite confident myself as to what the answer will be, but I am not in the least bit regretful about anything I did.  

Unfortunately this thesis cannot wait twenty or thirty years and I must attempt an appraisal now. In this section of the thesis, I depart from one of the general constraints I set for myself of avoiding judging Barwick CJ's responses to specific issues as being good or bad. I will in this section comment on the propriety of Barwick CJ giving the advice he gave to the Governor-General. If I did not discuss the propriety of the giving of that advice, then the picture of Barwick CJ's perception of the relationship of the judiciary to the government, would be incomplete.

Professor Geoffrey Sawer, seems to me to have demonstrated clearly, how Barwick CJ's decision to advise the Governor-General endangered the independent status of the Court and also seems to me to have demonstrated what ambiguities, logical flaws, and inconsistencies there were in the content of Barwick CJ's advice. I respectfully adopt the points made by Professor Sawer. I now summarise those points adding as I do so, supplementary comments of my own and reference to Barwick CJ's answers at the National Press Club Luncheon of 10 June 1976, to questions about the advice.

Professor Sawer in his first point took issue with Barwick CJ's proposition that he was free to give advice without compromising himself or the Court, because it, the advice, related to an "existing situation which, of its nature, was unlikely to come before the court." (This seems impliedly to acknowledge that advising on matters which could come before the Court would have compromised

1 Also later when answering George Negus "And as I told the questioner here, even at this point of time I am quite content to be judged by what I did because I think it was right"

2 Federation Under Strain 158-160.

This statement is subject to challenge at two levels — whether or not the statement in fact related only to matters unlikely to come before the Court — whether, even, if it did only relate to matters unlikely to come before the Court, Barwick CJ's behaviour compromised his own and the Court's position. At the Press Club luncheon Barwick CJ was questioned on this and related points. His main line of defence was to assert that his advice only related to the authority of the Governor-General to withdraw the commission of a Prime Minister and that question could never come before the Court.  

No matter how one reads Barwick CJ's advice, however, it is impossible to conclude that it only related to the power of the Governor-General to withdraw a Prime Minister's commission. First, it contained assertions about the duty of a Prime Minister unable to obtain supply either to resign or to advise a general election. One can probably extend to this point Barwick CJ's statement that the "situation ... was unlikely to come before the Court" but still question the propriety of such advice being given. (The discussion will return to this aspect of the advice.) Secondly, it contained assertions about the constitutional authority and duty of the Governor-General, after dismissing a Prime Minister unable to obtain supply, to invite the leader of the Opposition if he could obtain supply to form a caretaker government pending a general election for either the House of Representatives or for both Houses of Parliament as that Government may advise. If the advice is to be construed as

1 Sir Garfield Barwick, "A Judge's Role in Public Life" Sunday Australian 10 October 1971. "Yet the judge who ventures to take place in the community in relation to its social affairs, must be astute not to act or to speak on or in relation to any matter which may generate litigation which may came before him in his judicial capacity."

2 Answers to questions from Mungo MacCallum, Richard Ackland, George Negus, John Lombard.
endorsing a double dissolution, then it was touching on a situation which could have come before the Court.

At the Press Club luncheon when a questioner drew attention to the aspect of Gibbs J's judgment in the Petroleum and Minerals Authority Case which indicated that the Court might be able to intervene to prevent an illegal dissolution of the Senate (the inference being that the deposed government might have instituted such action), Barwick CJ replied "if there is a difference between Mr Justice Gibbs and the rest well that will have to work itself out".  

This was an extraordinarily inadequate answer. In the s57 cases Barwick CJ himself had asserted that the Court had jurisdiction to ensure compliance with s57's prescribed method of law-making even to the point of taking preventative action to restrain a joint sitting

1 Although it might be argued that Barwick CJ's advice did not express a concluded opinion on whether or not a double dissolution could properly be effected, it is open to the construction that it did authorise a double dissolution. The advice concluded with the declaration that the "course upon which Your Excellency has determined" was consistent with his Constitutional duty. Governor-General Kerr's record of his conversations with Barwick CJ is similarly ambiguous and open to the construction that the "course" which the Governor-General explained to Barwick CJ included a s57 double dissolution. Sir John Kerr Matters for Judgment - An Autobiography 337, 342.

2 Mungo MacCallum.

3 (1975) 134 CLR 81, 157.

4 Cf Sawer op cit 158.

5 The question itself was less than satisfactory. The questioner (Mungo MacCallum) suggested that Gibbs J had expressed a concluded view on the power of the Court to intervene to prevent a dissolution not complying with s57. In fact Gibbs J, although indicating some support for the existence of such a power, carefully reserved the question. (1975) 134 CLR 81, 157. The question was also misleading in that it attributed to Gibbs J an opinion about the Court's power to prevent improper dissolution of both Houses of Parliament. In fact Gibbs J expressed the opinion that the power derived from ss5 and 28 to dissolve the House of Representatives was probably unrestricted Id. 155-156. Gibbs J's concentration was on the power in s57 to dissolve the Senate.
from legislating if s57's preconditions had not been satisfied. A questioner at the luncheon\(^1\) reminded Barwick CJ that in the First Territories Representation Case, he (Barwick CJ) had also expressed the opinion that deadlocked bills could become stale by the lapse of time so as no longer to be available for s57 action.\(^2\)

In relation to this specific point about stockpiled bills becoming stale, Barwick CJ replied that he was in the minority in expressing that opinion so he must have been wrong. This answer was received with hilarity by the audience and it cannot be seen as anything other than a joke. It in no way constituted a satisfactory answer. It is not inconceivable that Barwick CJ might have deferred to the opinion of his brother Judges who had expressed their opinion that deadlocked bills could not become stale through lapse of time.\(^3\) (Having in Cormack v Cope expressed the view that a reference in the Governor-General's proclamation convening a joint sitting to a bill which was not in fact eligible for enactment by a joint sitting, would vitiate any action taken at the joint sitting,\(^4\) Barwick CJ then in the First Territories Representation Case itself\(^5\) deferred to the contrary opinion expressed by three of his brethren in Cormack v Cope).\(^6\) Still if Barwick CJ were to have deferred readily on the fundamental point of stockpiling, going to the power to dissolve the Senate, it would have contrasted strongly with his refusal in the Second Territories Representation Case\(^7\) to accept what he perceived to be

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1 Richard Ackland.

2 (1975) 134 CLR 201, 220-222 accepting the submission (id. 211-212) of Western Australia's Solicitor General, Wilson later Wilson J of the High Court.

3 (1975) 134 CLR 201, 236-237 per Gibbs J; 251-253 per Stephen J; 265-266 per Mason J. 277-278 per Jacobs J; 289 per Murphy J.


5 (1975) 134 CLR 201, 225.

6 (1974) 131 CLR 432, 462-463 per Menzies J, 468 per Gibbs J 471 per Stephen J.

the fundamental inroad upon the Senate's position in the Federation created by the decision in the First Territories Representation Case.\(^1\)

In any case the point was not whether, if any action were brought, either to restrain the Governor-General from dissolving the Houses of Parliament or to challenge the validity or efficacy of that action afterwards, it would succeed. The question was whether if any such action were brought it would be entitled to be argued and not dismissed as vexatious. If any such action had been brought it is difficult to see that it would not have been entitled at least to be argued.\(^2\) Barwick CJ's own published judgments had clearly identified possible grounds for challenging s57 action and it was always possible that other grounds could be identified.\(^3\)

Barwick CJ's advice said, of course, not that it was impossible that the situation could come before the Court but that it was

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1 (1975) 134 CLR 201. Above pp.52ff.
2 G Sawer Op cit 158-159.
3 In the First Territories Representation Case Stephen J expressed the opinion that the Governor-General's powers in s57 were limited by purpose. (1975) 134 CLR 201, 260-262. Leslie Katz developed the argument that the Governor-General's power (under s57) to dissolve the Houses of Parliament can only be used for the purpose of resolving deadlocks of bills which have satisfied the preconditions for s57 action and cannot be used for other purposes. On that approach the Governor-General's action was ultra vires as it was taken for the purpose of resolving the conflict over the supply bills which were not deadlocked under s57. "The Simultaneous Dissolution of Both Houses of the Australian Federal Parliament 1975" (1976) 54 Canadian Bar Review 392. The Governor-General's statement explaining the basis for his action is set out in Sawer op cit 207-210 and in "Current Topics -The Fourth Double Dissolution, 11th November 1975" (1975) 49 ALJ 645. Richard Ackland at the Press Club luncheon attributed such a view to Barwick CJ in the First Territories Representation Case. The argument was a logical extension of Barwick CJ's proposition that we should bear in mind "the function of s57 in providing the possibility of the electorate expressing its opinion or the matters in difference between the Houses of Parliament ..." (1975) 134 CLR 201, 222) but Barwick CJ's judgment did not directly endorse the proposition. (The judgments of Mason J (id. 265-266) and Jacobs J (id. 277) were inconsistent with the notion that the Governor-General's actions under s57 might be reviewed for relevance of purpose.)
unlikely to do so. In a sense it was true to say that the situation was "unlikely" to come before the Court. It was "unlikely" that an action would be brought to restrain the Governor-General from dissolving the Houses of Parliament as the Governor-General did not intend to keep the Prime Minister informed of his intended actions. There is no evidence, however, that Barwick CJ knew of this secrecy. If Barwick CJ had been party to the secrecy, then he would have been involved in bringing the Court into highly controversial political action. (On the one previous known occasion of a Governor-General seeking advice from the Chief Justice, the Governor-General first obtained the consent of the Prime Minister to such an approach being made. It is not clear whether Barwick CJ knew or even questioned whether such consent had been given on this occasion.)

Even though Barwick CJ himself had stated in the PMA Case that failure to comply with s57's conditions would not vitiate any actual dissolution or consequent election in purported reliance on s57, the point could hardly be said to be conclusively settled and there was a real possibility of an application by the dismissed Prime Minister for a declaration that the purported double dissolution was a nullity.

And what of the deadlocked bills on which the double dissolution was based? According to the opinion polls, the Labor government had been out of favour with the electorate for some months and was not "likely" therefore to be returned so as to have the opportunity to

1 Sir John Kerr Op cit 334 "... Mr Whitlam, by his publicly announced and privately stated attitudes, had left me under no obligation to tell him how my thinking was developing."
3 (1976) 134 CLR 81, 120.
4 Jacobs J thought it possible that a failure to satisfy s57's preconditions could result in a purported dissolution being void. Id. 196. Gibbs J and Stephen J were of the same opinion as Barwick CJ, id. 157, 178. Mason J expressed no concluded opinion id. 183-184. The minority opinion of McTiernan J that the satisfaction of s57's preconditions was not justiciable would prevent challenge to the validity of a double dissolution.
submit the deadlocked bills to a joint sitting. It would seem, however, improper for the Chief Justice to risk compromising his position on the basis of the expectation of the success of one political group rather than another in a general election.\(^1\)

Furthermore, whatever the colour of the government elected after the double dissolution, this newly elected government could have adopted some of the deadlocked bills and might have submitted them to a joint sitting. There were twenty-one deadlocked bills. If any one of them had been passed by a joint sitting following the double dissolution the Court could well have been asked to decide on the validity of the resulting law.

I now leave for the moment the question of the propriety of Barwick CJ giving the advice and turn to the contents of the advice. Barwick CJ's proposition that the Senate has constitutional power to refuse supply has been exhaustively discussed by others.\(^2\) The general opinion is that Barwick CJ was correct to conclude that the final words of s53 - "Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all purpose of laws" - mean what they say and there is no basis for limiting them by implication to exclude the power to reject supply. I have nothing to add to that topic.

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1 Compare the Bank Nationalisation Case (1949) 79 CLR 497 where the Privy Council felt "free" to give its advisory opinion of how it would have decided the case if it could have. It is obvious that the Privy Council could not have felt "free" to publish its views if those views had been supportive of the substance of the appellant's case.

Barwick CJ's assertions about the duties of a government unable to obtain supply and about the responsibility of a government to the Houses of Parliament have not received similar general acceptance. As Sawer points out, Barwick CJ offered no authority for his assertion that a Prime Minister unable to obtain supply must either resign or advise a general election. Sawer could find no unequivocal precedent for the proposition and points out the inappropriateness of such a rigid rule in a complex political situation.\(^1\)

Barwick CJ's advice is not free from ambiguity. It can be construed as offering a justification for the assertion about the duty of a government unable to obtain supply, in these terms:— In the British unitary system, a government having the confidence of the House of Commons can continue in office and obtain supply without the support of the House of Lords. (Implicitly, a government not having the confidence of the House of Commons will not obtain supply.) The Australian Parliament is structured around principles of ministerial responsibility and federalism. For federal reasons supply can not be obtained without the support of the House of the States as well as the House of Representatives. Therefore, inability to obtain supply indicates an absence of Parliamentary confidence in the government which, according to principles of ministerial responsibility, is obliged to resign or advise an election.

Such a line of reasoning by equating ability to obtain supply with the confidence required by the doctrine of responsible government, introduces the proposition that Commonwealth governments must have

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\(^1\) Op cit 158. BL Lovell in a letter to the Editor of the Australian Law Journal, (1976) 50 ALJ 256, supports Barwick CJ's opinion and its basis in analogy with the United Kingdom Parliament. JG Starke rejects out of hand the suggestion that refusal of an upper house to grant supply is a basis for forced dismissal of a Prime Minister (reviewing Kerr, Matters for Judgment) (1979) 53 ALJ 105, 106.
the confidence of both Houses. As Sawer comments it would simply be absurd to say that Australian governments must have the confidence of both Houses.\(^1\) If that proposition were correct then it would make a nonsense of Australian parliamentary tradition and it would result in a state of anarchy whenever the House of Representatives and the Senate were under the control of different political forces as no government would have the confidence of both Houses. A questioner\(^2\) at the Press Club luncheon pointed out to Barwick CJ that after the Governor-General had dismissed Prime Minister Whitlam, and commissioned Fraser as Prime Minister, the House of Representatives had reaffirmed that Whitlam and not Fraser had its confidence. The questioner asked, should not Fraser have resigned his commission, because, according to Barwick CJ's theory of responsible government, governments must have the confidence of both Houses. Barwick CJ might have answered that according to his theory a Prime Minister lacking the confidence of both Houses must either resign or advise a general election and Fraser had done the latter. Instead Barwick CJ asserted that all that really mattered was ability to get supply and Fraser got supply. If this was all that Barwick CJ's written advice to the Governor-General had been intended to convey, then the references therein to ministerial responsibility in a federal bi-cameral structure and to the confidence of both Houses, were of marginal relevance and served only to confuse. The advice, however, seemed to treat these notions as pivotal.

Even if we accepted Barwick CJ's statement at the Press Club as confining the "duty to resign or advise election" to situations of inability to obtain supply, it still means that the advice carries consequences which it is difficult to believe the Founders could have intended. Even with such a limitation the advice would still give the States' House, the Senate, the power (through the coercion of threat to deny supply), to dictate to the House of the nation, the House of

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1 *Op cit* 159.

2 Bill D'arcy.
Representatives, that it must either accept a ministry of the Senate's choosing or keep on being dissolved and having general elections until people willing to do the Senate's bidding gained a majority in the House of Representatives. This consequence would follow because although the power of the Governor-General to send the House of Representatives to a general election is not subject to any express limitations, the Senators are guaranteed a fixed term unless there happen to be deadlocked bills making s57 available. Some might think it fortuitous and beneficial that the Senate have the power to force the House of Representatives to go to its electorate for re-endorsement. The nation may, otherwise, have to suffer a bad government for three years. Barwick CJ did not introduce any such notion to his advice and there is nothing to suggest that the Founders intended the House of Representatives to have to carry on its business under constant threat of election called, effectively, by the States' House.

In the context of determining the meaning of s57's phrase "fails to pass", Barwick CJ had eschewed any construction which would give the House of Representatives any power to compel the Senate even to enter upon deliberation of a bill. It was for him unthinkable and inappropriate to the Senate's status that the House of Representatives should have anything like a power to direct the Senate to consider a bill. Barwick CJ's advice implicitly recognized a much more

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1 Constitution ss28 and 32.

2 Constitution s7. PH Lane raised the question of whether the Governor-General has any prerogative power (apart from s57) to dissolve Parliament. "Double Dissolution of Federal Parliament" (1973) 47 ALJ 290. Barwick CJ emphasised in Cormack v Cape (1974) 131 CLR 432,449-450 that s57 provides the only power to dissolve the Senate. (No reference was made by Barwick CJ to the arguments proposed by Lane for the existence of a separate prerogative right.) J Goldring discusses the issue in "The Royal Prerogative and Dissolution of the Commonwealth Parliament" (1975) 49 ALJ 521 and agrees with Barwick CJ's conclusion. So too do the editorial commentators of the Australian Law Journal in Current Topics - "The Precise Ground for the Double Dissolution of 11th April, 1974" (1974) 48 ALJ 161.
fundamental and "unthinkable power" for the Senate to coerce the House of Representatives in any and every aspect of government.¹

Sawer's other line of criticism of Barwick CJ's assertions about Prime Minister's duties was that the assertions seemed to elevate conventional standards to rules of law.² This criticism was also central to Sawer's fourth point dealing with the references in Barwick CJ's advice to the constitutional duties of the Governor-General.³ Kerr reports that he only asked Barwick CJ in what circumstances he (Kerr) could take certain actions. "I did not, of course, ask the Chief Justice whether existing circumstances would warrant my doing this".⁴

Barwick CJ said at the Press Club "... he never asked me to advise him as to whether he should or he should not. He merely asked me whether if he took that course it was within his authority, constitutional authority, and that is quite a different thing".⁵ There is indeed a very large difference between power and duty. Yet despite all his protestations at the Press Club that his advice related solely to the power of the Governor-General to withdraw a Prime Minister's commission, Barwick CJ's advice clearly went beyond that topic. As noted above the advice contained the clear assertion that the Governor-General had a duty to invite the leader of the Opposition, if he could obtain supply, to form a caretaker government pending a general election for the House of

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¹ Compare Press Club luncheon. Question Tony Hawker "Do you think the events of November the eleventh have now confirmed or now indicated that ... the Senate has primacy over the House of Representatives, the People's House? 

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Barwick CJ - that is not for me to discuss. That is a political question."

² Op cit 158-159.

³ Id. 159-160.

⁴ Kerr Op cit 342.

⁵ Answering Tony Hawker.
Representatives or for both Houses of that Parliament. The advice also contained ambiguous declarations that "the course upon which Your Excellency has determined is consistent with your constitutional duty."

Sawer asks, were the Prime Minister's and Governor-General's duties to which Barwick CJ referred in his advice, legal or non-legal (conventional, moral) duties? Sawer asks further, if, as seems likely, Barwick CJ was talking about non-legal matters then what business was it of his to enter political debate about what Prime Ministers and Governors-General should do. The fact that Barwick CJ's advice seemed to go beyond matters of law into matters of convention and politics, reinforces the point already made - the giving of such advice endangered the independent status of the High Court. (One might add, if Barwick CJ wanted to enter the political arena, why did he not discuss whether the Governor-General should urge the Senate to comply with what many people considered to be a convention that Senates should not refuse supply?)

During one phase of questioning at the Press Club Barwick CJ's answers might be construed as elevating the duties referred to in his advice to duties in law. That viewpoint and Barwick CJ's understanding of the source of these legal duties emerge from these extracts.

Barwick CJ ... It is not reserve power at all. It's a simple case, simple case that of a Minister who cannot provide the Crown with money for the ordinary services of government, cannot remain the Crown's Minister. Now the fact is that.

1 Op cit 158-160.
2 Op cit 160.
3 The suggested convention is discussed in "Current Topics - Standing by the Constitution" (1975) 49 ALJ 553, 554; JE Richardson, "The Legislative Power of the Senate in Respect of Money Bills" (1976) 50 ALJ 273 especially pp.280-290; G Sawer Op cit 121-129.
[Unidentified questioner] Sir Garfield could I clarify an answer that you gave to an earlier question.\(^1\) If I just repeat the question. What section of the Constitution specifies that the Prime Minister unable to obtain supply, should either advise an election or resign, what section of the Constitution lays down that the Governor-General's duty would in these circumstances be to commission the opposition as a Caretaker Government. Now my understanding of it was that you replied to that, those questioners no.\(^2\)

Barwick CJ No, no - no sections about it - no.

[ ? ] Well was not the advice that you gave to the Governor-General then Sir, purely political?

Barwick CJ No, no, no. It was, it was founded on the legal traditions of a responsible government.

[ ? ] But Sir you referred in that, to the question there, to constitutional authority, which ...

Barwick CJ Yes that is right, well that is right, a responsible Government constitutional authority is built into our whole system."

Through this exchange there is of course the slide from questions about duty to answers about authority. The point to note is that Barwick CJ's answers can be construed as asserting that the assumption of responsible government underlying the Constitution creates by implication the legal duties described by the unidentified questioner.

\(^1\) Then the questioner was Geoff Simpson.

\(^2\) Barwick CJ had simply replied when asked before "None. But you could not carry on a Government otherwise".
This is, to say the least, a highly debatable proposition, indeed a radical proposition.¹

Some of the criticism which I have set out here of the content of Barwick CJ's advice and the fact that he gave such advice, can be undercut by pointing out that it turns on attributing the worst possible construction to Barwick CJ's words. This defence itself emphasises the ambiguity of Barwick CJ's language and thus reinforces the essential point that the decision to give such advice took the Chief Justiceship of the High Court of Australia into the political arena. Lawyers reading Barwick CJ's advice with their background knowledge of constitutional tradition might well be able to discern the narrower and more acceptable constructions and limitations in the scope of the advice. The advice was, of course, prepared for the Governor-General - who happened to be a distinguished lawyer. Both Governor-General and Chief Justice well perceived, however, the possibility of widespread publication of the advice.² Given its ambiguity, the publication of the advice in the political context of the time, left it open to being construed as an approval of the legality and propriety of all the Governor-General's actions.

Federal Parliament - Themes and Patterns in Barwick's behaviour

The issues dealt with in this Chapter surrounded sections of the Constitution which had not been explored by the High Court before Barwick's Chief Justiceship. The opportunity was thus presented for the members of the Court to state what they believed to be the best constructions of the sections without having to compromise their

¹ "Current Topics - Standing by the Constitution" (1975) 49 ALJ 553, 554. "Likewise, it cannot be postulated that there is any legal duty in the Prime Minister to advise the Governor-General that the House of Representatives should be dissolved in the event of a refusal of supply. The best that can be said is that there is something approaching a parliamentary usage that such dissolution should be advised, in view of the difficulty of carrying on government without the parliamentary control of moneys."

² Kerr op cit 342.
beliefs on account of precedent. (The activity of the 1970's quickly generated its own precedent, with, of course, dramatic effect on the outcome in the Second Territories Representation Case).

The following hypotheses are some of those which might be set up to explain the pattern of Barwick CJ's behaviour discussed in this Chapter.

H1: Barwick CJ was compelled to his conclusions by the unambiguous language of the constitution.

The discussion through the Chapter has demonstrated that seldom was the text of the Constitution unambiguous or inexorably compelling. Options were available. Indeed, where the language seemed to be at its most powerful - in s44(v) - Barwick CJ read it down.

H2: Barwick CJ's judicial choice was affected by his belief that the Senate should be strong so that it can perform its essential federal role of protecting State interests.

Barwick CJ expressly relied on the role which he considered that the Constitution intended for the Senate. Barwick CJ's zeal in defending (and some would say, elevating) the status of the Senate by reasoning emphasising its position as the States House might have surprised some of those who had followed the trend of his decisions relating to the scope of Commonwealth legislative power in the first decade of his Chief Justiceship. In that period and on that issue (which is examined in the following Chapter), Barwick CJ had generally not been one to tolerate let alone rely on, States rights arguments.

H3: Barwick CJ's judicial choice was affected by a belief that the Upper House (regardless of the electorates it theoretically represents) should be strong so that it can review and delay or block hastily conceived or ill conceived action of the House of Government.
(The evidence which might support this hypothesis is subsumed by the discussion relating to the next hypothesis).

H4: Barwick CJ's judicial choice was affected by a lack of respect for the democratic principle that the people manifest their political will through their elected government.

Barwick CJ clearly indicated his willingness to assert the power of the High Court over elected government even if that led the High Court into political controversy. He gave no recognition, to notions of democracy as a source for constitutional law relating to election of Parliamentary representatives.

On almost every issue through these cases on Federal Parliament and in his advice to the Governor-General, Barwick CJ chose a position which made it harder for the Labor Government to enact laws and to retain office than did other positions available. On the other hand, the giving of the advice to the Governor-General, which contributed to the dismissal of the Labor Government might be seen as indicating faith in the electoral process which came into operation on that dismissal).

There may be some degree of accuracy to all of these hypotheses. No single one of them is unshakeably convincing nor is any one of them sufficient to explain all of Barwick CJ's positions discussed in this Chapter. (None of the hypotheses set out above, for example, explains Barwick CJ's position in Re Webster. Perhaps the key to that decision lies in Barwick CJ's attitude to freedom of trade.)¹ The evidence does not suggest to me any other sustainable hypotheses. One broader point does emerge - as with his position on the doctrine of separation of powers, Barwick CJ set a higher value on the strength of the judiciary than he did on its reputation for independence and neutrality.

¹ Section 92 chapter.
Chapter IV

THE FEDERAL BALANCE — THE DISTRIBUTION OF
GOVERNMENTAL POWER BETWEEN THE
COMMONWEALTH AND THE STATES

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Chapter IV: The Federal Balance - The Distribution of Governmental Power Between the Commonwealth and the States

This Chapter follows Barwick's path through the issues of law and principle relating to the distribution of governmental power between the Commonwealth and the States. The States have general power to make laws for their respective geographical territories. The Commonwealth is given express power with respect to specific subject matters. Those express specific grants have been supplemented by implication. Some of the Commonwealth's powers are made exclusive to the Commonwealth by the Constitution. Most Commonwealth powers are concurrent so that the mere existence of Commonwealth power does not exclude the States. Section 109 provides that if there is inconsistency of a Commonwealth and a State law, the Commonwealth law shall prevail.

A - Federal Assumptions of the First Judges of the High Court

The first judges of the High Court, Griffith CJ, Barton and O'Connor JJ, determined constitutional issues by express reference to their understanding of the kind of federal balance the Constitution was intended to create.¹ Their Honours' perception of the intended balance was not stated with any great precision. Fundamental to their federation was the proposition

"In considering the respective powers of the Commonwealth and of the States it is essential to bear in mind that each is, within the ambit of its authority, a sovereign State, subject only to the restrictions imposed by the imperial connection and to the provisions of the Constitution, either express or necessarily implied".²

¹ Given their central involvement in the drafting of the Constitution their Honours were, of course, in a rather special position to comment on the federal balance intended by the Constitution. See also Clark J in Pedder v D'Emden (1903) 2 TasLR 146.

² D'Emden v Pedder (1904) 1 CLR 91, 109 per Griffith CJ, Barton and O'Connor JJ (emphasis added).
This perception of federalism provided the basis for two main doctrines, the doctrine of reserved powers, and the doctrine of intergovernmental immunities.

(i) The doctrine of reserved powers - federalism as a basis for construing grants of Commonwealth power

This doctrine went to the general problem of ascertaining the reach of Commonwealth powers in s51. This doctrine held that the Constitution had reserved to the States by ss106 and 107 powers omitted from the express list of Commonwealth powers in s51 (and, in particular, had reserved to the States the subject matter of intra-State trade, which was omitted from s51(i)'s grant to the Commonwealth of power with respect to inter-State and overseas trade). The reservation of certain powers to the States was just as much a part of the Constitution as the grant to the Commonwealth of a list of express powers. If the Commonwealth's express powers were to encroach on the States reserved powers, then the Constitution would involve an internal contradiction which could not have been intended. The Constitution should therefore be construed so as to avoid such a contradiction. From this reasoning there emerged two separate branches, both directed to protecting the area of powers and, in particular, the power with respect to intra-State trade, reserved to the States.

1 "The Constitution of each State of the Commonwealth shall, subject to this Constitution continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State."

2 "Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth or as at the admission or establishment of the State as the case may be".
One branch went to the definition of subject matters of power in s51. When a subject matter of power was capable of receiving more than one meaning, then it should be given the meaning which would encroach the least on the powers (or at least, on power over intra-State trade) reserved to the States. Thus, the phrase "trade marks" in placitum (xviii), rather than having the meaning "any mark used in connection with trade" (which would have encroached on the reservation to the States of power with respect to intra-State trade and which would have included the "Union Made" labels in issue,1 meant instead a "kind of incorporeal or industrial property consisting in the right of a person engaged in trade to distinguish by a special mark goods in which he deals, or with which he has dealt, from the goods of other persons."2 Since a trade union could not be said to be engaged in trade, "Union Made" labels could not be trademarks.3

The second branch went to the characterisation of a law as being with respect to a subject matter of power.4 When a Commonwealth law touched on a subject matter of Commonwealth power, and a subject matter not of Commonwealth power that is, a subject matter reserved to the States, then the High Court had to decide whether the law was in substance with respect to the Commonwealth head of power (and therefore valid) or, in substance, with respect to the non-Commonwealth subject matter (and therefore invalid.) The indicator of a law's substance or true character was its purpose apparent on its face. Thus in Barger's Case a law imposing tax liabilities on products manufactured in accordance with prescribed employment

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1 The Union Label Case (1908) 6 CLR 461, 503 per Griffith CJ.
2 Id. 512-513.
3 Id. 516-518.
4 Although some writers would use the word "characterisation" to cover both the definition of subject matter and the "with respect to" issue, it seems to me more appropriate to reserve the word "characterisation" solely for the "with respect to" issue and that will be the way in which I use the word.
standards was held to be not in substance a law with respect to taxation (so as to come within s51(ii)) but rather a law with respect to employment conditions, a subject matter reserved to the States.¹

The notion of substance involved here was necessarily vague, impressionistic and unpredictable in its application. By way of contrast with the result in Barger, in Osborne v Commonwealth a tax on large land-holdings was held to be in substance a law with respect to taxation and valid rather than a law with respect to breaking up large land-holdings and invalid.²

(ii) The doctrine of intergovernmental immunities - federalism as a basis for implying law into the Constitution

This doctrine was directed to the specific problem of the power of the Commonwealth to burden or hamper the States and the power of the States to burden or hamper the Commonwealth. The doctrine held that neither could bind the other. Each was sovereign and could not therefore be subject to the other. This mutual immunity was seen to be necessarily implied in the Constitution.³ As a result of this doctrine States could not tax the remuneration received by a federal officer⁴ and the relations between State railways and their employees were held to be beyond the Commonwealth power in s51(xxxv).⁵

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1 (1908) 6 CLR 41 per Griffith CJ, Barton and O'Connor JJ; Isaacs and Higgins JJ dissenting.
2 (1911) 12 CLR 321 per Griffith CJ, Barton, O'Connor, Isaacs and Higgins JJ unanimously.
3 The Railway Servants Case (1906) 4 CLR 488, 538.
4 D'Emden v Pedder (1904) 1 CLR 91. Deakin v Webb (1904) 1 CLR 585; Baxter v Commissioner of Taxation (1907) 4 CLR 1087.
5 The Railway Servants Case (1906) 4 CLR 488.
The doctrine was qualified by the proposition that the implication of State immunity from Commonwealth legislation (based as it was on the necessity for the continued sovereign existence of the States) could be offset if it was necessary for the effective exercise of any of the express Commonwealth powers (which defined Commonwealth sovereignty) that the States be bound. Thus, when it was considered necessary for the effectuation of the Commonwealth's power to impose customs duties (whether derived from the express power in s51(i) or the express power in s51 (ii)) that the States be bound like other importers, the implication of State immunity from Commonwealth action was pro tanto rebutted.¹

B - The Engineers Case - the rejection of federalism as a basis for constitutional interpretation

The specific issue in Amalgamated Society of Engineers v The Adelaide Steamship Co Ltd² was whether the Commonwealth could, in giving effect to the settlement of an industrial dispute otherwise within its power in s51 (xxxv), bind a State government in its industrial relations with its employees. It was held that the Commonwealth could so bind a State.³ In the course of explaining its decision the Court repudiated the reasoning and propositions on which both the doctrine of intergovernmental immunities and the doctrine of reserved powers had been based.

Four members of the majority in this 1920 Court, Knox CJ, Isaacs, Rich and Starke JJ gave a joint judgment. Central to their framework was the proposition that there is one indivisible Crown.⁴ There was, therefore, no justification for any reasoning, doctrine or

¹ The Steel Rails Case (1908) 5 CLR 818.
² (1920) 28 CLR 129.
⁴ Id. 146-147.
implication based on a perceived necessity to protect the independent sovereignty of the States from the Commonwealth (or vice versa). The one sovereign, the Imperial Crown had assented to be bound by laws made under the Commonwealth Constitution which had been established by the Imperial Parliament to fulfil the agreement of the people of the colonies to join in a Commonwealth.\(^1\) Therefore the extent to which the Crown in right of a State was bound by Commonwealth laws depended solely on construing the Commonwealth Constitution to see what authority it gave to bind the Crown. Since the Commonwealth Constitution dealt expressly with sovereign legislative, executive and judicial functions of the Crown, it would not have been difficult to conclude that it was intended that the Crown be bound by the Constitution and by laws made under its authority. That conclusion was put beyond doubt\(^2\) by the presence of covering clause V.\(^3\) Without adverting to the possibility of a distinction being found in the absence from State Constitutions of any provision like the Commonwealth covering clause V, their Honours also concluded that the Commonwealth could be bound by State laws. Any conflict of laws was to be resolved by recourse to s109.\(^4\)

The extent of particular Commonwealth heads of power (and, therefore, the extent of Commonwealth power to bind the States) was to be ascertained by construing the heads of power according to ordinary principles of construction.\(^5\) It was not a proper function for a Court to take to itself the power to veto government action by reference to vague political theories and the erection of arbitrary

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1 Id. 152.
2 Id. 152-153.
3 "This Act, and all laws made by the Parliament of the Commonwealth under the Constitution shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; ..."
4 Id. 155.
5 Id. 148, 154.
unpredictable implications. The possibility of abuse of power was a matter between government and the electors.\(^1\) If the text were explicit the Court could not add to it or subtract from it by making implications.\(^2\)

There was, as a matter of construction, no contradiction involved in s51 intruding into areas of State power continued by s107. There was no logical imperative that Commonwealth and State power be mutually exclusive. State powers were general and were therefore concurrent with most of the Commonwealth's express powers. Conflict through action in overlapping areas of competence was to be resolved by recourse to s109.\(^3\)

Thus, after the Engineers Case it appeared that the High Court had abandoned the doctrine of intergovernmental immunities and had abandoned so much of the reserved powers doctrine as went to subject matter definition. In relation to the branch of the reserved powers doctrine going to characterisation of a law as being with respect to a (defined) Commonwealth subject matter, the Engineers Case was, however, inconclusive.

I turn now to outline the experience after the Engineers Case, and Barwick's part in the exploration of the principles relating to the three issues - definition of subject matters of Commonwealth power, characterisation of laws as being with respect to (defined) subject matters and intergovernmental conflict.

\(^1\) Id. 145, 150-152.
\(^2\) Id. 149-150.
\(^3\) Id. 153-155 Cf the judgment of Dodds CJ in D'Emden v Pedder (1903) 2 Tas LR 146, 168ff.
C - Definition of Subject Matters of Commonwealth Power after the Engineers Case

(i) Definition of Subject Matters - General Principles

It was established early in the High Court's life that when defining terms used in the Constitution, it is the meaning of the terms as at the date of enactment, 1900, which must be ascertained.¹ It was also early established that although the 1900 meaning remained fixed, new developments not existing and perhaps unforeseen in 1900 might be encompassed by a 1900 definition.² These propositions were unaffected by the Engineers Case and are now entrenched. It is now customary to talk of the fixed meaning as the connotation in distinction from the denotation which means the things from time to time falling within the connotation.³ Barwick CJ accepted these propositions.⁴

In its nature, the problem of definition cannot be reduced to predictable mechanical rules. There has been no return to the pre-Engineers reserved powers doctrine of construing ss51 powers to as to avoid "contradiction" with ss107. Members of the High Court have simply set about finding the "natural meaning" of the words used. Thus, for example, when asked to construe "like services" in placitum (v) "Postal, telegraphic, telephonic, and other like services" the members of the High Court gave the phrase what they perceived to be its natural meaning without feeling any compulsion to choose a

¹ Union Label Case (1908) 6 CLR 469, 501 per Griffith CJ.
² Ibid.
³ Professional Engineers Case (1959) 107 CLR 208, 267 per Windeyer J.
⁴ Eg. King v Jones (1972) 128 CLR 221, 229. R v Federal Court of Australia; exp Western Australian National Football League (1979) 143 CLR 190, 208.
reasonable but narrower meaning which would have encroached less on intra-State trade.\(^1\) When considering a problem of subject matter definition in the \textit{St George County Council Case}, Barwick CJ commented:

"The reserved powers doctrine of the past has been fully exploded; but care needs to be taken that it does not still in some form or another infiltrate one's reasoning when construing Commonwealth powers or Acts of the Parliament."\(^2\)

The reserved powers doctrine drew significance from what had been omitted from grants of power to the Commonwealth and, thus, reserved to the States. Another argument which would limit the content of one power by reference to the presence of others, draws significance from what has been included in the other powers. The argument is that the presence of specific powers should prevent a generally expressed power being given a broad meaning (albeit a meaning otherwise available) if to do so would render the specific powers superfluous.

This argument was put in the \textit{Seas and Submerged Lands Act Case}\(^3\) in an attempt to limit the content of s51(xxiv) "External affairs", by taking account of the presence of the specific provisions, s51(x) "Fisheries in Australian waters beyond territorial limits" and s51(xxx) "The relations of the Commonwealth with the islands of the Pacific". No member of the Court accepted the argument. Only three members of the court, Barwick CJ, Mason and Jacobs JJ commented on this argument. All three were of the opinion there was no need to adopt a narrow definition of "external affairs" so as to avoid overlap.

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\(^1\) \textit{R v Brislan; ex p Williams} (1935) 54 CLR 262. The majority thought "like services" covered any system of distant communication and therefore included broadcasting. Dixon J in dissent thought the natural meaning of "like services" involved only two-way communications systems.

\(^2\) \textit{R v Trade Practices Tribunal; exp St George County Council} (1974) 130 CLR 533, 540-541.

\(^3\) \textit{New South Wales v Commonwealth} (1975) 135 CLR 337, 47 per KA Aickin QC later Aickin J of the High Court.
with s51(x) and s51(xxx). Only Mason J went so far as to say that the presence of s51(x) and s51(xxx) had no effect on s51(xxix).\footnote{1} Barwick CJ and Jacobs J seemed to leave open the possibility that the wide definitions of external affairs that they were willing to adopt could be subject to implied limitation(s) to take account of other specific powers.\footnote{2}

Parallel arguments have been put to try to limit the otherwise broad meaning of s51(xxi) "Marriage" by reference to the presence of the specific s51(xxii) "Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants". When taking the form of an argument that "Marriage" be limited to the entry into of the marital relationship, the argument was rejected by Taylor J and Menzies J in the Marriage Act Case\footnote{3} and implicitly rejected by the conclusions about the content of the "Marriage" power expressed by other members of the Court.

In Russell v Russell the argument took two forms: first, that the specific reference in s51(xxii) to "parental rights, and the custody and guardianship of infants" in relation to divorce or a matrimonial cause precluded parental rights, custody and guardianship being

\begin{itemize}
  \item \footnote{1} Id. 471.
  \item \footnote{2} Id. 360, 497 respectively. Their Honours' reservation may have been affected by the discussion of s51(x) in the earlier case of Bonser v La Macchia (1969) 122 CLR 177. There Barwick CJ at 190 (although foreshadowing at 189 the proposition which he and the majority adopted in the Seas and Submerged Lands Act Case (1975) 135 CLR 337, that the States geographical territories end at low-water mark) and Menzies J at (1969) 122 CLR 177, 209-210 concluded that s51(x) gave the Commonwealth no power with respect to fisheries in waters within three nautical miles of the coast. Kitto J expressed sympathy for that view (at 202), Windeyer J rejected it (226-227), and McTiernan J and Owen J did not express opinions.
  \item \footnote{3} Attorney-General (Victoria) v Commonwealth (1962) 107 CLR 529, 360, 372 re ec vely.
\end{itemize}
reached by s51(xxi) "marriage";\(^1\) secondly, that the specific reference to enforcement of marital rights in s51(xxii)'s "matrimonial causes" impliedly took out of s51(xxi) enforcement of the rights created under s51(xxi).\(^2\)

The majority in Russell, Stephen, Mason and Jacobs JJ rejected both these variations of the argument and held that despite the presence of s51(xxii), s51(xxi) extended to the institution of marriage both in terms of the creation of rights and obligations of parties to marriage relating to maintenance, custody and property, and in terms of the enforcement/creation of jurisdiction to deal with such rights and obligations.\(^3\) For these judges it was, in the context of determining a constitutional power, a rather dubious exercise to try to imply limitations for one power from the presence of another.\(^4\)

Gibbs J (in dissent) was of the opinion that s51(xxi) if read alone, would enable "the Parliament to legislate for the enforcement of the rights which one party had against the other and which arose from the marriage relationship, including rights to maintenance and custody".\(^5\) The presence, however, of the specific reference in s51(xxii) to "parental rights, custody and guardianship of infants" in relation to "Divorce and matrimonial causes" prevented "parental rights, custody and guardianship of infants" being reached under s51(xxi) unless associated with a divorce or matrimonial cause.\(^6\)

1 (1976) 134 CLR 495, 500.
2 Id. 498.
3 Id. 538-539 per Mason J with the concurrence of Stephen J on this point Id. 529; also 547-550 per Jacobs J.
4 Id. 539 per Mason J (Stephen J concurring 529), 550 per Jacobs J.
5 Id. 525.
6 Id. 525-527.
The other dissentient, Barwick CJ, seemed to allow that s51(xxi) extended to the creation of rights relating to the consequences of the celebration of a marriage both for the parties and for the children of the marriage.1 (So much was, of course, assumed by the Marriage Act 1961 which Barwick had sponsored as Attorney-General2 and which had been upheld in the Marriage Act Case.) That is, his Honour did not seem to think that the entire topic of parental rights, custody and guardianship of infants was taken out of s51(xxi) because of the specific treatment of part of that topic in s51(xxii).

Barwick CJ gave full force to the second argument for limiting s51(xxi) by reference to the presence of s51(xxii). His Honour was of the opinion that although some overlapping of subject matters of power is possible3 it was not permissible to construe s51(xxi) in a way which would render otiose s51(xxii), a power on a cognate topic.4 The subject matter in s51(xxi) could not, therefore, be construed so as to reach to the creation of jurisdiction to deal with rights that might be created under s51(xxii). (Barwick CJ offered as an alternative ground for decision, and in this he went further than Gibbs J, that even in the absence of s51(xxii) he would have held s51(xxi) did not reach to enforcement of rights created thereunder).5 In the result, according to Barwick CJ the Commonwealth's only power to create jurisdiction to enforce rights created by s51(xxi), was the power in s51(xxii) which limited the Commonwealth to creating jurisdiction to deal with divorce and nullity proceedings and matters ancillary thereto.6 (Similarly, in the Australian Assistance Plan Case Barwick CJ reinforced his conclusion

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1 Id. 509.
3 (1976) 134 CLR 495, 508.
4 Id. 508.
5 Id. 510, 512.
6 Id. 512.
that the words "for the purposes of the Commonwealth" in s81 import a limitation on Commonwealth Parliament's power to appropriate funds, by referring to the presence of the specific power in s96 to make grants to the States.)

Barwick CJ made no attempt to explain the difference between his attitude to s51(xxi) - construing it so as to prevent it rendering s51(xxii) otiose - and his attitude to s51(xxix) - construing it regardless of rendering s51(XXX) otiose. It might be suggested that legislative history provides a distinction between s51(xxi) and s51(xxii) on the one hand and s51(xxix) and s51(XXX) on the other. Barwick CJ offered no such reconciliation. Perhaps the strong views on s51(xxi) and s51(xxii) which Barwick expressed as Chief Justice can be traced to the views he had formed as Attorney-General. Then Barwick had expressed his belief, apparently based on a perusal of the Convention Debates "that the founding fathers proposed the cession to the Federal Parliament of the power to make laws with respect to marriage and with respect to divorce and matrimonial causes though deliberately confining power with respect to any further matters of matrimonial and family concern to such as were ancillary to divorce and matrimonial causes."


2 The Federal Council of Australasia Act (Imp) (1885) 48 & 49 Vict C 60, s15 gave the Federal Council of Australasia legislative authority in respect to inter alia "(a) The relations of Australasia with the islands of the Pacific". That legislative background could explain why the Founders would incorporate into the Constitution a power - s51(XXX) - in similar terms to s15(a) of the Federal Council of Australasia Act - even though the final draft of the Constitution had acquired a new power - s51(xxix) which subsumed s51(XXX). There was in the Federal Council of Australasia Act (s15(i)) a reference to legislative power in respect to "recognition in other colonies of marriage or divorce duly solemnized or decreed in any colony". That reference provided no justification in legislative history for an overlap of s51(xxi) and s51(xxii).

(ii) Definition of Subject Matters - Specific Powers

Barwick CJ's position on some other issues of subject matter definition should be noted at this stage.

(a) Section 51(i)

Barwick CJ gave a relatively wide definition to the subject matter of inter-State trade which is the subject matter of Commonwealth power in s51(i). That wide definition, however, was set out by Barwick CJ not in the context of s51(i) but instead in the context of s92 which declares that inter-State trade shall be absolutely free. The significant points of Barwick CJ's definition are set out in the s92 Chapter.

(b) Section 51(xx)

Section 51(xx) gives the Commonwealth power to make laws with respect to, inter alia, "trading corporations". In the St George County Council Case a Court of only five divided three to two with Barwick CJ and Stephen J in dissent.\(^1\) McTiernan, Menzies and Gibbs JJ held that the St George County Council, a corporation established under the New South Wales Local Government Act, was not subject to the Commonwealth Restrictive Trade Practices Act which applied to "trading corporations".

No member of the Court suggested that the Council had any inherent intergovernmental immunity. For McTiernan J it was simply a matter of construction of the Commonwealth Act involved which, in McTiernan J's opinion, was only intended to apply to private enterprise corporations.\(^2\) The other members of the Court, could not discern any such limitation in the meaning of the Act and treated the meaning of the phrase "trading corporation" in the Act as being tied to the same phrase in s51(xx).

\(^1\) R v Trade Practices Tribunal; exp. St George County Council (1974) 130 CLR 533.

\(^2\) Id. 546-547.
Menzies and Gibbs JJ followed the approach of Isaacs J who had in 1908 in *Huddart, Parker & Co Pty Ltd v Moorehead*\(^1\) expressed his opinion that corporations fell into mutually exclusive categories. Isaacs J offered a number of examples of categories. The decision of the true character of a corporation, the decision of which category a corporation belonged, was to be determined, according to all the corporation's circumstances such as the purpose and manner of its formation and its internal structure as well as its activity.\(^2\) There was a case for this "one true character" approach in nineteenth century company law.\(^3\) Isaacs J had set up this approach in 1908 to meet the argument that if the law in issue dealing with trade practices of trading corporations were held to be within s51(xx) there would be a radical Commonwealth encroachment on State areas. Isaacs J's point was that an application of his test would only bring a narrow range of corporations within the reach of s51(xx).\(^4\) His brethren Griffith CJ, Barton, O'Connor and Higgins JJ nevertheless held the law invalid. *Strickland v Rocla Concrete Pipes Pty Ltd*\(^5\) had overruled *Huddart Parker* just three years before *St George*.

The dissentients in *St George*, Barwick CJ and Stephen J considered that the character of a corporation as a "trading corporation" could be derived solely from the corporation's activity - whether intended or current activity was the *discrimen* did not matter (though Barwick CJ expressed a preference for the latter)\(^6\) - and whether or not the test was exclusive or predominant activity was the *discrimen* did not matter either (though again Barwick CJ expressed a preference for the

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1. (1908) 9 CLR 330, 393.
2. (1974) 130 CLR 533, 552-554 per Menzies J; 561-564 especially 564 per Gibbs J.
3. LR Zines, The High Court and the Constitution, 70.
4. (1909) 8 CLR 330, 393.
latter)\(^1\) - because the sole intended and sole current activity of the corporation was to trade.

When a Court of seven considered the definition of "trading corporation" again in *R v Federal Court of Australia; Exp WA National Football League Inc.*\(^2\) Barwick CJ found that he was one of four judges (the others were Mason, Jacobs and Murphy JJ) holding that incorporated football organizations were trading corporations because of their current trading activities. (Included among the three dissentients was Stephen J who agreed that the activity of the corporation was the determining consideration but who concluded, on applying that test to the facts, that the football organizations were not trading corporations. Barwick CJ's requirement in *St George* that trading be the predominant activity softened in the *Football League Case* to a requirement that trading be a substantial and not merely peripheral activity.\(^3\) This tended to widen the power - a corporation can have many substantial activities. It can, however, only have one predominant activity. (Barwick CJ did not acknowledge that this amounted to a shift.) Mason J (with Jacobs J's concurrence) was close to Barwick CJ's new approach adopting a test of whether trading represented a significant proportion of the corporation's activities.\(^4\) Murphy J took the most generous approach. He indicated that he would be satisfied if the trading was an important current activity of the corporation either in relative or in absolute terms\(^5\) and that he would be satisfied either by the current activity of the corporation or by the purpose for which the corporation was established.\(^6\)

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1 *Id.* 543.
2 *(1979) 143 CLR 190.*
3 *Id.* 208.
4 *Id.* 233.
5 *Id.* 239.
I do not wish to argue the relative merits of the arguments for and against accepting that the character of trading corporation can be derived solely from the corporation's activity. Nor do I wish to discuss the problems of applying a test which requires comparisons to be made of the relative significance of different activities carried on by one corporation. Such a test is inherently subjective and impressionistic and may in time lead back to the examination of the same kinds of balancing of factors which the true character test involved. The true character test is, of course, no more certain in its application. The significant point for current purposes is that acceptance of the activity test means that more corporations are likely to be within the reach of s51(xx) than would have been the case if the true character test had been the sole test. As the fact of Stephen J's dissent in the Football League case demonstrates however, the potential of the activity test can be curtailed, given its vagueness, at the point of application.

(c) Section 51(xxix)

The final specific point of subject matter definition to be mentioned relates to the subject matter of s51(xxix), "external affairs". It is generally agreed that the subject matter includes matters affecting Australia's relations with other countries. In the Seas and Submerged Lands Case Barwick CJ, Mason J and Jacobs J also regarded things geographically external to the continent of Australia as being a branch of the subject matter. Gibbs CJ (with the concurrence of Aickin and Wilson JJ) has since indicated his reluctance to accept the existence of that second branch to the subject matter. The issue takes on special importance when it is connected with the question of the geographical limits of the States which constitute the Commonwealth. The assumption of most legal experts was once that the league seas off the coasts of the States

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1 New South Wales v The Commonwealth (1975) 135 CLR 337, 360, 471, 197 respectively.
were part of the Territories of the States.\(^1\) In 1958 Professor O'Connell published an article arguing the view that the States' territories end at the low water mark.\(^2\) The 1969 case of *Bonser v La Macchia* concerned the sufficiency of s51(x) to support a Commonwealth law applying to a fishing activity six miles off the New South Wales coast.\(^3\) Both the Commonwealth and New South Wales requested the Court to refrain from considering the issue of the territorial limits of the States on the basis that that issue was not essential to the decision of the case.\(^4\) Despite that request, and even though there had been no argument on the point Barwick CJ delivered elaborate *dicta* arguing the view that the States' territories do end at low water mark.\(^5\) Windeyer J also favoured that view.\(^6\) Of the other members of the Court, only Kitto J made any comment and he indicated a tendency to recognize State territories as extending to a three mile limit.\(^7\)

The issue was brought directly to a head by the *Seas and Submerged Lands Case*\(^8\) when the Commonwealth statutorily asserted certain sovereign rights over the league seas and their subsoil and over the

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1. E Campbell, "Regulation of Australian Coastal Fisheries" (1960) 1 Tas Uni L Rev 405. See also the material collected in the dissents of Gibbs and Stephens JJ in the *Seas and Submerged Lands Case* (1975) 135 CLR 337.

2. DP O'Connell, "Some Problems of Australian Coastal Jurisdiction" (1958) 34 BYIL 199, 209.


4. Id. 180.

5. Id. 184-189. In a note on the case in (1970) 3 Adelaide L Rev 500, 504 Professor O'Connell states that after the conclusion of argument in the case Barwick CJ had presided at a symposium where Sir Percy Spender argued the view that the States' territories end at the lowwater mark. Sir Percy Spender and Barwick had been on the same floor in Chambers when Barwick was at the bar. Marr, Barwick 27.

6. Id. 218-224. Also after his Honour's retirement from the High Court his address "The Seabed in Law" (1974) 6 FL Rev 1.


continental shelf beyond. There was not really any issue about the Commonwealth assertion beyond the league seas. The Court was divided, however, about the league seas. The majority judges, Barwick CJ, McTiernan, Mason, Jacobs and Murphy JJ, held that the States' territories ended, generally, at low water mark. The dissents of Gibbs and Stephen JJ brought together a very strong case to support the proposition that the documents establishing the States and defining their territories placed the league seas under the sovereignty of the States. Barwick CJ left it to Mason and Jacobs JJ, to deal with the construction of the States' constituting instruments. Barwick CJ gave most of his attention to stating and supporting his view that it was "the intendment of the Constitution" that the Commonwealth should become an internationally recognized independent nation state and that any Imperial rights, sovereign or proprietary, in offshore waters subsoil and air space, which existed at federation were derived from international law and should pass to the Crown in right of the Commonwealth on acquisition of international status. That "intendment" was indicated by the grant to the Commonwealth of power with respect to "defence" and "external affairs". The Commonwealth had in time acquired that independent status "aided in that behalf by the Balfour Declaration and the Statute of Westminster and its adoption".\(^1\)

Barwick CJ indicated that his conclusions (both as to territorial limits and as to the passing of Imperial rights to the Crown in right of the Commonwealth) were affected by his belief in the desirability of these conclusions when he commented:

"This result conforms, in my opinion, to an essential feature of a federation, namely, that it is the nation and not the integers of the federation which must have the power to protect and control as a national function the area of the marginal seas, the seabed and airspace and the continental shelf and incline. This has been decided by the Supreme Courts of the United States\(^2\) and of

\(^1\) Id. 373. Similarly id 382 per McTiernan J; 469-470 per Mason J, 497-498 per Jacobs J.

Canada\textsuperscript{1} ... I am satisfied with the reasons given by those Courts for their conclusions.\textsuperscript{2}

The decision in the Seas and Submerged Lands Case obviously represented a significant victory for the Commonwealth and provided the potential for the Commonwealth to have control, similar to that of a government in a unitary state, over offshore activities and resources. The Commonwealth victory was traceable to judicial encouragement voluntarily offered by Barwick CJ and Windeyer J in Bonser v La Macchia. Their Honours may well have been surprised when their conclusions drawn from their perceptions of the needs of national government were rejected by the national government. After the Seas and Submerged Lands Case the Commonwealth government used s51(\text{xxxviii}) to extend federalism to offshore regulation by enacting a complex "offshore settlement" giving the States a role in the control of significant offshore regulation.\textsuperscript{3}

D - Characterisation ("with respect to") after the Engineers Case

The issues of definition of Commonwealth subject matters of power are one of the determinants of the federal balance - the line between Commonwealth and non-Commonwealth. The discussion now turns to another major determinant of that balance - the characterisation of a law as being "with respect to" a defined subject matter of Commonwealth power.

1 Characterisation - General Principles for the Central Areas of Powers

2 (1975) 135 CLR 337, 374.
3 "Current topic - Distribution of offshore constitutional responsibilities between the Commonwealth and States" (1979) 53 ALJ 605; RD Lumb, "Section51, pl.(\text{xxxviii}) of the Constitution" (1981) 55 ALJ 328.
No High Court judge has ever sought to make the subjective motives of the legislators a criterion of validity. When the pre-Engineers Court spoke of the relevance to validity of the purpose of a law, the reference was to the purpose apparent on the face of the law.\(^1\)

The pre-Engineers approach to characterisation had been affected by Canadian doctrines. In the Canadian context, with subject matters allocated to mutually exclusive lists, when a law touches on subject matters from the different lists, a decision must be made to allocate the law to one list or the other. The very structure of the Canadian Constitution requires Courts to decide the substance, in the sense of the one predominant character, of a law. After the Engineers Case, the reasoning which had sought to find for Australia a similar necessity in s107 was debunked. In Engineers it was pointed out that State power and Commonwealth power under s51 are concurrent not mutually exclusive.\(^2\)

The issue which remained after Engineers was, even if a Barger type inquiry\(^3\) into the purpose and substance of Commonwealth laws was not dictated by the structure of the Constitution, was such an inquiry nevertheless appropriate — and, if such an inquiry was not appropriate, what were the principles for characterisation of Commonwealth laws.

For three decades after Engineers, references to the substance of a law as the determinant of a law's validity were standard. Barger's Case was cited with approval.\(^4\) In Moran's Case\(^5\) the Privy Council referred to that aspect of Barger with approval.

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1 Barger's Case (1908) 6 CLR 41, 75 per Griffith CJ, Barton and O'Connor JJ.
2 (1920) 28 CLR 129, 153-155 per Knox CJ, Isaacs, Rich and Starke JJ.
3 Above pp.87ff.
4 Eg First Uniform Tax Case (1942) 65 CLR 373, 442 per Starke J.
5 (1940) 63 CLR 338, 341.
As counsel in the State Banking Case (1947)\(^1\) and the Bank Nationalisation Case (1948)\(^2\) Barwick KC submitted that a law prohibiting banking was not a law with respect to banking so as to be supported by s51(xiii) unless the prohibition was conditioned on some fact relevant to banking regulation. In the State Banking Case\(^3\) the prohibition was on the provision of banking services to State governments and was held invalid by a majority, (Latham CJ, Rich, Starke, Dixon and Williams JJ with McTiernan dissenting). Some of the majority judges\(^4\) used language compatible with the approach to characterisation involved in Barwick's submission but the issue of intergovernmental interference was very significant for the outcome and the case is dealt with further below under the heading "Intergovernmental immunities after the Engineers Case".\(^5\)

In the Bank Nationalisation Case\(^6\) the prohibition of banking was a prohibition of all private banking. Four members of the Court, Latham CJ, Starke, Dixon and McTiernan JJ\(^7\) with Rich and Williams JJ dissenting on this point,\(^8\) held that it was within power under s51(xiii) to prohibit banking absolutely but there was no common approach to characterisation.

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1 (1945) 71 CLR 29, 33-34.

2 (1948) 76 CLR 1; HCT (High Court Transcript) 9/2/48, 11-12; 11/2/48, 131-141, 151-153; 12/2/48, 155-185. Especially at 11/2/48, 152 "The test is pith and substance".

3 (1945) 74 CLR 31.

4 Id. 61-62 per Latham CJ; 67 per Rich J (reference to "pith and substance"); 98, 100 per Williams J.

5 Below pp.171ff.

6 (1948) 76 CLR 1.

7 Id. 197-198, 301, 331-333, 392-393 respectively.

8 Id. 258.
Latham CJ was amongst those who could find no clearer test than the "substance" of a law. His approach clearly differed from the reserved powers approach in that, although he required Commonwealth laws not only to operate on a Commonwealth subject matter but also to be substantially with respect to that Commonwealth subject matter, he did not require that the laws be predominantly concerned with the Commonwealth subject matters. That is, his Honour allowed that a law validly with respect to Commonwealth subject matter could also be with respect to non-Commonwealth subject matter. Nevertheless, this approach, like the Barger approach seemed to treat characterisation as an impressionistic matter of degree, a matter of sufficiency of connection with (defined) Commonwealth subject matters. PH Lane has exposed the lack of principle, the lack of guidance that is provided by terms such as "substance" and "predominant character".  

Dixon J introduced an alternative. Dixon J was opposed to any resort to imprecise tests of "substance". These, for him, led the Court too quickly into hazy inquiries into purpose and this led the law into uncertainty. Dixon J asserted that for most of the paragraphs of s51, operation on the Commonwealth subject matter was per se enough to bring a law within power. The existence of a non-Commonwealth purpose on the face of the law would not deprive the law of its relevant Commonwealth character.  

Dixon J considered that his approach should be applied to those paragraphs of s51 where the subject of power could be described either:

1 Bank Nationalisation Case (1948) 76 CLR 1, 185-187.
2 "Judicial Review or Government by the High Court" (1966) 5 SLR 203, 212-220.
3 Stenhouse v Coleman (1945) 69 CLR 457, 471; State Banking Case (1947) 74 CLR 31, 80.
1 by reference to a class of legal, commercial, economic or social transaction or activity such as trade and commerce, banking or marriage;

2 by specifying some class of public service (such as postal installations or light-houses) or undertaking (such as railway construction with the consent of a State), or

3 by naming a recognized category of legislation (such as taxation or bankruptcy).¹

The quest by Dixon J for certain and predictable tests of characterisation was consistent with the tone of the main judgment in the Engineers Case which had criticised the doctrine of implied intergovernmental immunity because inter alia, it introduced a vague and unpredictable test of validity.²

This flurry of activity in the 1940's had gone some way to identify the main alternative approaches to characterisation - vague and impressionistic true character/substance/degree/purpose tests on one hand versus the legalistic mechanical predictable test of Dixon J on the other.

A major development came with the case of Herald and Weekly Times Limited v The Commonwealth³ involving s51(v), the power with respect to "Postal, telgraphic, telephonic, and other like services". The case was argued and decided after Barwick had joined the Court but he did not participate. One of the Commonwealth laws in issue prohibited television broadcasting without a Commonwealth licence. (It was already established that the subject matter included television

¹ Stenhouse v Coleman (1945) 69 CLR 457, 471.
² (1920) 28 CLR 1, 145, 150-152 per Knox CJ, Isaacs, Rich and Starke JJ.
³ (1966) 115 CLR 418.
The holding of the licence was subject, *inter alia*, to a condition requiring the independence of the licence-holder from other licence holders. It was argued\(^2\) that the validity of the prohibition depended on the relevance of the conditions to the subject matter. In answer to this, there was a strong argument that the conditions were relevant to the subject matter of the power anyway. Indeed McTiernan J, a member of the High Court since 1930, simply dismissed the attack on the legislation with the statement that the legislation was in substance within s51(v).\(^3\) The other members of the Court, all appointed since 1950 and all members of the Court during Dixon's Chief Justiceship preferred to decide according to the same general principles which Dixon J had developed.

Kitto J, with Taylor, Windeyer and Owen JJ concurring,\(^4\) reasoned thus - television broadcasting was within the subject matter in s51(v) - the prohibition of television broadcasting was therefore a law with respect to a television service - a law relaxing the prohibition on conditions was therefore also a law with respect to a television service\(^5\) and then, the central point:

"A law which qualifies an existing statutory power to relax a prohibition is necessarily a law with respect to the subject of the prohibition. Even if the qualification gives it the additional character of a law upon some other topic - even, indeed, if that other topic be not a subject of federal legislative power - it is still a law with respect to the subject of the prohibition, and is valid if that subject be within federal power: cf *Fairfax v Federal Commissioner of Taxation*.\(^6\)

\(^1\) *Jones v The Commonwealth [No 2]* (1965) 112 CLR 206.

\(^2\) (1966) 115 CLR 418, 433 according to Kitto J. No such submission appears clearly in the report of the argument (*id.* 428-430) of KA Aickin QC (later Aickin J of the High Court).

\(^3\) *Id.* 432.

\(^4\) *Id.* 438, 442, 442 respectively.

\(^5\) *Id.* 433.

\(^6\) *Id.* 434.
The case which Kitto J cited, Fairfax v Commonwealth Commissioner of Taxation, had been decided early in Barwick's Chief Justiceship. The Commonwealth law in issue in Fairfax was an amendment to a tax assessment Act provision which gave an exemption to the investment income of superannuation funds. The amendment sought to deny the exemption unless a prescribed percentage of a fund's investments was in Commonwealth securities. Thus, this case, like Barger, involved s51(ii).

It was first argued that the Court should take notice of the notorious fact that the Commonwealth had been having difficulty in filling its loans. This argument which went to the motives of the legislature received scant attention from the Court.

The submissions of Commonwealth Solicitor-General AF Mason QC, (who was to be part of a later Barwick Court which developed the general principles further), echoed the dissents of Isaacs J and Higgins J in Barger's Case. Mason submitted that the validity of the law could only be determined by examination of its legal operation. The only legal liabilities defined by the legislation were tax liabilities. There was no positive command to invest in a certain way or any prohibition on investing in a certain way.

1 Id. 439 ff, especially 439-440.
2 (1965) 114 CLR 1.
3 Id. 2 NH Bowen QC.
4 Compare id. 10-11 per Kitto J.
5 (1908) 6 CLR 41, 99, 119 respectively.
6 (1965) 114 CLR 1, 3.
The Court of Barwick CJ, Kitto, Taylor and Menzies and Windeyer JJ unanimously upheld the legislation despite the purpose, apparent on its face, of affecting the investment policies of superannuation funds. There was, however, no united Court position on the issue of whether or not the purpose of a tax law could be relevant to its validity.

Kitto and Taylor JJ took the Dixon approach to characterisation. The validity of a law depended on the duties, obligations and liabilities it created. That was the only relevant "substance". The purpose, apparent on the face of this tax law, of inducing trustees of superannuation funds to invest in a certain way, did not change the character of the law. No legal obligation was placed on the trustees to make such investments. Kitto and Taylor JJ referred directly to Barger's Case and pointed out that that decision was a manifestation of the reserved powers doctrine which had since been exploded. Neither could see that the reasoning in Barger's Case had any continuing validity but neither unequivocally declared the decision overruled.

Menzies J's judgment was ambiguous in its attitude to the Barger approach to characterisation. Those who would read Menzies J's judgment as supporting Dixon J's approach can point to the passage.

"Whether or not a law is one with respect to taxation can not be determined by looking at its economic consequences, however apparent they must have been at the time of its enactment; nor is an enquiry into the motives of the legislature permissible."
That statement was, however, quite compatible with the Barger approach which claimed to ascertain the purpose (but not the motive) and thus the true character of a provision solely from its terms. What followed immediately was consistent with a Barger framework but inconsistent with Dixon J's approach.

"There may be laws ostensibly imposing tax which, nevertheless, are not laws with respect to taxation. For example, a special prohibitive tax upon income derived from the sale of heroin or from the growing or treatment of poppies for the production of heroin may not be a law with respect to taxation but rather a law made for the suppression of the trade in that drug by imposing penalties described as taxes for participation in it. The reason for denying to such a law the character of a law with respect to taxation would not be either its economic consequences or the motive behind its enactment. It would simply be that its true character is not a law with respect to taxation. The problem in every case is, therefore, to ascertain from the terms of the law impugned its true nature and character."

This passage is inconsistent with Dixon J's approach to characterisation but is consistent with Barger's (and Latham CJ's) characterisation approaches. It is to be noted that although Menzies J's heroin example referred to a prohibitive tax, towards the end of the quoted passage his Honour said that the "true character" test was to be applied in every case. That is, it seems that his Honour was not setting up his test as a mere proviso for extreme cases. Menzies J went on to find the impugned legislation valid but that decision seems to have been affected by his Honour's opinion that this was a typical kind of tax law. "The giving of taxation advantages to induce investment in Commonwealth securities has long been a feature of the taxation laws of the Commonwealth."2

There was thus a division with Kitto and Taylor JJ declaring for the Dixon J approach to characterisation and Menzies J supporting some (not necessarily Barger) true character/ substance/purpose approach.

1 Id. 17-18.
2 Id. 17.
Windeyer J expressed "substantial agreement"\(^1\) with all the judgments delivered in the case (including, presumably, the one yet to be discussed, that of Barwick CJ). His Honour made no direct reference to the apparent differences in approach of Kitto and Taylor JJ on one hand, and Menzies J on the other. Windeyer J seemed to come close to the position of Menzies J when he accepted that a condition might show that a law in the guise of a tax, was not a tax in its true character. The condition in issue, seeking to replenish the Treasury did not, however, deprive the tax of such character.\(^2\)

Chief Justice Barwick gave a short non-committal judgment. He stated that he had read the judgment of Menzies J and agreed with that judge that there was no basis for declaring the legislation invalid.\(^3\) On the point of difference between Kitto and Taylor JJ and Menzies and Windeyer JJ, Barwick CJ would say only;

"It is possible that a law increasing or decreasing the extent of an existing exemption from liability to pay a tax validly imposed may in some circumstances for my part not readily envisaged - be held not to be a law with respect to taxation."\(^4\)

If Barwick CJ thought that this possibility was remote and unlikely why was it that he chose to express agreement with the judgment of Menzies J rather than that of Kitto J or Taylor J? It may simply be that Menzies J had circulated a draft and received Barwick CJ's concurrence before any other judge had circulated and that Barwick CJ having once given his "support" to Menzies J, although perhaps later moved to qualify his support after reading other drafts, had no desire to re-direct his support to another judge.

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1 Id. 18.
2 Id. 19.
3 Id. 4.
4 Id. 5. Emphasis added.
Whatever the explanation, the result was that Barwick CJ clearly conveyed the impression that he would not have much sympathy for attempts to attack tax laws because of their purpose. Barwick CJ did not, however, give an unequivocal statement rejecting purpose inquiries. This fact left the judgment somewhat vulnerable.

A case of great significance for general principles of characterisation was the case of Murphyores Incorporated Pty Ltd v The Commonwealth.¹ This case involved legislation which prohibited the export of minerals without the consent of a Minister. The Minister withheld his consent to the export of minerals mined from Fraser Island in Queensland, pending the outcome of an inquiry into the environmental effect of the mining. The Minister proposed, when deciding whether or not to allow export, to take account of the inquiry's report on the environmental effect of the mining.

Former Commonwealth Attorney-General TEF Hughes QC challenging the validity of the Commonwealth action, argued that the export prohibition enabled the Commonwealth Minister to control a matter not within Commonwealth power, environmental considerations. In this operation Hughes submitted, the prohibition on export ceased to be a law with respect to overseas trade.² This argument was similar to those that Barwick KC had put to the High Court thirty odd years before. Now Barwick CJ interjected from the bench "That is R v Barger in its worst form."³

When Hughes pressed on, calling in aid defence power cases which required a relevance of criteria for government action to the purpose of the power,⁴ Barwick CJ again interjected to point out that the defence power is a purpose power and then stated that

2 Id. 3.
3 Ibid.
4 Id. 3.
"Other powers such as trade and commerce power can be used to attain an object not within the scope of the power."  

Later Barwick CJ also commented that the fact that the prohibition on export derived from a provision in the Customs Act, a taxing Act, was a further reason for "saying there is no limit to the objects that may be attained by the use of the power."  It was perhaps a little careless of Barwick CJ to suggest that the inclusion of a non-tax provision in a tax Act would make it subject to tax power (s51(ii)) principles of characterisation. Each operative provision of any Act should be tested against the principles of Characterisation for the power supporting the particular provision in issue rather than against the principles of characterisation for the power supporting other provisions in the Act. The significance of Barwick CJ's comment for present purposes is in its assumption that the tax power can be used to pursue non-Commonwealth purposes.

The legislation was upheld unanimously by the Court of seven. All members of the Court (except Murphy J who gave no reasons for his decision other than to say that the Minister could take account of national policies when deciding whether to grant or withhold his consent to export) endorsed the approach to characterisation set out by Kitto J in Herald and The Weekly Times to the effect that where an activity is within the centre of the subject matter of power, the Commonwealth can prohibit it absolutely or allow it conditionally without having to show that its prohibition has been imposed or relaxed by reference to conditions relevant to that or any other Commonwealth subject matter.

1 Id. 4.
2 Ibid.
3 Id. 26-27.
4 Id. 8 per McTiernan J; 11-12 per Stephen J, 22-23 per Mason J with Barwick CJ, endorsing the judgment of Stephen J (id. 5), and Gibbs (id. 9) and Jacobs JJ (id. 26) endorsing the judgments of both Stephen J and Mason J.
This declaration of principle was very important. (It was, of course, a victory for Dixon J and Kitto J. Barwick CJ was neither author nor sponsor. His only involvement as counsel had been to oppose its adoption. And, as the discussion of Barwick CJ's judgment in the Payroll Tax Case will show Barwick CJ left some doubt about his acceptance of the principle.) It is important to note, however, the limitations of the decision. The decision was directly concerned with the characterisation of laws imposing, and laws relaxing, prohibitions on activities within the central area of a subject matter or power.

The decision had nothing to say directly to the characterisation of laws authorising activities within the central area of a subject matter of power, that is, to the characterisation of laws going beyond mere relaxation of a Commonwealth prohibition to the vesting of a positive right, overriding any State prohibition, to engage in an activity. The thrust of the discussion in the case would probably, however, carry over to deal with vesting rights (overriding State prohibitions) to engage in activities within the central area of a subject matter of power.

The second main limitation is that the decision had nothing to say directly to the characterisation of laws when the subject matter of power is not an activity. The principle to be derived from the Herald and The Weekly Times and Murphyoresses decisions - that when the Commonwealth has power with respect to an activity it can prohibit it absolutely or allow it conditionally - probably governs not only the

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1 Below pp185ff.
broadcasting power (s51(v))\(^1\) and the trade and commerce power (s51(i)) but also other powers with activities as subject matters — banking (s51(xiii)) and insurance (s51(xiv)) and arguably even reaches Astronomical and meteorological observations, (s51(viii)) immigration (s51(xxvii))\(^2\) and the influx of criminals (s51(xxviii)). But what about other subject matters?

The Herald and The Weekly Times and Murphys decisions can probably be taken to have settled for all kinds of Commonwealth subject matters: first that a Commonwealth law can have more than one character so long as in at least one of its characters it is with respect to a Commonwealth head of power. Secondly that the mere fact that a Commonwealth law reveals on its face a purpose of achieving an effect not referable to a Commonwealth head of power will not take the law beyond Commonwealth power. But what about other problems of characterisation?

(ii) Characterisation — Specific powers

(a) Section 51(ii)

Dixon J had set up as his third general group of powers to which his mechanical, legalistic approach to characterisation would apply, those powers which defined their subject matter by naming a recognized

\(^1\) Section 51(v) refers to "services" rather than activities but has been held to include broadcasting activities. R v Brislan exp Williams (1935) 54 CLR 262 (Dixon J dissenting). Dixon J had, in his Stenhouse v Coleman classification, (1945) 69 CLR 457, 471 (Above p.108) originally placed the subject matter of s51(v) in his second category of powers where the power is described by specifying some class of public service. Dixon J would in any case have applied to that second category the same principles of characterisation as he applied to his first category of powers — legal, commercial, economic or social transactions or activities.

\(^2\) The body of precedent relating to this power is consistent with the Herald and The Weekly Times / Murphys principle.
category of legislation such as taxation or bankruptcy. The Murphyores decision could not even be said to have settled conclusively the principles of characterisation appropriate to s51(ii). Mason J (whose reasons for decision were adopted by Gibbs J and Jacobs J) did say that the decision in Fairfax had "swept away the last vestigial remnants of Barger's Case." The other judges, however, did not mention Barger's Case. The endorsement by McTiernan J and Stephen J of the discussion by Kitto J in Herald and Weekly Times, which drew support from Fairfax, doubtlessly left Barger in tatters. Given, however, the "true character" approach of Menzies J and Windeyer J in Fairfax, and given the silence in Murphyores of McTiernan J, and Stephen J (with whom Barwick CJ agreed) and Murphy J on the status of Barger, it was not perhaps completely accurate to say that the "last vestigial remnants of Barger's Case" had been swept away.

Barwick CJ could have tilted the balance by indicating agreement with the judgment of Mason J rather than, or as well as, that of Stephen J. (It is unlikely that Stephen J had circulated his draft judgment and received Barwick CJ's concurrence thereto before Barwick CJ had seen Mason J's draft as Stephen J referred to Mason J's description of the form and history of the action.) Indeed Professor Zines informs me that the first copy of Barwick CJ's judgment which he saw expressed agreement with both Stephen J and Mason J. Given the contempt which Barwick

2. (1975) 136 CLR 1, 23.
3. Id. 10.
4. The report of Barwick CJ's judgment in both (1976) 9 ALR 199, 200 and (1976) 50 ALJ 570, 571 is the same as in the "official" CLR.
CJ expressed for Barger during argument, it is unlikely that he was seeking to keep its principles alive. His Honour may of course, have taken for granted what Mason J was saying directly – that the case had not a shred of authority left. Barwick CJ's withdrawal of his original agreement with Mason J's judgment was probably completely unconnected with the difference between the judgments of Stephen J and Mason J on the point of the authority of Barger's Case. Nevertheless, by failing to endorse Mason J's statement about Barger, Barwick CJ again missed an opportunity to add his vote to an unequivocal rejection of Barger's approach to characterisation and thus left Barger's shadow over problems of characterisation for s51(ii).

(b) Section 51(xx)

There is another important power, s51(xx), where no clear approach to characterisation has emerged. Section 51(xx) gives the Commonwealth power with regard to "Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth". The decision in 1908 in Huddart Parker & Co Pty Ltd v Moorehead\(^1\) seemed to indicate that this was not a very significant power.\(^2\) There it was held by a majority, Griffith CJ, Barton, O'Connor and Higgins JJ, over the dissent of Isaacs J, that the power did not extend to control of restrictive trade practices of s51(xx)

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1 (1908) 8 CLR 330.

2 In argument in the Bank Nationalisation Case this exchange took place: Latham CJ "Placitum (xx) has been left by the decision in Moorehead's Case in a nimbus of uncertainty, has it not?" Dr Evatt "Not only a nimbus, but a cirrus". Latham CJ "A cumulus". Transcript of argument 8/3/48, 1132.
corporations. The judgments of Griffith CJ, Barton and O' Connor JJ were based on the reserved powers proposition that the control of intra-State trade had been reserved to the States.¹

These three "reserved powers" judges and Higgins J offered some thoughts on what kinds of laws would be within the reach of s51(xx). The concentration was on the corporate aspect of the subject matter. Griffith CJ² (Barton J not dissenting from the reasons of Griffith CJ)³ considered that the power extended to defining the capacity of foreign, trading and financial corporations (rather than the legality of their activities). O'Connor J⁴ and Higgins J⁵ considered that the power extended to recognition (throughout Australia) of corporate status obtained under foreign law or the law of one State.

In the Bank Nationalisation Case the power was put forward by Commonwealth Attorney-General Evatt to support a law prohibiting banking.⁶ Evatt adopted the approach foreshadowed in the dissent of Isaacs J in the Huddart Parker decision. According to this approach, s51(xx) should be approached on the basis that its purpose was to enable Parliament to control the external activities of three kinds of corporations with a great potential to affect society.⁷ Barwick KC also sought to derive an approach to characterisation for s51(xx) from the nature of the subject matter involved. He reasoned that the characteristics common to each of the three kinds of corporations mentioned in s51(xx) were - (a) the derivation of corporate status by the law of one jurisdiction; and (b) the likelihood of operation in

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¹ (1908) 8 CLR 330, 352, 354 per Griffith CJ, 363 per Barton J and 370 per O'Connor J.
² Id. 353-354.
³ Id. 366.
⁴ Id. 372-374.
⁵ Id. 413-414.
⁷ Ibid. For Isaacs J's dissent (1908) 8 CLR 330, 395-398.
Australia outside the jurisdiction of incorporation. It was therefore to be inferred that s51(xx) was intended to support laws providing for the recognition throughout Australia of corporate status originally based on foreign law or the law of one State as the case may be.¹

The content which Barwick KC found in the power corresponded to that suggested by O'Connor and Higgins JJ in Huddart Parker. O'Connor J had based his proposition on the reserved powers doctrine. Barwick KC acknowledged that his view of the content of the power coincided with that of O'Connor J and submitted that O'Connor J's conclusion was the correct one even if its reserved powers reasoning was unacceptable.²

Barwick KC developed his perception of s51(xx), and developed it fairly convincingly, by reference to the nature of the subject matter involved. Barwick KC disavowed reliance on the (discredited) reserved powers doctrine.³ He did, however, reinforce his submission that s51(xx) only had a relatively narrow scope by asserting

"... after all, the dominant idea of the Constitution is federal ... So often we fall into what I submit is the error of thinking about this national Parliament of today that there was a desire to give it unlimited power. This Constitution originates essentially as a federal document and federal by deliberate choice, whether the framers had before them the Canadian and American examples, and they chose to give, and in a somewhat niggardly spirit, power to the Federal Parliament and to give it by limitation as to the subject matters in these paragraphs. .... when the reserved powers doctrine was exploded it did not mean that you ... forget that it is a Federal Constitution ...[that] the States have the residue ... that these are only specific powers yielded up and you must find out what each means in relation to the other."⁴

This aspect of Barwick's argument represented a fairly clear attempt to limit the potential of s51(xx) by reference to assumptions about the intended federal balance.

1 BNC HCT 31/3/48, 2030-2051.
2 BNC HCT 1/4/48, 2039.
3 BNC HCT 1/4/48, 2036, 2050.
4 BNC HCT 1/4/48, 2050.
In the outcome Latham CJ, Rich and Williams JJ agreed with Barwick that s51(xx) did not support the law in issue. Dixon J and McTiernan J did not comment on the reach of s51(xx). Starke J did not express a concluded opinion but inclined to the view that s51(xx) did give a power to regulate the activities of the named corporations.

On his retirement from the High Court in 1952 and again in 1958, Sir John Latham suggested that s51(xx) might be very important if it were explored. Sir John went so far as to say that the Huddart Parker decision was no authority and was of no use.

As Attorney-General, Barwick sought to secure the enactment of trade practices legislation based, inter alia, on s51(xx), but it was only after his appointment to the High Court that any significant trade practices legislation was enacted. In 1971 in Strickland v Rocia Concrete Pipes Ltd a High Court including Barwick CJ grasped an opportunity to reconsider the Huddart Parker decision. In issue was Commonwealth trade practices legislation requiring the registration of restrictive trade practices. On its face, the requirement applied generally to all persons in business without

1 (1948) 76 CLR 1, 184.
2 Id. 255-256 jointly.
3 Id. 304.
4 (1952) 85 CLR vii, ix-x.
6 Ibid.
8 (1971) 124 CLR 468.
reference to s51(xx) and, it was conceded, exceeded Commonwealth power. It was held by a majority, Barwick CJ, Menzies, Windeyer, Owen and Walsh JJ with McTiernan and Gibbs JJ dissenting that the legislation could not be read down so as only to apply to agreements involving s51(xx) corporations.

Despite the decision that the legislation before them was inseverable most of the members of the Court stated their opinion that Huddart Parker was wrongly decided and should be overruled. All members of the Rocla court agreed that the taint of the reserved powers doctrine prevented the decision in Huddart Parker from constituting binding authority. It was one thing to conclude that the supporting reasoning for the decision was unacceptable. The able submissions of Barwick KC had demonstrated in the Bank Nationalisation Case, however, that it was quite another to conclude that the decision was wrong. The members of the Rocla Court made the leap to that second conclusion with remarkable ease and a conspicuous lack of reasoning.

Barwick CJ (McTiernan and Walsh JJ concurring) referred to and reserved the question of whether every law addressed specifically to s51(xx) corporations would be held to be a law with respect to s51(xx) corporations. (Such an approach would, of course, have provided a

1 Id. 472.
2 Id. 498, 499, 505, 513, 521 respectively.
3 Id. 499, 527-528 respectively.
4 Id. 485-488 per Barwick CJ (with the concurrence of McTiernan CJ Id. 499); 507-511 per Menzies J; 512-513 per Windeyer J; 513 per Owen J; 522-525 per Gibbs J.
5 Preceding note references. It is arguable that Windeyer J (at 512-513) was only committing himself to the opinion that Huddart Parker no longer constituted binding authority and was not expressing any opinion on whether the decision was nevertheless correct.
6 Id. 489-490. Similarly id. 507-508 per Menzies J.
certain and predictable test of characterisation). Why then should the laws considered in Huddart Parker have been held valid? Barwick CJ declined to offer any clear framework for testing laws for connection with s51(xx). Barwick CJ delivered himself of this theory (or non-theory) of characterisation.¹

We were also invited in the argument of these appeals to express some criteria by which a law may be held to be a law with respect to the topic of s51(xx). But such a submission in my opinion both misconceives our function and fails to realize that the constitutional formula is sufficient in itself. Efforts I know have been made to offer synonyms and explanations of that formula but, with great respect to those who have made the endeavour, the result cannot be definitive. An assumption of the Constitution in providing this Court as the arbiter of constitutional validity was that the Court would be able on being presented with a law made by the Parliament to answer the direct question whether properly construed and understood it was law with respect to one or more of the granted heads of power. The Constitution itself provides the criterion of validity: the law must be with respect to a topic of granted power. For my part the formula requires no explanation: in any case, it is the text and no commentary upon it however helpful may displace it. The constitutional formula requires a substantial connexion between the topic and the law. What will suffice in any particular instance to require an affirmative answer to the question whether it is a law with respect to the subject matter necessarily involves a matter of degree co-related to the nature of the power and to the provisions of the Act as they would operate in the area in which it is held they were intended to operate. As I have indicated, I have myself no difficulty whatever in saying that ss5(1) and 8(1) were laws with respect to, amongst other things, trading corporations formed within the limits of the Commonwealth.

There are two main points in this passage which require comment. First there is the notion that characterisation is a question of degree depending on all the circumstances of the case. That may well be the case with the periphery of Commonwealth power. The decisions in Herald & Weekly Times, Fairfax and Murphyores (the last two

¹ Id. 490-491.
involving Barwick CJ) reveal that there are some problems of characterisation which do not involve questions of degree and which do not depend on any "circumstances" other than the terms of the legislation. Secondly, it is, with respect, a duty of the High Court not only to decide but also to explain its decisions. Unless explanation is given for decisions there is no certainty or predictability in the law and the legitimacy of the High Court's position as authoritative interpreter of the Constitution is undercut.

It was, with respect, remarkably unhelpful and uninformative for Barwick CJ simply to say that it was clear to him what the constitutional formula "with respect to" meant.

Barwick CJ did at least indicate that his conclusion that the laws in *Huddart Parker* were valid, depended on the fact that those laws were controlling the trading activities of s51(xx) corporations. But why was that relevant? There is some suggestion of a possible theoretical basis for the conclusion in this passage:

"In my opinion such laws were laws with respect to such corporations. They dealt with the very heart of the purpose for which the corporation was formed, for whether a trading or financial corporation, by assumption, its purpose is to trade, trade for constitutional purposes not being limited to dealings in goods".

In *Huddart Parker* Isaacs and Higgins JJ had sought to derive theories of characterisation from the notion that to be valid under s51(xx) a law must deal with an identifying feature of the persons which are the subject of power. Higgins J proposed that to be valid a law must deal with the corporate aspect of the identity, in

1 *Id.* 489-491.
2 *Id.* 489.
particular, with the recognition of corporate status\(^1\) (and not with the trading aspect of the identity). Isaacs J proposed that to be valid a law must deal with the trading or financial (not the corporate) aspect of the identity.\(^2\) The weakness in Isaacs J's judgment was that it was in favour of holding valid a law which applied not only to trading and financial corporations engaged in restrictive trade practices but also to foreign corporations engaged in such activities. There is no correlation between the "foreign" aspect of a foreign corporation's identity and restrictive trade practices. Appearing as an alternative and wider theory in Isaacs J's judgment was the proposition that s51(xx) is concerned with "the regulation of the conduct of the corporations in their transactions with or as affecting the public".\(^3\) This wider proposition (which easily subsumed the restrictive trade practices of foreign corporations) was based inter alia on the fragile argument that the control of external aspects of s51(xx) corporations was within Commonwealth power because the internal aspects of s51(xx) corporations were not.\(^4\) Majority judgments in Huddart Parker demonstrated that it was possible to give a content to the power that reached neither the external nor the internal aspects that Isaacs J placed as opposites.

If Barwick CJ's judgment in Rocla were to be attributed to an identity theory approach to characterisation under s51(xx) then, like the dissent of Isaacs J in Huddart Parker, it had the weakness that it did not explain why that theory should bring the restrictive trade practices of foreign corporations within power. Barwick CJ was quite emphatic that the trading activities of foreign corporations were within the reach of s51(xx) and commented that the range of activities within the reach of s51(xx) might be wider for foreign corporations than it would be for the other corporations.\(^5\)

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1 (1908) 8 CLR 330, 409-414.
2 _Id._ 393-398 especially 397-398.
3 _Id._ 395. Emphasis added.
4 _Id._ 393-396.
5 _Id._ 490.
The judgment of Barwick CJ (which received the concurrence of McTiernan and Walsh JJ) is undoubtedly open to the criticism that it asserted that laws controlling the trade of foreign corporations and the trade of locally formed trading and financial corporations would be within power without explaining the reasons for those assertions. Other judgments in Rocla made the same assertions with even less attempt at explanation.\(^1\) The issue is, of course, a difficult one.\(^2\)

It is plain that the exploration of the corporations power has only just begun. It is plain also that the decision in Rocla that the power extends (at least) to regulation of the trade of trading corporations made this power one of the most important in the Commonwealth's list of powers and severely reduced the significance of s51(i)'s withholding from the Commonwealth of power over intra-State trade.\(^3\) The decision in Rocla probably represents Barwick's most significant and lasting mark on the federal balance. Barwick CJ's was the leading judgment and the members of the Court were united in their attitude to the issue of trade regulation under s51(xx). The decision to test the corporation's power as a basis for trade control was made during Barwick's Attorney-Generalship (albeit after Sir John Latham's suggestion).\(^4\) The fact that the Court in Rocla found it appropriate to comment on the scope of s51(xx) despite the majority opinion that the legislation was inseverably invalid, might itself be construed as a victory for Barwick CJ's enthusiasm for the matter.

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1 Id. 507-508, 511 per Menzies J, 513 per Owen J, 525 per Gibbs J.


3 Below pp.136ff.

4 Above p.122.
The early proponent of s51(xx) as a basis for trade controls, Isaacs J, had offset his attitude on that issue with a narrow definition of trading corporation.\(^1\) As discussed previously Barwick CJ rejected that "compensating" narrow definition and favoured a more wide-reaching definition.\(^2\) The combined result was to push out Commonwealth power under s51(xx) both on issues of definition and characterisation.\(^3\) Barwick CJ joined the unanimous decision in \textit{R v Australian Industrial Court; exp CLM Holdings Pty Ltd}\(^4\) which added to the efficacy of the power by holding that the power (whether

\[\begin{align*}
1&\text{ Above pp.99.} \\
2&\text{ Above pp.99ff.} \\
3&\text{ LR Zines, The High Court and the Constitution 70-71 argues that the narrow approach of Menzies and Gibbs JJ in the St George County Council Case to the definition of trading corporations might have led to a wider range of laws being characterised as being "with respect to" such corporations than was associated with Barwick CJ's relatively wider approach to the definition of trading corporations. In conversations on the point Zines has explained to me that his essential point was that if an "overall characterisation approach" and, in particular, an approach of characterising corporations according to nineteenth century company law had prevailed then the word "trading" might have been given a larger content than that derived from the meaning of the word "trade" in s51(i). (If that was the point then, with respect, Zines confused the issue in his book by stating (twice) that "all the corporate activities" might have been brought within Commonwealth power if an "overall characterisation approach" had been adopted.) I take Zines' point that nineteenth century company law may have given the word "trading" appearing as part of a term of art - "trading corporation" - a content different from that obtainable by reference to the word "trade" in s51(i). As for the specific example given by Zines, however - that manufacture might be within the "trading" activities of a trading corporation on Menzies J's "overall characterisation" approach to definition but not on Barwick CJ's "current activity" approach - there is room for comment. It is clear enough that manufacture is not inter-State trade for the purposes of s51(i) and s92. It is not clear, however, whether that is because manufacture is not "trade" or whether it is because manufacture is not "inter-State" or whether it is because it lacks either character. (Discussed below pp454ff.) That is, "manufacture" may well be "trade" even if within the meaning of that term where appearing in s51(i). \\
4 & (1977) 136 CLR 235.\
\end{align*}\]
centrally or incidentally was not decided) supported a law making it an offence for a natural person (a company officer) to be involved in the commission of an offence by a trading corporation.

The final point to be made about Barwick CJ's role in making s51(xx) an important source of Commonwealth power is that Barwick CJ proceeded almost entirely by assertion and offered very little in the way of a theoretical framework. It is quite remarkable that the essential proposition of Rocla could have been established without any positive supporting reasoning apart from a few cryptic comments.

(iii) Characterisation - tests of purpose, degree and substance for some powers

The discussion now turns to the problems of characterisation associated with powers where the validity of the law will turn on the purpose of the law or on the law being incidental to or calculated to affect some subject matter. The issues here are such that they could eventually swamp the fine issues of subject matter definition and central area characterisation and could become the main determinants of the federal balance.

To say that any thing may possibly be relevant to, or have and effect on, any other thing is to state a universal truth. That is the truth around which the issues of this sections revolve. What will constitute a sufficient connection between a law's operation on a subject-matter not within power, and the effect of the law on the purpose within the subject matter of power to justify the conclusion that the law is within power? Will certain kinds of effects be ignored? Will any effects of the law which do not provide a relevance to the Commonwealth subject matter be weighed against the effects which do have a relevance? If so, will the harshness of the law in its operation be weighed against its relevant effect - will the degree of its intrusion into areas of State power be taken into account?
(a) Section 51(xxi)

Dixon J had classified s51(xxi) "Marriage" as being subject to his legalistic approach to characterisation. Dixon J had put marriage along with trade and commerce and banking in his first category of powers - powers where the subject matter of power was described by reference to a transaction or activity.\(^1\) If that categorisation were appropriate then the Herald and Weekly Times and Murphyores judgments would lead to the conclusion that the Commonwealth could, under s51(xxi), prohibit marriage absolutely or allow it by reference to any kind of condition such as, for example, environmental considerations. Perhaps that is correct in so far as the activity of entering a marital relationship goes. The discussion in the Marriage Act Case\(^2\) demonstrated, however, that the subject matter "Marriage" in s51(xxi) includes more than just the entering into of the marital relationship.

The Marriage Act Case involved a consideration of various provisions from the Commonwealth's Marriage Act of 1961, an Act owing its existence to the work of Attorney-General Barwick.\(^3\) For the purposes of present discussion attention need only be given to the Court's response to the attack on s89 providing that children born out of wedlock should be regarded as legitimate for all purposes should their parents later marry. Kitto, Taylor, Menzies and Owen JJ with

1 Stenhouse v Coleman (1945) 69 CLR 457, 471.
2 Attorney-General (Victoria) v Commonwealth (1962) 107 CLR 529.
Dixon CJ, McTiernan and Windeyer JJ dissenting held s89 valid.¹

At one extreme Kitto J can be read as suggesting that a law attaching a consequence (legitimacy) to the taking of a step (marriage) should be held to be a law with respect to the step as well as a law with respect to the consequence, simply because the consequence is enacted by reference to the taking of the step.² Such a mechanical approach would provide a predictable but extraordinarily wide test of characterisation. At the other extreme, echoing a Barger type approach, McTiernan J set out as a generally applicable test for characterisation the object to which a law is primarily directed.³ McTiernan J's test of "object" is vague. His reference to the primary direction of a law assumes that a law can have only one character.

More important than these extreme positions for later developments was the notion common to some majority and minority judges, including

1 Some of the disagreement between the majority and the minority can be attributed to their different perceptions of the (purported) effect of s89. Kitto, Taylor and Menzies JJ clearly approached the question on the basis that s89 merely vested the status of legitimacy. There would be consequential effects for State legislation or private instruments which operated by reference to the presence or absence of the status of legitimacy. Nothing in s89 would, however, prevent State legislation or private instruments from adopting a different criterion which would differentiate between people born in wedlock and people born outside of wedlock regardless of legitimate status. (1962) 107 CLR 529, 553, 564, 574-575 respectively. Dixon CJ considered that State legislation attempting to differentiate between people born in wedlock and people born outside of wedlock whose parents subsequently married, would be inconsistent with s89. Id. 547. See also id. 586-587, 597 per Windeyer J. The case is fully discussed in R Sackville and C Howard, "The Constitutional Power of the Commonwealth to Regulate Family Relationships" (1970) 4 FL Rev 30, 40-53.

2 (1962) 107 CLR 529, 554.

3 Id. 549.
McTiernan J and Kitto J\(^1\), that the subject matter of power in s51(xxi) "Marriage" includes the "institution" rather than just the activity - that is, that the subject matter includes the definition by law of marriage and extends to attaching by law of consequences to the state of being married.\(^2\) Once the subject matter is defined in that way then it becomes impossible to maintain the distinction between the definition of this subject matter (as including a certain kind of law) and the characterisation of a law as being with respect to this subject matter. The characterisation issue merges into the (unpredictable, impressionistic) issue of definition.\(^3\)

Against that background, some decided that a law providing for legitimacy per subsequens matrimoniun was a law dealing with defining the institution of marriage, some that it was not. Neither group's conclusion could be said to be more valid, more consistent with general principle than the others, any more than the majority conclusion on the issue of subject matter definition in \(R \text{ v } Brislan exp Williams\)^\(^3\) could be said to have been dictated by inexorable predictable principle. As Sackville and Howard point out, however, to the extent that the minority judges reasoned from a presumption that private rights were not intended to be within Commonwealth power, their approach was inconsistent with the Engineers Case.\(^4\)

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1 Id. 549 per McTiernan J; 554-555 per Kitto J; 560-561, 570-571 per Taylor J; 572, 574 per Menzies J; 576, 580, 589 per Windeyer J; 602 per Owen J.

2 It might therefore, be more appropriate to place s51(xxi) under Dixon J's third heading of powers, where the subject of power is described by naming a recognized category of legislation). Stenhouse v Coleman (1945) 69 CLR 457, 471. Above pl08. PH Lane, "Federal Family Law Powers" (1978) 52 ALJ 121 discusses the nature of the problem of s51(xxi).

3 (1935) 54 CLR 262. Above p92.

4 Op cit 52-53.
When the question of the principles of characterisation to be applied to s51(xxi) arose during Barwick's Chief Justiceship all members of the Court adopted vague tests of characterisation. Barwick CJ and some other members of the Court supported the erection of tests which were not only vague tests but were also tests of degree. In R v Lambert; Exp Plummer Barwick CJ agreed1 with these statements by Gibbs J

"The question whether a law is one with respect to marriage is one of degree. The answer to it depends on the closeness of the connection between the law and the marriage relationship. Sometimes - as in the present case - it is helpful to consider what sort of rights and duties flow from the relationship of marriage in the ordinary understanding of reasonable men."2

(Wilson J (with Aickin J's concurrence)3 adopted a similar test requiring that there be "a close relationship between the law and the marriage relationship ...")4 Gibbs J (with Barwick CJ's concurrence) went on to apply that vague test of degree to a Commonwealth provision authorising the making of orders relating to the custody of the child of a marriage, which would prevail over any State law placing the child under the guardianship, care or control of State Minister, officer or authorized authority. Gibbs J concluded that the connection between the provision and marriage was so slight that it could not "properly be said to be, in reality and substance, a law with respect to marriage, at least in so far as its operation is relevant to the present case".5 (Wilson J with Aickin J concurring came to a similar conclusion.)6

2 Id. 512-513.
3 Id. 526.
4 Id. 537.
5 Id. The case involved an attempt by the husband of a marriage to obtain a custody order which would override a State order which had placed the child of the marriage under the care of a State officer after the child had been assaulted by a man living with the wife after the separation of the husband and the wife.
6 Id. 540.
The decision by Barwick CJ, Gibbs, Aickin and Wilson JJ, to introduce a test of degree, was not an inexorable extension of the proposition established by the Marriage Act Case that the power under s51(xxi) is a power with respect to marriage as an institution. The judgment of the dissentient, Stephen J (with Mason J concurring)\(^1\), demonstrated that the notion of marriage as an institution can be applied without adopting a test of degree. Stephen J, decided that the topic "Marriage" included as part of the centre of its subject matter the vesting in a party to a marriage of custody rights over a child of the marriage.\(^2\) Stephen J explained that by "custody" he meant the "making and carrying out of decisions relating to the upbringing of infant children" subject to general laws relating to topics such as criminal law, health controls and the like.\(^3\) If a child's movements were confined by a law operating on the child because the child had an infectious disease or because the child had committed a criminal offence that would not affect the continuation of any custodial rights in relation to the child — it would merely affect the range of options available in exercise of those rights.\(^4\) The topic of marriage does not include power with respect to, for example, general criminal law and there would be, therefore, no inconsistency between a Commonwealth law vesting custody rights and a State law sending a child to a

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1 Mason J adopted Stephen J's discussion and conclusion. Id. 521. Murphy J who referred to federal law cutting "across State child welfare laws" may have seen a wider content for the power. Id. 525.

2 Id. 515-517. Also Dowal v Murray (1979) 22 ALR 577, 583-584.


4 Id. 515-516. Compare persons who are sui juris. They remain sui juris even though the law may prohibit them from doing certain things. Custody is in a sense, the vesting of legal capacity to act (within the law) on behalf of a person who lacks capacity because of infancy.
reformatory for a breach of criminal law.¹ The State law in issue dealt, however, with the matter of custody itself and there was valid Commonwealth law which was intended to prevail and did therefore prevail.

At first sight there might seem to be little difference between the majority approach in R v Lambert requiring that laws under s51(xxi) have a close connection with the marriage relationship and the minority approach treating the subject matter "Marriage" as indicating a category of laws. Both are impressionistic and unpredictable. The majority approach brings to the forefront, however, a test of degree. Under the branch of the reserved powers doctrine dealing with characterisation² a test of degree was dictated by the assumptions made about the appropriate position of the States in the federation. The test of degree enunciated by Gibbs J and adopted by Barwick CJ, Aickin and Wilson JJ, as governing characterisation for the central area of s51(xxi), was perhaps introduced because of the difficulty found in defining precisely the subject matter "marriage". Once degree became the criterion then it was only a short step to the introduction, as a consideration to be balanced against aspects of the law relevant to establishing its connection with Commonwealth power, of the aspects of the law intruding into non-Commonwealth (State) concerns. Gibbs J left little doubt in his discussion that the effect of a law on State concerns would be taken into account under his degree test. Immediately after setting out his degree test, Gibbs J (with Barwick CJ's concurrence) commented "if a law is, in truth, a law with respect to marriage, it is not necessarily invalid because it affects the exercise of the powers of an authority of a State".³ To say that a law so affecting an authority of a State is not necessarily invalid seems to imply that

1 Id. 516.
2 Above pp.87-88.
3 Id. 513. Emphasis added.
it probably would be invalid. It would have been more consistent with the **Engineers Case** to say that the fact that a Commonwealth law may affect a State authority is **prima facie** irrelevant to the question of the validity of the Commonwealth law.

After Barwick CJ's retirement from the Court, the threat to introduce State interests as factors going to characterisation for s51(xxi)'s central area seemed to be borne out by the decision in **Gazzo v Controller of Stamps (Victoria) exp Attorney-General (Victoria).** In that case Gibbs CJ, Stephen and Aickin JJ held that neither s51(xxi) nor s51(xxii) nor s51(XXXIX) interacting with the judicial power were sufficient to support a Commonwealth law immunising from State stamp duty payable on instruments of transfer of land, an instrument transferring the matrimonial home from the husband of a marriage to the wife of the marriage on trust for herself and the children of the marriage. The instrument had been executed by the husband pursuant to a Court order on dissolution of the marriage. Consistently with the **Engineers Case** explosion of the reserved powers doctrine Gibbs CJ did say "that the effect of the law is to invade State power ... would not of course be relevant if the law were clearly within the substantive power expressly granted". Earlier in his judgment, however, and while holding the central area of s51(xxii) to be insufficient Gibbs CJ had said

"... the connection is only a remote one, since the object of the section is to destroy a liability that would otherwise be owed by a person (albeit a married person) to a State, under a law which does not take as the criterion of liability anything related to the marriage ...".

(b) **Incidental Powers and Economic effects**

The Constitution contains an express incidental power in s51(XXXIX) in these terms

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2 Id. 34.
3 Id. 30. Emphasis added.
51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or office of the Commonwealth.

It is established doctrine that as well as this express power, each specific grant of legislative power impliedly carries with it such power to deal with other matters as is necessary to make the central grant of power effective.

The High Court has distinguished these two incidental powers by saying that the express incidental power goes to matters incidental to particular exercises of powers while the implied power goes to matters incidental to the subject matter of particular powers. These incidental powers provide a potential for the expansion of Commonwealth power. That potential has been kept in check by High Court doctrines about the incidental power and by High Court application of the incidental power.

Sir Owen Dixon developed a doctrine which held that Commonwealth law dealing with intra-State trade could not be held to be reasonably incidental to the subject matter of s51(i), by virtue of the economic effect of the intra-State trade on inter-State trade. Dixon J/CJ reasoned that as the Constitution had deliberately drawn a distinction between inter- and intra-State trade that distinction had to be maintained and could not to be blurred by economic effects.

Soon after his appointment as Chief Justice Barwick and his Court unanimously held in Airlines Case [No 2] that an economic effect - the influence of engagement in intra-State air carriage on the profitability of an air carrier's overall operations, including inter-State carriage - did not justify the grant by the Commonwealth of a

2 R v Burgess; Exp. Henry (1936) 55 CLR 608, 671-672; Wragg v New South Wales (1953) 88 CLR 353, 385-386.
right to a carrier to engage in intra-State trade.\(^1\) A decade later, in the *Port Hedlands Case* Barwick CJ, Gibbs and Stephen JJ again held such economic effect to be insufficient to justify the grant of such a right.\(^2\) This time the other members of the Court (and there were only two others sitting) did not support this approach. Mason J reserved the question\(^3\) and Murphy J expressly rejected the majority approach.\(^4\)

Dixon's rationale for his doctrine was cryptic. It seemed to involve either

(a) a proposition that economic effects could not be taken into account under s51(i) because that placitum deliberately divides economic affairs into Commonwealth and non-Commonwealth spheres;

(b) a proposition that mere economic effects are too intangible to justify something so significant as a Commonwealth intrusion into intra-State trade which is intended by the Constitution to be within State control; or

(c) both (a) and (b).

Barwick CJ did not add anything to Dixon's cryptic case. He simply quoted it with approval.\(^5\)

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1. *Airlines of New South Wales Pty Ltd v New South Wales [No2] (1965) 113 CLR 54*, 378-79 per Barwick CJ (quoting Dixon CJ directly); 106-107 per McTiernan J speaking atavistically of "the residuary powers of a State"; 115 per Kitto J; 128 per Taylor J; 143 Windeyer J; 167 per Owen J.


3. *Id.* 521.

4. *Id.* 529-531.

As for proposition (a) - which seems to treat the exclusion of economic effects as being a consequence logically derived from the nature of the subject matter - an application of the incidental power, by definition, always extends Commonwealth power beyond specific subject matters expressly allocated to the Commonwealth. That involves no contradiction of the Constitution's distinction between Commonwealth (inter-State trade) and non-Commonwealth (intra-State trade). The central area of the power remains the same whatever matters come within the incidental area. Dixon J/CJ did not say that intra-State trade could never be reached by the incidental area of s51(i) and Barwick CJ and some other judges who endorsed the Dixon doctrine accepted in the Airlines Case [No 2] that the potential physical effect of intra-State air navigation on inter-State and overseas air navigation justified the establishment of safety standards for intra-State air navigation. It was, apparently, only economic effects that were to be ignored.

There is, admittedly, a certain symmetry of language in saying that economic effects are irrelevant to the incidental area of the "economic affairs" power. There is, however, no intrinsic logic to this proposition. The subject matter in s51(i) is inter-State and overseas trade. In the Bank Nationalisation Case the Privy Council endorsed a discussion by Dixon J of the concept of trade which included a suggestion that even non-commercial movement is trade.

1 (1965) 113 CLR 54, 91-93 per Barwick CJ; 115-116 per Kitto J; 142 per Menzies J; 151 per Windeyer J; 166-167 per Owen J. Taylor J dissenting accepted that the Commonwealth could under s51(i) impose safety standards on intra-State air navigation but held that the particular regulations in issue were not confined to safety considerations. Id. 130-132. McTiernan J did not express an opinion on the sufficiency of s51(i).

2 (1949) 79 CLR 497, 632-633.

3 (1949) 76 CLR 1, 381-383.
(Barwick displayed no enthusiasm for that suggestion.)¹ If part of the central area of s51(i) is inter-State movement, then the Constitution is drawing a distinction between inter- and intra-State movement. This distinction has just as much "logical" entitlement to be maintained as any other distinction made by s51(i) and should, therefore, result in the effects of intra-State movement on inter-State movement being excluded from the incidental area of s51(i).

Such reasoning should have led the Court to conclude in Airlines Case [No 2] that the potential physical effect of intra-State trade on inter-State trade did not justify the establishment of safety standards for intra-State air navigation. The absurdity of such a conclusion highlights the unacceptability of trying to justify the exclusion of economic effects from the incidental area as being logically dictated by the subject matter of the central area of the power.

Proposition (b) has two aspects. First, there is its appraisal of the "weight" of economic effects. The basic criterion of the incidental power is the relevance of a law to a subject matter or exercise of power. One must ask, as Murphy J did in the Port Hedlands Case,² what could be more relevant to a commerce power than commercial considerations? The notion that economic effects are too intangible to be taken into account in a legal issue of cause and effect, prevailed for sometime in the law of tort. Shortly before the judgments were delivered in the Port Hedland Case a High Court composed of Gibbs, Stephen, Mason, Jacobs and Murphy JJ handed down judgment in the torts case of Caltex Oil Australia Pty Ltd v The

¹ See the s92 discussion.
² (1976) 138 CLR 492, 530-531.
Dredge "Willemstad". Their Honours allowed that economic effects could sometimes be taken into account to show a causal link between action and injury in tort, and thus acknowledged that there is nothing in the nature of a test of sufficiency of connection between cause and effect which logically requires that economic effects always be ignored.

The other half of assumption (b) which asserts that the denial to the Commonwealth of power with respect to intra-State trade is a fundamental assumption of the Constitution, comes perilously close to reviving the reserved powers doctrine. In Airlines Case [No 2] itself Barwick CJ criticised submissions which looked to the interests and purposes of the States, as involving a resurrection of the "exploded view of the so-called reserved powers of the States ...". Barwick CJ declared his support for the principle of the Engineers Case:

"... the nature and extent of State power or of the interests or purposes it may legitimately seek to advance or to protect by its laws do not qualify in any respect the nature or extent of Commonwealth power. On the contrary, the extent of that power is to be found by construing the language in which power has been granted to the Commonwealth by the Constitution without attempting to restrain that construction because of the effect it would have upon State power."

Barwick CJ did not acknowledge that by endorsing Dixon's exclusion of economic effects, he was restraining Commonwealth power "because of the effect it would have upon State power" and was thus in conflict with, or at least, significantly qualifying the principle of the Engineers Case which he had supported so forcefully. In the Port

1 (1976) 136 CLR 529.
2 Id. 555, 574, 592, 597, 606 respectively.
3 Port Hedlands Case (1976) 138 CLR 492, 530-531.
4 (1965) 113 CLR 54, 79.
5 Id. 79. Emphasis Added.
Hedland Case Murphy J commented, "The maintenance of the supposed division and the further insistence ... that even the use of the incidental power in s51(xxxix) can not obliterate the division, keeps the pre-Engineers ghosts walking".\(^1\)

Admittedly the reserved powers doctrine shackled Commonwealth power much more significantly - the old doctrine went both to definition of subject matter and to characterisation within the central area. The Dixon doctrine goes only to the question of the incidental area and, as formulated by Dixon, only goes to the incidental area of s51(i). Both doctrines, however, involve the idea that the Constitution should be read so as to preserve State areas of power from Commonwealth encroachment. Barwick CJ did not reconcile his acceptance of the Engineers Case with his attitude to economic effects in the incidental area of s51(i).

Barwick CJ not only supported the exclusion of economic effects from consideration under s51(i)'s incidental area, he also was of the view that economic effects should be excluded from consideration when assessing whether s122 supported the operation of law outside Commonwealth Territory. The direct issue in the Port Hedland Case was the sufficiency of s122 to support Commonwealth legislation authorising a Commonwealth Commission, The Australian National Airlines Commission, to engage in intra-State air carriage which rendered the Commission's State/Territory air carriage more profitable. The facts involved a proposal to establish a route between A and B in Western Australia and between B in Western Australia and C in the Northern Territory.\(^2\) ANA wished to carry between A and B not only passengers going on to or comming from C,

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1 (1976) 138 CLR 492, 530.
2 (1976) 138 CLR 492.
but also passengers with no Territory leg to their journey. The service which ANA was providing for State/Territory travellers would be more financially viable if the Airline could carry intra-State travellers on the intra-State leg.

Stephen, Mason and Murphy JJ held that sl22 did support the intra-State trading activities.¹ Stephen and Murphy JJ each made the point that given the width of the terms of grant of the Territories power it was difficult to see that incidental power would add anything to it.²

Murphy J simply held without discussion that the activity was supportable as being part of the provision of services to the Territory.³ Mason J, who treated the source of power as being the incidental aspect of sl22, made it plain that when, as was the case with the incidental powers, the test of law is to ask "what is necessary or reasonably necessary" to the end within power (providing a service to the Territory) then attention must be paid to "all those factors which must be accounted for or satisfied so as to achieve the end in view."⁴ It was obvious to Mason J that maintaining a commercial air service to a Territory would be affected by economic considerations.⁵

Stephen J, who supported (or, at least, accepted as being authoritatively established) the exclusion of economic effects from the incidental area of s51(i), would not make a parallel exclusion of economic effects from sl22. His Honour's comment that "the power conferred by sl22 is not, I think, to be limited by reference to an

¹ Id. 515, 523-524, 531 respectively.
² Id. 514-515, 531 respectively.
³ Id. 531.
⁴ Id. 523.
⁵ Id. 523-524.
implication drawn from the terms of s51(i) or s92", \(^1\) reveals just how close to the reserved powers doctrine was the doctrine excluding economic effects from s51(i)'s incidental area. Stephen J thought the profitability of a government created corporation's activity of providing transport to a Territory was quite relevant to the government of the Territory. \(^2\)

The dissentients, Barwick CJ and Gibbs J both accepted\(^3\) that earlier decisions had established that sl22 could support the operation of laws outside Commonwealth Territories\(^4\) and did support the empowering of a corporation to provide transport services to Commonwealth Territories. \(^5\) Both judges, however, considered that the economics of providing such service could not justify empowering intra-State trading activities. Both considered that the arguments for excluding economic effects from the incidental area of s51(i) also applied to prevent economic effects justifying a sl22 intrusion into intra-State trade. \(^6\) Such arguments of course involve certain assumptions about the appropriate position of the States in the federation. By thus extending his application of "federal balance" arguments, Barwick CJ was widening the conflict with his endorsement of the general thrust of the Engineers Case. On the other hand Barwick CJ's position in relation to sl22 in the Port Hedland Case was quite consistent with Barwick CJ's perception of the place of the Territories in Federal Parliament. \(^7\)

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1  Id. 514.
2  Id. 514-515.
3  Id. 500, 503-504 respectively.
4  Lamshed v Lake (1958) 99 CLR 132.
5  Australian National Airways Pty Ltd v Commonwealth (1945) 71 CLR 29.
6  (1976) 138 CLR 492, 501, 504-505 respectively.
7  Above Chapter III.
There was another aspect to Barwick CJ's reasoning about s122 in the Port Hedland Case which throws up a point for comparison with Barwick CJ's approach to other sections. There was a suggestion in Barwick CJ's judgment here of an idea that he had proposed at the beginning of his career as a constitutional law advocate and which he was again to reintroduce at the end of his judicial career. It was the idea that government and commerce are mutually exclusive spheres. The idea is suggested in the Port Hedland Case by statements from Barwick CJ like this one.

"The efficiency, competitiveness and profitability of the business of the Commission can not be in themselves objects of legislative power to make laws for the Territory. In other words the economics of the business of the Commission do not, in my opinion, form part of the subject matter of s122 - the peace, order and good government of the Territory - nor are they incidentally part of that subject matter." ¹

The idea that government and commerce are mutually exclusive spheres was expressed more clearly by Barwick, as counsel and judge, in other contexts and is discussed fully in the Chapter on s92.

(c) Treaty implementation under s51(xxiv)

It is generally agreed amongst High Court judges that the words "external affairs", describing the subject matter of power in s51(xxiv) mean "Australia's relations with other countries". At its core that subject matter encompasses activities carried on by Australia's international representative, the Commonwealth Executive.

It is not inconceivable that a law might be passed directly regulating the Commonwealth Executive in activities such as the negotiation and entering into, of international treaties. The cases,

however, have not concerned laws which regulate Australia's relations with other countries, or the Commonwealth Executive in the carrying on of such relations, but have concerned instead, laws which regulate activities of actors other than international personalities. The justification offered for such laws is that in regulating such activities the laws are affecting Australia's relations with other countries.

There is a matter of terminology here worthy of mention. It would seem to me that a law, for example, prohibiting activities within Australia of exciting disaffection against foreign governments would be within the external affairs power not because the exciting of disaffection against foreign governments is an "external affair", is part of "Australia's relations with other countries", but rather because the regulation of that activity may be relevant to Australia's external affairs, that is, to Australia's relations with other countries. There are nevertheless statements in the cases to the effect that a subject matter (such as racial discrimination) can be regulated because it is an "external affair". That might of course be a simple shorthand way of expressing the steps which I have just set out in full. It might be, on the other hand, that such usage represents an implicit qualification of, or addition to, the generally agreed definition of the subject matter.

This issue is not just a semantic quibble. The issue of the characterisation of law as being within s51(xix) may well be affected by the initial decision of whether or not the law is regulating an activity within the centre of the power. A decision that the activity is not within the centre of the power and that the law is to be supported, if at all, by recourse to the incidental power, leaves more

1  R v Sharkey (1949) 79 CLR 121.
2  Eg Koowarta v Bjelke Petersen (1982) 39 ALR 417, 485 per Brennan J.
scope for federal balance of power arguments to be raised. The latent issue of the line between the central area and the incidental area of s51(xxiv) probably contributes to the conflict which has existed in the High Court since the Court first considered what would sufficiently connect the subject matter of a law with Australia's relations with other countries to justify the conclusion that the law was "with respect" to external affairs.

Most of the cases depending on the scope of s51(xxiv) have involved legislation purporting to implement international treaties. It is generally accepted that Australia is represented in international affairs by the Commonwealth Executive and that external prerogatives including the right to enter treaties are now vested in the Crown in right of the Commonwealth. The dominating issue much discussed but still unresolved, is - when Australia is party to an international treaty what effect if any will that fact have on bringing the subject matter of the treaty within the reach of s51(xxiv). Three main alternative views have been taken of the effect on commonwealth legislative power under s51(xxiv) of the Commonwealth Executive having entered into a treaty; first, there is the wide view that any subject matter will be brought within the reach of s51(xxiv) by the entering into of a treaty on that subject matter; secondly, there is the narrow view that the entering into of a treaty can never bring any subject matter within the reach of s51(xxiv); thirdly, there is the compromise view that there are some subject matters which can, and some which can not be brought within the reach of s51(xxiv) by the entering into of a treaty on the subject matter.

Alternative and not incompatible lines of reasoning have been offered to explain why it should be that the entering into of a treaty will or may bring its subject matter within the reach of s51(xxiv):-
First, the subject matter of a treaty is, by definition, a subject matter for which the treaty creates international obligations and rights and international obligations and rights are central to Australia's relations with other countries:

Secondly, failure to fulfil a treaty will tend to affect Australia's international relations by inviting international reaction to that failure;

Thirdly, failure to fulfil a treaty will deprive Australia's international representatives of credibility when carrying on future international negotiations;

Fourthly, subject matters of international concern are likely to affect Australia's international relations and the fact that international representatives have entered a treaty relating to a subject matter evidences the existence of international concern about that subject matter.

These points are all directed to establishing that implementing a treaty will affect Australia's relations with other countries. All of these points lose their force if the treaty is merely a sham contrived by the Commonwealth Executive as a device to generate legislative power. There would be no international consequences flowing from non-compliance with a treaty about which there is no international concern. It has been acknowledged by some judges, that a treaty can only convert a subject matter into an external affair if the treaty is bona fide.

The judges who say that the entering into of a treaty can never bring a subject matter within the reach of s51(29)(and pro tanto the judges who say that only some and not all subject matters can be brought within s51(29)) do not argue in terms of denying that treaty implementation may tend to affect Australia's international relations. The narrow view judges instead argue that the tendency of treaty implementation to affect Australia's international relations cannot be accepted as a sufficient connection with power and that position when justified is justified, solely in terms of protecting the legislative domain of the States.
The issue of the significance of the existence of a treaty was explored both before and during Barwick's Chief Justiceship. In 1936 in *R v Burgess; Exp Henry*\(^1\) the issue received full discussion. Only two judges, Evatt and McTiernan JJ, expressed a concluded opinion and they adopted the wide view.\(^2\) Latham CJ seemed to favour the wide view,\(^3\) Starke J seemed to favour the compromise.\(^4\) Dixon J would say only that the wide view seemed "extreme" but even on the narrowest view, the treaty in issue could be implemented because it related to matters which were clearly "international affairs".\(^5\) (Sir Robert Garran published a commentary on the case\(^6\) and there were others who discussed the problem of treaty implementation.)\(^7\)

In 1965 in *Airlines of New South Wales Pty Ltd v New South Wales [No2]*\(^8\) the issue was raised again but most members of the Court found no need to comment on it. Menzies J said in language consistent with the narrow view that "Under the Constitution, s51(29x) 'External Affairs', the Commonwealth has power to make laws to carry out its international obligations under a convention with other nations concerning external affairs."\(^9\) Without explaining the basis for his

\(^{1}\) (1936) 55 CLR 608.

\(^{2}\) Id. 681 jointly.

\(^{3}\) Id. 640-641.

\(^{4}\) Id. 658.

\(^{5}\) Id. 669-670.

\(^{6}\) (1936) 10 ALJ 297.


\(^{8}\) (1965) 113 CLR 54.

\(^{9}\) Id. 136. Emphasis added.
position, Barwick CJ said "... I would wish to be understood as indicating that in my opinion, as at present advised, the mere fact that the Commonwealth has subscribed to some international document does not necessarily attract any power to the Commonwealth Parliament."¹ This may have been just a particularly verbose way of reserving the issue. The passage might also be read, however, as indicating that Barwick CJ was tentatively endorsing the compromise position that some but not all subject matters can be brought within the range of s51(29) by the entering into of a treaty.

Consistently with that interpretation his Honour went on to say

"What treaties, conventions, or other international documents can attract the power given by s51(29) can best be worked out as occasion arises."²

If there were to be a division of subject matters into two categories such that entering a treaty about a subject from one category would "bring into existence an external affair" while entering a treaty about a subject from the other category would not, what would differentiate the categories? In Exp Henry Starke J seemed to indicate that the distinction was in the inherent nature of the subject matter. Starke J spoke approvingly of an American approach which would only allow implementation where the subject matter is "of sufficient international significance to make it a legitimate subject for international co-operation and agreement."³ Starke J acknowledged that this did not provide a very clear test.

In Airlines [No2] in concluding that the Chicago Convention did bring into existence an external affair Barwick CJ said:

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¹ (1965) 113 CLR 54, 85.
² Ibid.
"suffice it now to say that in my opinion the Chicago Convention, having regard to its subject matter, the manner of its formation, the extent of international participation in it and the nature of the obligations it imposes upon the parties to it unquestionably is, or at any rate brings into existence, an external affair of Australia. In thus enumerating matters which in this case point to the Convention being or creating an external affair of Australia, I would not wish to be thought to say that all these features must in every case be present if a treaty or a convention is to attract the external affairs power ..."1

It might be that Barwick CJ was inclining to Starke J's approach and concentrating on the inherent international significance of the subject matter. Barwick CJ's enumeration, however, goes beyond the character of the "subject matter" of the treaty and includes "the manner of its formation". The passage might be construed (and seems to have been so construed by Brennan J in Koowarta v Bjelke-Petersen,)2 as indicating that Barwick CJ was concerned only with the bona fides of the treaty. Such a construction would place Barwick CJ in the category of judges who consider that the entering into of a bona fide treaty will convert any subject matter into an external affair.

In the end, all that one can say is that Barwick CJ's position was ambiguous. If he was to be taken as supporting the compromise position - that there are some subject matters which can and some subject matters which cannot become external affairs - then he was supporting an approach which is such that it could be applied to any one treaty with the decision for or against there being Commonwealth power to implement, varying according to the centralist or States rights preferences of the individual judge.

There were other issues under s51(xxix) where Barwick CJ took clear positions all tending to be relatively favourable to Commonwealth power. Some have already been discussed.3

1 (1965) 113 CLR 54, 85.
3 Above pp.101ff.
It is accepted that if the existence of a treaty brings the subject matter of the treaty within the reach of s51(xxix) then there must be a correlation between the "general requirement" of the treaty and the legislation depending on the treaty. In *Airlines* [No2] the Court was asked to hold that provisions requiring licences for air navigation inside Australia were supported by s51(xxix) implementing the Chicago Convention. The only relevant current obligation on Australia under the Convention was "to collaborate [with other contracting States] in securing the highest practicable degree of uniformity in regulations, standards, procedures and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air

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1 R v Burgess Exp Henry (1936) 55 CLR 608, 688 per Evatt and McTiernan JJ. After Barwick CJ retired from the Court Gibbs CJ (with Aickin and Wilson JJ concurring) took the view that a treaty can only be implemented if its subject matter is inherently relevant to Australia's relations with other countries. *Koowarta v Bjelke-Petersen* (1982) 39 ALR 417, 440 per Gibbs CJ. Stephen J can be construed as agreeing with this approach (id. 453) - but as then taking a more generous approach than did Gibbs CJ, Aickin and Wilson JJ to what connection with Australia's international relations will suffice to bring a subject matter within the reach of s51(xxix). The difficulty with this narrow view of the effect of the existence of a treaty is that it seems to deny that the existence of an international treaty has any relevance. If the subject matter of a treaty is inherently relevant to Australia's external affairs then there is no justification for requiring that legislation dealing with that subject matter correspond to the terms of the (irrelevant) treaty. The discussion of Gibbs CJ seems to proceed on the basis that there are only two possibilities - either that the entering of a treaty will bring any subject matter within power or that it will not bring any subject matter within power. This ignores the compromise suggested by Starke J in Exp Henry. When G Sawer published his article "Execution of Treaties by Legislation in the Commonwealth of Australia" in (1956) 2 University of Queensland Law Journal at p.297 HT Gibbs was a member of the Editorial Board. In that article Sawer explained (id. 299), inter alia, the Starke J compromise view which would allow some but not all subject matters to be brought within reach of s51(xxix).

2 (1965) 113 CLR 54.
navigation." Three judges, Kitto Taylor and Windeyer JJ, held that s51(xxix) would not support the licensing legislation because the provisions were not closely enough related to carrying out the obligation under the Convention. Taylor J and Windeyer J were concerned, inter alia, about the width of the criteria for refusing a licence. Kitto J took the point that the only current obligation was to collaborate.

Barwick CJ, a former Minister for External Affairs, considered that the Convention was not to be read narrowly. Barwick CJ looked to the spirit not the strict letter of the convention to discern in it an obligation to secure uniformity. If one goes back to the basic definition of "external affairs" then Barwick CJ's approach is persuasive, for compliance with the spirit of international obligations is likely to be more important to Australia's international relations than is compliance with the letter of international obligations.

In the alternative, Barwick CJ relied on the aspect of the Convention which required compliance with any specific international standards established from time to time. There were none presently established but Barwick CJ considered that the licensing system could be accepted as being a framework by which any future standard could be introduced. Such an approach of allowing action to be taken to anticipate possible future obligations was quite generous to the Commonwealth.

1 Id. 130-131, 154-155 respectively.
2 Id. 117.
3 (1965) 113 CLR 1, 87.
4 (1965) 113 CLR 1, 86.
5 Id. 91.
Another point at which Barwick CJ favoured the Commonwealth, was on the question of implementation of rights obtained under international treaty. Barwick CJ commented in Airlines [No2] that any Commonwealth power to implement treaties should apply as much to the securing of benefits as to the fulfilment of obligations. In the Seas and Submerged Lands Case Barwick CJ gave as an alternative ground for his decision upholding the Commonwealth legislation asserting certain rights over offshore seas and submerged lands, that the legislation was taking the benefit of rights recognized by international convention. Neither Barwick CJ, nor any of the other judges who have indicated a willingness to allow the Commonwealth to legislate to take advantage of internationally recognized rights, have related their viewpoint to the arguments which relate treaty implementation to Australia's relations with other countries. Indeed any attempt to carry over the arguments in favour of allowing implementation of treaty obligations soon reveals how much weaker is the case for allowing implementation of a treaty right. Australia's international relations are much less likely to be agitated by the failure of Australia to exercise its rights than they are by the failure of Australia to fulfil its obligations. Barwick CJ stated in the Seas and Submerged Lands Case that it was because international sovereignty over offshore areas was conceded "internationally to the nation state and depends on international mutuality" that the legislative acceptance and assertion of that sovereignty were "pre-

1 Id. 86. This view had been supported in Exp Henry by Latham CJ (1936) 55 CLR 608,644. Evatt and McTiernan JJ seemed to treat international rights as being subject to the same analysis as international obligations. (Id. 687.)

2 (1975) 135 CLR 337, 364.
eminently external affairs."¹ That approach does very much beg the question of the division of sovereignty in municipal law. All internationally recognized rights depend ex hypothesi on international recognition. The fact that there is international recognition for Australia's sovereign right to control jay-walking does not imply that the Commonwealth has legislative power over jay-walking.

(d) Implied National Powers

In an article I published in (1981) 7 Adelaide Law Review, 348, "The Commonwealth/State Co-operative Basis for the Australian Wheat Board and the National Companies and Securities Commission: Some Constitutional Issues", I traced the development of the proposition that the Commonwealth has powers, legislative and executive, which are not expressed in the Constitution but are implied into the Constitution on account of, and as being incidental to, the Commonwealth's status as the national government.²

In the Australian Assistance Plan Case³ Barwick CJ was amongst those to discuss implied national power. The broadest view of the power was that of Jacobs J who proposed that the need for coordinated national action to deal with national problems itself generated national power and supported the Commonwealth activities (which were under challenge in the case,)⁴ of formulating and co-ordinating social welfare activities. No other member of the Court accepted

1 Id. 364.
2 Op cit 370-374.
3 (1975) 134 CLR 338.
4 Id. 412-413.
"national need" as being a source of power. Barwick CJ, Gibbs and Mason JJ while acknowledging the existence of the implied national power, each emphasised that its content would be limited. Barwick CJ put it thus:

"However desirable the exercise by the Commonwealth of power in affairs truly national in nature, the federal distribution of power for which the Constitution provides must be maintained." Barwick CJ, Gibbs and Mason JJ each decided that implied national power was insufficient to support the activities under challenge.

Of course, any implication of national power necessarily alters the "federal distribution of power "because it increases Commonwealth power. Barwick CJ acknowledged that there is some implied national power. His Honour gave scientific research as an example of an activity within implied national power. Why should it be that the implication of Commonwealth power to engage in scientific research can be allowed to disturb the federal distribution of (express) powers while the implication of Commonwealth power to engage in welfare coordination can not? Perhaps the distinction is that activities of scientific research are not nearly so openly political as are social welfare decisions. As I commented in my article, the thrust of the Commonwealth's activities under the Australian Assistance Plan "was to shift the balance of power in a very significant manner. The Plan involved the Commonwealth directly in making basic social value judgments. The State governments, Parliaments and bureaucracies were by-passed".

1 Id. 362, 364 per Barwick CJ; 328 per Gibbs J; 398 per Mason J.
2 Id. 364.
3 Id. 362.
4 Op cit 373.
E - Financial Power

This topic provides a bridge between general issues of Commonwealth power and specific problems of intergovernmental conflict. The power of money is obvious. The discussion has already addressed one constitutional aspect of financial power - the Commonwealth power to tax, the power to impose financial burdens on activities. The discussion now turns to the Commonwealth's power to spend.

(i) Section 94

Section 90 of the Constitution prohibits States from exercising powers which had, before federation, been a major basis for colonial revenue raising. The federal purpose of that section is discussed below.¹ Section 88 required the Commonwealth to impose uniform duties of customs within two years of the establishment of the Commonwealth. Section 94 reflects the Founders' expectation that the Commonwealth would not require all the revenue which it collected. The section declares that "After five years from the imposition of uniform duties of Customs, the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth". In 1908 in New South Wales v The Commonwealth, the High Court upheld Commonwealth legislation which prevented there being any surplus available for distribution under s94.² All members of the Court, even the authors of the reserved powers doctrine and the doctrine of intergovernmental immunities, Griffith CJ, Barton and O'Connor JJ were agreed that an appropriation which merely set funds aside against the possibility of future expenditure was sufficient to prevent those funds being surplus.

1 Pp203ff.
2 (1908) 7 CLR 179.
under s94. Apart from that simple device for avoiding any "surplus" from coming into existence the pattern of Commonwealth government spending has so changed since federation and the practice of government operating in deficit has become so widely accepted, that s94 is not likely to have any function to perform in the foreseeable future.

(ii) Section 96

Contrary to the expectations of the Founders, s96 and not s94, has turned out to be the section around which Commonwealth/State financial arrangements have been organized. In 1942 in the First Uniform Tax Case\(^1\) the High Court considered the validity of a Commonwealth scheme of legislation which had the practical effect of excluding the States from the field of income taxation and of leaving that field entirely to the Commonwealth. The Commonwealth set its income tax rates at such a level as to leave no scope for the exaction of State taxes. To make up for this exclusion of States from income taxation the Commonwealth proposed to provide funds to the States through s96. Each State's s96 grants were, however, conditioned on the Treasurer of the Commonwealth being satisfied that the State did not tax incomes. The essential points of the scheme were upheld with Latham CJ, Rich, McTiernan and Williams JJ (Starke J dissenting) upholding, the attaching to s96 grants of conditions aimed at forcing the States to refrain from exercising their taxing powers.

There was some possibility that the decision could be confined to circumstances of defence emergency and the High Court was asked in 1956 in the Second Uniform Tax Case to reconsider its decision.\(^2\) This time Sir Garfield Barwick QC was involved.

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1 South Australia v The Commonwealth (1942) 65 CLR 373.
2 (1956) 99 CLR 575.
He was part of the contingent representing Victoria and its Attorney-General. Barwick made submissions based on propositions about the federal nature of the Constitution and on doctrines of intergovernmental immunities and those submissions are considered below. His only reported arguments based on s96 itself were these: first that s96 is only intended to support ad hoc grants to meet emergencies or other transient problems and can not, therefore support a system of standing grants available regardless of need, secondly, that it was incompatible with the purpose of the section for the Commonwealth to create the need to be met by a grant, by conditions attached to the grant.

Dixon CJ expressed agreement with Barwick's perception of the purpose of s96 but neither he nor any other member of the Court felt able to translate that purpose into any acceptable constitutional limitation on s96. The First Uniform Tax Case was unanimously affirmed in its essential points. The interference with State governmental function was to be reconciled with federal doctrines against intergovernmental interference (which had come to the fore in the years between the First and Second Uniform Tax Cases) by pointing to the fact that no Commonwealth law attempted to regulate State behaviour. The Commonwealth merely offered an economic inducement, albeit an irresistible one, for the States to act in a certain way.

1 Pp185-186.
2 Id. 585.
3 Ibid.
4 Id. 603-604, 606-609.
5 Id. 609-610 per Dixon CJ. G Sawer, "The Second Uniform Tax Case" (1957) 31 ALJ 247.
As Chief Justice in the Australian Assistance Plan Case, Barwick described the operation of s96 in these terms:  

"Section 96 ... has enabled the Commonwealth to intrude in point of policy and perhaps of administration into areas outside Commonwealth legislative competence."

Echoing the First Uniform Tax Case's reconciliation of this use of s96 with the federal principle of the Constitution, Barwick CJ also commented

"But a grant under s96 with its attached conditions cannot be forced upon a State: the State must accept it with its conditions. Thus, although in point of economic fact, a State on occasions may have little option, these intrusions by the Commonwealth into areas of State power which action under s96 enables, wear consensual aspect."^2

In the DOGS Case Barwick CJ and all other members of the Court reaffirmed the validity of the attachment to s96 grants of detailed conditions which reduced the States to mere conduits.3 In an extra-judicial statement in 1968 Barwick CJ referred to the system of tied s96 grants as being one of the three most important stabilising features of the Constitution.4 Contrary to his submissions in the First Uniform Tax Case, and in an apparent reference to s90, Barwick CJ suggested that the achievement by the Commonwealth through the Uniform Tax Cases of control over the main governmental revenue sources, might be "regarded as a reversion to the original compact".5 The surprising suggestion that the purpose of s90 was to

1 (1975) 134 CLR 338, 357.
2 Ibid.
3 Attorney-General for Victoria and Black v The Commonwealth (1981) 33 ALR 321, 330-331 per Barwick CJ; 335-336 per Gibbs J (Aickin J concurring); 351-352 per Stephen J; 357-358 per Mason J; 358 per Murphy J; 389-392 per Wilson J.
4 Opening Address at the Eleventh Annual Conference of the Royal Institute of Public Administration (1968) 28 PA 1, 2.
5 Op cit 3.
give the Commonwealth exclusive control over customs and excise because they were the main sources of government revenue is discussed below.

(iii) Sections 81 and 83 - The Commonwealth Parliament's Power to Appropriate Funds

Section 81 of the Constitution provides that

"All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution."

Section 83 prescribes that appropriation be "by law".

In the article I published in the Adelaide Law Review, I discuss, inter alia, the judicial attitudes to the question whether the words "for the purposes of the Commonwealth" impose any and if so what restraint in law on Parliament's power to appropriate funds. That question had been considered in 1945 in the Pharmaceutical Benefits Case and arose again during Barwick's Chief Justiceship in 1975 in the Australian Assistance Plan Case.

As with construing and applying constitutional sections relating to the structure and procedures of Parliament, Barwick CJ found no difficulty in holding that the compliance of an Appropriation Act with

1 Pp214ff.
3 (1945) 71 CLR 237.
4 (1975) 134 CLR 338.
the limitation, "for the purposes of the Commonwealth", was a justiciable issue.\(^1\) In the Australian Assistance Plan Case only Gibbs J clearly supported Barwick CJ's conclusion of "justiciability".\(^2\) McTiernan J, reaffirmed the opinion which he and Latham CJ had expressed thirty years earlier in the Pharmaceutical Benefits Case,\(^3\) that whether or not an Appropriation Act was "for the purposes of the Commonwealth" was a non-justiciable issue.\(^4\) Other judgments in the Australian Assistance Plan Case either reserved, or were ambiguous on, the point of justiciability but tended to favour the conclusion that the point was not justiciable.\(^5\) The issue of justiciability was closely connected with the issue of the meaning to be attributed to the phrase "for the purposes of the Commonwealth". McTiernan, Mason and Murphy JJ considered that the phrase "purposes of the Commonwealth" meant such purposes as Commonwealth Parliament determines. This interpretation was supported by these main points. First, that the (sole) function of the provision was to declare the British constitutional principle of Parliamentary control over executive spending of public monies.\(^6\) Secondly, that understood against the British background the word

\(^{1}\) (1975) 134 CLR 338, 364.

\(^{2}\) Id. 379-380.

\(^{3}\) (1945) 71 CLR 237, 256, 273-274 respectively.

\(^{4}\) (1975) 134 CLR 338, 368-369.

\(^{5}\) GA Rumble Op cit 362.

\(^{6}\) AAP Case (1975) 134 CLR 338, 396 per Mason J. Although Stephen J decided the case on the basis that the plaintiffs, Victoria and its Attorney-General, had no standing to challenge the Appropriation Act or expenditure thereunder by seeking a declaration (id. 390-391), his judgment tends to reveal a perception of s81 similar to that contained in Mason J's judgment. (Id. 386-387, 391.).
"Commonwealth" meant the people of the Commonwealth who indicate their purposes through their elected representatives in Parliament. Barwick CJ and Gibbs J construed s81 as being a declaration of a federal rather than a British principle. For them the phrase "for the purposes of the Commonwealth" meant for the purposes of the Commonwealth as a body politic with powers and functions defined and limited by the Constitution. (As Gibbs J commented, this was the view heavily favoured by the balance of judicial opinion.) Barwick CJ's reasoning and discussion involve propositions about the very basis of Australian federation.

Barwick CJ's first proposition was that ss81 and 83 could not be taken as being simply and exclusively a declaration of the British principle of Parliamentary control of Executive spending. According to Barwick CJ, it was not necessary to declare that principle expressly, as it would have been part of the Commonwealth's inheritance of British common law. The words "for the purposes of the Commonwealth" could not be dismissed as being mere surplusage. They had a meaning and a function and that meaning and function could be ascertained by placing "the financial provisions of the Constitution in the setting of the period in which federation was mooted and achieved".

1 PB Case (1945) 71 CLR 237, 255-256 per Latham CJ and approved in the AAP Case (1975) 134 CLR 338 by McTiernan J (368-369) Mason J (396) and Murphy J (417, 421).
2 Id. 354, 374 respectively.
3 Id. 360-363, 371-374 respectively.
4 Id. 373.
5 Id. 354.
6 Ibid.
7 Ibid.
The federal goal of establishing a customs union\(^1\) necessitated the surrender to the Commonwealth of the colonies' powers to impose customs and excise duties.\(^2\) The assumption and expectation in the "plan of federation" was that the revenues collected by the Commonwealth would be shared between the Commonwealth and the States.\(^3\) Even though no permanent formula could be agreed for the distribution of revenue the federal nature of the financial provisions of the Constitution could not be denied.\(^4\)

It was as necessary then in 1975 as it had been when the principles of federation were in negotiation to recognize and respect the principle of s94.\(^5\) The principle of s94 was (despite the absence of mandatory terms therein) that the Commonwealth be obliged to make available to the States any surplus of Commonwealth revenues.\(^6\) Barwick CJ then construed ss81 and 83 as being provisions designed to support s94 by limiting Commonwealth expenditure and thus tending to ensure that there would be surplus revenue available to be shared through s94 amongst the States.\(^7\)

Barwick CJ was not at all perturbed by the fact that ss81, 83 and 94 do not in fact achieve the federal purposes which he attributed to them. It will be recalled that Barwick CJ was similarly, not deflected by the current reality of a Senate acting as a party house,

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1 Discussed further in the s90 and s92 Chapters.
2 Id. 354-355.
3 Id. 355.
4 Id. 356.
5 Id. 357.
6 Id. 358-359 citing New South Wales v The Commonwealth (1908) 7 CLR 179.
7 Id. 357, 359.
from construing provisions relating to Parliament by reference to the intended federal role for the Senate as a States House.\footnote{Above pp45ff.} In both cases of course, Barwick CJ was strictly complying with the proposition that it is the intention of the Imperial Parliament in 1900 which is determinative. There was, however, something unrealistic about Barwick CJ's resolute determination to protect a provision – s94 – which was a dead letter, is a dead letter and had been a dead letter since 1908.

Barwick CJ reinforced his conclusion that s81 was limited to appropriation for purposes referable to Commonwealth power, by a more specific line of reasoning which was quite remarkable. Barwick CJ commenced thus: Section 81 could not be construed as vesting in the Commonwealth a power to spend money on any purpose whether or not itself relevant to Commonwealth power, as that would enable the Commonwealth "effectively to interfere ... in matters covered by the residue of governmental power assigned by the Constitution to the State".\footnote{\textit{Id}. 358.} From this stage on, I set out Barwick CJ's discussion in full.

"It is perhaps worth remarking at this point that the doctrine of the Court established in the \textit{Amalgamated Society of Engineers v Adelaide Steamship Co Ltd} has supported the exercise to the full of Commonwealth legislative power. But however large and generous the interpretation of those powers, the Constitution requires that the power of the States with respect to the residue, not embraced in Commonwealth power as thus construed, should not be trespassed upon by the Commonwealth without the concurrence of the State. Participation by the Commonwealth in policy-making or of administration in connexion with matters of State concern, matters within the residue left to the States by ss106 and 107, must, in my opinion, be confined to the use by the Commonwealth of s96
which, as I have said, involves the consent of a State. The Commonwealth, in my opinion, activity under s96 apart, cannot enter that residual area left by the Constitution to the States, either by legislative or by executive act.\(^1\)

What distinguishes this from the reserved powers doctrine? There is the notion that a possible construction of Commonwealth power should be rejected if it would encroach on the areas left to the States by ss106 and 107. All that seems to be lacking is the use of the words "reserved powers". Barwick CJ speaks instead of the "assigned residue".

\(^1\) Ibid.

F - Intergovernmental immunity after the Engineers Case\(^2\)

(i) Federal Implications

What follows is intended to be read as a continuation of the earlier discussion of intergovernmental immunity up to and including the Engineers Case.\(^3\)

The Engineers Case declared against the making of implications of intergovernmental immunity and proposed a simple scheme with both the Commonwealth and the States subject to one another's laws and with the only "immunity" to be that accruing


\(^3\) Above pp88ff. The development of this topic was postponed pending the preceding section's analysis of post-Engineers principles of characterisation. Some judges including Barwick CJ have tried to deal with intergovernmental immunity solely by application of general principles of characterisation. Below pp185-187.
to the Commonwealth through ss109. Dixon J and Evatt J in particular did not accept that the Engineers Case had totally barred the making of implications drawn from the federal spirit of the Constitution.  

In 1947 Barwick KC appeared in the State Banking Case a case central to the identification of possible approaches to intergovernmental immunity.  

The State Banking Case

The law which Barwick was briefed to challenge in this case prohibited private banks from providing banking facilities to State governments. Barwick put a succession of submissions in the alternative with a view to establishing the invalidity of the law.  

First, Barwick submitted that the Commonwealth law in issue, s48 of the Banking Act 1945, was not in substance a law with respect to banking under s51(xiii), as the prohibition on provision of private banking facilities to State governments was imposed without reference to any banking consideration.  Although this submission abided by the Engineers Case interdiction of federal implications of intergovernmental immunity, it involved an approach to characterisation of laws (as being with respect to a Commonwealth subject matter) which was similar to the characterisation branch of the reserved powers doctrine. That branch of the reserved powers doctrine was the only part of the pre-Engineers scheme not to receive

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1 West v Commissioner of Taxation (NSW) (1937) 56 CLR 657, 681, 688.  
2 (1947) 74 CLR 31. The case is analysed in JD Holmes, "Back to Dual Sovereignty" (1947) 21 ALJ 162.  
3 Id. 36.
a direct repudiation by the Engineers Case and its status and the general issue of characterisation were relatively unexplored at this stage.¹

Secondly Barwick submitted that the federal structure of the Constitution impliedly precluded certain kinds of intergovernmental interference. If federal implications were to be made, it did not matter, Barwick submitted, whether the category of prohibited action was discriminatory action by one sphere of government against the other², or interference with an essential function of government³ or, more widely, any substantial intergovernmental interference whether discriminatory or not, and whether with an essential governmental function or not⁴. It did not matter which category of implied prohibition the Court was willing to acknowledge, and the Court did not have to commit itself to one category of implied prohibition to the exclusion of others, because the suspect law was a substantial discriminatory interference with an essential State governmental function and therefore offended all of the suggested implications.⁵

The law was held invalid by majority. The sole dissentient McTiernan J held, s48 to be a law with respect to banking under s51(xiii),⁶ applied the Engineers Case declaration against the making of vague political implications and held the States to be subject to this law⁷. The majority judges were Latham CJ,

¹ Above ppl04ff.
² Id. 36, 41.
³ Id. 36.
⁴ Ibid.
⁵ Id. 38.
⁶ Id. 94.
⁷ Id. 88.
Rich, Starke, Dixon and Williams JJ. The "true" basis for the majority decision was, however, far from clear as there were variations in the grounds for deciding that s48 was invalid and in the attitudes expressed to the questions of whether any and if so what federal implications should be made.

Latham CJ (who had been amongst counsel arguing for the recognition of federal implications in the Engineers Case itself)\(^1\) purported to abide by and accept the Engineers Case declaration against the making of federal implications\(^2\). There was, however, ambiguity in Latham CJ's discussion.

As Chief Justice, Barwick claimed\(^3\) that Latham CJ's judgment in the State Banking Case treated the resolution of problems of intergovernmental interference as being a matter for the application of ordinary principles of characterisation. (This interpretation corresponded to the characterisation submission of Barwick set out above).

This interpretation of Latham CJ's judgment was consistent with the passage where Latham CJ said

"In my opinion the reason why such discriminatory legislation is invalid is that what is called 'discrimination' shows that the legislation is really legislation by the Commonwealth with respect to a State or State function as such and not with respect to the subject in respect of which it is sought to bind the State ..."\(^4\)

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1 (1920) 28 CLR 129, 134-137.
2 (1947) 74 CLR 31, 61.
4 (1947) 74 CLR 31, 61 also a similar statement at 62.
Earlier in his judgment, however, Latham CJ had said "... the argument that s48 is not legislation with respect to banking should not be accepted...". An alternative interpretation of Latham CJ's judgment is to attribute it to a reliance on the phrase "peace, order and good government" appearing in the introductory words of s51. These had been the terms in which some years earlier in Wests Case, Latham CJ had discussed intergovernmental discriminatory interference. If this were the "true basis" of Latham CJ's decision in the State Banking Case, then it was essentially dependent on a federal principle, the federal division of government into different spheres. Indeed Latham CJ's judgment contains reference to the federal background to the problem.

Rich and Starke JJ, considered s48 to be a law with respect to banking. The discussion of Dixon J did not expressly hold that s48 was a law with respect to banking, but did repudiate the assumptions about general principles of characterisation involved in Barwick KC's first line of argument. Williams J did not comment directly on Barwick's submission around the words "with respect to" but he did include as one of his grounds for decision a reference to the phrase "peace, order and good government of the Commonwealth".

1 Id. 50.
3 (1937) 56 CLR 657, 669. See also Williams J in the State Banking Case (1947) 74 CLR 31, 99-100.
4 Id. 55, 60.
5 Id. 65, 69 respectively.
6 Id. 78-80.
7 Id. 99-100.
Rich, Starke, Dixon and Williams JJ all clearly endorsed the proposition that the federal nature of the Constitution gives rise to some intergovernmental immunity.\(^1\) All of these judges thought that discrimination was important when considering the compatibility of a law with the federal principle of the Constitution\(^2\) but again, there was variation - this time in the weight given to the presence of discrimination in s48.

The decisions of Rich and Starke JJ seemed to hold s48 invalid because of its conflict with a general federal principle. According to these judges there was a federal principle in the Constitution that the Commonwealth and the States should each continue to exist.\(^3\) For Rich J the corollary of this principle (so far as is relevant to s48) was that the Commonwealth could not take action (whether discriminatory or not), which prevented or impeded States or State agencies from performing "the normal and essential functions of government".\(^4\) His Honour considered that "the power freely to use the facilities provided by banks, under modern conditions, must be regarded as essential to the effective working of the business of government...".\(^5\)

Starke J spoke of an implication preventing either sphere of government from abolishing the other or substantially curtailing the other's exercise of its constitutional powers.\(^6\) Although not willing to draw distinctions between categories of activities (some to be entitled to immunity and some not)\(^7\), Starke J was willing to take

\(^1\) Id. 65-66, 70-75, 81-83, 99-100 respectively.
\(^2\) Id. 66, 75, 78-79, 99 respectively.
\(^3\) Id. 66, 70 respectively.
\(^4\) Id. 66.
\(^5\) Id. 67.
\(^6\) Id. 70. Also First Uniform Tax Case (1942) 65 CLR 373, 442; Exp Victoria (1942) 66 CLR 488, 515.
\(^7\) (1947) 74 CLR 31, 74-75.
account of the nature of the activity affected and, in deciding that s48 was invalid, noted that "The management and control by the States and by local governing authorities of their revenues and funds is a constitutional power of vital importance to them."\(^1\)

The willingness of Rich J and Starke J to recognize a federally derived intergovernmental immunity seemed difficult to reconcile with the sweep of the main Engineers majority judgment to which they themselves had been party a generation beforehand, and the continuing authority of which they accepted.

Rich J attempted to reconcile the federal principles he applied in the State Banking Case with the Engineers Case by saying that the Engineers Case was only about implications and had nothing to say about express constitutional limitations. Section 51 provided that Commonwealth powers were "subject to the Constitution" and, according to Rich J, the Constitution provided for the continued existence of the States "as such".\(^2\) Rich J did not identify the express provisions which he claimed predicated the continued existence of the States "as such". Many provisions of the Constitution assume the continued existence of States. Section 106 provides for the continuation of the Constitutions of each State and s107 provides for the continuation of State powers but no provision expressly provides for the continued existence of the States "as such". Those two words seem to carry a guarantee of a certain status and position beyond mere formal existence.

Starke J who had also been party to the main majority judgment in the Engineers Case, simply asserted that the Engineers Case had not

\(^1\) Id. 75.  
\(^2\) Id. 66.
precluded the making of federal implications into the Constitution.\(^1\) Starke J made no attempt to explain the apparent conflict between the broad implication he discerned in the State Banking Case and the Engineers Case broad declaration against federal implications. On examination Starke J's formulation differed from the pre-Engineers doctrine of intergovernmental immunity in that it did not postulate freedom from all interference from the other sphere of government as the starting assumption of the Constitution. The authors of the original doctrine had considered it inappropriate for the High Court to try to distinguish acceptable from unacceptable burdens. Therefore all interferences were prima facie prohibited.\(^2\) Starke J saw no such difficulty in distinguishing acceptable from unacceptable interferences. He was willing to approach it as a practical question with the facts of each case relevant.\(^3\)

Dixon and Williams JJ agreed with Starke J that any federally derived intergovernmental immunity was a matter of implication rather than express provision.\(^4\) Like Rich and Starke JJ, Dixon and Williams JJ, considered that the Constitution predicated the continued existence of the States as independent entities.\(^5\) Dixon and Williams JJ, however, based their decision that s48 was invalid on its discriminatory aspect.\(^6\)

Like Starke J, Williams J simply asserted that the making of federal implications was compatible with the Engineers Case.\(^7\) Dixon

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1 D'Emden v Pedder (1904) 1 CLR 91, 118.
2 State Banking Case (1947) 74 CLR 31, 75.
3 Id. 81-82. Also West's Case (1937) 56 CLR 657, 681-682 per Dixon J. (1947) 74 CLR 31, 99 per Williams J.
4 Id. 82, 99 respectively.
5 Id. 82-84, 99-100 respectively.
6 Id. 99.
7 Id. 70, 73.
J's discussion was more elaborate and continued the development of a theory he had introduced in earlier cases.¹

Dixon J rejected the Engineers Case proposition that no political implications could be drawn from the federal nature of the Constitution. How, Dixon J asked, could political considerations be excluded from the construction of a political document?² Although rejecting that central part of the reasoning in the Engineers Case, Dixon J accepted the case as having authoritatively established that Commonwealth law can prima facie bind the States.³

Dixon J's framework struck a compromise between the authority of the Engineers Case declaration against vague unpredictable implications and the inherent force of the federal argument of the pre-Engineers doctrine by elaborating a precise and specific set of federal implications. Dixon J argued that the Engineers Case main judgment itself reserved intergovernmental interference by taxation or with prerogative and furthermore had nothing to say to discrimination.⁴ Dixon J considered that in these areas, the federal nature of the Constitution would prima facie preclude intergovernmental interference.⁵

¹ For greater depth, LR Zines, "Sir Owen Dixon's Theory of Federalism" (1965) 1 FL Rev 221.

² West's Case (1937) 56 CLR 657, 681-682; State Banking Case (1947) 74 CLR 31, 81-82.

³ Id. 78.


⁵ Previous note, case references.
The federal implications in favour of the States might, however, be displaced by the special nature of the Commonwealth power in issue.¹ (In this, Dixon J's theory was similar to, though not supported by reference to the pre-Engineer's doctrine.²) The implications were moreover to be much stronger to protect the Commonwealth than they were to protect the States. This lack of symmetry in the implied immunity occurred, according to Dixon J, because the Commonwealth's dominance was recognised by s109 of the Constitution and because the Commonwealth was given express grants of power which impliedly carried with them everything necessary for their full effectuation.³

These then were the range of approaches to federal implications which had been brought into focus in the State Banking Case.⁴

The topic was raised again in later cases but no conclusive Court attitude emerged.

Arguments based on intergovernmental immunity were included amongst the grounds for attacking the Commonwealth scheme for nationalising private banks in the Bank Nationalisation Case.⁵ A central provision of the scheme, s46 of the 1947 Banking Act, gave

1 State Banking Case (1947) CLR 31, 81.
2 Compare the Steel Rails Case (1908) 5 CLR 818.
3 State Banking Case (1947) 74 CLR 31, 82-83. (One might have thought that the availability to the Commonwealth of the power to free itself through s109, of annoying State laws would have tilted the balance of the implied immunities in favour of the States).
4 Latham CJ (id. 62-63) and Williams J (id. 101) also considered that s48 was inconsistent with s105A of the Constitution. Starke J (id. 75-76) and McTiernan J (id. 95) considered that it was not and Rich J and Dixon J made no comment on this point which was not apparently argued (id. 62 per Latham CJ).
5 (1948) 76 CLR 1, 45-46 per Hudson KC.
the Commonwealth Treasurer power to order any private bank to cease banking. This law which gave power to deny private banking facilities to all seemed therefore to have exactly the same effect on the States' access to banking facilities as the law held invalid in the State Banking Case.

McTiernan J was the only member of the Court to uphold s46.1 Of the majority judges who held s46 to be invalid, none included intergovernmental interference amongst their grounds for decision. In their joint judgment Rich and Williams JJ reserved,2 and made no comment on, the arguments of intergovernmental immunity.

Dixon J accepted that a law not involving discrimination (or taxation or preogative) could offend a Federal implication, but considered that that possibility was irrelevant to the case before him "where the law relates to the form to be taken by part of the established organization of the community affecting all alike".3 Starke J shifted ground from his position in the State Banking Case and came closer to Dixon J's framework. Starke J reaffirmed his view that general laws of one sphere of government substantially curtailing the exercise of powers by the other sphere of government would be invalid,4 but then held that the law in the Bank Nationalisation

1 _Id._ 393.
2 _Id._ 283.
3 _Id._ 338. In acknowledging the possibility that a law "without discrimination" might be beyond Federal power, Dixon J made reference to New York v United States (The Saratoga Springs Case) 326 US 572; 90 Law Ed 326 (1945). In that case the United States Supreme Court (by majority) upheld the application of general Federal tax to a State activity. It is not clear whether the "possibility" which Dixon J saw as being suggested (presumably by the dicta) in this case was the possibility reserved by Frankfurter J - of a tax general on its face in fact being discriminatory because it operated by reference to a criterion uniquely associated with States. (326 US 583-583; 90 Law Ed 333-334) - or whether it was that possibility reserved by Reed, Murphy and Burton JJ -of a general tax being an undue interference with States. (326 US 586-587; 90 Law Ed 336).
4 (1948) 76 CLR 1, 326.
Case was not curtailing or impeding any power or function of the States. Starke J purported to distinguish the law held invalid in the State Banking Case by referring to that law's discriminatory aspect. This ground for distinction failed to take account of the fact that Starke J's judgment in the State Banking Case had emphasised that law's effect on the State, rather than its discriminatory aspect and Starke J offered no basis for distinguishing the effect of the law before him in the Bank Nationalisation Case.

Whatever the true interpretation of his judgment in the State Banking Case, in the Bank Nationalisation Case Latham CJ clearly accepted that the State Banking Case had established that the Constitution contained federal implications. Latham CJ considered that the presence of discrimination in the State Banking Case law distinguished that decision and, while, apparently accepting that the effects on a State of a non-discriminatory law could offend a federal implication, considered that the denial to the States of access to private banking facilities did not constitute an offensive burden given the freedom of the States to establish their own banks.

In the Second Uniform Tax Case Sir Garfield Barwick QC, representing Victoria set up this federal scheme. The federal structure itself involved inherent immunity for both the Commonwealth and the States from one another's laws. The grant of residual non-specific law making power to the States did not detract from the Commonwealth's prima facie immunity. On the other hand the specific

1 Id. 325-326.
2 Id. 326.
3 Above pp171-173.
4 (1948) 76 CLR 1, 242-243. Also Wenn v Attorney-General (Vic) (1948) 77 CLR 84, 113.
5 (1948) 76 CLR 1, 243.
6 Id. 243.
powers granted to the Commonwealth were to be construed as sufficient to offset the States' *prima facie* federal immunity. Despite the grant of specific powers to the Commonwealth, the federal principle was not, however, completely displaced and the States had some immunity derived from the federal structure itself. (To this point, and as stated in the abstract, Barwick QC's federal scheme was very similar to the pre-Engineer's doctrine of implied intergovernmental immunity.)

Citing the *State Banking Case*, Barwick QC submitted that the federal structure of the Constitution "prevents any law of the Commonwealth operating to destroy or weaken the independence or integrity of a State or to place a particular disability or burden upon an operation or activity of a State and more especially upon the execution of its constitutional powers". The resolution of the case did not, however, give the Court an opportunity to settle the question of the appropriate framework for dealing with intergovernmental interference and that issue remained when Barwick was appointed to the Court.

**The Payroll Tax Case**

In 1971, Barwick's High Court was asked whether a Commonwealth law imposing tax on the payment of wages could apply to the wages of State government employees, and whether an associated Commonwealth law obliging employers to pay the tax could apply to State governments as employers. Taxation was one of Dixon J's three specific categories of intergovernmental immunity. In *Essendon Corporation v Criterion Theatres Ltd* Dixon J had based his decision that the Commonwealth executive was not able to pay rates for its occupancy of land, on his proposition that it was inherent in the federal principle of the Constitution that neither the Commonwealth nor the States could tax the other. (Other members of the Court were able to decide the case, without reference to Dixon J's propositions about intergovernmental immunity, either as a simple matter of construction.

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1 Above pp88ff.


3 (1947) 74 CLR 1, 19.
of the State legislation in issue\(^1\) or by application of s114.\(^2\)

The Payroll Tax\(^3\) presented the opportunity for a choice to be made between the different approaches to intergovernmental interference which had been set out in the State Banking Case and to consider Dixon J's proposition that there was inherent intergovernmental immunity from taxation.

The members of the 1971 Court were unanimous that the laws in issue could validly apply to wages of State employees and to States as employers. The judgments did not, however, provide a clear cut victory for any approach to intergovernmental immunity. There seemed to be general agreement that discrimination would tend to result in invalidity but this conclusion was reached by different routes.\(^4\)

Menzies, Walsh and Gibbs JJ presented a framework with these essential elements. The Engineers Case established a prima facie rule that States were bound by Commonwealth laws otherwise valid. Problems of intergovernmental interference were not, however, capable of resolution simply by application of general principles of characterisation.\(^5\) The federal nature of the Constitution gave rise to implication, the existence of which was recognized by precedent, preventing some interference by the Commonwealth with the States.\(^6\)

The three specific categories - prerogative, taxation and discrimination - central to Dixon J's framework, could not be

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1 Id. 15-16 per Rich J; 28-29 per McTiernan J; 30 per Williams J.

2 Id. 13-14 per Latham CJ So far as is relevant, s.114 provides "A State shall not, without the consent of the Parliament ... impose any tax on property of any kind belonging to the Commonwealth, ...".


4 Id. 372 per Barwick CJ (Owen J concurring); 385 per McTiernan J; 391-392 per Menzies J; 403 per Windeyer J; 411 per Walsh J; 424 per Gibbs J.

5 Id. 386 per Menzies J; 405 per Walsh J; 420-421 per Gibbs J.

6 Id. 386 per Menzies J; 406 per Walsh J; 417-418 per Gibbs J.
accepted as a satisfactory or exhaustive list to indicate when federal implications would provide intergovernmental immunity. (There was no need to comment on the prerogative.)¹ There was no automatic implied immunity from tax laws.² On the other hand, although discrimination against the States was impliedly prohibited and was an indicator of invalidity, its absence did not automatically indicate the validity of a Commonwealth law. General Commonwealth laws could be invalid in their application to the States.³

There was, according to Gibbs J, a general underlying implication prohibiting the Commonwealth from preventing the States from continuing "to exist and function as such."⁴ Menzies J acknowledged that such a general implication probably did exist and Walsh J acknowledged that it could exist. Menzies and Walsh JJ did not however, commit themselves on that matter.⁵ All three judges perceived the imprecise content of such an implication and the difficulties of definition which would arise should it involve a necessity to distinguish between essential and non-essential functions of government.⁶ Their Honours found no need to explore those difficulties of definition, however, as they concluded that on any approach that might be taken to those issues, it could not be said that the Commonwealth tax in issue was destroying or threatening the continued existence of the States.⁷

¹ Id. 424 per Gibbs J.
² Id. 392 per Menzies J; 408–409 per Walsh J; 423–424 per Gibbs J.
³ Id. 391–392 per Menzies J; 411 per Walsh J; 424 per Gibbs J.
⁴ Id. 424.
⁵ Id. 93 per Menzies J; 422, 412 per Walsh J.
⁶ Id. 392 per Menzies J; 410–419 per Walsh J; 424–425 per Gibbs J.
⁷ Id. 392–393 per Menzies J; 413 per Walsh J; 424–425 per Gibbs J.
This framework had certain attractions. It separated general principles of characterisation, under which heading some degree of certainty and predictability had by this stage been developed, from the special problem of intergovernmental interference. In relation to the special problem, it acknowledged the force of the proposition that the Constitution must be taken to be guaranteeing a continued existence for the States.

It might be said against the framework that its federal implication is, like the pre-Engineers implication of intergovernmental immunity, vague and difficult to define. The uncertainty of the new doctrine (or of this new version of the old doctrine) does not, however, dominate Australian constitutional law to the same degree that the pre-Engineers doctrine did. The old doctrine set up State immunity as a starting assumption, exception to which might be established. The new doctrine accepts the Engineers Case as establishing that the States are prima facie bound by Commonwealth law, and then adds State immunity from Commonwealth action as a proviso to come into operation in extreme cases. The new doctrine has therefore the certainty which comes from the unlikelihood of its being called into operation. That certainty is, however, vulnerable. A High Court minded to improve the status of the States could start using the proviso.2

The judgment of Windeyer J was similar in its essentials to that of Menzies, Walsh and Gibbs JJ. Windeyer J expressly rejected a Canadian style approach of attributing laws to one mutually exclusive list or another and expressly said that he regarded, the State.

1 Above pp104ff. Menzies J did not make this break as clearly as did Walsh J and Gibbs J.

2 Compare the s92 experience where the proviso to the Privy Council's declaration of individual liberty has been given force. Below pp389ff.

3 Id. 400.
Banking Case law as a law with respect to banking.\(^1\) Windeyer J considered it quite appropriate for the Court to look in the Constitution for implications to explain or limit the express terms of the Constitution in accordance with what was assumed. His Honour emphasised that the Court's role was not to make implications but rather to reveal what was implicit.\(^2\) Windeyer J had no trouble in accepting that the federal character of the Constitution was implicit\(^3\) and that the Constitution assumed "the continued existence of the States as constituent elements in a federation."\(^4\)

These assumptions did not for Windeyer J require automatic immunity from laws on particular subject matters (such as taxation). They required rather, immunity from exercises of power in particular ways. In the end Windeyer J said that the appropriate way to express a conclusion that a Commonwealth law had offended a federal assumption would be to say that although the law might be with respect to a particular Commonwealth subject matter, it was not, in accordance with the formula governing s51, a law for the peace order and good government of the Commonwealth.\(^5\) Windeyer J considered that it was on this point, rather than the point of the character of the law in issue, which provided the basis for the decision of Latham CJ in the State Banking Case.\(^6\) This construction of Latham CJ's judgment went some way to resolve the conflict noted\(^7\) above between a statement by Latham CJ that the law was a law with respect to banking\(^8\) and his

\(^1\) Id. 402, 403-404.
\(^2\) Id. 401-402.
\(^3\) Id. 402.
\(^4\) Id. 397.
\(^5\) Id. 403.
\(^6\) Id. 402.
\(^7\) Id. 421.
\(^8\) (1947) 74 CLR 31, 50.
eventual conclusion that the law was invalid because it was in substance with respect to a subject (State governmental function) not within Commonwealth power.\(^1\)

McTiernan J had been the only member of the Court in the \(\text{State Banking Case}\) to uphold the Commonwealth provision discriminating against States. Without indicating whether he considered himself bound by that decision, McTiernan J declared this Commonwealth payroll tax to be valid in its application to the payment of remuneration by the States to their employees.\(^2\) McTiernan J did comment that if the tax had been "laid on the appropriation of revenue to pay for services" then he might have had to examine the legislation further.\(^3\) McTiernan J seemed to be assuming that something like Latham CJ’s approach to characterisation should be applied to any Commonwealth law taking as the criterion of operation some activity not normally carried on between subject and subject.\(^4\) If a Commonwealth law did have such a feature then it seems that McTiernan J contemplated the possibility that the law might, (though, presumably from his conclusions in the \(\text{State Banking Case}\), would not inevitably) be held to be "in substance a law with respect to the States".\(^5\)

The judgment of Barwick CJ (with which Owen J agreed) raises many questions. In answer to the argument (accepted by four of his brethren) that cases since the \(\text{Engineers Case}\) had established the existence of federal implications, Barwick CJ said:-- that the cases had not established the existence of federal implications - that his task was to construe the Constitution not earlier judgments - that the Constitution did not contain federal implications. (Although Barwick CJ asserted that it was his duty to construe the Constitution rather

\(^1\) Id. 61.

\(^2\) (1971) 122 CLR 353, 386.

\(^3\) Id. 385.

\(^4\) Id. 385-386.

\(^5\) Id. 385.
than earlier judgments, he somewhat inconsistently spent a great deal of time construing the Engineers Case to identify the principle that could be derived from that decision, on criticising Dixon’s interpretation of the Engineers Case and on identifying the “true basis” for decision in the State Banking Case).¹

As to the first point, the state of the authorities:— Barwick CJ without a doubt was correct to construe the Engineers Case as an uncompromising declaration against the making of federal implications. Barwick CJ was, similarly, undoubtedly right² to dismiss the reference in the Engineers Case to the taxation power as falling far short of the well-considered express exception to the prima facie rule of State subjection to Commonwealth law, which Dixon J had discerned. Barwick CJ was less convincing in his attempt to dismiss the Engineers Case express reservation of the power of the Commonwealth to bind a State in the exercise of its prerogative power as being inserted solely to indicate an awareness of an issue in Canada, which obviously (according to Barwick CJ) can not arise in Australia.³

Barwick CJ asserted that the “real ground of decision” in the State Banking Case was that the Commonwealth law prohibiting banks from providing banking services for States, was not a law with respect to any Commonwealth head of power.⁴ As has been noted above, there was some support for this approach in Latham CJ's judgment and it was on Latham CJ's judgment that Barwick CJ principally relied to justify his interpretation of the decision.⁵ As was also noted above, however, there was ambiguity in Latham CJ's position and the other

1 Id. 376-383.
2 Id. 378-379.
3 Id. 378-380.
4 Id. 382.
5 Id. 373, 382.
State Banking Case majority judgments either rejected or were silent on the "real ground" which Barwick CJ discovered.

Barwick CJ undoubtedly misconstrued some of the State Banking Case judgments when he tried to dismiss references therein to the Constitution's contemplation of the continued existence of the States, as being, either inessential introduction by the judges identifying what they believed to be the likely historical explanation for the omission from the Commonwealth's list of powers of an express power with respect to the custody of State funds, or a mere paraphrase of the conclusion that the law was in substance not with respect to a Commonwealth head of power.¹

Apart from the question of whether or not Barwick CJ correctly identified the real ground for decision in the State Banking Case, his statement that the "characterisation" interpretation he put on that case was the only "acceptable" basis for the decision² is very difficult to reconcile with his approach to characterisation in other cases. Consider this passage from the judgment of Barwick CJ in the Payroll Tax Case. Commenting on a statement of Dixon J in the State Banking Case to the effect that the law denying States access to private banks was not justified by s51(xiii), Barwick CJ said

"That followed, in my opinion, because such a law was not in substance a law with respect to banking: but on the contrary, had the States and the banking of their funds as its subject. Of course, a law may be at the same time thought to be a law with respect to either of two of the topics enumerated in s51 and it may be satisfactory in such a case not to trouble to say with respect to which of the two subject matters the law should preferably be regarded. But when a law may possibly be regarded as having either of two subjects as its substance, one of which is within Commonwealth power and the other is not, a decision must be made as to that which is in truth the subject matter of the law. Although usually not an appropriate course in determining whether a law is a law on an enumerated topic, in such a case, the

¹ Id. 382.
² Id. 373, 382.
decision of what is the subject matter of the law may be approached somewhat in the manner the validity of a law claimed to be within one of the two mutually exclusive lists in the Canadian Constitution is determined. The law must be upon one or other of the subjects. It cannot be on both."  

In the Fairfax Case decided before the Payroll Tax Case and the Murphyores decision decided after Payroll, Barwick CJ took approaches to characterisation incompatible with any use of Canadian principles. There was, admittedly some ambiguity in Barwick CJ's position in Fairfax. There was, however, no such ambiguity in his position in Murphyores where he was associated with a clear rejection of the proposition that a decision of the substance of the law had to be made when it touched both Commonwealth and non-Commonwealth subject matters. After Murphyores it was beyond doubt that a law which prohibited banking was a law with respect to banking. Yet Barwick CJ in Payroll asserted that the law in the State Banking Case prohibiting the provision of banking services to States was not a law with respect to banking.

Barwick CJ did say in Payroll that the Canadian approach was not usually appropriate but was only appropriate in "such" a case. If Barwick CJ meant that that was the appropriate approach whenever a law may possibly "be regarded as having either of two subjects as its substance," then the conflict with Fairfax and Murphyores remained. If Barwick CJ meant that Canadian principles were only appropriate when dealing with a Commonwealth law discriminating against the States, then the inconsistency with Fairfax and Murphyores is resolved but a new inconsistency immediately appears. This time the inconsistency is with other parts of Barwick CJ's discussion in Payroll itself.

1 Id. 382.
2 (1965) 114 CLR 1; above pp110ff.
3 (1976) 136 CLR 1; above pp114ff.
The whole thrust of Barwick CJ's judgment in Payroll was to deny that State interests had any special claim to be taken into account when assessing the validity of Commonwealth law and to assert that the validity of a Commonwealth law affecting a State was determined by the same principles which determined the validity of any Commonwealth law. If the proviso, "in such a case", is read in the way suggested, then Barwick CJ proposed the use of different principles of characterisation when a Commonwealth law discriminated against States.

Why would Barwick CJ propose such an awkward and aberrant framework? He knew well enough the alternatives as he had built alternative submissions around them when he himself appeared before the High Court in the State Banking Case and the Second Uniform Case. Whatever the motivation, the result of Barwick CJ's framework was to give the Commonwealth a power over the States which fell short of being a complete power only to the extent required by the decision in the State Banking Case of barring the Commonwealth from legislating specifically for the annihilation of the States.

Although not on the scale of the conflict between Barwick CJ on characterisation in Payroll and Barwick CJ on characterisation in Fairfax and Murphyores, there was other inconsistency involved in Barwick CJ's behaviour. Barwick CJ had found fault with the federal implication proposition because it was "incapable of exact expression and certainty of practical application." Barwick CJ's framework for dealing with discrimination could hardly be said to indicate clear conclusions. Barwick CJ did not regard discrimination as something which would automatically lead to invalidity. There was discrimination involved in the legislation before him. It gave an exemption to wages paid to teachers at private schools and did not make that exemption available to wages paid to teachers at State schools.¹ This discrimination was insufficient to justify a

¹ (1971) 122 CLR 353, 374-376.
conclusion that the legislation was not with respect to taxation.\footnote{1}{Id. 375-376.} The question of the substance of the law was a question of degree with the extent of the impact of the law upon the States in the exercise of their powers and functions a factor to be taken into account.\footnote{2}{Id. 373-374.} It is difficult to conceive of a more impressionistic and arbitrary criterion.

Barwick CJ had said that the formula proposed in argument —undue interference with State functions — "provides but a question begging formula."\footnote{3}{Id. 382.} How then did Barwick CJ's formula differ when it involved an examination of the extent of impact on the States to see whether the impact was sufficient to justify a conclusion as to the substance of a law?

When dealing on its merits with the argument that the Constitution necessarily involved federal implications, the judgment of Barwick CJ accepted many of the submissions of the Commonwealth Solicitor-General Ellicott QC\footnote{4}{Id. 358 ff.} and involved a reiteration cum expansion of the points made half a century before in the main majority judgment in the Engineers Case. According to Barwick CJ\footnote{5}{Id. 364-367, quoting from the Engineers Case (1920) 28 CLR 129, 152-154.}:— The Crown in right of the State was bound by Commonwealth laws referable to subject matters of Commonwealth power because the one indivisible Crown, had assented to be bound by laws made under the Commonwealth Constitution, an enactment of the Imperial Parliament. The validity of laws relying on the authority of the Constitution depended, therefore, solely on the
application of ordinary principles of statutory interpretation. A federal implication to protect the States from the Commonwealth could not and should not be drawn because it involved "concepts incapable of exact expression and certainty of practical application." ¹

Any notion that the making of implications was necessary to prevent abuse in the use of Commonwealth power against the States was misguided; first, because abuse of power was a matter for the electorate not the judiciary;² secondly because it assumed a status for the States which was not intended by the Constitution.³

In relation to this second point, the intended status of the States, Barwick CJ went a good deal further than had the Court in the Engineers Case. The Court in Engineers Case had noted that the Constitution was the compact of the Australian people and this compact was enacted into law by the Imperial Parliament,⁴ but had not directly developed any proposition from that fact. Barwick CJ drew this significance from that fact:— The Commonwealth Constitution does not contain, and was not intended by the Imperial Parliament to operate as, a treaty of union between, or a confederation of, independent States. The Constitution is a statutory Constitution under the Crown set up to fulfil the wish of the people to be united.⁵ Whatever the status of the colonies pre-federation, the Imperial Parliament had the power to alter that status and did alter

² (1971) 122 CLR 353, 365 relying on the Engineers Case (1920) 28 CLR 129, 152.
⁴ (1920) 28 CLR 129, 142, 152. The preamble to the Commonwealth of Australia Constitution Act recites the agreement of the people of all the Australian colonies (except Queensland) to join together in the Commonwealth.
⁵ Id. 370.
that status by terminating the existence of the colonies. The Constitution could not be treated as the union of pre-existing States because the States "derived their existence from the Constitution itself."¹

The dominance that Barwick CJ was asserting for the Commonwealth is indicated in these passages.

"... by their union in one Commonwealth, the colonists became Australians ... of course, that Act [the Commonwealth of Australia Constitution Act 63 & 64 Vict. c.12.] must be construed in the light of its antecedent history. But the outstanding fact that the Act created the Commonwealth as the embodiment of the people of Australia and gave it, amongst other things, legislative power over the enumerated subject matters cannot be gainsaid."²

The Commonwealth is referred to as the embodiment of the Australian people rather than just one of the embodiments of the Australian people.³ Separate status as Queenslander or Victorian is apparently, a matter of "antecedent history." The reference to the Commonwealth's list of powers is made not to acknowledge that the list is limited and that the States also have power but rather to emphasise the fact of Commonwealth power.

Complementing Barwick CJ's framework of Commonwealth dominance over the States, was his Honour's acceptance in Payroll Tax Case⁴ and other cases, of the proposition that the Crown in right of the Commonwealth has an inherent immunity from State laws. The proposition and its derivation are now discussed.

¹ Id. 371.
² Id. 371. Emphasis added.
³ Compare McCulloch v Maryland (1819) 4 Wheat 316, 431 per Marshall CJ "In the legislature of the Union alone are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused."
⁴ (1971) 122 CLR 353, 373.
(ii) The Commonwealth as a Graeco/Roman Goddess - the doctrine of total immunity for the Crown in right of the Commonwealth

In Uther v Federal Commissioner of Taxation\(^1\) the Court examined a New South Wales law depriving the Crown in right of the Commonwealth of its prerogative right to priority in payment from an insolvent debtor. A majority of the Court held the law to be valid.

Dixon J dissented on the basis that the Crown in right of the Commonwealth had not been subjected to State law making power.

"The Colony of New South Wales could not be said at the establishment of the Commonwealth to have any power at all with reference to the Commonwealth. Like the goddess of wisdom the Commonwealth una ictu sprang from the brain of its begetters [Sic] armed and of full stature. At the same instant the colonies became States; but whence did the States obtain the power to regulate the legal relations of this new polity with its subjects? It formed no part of the old colonial power. The Federal constitution does not give it." \(^2\)

Fifteen years later in the Commonwealth v Cigamatic Pty Ltd\(^3\) the Court by majority overruled Uther. The majority judges, Dixon CJ, Kitto, Menzies, Windeyer and Owen JJ (with McTiernan and Taylor JJ dissenting) endorsed Dixon J's Uther dissent. The decision in Cigamatic might have been confined to a finding of inherent immunity for Commonwealth prerogative rights\(^4\) or to governmental (as opposed to business) activities.\(^5\)

\(^1\) (1947) 74 CLR 508.

\(^2\) Id. 529-530. In Grecian mythology the goddess Athenae (Minerva to the Romans), goddess of wisdom and warlike prowess, came into being by emerging from the forehead of Zeus (Jove).

\(^3\) (1962) 108 CLR 372.

\(^4\) Id. 378 per Dixon CJ; 389-390 per Menzies J. See also Uther (1947) 74 CLR 508, 530 per Dixon J. "It is a question of the fiscal and governmental rights of the Commonwealth...". WMC Gummow, "The Nature and Operation of Prerogative Powers in the Federal System" (1964) 4 SLR 435. G Evans "Rethinking Commonwealth Immunity" (1972) 8 MULR 521.

\(^5\) RD Lumb, "Constitutional Relations between the Commonwealth and the States" (1963) 4 UQLJ 332, 334.
In between the Uther and Cigmatic decisions there was the case of Commonwealth v Bogle. Obiter dicta in the judgment of Fullagar J which received the concurrence of Dixon CJ, Webb J and Kitto J, took the immunity a lot further to include immunity for all Commonwealth executive action.

"... the State Parliament has no power over the Commonwealth. The Commonwealth - or the Crown in right of the Commonwealth, or whatever you choose to call it - is, to all intents and purposes, a juristic person, but it is not a juristic person which is subjected either by any State Constitution or by the Commonwealth Constitution to the legislative power of any State Parliament. If, for instance, the Commonwealth Parliament had never enacted s.56 of the Judiciary Act 1903-1950, it is surely unthinkable that the Victorian Parliament could have made a law rendering the Commonwealth liable for torts committed in Victoria. The Commonwealth may, of course, become affected by State laws ... But I should think it impossible to hold that the Parliament of Victoria could lawfully prescribe the uses which might be made by the Commonwealth of its own property, the terms upon which that property might provide accommodation for immigrants introduced into Australia."

There were limitations on this doctrine – first it only protected the Crown in right of the Commonwealth and secondly it only stopped State laws from binding, as against merely affecting, the Crown in right of the Commonwealth. The doctrine did however, represent a large shift in the balance of intergovernmental relations.

1 (1953) 89 CLR 229.
2 Id. 259-260.
3 Id. 249.
4 Id. 255.
5 Id. 274.
In the Payroll Tax Case Barwick CJ seemed to take it for granted that the Cigamatic/Bogle doctrine of Commonwealth immunity was valid and established.\(^1\) In Maguire v Simpson\(^2\) the Court was asked to reconsider the Cigamatic/Bogle doctrine\(^3\) but found it unnecessary to decide whether the doctrine was valid.\(^4\) Although not committing himself finally, Barwick CJ indicated support for the doctrine when he said "it would be difficult, in my opinion, to conclude that a State could legislate directly to bind the Commonwealth in any of its manifestations or emanations."\(^5\)

In 1979 in Superannuation Fund Investment Trust v Commissioner of Stamps (SA), Barwick CJ in dissent would have held the Superannuation Fund Investment Trust set up by the Commonwealth for its employees to be immune from State stamp duty legislation on transfers of land. Barwick CJ's decision proceeded on the basis that the Crown in right of the Commonwealth could only be subject to State taxation if it were subjected to such taxation by Commonwealth legislation.\(^6\) Such an assumption was compatible with the Cigamatic/Bogle doctrine but Barwick CJ made no reference to that or any other explanation for his assumption of inherent Commonwealth immunity from State taxes.

The other members of the Court, who concluded that the Trust was subject to State taxation, all did so without deciding whether or not the Crown in right of the Commonwealth had any inherent immunity from State taxation. For the members of the majority that issue was

\(^1\) (1970) 122 CLR 353, 373.

\(^2\) (1977) 139 CLR 362.

\(^3\) Id. 365 McLelland QC.

\(^4\) Jacobs J did think it worth recording criticisms of the doctrine. Id. 404.

\(^5\) Id. 368-369.

avoided either by a conclusion that the Trust was not part of the
Crown in right of the Commonwealth\(^1\) or by a conclusion that there
was to be discerned in Commonwealth legislation an intention to
subject the Trust to State tax of the kind in issue.\(^2\) (Barwick CJ
came to contrary conclusions on both of these points.)\(^3\)

Also in 1979 in *Bank of New South Wales v Deputy Commissioner of
Taxation*\(^4\) Barwick CJ went out of his way, again *obiter dicta* to say
that the decision in *Cigamatic* should not be reopened. (In the
context, Barwick CJ's reference to the decision in *Cigamatic* would
only seem to go to Commonwealth prerogative rights and might indeed be
confined to prerogative rights to priority.)

"In the first place, in my opinion, the decision was right in
principle: and secondly, in any case, it was a decision of seven
justices and has now stood for some time."\(^5\)

(I do not wish to explore the question of Barwick CJ's attitude to
precedent. I would, however, say this in relation to the second
point. Two of the seven justices in *Cigamatic* dissented and none of
the others adverted to provisions in the Judicature Act which would
seem to have picked up the State provisions and given them the force
of Commonwealth laws.)\(^6\)

Barwick CJ's first point - "the decision was right in principle"
is the point of immediate interest. Barwick CJ's endorsement of the
decision in *Cigamatic* on the constitutional point involves conflict
with other parts of Barwick CJ's overall framework.

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1. Id. 110 per Stephen J; 125 per Aickin J; contra id. 101 per
Barwick CJ, 117 per Mason J with Murphy J not deciding.
2. Id. 117-118 per Mason J; 118-119 per Murphy J.
3. Id. 101, 102-103 respectively.
5. Id. 444.
6. Maguire v Simpson (1977) 139 CLR 362, 402 per Mason J; 403-
404 per Jacobs J.
At the core of the Cigamatic doctrine was Dixon CJ/J's proposition that the power to regulate the legal relations of the polity, the Commonwealth, with its subjects was (a) not part of the old colonial power and (b) not given by the Federal Constitution.¹

The rhetoric with which Dixon J surrounded his discussion in Uther suggested that the pre-federation colonies had no power with respect to the Commonwealth because the Commonwealth did not exist pre-federation. Dixon J could not have been deriving Commonwealth immunity from the mere fact that the Commonwealth did not exist as a legal person when the colonies were first given their law-making powers. There is nothing in the nature of the grant of power to make laws with respect to a geographical area which immunises legal persons — natural or artificial — who come into existence after the grant of power.² Dixon J seems to have been relying on the fact that the Commonwealth did not exist as a polity before federation. That is, Dixon J seems to have been concerned with the principle that the Crown is not bound by a statute unless it assents to being bound by the Statute.

Such a rationale for total immunity for the Crown in right of the Commonwealth from State legislation, conflicts with the Engineers Case theory of Crown indivisibility.³ According to the reasoning in that case the Crown in right of each State was subject to any authority to bind the Crown vested by the Commonwealth Constitution in the Commonwealth, because the Imperial Crown had assented to the

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¹ RP Meagher and WMC Gummow manage to identify and debunk eleven propositions which have been put forward to support the doctrine of total Commonwealth immunity. "Sir Owen Dixon's Heresy" (1980) 54 ALJ 25, 28-29.

² G Evans, "Rethinking Commonwealth Immunity" (1972) 8 MULR 521, 524.

³ wE Cuppaidge, "The Divisibility of the Crown" (1954) 27 ALJ 595.
Commonwealth Constitution. The doctrine of indivisibility dictated, and the main judgment in the Engineers Case accepted, that because the one indivisible Crown assented to the colonies being given their law-making powers, the Commonwealth being but another emanation of that one indivisible Crown, should have been bound by that assent regardless of when the Commonwealth came into existence.

In the Payroll Tax Case Barwick CJ relied on the Engineers Case doctrine of Crown indivisibility to justify the recognition of Commonwealth power to subject States to Commonwealth legislation. Yet in the same case and in the cases in 1979 mentioned above, without acknowledging the passage in the Engineers Case to the contrary and without reconciling his position with the doctrine of Crown indivisibility, Barwick CJ asserted the lack of State power to bind the Commonwealth.

Even if it were relevant that the Commonwealth did not exist when the colonies were vested with law-making power that point should have been answered for Barwick CJ by the Commonwealth Constitution itself. Barwick CJ reasoned in the Payroll Tax Case that the States were new bodies created by the Constitution and were not just the colonies with a new name. On this approach, why was not the vesting of power

1 (1920) 28 CLR 129, 146-147, 152-153.
2 (1920) 28 CLR 129, 155.
7 The doctrine of Crown indivisibility is not without its critics (Eg the discussion of WMC Gummow, "The Nature and Operation of Prerogative Powers in the Federal System" (1964) 4 SLR 435, 442-444.) The point is that Barwick CJ was not consistent in his attitude to the doctrine.
in the States which was effected by the Commonwealth Constitution itself (s 106 and 107), sufficient to bind the Commonwealth which was brought into existence by the same document as brought the States into existence? Barwick CJ simply asserted that it was the fact that "the Crown [in right of the Commonwealth] has not by the Constitution submitted itself to the legislatures of the States".  

There is one way to interpret the Bogle/Cigamatic doctrine to bring it into some kind of reconciliation with the Engineers Case. One can accept that the assent of the one indivisible Crown to the vesting of law-making authority in the Colonies/States bound the Commonwealth. The question still remained, however, to what had the Crown assented.  
The Commonwealth "immunity" might be drawn from a construction of the States' law-making powers. Immediately following the key passage from Uther which has been set out above, Dixon J said

"Surely it is for the peace, welfare and good government of the Commonwealth, not for the peace, welfare and good government of New South Wales to say what shall be the relative situation of private rights and of the public rights of the Crown representing the Commonwealth, where they come into conflict."  

This could be taken as meaning that even if the Commonwealth were bound by the indivisible Crown's assent to the vesting in the State of a power to make laws for the peace, welfare and good government of the geographical territory which is New South Wales, that power was, on a "proper" construction, insufficient to reach the Commonwealth. It might for example be reasoned that it is not "proper" to construe State legislative power as being sufficient to bind the Crown in right of the Commonwealth as laws binding the Commonwealth "concern all the

1 Id. 373.
2 (1920) 28 CLR 129, 153-154.
3 (1947) 74 CLR 508, 530.
people of the Commonwealth and the entire territory of the Commonwealth, and therefore a law purporting to affect [the powers, rights and functions of the Crown in right of the Commonwealth] can not be for the peace, order and good government of the State alone. As counsel in the Second Uniform Tax Case Barwick had offered a similar federal theory. There Barwick had submitted that the federal structure, itself implied a **prima facie** total intergovernmental immunity. The States' immunity was, however, significantly but not entirely, displaced by the grant to the Commonwealth of specific law making powers. Commonwealth immunity was not displaced because, properly construed, State general law making powers were insufficient to displace Commonwealth immunity.

There is, indeed, some force in pointing out the national impact of a State law binding the Commonwealth. (Such a point was part of the basis for the pre-Engineers doctrine of immunity for the Commonwealth from State legislation.) This point can hardly be said, however, to provide a completely satisfactory reconciliation of the Bogle/Cigamatic doctrine with the Engineers Case (and of Barwick CJ's acceptance of both) as the "peace, order and good government" argument inevitably depends on federal and political considerations which Barwick CJ eschewed. Furthermore any attempt to justify Commonwealth immunity as being based simply on the "proper" construction of State law - making power, serves only to conceal the issue and the basis for judicial recognition of the doctrine.

1. LR Zines, *The High Court and the Constitution* 276.
2. Above pp177-178. WMC Gummow op cit 440-441, 446.
3. D'Emden v Pedder (1904) 1 CLR 91, 113-115 per Griffith CJ, Barton and O'Connor JJ adopting with approval the discussion of Marshall CJ in McCulloch v Maryland (1819) 4 Wheat 316, 428-432. Also D'Emden v Pedder (1904) 1 CLR 91, 120 "In our judgment the operations of the Commonwealth, and the acts of its agents as such, ought, so far as regards State control to be considered on the same footing as if they did not occur within the territorial limits of any State." Also Payroll Tax Case (1970) 122 CLR 353, 403 per Windeyer J, discussed above p182. G Sawer Op cit 583.
G - Federal Balance - Themes and Patterns in Barwick's behaviour

For the issues of this Chapter there was no apparent connection between Barwick's submissions as counsel and opinions as Chief Justice. As counsel in the State Banking and Bank Nationalisation Cases Barwick had proposed an approach to characterisation which was inconsistent with the approach to characterisation which he supported in the Murphyores decision. As counsel in the State Banking Case and in the Second Uniform Tax Case Barwick argued that the federal nature of the Constitution implied certain immunity for the States from Commonwealth action. As Chief Justice Barwick held in the Payroll Tax Case that the federal structure did not imply any immunity for the States from Commonwealth action. It seems that there was at least the link that as counsel, in the Second Uniform Tax Case, Barwick suggested that the Commonwealth was immune from State legislation and as Chief Justice Barwick endorsed that proposition. Even in that link there were significant differences - as counsel Barwick had drawn Commonwealth immunity from an implication from the nature of federalism, whereas as Chief Justice Barwick directly said that the Commonwealth immunity was not founded in federal implication.

Barwick's contribution to the establishment of certain and predictable (and, in terms of the Engineers Case judgment's values, appropriate) principles of characterisation was less than wholehearted. He supported certain and predictable principles in the Fairfax and Murphyores decisions. Barwick CJ's support for that certainty and predictability was, however, not absolute even in those decisions themselves and was clouded further by his Payroll Tax Case view that Commonwealth action discriminating against States could be held invalid by the application of unpredictable tests of characterisation which are inconsistent with the Fairfax and Murphyores principles.
Various weaknesses in reasoning within particular judgments of Barwick CJ and some failures of consistency in expressed reasoning across cases have been exposed through the Chapter. The proposition that the Huddart Parker decision was based on the "unacceptable" reserved powers doctrine begged the question of whether the decision was right or wrong on "acceptable" grounds. Construing Commonwealth powers so as not to render other powers otiose was an acceptable principle when construing the marriage power but not when construing the external affairs power. Preserving the State sphere of exclusive power was an acceptable consideration, and taking account of national need was an unacceptable consideration, when determining the ambit of incidental powers, implied national power and Commonwealth spending power but the converse applied when dealing with issues of intergovernmental immunity and determining the content of the corporations and external affairs powers.

Leaving aside Barwick CJ's expressed reasons for decisions can any consistent pattern be identified? Barwick CJ's decisions were relatively favourable to Commonwealth power to regulate economic activities through ss51(i), s51(xx) and s51(xxix) but relatively niggardly towards Commonwealth power to deal with social issues through s51(xxi) and implied national power. It must be remembered, however, that sections 51(i) and 51(xxix) could not, and section 51(xx) may not, be confined to laws merely implementing economic policy. The Murphyores decision itself represented the use of s51(i) to implement environmental policy. Looked at from another perspective, Barwick CJ's position hindered the "socialistic" Commonwealth activities of government trading (Port Hedland Case) and social welfare funding (The Australian Assistance Plan Case). Barwick CJ supported, however, the establishment of unlimited Commonwealth taxing power (Fairfax) and showed no interest in submissions that taxes were unconstitutional on the grounds that the proposed application of the
revenue raised by a tax was invalid\(^1\) or on the grounds of discrimination between States in the means of collection.\(^2\) Barwick CJ also joined a decision upholding a Commonwealth provision giving priority for taxes owed to the Commonwealth over secured creditors of an insolvent debtor.\(^3\) That support for wide Commonwealth taxing power was hardly consistent with any anti-socialist creed. Barwick CJ made no secret of his attitude to taxation. In the case of Cullen v Trappell, concerned with whether or not allowance should be made for income taxation in damages assessments in tort actions, he said: "The community appears already to be aware that the level of income tax has become destructive of individual initiative and effort and, further, has a tendency to undermine much of the sense of moral rectitude on which a community so much depends."\(^4\)

Some might argue that Barwick CJ more than off-set his acceptance of constitutionally wide taxing power by his attitude to the construction and application of taxation legislation.\(^5\) Nevertheless, Barwick CJ seemed to have managed to exclude his dislike of taxation from his decisions on constitutional limits of the Commonwealth's power to tax. The next Chapter will show that Barwick CJ did not take up significant options under s90 to reduce State power to tax.

\(^1\) Logan Downs Pty Ltd v FCT (1965) 112 CLR 177.
\(^2\) Conroy v Carter (1968) 118 CLR 90.
\(^3\) Commonwealth v Barnes (1975) 133 CLR 483.
\(^4\) (1980) 29 ALR 1, 6.
\(^5\) D Marr Barwick 293–294.
Chapter V

EXCISE DUTIES UNDER SECTION 90

A - Section 90's Place in the Constitutional Framework

(i) The Purpose of the Founders

(ii) Judicial Perceptions of the purpose of s90 and of the inclusion of excise in s90

(iii) Economic Management

(iv) The revenue aspects of s90

(v) Relevance of the "purpose" of s90 to judicial behaviour

B - "Duty" - To be an excise the law must be imposing a duty

(i) The link between s51(ii) and s90

(ii) A compulsory acquisition of property is not a tax

(iii) A payment for services is not a tax

(iv) A licence fee can be a tax

(v) Summary of "Duty"

C - "Excise" - What kind of duties are excises?

(i) The link between excise duties and indirect taxes

(ii) Definition

   (a) An excise is a tax on production of goods

      Peterswald v Bartley 1904

      COR Case 1926

   (b) An excise is a tax on any dealing with goods

      Matthews v Chicory Marketing Board 1938

      Parton v Milk Board (Victoria) 1949
(c) The settling of the definition of excise - an excise is a tax on any dealing with goods except consumption.  

(iii) Characterisation  

(a) A flat tax is not an excise - the requirement of a quantitative link  

(b) A time-lagged tax is not an excise  

Dennis Hotels Pty Ltd v Victoria 1960  
Dickenson's Arcade Pty Ltd v Tasmania 1974  
MG Kailis Pty Ltd v Western Australia 1974  
HC Sleigh Ltd v South Australia 1977  
Summary of Barwick CJ's position on time-lagged taxed  

(c) The sufficiency of an indirect quantitative link and the criterion of liability test  

Matthews v Chicory Marketing Board 1938  
Transport Cases 1930's  
Hughes and Vale Pty Ltd v New South Wales 1953  
Bolton v Madsen 1963  
Browns Transport v Kropp 1958  
Andersons Pty Ltd v Victoria 1964  
The Barwick/Kitto confrontation in the Receipts Tax Cases 1969, 1970  
Associated Steamships 1969  
Hamersley [No1] 1969  
Chamberlain's Case 1970  
Logan Downs 1977  

(d) Characterising a tax as being an consumption  

Dickensons Arcade 1974  

D - Conclusions of s90 Chapter
Chapter V: Excise Duties under Section 90

Section 90 holds an important place in the Australian federal structure of revenue and economic management. It provides that

On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and excise, and to grant bounties on the production or export of goods, shall become exclusive.¹

Section 90 does not operate to vest any power in the Commonwealth. It merely declares that certain of the Commonwealth's powers shall "become exclusive". The function of the section is to deny those powers to the States. The focus of the ensuing discussion is the contribution of Barwick as counsel and Chief Justice to the High Court's exploration of the extent of the denial of power effected by the inclusion in s90 of the word "excise". (There is little case law about the other parts of the section.)

The word "excise" is one of the most inscrutable in the Constitution. The word has been used with a wide range of meanings through history and the meanings themselves are vague and imprecise. Not even Barwick CJ has suggested that the meaning of the word as it appears in s90 is self-evident. The word presents, therefore, both a challenge and an opportunity for the High Court to develop a doctrine to "explain" the meaning of the word. The Court's performance has, so far, been characterized by a high level of disagreement within the Court and by the emergence of a multiplicity of theories. It seems that much of the difficulty the Court has had in dealing with "excise" can be traced to the Founders' not having any clear idea about why they were denying to the States power to levy excise duties and about

¹ It also contains transitional provisions.
how the terms of s90 could effect their purpose. Before the discussion turns to the detail of the attempts by the Court to explain "excise". it is therefore necessary to consider s90's role in the scheme of the Constitution.

A - Section 90's Place in the Constitutional Framework

(i) The Purpose of the Founders

Barwick CJ explained in the AAP Case

"One of the mainsprings of the movement in the colonies for federation was the need to have a common external tariff and to remove border customs and other impediments to trade over the colonial boundaries. This is evidenced by ss.86, 88, 90 and 92 of the Constitution".¹

An examination of the Convention Debates bears out Barwick CJ's statement. If anything the "need" referred to by Barwick seemed to be the main mainspring.²

These two principles - intercolonial free trade and a unified external trade protection policy - were recognized in the four basic principles for federation moved by Parkes at the start of the 1891 Convention. The second of the four basic principles declared in terms very similar to what is now s92.


2 Eg in relation to giving the control of the external tariff to the Commonwealth, Australasian Federation Conference 1890 (henceforth referred to as Melbourne 1890), 89, 104; Debates of the Australasian Federal Convention second session Sydney 1897 (henceforth referred to as Sydney 1897) 1058; Debates of the Australasian Federal Convention Third Session Melbourne, 1898 (henceforth referred to as Melbourne 1898) VolI, 828-829, 857, 865, 955, 1244. In relation to establishing free trade between the colonies Melbourne 1890, 69, 154, 161, 229.
"That the trade and intercourse between the federated colonies, whether by means of land carriage or coastal navigation, shall be absolutely free."

The third principle declared

"That the power and authority to impose customs duties shall be exclusively lodged in the Federal Government and Parliament subject to such disposal of the revenues thence derived as shall be agreed upon."1

The two principles were sometimes subsumed by saying Australia should be customs union2 and synonyms for customs union such as "uniformity of trade" and "equality of trade" appear with great frequency through the Debates on topics such as bounties and railway rates.3

It is to be noted there was no reference to excise (or bounties) in the four basic principles of 1891.4 When the Convention came to consider the third principle dealing with customs, Deakin proposed to move by way of amendment.

"That after the word 'customs' the words 'and excise' shall be introduced."5

Deakin withdrew his amendment at the request of Gordon who then moved a long amendment which, significantly, associated customs, excise, bounties, railway rates, inter-State free trade and revenue sharing.6

1 National Australasian Convention Debates (henceforth referred to as Sydney 1891) 23.
2 Eg Melbourne 1890, 89. At Melbourne 1898 VolI, 794 there is a reference to commercial unity.
3 Eg Melbourne 1898, VolI, 910-987 (bounties); Sydney 1891, 354; Melbourne 1898, VolI, 1268 into 1522 of VolII (Railway rates).
4 The first principle related to the continuation of State power and territory; the fourth principle to defence.
5 Sydney 1891, 351.
6 Sydney 1891, 351-352.
Gordon later withdrew his amendment and Deakin then proposed to amend the basic resolution by "insertion after the words customs duties of the words and duties of excise upon goods the subject of customs duties." That amendment was agreed to as also was a proposal to add the words "and to offer bounties".

The 1891 Convention later approved as part of the full draft Constitution presented by Sir Samuel Griffith a clause in these terms

Cl4 The Parliament of the Commonwealth shall have the sole power and authority, subject to the provisions of the Constitution, to impose Customs duties, and duties of Excise upon goods for the time being the subject of Customs duties, and to grant bounties upon the production or export of goods ...".

The parts emphasised are the most significant variations from the general proposal approved by the convention. In Adelaide in 1897 the words "upon goods for the time being the subject of Customs duties" were deleted and there were no further motions directly concerned with the inclusion of the word excise in the clause which became s90.

1 Sydney 1891, 361.
2 Sydney 1891, 368.
3 Sydney 1891, 368.
4 When the clause came up for approval the only discussion related to the transitional provisions included in cl4. Sydney 1891, 789-801.
5 Australasian Federal Convention, First Session Adelaide 1897 (henceforth referred to as Adelaide 1897) 836.
Some commentators have taken the inclusion of the word excise in s90 as having been intended to prevent State interference with Commonwealth decisions about the appropriate level of protection for local producers from foreign competition.\(^1\) Against this view Coper points out that most of those who spoke to the 1891 motion for inserting the words "duties of excise upon goods the subject of customs duties" addressed themselves only to the question of the appropriateness of giving to the Commonwealth a power to levy such duties and ignored the question of the desirability of excluding the States from the area.\(^2\) At the start of the 1891 proceedings when discussion was still directed to general principles, that approach of delegates to the matter was understandable. There was, however, by the end of 1891 an inclusion within cl52 of Chapter I of the full draft, under the heading Powers of the Parliament, a grant of power in these terms.

"2. Customs and Excise and bounties, but so that duties of Customs and Excise and Bounties shall be uniform throughout the Commonwealth, and that no tax or duty shall be imposed on any goods exported from one State to another."\(^3\)

It was a little surprising therefore that the only argument put in 1897 to support the motion to delete the words "upon goods for the time being the subject of Customs duties" was that it would be inappropriate to retain that limitation on the Commonwealth's power.\(^4\) As Coper points out that argument which ignored the grant


\(^2\) M Coper, "The High Court and Section 90 of the Constitution" (1976) 7 FL Rev 1, 21-23.

\(^3\) Sydney 1891, 952. Subsection 3 gave power with respect to "Raising money by any other mode or system of taxation; but so that all such taxation shall be uniform throughout the Commonwealth."

\(^4\) Adelaide 1897, 835-836.
of power in cl52(2) misconceived the function of the clause which was to become s90. Given that the Draft settled on by the end of 1891 and under discussion in 1897, gave the Commonwealth power with respect to customs, excise and bounties in cl52(2) of Chapter I, the function of s90's predecessor would have seemed to have been to exclude the States rather than to give power to the Commonwealth. Coper concludes "The theory that section 90 [Presumably Coper means the inclusion of "excise" in s90] was intended to prevent the States from obstructing Commonwealth tariff policy may well be right, but it does not appear clearly from the Debates".

The absence of any extensive discussion of "excise in s90", based on an understanding of the negative function of s90, is readily explained. Excise duties had not been and were not expected to be very important to revenue or external trade policy. Although when the Constitution speaks of "customs duties" it relates only to duties on importation from abroad, "customs" duties in the wider sense of duties on importation both from abroad and from other colonies were what held the attention of the Convention. Such customs duties had dominated colonial revenues and had dominated the intercolonial trade war.

Those who were anxious to end intercolonial warfare and those who were concerned with the general debate - free trade versus protectionism - had no reason to be worried about colonies inflicting injuries on themselves by imposing excise duties on their own

1 Op cit 23.

2 Op cit 25.

3 Commonwealth Oil Refineries v South Australia (The COR Case) (1926) 38 CLR 408, 435, 438; Carmody v FC Lovelock Pty Ltd (1970) 123 CLR 1.

4 Melbourne 1890, 69, 117, 121; Sydney 1891 348, 528; Sydney 1897, 28, 39-57; Melbourne 1898, Vol I, 848; Melbourne 1898 VolII, 854, 856, 865.
producers. Those who were concerned about State revenues paid little attention to what they regarded as a relatively unimportant source of government funds.\(^1\) It is indicative of the perception of the importance of excise duties that proposals to require the Commonwealth to impose uniform excise duties at the same time as it imposed uniform customs duties were rejected on the grounds that the Commonwealth might see no need to impose excise duties.\(^2\)

Yet although there was little direct discussion at the Conventions of the function of the word "excise" in s90, Coper's point that there was an absence of discussion of function of denying power to the States should not lead one to conclude that s90's inclusion of excise was based on the belief that s90 had a function of granting power to the Commonwealth. Despite the confusion in the discussion when motions dealing with "excise" in s90 were under consideration there can be little doubt that it was clearly understood by the end of proceedings that s90's sole function was to deprive the States of power. No sooner had the specific motion dealing with excise in s90 (at that stage cl82) been dealt with in 1897 than Higgins and Isaacs drew attention to the apparent conflict between the words of the draft clause 82 which seemed to vest an exclusive power in the Commonwealth and the words of cl50(2) (cl52(2) of the 1891 draft) which vested a corresponding concurrent power.\(^3\) When the clause came up for consideration in 1898 it was amended without much fuss to its present form which contains no suggestion that s90 itself vests power in the Commonwealth.\(^4\) It would seem open to infer that in the months

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1 Sydney 1891, 118, 347, 675, 678; Sydney 1897, 150; Melbourne 1898 Voll, 834, 865; 1080 ff.
2 Melbourne 1898, Voll, 647, 940.
3 Adelaide 1897, 837.
4 Melbourne 1898, 909, 936-938. With even less fuss the grant to the Commonwealth of an express power in cl50 to impose duties of customs and excise had simply disappeared, presumably considered redundant given the inclusion of the general power of taxation given to the Commonwealth by cl50(2) following cl52(3) of 1891.
between the 1897 and 1898 sessions consideration was given to the s90 clause and other associated provisions (some of which were amended in 1898) and that a decision was made to retain the word excise without any limitation tying it to tariff policy (whatever the misconceived reasons for originally including it) because it was found to be a desirable provision.¹

It appears clearly from what was said at various stages of the Conventions that there was an understanding that excise duties can interact with customs duties to affect the position of local producers relative to foreign competitors.² That fact and the fact that excises were but rarely mentioned in relation to the principle of freedom of intercolonial trade³ does not, however, mean that delegates saw these duties as being only of relevance to external competition and does not dictate the conclusion that the Delegates would not have been concerned with the effect of excise duties on the ability of producers of one State to compete with producers from other States.

At the very least it can be said that retention of the word excise without any limitation expressly tying it to tariff policy was consistent with the wider principle (which subsumes the principle of giving the Commonwealth exclusive control of tariff policy) of

¹ The words of limitation introduced in 1891 and deleted in 1897—"Upon goods for the time being the subject of Customs duties"—were even too narrow to guarantee the Commonwealth control of tariff policy. A Commonwealth decision to expose local producers to overseas competition without any distortion by taxation would be disrupted by a State excise tax on local production. As the clause stood in 1891, the States could have disrupted a Commonwealth policy of fiscal inaction (free trade) by taxing goods, the competing imports for which, were (ex hypothesi) not subject to customs duties.

² The references are collected in M Coper Op cit 20-24.

³ Sydney 1891, 347; Adelaide 1897, 841; Melbourne 1898 VolI, 976, 1244.
making Australia a Customs Union. The circumstantial evidence is that the word was retained because of a positive decision that it had a role to play in making Australia a Customs Union.

(ii) Judicial Perceptions of the purpose of s90 and of the inclusion of excise in s90.

Counsel and judges have at times set out to reason from what they perceive to be the purpose of s90. Sir Garfield Barwick QC in Browns Transport Pty Ltd v Kropp asked the Court to accept this notion of the purpose of s90.

"... the way is open to give effect to the emphasis which is in the Constitution. There are three elements in that emphasis. One is the correlative nature of customs and excise in relation to fiscal policy not in relation to the gathering of money, but in relation to the use of taxation as an instrument of policy. The second is that there is bracketed with customs and excise, bounties which also relate to fiscal policy. The third is the exclusiveness of the power over all three given to the Commonwealth. These considerations yield the notion that behind the word "excise" is the policy of having one single fiscal policy in relation to dealings in commodities, from the point of time of importation or manufacture down to consumption." ¹

Some judges had previously perceived that or a similar general purpose in s90 (or considered that it was desirable that s90 be so construed.) Rich J in the COR Case said

"One authority [the Commonwealth] should exercise the complementary powers of customs, excise and bounties without hindrance, limitation, conflict or danger of overlapping from the exercise of a concurrent power by another authority vested in the States." ²

¹ (1958) 100 CLR 117, 124.
² Commonwealth and Commonwealth Oil Refineries Ltd v South Australia (1926) 38 CLR 408, 437.
Against that background his Honour rejected a proposed narrow
definition of the word "excise" under which "the fiscal policy of the
Commonwealth may be hampered".¹

Dixon J in Parton² spoke of an intention in s90 to give the
Commonwealth a "real control of the taxation of commodities and to
ensure that the execution of whatever policy it adopted should not be
hampered or defeated by State action". Barwick CJ twice cited this
passage as representing a view similar to his own.³

In these statements from Rich J, and Dixon J (endorsed by Barwick
CJ) there was a tendency to assume that the purpose of s90 is too
obvious to need elaboration. Rich J assumed that the reader knows
what he means by fiscal policy. Dixon J assumed that the reader knows
how bounties, customs and excise can be used to implement policy. The
reader cannot however, know how many of the different kinds of effects
of bounties, customs and excises their Honours had in mind.⁴

¹ Ibid.
² (1949) 80 CLR 229, 260.
³ Western Australia v Chamberlain Industries Pty Ltd (1969) 121 CLR,
17; Dickenson's Arcade Pty Ltd v Tasmania (1974) 130 CLR 177,
185.
⁴ Some judges have given some indication of their understanding of
the ways bounties, customs and excises can interact. For example,
Latham CJ in Homebush Flour Mills Case (1937) 56 CLR 390, 396 and
McTiernan J in Parton v Milk Board (Vic) (1949) 80 CLR 229, 265
when discussing the purpose of s90 seemed to treat the phrase
"fiscal policy" as a short-hand way of describing the use of
taxation to affect the competitive position of home produced goods
relative to imports. Whether or not their Honours considered that
"protective" is synonymous with or merely an example of "fiscal"
was not clear. Mason J on the other hand has looked to the
"fiscal" relationship between excises and bounties. In MG Kailis
Pty Ltd v Western Australia (1974) 130 CLR 265, 295 Mason J stated
that the power to impose excise duties had been taken from the
States so as to make the Commonwealth's power with respect to
bounties effective.
(iii) Economic Management

The first wave of effects of bounties, customs and excise is their artificial distortion of the relative competitive positions in markets. Each changes the competitive position of local producers relative to producers of the same product in other States or abroad. Each changes the competitive position of one product (for example, butter) relative to a substitutable product (margarine) whether produced in the same State, another State or abroad. Each changes the competitive position of producers who use as an input a commodity whose price is affected by a customs, excise or bounty, relative to producers who do not use that input. Each changes the competitive position of producers of the affected commodity as purchasers of an input relative to other buyers of the input.

As well as the fairly distinct category of market distortion, there are other miscellaneous effects of bounties, customs and excises. For example, each affects external balance of payments, foreign exchange rates, income distribution and inflation and employment levels.

Whether the purpose of including (retaining) "excise" in s90 was (as this writer sees it) to make Australia a Customs Union or whether it was merely to give the Commonwealth effective control of tariff policy, the effect was in some ways much wider than either. The States are denied the power to impose duties of excise (and the power to impose duties of customs and to grant bounties) not only as tools for distorting competitive positions but also as tools for affecting income distribution, inflation and employment levels.

On the other hand s90 is not in itself sufficient to guarantee that the Commonwealth will be able to control market relativities. The first principle of Federation moved by Parkes in 1891 was the continuity of State powers. The second and third related to making

1 Sydney 1891, 23.
Australia a customs union. Thus the Founding Fathers set out to divide the tools of economic management – giving the Commonwealth power to influence behaviour indirectly by making activities more or less financially rewarding while leaving to the States the power to influence behaviour directly by prohibiting, empowering or requiring activities. The States are not prohibited from frustrating the policy behind the Commonwealth's use of economic tools of economic management.

Barwick CJ stated the contradiction without acknowledging that it is a contradiction.

"I have reached the conclusion in this case without any reasoning founded on the purposes [of s90] ... But the conclusion I have reached is conformable, in my opinion, to those purposes and consistent with the control of the national economy as a unity which knows no State boundaries by a legislature without direct legislative power over that economy as such."

(iv) The revenue aspects of s90.

Customs and excise duties are not just tools for implementing government policies. Customs and excise duties are also sources of government revenue. At the end of the nineteenth century, customs were the main source of government revenue and those drafting the Constitution did not foresee any other significant source of revenue developing. It was accepted that power with respect to customs had to be exclusively vested in the Commonwealth so that the Commonwealth

1 Western Australia v Chamberlain Industries Pty Ltd (1969) 121 CLR 1, 17. Emphasis added. It is not entirely clear from this passage whether Barwick CJ regarded "the control of the national economy as a unity" etc as the purpose of s90 or simply as a desirable goal. (Compare Rich J in the COR Case quoted in the text above p.210. A similar discussion in Dickenson's Arcade Pty Ltd v Tasmania (1974) 130 CLR 177, 185 when Barwick CJ set out to "repeat" the point he made in Chamberlain does not resolve the ambiguity.
could settle the external protection/free trade question. The loss to the States of this revenue was seen as an undesirable side-effect and a great deal of time was spent on trying to devise specific guarantees for the Commonwealth to pay its surplus revenue to the States.¹

Barwick CJ has referred to the revenue aspect of s90 in three not entirely consistent statements. In an extra curial address in 1968² he described s90 as incorporating a compact that the main "sources of government revenue should go to the centre". His Honour also noted that there was no permanent agreement as to how the revenue would be shared. At the time Barwick CJ was identifying the features of the Constitution which had, in his opinion, kept the Australian federation strong and stable. His Honour identified s90 and the Uniform Tax Cases (giving the control of the main sources of government revenue to the central government) and s96 (giving the power to impose national standards as conditions of grants of revenue to the States)³ as being fundamental in the development and maintenance of national identity. The inference seems to be that the essence of s90, the fundamental purpose of s90, was to give to the central government control of the main sources of government revenue.

Of course the purpose of s90 was not to give the power over customs to the central government because customs were the main source of revenue. If control over collection of revenue was the "purpose" of s90, why would the section also prohibit the State grant of bounties?

¹ Sydney 1891, 55, 370, 529, 530, 671 ff; Adelaide 1897, 1057-1070; Sydney 1897, 53-108; Melbourne 1898 Vol I 773-900, 1076-1080, 1244.

² (1968) 28 Public Administration, 3.

³ Above pp158-161.
In the extract already quoted from his argument in 1958 in *Browns Transport Pty Ltd v Kropp* Barwick, then Sir Garfield Barwick QC had, with respect, stated the "emphasis" of the Constitution more accurately. There he said that the "correlative nature of customs and excise" was "not in relation to the gathering of money, but in relation to the use of taxation as an instrument of policy".¹

As Chief Justice in 1975, Barwick CJ took a similar approach in the *Australian Assistance Plan Case*. In the passage set out above,² Barwick CJ referred to the "mainspring" of the federation movement as being "the need to have a common external tariff and to remove border customs and other impediments to trade over the colonial boundaries".³ His Honour then pointed out that the handing over of power over "customs" was related to those main purposes and was in spite of rather than because of the power's revenue implications.

It is apparent from the history of the proposals for federation that the plan of federation involved, and essentially involved, the sharing or distribution of the revenues of the Commonwealth."⁴

In the 1968 address "The failure to agree upon a permanent formula for distributing the revenue", seemed to have been cited as a factor indicating that government revenue was a national matter. In 1975 that failure was brushed aside as not denying "the essentially federal nature of the financial provisions of the Constitution".⁵

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2 Above p.203.
4 Id. 355, emphasis added.
5 Id. 356.
Although the purpose of s90 was not to deny revenue sources to the States, s90 has that effect. This revenue aspect of s90 puts pressure on the High Court for the following reasons.

The demands of voters for government activity and government expenditure have become more varied. Taxes on goods hold the political attraction that they allow a wide spreading of the tax burden and can be exacted from the taxpayers in small amounts. There is thus incentive for State governments to devise means to raise revenue from dealings with goods and for State advisers to test s90 and the High Court.

There is another revenue aspect of s90 which puts pressure on the High Court. Barwick as Attorney-General explained some of the implications of s90 to the Privy Council in Dennis Hotels Pty Ltd v Victoria.

"To illustrate the great Australian content of this in the practical sense, the Commonwealth and the States have in the last two years or so reached an arrangement or a financial formula by which the uniform tax proceeds collected by the Commonwealth are returned to the States in certain proportions. To find suddenly that 'excise' received a construction which took from the States an area of revenue and cast it exclusively into the hands of the Commonwealth would make an enormous difference in relation to this formula."

The knowledge that previous High Court decisions on s90 have been relied on in the working out of federal financial relationships, inhibits judges asked to review those decisions. Against this background the rationale of stability underlying the doctrine of precedent has more than its usual force.

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2 Jacobs J in HC Sleigh Ltd v South Australia (1977) 136 CLR 475, 513 commented: "The difficult and delicate balance between the Commonwealth and the States on fiscal matters may be currently being preserved upon the decisions previously given by this Court."
(v) Relevance of the "purpose" of s90 to judicial behaviour

Barwick has been one of the few Judges to claim an understanding of the purpose of s90. He (and some others) have, when deciding how to apply s90, reasoned from those purposes or strengthened their conclusion by reference to those purposes. There are basic difficulties with this approach.

First, those relying on the premise seldom commit themselves to an expression of their understanding of the purpose. When attempts have been made to state the purpose, the statements have been fairly ragged with only a limited perception of the relevance of bounties, customs and excises to economic management being revealed. Secondly, whatever purpose behind s90 can be discerned, s90 does not expressly declare a social policy to be maintained as does the nearby s92. Section 90 in its terms prohibits three specific kinds of government action. Thirdly, and perhaps most importantly of all, is that s90 is based on last century's notions of economic management.

In the nineteenth century to give to the Commonwealth exclusive control of bounties, customs and excise was to give to the Commonwealth exclusive control of the means of dealing with what would then have been considered the appropriate concerns of governmental economic management. The understanding of the economic interdependence of private and government actions and the notions of the appropriate concerns for government economic manipulation have changed greatly since the 1890's. Ironically although the purpose of s90 may well have been to give the Commonwealth an effective power to control economic management with the removal from the States of power to raise revenue being regarded as an undesirable side effect, the States are free to interfere with Commonwealth economic management so long as they do not do so while raising revenue.
Most judges have not claimed any knowledge of the purpose of s90. Indeed, Stephen J when asked to preserve the "clear constitutional intent" of s90 and to invalidate a State law on account of its "reality", replied that the argument was based on the assumption that the exclusive nature of the federal parliament's power to impose duties of excise can readily and with accuracy be explained by reference to constitutional purpose or historical reason... Yet experience in the past suggests that neither source offers certain guidance.¹

This then is the uncertainty underlying the judicial disorder. The discussion now turns to the detail of the High Court's attempts to explain the extent of the prohibition on the State levy of excise duties.

¹ HC Sleigh Ltd v State of South Australia (1977) 146 CLR 475, 497.
"Duty" - To be an excise the law must be imposing a duty

(i) The link between s51(ii) and s90

Section 90 denies power to the States indirectly by declaring that the Commonwealth's power to impose duties of excise shall become exclusive. There is no specific Commonwealth head of power with respect to "the imposition of duties of excise". The reference in s90 to the Commonwealth power to impose duties of excise, is a reference to part of Commonwealth power under s51(ii) which empowers the imposition of taxation.

The standard definition of taxation is as follows

"It is a compulsory exaction of money by a public authority for public purposes, enforceable at law, and is not a payment for services rendered."

A State law will not be held to have breached s90 unless the Commonwealth could therefore, have enacted the same provision as part of its power under s51(ii) to impose taxation (or as part of its power to grant bounties under s51(iii) as the case may be). The judgment of Dixon J in Vacuum Oil Pty Ltd v Queensland provides an example of this approach.

1 Nor is there any specific power with respect to the imposition of duties of customs. There is a specific head of power, s51(iii), with respect to "Bounties on the production or export of goods".

2 Burton v Honan (1952) 86 CLR 169. There was for a while in the Drafts express power with respect to customs and excise. Above p206 and note 4 p208.

3 I will follow the example of most members of the High Court and use "tax" and "duty" interchangeably. In Dennis Hotels Pty Ltd v Victoria, Fullagar J indicated his belief that there is a difference between the two when he said, "It is probably correct to say that every duty is a tax, but not every tax is a duty."

(1960) 104 CLR 529, 552.
"The power of the Commonwealth Parliament to impose duties of customs and of excise, which s90 makes exclusive, is conferred by s51(ii) as part of the power to make laws with respect to taxation. I cannot think that, in the exercise of that power, the Commonwealth Parliament could pass such an enactment as that contained in the Queensland Motor Spirit Vendors Act 1933."\(^1\)

It followed, according to His Honour, that the Queensland provisions in question did not offend s90.

As stated the principle is unequivocal and referable to the language of the Constitution. Whatever other attributes a State law must have to be an excise (and therefore invalid) it must be such a provision as the Commonwealth could enact as a tax. It is beyond the scope of this discussion to review every aspect of the definition of taxation and characterisation of tax laws. It is, however, pertinent to note some of the aspects of the concept of taxation which interact with s90 in particular to affect the States' capacity to raise revenue by taxing goods.

(ii) **A Compulsory acquisition of property is not a tax**

A compulsory acquisition of property is not a compulsory exaction of money. Thus the States can put themselves in funds without offending s90 by acquiring produce, selling it themselves, and then paying any or indeed no compensation to the dispossessed producers.\(^2\)

In the **Homebush Flour Mills Case**\(^3\) a State stretched this option too far. The Court held to be an excise a New South Wales Act which compulsorily acquired flour produced by millers, required the millers to keep the flour acquired at their own risk and expense until the

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1. (1934) 51 CLR 108.
2. *Crothers v Sheil* (1933) 49 CLR; *Hopper v Egg and Egg Pulp Marketing Board* (1939) 61 CLR 665.
3. (1937) 57 CLR 390.
Crown called for it, and then gave the millers an "option" to repurchase the flour from the Crown at a price which tended to be higher than the compensation which was to be paid to them for the acquired property. Even in the face of this blatant attempt to evade s90, the members of the Court (with the possible exception of Evatt J)\(^1\) did not base their decision of invalidity on any notion of the purpose of s90. They held simply that the practical compulsion on producers to repurchase what had been their own produce was sufficient compulsion to constitute a "compulsory exaction". With the other elements of the definition of tax present, and with there being little doubt that if this law was a tax, then the other elements of excise were present, the law was held to offend s90.

(iii) A Payment for services is not a tax

After some leniency in *Hartley v Walsh*\(^2\) where the Court was willing to allow fees to be extracted from producers to cover the costs of a marketing authority on a fairly vague notion of the service being rendered to the feepayer by the authority, a more rigorous approach was introduced in *Parton v Milk Board (Vic).*\(^3\) The majority held in *Parton* that a charge could only be characterised as a fee for services if it was for specific services rendered to the feepayer. As the charge made in *Parton* was for the general costs of the Milk Board's activities and some of the activities of the Board, such as general promotion of the product, did not directly benefit particular feeayers, the fee could not be characterised as a fee "for" services. This decision has not been challenged since.

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1 Id. 417.
2 (1937) 57 CLR 372.
3 (1949) 80 CLR 229.
In Harper v State of Victoria\(^1\) Barwick CJ was part of a court which considered the application of the proposition "payment for services is not a tax" to Victorian legislation relating to egg marketing. The Victorian legislation prohibited the sale of eggs unless they had been graded for size and quality and stamped by the Victorian Marketing Board. The main declaration sought by the plaintiff was that s92 prevented the Act from applying to his sales of ungraded eggs imported from New South Wales. Barwick CJ was the only member of the Court who was in favour of so declaring. The other judges, McTiernan, Taylor, Menzies and Owen JJ rejected the s92 attack.\(^2\)

The plaintiff also sought a declaration to the effect that the grant by the Victorian legislation of power to the Board to charge a fee for grading and stamping was an excise and invalid because of s90. McTiernan, Taylor, Menzies and Owen JJ rejected the challenge based on s90.\(^3\) The main ground of decision of the majority was that the fee although compulsory was for services rendered and therefore was not a tax.\(^4\) The majority conclusion was stated without supporting reasoning. Because of the view he took on the s92 argument, it was not necessary for Barwick CJ to decide the s90 point. Nevertheless his Honour did record his "considerable doubt as to whether a fee payable by statute in respect of acts to which the subject is

\(^1\) (1966) 114 CLR 361.

\(^2\) Below pp383-385, 448-449.

\(^3\) In Permswan Wright Consolidated Pty Ltd v Trewhitt (1979) 27 ALR 182 the High Court was asked to reconsider Harper but only on the s92 point. Harper was affirmed with Barwick CJ and Aickin J dissenting. Below pp383-385, 452.

\(^4\) Id. 377 per McTiernan J; 328 per Taylor J; 378 per Menzies J; and 382 per Owen J.
compelled to submit can be regarded as a payment for services rendered ...
when considering whether an exaction is or is not a tax."\(^1\)

(iv) A licence fee can be a tax

A common administrative device for collecting revenue is to prohibit engaging in an activity without a licence and impose a fee on issue of the licence. No one would doubt that the States can prohibit activities absolutely without offending s90. One might have thought if a State chose to charge for any relaxation of its prohibition, that such a charge could be characterised as the "price" of a licence, or the "price" for a service rendered. Such notions have been brushed aside by the Court. The Court has always assumed that a "price" for relaxing a prohibition of an activity, is a tax on that activity. One might ask, could the Commonwealth set up a licence system for an activity otherwise beyond Commonwealth power and support it as an exercise of s51(ii) because there was a fee involved? Surely not. We can suspect that the rule relating to licence fees is grounded on some perception of the purpose of s90 rather than on any strict approach to characterisation of laws as taxes within the meaning of s51(ii).

\(^1\) Id. 376. It seems that the majority, although allowing this charge, would not allow a State to impose charges without limit for the provision to a person of a service that the State compelled the person to receive. Owen J pointed out that the Act required the amount of the fee to be determined by the Board according to the expenses that the Board calculated it had incurred in providing such services. Id. 382. Taylor J said the Board would be acting ultra vires the Act if it set a fee which bore "no relation to the expenditure" actually incurred by it. Id. 378. These cryptic comments should be understood against the background of the rules developed under s92 for allowing some taxation of inter-State trading activities. In that context States have been allowed to exact taxes for the use by traders of facilities such as roads so long as there is a close connection between the use of the facility and the charge. Compare Perrewan Wright Consolidated Pty Ltd v Trewhitt (1979) 27 ALR 182, 192 per Gibbs J; 207-208 per Mason J. The rules developed for the purposes of s92 for ascertaining which taxes are compatible with the freedom guaranteed by s92 may not be directly applicable to s90 when the question is whether an exaction is a tax.
(v) **Summary of "Duty"**

It can be seen from the above discussion that the Court has rejected some attempts by the States to devise laws to raise revenue without the laws being classified as "duties". The key points to be noted are as follows. First, we can suspect that the definition of taxation has been affected by perceptions of the purpose of s90 and by reluctance of members of the Court to allow s90 to be easily avoided by devices. Suspect as we may, the Court has only talked in terms of the meaning of the word taxation. Secondly, the current definition of taxation, albeit quite wide, is not wide enough to prevent all State income producing arrangements hindering the effectuation of Commonwealth fiscal policy. The relatively simple device of compulsory acquisition is beyond the reach of s90 (so long as no pressure is put on the dispossessed owner to repurchase the goods). Thirdly, the High Court judgments in this area have been characterised by a high degree of consensus within the Court. Fourthly, in the one case, Harper v Victoria, when Barwick CJ was part of a Court asked to consider the definition of taxation in a case involving s90, his Honour indicated that he was inclined to give taxation (and thus, s90) a wider definition than did the other members of the Court.

The law relating to the identification of "duties" is not interdependent with the law relating to the identification of particular duties as "excises" and the two questions can be separated. In Western Australia v Chamberlain KA Aickin QC asked the High Court to apply the techniques used in Homebush (to define taxation) to the problem of identifying a duty as an excise.¹ Menzies J pointed out that the questions are separate and Homebush is therefore not in point when considering the second question.² It will be argued later that one important issue in the case of Dickensons Arcade should have been treated as a matter of the definition of taxation rather than as a problem of characterising an excise.³

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1 (1970) 121 CLR 1, 8.
2 Id. 25.
3 Below pp295ff.
"Excise" - What kind of duties are excises?

Since the High Court first considered s90 there has been acceptance of the general proposition - an excise is a tax on goods. This general proposition has spawned more specific subpropositions intended to explain the generality. Some of these more specific propositions have been accepted by some and rejected by others. Some are still so general as to be acceptable to all. An attempt will be made to determine whether a proposition goes to the questions of characterisation subsumed by the word "on" and when to the matters of definition subsumed by the word "goods". The idea here is to use a framework similar to that used when asking whether a Commonwealth law is within a head of power. There are two steps involved when asking whether, for example, a law is within power under s51(i) as being a law with respect to overseas trade. First one must decide what "overseas trade" means (a matter of definition), then one must decide whether the law in question is one "with respect to" overseas trade (a matter of characterisation). Similarly the ensuing discussion will be broken down into the questions. Taxes on which dealings with goods constitute "excises"? (Definition). When will a tax be said to be "on" a relevant dealing with goods? (Characterisation).

There is no sharp analytical division. Some judges treat some things as matters of definition which others treat as matters of characterisation. Some merge the two aspects and few judges draw the distinction between the two inquiries.

Barwick CJ, however, drew the distinction and indicated his willingness to be guided by the purpose of s90 at both levels.

"I continue to regard the evident purpose of the grant of exclusive power to impose duties of customs and of excise as of significance both in deciding the connotation of the word 'excise' in s90 of the Constitution and in deciding whether in its
operation a State statute does impose a duty of excise ... in
determining both connotation and denotation, the constitutional
purposes of the grant or exclusive power must be kept in
mind."\(^1\)

There is one issue/proposition which falls both across matters of
definition and across matters of characterisation and which has
affected other issues of definition and characterisation.

(i) The link between excise duties and indirect taxes

The first High Court of Griffith CJ, Barton and O'Connor JJ took
it for granted that an excise tax is an indirect tax\(^2\) and adopted
for the purposes of s90 of the Australian Constitution, the
distinction between direct and indirect taxes adopted by the Privy
Council for the purposes of the Canadian Constitution.\(^3\) Under the
Canadian Constitution it is necessary to distinguish between direct
and indirect taxes. Under the Canadian Constitution these categories
are treated as being mutually exclusive. In that context excise duty
is often given as an example of an indirect tax.\(^4\) The Privy Council
had incorporated into Canadian doctrine the distinction between direct
and indirect offered by JS Mill.

"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 person in the expectation and intention that he shall
indemnify himself at the expense of another, such are 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 who it is supposed that he will recover the amount
by means of an advance in price."\(^5\)

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1 Dickenson's Arcade Pty Ltd v Tasmania (1974) 130 CLR 177, 185.
2 Peterswald v Bartley (1904) 1 CLR 497, 511.
3 Id. 512.
4 Eg, Attorney-General for Manitoba v Attorney-General for Canada
[1925] AC 561, 566.
5 Brewers and Maltsters' Association of Ontario v Attorney-General
of Ontario [1897] AC 231, Bank of Toronto v Lambe, 12 App Cas 575,
582.
Within the Canadian framework to say that a tax was "on goods", to say that a tax was indirect, meant that it was intended to be passed on by the taxpayer to the person purchasing the goods from him. If it was not intended to be passed on then the tax fell into the category of direct tax and was a tax "on the person", the taxpayer.

In cases up to and including Parton v Milk Board (Vic) in 1949 the linking of (Canadian) indirectness and (Australian) excise was, generally, assumed.¹ Not long after Parton, H Arndt published an article in the Australian Law Journal² demonstrating that the direct/indirect distinction of nineteenth century political economy was not particularly meaningful or precise when exposed by economic analysis.

In Browns Transport v Kropp³ Sir Garfield Barwick QC framing his submission to meet the Court's previous incorporation of Canadian "indirect" into the definition of "excise, argued that the tax in question was "indirect" because it was in its nature "susceptible of being passed on".⁴ The next step in Barwick's submission was to say that the fact that the tax was "indirect" was sufficient to demonstrate that it was an "excise".

¹ In Matthews v Chicory Marketing Board (Vic) (1938) 60 CLR 263, 285 Starke J had challenged the linking of the two concepts but had received no support. Contrast "Customs and excise are essentially indirect taxes". Id. 277 per Latham CJ, McTiernan J concurring.
³ (1958) 100 CLR 117.
⁴ Id. 125.
The Court need only have responded, as did counsel defending the tax, that "not all indirect taxes are excise duties".\(^1\) The Court in a joint judgment of Dixon CJ, McTiernan, Fullagar, Kitto, Taylor and Windeyer JJ went out of its way, however, to downgrade the "indirect" test. Their Honours, although finding that the tax in question was not an excise, removed "indirect" from the essential elements of the definition of excise by saying:

"It would perhaps be going too far to say that it is an essential element of a duty of excise that it should be an 'indirect' tax."\(^2\)

Immediately after this severing of "excise" and "indirect" the Court added the qualification:

"But a duty of excise will generally be an indirect tax, and, if a tax appears on its face to possess that character it will generally be because it is a tax upon goods rather than a tax upon persons."

That proviso, which was explained by setting out a Canadian explanation of "indirect", may have been added out of deference to the earlier High Court decisions which had treated "indirect" as being part of the definition of "excise" and had incorporated Canadian doctrine accordingly. The proviso may represent a compromise concealing a lack of real agreement about the point amongst the parties to the joint judgment. This approach of giving the concept of indirectness the status of "relevant but not conclusive" allows judges to ignore or rely on the test of indirectness as they wish.

\(^1\) Id. 126.

\(^2\) Id. 129.
Whatever the evolution of this passage it did little to clarify the notion of "excise". Consider for example the Dennis Hotels decision. Two judges, McTiernan and Fullagar JJ, who had been parties to the joint judgment in Kropp ignored the compromise reached there. McTiernan J reverted to the old position that indirectness is an essential aspect of an excise (and found it was present). At the other extreme, Fullagar J considered indirectness a meaningless and irrelevant concept.

The remaining judges behaved consistently with the Kropp solution of treating indirectness as relevant but not conclusive. Dixon J and Windeyer J were aided in their decision that the taxes in question were excises by their conclusion that the taxes were indirect. Kitto and Taylor JJ were aided in their decision that the taxes were not excises by their conclusion that the taxes were not indirect. Menzies J decided that the two taxes in question were indirect but that nevertheless one of the taxes was an excise anyway.

Barwick had an opportunity to comment on the matter in his first constitutional case as Chief Justice, Andersons Pty Ltd v Victoria. Without citing the Kropp dicta, Barwick CJ took a similar position. If a tax is not intended to or cannot be passed on that "may assist to demonstrate" that it is not upon goods. If a tax does tend to enter the cost of the goods, that may assist to demonstrate that it is upon

2 Id. 549.
3 Id. 553-554.
4 Id. 540, 545-546 per Dixon CJ, 594-595, 597 per Windeyer J.
5 Id. 559-560, 556-567 per Kitto J; 575-576 per Taylor J.
6 Id. 590-591.
7 (1964) 111 CLR 353.
goods. The tendency to be passed on was merely a "circumstance", not a "criterion".\(^1\) Barwick CJ expressed his preference for forgetting about attempts, like the direct/indirect test, to find synonyms for the "accepted formulation".\(^2\) Of the other members of the Court in \textit{Anderson}, McTiernan, Kitto, Taylor, Menzies and Windeyer JJ, had also been involved in the \textit{Dennis Hotels}. Their Honours either reaffirmed or acted consistently with their respective positions in \textit{Dennis Hotels}.\(^3\) The other member of the Court, Owen J, who had, like Barwick CJ joined the Court after \textit{Dennis Hotels}, ignored the \textit{dicta} in \textit{Kropp} and said that an excise is an indirect tax.\(^4\)

Since \textit{Anderson} the fashion among members of the High Court has been, with a few exceptions, to say nothing about the relevance or irrelevance of indirectness to characterising a tax as an excise. This does not mean, however, that the doctrine is defunct. Both in the joint judgment in \textit{Kropp} and in judicial statements up to and including \textit{Anderson}, the general position adopted has been to say that indirectness is not an element in the definition of excise but is relevant to revealing the character of a tax. More recently, Stephen J expressly relied on lack of indirectness in \textit{Dickenson's Arcade}\(^5\) and \textit{MG Kailis Pty Ltd} v Western Australia.\(^6\) Since \textit{Kropp} only two members of the court have expressly completely repudiated indirectness.\(^7\)

\(^1\) \textit{Id.} 365.
\(^2\) \textit{Ibid.} The "accepted formulation" is discussed below pp266ff.
\(^3\) (1964) 111 CLR 353, 370, 374-375, 376, 377-378, 379 respectively.
\(^4\) \textit{Id.} 382.
\(^5\) (1974) 130 CLR 177, 231.
\(^6\) (1974) 130 CLR 245, 262.
\(^7\) Fullagar J in \textit{Dennis Hotels} (1960) 104 CLR 529, 553-554. And Gibbs J in \textit{Dickenson's Arcade} citing Fullagar J. Gibbs J described the incorporation of the Canadian cases on "indirect" as being a regrettable intrusion of irrelevant matter. (1974) 130 CLR 177, 222.
The concept of "indirectness" has to be borne in mind, not only because it is still apparently relevant even if not conclusive, but also because the intrusion of that concept has had some lasting effects on the state of the law on the specific problems of flat taxes, consumption taxes and time-lagged taxes. Furthermore the incorporation of Canadian case law about mutually exclusive categories and Mill's political economy approach which concentrated on the "expectation and intention" of the legislature, may go some way to explain High Court references to, and reasoning based on, the "substance" of legislation and inquiries into what the law was "aimed at" when dealing with general problems of s90 characterisation. Barwick himself introduced a concept of "intended operation" which seems to be similar to the Canadian expected operation.

(ii) Definition

Under this heading concentration will be on the question - which dealings with goods are such that a tax on them will be an excise. The discussion will be organized around the propositions which have been put from time to time to answer that question.

(a) An excise is a tax on production of goods

There are strong arguments, from the text of the Constitution for linking "excise" to production and no judge has refuted the general

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1 Below pp242ff.
2 Below pp237ff.
3 Below pp245ff.
4 E.g., Peterswald v Bartley (1904) 1 CLR 497, 511 per Griffith CJ; Barton and O'Connor JJ; Cor Case (1926) 38 CLR 408, 438 per Starke J; Matthews v Chicory Marketing Board (1938) 60 CLR 263, 302 per Dixon J.
5 Below pp301ff.
6 Generally, Peterswald v Bartley (1904) 1 CLR 497 and the judgment of Fullagar J in Dennis Hotels Pty Ltd v Victoria (1960) 104 CLR 529, 555-556.
proposition that the word "excise" in s90 has something to do with production. Opinions have varied, however, on the exact relationship of production to the definition of excise.

Peterswald v Bartley 1904

The first High Court in Peterswald v Bartley suggested a simple, clear and narrow definition of excise. For Griffith CJ, Barton and O'Connor JJ, judges who were to develop the doctrine of reserved powers, the word "excise" in s90 was to be read against the assumption that the Constitution did not intend to deprive the States of their power to regulate inter-State trade.¹ This discussion was not essential to the decision that the tax in issue was valid.²

COR Case 1926

In the COR Case³ the High Court was called on to determine whether a set of South Australian taxes offended s90 (as being customs duties in some operations and as being excise duties in other operations) and/or s92 (in their effect on inter-State trade). The main tax considered, calculated at the rate of threepence for every gallon of motor spirit sold, was levied on the first sale and delivery of motor spirit within the state "after the entry of such motor spirit into the State, or, as the case may be, after production within the State...".⁴

1 (1904) 1 CLR 497, 512.
2 The basis for decision is discussed below p242.
3 Commonwealth and Commonwealth Oil Refineries Ltd v South Australia (1926) 38 CLR 408.
4 Ibid. Isaacs, Higgins, Powers and Starke JJ (with Knox CJ and Rich J not deciding and Gavan Duffy J dissenting) held that in so far as the law applied to tax first sale after import from abroad it was a tax on importation and therefore a customs duty and offensive to s90.
The Court was asked to adopt a definition of "excise" wider than the 1904 Peterswald formula which confined excise to taxes on production. Knox CJ, Isaacs, Powers and Starke JJ adhered to the narrow definition but held the tax invalid by characterising a tax imposed by reference to sale by the producer as being a tax "on" production. Higgins J also adhered to the 1904 definition but advocated an approach to characterisation which would make a tax imposed by reference to any dealing with goods, a tax on production. Rich J adopted a new wide definition of excise including within the concept, duties upon all dealings with goods.

(b) An excise is a tax on any dealing with goods

Matthews v Chicory Marketing Board 1938

In a wide ranging discussion (much of which was of marginal relevance to the issue before him) in Matthews v Chicory Marketing Board, Dixon J supported a wide definition of excise along the lines proposed by Rich J in the COR Case. Dixon J acknowledged that some sections of the Constitution, including s90 itself, associate excise with production. His Honour did not consider that that fact compelled him to confine excise to taxes on production. His Honour considered that

"The basal conception of an excise in the primary sense which the framers of the constitution are regarded as having adopted is a tax indirectly affecting commodities... The tax must bear a close relation to the production or manufacture, the sale or the consumption of goods and must be of such a nature as to affect them as the subjects of manufacture or production or as articles of commerce".

1 Id. 419-421, 430, 436, 439 respectively.
2 Id. 435.
3 Id. 437.
4 (1938) 60 CLR 263.
5 Id. 292.
6 Id. 303-304.
This proposal of Dixon J to expand the definition of "excise" to catch taxes on all dealings with goods after production was dicta not only in that there were narrower bases for decision consistent with the 1904 formula but also in that it did not even cover the issue he had to decide which related to a tax on an activity, planting a crop, before the goods came into existence.¹ (The requirement that the tax affect the goods "as" subjects of manufacture or "as" articles of commerce, has importance for characterisation.)²

Dixon J did not seek to support his definition by any reasoning based on the grouping of bounties, customs and excise duties, or their interrelations in matters of economic management or on any perception of the purpose of s90. He based his wide definition on the usage of the term in English legislation³ and, to a lesser extent, in some Australian colonial legislation.⁴

Dixon J adverted to the usage in economic writings (including JS Mill) which had used the word "excise" to describe taxes on articles of home production.⁵ For Dixon J such a usage of "excise" was merely a convenient convention so that "excise" could be used in contradistinction to "customs" when the writers' concern was to distinguish between burdens upon domestic production and upon importation.⁶ (This tends to imply at least that Dixon J did not

¹ Rich J who had indicated in COR his support for the wide definition found it unnecessary to refer to that matter. Id. 280-282. The matter actually decided in Matthews, is discussed below pp266ff.
² Below pp240ff.
³ (1938) 60 CLR 263, 293-298.
⁴ Id. 298-299.
⁵ Id. 297-298.
⁶ Id. 297-298.
think that "excise" should be construed on the assumption that the word "excise" was included solely because of the effect of such taxes on the competitive position of local producers relative to foreign producers.) His Honour did not feel compelled by that specialised usage to confine excises to taxes on goods which are home products, when he was confident there had been a wider usage of the word "covering inland taxes on commodities, whether imported or produced or manufactured in England" but left the question open.

The relevance to the validity of taxes of the question - should excise be confined to taxes on articles of home manufacture - is indirect. Even if "excise" were so confined a tax which applied to goods not locally produced could then offend s90 as being a customs duty, a tax on importation. The significance of the issue is that if it is decided that excise is to be confined to taxes on locally produced goods, then the argument (which Dixon J was seeking to refute) that excise means tax on production is more convincing.

**Parton v Milk Board (Victoria) 1949**

In this case the High Court had for the first time to decide whether a tax imposed on a dealing after the goods had left the producer's hands could be an excise. A Victorian regulation

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1 Id. 294. Also 299 in relation to Australian usage.
2 Id. 299.
3 COR Case (1926) 38 CLR 408 above pp232-233.
4 Compare the behaviour of Menzies J below p242 note 3.
5 (1949) 80 CLR 229.
6 The legislation challenged in the COR Case (1926) 38 CLR 408 had (as well as the tax on first sale), imposed a tax on the use within the State of motor spirit purchased outside the State. Although the wider statements of Higgins and Rich JJ above p233 would make such a tax an excise, neither they not any other member of the Court considered the tax in those terms in this case.
empowered the imposition of a tax, not exceeding 1/4d per gallon, on sellers, other than producers or milkshop proprietors, of milk. In purported reliance on this power, levies at 1/10d and 1/8d per gallon had been imposed at different times. With Latham CJ and McTiernan J dissenting, Dixon, Rich and Williams JJ constituted the narrow majority holding the tax invalid.

Dixon J based his decision on the meaning of excise he had proposed in Matthews. (He did however propose that that definition be qualified by withdrawing taxes on consumption.)¹ This tax was imposed by reference to a commercial dealing, sale of goods and was therefore within his Matthews definition.² This time Dixon J sought to justify his definition on grounds other than merely the "accepted usage" he had relied on in Matthews. His Honour assumed that the purpose of s90 in excluding the States from buying duties of customs and excise, was to give "the Commonwealth Parliament a real control of the taxation of commodities and to ensure that the execution of whatever policy it adopted should not be hampered or defeated by State action." That purpose would be defeated if "excise" "did not go past manufacture" because "a tax upon a commodity at any point in the course of distribution before it reaches the consumer produces the same effect as a tax upon its manufacture on production."³

In a joint judgment Rich and Williams JJ pointed out there was no direct decision confining "excise" to taxes on production and taxes on first sale by producers.⁴ Their Honours first adopted the approach of Higgins J in the COR Case⁵ which (echoing Peterswald v Bartley's definition) accepted that to be an excise the tax had to be

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¹ Below pp237ff.
² (1949) 80 CLR 729, 261.
³ Id. 260.
⁴ Id. 251-252.
⁵ (1926) 38 CLR 408 Above p233.
"imposed so as to be a method of taxing the production of goods" but allowed that requirement to be satisfied by a tax on any dealing with the goods where it was expected and intended that the taxpayer would pass the tax on.\(^1\) Having at this point accepted a narrow definition coupled with a wide approach to characterisation, Rich and Williams JJ then also adopted the approach of defining excise widely.\(^2\) The difference between the two routes to the same conclusion was not immediately apparent on the facts in Parton but it can be significant and has been significant in later decisions.\(^3\)

C - The settling of the definition of excise - an excise is a tax on any dealing with goods except consumption

In Browns Transport v Kropp,\(^4\) Dennis Hotels Pty Ltd v Victoria\(^5\) and Bolton v Madsen,\(^6\) decided after Parton and before Barwick's arrival on the Court, the wide definition of excise was generally accepted and seemed thus to be entrenched. The only issues of definition apparently outstanding were

- is excise to be confined to taxes on goods which are home produced

- are consumption taxes excises.

In its nature the first issue is not likely to come up squarely for decision in the context of s90. Barwick CJ was part of the court in Dickenson's Arcade which was asked to consider the second issue.

\(^{1}\) (1949) 80 CLR 229, 252.
\(^{2}\) Id. 252-253.
\(^{3}\) Below pp241-242.
\(^{5}\) (1960) 104 CLR 529. Below pp245ff.
Dixon J originally included consumption taxes in his definition of excise proposed in Matthews. Then in Parton he proposed that consumption taxes be withdrawn from the definition of excise. The only explanation given by Dixon J for taking consumption taxes out of the definition was to refer to the 1943 Privy Council decision in Atlantic Smoke Shops v Conlon.\(^1\) In Atlantic Smoke Shops the Privy Council had decided that a consumption tax could not be an indirect tax within the meaning of the British North America Act.\(^2\) The reasoning was that a consumption tax cannot be passed on with the goods because, by definition, a consumer does not pass goods on.

The exemption of consumption taxes was reiterated occasionally after Parton. It was approved by a joint judgment of Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ in Bolton v Madsen.\(^3\) It was, however, not until Dickensons Arcade Pty Ltd v Tasmania in 1974\(^4\) that the Court was asked to decide directly whether consumption taxes are outside the definition of excise.

By the time of Dickenson it was no longer necessary if a tax were to be held to be an (Australian) excise that it first be held to be a (Canadian), indirect tax.\(^5\) Nevertheless, five of the six members of the Court including Barwick CJ accepted the withdrawal of consumption taxes from the definition of excise. No member of the Court relied on the reasoning in the Atlantic Smoke Shops decision. Stephen J came nearest to doing so, but even he was not willing to put it any higher than "direct taxes are inherently less closely related to goods than are indirect taxes and are to that extent less likely to be found to be duties of excise...".\(^6\)

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2. Id. 563-564.
5. Above pp226ff.
The reason given by Menzies, Stephen and Mason JJ for accepting the withdrawal of consumption taxes from the definition of excise was no more nor less than a desire to preserve the degree of certainty which had been achieved by the repetition of the proposition since the dicta in Parton. Gibbs J went to some trouble to point out that the exemption was anomalous. In the end, he too concluded that the anomaly was entrenched.

Barwick CJ also referred to the dubious relevance of a Privy Council decision about the meaning of indirect to the Australian definition of excise. His Honour accepted the exemption, however "in deference to the views expressed by other Justices...". Whether the "other Justices" referred to, are Barwick's predecessors or the other judges involved in the Dickenson decision or both, is not clear.

Why did Barwick CJ accept this anomalous exemption so deferentially? It only had the support of dicta. At no stage had developed reasoning been set out to support the anomaly. The acceptance of the anomaly was not in harmony with the tone of Barwick CJ's surrounding discussion. Shortly before his deferential acceptance of the anomaly Barwick CJ said

"I continue to regard the evident purpose of the grant of exclusive power to impose duties of customs and excise as of significance both in deciding the connotation of the word 'excise' in s90 of the Constitution and in deciding whether in its operation a State statute does impose a duty of excise."

And shortly after accepting the anomaly in the definition (connotation) Barwick CJ said

1 Id. 209, 230, 239 respectively.
2 Id. 217-222.
3 Id. 186.
4 Id. 185-186.
5 Id. 185.
Unless ... the substance of the operation of the Statute, rather than merely its form, is treated as definitive of the relevant nature of the tax it imposes or exacts, a premium will be placed upon verbal sleight of hand and, in the end, the Constitution mocked.¹

If Barwick CJ was so anxious to protect the "spirit" of s90, why allow the definition of excise to be modified in a manner offensive to that "spirit"?

It may be that Barwick CJ had perceived that Menzies, Gibbs and Stephen and Mason JJ were united and immovable in their acceptance of the exemption. There was no such united alliance that could be rallied against the exemption. McTiernan J held that consumption taxes were not exempt but, somewhat inconsistently, continued to regard "indirectness" as being of importance. Barwick CJ may have decided, therefore, to concentrate on arguing with Menzies, Gibbs and Stephen JJ on their own terms. He accepted their definition of excise but challenged them at the level of characterisation.²

(iii) Characterisation

Under this heading the concentration will be on the question - when will a tax be held to be "on" a relevant dealing with goods. Although the issues of definition seemed to be fairly well settled before the appointment of Barwick to the Chief Justiceship, the same could not be said about issues of characterisation.

The basic issues of characterisation underlying s90 can be listed thus:

Is the character of a tax to be determined solely by reference to its terms or can its likely practical effect be taken into account? Can the legislature's purpose be taken into account either to invalidate or to redeem? Does each tax have one character and one character only so that a judicial choice must

¹ Id. 186.
² Below pp295ff.
be made as to which of the matters touched by a tax gives the tax its character? Or can the tax have more than one character according to the various matters in reference to which it operates? Or can the tax have more than one character not only according to the various matters in reference to which it operates but also in its different applications to facts?

Even if the tax can have more than one character, is it nevertheless still open to question whether a tax although otherwise an excise, is not in substance an excise?

Which attributes of a tax are conclusive of validity/invalidity which merely relevant and which totally irrelevant?

These are typical constitutional issues. Unfortunately the issues have not always been fully identified, argued or analysed in relation to s90.

It is not always possible to classify particular judgments of individual judges let alone decisions of the Court as a whole, as being attributable to an application of one principle rather than another. Opaque statements such as - this is/is not in substance an excise - are frequently encountered. Furthermore particular outcomes can be variously explained as being the result of the interaction or definition A with characterisation Z or of definition B and characterisation Y.¹

Before the discussion turns to the way in which the issues have been dealt with in the cases, the framework used by Menzies J must be outlined because Menzies J's approach was crucial to the outcome of important cases and because Barwick CJ endorsed it in one of his last considerations of s90.²

Menzies J was not convinced of the soundness of the Parton extension of excise.³ He described the decision as being merely a "gloss" on the main proposition of Peterswald v Bartley that an

¹ Eg the COR Case above pp232-233.
² Below pp293.
³ (1949) 80 CLR 229 above pp235ff.
excise is a tax on production.¹ For Menzies J Parton was a "high water mark".² Menzies J chose to ignore the wide definition route to the majority conclusion in Parton — even though it had been the sole basis of decision of Dixon J and a basis for decision of Rich and Williams JJ. Menzies J concentrated on the second line of reasoning used by Rich and Williams JJ which accepted the Peterswald definition — tax on production — but characterised a tax imposed by reference to an activity after production as being on production. All that Menzies J was willing to accept Parton as establishing was that taxes imposed by reference to activities after production could be but need not be characterised as taxes on production.³

It is to be remembered when reading the discussions of Menzies J that he was asking whether a tax which does not operate by reference to production can be classified a tax on production. The terms of the legislation were just another circumstance to be taken into account in that question of degree. This (non) principle is inherently vague and unpredictable.

(a) A flat tax is not an excise — the requirement of a quantitative link

Although most of the statements in Peterswald v Bartley⁴ about the reach of the word "excise" have been abandoned as being too narrow, the actual decision has been upheld and followed. The tax challenged in Peterswald v Bartley was the annual fee on a licence

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¹ Dennis Hotels Pty Ltd v Victoria (1960) 104 CLR 529, 590.
² Western Australia v Hamersley Iron Pty Ltd [No 1] (1969) 120 CLR 42, 66.
³ Dennis Hotel Pty Ltd v Victoria 104 CLR 529, 590-591. Hamersley [No 1] (1969) 120 CLR 42, 65. Consistently with his idea that excise was dominated by the effect of taxes on production, Menzies J argued that that limitation was necessary to keep customs and excise, as mutually exclusive categories as it is to be inferred from s55 that they must be mutually exclusive.
⁴ (1904) 1 CLR 497.
to make beer for sale. The fee was the same no matter what the level of production might turn out to be. Even though production of goods was an element in the liability to pay tax, the Court held that this tax was not "on" goods.

It has already been noted that this Court accepted that excise taxes are indirect taxes and accepted the established doctrine about the meaning of "indirect" in the British North America Act. It was the Canadian doctrine about the meaning of "indirect", which provided the reasoning supporting the Australian decision that a flat licence fee for producers is not an excise.

The Canadian categories of direct/indirect are mutually exclusive. To decide, as the Privy Council had in Bank of Toronto v Lambe that a flat licence fee is _prima facie_ not intended to be passed on and is therefore direct, implies as an inevitable corollary that such a tax is not indirect. When the Australian Court said this flat fee was "on" producers (persons) and not "on" production (goods), it meant the fee was direct and therefore not indirect.  

Out of the proposition - a flat fee is not an excise - (a matter of definition), has emerged as a corollary a proposition which tends to be more a matter of characterisation - a tax is not an excise unless it is measured by quantity or value of goods. Although the proposition - a flat tax on dealings with goods is not a tax "on" goods - and its corollary are so clearly attributable to the first High Court's incorporation of "indirectness" into the definition of "excise" and despite the later downgrading of "indirectness", the High

1 Above p226.
2 (1887) 12 App Cas 575.
3 (1904) 1 CLR 497, 511-512.
4 _Dennis Hotels Case_ (1960) 104 CLR 529, 556 per Fullagar J.
Court has reaffirmed the proposition with little discussion. In *Anderson Pty Ltd v Victoria* Barwick CJ and other members of the Court simply ignored a submission that there does not have to be a quantitative link between the amount of a tax and a dealing with goods.\(^1\) In *Dennis Hotels,\(^2\) Dickenson's Arcade\(^3\) and HC Sleigh\(^4\) flat taxes were upheld on the authority of *Peterswald v Bartley*. Barwick CJ was party to the *Dickenson* and *Sleigh* decisions.

Only two judges have indicated any disagreement with the decision in *Peterswald v Bartley*. One was Fullagar J in *Dennis Hotels*, who thought that any tax including a flat tax would be an excise if "payable by reason of, and by reference to, the production or manufacture of goods."\(^5\) No member of the Court has discussed the issue in terms of the effect of a flat tax on relative competitive position.\(^6\)

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1 (1964) 111 CLR 353, 359 per Bowen QC.
2 (1960) 104 CLR 529.
3 (1974) 130 CLR 177.
6 It is true that there is a distinction between a flat tax and an *ad valorem* or per unit tax. A flat tax would enter the costs of production like a capital cost. The higher the level of production, the lower the per unit increase in cost attributable to the tax. With a per unit tax, *ex hypothesi*, the per unit increase in cost attributable to the tax is the same at all levels of production. This distinction between flat taxes and per unit taxes does not offer any rationale based on theories about relative competitive position to justify the exemption of flat taxes. A flat tax can still have a significant effect on relative competitive position.
(b) **A time-lagged tax is not an excise**

This section examines the body of law which has grown up concerning taxes which are imposed in the form of fees for licences to deal with goods and which are quantified by reference to the level of a dealing with goods in an earlier period. I examine this topic at this point because, even though the law relating to time-lagged taxes has hardened into its own specialised rules, it was in the context of the consideration of a time-lagged tax that significant approaches to the general problem of characterising taxes for the purposes of s90 were developed.

Dixon J in *Parton v Milk Board (Vic)* was the first to suggest that a time-lag in the quantification of a tax might be of significance.\(^1\) The idea was tested in *Dennis Hotels Pty Ltd v Victoria*\(^2\).

**Dennis Hotels Pty Ltd v Victoria 1960**

In issue in *Dennis Hotels*\(^2\) were fees payable for licences for the sale and disposition of liquor under the Victorian Licensing Act 1928.\(^3\) There were two main taxing provisions. One related to annual licences and one to temporary licences. The plaintiff held an annual victualler's licence and had from time to time held temporary victualler's licences. These licences authorised the retail sale and disposal of liquor.\(^4\)

The fee payable under an annual victualler's licence was at the rate of "six per centum of the gross amount (including all duties thereon) paid or payable for all liquor which during the twelve months

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1. (1949) 80 CLR 229, 263.
2. There is a useful note of this case by JG Wilkin at (1960) 2 MULR 543.
3. (1960) 104 CLR 529. The relevant provisions of the 1928 Act were substantially similar to provisions in the 1958 Licensing Act which had repealed the 1928 Act after the case had commenced. Id. 560.
4. Sections 8, 9.
ended on the last day of June preceding the date of the application for the grant or renewal of the licence was purchased for the premises...". The fee payable on a temporary licence was one pound for each day of the licence plus six per centum of the gross amount paid or payable for all liquor purchased for sale or disposal under such licence.

Dixon CJ, McTiernan and Windeyer JJ favoured holding both the annual and the temporary fee invalid. Fullagar, Kitto and Taylor JJ held both valid. The votes of Menzies J determined the matter. He decided to hold the annual fee valid and the temporary fee invalid. There were many levels of disagreement and many different approaches taken.

The approach of Fullagar J was quite simple. Fullagar J was in favour of adopting a definition of "excise" similar to that proposed by the Court in Peterswald v Bartley. Fullagar J would have rejected the 3/2 decision in Parton and confined excise to taxes "on" production. As neither the annual nor the temporary fee was imposed "on" production there was no excise and therefore, according to Fullagar J no breach of s90.

The other judgments accepted the Parton extension of the definition of excise, and turned to the issue of characterisation. There were two main attacks on the annual licence fee. The first was the argument that the fee was a tax on sales made during the currency of the licence. Kitto and Taylor JJ rejected this proposition. Their Honours did not refer to the decision in Peterswald v Bartley but

1 Section 19(1)(a).
2 Section 19(1)(b).
3 Id. 555, 558.
4 Id. 558. Although, agreeing with the Court in Peterswald v Bartley on this point Fullagar J indicated his doubts about the actual decision in Peterswald upholding a flat tax on production. Id. 556 above p244.
their reasoning is very reminiscent of the reasoning in that case.1 Their Honours emphasised that there was no quantitative relation between the amount of the fee payable at the commencement of the licence period and the levels of sales during the period. The licence holder would not be able to apportion the fee in equal amounts to each sale made during the period as he would not know until the end of the period how many sales he had made. The fee was direct and therefore a tax "on" the occupation not "on" the activities carried on.2

The more difficult question was whether the annual fee payable on renewal or grant was a tax "on" the sales of the goods purchased for sale at the premises in the prescribed period preceding the application for renewal or grant. The tax was quantified by reference to those purchases and so was not covered by the flat tax aspect of Peterswald v Bartley. Kitto and Taylor JJ both emphasised the history of liquor licensing to reinforce their conclusion that this tax was "on" the licence holder and not "on" the goods.3 In this context the fee was a reasonable measure of the value of monopoly rights. Their Honours did not suggest that there was a sufficient quid pro quo in the grant of a licence to deprive the fee of its character as a "duty".4 Their point was that the licensing system with its fees was "a traditionally accepted method of regulating a trade which the public interest demands shall be subject to strict supervision". The fee was an adjunct to substantive regulatory provisions rather than the licensing framework being a mere adjunct to a revenue statute.5

1 Above pp242-243.
2 Id. 563 per Kitto J; 575-576 per Taylor J.
3 Id. 567-568 per Kitto J; 576-578 per Taylor J.
4 Id. 563 expressly rejected by Kitto J. The point was conceded by the State Id. 592.
5 Id. 576 per Taylor J.
To reinforce that conclusion their Honours pointed out that the fee payable on renewal of the licence for the premises was payable no matter who had purchased the liquor during the preceding year.\(^1\) This factor was further indication that the licence was concerned with the person and premises licensed and that the fee was concerned with the value of the licence rather than with the goods. Kitto J also drew attention to the other fees levied by the Act which he classified as taxes "on" occupations rather than taxes "on" goods.\(^2\)

Since the Dennis Hotels decision much has been made of a passage in the judgment of Kitto J. Kitto J set out this proposition to sum up his understanding of the principles of earlier cases.

"What is insisted upon may, I think, be expressed by saying that a tax is not a duty of excise unless the criterion of liability is the taking of a step in a process of bringing goods into existence or to a consumable state, or passing them down the line which reaches from the earliest stage in production to the point of receipt by the consumer."\(^3\)

Kitto J went on to say that the insuperable difficulty with the challenge to the annual licence fee was "that the person making each individual purchase does not by doing so become liable for the fee or any part of it".\(^4\) Taylor J also put emphasis on the fact that purchase of stock did not create the "relevant liability, for the fee is not payable unless and until an application for the renewal of the licence is made".\(^5\)

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1  *Id.* 564 *per* Kitto J; 576 *per* Taylor J.
2  *Id.* 562-563.
3  *(1960) 104 CLR* 529, 559.
4  *Id.* 565.
5  *Id.* 576.
Did their Honours mean that a tax could only be an excise if the last thing required to give liability was the undertaking of one of the relevant dealings with goods?¹ That interpretation would cover the conclusion of Kitto and Taylor JJ that the annual licence fee was not an excise. It would not, however, cover their conclusion that the temporary licence fee was not an excise either.

The temporary licence fee had two components. The first was a fixed amount. That was covered by the decision in Peterswald v Bartley. The second component was quantified by reference to the value of liquor purchased for sale under the licence. Taylor J merely commented that this fee was covered by the same considerations as determined the validity of the annual fee.² Kitto J noted that the fee was measured by reference to purchases some or all of which may already have been made when the licence was granted.³ This aspect led him to conclude that "What attracts the liability is the acceptance of the licence. The tax is not on the liquor; it is on the licence - on the obtaining of authority to sell and dispose of liquor generally at the relevant function."⁴

Their Honours Kitto and Taylor JJ were, with respect, failing to state the steps in their conclusion. True enough, in so far as the temporary fee was quantified by reference to the value of liquor purchased before the licence was taken out, there was no liability

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¹ On this view a law might tax breathing. It could then quantify the tax by reference to the amount of goods produced by the breather the previous day. So long as a person who has produced goods did not breathe there would be no tax liability. Some might think this example is far-fetched. If people do not breathe they die - there is a practical compulsion to do the act which incurs the tax liability. (Compare Attorney-General (New South Wales) v Homebush Flour Mill Ltd (1937) 56 CLR 390 above p220.) Yet similarly in Dennis Hotels if victuallers did not seek to renew their licences their businesses would die. There is a similar practical compulsion.

² Id. 578.

³ Id. 569.

⁴ Id. 569.
to pay until and unless the licence was taken out. In so far as the
taxing provision applied to purchases made during the currency of the
licence, however, the actual purchase created a liability to pay
tax. Yet Kitto and Taylor JJ felt able to ignore this later
operation of the tax.

To decide as Kitto and Taylor JJ did, that the fee was "on" the
licences, and not "on" the purchases on liquor tends to assume away
a significant and crucial issue - whether a tax can have more than
one character. Their Honours seem to assume that a tax can only have
one character, one substance. The reference of Kitto J to "the
criterion of liability" and the reference of Taylor J to the "relevant
criterion" were subordinate to their discussion of the substance of
these fees, as revealed by historical precedents for regulating trade
in liquor, and to their perception of the general purpose of the Act.
It will be necessary in a later section to consider this approach to
classification more fully.2

Menzies J regarded the extension made by the Parron decision as
a matter of characterisation rather than definition. Menzies J
considered that an excise is a tax "paid on the production or
manufacture of goods...".3 His Honour reviewed the cases and
concluded that the position had been reached that "a tax upon the sale
or purchase of goods manufactured in Australia at any point before
sale for consumption is to be regarded as a tax on production or
manufacture;"4 Menzies J felt bound to accept that position
"notwithstanding the reservations I would otherwise have about the
glosses upon the main proposition".5

1 Compare id. 591 per Menzies J.
2 Below pp261ff.
3 Id. 582. Discussed above pp241-242.
4 Id. 590.
5 Id. 590.
Menzies J concluded that the annual fee was not a sales or purchase tax because "a dealing with the goods does not expose the licensed victualler to liability for tax; the tax is upon the person seeking a licence to sell liquor upon particular premises in the future...". The tax was, according to Menzies J, the price for the franchise to carry on a business. On the other hand some of the fee payable under the temporary licence was attracted at the rate of six percent of purchase price of goods in fact purchased during the period of the licence. Menzies J felt bound by Parton to hold that fee to be to that extent an invalid excise. The invalid operation was inseverable and therefore the whole fee was invalid.

This then was the basis for the majority in Dennis Hotels upholding the annual licence fee. The fact of a time-lag was of no significance to Fullagar J and only of marginal relevance to Kitto and Taylor JJ. The fact of a time-lag in the annual tax did tip the scales to validity for Menzies J but the same judge was, in a later case, to invalidate a tax with a time-lag. It is clear when one reads all the judgments of Menzies J in this area that as far as he was concerned a time-lag was not conclusive but was just another factor to be taken into account when answering the question of degree - whether the tax was directly affecting production or was too remote therefrom.

Dixon CJ and Windeyer J in the minority in relation to the annual income fee and the majority in relation to the temporary licence fee were not impressed with the point that there was no tax liability on an annual licence until and unless a licence was renewed. As far as they were concerned a tax could have more than one character and the conclusion that the tax was "on" an occupation did not preclude a

1 Id. 591.
2 Id. 591.
3 Below pp253ff.
conclusion that the tax was also "on" goods. They both spoke in terms of each tax's likely practical effect and of each tax's general character.

McTiernan J in dissent in Parton felt constrained to accept that decision as establishing that taxes on goods after production could be excises. For his Honour "indirectness" was an essential attribute. The percentage fees came within the concept of "excise" accepted by McTiernan J. These fees were "payable on or in respect of goods" and were reasonably "expected to be passed on and finally borne by the consumer or user of the goods as part of the price which he pays for them".

Dickenson's Arcade Pty Ltd v Tasmania 1974

Dickenson's Arcade involved inter alia, a fee attached to a licence to retail tobacco. The fee was quantified by reference to the average value of tobacco handled per month for a six month period preceding the licence period. This method of quantification was similar to (although not identical to) that used for the permanent licence fee upheld 4/3 in Dennis Hotels.

Menzies J whose vote had settled the matter in Dennis Hotels saw no reason to reconsider his decision, and warned against accepting some of the wider statements about the reach of s90. Stephen J adopted Menzies J's discussion. Gibbs J adopted the reasoning of

1 Id. 541 per Dixon CJ; 602 per Windeyer J.
2 Id. 541-543, 547 per Dixon CJ; 595-597 per Windeyer J.
3 Id. 549.
4 (1974) 130 CLR 177. Other aspects of the case are considered above pp237ff and below pp295ff.
5 Id. 212-213.
6 Id. 236.
Kitto and Taylor JJ in *Dennis Hotels* to the effect that the concern of the tax was the business generally and not particular dealings with goods.¹

The other members of the Court expressed no enthusiasm for the reasoning of the majority in *Dennis Hotels*. McTiernan J in dissent in *Dennis Hotels*, did not feel constrained to change his position.² Mason J although unable to see any reason in principle for giving significance to the presence of a time-lag in a tax felt obliged to follow *Dennis Hotels* but indicated his willingness to confine the decision - "it has no necessary application to fees prescribed for a licence to manufacture or process goods ...".³

Barwick CJ stated his preference for the reasoning of the statutory minority in *Dennis Hotels*.⁴ He went on, however, to say that even though he did not consider himself "bound by any of the several reasons" given by the majority judges in *Dennis Hotels*, he did consider himself bound by *Dennis Hotels* in indistinguishable statutory and factual situations.⁵ He concluded that the situation in *Dickenson* was so similar to, as to be covered by, the *Dennis Hotels* decision.⁶

**MG Kailis Pty Ltd v Western Australia 1974**

On the same day⁷ as the Court delivered judgment in *Dickenson* it handed down *MG Kailis (1962) Pty Ltd v Western Australia*.⁸ The

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¹ Id. 225-226.
² Id. 206.
³ Id. 240.
⁴ Id. 188.
⁵ Id. 188-189.
⁶ Id. 189.
⁷ April 1, 1974.
⁸ (1974) 130 CLR 245.
The case involved a tax in the form of a fee for a licence. The awkward drafting of the legislation involved, the Fisheries Act 1905-1971 (WA), confused the issue. Section 35G(1) provided simply that the fees payable for a processor's licence "shall be assessed at a percentage of -

(a) the value of fish caught; and

(b) the moneys paid or payable for fish purchased",

by the processor for processing. If that provision had stood alone there would have been little doubt it constituted an excise. Section 35G(2), however, seemed to "clarify" and limit the general formula in s35G(1) by making a detailed provision requiring any person taking out a processor's licence to pay a fee quantified by reference to the amount of fish caught and bought for processing in an earlier period. Gibbs, Stephen and Mason JJ stated clearly that s35G(2) must be understood as converting the tax imposed by s35G(1) into a time-lagged tax and McTiernan J proceeded on the same assumption.

There has been some confusion as to the interpretation which Menzies J put on the legislation.

1 Below pp257-258.
2 Id. 253 per Menzies J; 259 per Gibbs J; 261 per Stephen J.
3 Id. 259, 261 and 264.
4 Id. 250.
5 Below pp257ff.
McTiernan, Menzies and Mason JJ held the tax offended s90. Gibbs and Stephen JJ would have upheld it.

Gibbs and Stephen JJ (in dissent) could see nothing to distinguish this annual time-lagged licence fee from the permanent licence fee upheld 4 to 3 in Dennis Hotels. Gibbs J offered no other reason for upholding the tax. Stephen J seemed to think that Dennis was correctly decided. There was one main feature which Stephen J considered justified the majority decision in Dennis and applied equally to the case before him. A time-lagged tax cannot be "passed on". That lack of indirectness seemed for his Honour to be conclusive that this tax was not "on" any particular goods. (To give such weight to the lack of indirectness was, to say the least, anachronistic.)

McTiernan J who had been in the minority in relation to the similar tax in Dennis Hotels ignored that decision. Quoting from Dixon J in Matthews saying that the Court should look to the "substantial effect" of a levy and from Isaacs J in COR saying that s90 could be indirectly transgressed, his Honour held this tax offended s90.

Mason J distinguished Dennis Hotels on the basis that this fee was attached to a licence to "manufacture or produce goods". His Honour considered that if fees such as this were upheld, s90 would be reduced to "a formal operation, having little substantial importance."

1 Id. 259, 263.
2 Id. 262.
3 Id. 262.
4 Above pp226ff.
5 Id. 251.
6 Id. 265.
7 Id. 265.
Menzies J had been in the majorities in Dennis Hotels and Dickenson upholding very similar time-lagged taxes. As far as Menzies J was concerned Dennis Hotels (and Dickenson) were distinguishable and this tax was invalid. The "real" basis for the decision of Menzies J is considered in the next case discussed.

**HC Sleigh Ltd v South Australia 1977**

Three years after Kailis when death had taken Menzies J from the bench, the Court had to consider another time-lagged tax in HC Sleigh Ltd v South Australia.¹ This time the tax was in the form of a fee for a licence to carry on the business of selling petroleum products. The fee was calculated by reference to the amount of petroleum products sold by the licensee in a preceding twelve month period.

The Court upheld the tax. The only dissent came from Jacobs J who could find no reasoning in Dennis Hotels and Dickenson to support what he saw developing as the "virtual supersession of s90" by "setting up a licensing system in respect of dealing in any commodity at all...".² His Honour would have distinguished and confined Dennis Hotels and Dickenson "upon the ground that in both of them there was present in the impugned legislation a concatenation of factors - the nature of the product - and the licensing of premises for the sale of the product -" which enabled the decision that the tax was no more than a licence fee.³ (This downgrading of the significance of a time-lag did, with respect, seem to accord with the actual reasoning of Kitto, Taylor and Menzies JJ in Dennis Hotels).

2. Id. 526.
3. Id. 536.
Murphy J in the majority pursued his own unique theory of s90.\(^1\) The other members of the majority, Barwick CJ, Gibbs, Stephen and Mason JJ considered Dennis Hotels and Dickenson to be indistinguishable from the case before them.\(^2\) Barwick CJ acknowledged that "the result, as I think, tends to put a premium on drafting ingenuity and is a disregard of substance."\(^3\) Barwick CJ expressed general agreement with the judgment of Mason J. Mason J had proposed in Dickenson and applied in Kailis, an approach of striking down time-lagged taxes closely connected with production. In those cases his Honour had been anxious to preserve s90 as a section of substance. Now His Honour distinguished them on the basis that this tax was on selling not on production. With respect, this "distinction" is a distinction of form ignoring the substance that the sellers being taxed were also the producers.\(^4\)

Gibbs, Stephen and Mason JJ (with Barwick CJ indicating general agreement with Mason J) all commented on the judgment of Menzies J in Kailis. Stephen J simply said the judgment of Menzies J turned upon the particular meaning which he assigned to the curious terms in which the legislation there in question was cast.\(^5\) Stephen J was presumably interpreting the judgment of Menzies J in the same way as Gibbs and Mason JJ who stated expressly their understanding of Menzies J's basis for decision thus:

"... Menzies J, considered that the effect of the legislation, on its proper construction, was that the fee was to be assessed by reference to the fish acquired for processing during the period of the licence." (per Gibbs J).\(^6\)

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1 Below p291.
3 Id. 488.
4 Cf. COR Case. Above p232.
5 (1977) 136 CLR 475, 496-497.
6 Id. 493. Emphasis added.
"... Menzies J ... considered that the licence fee was calculated by reference to the quantity of materials processed during the period for which the licence was held." (per Mason J, with Barwick CJ in agreement).\(^1\)

If it had not been for the fact that such eminent judges had given that interpretation to the judgment of Menzies J, I would have thought it untenable.

There are some aspects of the judgment of Menzies J which if taken in isolation might be thought to justify that interpretation. For example, Menzies J concluded "I regard the tax imposed by s35G as one upon the processing of fish caught or purchased for that purpose."\(^2\) It is to be noted, however, that his Honour did not say that he regarded the tax as being imposed upon the processing of fish during the currency of the licence. His Honour also set out and rejected a submission that s35G(2) qualified s35G(1) and thus brought the tax within the authority of Dennis Hotels. From what followed, however, it becomes plain that Menzies J was merely rejecting the proposition that the case was covered by Dennis Hotels and was not rejecting the preliminary proposition that s35G(2) qualified s35G(1).\(^3\)

Menzies J expressly noted and set out the provision in s35G(2) requiring the licence fee to be paid "in two moieties 'the first of which shall be paid within thirty days after the licence is granted or as the case may be, renewed and the other within a period of six months thereafter' ...".\(^4\) His Honour's reference to this provision is the key to understanding his judgment. First it indicates that his Honour accepted that s35G(2) did qualify s35G(1). Secondly, it indicates that his Honour was not basing his decision on the assumption that the tax was on activities during the currency of the licence.

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1 Id. 500.
3 Id. 253-254.
4 Id. 254.
licence. If the tax were on the activities during the currency of the annual licence then the fee payable would not be known until the end of the licence period. Yet s35G(2) expressly required the fee to be paid in two "moieties" well before the licence expired.

If one considers again the judgment of Menzies J in Dennis Hotels the real basis for his decision in Kailis becomes plain. In Dennis Hotels Menzies J indicated that he understood the test to be whether the tax was too remote from production to be an excise or whether it was in substance on production. It would seem in Kailis his decision was that this tax was in substance, even with its time-lag, upon the processing of fish. The point of this excursion into the question of what Menzies J actually decided in Kailis is that it demonstrates that this judge, who had played such an important role in the Dennis Hotels decision did not consider that that case meant that the presence of a time-lag in a tax would guarantee exemption from s90.

**Summary of Barwick CJ's position on time-lagged taxes**

I quote again the words of Barwick CJ in Dickenson:

Unless ... the substance of the operation of the Statute rather than merely its form, is treated as definitive of the relevant nature of the tax it imposes or exacts, a premium will be placed upon verbal sleight of hand and, in the end, the Constitution mocked.

By joining in the establishment of a rule which allows States to tax any dealing in goods after production and to receive immunity from the operation of s90 by the simple device of interposing a licence and a time-lag in the quantification of the tax, Barwick CJ was, as he himself acknowledged in Sleigh, allowing a result which "tends to put a premium on drafting ingenuity and is a disregard of substance." 3

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1 Above pp250-251.
2 (1974) 130 CLR 177, 186.
3 (1977) 135 CLR 475, 488
Barwick CJ "explained" this inconsistency between his stated principle and his actual decisions in this area as being forced upon him by the constraints of precedent in the form of the Dennis Hotels decision upholding the annual licence fee. Even if Barwick CJ were, under the constraints of the doctrine of stare decisis, to accept that decision which he considered to be wrong there were options for confining that decision.

The dissent of Jacobs J in Sleigh pointed out the annual fee in Dennis Hotels had been accepted by some of the majority judges because it was part of a scheme for limiting and regulating the outlets of liquor, a special kind of commodity with a special history of regulation. By the time of Sleigh the time-lagged licence fee had become simply a device for collecting revenue.

In Kailis Mason J had distinguished Dennis Hotels on the basis that the Dennis Hotels time-lagged tax was on purchase for retail sale while the Kailis time-lagged tax was on production. It would have been possible to develop and extend this basis for confining Dennis Hotels to the operation of the time-lagged tax on wholesaling activities in Sleigh where the taxpayer was also the producer.

Barwick CJ did not support either of these points for confining Dennis Hotels. Not only, however, did Barwick CJ not take either Jacobs J's or Mason J's point for confining Dennis Hotels, Barwick CJ also went the further step of supporting the erection of a rule that a time-lag will guarantee exemption from s90, a rule which no member of the Court in Dennis Hotels had supported. For Menzies J the presence of a time-lag was never more than just one factor in his test of degree and did not, on my interpretation, prevent Menzies J himself

1 (1974) 130 CLR 177, 188.
2 (1977) 136 CLR 475, 526.
holding a time-lagged tax invalid in *Kailis*. It seems to be an extreme application of *stare decisis*, for Barwick CJ to have felt more constrained by the majority decision in *Dennis Hotels* than did Menzies J who had been a party to that decision.

C - The sufficiency of an indirect quantitative link and the criterion of liability test

The rule relating to time-lagged taxes discussed in the previous section, has become fixed and is now independent of the general issues of characterisation under s90. This section will explore the general issues of characterisation under s90.

**Matthews v Chicory Marketing Board** 1938

In *Matthews v Chicory Marketing Board*¹ the tax challenged was a tax on chicory producers quantified by reference to the number of acres they planted with chicory. It was argued and accepted by Latham CJ and McTiernan J in dissent² that the tax was not "measured by quantity or value of goods" and therefore was not an excise. As Latham CJ pointed out "the yield of equal areas may obviously vary very greatly indeed".³

The majority judges who held that this tax was an excise were Rich, Starke and Dixon JJ. There was no common majority position. Starke J did not seem to require that the quantification of the tax

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1  (1938) 60 CLR 263.
2  *Id.* 279, 304.
3  *Id.* 279. His Honour also stated that this tax would not "normally and as of course enter into the price of the goods so as to be passed on to the purchaser or consumer" and was therefore not an indirect tax. *Ibid.*
be linked to amount or value of goods produced. It seemed to be enough for him to make this a tax on production that nobody was liable to pay tax under the Act unless some of the product were actually grown. This approach conflicts with the decision in Peterswald v Bartley and the rule allowing flat taxes.

There are (at least) two interpretations of the grounds for the decision of Rich and Dixon JJ. The definition of excise should be expanded to include taxes imposed and quantified by reference to essential steps in production (such as planting a crop) as well as taxes imposed and quantified by reference to amount or value produced. Alternatively, and not inconsistently, because of the natural relationship between steps in production and amount produced, a tax imposed by reference to a step in production should be regarded as sufficiently connected to the amount produced to be characterised a tax "on" production. The real basis for the decision in Matthews has been a continuing issue (though at times unacknowledged).

There was another important aspect of the judgment of Dixon J in Matthews. As Attorney-General for New South Wales in the Newspaper Tax Case in 1920, McTiernan had argued that a tax on the issue of newspapers was concerned with them as information not as goods. That submission was unsuccessful but its underlying assumption was echoed by Dixon J in Matthews. Dixon J's rider that to be an excise the tax must be on goods "as ... subjects of manufacture or production or as articles of commerce" seemed to contemplate a possible inquiry into the substance, or concern of a suspect tax.

1 Id. 286.
2 Above p242.
3 Id. 281 per Rich J; 303 per Dixon J.
4 John Fairfax Sons Ltd v New South Wales (1927) 39 CLR 139.
5 (1938) 60 CLR 263, 304. Emphasis added.
This idea also is traceable to the Canadian background for sorting out taxes into the mutually exclusive categories - direct and indirect. Earlier in his judgment Dixon J had quoted from the discussion in the Privy Council decision of Attorney-General for British Columbia v Kingcome Navigation Co. The passage in Kingcome that Dixon J quoted contained the following:

"Customs and excise duties are, in their essence, trading taxes, and may be said to be more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is exacted."

**Transport Cases 1930's**

The 1930's Transport Cases were mainly concerned with the compatibility of State transport regulation and licensing systems with s92. An ancillary issue was whether a tax imposed on road use and calculated by reference to carrying capacity of vehicles and distance covered, was compatible with s90. The answer received had been that such taxes were compatible with s90.3

**Hughes and Vale Pty Ltd v New South Wales 1953**

In Hughes and Vale Ltd v New South Wales the Court was asked to reconsider the compatibility of road taxes with s90 in the light of the decision in Parton v Milk Board (Vic). The main issue in the case was the authority of the 1930's Transport Case in the light of the Privy Council dicta in the Bank Nationalisation Case6

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1 [1934] AC 45, 59 emphasis added.
2 (1938) 60 CLR 263, 301.
3 Eg O Gilpin Ltd v Commissioner for Road Transport (NSW) (1935) 52 CLR 189.
4 (1953) 87 CLR 49, 58.
6 [1950] AC 235; (1949) 79 CLR 497.
relating to s92. The submission relating to s90 seems to have been presented rather half-heartedly and only three of the seven members of the Court referred to it. Of these three, Webb J\(^1\) merely cited a 1930's **Transport Case, Gilpins Case.**\(^2\) Williams J adopted\(^3\) the reasoning of Dixon CJ who said:

"In answer to this contention it is, I think, enough to say that the tonnage rate is not a tax directly affecting commodities. It is calculated on the combined weight of the vehicle and weight of the load it is capable of carrying and is payable in respect of the employment of the vehicle upon a journey independently of the weight or quantity of the commodities carried. It is a tax on the carrier because he carries goods by motor vehicle.\(^4\)

The first sentence in this extract states the conclusion. The reasons for the conclusion seem to be set out in the second and third sentences: The point in the second sentence is quite different to that in the third sentence.

**Bolton v Madsen 1963**

A tax similar to that involved in **Hughes and Vale** was challenged in **Bolton v Madsen.**\(^5\) The tax was in the form of a fee on a permit to transport goods by road. The fee varied according to the nature of the goods for the carriage of which a permit was sought. The relevant rate in **Bolton** was that for wool and was at the rate of 3d per tonmile on registered carrying capacity.\(^6\) The person objecting to the payment of the fee was a producer who had been charged with transporting his own produce without a permit.

1. (1953) 87 CLR 49, 90.
2. (1935) 52 CLR 189, 87 CLR 49, 87.
3. (1953) 87 CLR 49, 87.
4. Id. 75. Emphasis added.
5. (1963) 110 CLR 264.
6. Id. 270.
7. Id. 269.
Aickin QC leading the challenge to the tax in Bolton submitted that the Matthews decision should govern the case. This seemed to be a fairly strong argument. The Court in Bolton itself stated that it understood the ratio of Matthews to be contained in the words of Dixon J:

"the basis adopted for the levy has a natural although not a necessary, relation to the quantity of the commodity produced." 3

The Bolton Court also accepted the wide definition of excise:

"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." 4

Kitto J in Dennis Hotels had brought together the Matthews decision and the wide definition of excise to give the following composite proposition.

"... through some mischance it may happen that no goods issue from the activity to be passed down the line to the consumer, and therefore there may be no opportunity to pass the tax on. But the impost is nevertheless a duty of excise if it operates as a tax upon the taking of a step in a process of producing of distributing goods." 5

One would have thought that the statement identified by the Bolton Court as representing the ratio of Matthews would have applied mutatis mutandis, to the tax in Bolton (and for that matter to the tax in Hughes and Vale Pty Ltd v New South Wales) in its application to the movement of goods from producer to consumer. The tax took as its

1 (1963) 110 CLR 264, 266.
2 Id. 272.
3 (1938) 60 CLR 263, 303.
"basis for levy" load capacity of trucks. Surely load capacity of a truck (by reference to which the tax was calculated) has a "natural although not a necessary relation to the quantity" of a commodity which can be distributed (by truck) just as the number of acres planted has a natural relation to the amount which will be produced.

Nevertheless the Court in a unanimous joint judgment held Matthew to be distinguishable and the tax to be valid. The distinction offered was that the tax in Bolton was independent "of the weight or quantity of the commodities carried". The Court was quite deliberate in emphasising and endorsing that one aspect of the judgment of Dixon CJ in Hughes and Vale. It is difficult to see how that point distinguished Matthews. In Matthews the extent of the tax liability was also independent of the amount or value of the product.

An important feature of the judgment in Bolton is that it adopted this passage from the judgment of Kitto J in Dennis Hotels:

"... a tax is not a duty of excise unless the criterion of liability is the taking of a step in a process of bringing goods into existence or to a consumable state, or passing them down the line which reaches from the earliest stage in production to the point of receipt by the consumer."

Reference has already been made to the significance of the fact that Kitto J spoke of the rather than a criterion of liability. This implied that a tax can have only one "criterion of liability", only one relevant character. So much was implied, but the fundamental

1 (1963) 110 CLR 264, 272.
2 Above p264.
3 Discussed further below p290.
5 (1960) 104 CLR 529, 559.
6 Above p250.
point was not discussed or justified. From their behaviour in other cases it would seem that not all of the judges who in Bolton adopted this passage from Dennis Hotels were willing to accept such a principle of characterisation when the issue was raised directly. Barwick CJ repudiated the assumption when the opportunity presented itself.

**Browns Transport v Kropp 1958**

Decided after Hughes and Vale and before Bolton v Madsen was Browns Transport Pty Ltd v Kropp, the only reported decision where Barwick appeared as counsel to argue s90. A Queensland law prohibited carriage of passengers or goods without a licence. A licence condition was that the carrier pay 20% of gross revenue derived from the carrying on of the licensed carriage.

Barwick QC appeared for one plaintiff transport company, Downs, and Gibbs QC for another, Browns. The plaintiffs' licences to carry goods had been cancelled because the licence fees had not been paid. The plaintiffs objected that the fees breached s90.

Barwick asked the Court to give s90 a wide application so as to give effect to the policy of s90 "of having one single fiscal policy in relation to dealings in commodities, from the point of time of importation or manufacture down to consumption". Barwick proposed to the Court that, as production was no longer "the focal point of excise", the concentration should be on price to the consumer as "It is the price to the consumer that will be the factor that will alter

1 (1958) 100 CLR 117. Barwick had appeared in Hughes and Vale Ltd v New South Wales on its appeal to the Privy Council but the appeal only involved s92. (1954 ) 93 CLR 1; [1955] AG 241.

2 (1958) 100 CLR 117, 124.
or impinge upon the federal policy...". Barwick proposed this specific test to reveal whether a tax was "on" goods.

"The tax will be in relation to the commodity if it is in respect of an act or dealing with a commodity, which act or dealing tends to affect the ultimate price to the consumer in a specific way." Barwick was asking the Court to adopt a test involving the likely practical effect of the law. If the Court had accepted the submission, then it would not have been too difficult for the court to take another step and conclude that a tax on the carriage of goods would tend to affect "the ultimate price to the consumer".

The submission was rather ambitious but the effect of Parton had not yet been appraised (apart from the shallow discussion in Hughes and Vale). The submission did have the problems of any argument based on the purpose of s90. On the other hand the submission had its strengths. The idea of suggesting that the test, familiar from the tests for "indirectness", "tendency to be passed on to the consumer", was calculated to give effect to the policy of s90 was a clever piece of advocacy to dress up a submission which was basically that the Court should accept "indirectness" as being sufficient to indicate that a duty was an excise. Clever, but as it turned out, not clever enough. Barwick must have been a little disappointed when counsel defending the tax was stopped by the Court, indicating clearly that Barwick's submission had been rejected outright.

1 Id. 124.
2 Id. 125. This formula incorporates "definition" as well.
3 Above p235.
4 Above pp203ff.
5 (1958) 100 CLR 117, 126.
In a joint judgment, the Court of Dixon CJ, McTiernan, Fullagar, Kitto, Taylor and Windeyer JJ rejected Barwick's submission. Even if this tax was an indirect tax, a matter not decided, it was in their Honours' opinion not "'upon' goods, or 'in respect of' goods, or 'in relation to' goods." The decision could have been based on the reasoning of Dixon CJ in Hughes and Vale which was to be adopted in Bolton v Madsen. The reasons given in Kropp, however, were:

"Here the exaction is imposed without mention of, and without regard to, any commodity or class of commodities. The person taxed is not taxed by reference to, or by reason of, any relation between himself and any commodity as producer, manufacturer, processor, seller or purchaser. The taxes which s35(2) authorises, calculated on one or more of a variety of bases, are payable whether the person taxed carries goods or passengers, and, if he carries goods, whatever may be the nature of the goods carried. The exaction is in truth, as it purports to be, simply a fee payable as a condition of a right to carry on a business. 'A tax imposed upon a person filling a particular description or engaged in a given pursuit does not amount to an excise': Matthews v Chicory Marketing Board (1938) 60 CLR 263, 300 [per Dixon J] Cf Parton v Milk Board (Vic) (1949) 80 CLR 229, 259 [per Dixon J]."

This was no doubt intended to discredit completely Barwick's submission. The Court may, however, have weakened the force of the decision as a precedent. It is difficult to tell which of the conclusions in the list relate to accepted grounds for invalidity and which relate to grounds which may or may not indicate invalidity but which are not made out anyway. The passage seems to suggest that only taxes which taxed particular classes of goods would be "on" goods and that taxes which taxed all goods generally would not be classified as taxes "on" goods. If that was the basis for decision then the Matthews tax which was only concerned with one commodity was distinguishable. Such a notion is, however, quite extraordinary for

1 Id. 129.
2 Above p266.
3 Despite the submission of Gibbs QC Id. 123.
4 The plaintiffs' licences had been to carry goods (not persons).
5 (1958) 100 CLR 117, 129-130.
it implies that the indicator of invalidity is not the tendency or capacity of the State tax to impinge on the use by the Commonwealth of tools of fiscal policy but rather the intention of the State to implement its own fiscal policy in relation to particular commodities. Though that idea was to receive some support in Anderson's case\(^1\) it was to be ignored in Chamberlain\(^2\) by both majority and dissenting judges concerned with a tax on receipts of payments for all goods.

Barwick as Chief Justice has been involved in cases which have raised again the basic issues underlying the Matthews, Kropp and Bolton decisions. Neither he alone nor the Courts of which he has been part have taken the opportunities to resolve the apparent conflict between Matthews on one hand and Kropp and Bolton on the other.

**Andersons Pty Ltd v Victoria** 1964

This was for Barwick as Chief Justice, his first case involving a point of constitutional law.\(^3\) In issue were provisions of the Victorian Stamps Act of 1958 taxing credit purchase, hire purchase and rental agreements which were defined to cover a range of credit arrangements associated with the transfer of property in goods.\(^4\) The Act required such agreements to be put in writing and stamped. The stamp duty payable on such instruments was quantified by reference to the amount of "credit" extended to the purchaser/bailee of the goods under the agreement.

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1 Below pp270ff.

2 Below pp281ff.

3 (1964) 111 CLR 353.

4 "Credit purchase agreement" was defined to encompass certain kinds of purchases of goods. "Hire purchase agreement" was defined to mean agreements for the bailment of goods with provision for rental payments to be credited to the bailee when and if he purchased the bailed goods. "Rental agreement" was defined to mean an agreement whereby after a specified number of payments, a bailee could continue the bailment indefinitely making only nominal further payment or without making any further payment.
There were two basic steps to the main argument of Bowen QC who was challenging the tax. Credit and hire purchase agreements were methods of distributing goods. The law operated by reference to the making of such agreements. Therefore, the tax was, in Bowen's submission, "on" distribution of goods. Surprisingly Bowen refuted the need for there to be a quantitative link between the tax and the goods. As reported, Bowen did not put any submission in the alternative to demonstrate a quantitative link if the Court thought one necessary. It could have been argued for example that there was a natural relation between the amount of credit extended (which was taxed) and the value of the goods. The amount of "credit" under an agreement naturally can not exceed the purchase price of the goods. If such an argument had been put, Barwick CJ might have felt inclined to comment on Bolton. There the tax was quantified by reference to load capacity which set the upper limit for goods that could be distributed. Here the relationship was reversed. The price of the goods set the upper limit for the activity taxed.

The Court of Barwick CJ, McTiernan, Kitto, Taylor, Menzies, Windeyer and Owen JJ unanimously rejected the challenge. A diversity of reasons were stated. The comparison of the judgments of Barwick CJ and Kitto J (with whom Taylor J basically agreed) provides the real interest in the case. Each tended to adopt the tone of counsel putting submissions to the other as judge.

Barwick CJ commenced his discussion by referring to Kitto J's Dennis Hotels formula endorsed by the Court of six in Bolton v Madsen. Barwick CJ was not only "prepared to adopt" the Kitto formula, he also volunteered that that formula "commended" itself to him (Barwick). The question of whether a particular impost was an

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1 Id. 358. Assisted by inter alia, KA Aicken QC.
2 Id. 359.
3 (1963) 110 CLR 264, 273. Above p266.
4 (1964) 111 CLR 353, 364.
excise was to be resolved by that established formula rather than by any attempt to substitute "supposed synonymous expressions". Kitto J had probably been wooed by too many "respectful" counsel to be lulled by this demure and deferential adoption of his formula by Barwick CJ.

On the other side, Kitto J attempted to justify his formula by reference to the purpose of s90. "The reason [underlying the formula] is that a duty of excise is, at bottom, a burden on home production or manufacture". Thus taxes on dealings after production were excises because "from the time the goods come into existence the law makes it inherent in their nature, as goods requiring distribution in order to become available to fulfil their purpose, that the tax shall be paid". Next his Honour explained that the relevance of the frequent inquiries into the tendency of the tax to be "passed on", is that such a tendency "reflects back upon the production". This echoed the submission of Barwick QC as he then was in Kropp. Barwick QC had asked the Court in Kropp to accept tendency to affect the price to the consumer as the sole test of validity. Barwick QC had asked the Court to accept that simple test on the basis that all taxes affecting price to consumer would have a practical effect on production. (The submission of Barwick QC in Kropp and the judgment of Kitto J in Anderson both contained the same error. The easier it is for a producer or other distributor to pass the tax on, the less is the effect on production. When all the tax can be passed on there is no effect on production.)

1 Id. 365.
2 Id. 374.
3 Id. 374.
4 Above pp267-268.
Now in **Anderson**, Barwick as Chief Justice set about distancing himself from such an approach. The question was a legal one not a matter of economic theory. The mere fact that the conclusion of law (that a tax was in substance upon the relevant dealing with goods) would satisfy the concern of economic theory (with the effect of excises upon production) did not mean that economic theory was the test of validity.\(^1\) Barwick CJ rejected the possibility of characterising a tax as an excise because "in economic theory or in fact" it was affecting the rate of movement of goods into consumption.\(^2\) "...resort to economic theory or speculation in this fashion should not be had in order to resolve the legal problem as to the essential nature of the impost."\(^3\)

In their decisions that this tax was not an excise, both Barwick CJ and Kitto J talked generally about whether the tax was in substance an excise.\(^4\) Their Honours would probably have been happy to accept as a summary of their conclusions the proposition that the tax was essentially concerned with entering credit transactions. Despite their agreement at that level, there is clear disagreement in the principles of characterisation that they set out.

Kitto J felt the need to paraphrase his own formula approved in **Bolton v Madsen**. In a new attempt to explain what his formula meant and what similar formulas meant when referring to taxes "upon" goods his Honour revealed, for the first time, the assumptions upon which his decision and formula in **Dennis Hotels** were based.

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1 Id. 365.
2 Id. 367.
3 Id. 367–368.
4 Id. 365 per Barwick CJ; 375–376 per Kitto J.
"What is referred to may, I think, be described as a relation consisting in this, that some conduct is selected by the relevant legislation as being a step in the production, manufacture or distribution of goods and in that character is made of the essence of the tax.

A tax must necessarily be made payable by a person; but it is not a duty of excise, unless the criterion of the person's liability is the fact that some act of his possesses the quality of a contribution either to the physical character of goods as subjects of commerce or to the sequence of events which results in their being available, as in the hands of a consumer, to be put to their ultimate purpose."¹

To be "on" goods a tax has to be quantified by reference to a relevant step in the production or distribution of goods. Not only must there be such a reference in the terms of the taxing Act, but also, that reference must constitute the essence of the tax.² A tax can have only one essential character.

Barwick CJ, although decrying attempts to substitute "supposed synonymous expressions"³ for the "definitive exposition"⁴ of Kitto J's formula, was not himself reluctant to paraphrase the formula thus:

"...it ought now to 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 a process of bringing goods into existence or to a consumable state, or of passing them down the line which reaches from the earliest stage in production to the point of receipt by the consumer."⁵

The words "the criterion of liability" did not appear.

Barwick CJ further "explained" what the definitive exposition accepted in Bolton v Madsen meant. Barwick CJ drew a list of factors relevant to the question of whether a tax was in substance upon a relevant step.

¹ (1964) 111 CLR 353, 373-374. Emphasis added. The decision in Dennis Hotels is discussed above pp245ff.

² Also id. 375.

³ Id. 365.

⁴ Id. 364.

⁵ (1964) 111 CLR 353, 364.
...factors which may not be present in every case and which may have different weight or emphasis in different cases. The 'indirectness' of the tax, its immediate entry into the cost of the goods, the proximity of the transaction it taxes to the manufacture or production or movement of the goods into consumption, the form and content of the legislation imposing the tax — all these are included in the relevant considerations."

The disagreement with Kitto J became clearer as Barwick CJ continued. The central question, whether the tax is in substance a tax upon the relevant step, would not in Barwick CJ's opinion necessarily be resolved by the form of the tax or by identifying what according to that form the legislature has made the criterion of its imposition, however important in any particular case these matters may be.

For Kitto J the tax needed both to refer to an essential step in the production or distribution of goods and to be in essence a tax on that essential step. The tax had to be on goods both in form and in substance. Barwick CJ rejected the first requirement. The form of the law was, according to Barwick CJ, just another circumstance going to substance. It was not in itself a separate requirement.

The application by Barwick CJ of his general statements to the tax in question illustrated the shift he was trying to effect. He methodically discussed factors, which were of importance to other judges, as being relevant but not conclusive.

When upholding the tax in Kropp the Court had said

"Here the exaction is imposed without mention of, and without regard to, any commodity or class of commodities."2

Barwick CJ was willing to treat the fact that this tax was not confined to a particular class of goods as a factor relevant3

1 Id. 365.
2 (1958) 100 CLR 117, 129-130.
3 Id. 368.
although not conclusive\(^1\) to the conclusion that this tax was not in substance on excise.

Another factor Barwick CJ thought was relevant, though not conclusive, was the stage of the dealing with the goods at which the duty was exacted. "... the duty is levied at a point after the price of the particular goods or the total of the rental payments to be paid to the consumer has been fixed. In that sense it could be said that the tax is exacted after the goods have passed into consumption and is rated to the amount of payments to be made after they have passed into consumption."\(^2\) The fact that Barwick CJ thought this factor relevant but not conclusive, indicated that he was not treating this as a tax on consumption. He had earlier accepted that a tax on a dealing after receipt by the consumer was not an excise.\(^3\) Lack of a tendency to be passed on, lack of indirectness was also relevant but not conclusive.\(^4\)

Barwick CJ was following the time-honoured judicial traditions of undermining precedent. He adopted the language of "substance" familiar through the judgments and gave it his own meaning. When deciding what the substance of the tax was Barwick CJ looked to the same factors as had been taken into account in earlier decisions. The subtle but important shift was that whereas the decisions hitherto had tended to look at those matters as alternative indicators that a tax was not an excise, Barwick CJ reduced them all to relevant but not conclusive.

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1 Id. 367.
2 Id. 368. In Anderson, both Windeyer and Owen JJ considered that the fact that the tax was not confined to transactions involving particular kinds of goods a relevant if not crucial consideration in their conclusion that the tax was "on" particular kinds of credit transactions. Id. 379 per Windeyer J; 382 per Owen J.
3 Id. 367.
4 Id. 364.
5 Id. 368.
The other key feature of Barwick CJ's approach was that he was making this test of substance the only test. This is to be contrasted with Kitto J's requirement that a tax be an excise both in its terms and in its substance. The introduction by Barwick of this "technique" for accommodating earlier decisions without "overruling" them makes the law unpredictable and uncertain. Any decision made using this formula can be ignored/distinguished by later Courts on the basis that each case depends on the concatenation of all its relevant circumstances.

"all these are considerations of which I do not deny the relevance but no single one of them is to my mind of transcendent value in resolving the question as to the nature of the tax."  

Barwick CJ and Kitto J were to find themselves in opposition in two more cases concerned with s90, the Receipts Tax Cases, before Kitto J left the court in 1970.

The Barwick/Kitto confrontation in the Receipts Tax Cases 1969, 1970

In 1969 and 1970 the High Court decided three cases involving challenges to Western Australian stamp duties legislation. Section 99(2) of the Western Australian Stamp Act required any person receiving any payment of money (with some listed exceptions) to make a stamped receipt. Section 16 and the schedule to the Act imposed a stamp duty on receipts quantified according to the amount acknowledged in the receipt. These provisions had been part of the Stamp Act since it was first enacted in 1922.

In 1966 ss99A and 99C had been added. These sections gave an option to persons otherwise required to make receipts to submit a monthly statement of payments received and make one payment of duty on the month's total of payments received. Another provision had also

1 Id. 368.
been added in 1966. Section 101A provided that where a payment for goods supplied or services rendered in the State by a person therein had been received or made outside the State, payment was deemed to have been received in the State by the person who supplied the goods or rendered the services, and that person was required to issue a receipt subject to usual stamp duty.

The cases which considered these provisions were Associated Steamships Pty Ltd v Western Australia\textsuperscript{1}, Western Australia v Hamersley Iron Pty Ltd [No 1]\textsuperscript{2} and Western Australia v Chamberlain Industries Pty Ltd.\textsuperscript{3} Both Associated Steamships and Hamersley [No 1] were argued and their decisions delivered before Chamberlain was argued. Associated Steamships was argued a month before Hamersley [No 1] but the Associated Steamships judgments were delivered a month after the judgments in Hamersley [No 1]. The point involved in Associated Steamships is, for our purposes, relatively simple and it is convenient to discuss this decision first.

**Associated Steamships 1969**

In this case\textsuperscript{4} the plaintiff was a carrier of goods. The challenge to the tax was based on s92. The plaintiff sought a declaration that s92 prevented the Stamp Act from compelling it to issue and/or pay stamp duty on receipts for money it received under contracts of inter-State carriage and that s92 also prevented the Stamp Act from compelling it to include payments under the optional system and/or pay duty on such payments. (The case is discussed further in the s92 Chapter). No attempt was made to use s90 to

\begin{itemize}
  
  \item 1 (1969) 120 CLR 92.
  
  \item 2 (1969) 120 CLR 42.
  
  \item 3 (1970) 121 CLR 1.
  
  \item 4 (1969) 120 CLR 92.
\end{itemize}
challenge the application of the Stamp Act to its receipts from all carriage of goods. Bolton and Kropp were not directly in point but may have been taken as an indication of the likely reception for any such challenge. The majority, McTiernan, Kitto, Menzies and Windeyer JJ, with Barwick CJ and Owen J dissenting, rejected the s92 challenge.

The well-known formula laid down by the Privy Council in the Bank Nationalisation Case has two aspects to it.¹ A law will only be said to have offended s92 if it both directly affects inter-State trade and, further, can not be said to be merely regulatory. Dixon had developed a theory of “direct” which depended on the terms of the legislation. According to Dixon a law could only be said to be directly on inter-State trade if it was operating by reference to either inter-State stateness or to some fact, event or thing forming an essential attribute of the conception of trade.² Kitto J had supported this Dixon theory of direct. In relation to the facts in Associated Steamships, Kitto J (with the concurrence of Menzies J) considered that although receiving payments might be part of the business of an inter-State trader it was not part of the conception of inter-State trade and the law was therefore not directly on inter-State trade.³

Barwick CJ had frequently attacked Dixon's theory of direct as being too narrow in confining itself to the terms of the law. In this case, however, Barwick CJ argued that even on Dixon's terms this tax was directly on inter-State trade. According to Barwick CJ the

1 Section 92 Chapter.
2 Hospital Provident Fund Pty Ltd v Victoria (1953) 87 CLR 1, 17-18 per Dixon CJ.
3 Id. 109-110. Id. 107 and Windeyer J. Id. 118 the other members of the majority did not rest their decision on Dixon's direct theory. They seemed rather to look to the second leg of the Banking Case test in deciding that this legislation was not, as a matter of degree, so burdensome as to offend s92.
receipt of money as payment for inter-State carriage is part of the conception of inter-State trade. This Act was imposing its liability by reference to the receipt of money and should, according to the Dixon theory of direct, be held to be directly burdening inter-State trade in its application to the plaintiff's receipt of money which was in fact payment for activities of inter-State trade.¹

The relevance of Associated Steamships to our discussion of s90 is in its demonstration of the analogies between the s90 and s92 issues. Barwick CJ, in fact, said that Associated Steamships (s92) and Hamersley [No 1] (s90) involved the same issue. Was a tax on the receipt of payment a tax on the activity for which the payment was made?²

Hamersley [No 1] 1969

In Hamersley [No 1] the Court had to consider the validity of s101A in its application to payments received by Hamersley Iron Pty Ltd.³ The company had received outside the State, payment for iron ore supplied in Western Australia.⁴

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¹ Id. 104. Cf the attitude of Menzies J to receipts given in the course of inter-State trade Australian Coastal Shipping Commission v O'Reilly (1962) 107 CLR 46, 68-69.
² (1969) 120 CLR 92, 104.
³ (1969) 120 CLR 42.
⁴ The question of whether or not the goods had actually been supplied in Western Australia was not gone into. KA Aickin AC, who was challenging the tax himself described delivering into a ship next to a Western Australian wharf as supply in Western Australia. (Id. 44.) With hindsight, in the light of the Seabeds Case (1975) 135 CLR 337 above pp101ff, the taxpayer might have been advantaged if he had looked closely at the facts to see whether or not these supplies were made in Western Australia. One would have thought it would have been a simple matter to arrange the "supply" so that it did not occur in Western Australia.
The Court divided evenly on the question whether s101A could validly apply to those dealings. Barwick CJ, Windeyer and Owen JJ held s101A's application to the money received by the plaintiff outside the State for goods supplied within the State to be a breach of s90. Kitto J, with whom McTiernan J concurred, and Menzies J held that s101A could validly apply to those payments. By virtue of s23 of the Judiciary Act, the opinion of the Chief Justice prevailed in this evenly divided Court. Taylor J, who had also been part of the Court which heard the case, died before judgment was delivered. If Taylor J had lived, the decision would have been a little more authoritative as the judgment delivered by Barwick CJ had, according to Barwick CJ, been prepared by Taylor J as a joint judgment of himself and the Chief Justice. In Hamersley [No 2], Kitto J referred to [No 1] in these terms:

"The decision has no application in this Court as against anyone but the defendant company, because the Court as constituted at the delivery of judgment was equally divided in opinion. Although s23(2) of the Judiciary Act (Cth) enabled an order to be made in the particular case in accordance with the opinion of the Chief Justice it does not make the decision 'a precedent which in this Court has authority': Tasmania v Victoria (1935) 52 CLR 157, 184."

Camberlain's Case 1970

The Court was asked in Western Australia v Chamberlain Industries Pty Ltd to consider the validity of the provisions taxing payments made within the State. It would have tended to a clearer analysis of the issues if the validity of the central provisions taxing payments made within the State had been decided, before the Hamersley [No 1] case decided the validity of the provisions taxing payments.

1 (1969) 120 CLR 42, 48.
2 (1969) 120 CLR 74, 82-83.
4 At the same time the Court heard argument in Victoria v IAC (Wholesale) Pty Ltd in which it was asked to consider the validity of similar Victorian provisions.
made outside the State. Most of the judgments in the Hamersley [No 1] decision concerned with the "incidental" provision s101A seemed to carry assumptions about the validity or invalidity of the central taxing provisions taxing payments within the State.

Given the attitudes to the validity of the central provisions which seemed to be implied from (or expressly stated in) the judgments in Hamersley [No 1] it was to be expected that the outcome of the Chamberlain decision would depend on the vote of the new Justice, Walsh J, appointed to replace Taylor J. Walsh J decided that the central provisions were not offensive to s90, but instead of being able to provide a vote to constitute a majority in favour of validity, Walsh J found himself in the minority. Menzies J who had decided in Hamersley [No 1] that s101A was valid now found the main provisions taxing payments within the State to be invalid. Apart from Menzies J who must be dealt with as a special case¹, the other judges saw the validity of s101A and the validity of the central provisions as related issues and the ensuing discussion draws together the individual views from both cases.

Kitto J in dissent in both Hamersley [No 1] and Chamberlain answered the issue in a manner consistent with his discussion in Anderson. The following propositions emerge. Whether or not a tax is an excise is a question of its essential character. A tax can only have one essential character.² Particular operations in particular circumstances may, as in Dennis Hotels, be called on to illustrate the one true character of the tax³ but the character of the tax is determined in the abstract as an entire exaction⁴.

Under s92 a law may take on different characters in its concrete application to different situations. Kitto J argued, however, that

1 Apendix.
3 Hamersley [No 1] 58.
4 Chamberlain 20-21.
the techniques of characterisation under s92 have no application to s90. Section 92 is concerned with the freedom of individuals and therefore it is relevant to look at the effect of a law on particular individuals. Section 90 is concerned with denying power to the States to impose laws of a certain character.\(^1\) It followed, according to Kitto J, that the character could only be ascertained from the terms of the Act itself and in particular "by ascertaining what criterion of liability the legislation selects".\(^2\)

Furthermore, according to Kitto J, even if a tax expressly operates by reference to a dealing with goods and makes it an element in imposing the liability, the law is only offensive if the tax not only makes a dealing with goods an element in the liability but also makes that element the criterion of liability\(^3\). Thus, within Kitto J's theory, for a tax to constitute an excise it has to operate expressly by reference to a relevant dealing with goods and has to be characterised as being predominantly concerned with goods.

The central taxing provisions (considered in Chamberlain) were valid because of the first aspect of Kitto J's formula. The tax did not operate by reference to any dealing with goods. The incidental provisions S101A (considered in Hamersley [No 1]) did operate by reference to dealings with goods but was valid nevertheless because of the second aspect of Kitto J's formula. Section 101A was, according to Kitto J, substantially concerned with preventing avoidance of the valid central taxing provision.

To state Kitto J's conclusion thus illustrates how his legalism had acquired an air of unreality. The central tax was valid because of its generality, its lack of concern with goods, while another tax was valid even though specifically referring to dealings with goods on the basis that its concern was to prevent avoidance of the central tax "unconcerned" with goods.

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1  _Id._ 20.
2  _Id._ 19-20.
3  _Hamersley [No 1]_ (1969) 120 CLR 42, 63.
The proposition of Kitto J - that a tax can only be an excise if the tax is in its terms confined to relevant dealings with goods - would expose s90 to easy avoidance. Consider for example, the Matthews decision\(^1\) where a tax operating by reference to planting acres with chicory was held to be an excise. That case can be fitted into Kitto J's theory on the basis that planting with chicory has only one character and is an essential step in the production of chicory. According to Kitto J's theory, however, a tax on ploughing acres would not be an excise even in its operation on ploughing as part of a process of planting with chicory.

Kitto J's proposition requiring the tax in its terms be confined to relevant dealings with goods does not, moreover, follow from the fact that s90 is about the States' position vis-a-vis the Commonwealth. The fact that a State law may have a range of operations and effects seems insufficient to redeem it, if in one of its operations it has entered the field made exclusive to the Commonwealth. It could, in that field, be significantly interfering with the effectuation of the Commonwealth "fiscal policy".

Walsh J who joined the Court after the death of Taylor J participated in the second decision, Chamberlain. Walsh J gave strong support to Kitto J. Walsh J argued that unless the Court were to shuffle haphazardly from case to case, the formula adopted in Bolton v Madsen should be accepted and applied.

"Unless this Court sees fit in the future to reconsider the statements of principles in Bolton v Madsen, its decision in this case whether the duty has or has not the character of an excise duty should be based upon the test by which the character of the duty is to be ascertained."\(^2\)

\(^1\) Above pp261ff.

\(^2\) Id. (1970) 121 CLR 1, 35.
The application of the Bolton formula to the legislation involved in Chamberlain was, according to Walsh J put beyond any doubt by the way it was applied in Bolton itself and by its explanation given by its author, Kitto J, in Anderson.¹

Walsh J was in no doubt that the established (Kitto) doctrine of the Court meant that he could only hold a tax to be an excise if it operated by reference to something which was a relevant dealing with goods.² It followed moreover from those considerations and in particular from the decision in Bolton that a provision taxing all activities of particular kind (carriage, receipt of money) did not take on a multiplicity of characters according to the circumstances surrounding that activity. A tax could only have one predominant character - one criterion of liability. A tax operating by reference to carrying capacity was a tax on carrying capacity. A tax operating by reference to the act of receiving money was a tax on the act of receiving money. The fact that in some situations people who paid tax on carrying capacity would be using that capacity of distribute goods on their way to consumers or that in some situations people who paid tax on the act of receiving money would be receiving money as payment for goods sold did not give the taxes in those operations the character of taxes "on" goods.

Walsh J seemed to identify the appropriate alternatives for those members of the Court inclined to hold the tax invalid when he said

"If the distinction is to be regarded as over-refined then the tests which have been adopted for determining whether or not a tax is a duty of excise should be abandoned or modified. If they be accepted, I think that their application to this case required a conclusion that the duty payable ... is not a duty of excise."³

¹ Id. 35-37. Above pp270ff.
² Id. 38.
³ Id. 42.
That is, to hold this tax invalid a judge should either reject the Bolton formula or give good reasons for distinguishing the Bolton decision.

Barwick CJ abandoned the deferential approach that he had displayed in Anderson towards Kitto J and his formula. In Anderson Barwick CJ had said that the formula approved in Bolton v Madsen commended itself to him and no attempts should be made to paraphrase that accepted formula. In Chamberlain, his Honour downgraded and paraphrased the formula thus

"...the plaintiffs were prone to treat the expression 'criterion of liability' as it is found in judicial exposition, as if it were a text with statutory force upon which as a foundation what might be thought to be logical consequences could be built. But useful and often definitive as such generalized expressions may be, they must, in my opinion, always be read and understood against the background of the facts and circumstances of the case in which they were propounded and as conditioned and at times limited by the nature of the arguments which prompted their expression."  

The move was from the undermining activity of Anderson to direct confrontation. Howard criticised Barwick CJ for his attack on the Bolton v Madsen formula. "This was a departure from the unanimous statement of principle in Bolton v Madsen and is much to be regretted because it immediately reopened issues which had appeared to be settled."  

Howard went on to accuse Barwick CJ of introducing subjective questions of degree. In Barwick CJ's defence it needs to be pointed out first, that the "Bolton" formula itself required a subjective decision as to which of a tax's preconditions for liability was its one criterion of liability (the only difference was that, as interpreted by Kitto J, the Bolton formula had the objective limitation that only a condition expressly referred to could be the criterion of liability); secondly, that the Bolton formula did not

1 Id. 15.
2 C Howard, Australian Federal Constitutional Law (2nd ed), 385.
3 Ibid.
guarantee any certainty of result. Most of the judges who were party to the Bolton unanimous joint judgment were also involved in the Dennis Hotels case where Kitto J had introduced the formula. The division of the Court in Dennis Hotels indicated that Kitto J's formula contained no precise criterion of validity. In the Receipts Tax Cases themselves, Taylor, Menzies, Windeyer and Owen JJ, all of whom had been party to the Bolton joint judgment, all disagreed with Kitto J, on the validity of the central taxing provisions; thirdly, the suggestion in Kitto J's formula that each tax can only have one character had not been discussed and was not, therefore really settled at all.

Although he downgraded Kitto J's criterion of liability, Barwick CJ's conclusion that the central taxing provision was invalid did not require a rejection of the criterion of liability test. Barwick CJ found the offence of this tax in its terms, "The language of the statute is clear enough." According to Barwick CJ "the criterion of liability to pay the tax will not be found exclusively in the verbal formulae of the statute ... the basis of liability can only be ascertained by considering not only how the Act is expressed but how, through those expressions, it is intended to and does operate." The generality of the central provision Act imposing tax liability by reference to the receiving of money and the fact that the Act could apply to transactions when no relevant dealing with goods was involved did not prevent the tax having the character of an excise in its application to payments which were in fact payments to a vendor by a purchaser as a discharge of his obligation to the vendor under a contract for the sale of goods.

1 This point is well made in "Current Topics - State Finances and the Excise Power" (1969) 43 ALJ 597.

2 Chamberlain (1970) 121 CLR 1, 16.

3 Id. 15.

4 Id. 16-17. Windeyer and Owen JJ came to the same conclusion. Id. 29, 30, respectively. Although the central taxing provisions were not directly in issue in Hamersley [No 1] Barwick CJ made a similar comment about them in that case (1969) 120 CLR 42, 55-56.
The central tax operated by reference to receipt of money and

"The payment of money is never colourless, nor is the receipt of payment. It is a payment for something or of some definable kind, even if a gift. Each and every payment in each and every category of payments is intended to be subjected to the tax if not within an exemption in the schedule, for all unexempted payments of money received are intended to be taxed."\(^1\)

The point was simple. The Act taxed, operated by reference to, took as its criterion of liability, the receipt of money. The receipt of money is sometimes part of an essential step, sale, in the distribution of goods. This reasoning was adequate to dispose of s101A as well.\(^2\)

It has been argued that Barwick CJ's approach was in conflict with the Fairfax principle of characterisation\(^3\) in that Barwick CJ was going beyond the terms of the Act to characterise the tax.\(^4\) Once one accepted Barwick CJ's assumption that payment of money is part of an essential step in the distribution of goods, then the conclusion of Barwick CJ that these taxes were in their terms operating by reference to something which is a relevant dealing with goods was quite conventional.\(^5\) The Fairfax principle goes to the problem of characterising a law as being within the grant of power in s51(ii). Section 90 involves a problem of characterising a law as encroaching on a forbidden field. The generality of State laws operating within a forbidden field does not save them when s52 and s109 of the

1 (1970) 121 CLR 1, 16.
2 Hammersley [No 1] (1969) 120 CLR 42, 56.
3 Above pp110ff.
5 As for the fact that the tax would only be attracted when and if the sale price was received, Barwick CJ said: "But to say that a tax upon the act by which a purchaser discharged his obligations to a vendor under a contract for the sale of goods is not a tax upon the sale itself is, in my view, to play with words." Hamersley [No 1] (1969) 120 CLR 42, 55.
Constitution are involved. Nor does the generality of a provision save it under most theories of s92.

**Logan Downs 1977**

The Receipts Tax Cases' results, in the end, depended on the majority's interpretation of the criterion of liability formula. The case of Logan Downs in 1977 gave an opportunity for Barwick CJ to develop his general approach to s90 characterisation and gave the Court an opportunity to reconcile the Matthews decision with the Kropp and Bolton decisions.

In *Logan Downs Pty Ltd v Queensland* the High Court had to consider the validity of a tax imposed by the Queensland Stock Act.² The tax was an annual tax imposed and quantified by reference to ownership of "cattle, horses, sheep and swine" whether or not the owner himself had been involved in the "production" or "processing" of the animals and no matter for what purpose the animals were owned. The plaintiff taxpayer, "owned large numbers of sheep and cattle, some pigs and some stock horses. The cattle were kept for fattening and sale of meat, or for breeding and only ultimately for sale for meat; the pigs for fattening for sale, some sows being used for breeding purposes and only ultimately being sold for meat, the sheep were kept for their wool and sooner or later for sale for meat. The horses were used for working the company's properties ..."³

The case could have been taken by the Court as an opportunity to resolve or at least clarify the issues of characterisation. Was

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1. *(1977) 137 CLR 59.*

2. It was argued that the money exacted which was paid into a Fund used to cover the expenses of administering the Act and providing husbandry services was a fee for services and therefore not a tax. *Id.* 60. This argument received no support and the question was whether the tax was an excise.

3. *Id.* 59. In Matthews Dixon J had quoted ((1936) 60 CLR 263, 300-301), apparently with approval, a statement from the Privy Council in Attorney-General for British Columbia v Kingcome Navigation Co [1934] AC 42, 59 to the effect that a dog tax is not an excise.
Matthews to be accepted as deciding that a law operating by reference to something which is not part of a relevant dealing with goods could be held to be an excise because of the likely practical effect on a relevant dealing with goods, of taxing a connected activity? If Matthews did so decide, how was it to be reconciled with the decision in Bolton where a tax imposed by reference to carrying capacity was held not to be an excise despite the connection between carrying capacity and amount that could be distributed?

Did the reconciliation lie in the proviso of Dixon J in Matthews that an excise was a tax affecting goods "as" articles of commerce or manufacture? On this basis Matthews and Bolton could have been reconciled even if it were accepted that they both operated by reference to a relevant dealing with goods. In Bolton another element in the quantification of the tax liability was distance travelled. This could have been taken as an indication that the law was not concerned with the goods as articles of commerce but rather as loads, relevant to wear and tear on roads. Was there some other reconciliation?

The Court in Logan Downs divided three/three with Barwick CJ, Stephen and Mason JJ holding that the tax was an excise in some of its operations and Gibbs, Jacobs and Murphy JJ holding that the tax was not an excise in any of its operations. The Chief Justice's opinion prevailed. The case was heard in Brisbane and was only argued for part of a day. The judgments were not handed down until eight months after the case was argued but do little more than state the protagonist's positions. There is little in the way of thoroughgoing analysis or discussion of the opponents' viewpoint.

1 Abov 262-263.

2 The difficulty with that reconciliation is that the rate also varied according to the kind of goods being carried.

3 PH Lane suggested in his note of Bolton at (1963) 37 ALJ 267 that a possible distinction lay in the concern of s90 with the use of excise duties to encourage and discourage production of goods. In Matthews the effect of the tax was to put a similar tax on all chicory. In Bolton only road transport of wool was taxed. Wool transported by rail, sea or air went untaxed.
Murphy J in the statutory minority in favour of upholding the tax, considered that s90 was only concerned with taxes with a 'tendency to discriminate between goods locally produced and other goods'.\(^1\) His Honour concluded that as the tax applied to all stock in Queensland whether it had been produced in Queensland or not and regardless of where its produce might be used, the tax was inoffensive. No other member of the Court gave any consideration to this theory of s90.

The other two members of the statutory minority, Gibbs and Jacobs JJ approached the problem much as Kitto J might have done. This tax was on ownership. Ownership is not an essential step in production. The tax was therefore not on an essential step in production.\(^2\)

Gibbs J noted that Matthews was only a majority decision\(^3\) and that Bolton v Madsen was a joint judgment of the Court.\(^4\) One suspects that if his Honour had had to choose between the two decisions he would have accepted the joint judgment of the Court in Bolton rather than the mere majority decision in Matthews. Nevertheless his Honour felt no compulsion to choose as he found a way to distinguish the Matthews tax from the Queensland stock tax. In Matthews although the tax was quantified by reference to acres planted rather than amount produced, only people who actually produced something were liable to pay tax. The Queensland stock tax, taxed all stock whether used for produce or not.\(^5\) That is, Gibbs J relied on the generality of the law just as Kitto J had done in his dissent in Chamberlain.

Jacobs J seemed to contemplate that even if only producers had been liable to pay the stock tax, it would still not have been an

\(^1\) (1977) 137 CLR 59, 84.
\(^2\) Id. 64-64 per Gibbs J, id. 82-83 per Jacobs J.
\(^3\) Id. 66.
\(^4\) Id. 63.
\(^5\) Id. 66-67.
This attitude of Jacobs J parallels the reasoning of Kitto J in *Hamersley [No 1]*.

Jacobs J spoke in terms of the "criterion of liability" of the legislation. Gibbs J was willing to acknowledge the existence of a difference of opinion as to the importance of the *Bolton v Madsen* formula. His Honour considered, however, that there was no doubt about the decision in the case which he took to be that a tax was only an excise if it was on a step in the production or distribution of goods. Both Gibbs and Jacobs JJ considered, that mere ownership was not the taking of an essential step.

Gibbs and Jacobs JJ stated flatly that the fact that some of the goods taxed might be on the course from production to consumption, did not make the tax on the ownership of those goods, pro tanto, an excise. Unfortunately the report of argument does not indicate whether the Court was referred to the decision in *Chamberlain*, and Gibbs J and Jacobs J did not refer to that case let alone make any attempt to reconcile it with their approach.

Barwick CJ agreed with the conclusions and reasoning of Mason J who qualified the "criterion of liability" formula away to nothing. Mason J noted there was difficulty of reconciling the reasoning in *Bolton v Madsen* with the decision in *Matthews*. Mason J stated the problem thus. Was *Matthews* to be regarded as an isolated case, an aberration from the principle summarised in the criterion of liability

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1 *Id.* 82-83.
2 Above p280.
3 *Id.* 82.
4 *Id.* 67, 82-83 respectively.
5 Compare the decision, for the purposes of s92, that a law operating by reference to possession of kangaroo skins was held to be (Dixon) directly affecting the activity of inter-State trade in its application to the possession of skins in the course of inter-State trade on the basis that the possession of the skins was inseparable from the activity of inter-State trade in the skins *Fergusson v Stevenson* (1951) 84 CLR 421.
formula of Bolton? His Honour concluded that the cases of Dickenson\(^1\) and Kailis\(^2\) indicated that on the contrary, "the criterion of liability formulated in Bolton v Madsen has limited application...". Chamberlain, which in some of its aspects, seemed to be a more direct confrontation to the criterion of liability formula than would either of the cases cited, is not mentioned by Mason J.

The essential weakness of the "criterion of liability" formula as a universal test could be traced, Mason J argued\(^3\) to some remarks of Dixon J in Matthews. The passage that Mason J quoted\(^4\) contains comments to the effect that the tests for identifying taxes as excises should be applied flexibly so as not to expose s90 to easy evasion. The passage quoted also contains the words

"The tax must bear a close relation to the production or manufacture, the sale or the consumption of goods..."

Mason J used this passage to justify treating the characterisation of a tax as an excise as being a matter of the degree of closeness of relation of the activity taxed to a relevant activity. By adding to that background of vague principle the proposition that the basal concern of s90 is production, Mason J had no difficulty in distinguishing Dennis Hotels and Bolton v Madsen. Those cases involved taxes on goods after production. As the basal concern of s90 is production, the relationship of the tax to production will be more easily perceived when, as in the case before him, the sufficiency of connection with production is sought to be made out directly and not indirectly through a connection with sale or distribution. The reasoning of Mason J and thus vicariously Barwick CJ, can be epitomised as the kind of judgment Menzies J might have delivered if he had had to decide Logan Downs.

1 Below pp295ff.
2 Above pp253ff.
3 (1977) 137 CLR 59, 76-77.
4 (1938) 60 CLR 263, 304.
The other member of the statutory majority, Stephen J combined and applied Matthews and Chamberlain. Citing Matthews - "The tax has at least a 'natural', although not perhaps always a 'necessary' relation to the quantity of the commodities produced and is upon an essential step in production".\(^1\) And "This Court's decision in the Chamberlain Industries Case also disposes of any suggestion that because the tax imposed by the legislation will not in every instance be a duty of excise, for example, in the case of the plaintiff's stock horses, that should lead to the conclusion that it is not in any instance void as imposing a duty of excise: see esp. per Barwick CJ".\(^2\) His Honour ignored the formula in Bolton. The only reference made to the case is in these terms.

"It is a tax directly related to those commodities and imposed at some step in their production before reaching the hands of consumers." Bolton v Madsen (1963) 110 CLR 264, 271.\(^3\)

The use of the word "at" in this way involves a rather large shift in meaning. In Bolton v Madsen, the Court was interested not in the question at what time does the tax happen to be incurred but rather by reference to which event is the tax liability imposed.

This sort of direct application of Matthews and Chamberlain is the kind of thing that we might have expected from Barwick CJ. The fact that Barwick CJ chose to adopt the reasons of Mason J rather than those of Stephen J may mean only that Mason J had circulated his draft and received Barwick CJ's endorsement before Stephen J circulated.

In the result the case settled none of the questions. Gibbs and Jacobs JJ kept alive Kitto J's approach. Mason J with the concurrence of Barwick CJ reverted to the Peterswald definition-tax on production - and adopted the techniques of Menzies J which confine each decision of its own facts and reduce the law to uncertainty and unpredictability.

\(^1\) Id. 70.
\(^2\) Id. 71.
\(^3\) (1977) 137 CLR 59, 70 emphasis added.
(d) **Characterising a tax as being on consumption**

*Dickenson's Arcade 1974*

Some aspects of this case have already been considered¹. Our current interest is in the problem of characterising a tax as being "on" consumption, for, of the Court of six, only McTiernan J considered that consumption taxes are excise duties. Barwick CJ, Menzies, Gibbs, Stephen and Mason JJ all accepted that consumption taxes are not excise duties.² These judges had to consider whether the tax before them was on consumption and therefore valid or on purchase and therefore an invalid excise. The case provided a very unsatisfactory exploration of the possibility for the States to raise revenue using consumption taxes.

The Tasmanian Act and regulations in issue were awkwardly and ambiguously drafted and it is not clear exactly what assumptions the judges were making about the meaning of the legislation and whether indeed, they were all making the same assumptions. The case is as notable for the points and arguments that were not dealt with, either by counsel or the Bench, as for the arguments that were considered.

Section 3 of the Tasmanian Act in issue imposed a tax on the consumption of tobacco. The section required further that the tax be paid within seven days of consumption. The section also referred to the possibility of tax being paid "in respect of" the consumption of tobacco without the tobacco having been consumed.

s3(5) Where the tax has been paid in respect of the consumption of any tobacco and, on application being made to him within three months of that tax being paid, the Commissioner is satisfied that that tobacco has not been, and will not be, consumed, he shall refund the amount of that tax to the person by whom it was paid or, if he has died, his legal personal representative.

² Discussed above p237ff.
There is no explanation on the face of the Act of how a person could pay tax "in respect of the consumption of any tobacco" before that tobacco had been consumed. Section 7 authorised the making of regulations for the collection of the consumption tax and one must look to the regulation to "explain" the parent Act.

Regulation 2 gave an option for payments of tax to be made either to a collector before consumption or to the State Taxation Commissioner after consumption. Regulation 2 was in these terms:

"(1) Subject to sub-regulation (2) of this regulation, payments of tax shall be made to a collector or a person authorized by him to receive payments of tax on his behalf.

(2) Where tobacco is consumed without the tax on the consumption thereof having been paid that tax shall be paid to the Commissioner.

(3) ..."

Regulation 3 of the 1972 Tobacco Regulations empowered the State Taxation Commissioner to appoint collectors. Regulation 4 prohibited the carrying on of a retail tobacco business unless the Commissioner had appointed a person to act as collector of tax for tobacco sold for consumption from those premises.

The power in Regulation 3 to appoint collectors was expressed to be "subject to these regulations". As Regulation 4 dealt in detail with the making of arrangements for people to act as collectors of the tax payable in respect of the consumption of tobacco sold from

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1 Or at least this was the construction of regulation 2 assumed by Aickin QC (id. 183) defending the tax, not challenged by those attacking the tax and assumed by the members of the Court. (If the meaning assumed was intended then the regulation was expressed in a rather roundabout fashion. It seems particularly inapt to say that the obligation in subregulation (1) to do something before consumption was subject to the possibility of payment under sub-regulation (2) which could only happen after consumption.)
particular premises, it would seem to be implied in the regulations that people could only be appointed collectors in relation to particular premises.¹

Regulation 17 provided that where a person was in possession of tobacco, in respect of the consumption of which no tax had been paid, otherwise than for the purpose of sale or delivery to a person for sale, he had to give written notification of that fact to the Commissioner and provide details of the circumstances of his possession.

Barwick CJ held the Act (and thus, also, the regulations) invalid as constituting a tax or purchase and therefore an excise. Mason J held the Act to be a valid consumption tax but the regulations to be ultra vires the Act in that they were attempting to convert the tax into an invalid purchase tax. McTiernan J (who regarded consumption taxes as excise duties) held the Act and its regulation invalid.² These three, Barwick CJ, McTiernan and Mason JJ thus provided a statutory majority holding the regulations (but not the Act) invalid. The minority, Menzies, Gibbs and Stephen JJ, held the Act and the regulations valid.

The resolution of the question in this case - were these payments excise duties - had more to do with the definition of tax than with the principles of characterisation relevant to deciding which taxes are excise duties. The issue was really - were payments made at the time of purchase, taxes. Even though both the Act (s3(5) and the regulations (eg regulation 2) labelled such payments as "taxes" they need not have been so regarded for constitutional purposes. For constitutional purposes a tax is a compulsory exaction of money for public purposes.³

¹ Id. 243 per Mason J.
² Id. 196.
³ Above p219.
Deane QC attacking the legislation came close to the matter when he argued that payments made at the time of purchase were "compulsory exactions". He drew attention to the practical pressures on a purchaser to pay at the point of purchase and thus avoid the inconvenience of sending the information required by reg 17 and making payment after consumption. The case of Homebush Flour Mills was cited. In that case it was held that practical compulsion is sufficient to constitute the "compulsion" which is part of the definition of taxation. Aickin QC defending the legislation replied only by pointing out that there was no compulsion at law to pay at the point of purchase.

The statutory minority, Menzies, Gibbs and Stephen JJ, assumed that the likely practical effect of the regulations was that purchasers would opt to pay the consumption tax at the point of purchase rather than go to the trouble of filling in the forms that regulation 17 required of people taking possession of tobacco without having paid the tax (and of filling in the further papers that regulation 2(3) required for people paying after consumption). For these judges the likely behaviour of purchasers did not change the legal nature of the tax imposed by the Act on consumption, and the regulations, which were merely a convenient mode of collection of a valid tax, did not deprive the tax of its validity. An important point for those judges was that people were not under compulsion by law to pay at the point of purchase.

Only Stephen J tried to reconcile this decision with the Homebush Flour Mills case. Stephen J stated that not all practical compulsion is sufficient to bring Homebush Flour Mills into operation. Stephen J seemed to think that the practical compulsion was only sufficient if

1 Id. 180-181.
3 (1974) 131 CLR 177, 183.
4 Id. 209 per Menzies J, 215 per Gibbs J; 232 per Stephen J.
5 Id. 210 per Menzies J, 224 per Gibbs J, 233 per Stephen J.
the legislature had created the context of laws generating the practical compulsion in a way which was "artificially and purposely onerous". This practical compulsion was not "artificially and purposely onerous". The onerous paperwork which could be avoided by paying at the time of purchase was simply a reasonable way of administering tax on the consumption of this kind of commodity.

A case that could have been called in aid by the defenders of the tax was Moore v Commonwealth. To be tax an exaction must be "for public purposes". If a payment is not "for public purposes" then even if it is to government and even if it is a compulsory exaction, it is not a tax. In Moore v The Commonwealth Dixon, Webb, Fullagar and Kitto JJ held that an exaction which was to be applied to discharge future tax liability and future provisional tax liability with any excess to be returned to the "taxpayer" was not an exaction for public purposes and therefore was not a tax. That decision would have seemed relevant to the situation in Dickenson as support for the minority's implicit position that payments made at the time of purchase were not themselves taxes but merely payments in anticipation of a tax liability likely to be incurred in the future.

The reasoning given by Mason J to support his conclusion that the regulations were attempting to turn the Act's valid consumption tax into a purchase tax was uncharacteristically weak. His Honour seemed to say no more than that the fact that under the regulations money was paid at the time of purchase made it a tax on purchase. It can probably be inferred that His Honour meant that the money was being exacted under practical compulsion at the point of purchase and that practical compulsion is sufficient to constitute the compulsion in the definition of tax. Supportable as such a position might be by

1 Id. 233.
2 Id. 233-234.
3 (1951) 82 CLR 547. Appendix.
4 Id. 243.
reference to Homebush Flour Mills, it fails to answer the Moore v Commonwealth point – not all compulsory exactions are taxes. The defenders of the legislation only had to decide that one element of the definition of tax was absent (at the time of purchase). To hold the payment was a tax (on purchase) Mason J needed to find that all the elements of tax were present (at purchase).

Mason J did note that the tax was calculated by reference "to the retail sale price".\(^1\) This was not apparently the key to the offence of the regulations as the provision bringing retail price into the calculation of the tax liability was contained in s6 of the Act and Mason J held the Act valid.\(^2\)

Barwick CJ repeated propositions which he had introduced in earlier cases – especially Anderson and Chamberlain.

"The question whether a statute imposes a duty of excise is a matter of substance in which its intended operation as well as its form is of importance."\(^3\)

None of Barwick CJ's decisions under s90 had depended on going beyond the terms of the suspect law and in the event he claimed not to have to go beyond the meaning of this legislation to hold it invalid.

Barwick CJ found whimsical visions of the circumstances in which people consume tobacco "crowding in upon his mind"\(^4\) What of the elderly gentleman in the park who was given some tobacco? Did the Act intend to tax his consumption? Surely not. Barwick CJ stated flatly that, whatever the Act said, he could not believe that it intended to

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1 Id. 243.
2 Section 3 of the Act imposed the consumption tax as a percentage of the value of tobacco consumed. Section6 (1) provided that the value of tobacco should be deemed to be "the price at which tobacco of that kind ... is ordinarily sold by retail".
3 Id. 186.
4 Id. 191.
tax anyone but purchasers.\(^1\) Furthermore, his Honour continued, it would be so difficult and uneconomical to collect other than at the point of purchase, that the Act must be understood as intending that the only tax collected should be tax collected in the way provided for in the regulation - from the purchaser by the addition of the tax to the purchase price.\(^2\)

Barwick CJ reduced his conclusion to conventional language.

"Upon its proper construction, the Act imposes a tax not upon consumption of tobacco in any and all circumstances by any person, but only upon the consumption by or at the instance of a purchaser of tobacco purchased by retail."\(^3\)

That is, Barwick CJ claimed that he was not resting the invalidity of the tax on the practical effect of a law inoffensive in its terms. The law was, according to Barwick CJ, offensive in its terms (albeit in its implied terms) and the only difference between Barwick CJ and the statutory minority was, on this approach, in their understanding of what the Act meant.

Barwick CJ had said at the outset that the Court must look to the "intended operation" as well as the "form" of the legislation. If he merely meant by this that one must look to the implied terms as well as the express terms of the legislation then his judgment is quite unremarkable. Surely even Kitto J would have accepted that proposition.

Barwick CJ's claim to orthodoxy was, however, an unjustified claim. Or to put it in his words, despite the orthodox "form" of his reasoning, the "substance" of his reasoning was quite unorthodox. Barwick CJ was claiming to rest his conclusion on the construction of the legislation. That conclusion was based, however, on a discussion of "intended operation" a phrase which Barwick CJ was using in a manner calculated to deceive the unwary.

\(^1\) Id. 192.
\(^2\) Id. 193.
\(^3\) Id. 193.
The course that his Honour took, involved the following misleading use of the words "intended operation". It is an orthodox proposition that when one looks for the "intention" of legislation, one is concerned with the rights and obligations created by the legislation. The word "operation" is also usually used, in reference to legislation, to mean the rights and obligations created by the legislation. There was, therefore, nothing unorthodox in Barwick CJ describing an inquiry into the "intended operation" of legislation as an exercise in construction. The shift however, came when he equated the "intention" of the legislation with the practical effect that Parliament expected the legislation would have. That is, his Honour seemed to equate the practical effect expected by the legislature with the legal rights and obligations intended by the legislature. These are two very different things. The mere fact that the Court might be able to decide that Parliament would have realised the difficulties in collecting from consumers after consumption is in no way conclusive that Parliament did not, nevertheless, "intend" to impose a tax liability on consumption.

The kind of "intended operation" that Barwick CJ is talking about seems to have an ancestor in Canadian indirectness and its adoption of JS Mill's definition of indirectness.

"Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another, such are the excise or customs." 2

In the context of applying that test, the character of indirectness was determined not by the "intended operation" in the sense of the rights and obligations created by a law, but rather by the "intended operation" in the sense of the practical effect that the legislature contemplated would flow from the rights and obligations it created by its law.

1 There were, indeed, strong arguments available on which one could have attacked the legislation in terms of the rights and obligations it created. See Appendix. Barwick CJ did not, however, advert to those specifics.

2 Above p226.
The general policy of the High Court has been to avoid making the motives of Parliament the criterion of validity. If Barwick CJ wanted to introduce Parliamentary motives as a relevant inquiry then it would, with respect, have been more appropriate to do so by direct statement rather than by using orthodox terms with an altered meaning. If his Honour wished to make practical effect of the law its criterion of validity then again it would have seemed more appropriate to say what he was doing openly. It would also seem somewhat incongruous for Barwick CJ to adopt techniques similar to those used in the Canadian context when he had agreed¹ to severing the linking of (Australian) excise and (Canadian) indirectness.

D – Conclusions of s90 Chapter

Barwick CJ huffed and puffed about protecting s90 and not allowing it to be easily evaded. Against his own criterion of "protecting" s90, his performance was, however, patchy.

Barwick CJ was part of the majority in Chamberlain holding that a Stamp Act applying to all receipts of money (except those expressly exempted) was prevented by s90 from applying to payments received by the plaintiff for the supply of goods. Some may regard that victory as particularly significant given that the majority included Menzies J. Menzies J had previously stated his lack of enthusiasm for the extension of "excise" made by the Parton decision and had upheld taxes on receipts in Hamersley [No 1]. There is no indication, however, that Menzies J's vote for invalidity in Chamberlain was attributable to the forcefulness of Barwick CJ's reasoning.

There are some indications that Barwick CJ himself did not regard the Chamberlain decision as establishing any important basal principle of s90. In the Logan Downs decision when Chamberlain seemed to be in point, Barwick CJ, although part of the statutory majority holding the tax invalid, did not rely on Chamberlain. Barwick CJ's enthusiasm in Chamberlain for invalidating the tax involved may indeed be

¹ Above p229ff.
attributable to the analogy that he drew between the respective effects of s90 and s92 on the tax question. Around the same time as Chamberlain was decided, Barwick CJ was in the minority when the same legislation was held to be compatible with s92.

Barwick CJ was also part of the statutory majority in Dickenson's Arcade holding regulations associated with collecting a tax on consumption to be offensive to s90. Again this was hardly a Barwick victory. Apart from the fact that the Court split three three, Barwick CJ in no way dominated the other members of the statutory majority, McTiernan and Mason JJ. McTiernan J in fact was, on this occasion, more resolute that Barwick CJ in protecting s90. McTiernan J held that there was no reason for exempting consumption taxes from s90. Despite the absence of any theory for exempting consumption taxes and despite the absence of any decision exempting consumption taxes Barwick CJ bowed to the "weight" of dicta and accepted that exemption. His Honour compensated to some degree by going on to find the tax before him, despite the generality of its terms, only intended to apply to purchasers and was therefore an invalid tax on purchase. This conclusion was narrowly based on the nature of tobacco and presents no general threat by Barwick CJ to consumption taxes. Even in that, Barwick CJ failed to carry the third member of the majority, Mason J. Mason J considered the Act imposing the tax to be what it purported to be, a tax on consumption and therefore exempt from s90. Mason J considered that the regulations providing for collection were invalid because they turned the (valid) consumption tax into an invalid tax on purchase.

Barwick CJ's lack of resolution was of greatest significance in the area of time-lagged taxes. The first time that any significance had been attached to a time-lag in a tax was in the Dennis Hotels decision. In that case four of the seven judges involved had held the annual liquor licence fee which was calculated by reference to purchases for sale on the licensed premises made in an earlier period not to be an excise. The majority was comprised of Fullagar, Kitto,
Taylor and Menzies JJ. Fullagar J did not rely on the time-lag at all. Kitto, Taylor and Menzies JJ did think the time-lag significant. Kitto and Taylor JJ in particular, however, made it plain that they considered the time-lag just another factor indicating that the fee was in substance part of the traditional framework for regulating liquor outlets. Their Honours would have also upheld the temporary licence which was not time-lagged. Their reasoning depended very much on the special nature of liquor. In HC Sleigh Jacobs J drew attention to that aspect of the majority reasoning in Dennis Hotels but found himself the only member of the Court willing to distinguish and confine Dennis Hotels on that basis. Barwick CJ had, on the authority of Dennis Hotels, already accepted the time-lagged tax on retail sale of tobacco in Dickenson's Arcade and accepted the time-lagged tax on wholesale of petrol in HC Sleigh.

Barwick CJ also gave no support to the possibility for confining Dennis Hotels suggested by the Kailis decision invalidating a time-lagged tax on acquisition of fish for processing. In that case Mason J expressly distinguished Dennis Hotels on the basis that the Kailis fee was imposed on the production stage. Menzies J did not expressly distinguish Dennis Hotels on that basis but held this tax to be an excise despite the time-lag. The clear inference is that Menzies J considered time-lagging just another factor to be considered in his inquiry of whether a tax was in substance remote from or on production. Barwick CJ was not involved in Kailis. When in HC Sleigh Mason J himself distinguished the tax in issue, a time-lagged tax on wholesalers' turnover, from Kailis on the basis that it was not on production, Barwick CJ simply treated the case as being covered by Dennis Hotels. Allowing time-lagged taxes, as Barwick CJ did, allows s90 to be set at nought in relation to State taxation of any commodity which in its nature tends to be sold by continuing businesses.

And what of Barwick CJ's contribution to providing a theoretical framework for s90? He stated a willingness to look to the purpose of s90 at three levels. First in defining with which dealings with
goods s90 is concerned. Secondly in characterising taxes as being on relevant dealings. Thirdly, to find an offence to s90 in a law's practical effect.

Barwick CJ's theory can perhaps be drawn together thus. A tax will constitute an excise duty if it is imposed by reference to something which is an essential step, or is part of an essential step in the production, distribution or movement of goods into consumption. (Taxes on consumption are tolerated out of deference to the views of others.) A tax can have more than one character arising from its different conditions of liability. A tax can also have more than one character arising from the distributive operations of one condition of validity. Barwick CJ also threatened to invalidate taxes (query any law) which even if not an excise within the tests already stated has the same practical effect as an excise. Barwick CJ claimed not to have needed to rest any decision on the basis of its practical effect though he seems, despite his protestations, to have been doing so in Dickenson's Arcade.

Barwick CJ's theory should be contrasted with Kitto J's and Menzies J's approaches. For Kitto J a tax could only be an excise if it expressly referred to an essential step in production, distribution or movement into consumption and the law was concerned with that step as a step in manufacture or commercial dealing. A tax could only have one character. Thus, however many conditions precedent to liability a tax had, only one condition could be the criterion of liability giving the tax its one character. Furthermore, a tax could not be given different characters in the distributive operations of one condition of liability. In comparison with Barwick CJ, Kitto J put a premium on drafting ingenuity and leaves s90 with little scope.

For Menzies J the question was not whether the tax was on any dealing from production through to the movement of the goods into consumption but solely whether the tax was on production. This is a question of degree, fact and substance. Whereas Kitto J put an
emphasis on the form of the legislation and thus on drafting ingenuity, Menzies J looked at all the relevant circumstances of the case and thus introduced unpredictability. Barwick CJ's formula tended to be in between the Kitto and Menzies' theories until Logan Downs when Barwick CJ agreed with the judgment of Mason J which adopted Menzies J' theory.

The table of voting patterns on s90 issues set out in an Appendix shows the voting behaviour in cases involving the compatibility of taxes with s90 when Barwick CJ was part of the Court. The sample is quite small and no clear inferences can be drawn from it. The following points are worth mentioning.

Barwick CJ was in the majority in the conclusion for each of the eight taxes considered. Of the six occasions when the Court divided, it was evenly split on three occasions with Barwick CJ's casting vote as Chief Justice deciding those cases. On another occasion Barwick CJ's vote provided the majority for a four/three decision. That is to say, of the six occasions when the Court divided, Barwick's vote determined the resolution of the case on four occasions. In the other two cases when the Court divided McTiernan J was the lone dissident in one and Jacobs J the lone dissident in the other. On each of these two occasions the lone dissident would have held invalid a tax which the majority (including Barwick CJ) accepted.

Windeyer, Owen and Mason JJ who each sat with Barwick CJ on four cases involving s90 challenges agreed with Barwick CJ on each occasion. The bare figures do not indicate that any of Barwick CJ's brethren had had a clear cut propensity to disagree with him. On each occasion when either Kitto, Menzies, Walsh, Gibbs, Stephen or Murphy JJ disagreed with Barwick CJ, that judge was in favour of upholding a tax that Barwick CJ considered invalid. These figures reveal that Barwick CJ has been slightly more inclined to hold taxes offensive to s90 than have the other judges involved. The figures do not, however, mark Barwick CJ as an extremist. For example, he not only disagreed
with McTiernan J and Jacobs J in holding invalid taxes that they considered valid, but also in holding valid, taxes that they considered invalid.

The most significant feature of this outline of voting behaviour remains the extraordinary division of the Court into four against three in one case and three against three in three cases. That division is symptomatic of the failure of the Court not only to resolve but also to analyse, fundamental issues.

The confusion within the Court generally and the key to Barwick CJ's lack of resolution in defending the purpose of s90 and the related vagueness of his position on a theory of s90 may ultimately be the aspect of s90 discussed at the start of this chapter. It is not at all clear exactly why the Founders prohibited the imposition of excise duties, and it is quite clear that the presence of the word "excise" in s90 was not a particularly logical basis for a division of power over economic management.
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N - Definition of inter-State trade - the Direct/Indirect Issue. Summary

O - Section 92 - The overview of Barwick's behaviour
Section 92 is the most frequently litigated provision of the Constitution. It provides -

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.
...

(The Section also contains transitional provisions relating to customs duties on goods imported before the imposition of uniform duties of customs.)

The key to the difficulty of s90 has been that its specific provisions do not readily fulfil any of the purposes which have been suggested as underlying or "explaining" s90. The essential difficulty of s92 is its generality. Section 92's language is general enough (and incomplete enough) to be filled out by reference to any of the purposes which have been put forward as underlying the section.

A. Section 92's issues

On the face of s92 two main inquiries present.

What kind of freedom is guaranteed to "trade, commerce and intercourse among the States"? and

What is "trade, commerce and intercourse among the States"?
If it is added that it was early established as part of the answer to the first inquiry that s92 was intended to give freedom from certain kinds of government action\(^1\) then the third main level of inquiry arises.

When will legislative or executive action be said to be affecting "trade, commerce and intercourse among the States"?

Perceptions of the purpose of s92 have most relevance to the first constructional issue – the kind of freedom guaranteed by s92. There has been disagreement amongst the Judiciary about the purpose of s92. If the High Court were to look to the evidence of the Convention Debates then I agree with Beasley that it would find that that evidence indicates that s92 was intended to establish free trade between the States.\(^2\) The High Court has hitherto denied itself access to such material to solve the constructional issues of s92.

The three constructional issues interact to determine the reach of s92. It is not possible to understand a particular judge's position in relation to s92 without knowing his position in relation to each of the three issues. In some formulations which have been proposed over the years the inquiries, especially the first and third inquiries, merge. The judicial options for each inquiry are now briefly outlined.

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1. In *Pilkington v Frank Hammond Pty Ltd* (1974) 131 CLR 124, 198-199 (Emphasis added) Jacobs J suggested that s92 might control the actions of private citizens as well as governments when he said. "In particular s92 created not only the economic but also the social entity. No act of legislature, executive, corporation or individual was, after imposition of uniform duties of customs, to be able to fragment the newly created Commonwealth in its economic and social aspects." See also *Duncan's Case* (1916) 22 CLR 556, 619 per Isaacs J.

2. Appendix
(1) What kind of freedom is s92 guaranteeing?

This is the most difficult issue and the one that takes the Court furthest from traditional legal formulae and techniques and more into political and philosophical concepts.

The main alternatives are -

1 Freedom from pecuniary imposts. There is a case for this interpretation but it has had little support. In Duncan v Queensland Gavan Duffy and Rich JJ acknowledged the strength of the arguments supporting this interpretation but accepted the rejection of this interpretation by their brethren who had been members of the Constitution Drafting Conventions. This narrow theory seemed to be defunct until Murphy J adopted it with the further limitation that only discriminatory financial imposts offended s92.

2 Free Trade. For economists the expression free trade is a term of art which connotes a freedom from protectionist action. Against this background s92 can be understood to

1 (1916) 22 CLR 556, 639.
2 In argument in James v Commonwealth (1936) 55 CLR 1, 26 RG Menzies confessed that if the matter were free from authority he would support this narrow notion of s92's freedom. Lord Wright of Durley argued for the adoption of this interpretation in "Section 92-A Problem Piece" (1954) 1 SLR 145.
4 It is theoretically possible that a burden could be imposed on an inter-State aspect of a trading activity without that having a protectionist effect. For example, a tax on the introduction to a State of commodities which have no local competitors, ex hypothesi, provides no protection for local producers. Such examples are rare. Even a Tasmanian tax on pineapples provides protection albeit difficult to detect, for the foodstuffs which Taswegians substitute for pineapples. It is, therefore, reasonable to equate free trade with a freedom from interferences conditioned on the connection of an activity with more than one State.
be declaring that trade commerce and intercourse among the States shall be absolutely free of control imposed on such activities by reference to their connection with more than one State, that is, free of action discriminating against inter-State activities.

This interpretation received the support of Griffith CJ in *Duncan v Queensland*\(^1\) and Gavan Duffy J in *W & A McArthur Ltd v Queensland*\(^2\) and of Attorney-General Evatt in his submissions to the Privy Council in the *Bank Nationalisation Case*.\(^3\) As a Justice of the High Court Evatt also talked about free trade but gave it a different meaning to that set out here.\(^4\)

3 **Freedom from State Action.** The United States Supreme Court has drawn from the existence of the Congress's commerce power an implication that inter-State trade is free of State laws. This implication is justified by the reference to the national need for uniformity of economic regulation. (This implied principle of national uniformity is not absolute, however, and can be offset by a sufficient State interest.)\(^5\)

There are references throughout the Australian Constitutional Convention Debates to principles of equality or uniformity of trade.\(^6\) Only once has a High Court Justice, Isaacs J in

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1 (1916) 22 CLR 556, 574, 580-581.
2 (1920) 28 CLR 530, 568-569.
4 Below pp318ff.
5 *Cooley v Board of Port Wardens* 12 How 299 (US 1851).
6 S90 Chapter and appendix.
Exp Nelson, expressed the view that s92 frees inter-State trade from all State laws.¹ This view was based on the assumption that s92 did not bind the Commonwealth, an assumption which was rejected by the Privy Council in James v The Commonwealth in 1936.² Of course, to deny to the States power to regulate inter-State trade does not result in national uniformity of economic regulation. It results only in national uniformity in the regulation of inter-State trade. The diversions of trade which might occur from that discrimination between inter- and intra-State trade could well result in a damaging misallocation of the nation's resources.

4 Freedom from all Government control. No judge has ever argued that s92 establishes anarchy.

5 Ordered freedom for individual inter-State traders as individuals/laissez-faire freedom for individual inter-State traders. The fifth and fourteenth amendments to the Constitution of the United States each declare, inter alia, that no person shall be "deprived of life, liberty, or property, without due process of law ..." For a period from the 1890s running well into the twentieth century the United States Supreme Court found in that guarantee of due process, a laissez-faire standard of reasonableness against which both Federal and State controls of trade were measured.³

1 (1928) 42 CLR 209, 224, 242.
2 (1936) 55 CLR 1.
3 Schwartz, Constitutional Law (2nd ed), Chapter 6. PE Nygh, "The Police Power of the States in the United States and Australia", (1967) 2 FL Rev 183, 183-187 discusses the doctrine of Police Power which performed a similar function in relation to State action before the Fourteenth Amendment made the States subject to the due process requirement.
An individual liberty basis for s92 was first set out clearly in the dissenting judgments of Barton and Isaacs JJ in Duncan v Queensland. The individual liberty interpretation was fundamental to the important theories of Dixon and Barwick.

6 Freedom from interferences incompatible with federalism. The federal nature of the document in which s92 appears might support such an approach. The American balance between national and State interests referred to under heading (3) above, is clearly a federal solution. There is, however, no universal definition of federalism and no particular definition of freedom can be said to be inexorably dictated by the federal context. Most would agree that federalism required "free trade" (as defined above), but beyond that there is room for disagreement. Barwick CJ argued that his individual liberty interpretation was dictated by the federal principle of the Constitution.

7 Freedom as defined by precedent. I add this interpretation to make the point that a judge may feel obliged to follow decisions based on a definition of freedom that he does not necessarily accept and may indeed feel obliged to fashion some hybrid definition of freedom to encompass both his own definition and the decided cases.

Precedent may not, of course, uniformly manifest any one particular definition of freedom. A judge committed to "following" the decided cases could easily find himself applying a "definition" of freedom which consists of a collection of unconnected rules.

1 (1916) 22 CLR 556, 592-593 per Barton J; 619-621 per Isaacs J.
2 DJ Rose, "Federal Principles for the Interpretation of s92 of the Constitution" (1972) 46 ALJ 371. The essence of this approach is suggested by KH Bailey, "Inter-State Free Trade" (1932) 6 ALJ 248, 249.
3 Samuels v Readers Digest Assoc Pty Ltd (1969) 120 CLR 1, 14.
I have made the above list to identify what I see as the main possible interpretations of "free". No matter what definition of freedom is adopted it is always open to argue that it is only a prima facie principle which can be displaced by necessity (or some lesser justification.)¹ Some judges, Evatt J and Mason J for example, have spent more time talking about the acceptable bases for interfering with inter-State trade, than they have in identifying s92's prima facie freedom. No definition of freedom is complete until both offensive burden and justifiable interference are indicated.

(ii) What is inter-State trade?

This is, conceptually, the easiest of the three inquiries involving straightforward case by case definition. In its nature it does not involve the development of general principles.

(iii) When will government action be said to be on inter-State trade?

The issues under this heading are manifold. Is the test effect or purpose or both? If the test is "effect", is it only legal effect that is relevant or can practical effect be taken into account as well? If legal effect is the test, is that to be determined solely by asking whether a law operates by reference to something which is part of inter-State trade or is the inquiry into the pith and substance of the law?

If the test is purpose, how is the purpose to be ascertained? If the prima facie test is effect, can government action prima facie offensive because of its effect on inter-State trade be redeemed because of its purpose?

¹ Compare the comments of Stephen J on judicial options in Permewan Wright Consolidated Pty Ltd v Trewhitt (1979) 27 ALR 182, 194-195.
These then are the general issues which interact to determine the reach of s92. On Barwick's entry to the s92 lists as counsel in 1945,¹ the scene was set for a contest between the theory of Dixon J on one side and, on the other side, that of Evatt who had been a justice of the High Court through the 1930's but who was Commonwealth Attorney-General by this stage.²

B. The Theory of Dixon J

The theory of Dixon J owed a great deal to the judgment of Isaacs J (dissenting) in Duncan's case³ and the joint judgment of Knox CJ, Isaacs and Starke JJ in McArthur's case.⁴ In his first s92 case as a member of the High Court⁵, Peanut Board v Rockhampton Harbour Board, Dixon J declared his belief that s92 is concerned with guaranteeing a freedom for the individual from government restraint.⁶ (In so declaring, Dixon J noted the existing

¹ Gratwick v Johnson (1945) 70 CLR 1 Below pp330ff; Airways Case (1945) 71 CLR 29 Below pp333ff.
³ Duncan v Queensland (1916) 22 CLR 556, 605ff.
⁴ W & A McArthur v Queensland (1920) 28 CLR 530, 539ff.
⁵ Shortly before his appointment to the Court in 1929 Dixon had had an opportunity as counsel to address the High Court on s92 when briefed to defend s20 of the South Australian Dried Fruits Act in James v South Australia. He apparently attempted to defend the legislation (and attempted unsuccessfully) solely on the basis of a suggested lack of High Court jurisdiction. (1927) 40 CLR 1, 12, 13.
⁶ (1933) 48 CLR 266, 287.
understanding that the Commonwealth was not bound by s92. When the Privy Council later held in James v The Commonwealth that the Commonwealth was bound by s92, Dixon J did not revise his notion of the kind of freedom guaranteed by s92.

The theory also included a framework which attempted to reduce s92 problems to legalistic almost mechanical inquiries. There were two branches to this theory. According to Dixon J a law would only offend s92 if it operated directly on something which was inter-State trade and it could not be accepted as being merely regulatory.

Dixon J claimed that his formula excluded any inquiry into the purpose of challenged legislation. In relation to the first branch of his framework, Dixon J's claim was undeniably true. For Dixon J, before a law could be held to be directly on inter-State trade, it had to be shown that the law operated in its terms by reference either to the inter-State connection or to something which was part of trade (or intercourse). Thus a law which operated by reference to movement would be directly on inter-State trade as movement is within the concept of trade. Thus also, a law which operated by reference to the inter-State origin of goods would be directly on inter-State trade. By contrast a law operating by reference to production was not directly on inter-State trade because production precedes trade.

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1 Id. 286.
2 (1936) 55 CLR 1.
3 Although Dixon J's first s92 decision Peanut Board v Rockhampton Harbour Board (1933) 48 CLR 266 did not set out this framework (and is indeed difficult to bring within this framework), its elements were evident in Dixon J's second s92 judgment in Willard v Rawson (1933) 50 CLR 30, 60, 68 and Gilpin's Case (1935) 52 CLR 189, 204-207.
4 Willard v Rawson (1933) 48 CLR 316, 332. Vizzard's Case (1933) 50 CLR 30, 60.
5 Gilpin's Case (1935) 52 CLR 189, 204-206. The relationship between movement and trade and production are discussed further below pp431ff and pp454ff.
On the other hand, an inquiry into purpose seemed inevitably to underlie Dixon J's proposition that a law directly on inter-State trade could be held to be merely regulatory. Dixon J attempted to turn the issue - offensive burden or acceptable regulation - into a legal inquiry by asking whether a burden was imposed "in virtue of" any of the "essential qualities which are connoted by the description 'trade, commerce and intercourse among the States'." Given that this inquiry only commenced once it had been concluded that the law was direct, that is, once it had been concluded that the law was operating (inter alia) by reference to one of the "essential qualities which are connoted by the description 'trade, commerce and intercourse among the States'", it was obvious that Dixon J's test involved a decision as to which of a law's criteria of operation was the dominant one.

C. The theory of Evatt J

Evatt J was emphatic that the purpose of s92 was not to give individuals engaged in inter-State trade immunity from government control, that the principle of s92 was not laissez-faire. Trade could be free even if taken over entirely by the government. According to Evatt J the principle of s92 was to be derived from "the resolve of the people of the pre-Federation colonies to suppress those

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1 Gilpin's Case (1935) 52 CLR 189, 206. Discussed further below pp368ff.
2 Discussed further below pp368ff.
3 R v Vizzard; Ex parte Hill (1933) 50 CLR 30, 71-95 especially 93.
4 Milk Board (NSW) v Metropolitan Cream Pty Ltd (1939) 62 CLR 116, 151.
evils, so conspicuous at the colonial boundaries, which were at once summed up and condemned in the picturesque phrase, 'the barbarism of borderism'. The principle to be derived was the "well-known economic doctrine and ideal", the rule of inter-State free trade.

Evatt J was not using the expression "free trade" to indicate simply an absence of interference with trade based on an inter-State discrimination. While emphasising the concern of s92 with the eradication of discrimination, Evatt J's concept of free trade included freedom from Commonwealth or State action taken for the purpose of restricting all trade. This was a rather strange definition of free trade which Evatt J may have adopted to accommodate inconvenient precedent.

Just as important as Evatt J's vague definition of free trade was his vague subjective purpose approach to characterisation. Evatt J considered that the characterisation of a law as being "on" inter-State trade required an inquiry into the purpose of the provision and a decision as to its substance. His free trade principle interacted with this purpose approach to characterisation to reduce s92 to one issue - was the State or Commonwealth attacking trade (including

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1 Peanut Board v Rockhampton Harbour Board (1933) 48 CLR 266, 298
2 R v Vizzard; Ex parte Hill (1933) 50 CLR 30, 86. Milk Board (NSW) v Metropolitan Cream Pty Ltd (1939) 62 CLR 116, 151
3 Peanut Board v Rockhampton Harbour Board (1933) 48 CLR 266, 295 citing James v Cowan [1932] AC 542; (1932) 47 CLR 386 discussed below pp325-326; Milkboard (NSW) v Metropolitan Cream Pty Ltd (1939) 62 CLR 116, 151 citing James v The Commonwealth discussed below pp326ff.
4 Discussed further below pp320ff.
inter-State trade), or was it directing its action to some other purpose. A law had to be directed against, in the sense of hostile to, the flow of goods inter-State before it could in Evatt J's view, offend s92.¹

D. The State of the Authorities to 1945

Perhaps the most significant case on s92 in the first twenty-five years of the Constitution's operation was the case of W & A McArthur v Queensland.² A majority of the Court tied their conclusion that s92 did not bind the Commonwealth, to an ordered liberty theory of freedom and applied that concept of freedom to prevent State price-fixing legislation applying to inter-State contracts.³

When Evatt J was appointed to the High Court in 1930 he did not repudiate the decision in McArthur directly. In the main he just did not bring the case into his discussions. Its presence as an authority prima facie binding the Court may, however, have acted as some constraint on the interpretation of s92 that he felt able to set out.

1 Peanut Board v Rockhampton Harbour Board (1933) 48 CLR 266, 297-299; R v Vizard Exp Hill (1933) 50 CLR 30, 87-95; see also submissions of Evatt as counsel in Roughley v New South Wales (1928) 42 CLR 162, 170 and Exp Nelson [No 1] (1928) 42 CLR 209, 212-214. PE Nygh comments that this willingness to take account of "legitimate" purpose to offset the effect of a law on inter-State trade brought Evatt's formula very close to the American doctrine of police power. "The Police Power of the States in the United States and Australia" (1967) 2 FL Rev 183, 207-208.

2 (1920) 28 CLR 530.

3 Id. 539ff per Knox CJ, Isaacs and Starke JJ with Rich J concurring 569-570. Higgins J agreed that the Commonwealth was probably not bound by s92 (Id. 563). His Honour also found that the State law offended s92 but did so by a characterisation approach (Id. 565.) Gavan Duffy J dissented because of his free trade interpretation of s92 (Id. 567-568.)
On the other hand although McArthur provided an obstacle to Evatt J's theory of the kind of freedom guaranteed by s92, there was authority for Evatt J's approach to characterisation based on purpose. In Duncan v Queensland\(^1\) decided before McArthur a majority of the Court had upheld a Queensland law prohibiting the removal of cattle from the State. That law might, therefore, have been held to offend a free trade basis of s92 as it was discriminating against inter-State trade. Most of the majority judges considered, however, that the object, the substance, of the law was to reserve stock for the Imperial army, not to restrain inter-State trade, and was therefore valid.\(^2\) (The dissenting judges Barton and Isaacs JJ based their dissents on the proposition that s92 is a guarantee of an ordered freedom for individuals).\(^3\)

Some members of the Court in McArthur considered that they were overruling Duncan.\(^4\) Nevertheless in Roughley v New South Wales a majority held that a State law prohibiting the carrying on without a licence of business as a produce agent, could apply to agents selling goods of inter-State origin.\(^5\) Again the object of the law was a significant factor.\(^6\) Evatt as counsel attacking the law presented

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1 (1916) 22 CLR 556.
2 Id. 581 per Griffith CJ, 641 per Gavan Duffy and Rich JJ, 647 per Powers J. Higgins J also upheld the legislation but not on this basis. Barton and Isaacs JJ dissenting.
3 Id. 592, 596–599 per Barton J, 620 per Isaacs J.
4 (1920) 28 CLR 530, 555–556 per Knox CJ, Isaacs and Starke JJ, 569–570 per Rich J.
6 The object was perceived by Knox CJ for example to be honest dealing. Id 177.
his theory to the Court in his case. Higgins J (with whom Powers J concurred) strongly supported Evatt's approach to characterisation, and expressly endorsed the introduction of the techniques of characterisation used in the Canadian context of mutually exclusive legislative powers, that is, endorsed inquiry into the object of law to reveal its one substance. Drawing as well on the American distinction between laws directly affecting trade and laws indirectly affecting trade, Higgins J reduced the s92 inquiry to the question whether the law was "directly aimed at, in his (Canadian) sense of being "with respect to", trade.\(^3\)

A significant development came with the 1932 Privy Council decision in James v Cowan.\(^4\) Until this decision the 1915 High Court decision in the Wheat Case\(^5\) had been accepted as establishing that compulsory acquisitions of goods could not offend s92. In that case some of the goods acquired had been committed to inter-State trade when acquired\(^6\) and the State Government admitted that its intention was to stop the goods leaving the State.\(^7\) The High Court decision that neither the legislative grant of power to acquire nor its particular executive exercise offended s92 was rested on the proposition that although s92 gave the owner of goods certain freedoms to deal with his goods, s92 had nothing to say about State action affecting ownership of commodities.\(^8\)

\(^1\) Id. 170.
\(^2\) Id. 194.
\(^3\) Id. 199-201.
\(^4\) [1932] AC 542; (1932) 47 CLR 386.
\(^5\) Commonwealth v New South Wales (1915) 20 CLR 54.
\(^6\) Id. 67 per Griffith CJ.
\(^7\) Id. 69.
\(^8\) Id. 68 per Griffith CJ, 80 per Barton J, 100 per Isaacs, 105 per Gavan Duffy J, 107 per Powers J, with Rich J concurring with Gavan Duffy J at 111.
James v Cowan involved the South Australian Dried Fruits Acts of 1924 and 1925. That legislation had earlier been considered by the High Court in James v South Australia.\textsuperscript{1} Section 20 of the legislation had authorised the Board to determine where and in what quantities dried fruit could be sold and the Board had made determinations limiting quantities to be sold within Australia. The High Court had held that that section and the determinations made thereunder offended s92. James v Cowan involved acquisitions made under another section of the legislation, s28.

The High Court accepted that the Wheat Case had put acquisitions beyond the reach of s92.\textsuperscript{2} It therefore made no difference that the purpose of the executive in making this particular acquisition was to force surplus dried fruit off the Australian market so as to avoid a glut, that is to achieve the same result as that of the government action held invalid in James v South Australia.\textsuperscript{3}

On appeal the Privy Council was asked by counsel defending the legislation, in an argument echoing Evatt J's theory, to confine s92 to "interference with inter-State commerce 'as such'" and to accept that "legislation which applied equally to commerce within the State, as well as to inter-State commerce, and was designed for the welfare of the State, was not affected by s92,\textsuperscript{4} and that, therefore, James v South Australia was wrongly decided. The Privy Council expressly reserved the question of the nature of the freedom guaranteed by s92. Their Lordships considered that even on the narrow test proposed s 20 and the determinations thereunder "were directed at inter-State commerce as such" and that therefore James v South Australia was correctly decided.\textsuperscript{5} As for the s 28 acquisitions which were

\begin{itemize}
  \item[1] (1927) 40 CLR 1.
  \item[2] (1930) 43 CLR 386.
  \item[3] Id. 390-391.
  \item[4] [1932] AC 542, 555; (1932) 47 CLR 386, 393.
  \item[5] Ibid.
\end{itemize}
directly in issue - the purpose of "forcing the surplus off the Australian market" necessarily involved first, fixing a limited amount for Australian consumption and then preventing the sale of the balance in Australia. Viewed in this way the "direct object of the exercise of the powers was to interfere with inter-State trade". As the power of acquisition was expressly subject to s92, and this purpose offended s92 even on the narrow view proposed, the acquisitions by the executive were *ultra vires* the Act because of the executive's purpose.\(^1\)

Even though the acquisitions were thus invalidated by the Privy Council, the decision did no harm to Evatt J's proposition as to the kind of freedom guaranteed by s92. As noted the question of the kind of freedom guaranteed was expressly reserved by the Privy Council. The decision was even consistent with a discrimination theory of s92 because the plaintiff, a South Australian producer and buyer, sold most of his fruit inter-State. (Evatt J, however, never sought to explain the decision on that basis.)

On the other hand Evatt J drew positive support for his principles of characterisation from *dicta* in the case. Their Lordships had, strictly speaking, only held particular executive acquisitions to be invalid. Their Lordships did not need to decide whether a *legislative* grant of a power of acquisition was outside the reach of s92 as the Wheat Case suggested. Their Lordships commented, however, that they could not accept that all legislative grants of powers of acquisition were outside the reach of s92. They considered that -

"If the real object of arming the Minister with the power of acquisition is to enable him to place restrictions on inter-State commerce, as opposed to a real object of taking preventive measures against famine or disease and the like, the legislation is as invalid as if the legislature itself had imposed the commercial restrictions."\(^2\)

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1 Id. 558-559; 396-397.
2 Id. 558; 396.
Thus the Privy Council, albeit in dicta had endorsed an inquiry into the "real object" of legislation and had assumed that there would be mutually exclusive categories of laws according to their "real objects."

Evatt J assumed, as did most of his brother judges through the 1930's, that if, as the Privy Council had said, it was permissible to inquire into the real object of legislation to reveal its invalidity, it was also permissible to inquire into legislation's real object to reveal that it was of a character inoffensive to s92. Through the 1930's Evatt J found himself in the majority (and Dixon J found himself in the minority) in a series of cases which came to be known as the Transport Cases, upholding State laws which excluded road hauliers from competing with the State railway systems for carriage (including inter-State carriage). These decisions seemed to be inconsistent with an individual right basis to s92.

On the other side Dixon J found himself in the majority (with Evatt J dissenting, in Peanut Board v Rockhampton Harbour Board holding invalid a compulsory acquisition as part of a Queensland marketing scheme for the entire crop of peanuts in the State. The majority judgments reflected the "individual freedom" theory.

1 Willard v Rawson (1933) 48 CLR 316; R v Vizzard Exp Hill (1933) 50 CLR 30; O Gilpin Ltd v Commissioner for Road Transport and Tramways (NSW) (1935) 52 CLR 189; Bessell v Dayman (1935) 52 CLR 215; the case of Riverina Transport Pty Ltd v Victoria (1937) 57 CLR 327 is also counted as one of the 1930's Transport Cases but needs to be distinguished as having been decided after the Privy Council in James v The Commonwealth had given a general endorsement to Evatt's theory. Below pp329ff.

2 (1933) 48 CLR 266.

3 Id. 277 per Rich J, 285 per Starke J, 287-288 per Dixon J, 312-314 McTiernan J.
How was it then that some of the judges who in Peanut Board endorsed the individual freedom theory of s92, also joined Evatt J in the Transport Cases to uphold laws which prohibited (individual) road hauliers from competing with (government) railways? The key consideration was the general acceptance of Evatt J’s ideas about the appropriate principles for characterising a law as being "on" trade. This approach to characterisation coupled with a distinction between the (protected) activity of inter-State trade and the (unprotected) use of motor vehicles, the mere integers of inter-State trade, provided the basis for the decisions in the Transport Cases. Against this background members of the Court could look at the real object of a law which prohibited the use of vehicles to carry goods (inter-State) and decide that in substance the law was not "on" inter-State movement of goods but was, rather "on" transport co-ordination. Thus by the mid 1930's Evatt J's approach to characterising a law as being on inter-State trade had wide support and negated most of the support that Dixon J could rally for the proposition that s92 was a guarantee of individual liberty.

At this point the Privy Council was again called on to consider s92. The Commonwealth seized dried fruit belonging to James in purported reliance on Commonwealth legislation similar to the South Australian legislation which had been put forward as the basis for the acquisitions held invalid by the Privy Council in James v Cowan. In this case, James v The Commonwealth, the High Court decided that it should regard itself as bound by the dicta in McArthur’s Case to the

1 Above pp319ff.

2 Eg Willard v Rawson (1933) 48 CLR 316, 326 per Starke J; R v Vizzard Exp Hill (1933) 50 CLR 30, 47 per Gavan Duffy J, 51 per Rich J 102 per McTiernan J. Eg Willard v Rawson (1933) 48 CLR 316, 324 per Rich J; O Gilpin Ltd v Commissioner for Road Transport and Tramways (NSW) (1935) 52 CLR 189 especially at 212–213 per Evatt and McTiernan JJ with the general concurrence of Gavan Duffy CJ and Rich J.
effect that the Commonwealth is not bound by s92.\(^1\) James appealed to the Privy Council where it was held that the Commonwealth was bound by s92 and that the Commonwealth's seizures offended s92 just as surely as had the similar (State) acquisitions held invalid in James v Cowan.\(^2\) In the course of so doing the Privy Council seemed to support the significant aspects of Evatt J's framework.\(^3\)

At a general level, one of the Transport Cases, Vizzard, was described by the Privy Council as being the "best example" of "an important series of cases" and reference was made to the "great importance" of the "elaborate judgment of Evatt J in that case".\(^4\) As Dignam commented, the fact that the Privy Council had refused leave to appeal in two transport cases - Duncan and Gilpin - also seemed to indicate that the Privy Council approved of those decisions.\(^5\)

On the question of the kind of freedom guaranteed by s92, the Privy Council's decision was vague but seemed to involve a free trade approach.

\(^1\) (1935) 52 CLR 570. Professor KH Bailey had suggested that Commonwealth "immunity" from s92 be used in this way in "Interstate Free Trade. The Expropriation Power and Section 92" (1933) 7 ALJ 64, 66.

\(^2\) [1936] AC 578; (1936) 55 CLR 1. Robert G. Menzies had lucidly argued the case for holding the Commonwealth bound by s92 in "The Commonwealth in relation to Section 92 of the Constitution" (1927) 1 ALJ 36.

\(^3\) It might be said that the victory was as much Sir Robert Garran's as Evatt J's. The language of the Privy Council in James v Commonwealth reflected that used by Garran in his submission for the Commonwealth intervening in Vizzard's Case (1933) 50 CLR 30, 35-39.

\(^4\) (1936) AC 578, 621; (1936) 55 CLR 1, 50.

"The true criterion seems to be that what is meant is freedom as at the frontier or, to use the words of s 112 in respect of 'goods passing into or out of the State' ... The idea starts with the admitted fact that federation in Australia, was intended (inter alia) to abolish the frontiers between the different States and create one Australia. That conception involved freedom from customs duties, imposts, border prohibitions and restrictions of every kind: the people of Australia were to be free to trade with each other and to pass to and fro among the States without any burden, hindrance or restriction based merely on the fact that they were not members of the same State. But it has become clear ... that such burdens and hindrances may take diverse forms, and indeed appear under various disguises ... In every case it must be a question of fact, whether there is an interference with this freedom of passage."¹

This passage seemed to declare a simple, discrimination basis to s92. Yet earlier their Lordships had said

"Nor does 'free' necessarily connote absence of discrimination between inter-State and intra-State trade. No doubt conditions restrictive of freedom of trade among the States will frequently involve a discrimination; but that is not essential or decisive. An Act may contravene s92 though it operates in restriction both of intra-State and of inter-State trade. A compulsory seizure of goods, such as that in James v Cowan, may include indifferently goods intended for intra-State trade and goods intended for trade among the States."²

It is arguable that this passage was governed by the later discrimination oriented discussion and may merely have been intended to cover the possibility of disguised discrimination. In support of

¹ Id. 630; 58. Emphasis added.
² Id. 628; 56.
this argument is the fact that their Lordships later referred to the Cowan and the Peanut decisions as examples of disguised hindrances. This passage was not, however, an unambiguous statement that discrimination is the ultimate criterion as their Lordships said that the Cowan and Peanut decisions demonstrated that acquisitions could offend if "directed wholly or partially against inter-State trade in the goods."¹

The "individual liberty" theory was indirectly discredited by the Privy Council's criticisms and expression of "doubts" about the correctness of the decision and rejection of much of the reasoning and dicta in McArthur's Case.² Furthermore their Lordship's consideration of the Commonwealth legislation monopolising postal services was consistent with a free trade theory and inconsistent with an "individual liberty" theory. Their Lordships considered that the postal monopoly was consistent with s92 because, inter alia, it merely "canalized" the course of inter-State correspondence.³

On the point of characterisation, their Lordships took the dicta from James v Cowan about the possibility of finding legislation invalid by an inquiry into its "real object", to be the basis for decision in that case.⁴

Thus Dixon J's theory seemed to be defeated and Evatt J's approach seemed to be endorsed in both its essential aspects. There was even the same fuzziness about the possibility of non-discriminatory provisions offending. When in Riverina Transport Pty Ltd v Victoria a challenge was brought to State legislation excluding road hauliers from competition with State railways even Dixon J accepted that

¹ Id. 630; 59. Emphasis added.
² Id. 620, 622, 625, 628-629, 631; 49, 51, 53-54, 56-57, 59.
³ Id. 626; 54.
⁴ Id. 622-623; 51. The decision in Cowan was actually confined to a finding that the executive actions challenged were ultra vires the legislation on which they purported to rely. Above pp323-324.
Vizzard and Gilpin (cases in which he had dissented) must be taken as establishing the validity of the legislation.\textsuperscript{1} Again in 1941 in Andrews v Howell\textsuperscript{2} Dixon J acknowledged the rejection of his own formula. Starke J who had supported Dixon J in some of the cases of the 1930's referred to the matter in Home Benefits Pty Ltd v Crafter.\textsuperscript{3} His Honour considered that James v The Commonwealth and the Transport Cases precluded the adoption of Dixon J's Gilpin test.\textsuperscript{4} Starke J accepted that the established test looked at the true character of the legislation to see at what it was aimed.\textsuperscript{5}

This then was the situation when Barwick first became involved with s92.\textsuperscript{6}

\textbf{E. Barwick and Dixon against Evatt}

In 1945 Barwick already an established silk was briefed in the first s92 case since 1941.\textsuperscript{7} In issue in the case of Gratwick v Johnson\textsuperscript{8} was an order made under the (Commonwealth) National Security (Land Transport) Regulations. The order provided that –

\begin{itemize}
  \item[1] (1937) 57 CLR 327, 362-363
  \item[2] (1941) 64 CLR 255, 279.
  \item[3] (1939) 61 CLR 701.
  \item[4] Id. 718.
  \item[5] Id. 717, 718.
  \item[6] For the outline of Barwick's record as counsel in s92 cases see Appendix.
  \item[7] The 1941 case was Andrews v Howell (1941) 64 CLR 255.
  \item[8] (1945) 70 CLR 1.
\end{itemize}
"Except as otherwise provided in this Order no person shall without a permit travel by rail or by commercial passenger vehicle (a) from any State in the Commonwealth to any other State therein; ... Nothing in this Order shall apply to any person travelling in uniform on defence duty and holding a ticket issued in pursuance of a defence voucher."

Johnson, a young woman had been charged for a breach of this order when, in an attempt to visit her fiance in Western Australia, she had travelled by train from Broken Hill to Perth without a permit. (She had applied for a permit and when it was refused had travelled without one.)

The war years had seen an exploration of the Commonwealth power in s51(vi) to make laws for the defence of the Commonwealth. The exploration of s51(vi) had involved a development and refinement of techniques for assessing laws when "purpose" is the criterion of validity. Against this background it was submitted for Johnson that the order could not be upheld if there was not a sufficient nexus between its operation and the defence of the Commonwealth.¹

This argument was important to the Court's decision that the order could not apply to Johnson. The argument went both to whether the law was supportable under s51(vi) and to whether the law was compatible with s92. If the prohibition on travel had only been to operate when the facilities were in fact required for defence personnel, the

¹ Id. 6. Apparently Maughan, a senior silk, and not Barwick KC, put the case for Johnson.
decision could well have been different.  

The concept of purpose applied in this case was more precise and legalistic than that which had been involved in earlier s92 discussions. This legalistic test was more difficult to satisfy and was eventually to be significant in overturning the actual decisions in the Transport Cases. The major s92 issues were, however, all to be reconsidered before the decisions in the Transport Cases were overruled.

The actual decision in the Gratwick case was reconcilable with Evatt J's concept of freedom because the Order was expressly conditioned on the crossing of State borders. The threat to the Evatt J theory came in dicta from Starke J and Dixon J. Starke J asserted that the Privy Council's favourable statements about Vizzard's Case went no further than to endorse the criticism in Vizzard of the widest statements of freedom set out in McArthur's Case. Dixon J denied the existence of any workable formula for applying s92 and

1 Id. 10 per Latham CJ, 19 per Dixon J. Dixon J seemed to contemplate that even without a limitation in the terms of a law, evidence of the operation of a law could make out its validity. In Uebergang v Australian Wheat Board (1980) 32 ALR 1, 23 the joint judgment of Gibbs and Wilson JJ said "Gratwick v Johnson is one case which must have been decided differently if the circumstances in which the citizen was denied the right to travel inter-State had been such that all means of transport were required for troop movements." In the context it seems that their Honours meant that such a set of surrounding circumstances could justify the law even if it was not limited in its terms to operations in such circumstances. In the same case Barwick CJ, referring to Gratwick, said that individuals could find themselves prevented from engaging in private travel if troop movements had absorbed all travel capacity without, it seems, that involving any breach of their liberty. Id. 9.

2 Below pp363ff.

3 (1945) 70 CLR 1, 18.
indicated that he would be guided only by the text of s92 itself and by the Privy Council decisions in James v Cowan and James v The Commonwealth and not by "abstract reasoning".  

Another s92 case was argued and decided in 1945. In the Airways Case Barwick KC was briefed to challenge the Commonwealth legislation which set up the Australian National Airlines Commission to engage (inter alia) in inter-State commercial air carriage and attempted to secure for that body a monopoly of such carriage. Most of Barwick's submissions were directed to arguing the insufficiency of the Commonwealth's power under s51(i) to support the legislation. Those arguments were unsuccessful. Barwick's submissions in relation to s92 were, as reported, brief and did not reveal any developed theory.

The monopoly provisions had been drafted in accordance with the theory of Evatt J who was by this stage Attorney-General of the Commonwealth. Existing Commonwealth legislation prohibited inter-State air carriage without a licence. The new 1945 legislation set up the Commission, imposed a duty on the Commission to provide adequate air services and provided that so long as the Commission did provide adequate services, licences to engage in air carriage should cease to be operative.

Counsel defending the legislation called in aid the Transport Cases and argued that the legislation could not be said to be directed to reducing the amount of inter-State carriage as it positively

1 Id. 19.
2 Australian National Airways Pty Ltd v Commonwealth (1945) 71 CLR 29, 32ff.
3 The body was also to engage in intra-territorial, Territory to Territory, State to Territory, and Territory to State carriage.
4 Id. 33-35, 46-47.
required the Commission to provide adequate services.\(^1\) Barwick KC did not attack the **Transport Cases**. He merely suggested that they were distinguishable. This "straightout attempt to create a monopoly" was, according to Barwick KC to be distinguished from the "transport co-ordination" legislation upheld in the **Transport Cases**.\(^2\) Barwick also suggested the Court distinguish the **Transport Cases** where the legislation made under State power was general, and therefore not directly on inter-State trade, and the Commonwealth legislation in issue which either had as its subject matter inter-State trade and commerce and was therefore offensive to s92 or was not with respect to inter-State trade and commerce and was therefore not within the relevant head of power, s51(1).\(^3\)

The members of the Court agreed with Barwick that the **Transport Cases** were distinguishable and s92 did invalidate the legislation. Latham CJ and Starke J agreed with Barwick that this provision for setting up a simple monopoly could not be described as transport co-ordination. Rich J acknowledged that canalization of trade might be compatible with s92 - the Privy Council had said so in **James v The Commonwealth** in its discussion of the Commonwealth posts monopoly - according to Rich J, however, that reference should be taken to indicate not that the posts monopoly was valid because it involved "canalization", but rather that the posts monopoly was a special problem. In any case this monopolisation was inconsistent with s92.\(^4\) Thus in these three judge's reasons Evatt's theory suffered a significant downgrading.

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1 Id. 41 per Tait KC.
2 Id. 33.
3 Id. 46-47.
4 Id. 72-73.
Dixon J adverted to Evatt J's flow theory but was unwilling to take that theory as having been established by the Transport Cases.\(^1\) These cases could be distinguished because of the distinction drawn by some of the judges involved in them between the activity of trade and the use of motor vehicles, a distinction not relevant to the legislation in issue.\(^2\) Dixon J also stated that an application of the Privy Council's "freedom as at the frontier" test would result in the conclusion that "it is because the business involves crossing the frontier that it is eliminated".\(^3\) This was to be contrasted with the postal monopoly which was apparently acceptable because the exclusion of private competitors was made "independently of State boundaries".\(^4\) The inference seemed to be that Dixon J would allow legislation to affect inter-State trade if the legislation were non-discriminatory.\(^5\) (Dixon J was soon in the Bank Nationalisation Case to disclaim discrimination as the exhaustive test.)

Apart from this legislation of 1945, the Court also held invalid a 1940 amendment to regulation 79(3) of the licensing regulations. This 1940 amendment gave a wide administrative discretion to withhold a licence. Barwick KC submitted that this regulation could not be supported as being a merely regulatory provision as the discretion to withhold licences was not limited to exercise on grounds such as

\(^1\) Id. 85-88.
\(^2\) Id. 99.
\(^3\) Id. 90.
\(^4\) Id. 91. Dixon J offered another basis for distinguishing the postal monopoly which was less problematical. The post office is, as he noted, a traditional function of government dealt with as such in the Constitution. Ibid.
\(^5\) Similarly Id. 109-110 per Williams J.
aircraft safety and the like - which might have given the provision that character.\textsuperscript{1} Again Barwick's attack was successful and the amendment was held invalid. As in \textit{Gratwick v Johnson} the Court was applying a precise concept of "purpose".

Thus Evatt J's proposition that the rights of the individual to trade had nothing to do with s92's freedom and Evatt J's imprecise concept of purpose had been undermined. There was as yet no clear exploration of these issues and no established support for an alternative analysis. The \textbf{Bank Nationalisation Case} was to take the matter a good deal further.

\section*{F. The Bank Nationalisation Case - Free-trade or Ordered Liberty?}

The High Court got an unambiguous opportunity to examine the kind of freedom guaranteed by s92 when it was asked to make a decision on Commonwealth legislation attempting to nationalise private banks. In the \textbf{State Banking Case},\textsuperscript{2} for reasons unconnected with s92, the High Court had held invalid a Commonwealth provision which prohibited (private) banks from providing banking facilities for State governments and instrumentalities. In the course of his judgment Dixon J had commented that the provision was offensive because it discriminated against State governments. While elaborating this point, Dixon J commented that if the Commonwealth were lawfully to establish a monopoly in banking the States would have to put up with it.\textsuperscript{3}

The Labour Government responded by enacting legislation to prohibit private banks from carrying on all banking business and by setting up an elaborate framework for the Commonwealth takeover of the

\begin{itemize}
\item \textsuperscript{1} \textit{Id.} 34.
\item \textsuperscript{2} (1947) 74 CLR 31. Above pp167ff.
\item \textsuperscript{3} \textit{Id.} 84.
\end{itemize}
businesses of the private banks. Private banks and the States of Victoria, South Australia and Western Australia sought declarations that the legislation was **ultra vires**. The case reported under the name of the Bank of New South Wales v Commonwealth became known variously as the **Banks Case** and the **Bank Nationalisation Case**. In the frequent references made to it in the ensuing discussion I will refer to it as **BNC**.

Argument before the High Court\(^1\) took about forty sitting days spread over three months in 1948 and ranged over many issues. The plaintiffs succeeded in obtaining declarations that the central provision prohibiting private banks from carrying on their banking activities on receipt of a notice from the Treasurer to cease those activities offended s92, that various provisions for the Commonwealth takeover of the private bank's businesses were invalid because they failed to provide just terms as required by s51(***xixi***) and/or because of insufficiency of Commonwealth power and that the vesting in a Federal Court of Claims of exclusive jurisdiction for assessing compensation was in conflict with s75(**iii**).

The Commonwealth appealed the s92 point to the Privy Council\(^2\) and at this stage received the support of New South Wales and Queensland intervening. There the respondents challenged the Privy Council's jurisdiction to hear the appeal. The Privy Council decided to hear argument on the s92 point before deciding the jurisdictional point and argument on the two issues took up about 35 days spread over four months of 1949. In the end the Privy Council decided that it did not have jurisdiction to entertain the appeal but thought it appropriate in light of the amount of time spent arguing s92, to indicate that if it could have decided the s92 point it would have agreed with the High Court that the provision prohibiting banking offended s92.

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1. (1948) 76 CLR 1.
2. [1950] AC 235; (1949) 79 CLR 497.
Barwick briefed for the Bank of New South Wales led the argument for the large team of counsel attacking the legislation in the High Court and then put the respondents' submissions on s92 to the Privy Council. Attorney-General Evatt appeared before the High Court of which he had been a member for nearly a decade and then before the Privy Council to defend the legislation, his own theory of s92 and, indirectly, the government of which he was part.

The initial s92 issue was whether banking was trade. The Privy Council considered, as had a majority of the High Court, that banking was trade and therefore an activity protected by s92. The discussion of Dixon J was expressly adopted by the Privy Council.

The ideas which prevailed were that trade should be defined widely to include movement of intangibles, that banking should be defined to include the movement of (intangible) credits and therefore banking in the form of inter-State transmission of bank credits should be regarded as inter-State trade.

On the basis that banking was trade and that some banking was inter-State trade the next issue for Evatt and Barwick was whether a law which prohibited all private participation in that particular trade (including, but not confined to, inter-State trade) was offensive to s92.

1 From the Australian Bar, Barwick was supported by many distinguished barristers including three, Kitto, Taylor and Menzies, who were all later to share the High Court Bench with him. In England the local Bar provided inter alia Sir Walter Monckton and Kenneth Diplock.

2 In an interview a decade later, Barwick, by this stage Attorney-General in the Menzies Government, referred to the case as a crucial factor in the loss of office by the Labour Government. Times 9/11/59, "People to Watch".


4 [1950] AC 235, 303; (1949) 79 CLR 497, 632-633. The concept of trade is discussed below.
Evatt submitted that s92 was based on the idea of relieving inter-State trade from burdens imposed on account of its inter-State connection. "...there will be no infringement of s92, unless the person challenging the enactment shows that it is directed against goods or persons because of their passing into or out of the State."  

Barwick took the position that s92 was a guarantee of individual freedom, a guarantee to individuals of freedom to engage in inter-State trade. Barwick stated the issue and his position thus:

"whether or not s92 is directed to trade and commerce in the abstract or whether it is, ... a right or immunity for the people of Australia as individuals ... Section 92 is a constitutional guarantee to the people ... it advances a right or immunity to the individual. Let there be no misconception in my use of the word 'right' ... it is the individual's freedom to move from place to place and the individual's right to conduct his business across State-lines, which is protected by the Section."  

Evatt's positive propositions in support of a free trade theory and Barwick's direct responses to these propositions were these.

Evatt referred to the problem in nineteenth century Australia of the "barbarism of borderism" and the tensions arising from different attitudes to external customs duties. Against that historical background it should according to Evatt, be inferred that the mischief at which s92 was aimed was the elimination of border restrictions and

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1. HCT, 16/3/48, 1516; similarly PCT 22/3/49, 44, 47. The initials HCT and PCT used in footnotes refer to transcript of argument in the High Court and Privy Council respectively.


inter colonial trade war, and thus that the freedom guaranteed by s92 was freedom from government action directed against the "inter-Stateness" of a trading operation. According to Evatt s92 lays down, broadly speaking, a regime of freetrade as opposed to a regime of protection as between its units.

Barwick acknowledged that Evatt had accurately identified a problem which provided impetus for federation but stated that when the question of how best to solve the problem of inter-State trade warfare was considered a deliberate decision was taken, (inspired by the American experience of an implied freedom for inter-State commerce from (State Government) action) that a provision with a reach which included but which was not exhausted by, freedom from burdens imposed on account of inter-State connection should be inserted.

Evatt argued that the authorities had established the free trade basis to s92. The Transport Cases were a manifestation of it (and were inconsistent with the individual liberty theory). The Privy Council in James v The Commonwealth supported it first by approving the Transport Cases and in particular by approving Evatt's own judgment in Vizzard's Case and secondly by their Lordship's expressed attitude to actual or hypothetical legislation not directly in issue but referred to for the purposes of discussion and finally by formulating the principle, freedom as at the frontier, which concentrated on the border.

1 HCT 16/3/48, 1511A-1516; PCT 14/3/49, 15.
4 PCT 22/3/49, 4.
5 Eg Their Lordships indicated that the Commonwealth's postal monopoly (that is the exclusion of private individuals from carriage of mail for reward) was compatible with s92 because it "canalised" trade. (1936) 55 CLR 1, 54. PCT 16/3/49, 52; 23/3/49, 30-35.
As for the authority of the Transport Cases Barwick submitted rather weakly, that the lack of any ground common to the majority judges prevented any general principle being drawn from them. More tellingly Barwick drew attention to the more recent Airways decision.

When it came to the apparent support given by the Privy Council to Vizard's Case and to Evatt J's leading judgment in the case, at first Barwick could only suggest that the Privy Council was only approving so much of Evatt's judgment as went to criticising the wider statements of freedom contained in McArthur's Case. As for the Privy Council's discussion of other legislation in terms of a free trade theory, Barwick was able to bring some of the examples within his concept of acceptable regulation and described the others as being special cases.

As for the James v The Commonwealth formula "freedom as at the frontier", Barwick suggested to the Privy Council that that statement was not addressed to the kind of freedom guaranteed by s92. It was rather, to be understood as intended to reject the wider statements in McArthur's Case of the range of activities protected by s92 and to re-emphasise that it was only trade which was in fact inter-State trade that was protected and that this was perhaps the point from Evatt J's judgment in Vizard which was endorsed. Even this seemed to be an overambitious attempt to explain away the 1936 Privy Council's positive references to Evatt J in Vizard. Barwick went a step further and argued that indeed James v The Commonwealth rejected the

1 HCT 14/4/48, 2247-2249.
2 PCT 28/4/49, 42.
4 Below pp348-350.
6 PCT 27/4/49, 42.
free trade theory as their Lordships had said, and Evatt himself conceded, that a law which did not "discriminate" could offend s92. Evatt did not make particularly clear that what the Privy Council in James v The Commonwealth may have meant was that a law which did not discriminate on its face could be shown to be directed against inter-State trade. Thus Barwick's point stood because of lack of unequivocal rebuttal by Evatt.

Barwick's most telling point against Evatt's theory was to question its workability. How could a court, Barwick asked, assess the effect of government action on the flow of the totality of trade? Evatt said that the Court was only asked to decide whether a provision was directed at reducing the flow, not whether it would in fact reduce the flow. (Ultimately Evatt said that the "flow" formula was merely a test not in itself conclusive and that the conclusive consideration was whether the government action in question imposed a restriction on account of inter-State connection. This represented a significant modification of the formula of Evatt J and came closer to the general understanding of free trade.) How then, asked Barwick, could a court inquire into the purpose of Parliament? Evatt pointed to the fact that there were many statements in the precedents recognizing the relevance of purpose/object. In particular the Privy Council in James v Cowan had said that Parliament's purpose could be examined. Barwick could not believe that the Privy Council had intended to introduce "purpose" in the way that Evatt used the

2 PCT 23/3/49, 35-44.
5 PCT 22/3/49, 27.
term.\textsuperscript{1} Evatt said the question was whether the Parliament was deliberately interfering with inter-State trade, whether the Parliament was hostile to inter-State trade.\textsuperscript{2} That was leading to an inquiry into the \textit{bona fides} of Parliament; an inquiry into the purpose or motive of executive action might, as Barwick pointed out, be allowable but an inquiry into the purpose or motive of Parliament could not be contemplated.\textsuperscript{3}

Evatt thought the departure from what was generally allowable was quite reasonable given that s92 is a constitutional guarantee. Constitutional guarantees should not be allowed to be easily evaded by statutory devices. A law neutral in its terms must be subject to examination to see whether its purpose was in fact offensive. As a corollary, a law apparently offensive in its terms could be redeemed by its purpose.\textsuperscript{4}

Barwick exposed Evatt's \textit{non sequitur}. Just because it might be permissible to inquire into the purpose of a law neutral in its terms to show that it was in fact offensive to a constitutional guarantee, it did not necessarily follow that a law offensive in its effect could be redeemed by its purpose.\textsuperscript{5}

Barwick could not, however, give any satisfactory answer to Evatt's examination of the problem of compulsory acquisitions. As Evatt said, on the authorities, purpose had to be considered when judging an acquisition. An acquisition made with the object of

\begin{itemize}
\item \textsuperscript{1} PCT 7/4/49, 26; 26/4/49, 21.
\item \textsuperscript{2} PCT 16/3/49, 58.
\item \textsuperscript{3} PCT 6/4/49, 26; 26/4/49, 39; 27/4/49, 7-8, 20.
\item \textsuperscript{4} HCT 16/3/48, 1513; PCT 16/3/49, 12.
\item \textsuperscript{5} HCT 13/4/48, 2200.
\end{itemize}
providing supplies for defence or with the object of avoiding famine would have exactly the same effect as an acquisition made with the object of reducing inter-State trade. Yet only the last example would offend s92.

If purpose was relevant to acquisition, then surely it was relevant to the validity of other laws. Barwick could only reply that acquisition cases gave rise to special problems and were not directly relevant. Even he acknowledged that the validity of an acquisition would probably depend on the use to which the goods were to be put. An acquisition of goods with a view to using them would be valid while an acquisition of goods with a view to selling them would be invalid.

In the end, however, Barwick's simple point remained. No matter what support there was in the precedents for inquiring into purpose, no matter what the arguments based on the special nature of constitutional problems, no Court was going to feel comfortable using a vague formula dominated by the need to come to a decision about whether a government was hostile to inter-State trade. Repeatedly the Privy Council asked Evatt exactly what he meant by his references to the legislature's purpose and exactly how that purpose was to be ascertained. Evatt's responses were vague. He did propose a list of relevant evidence including surrounding facts and executive action taken in reliance on the Statute and Ministerial statements.

1 HCT, 16/3/48, 1507; PCT 16/3/49, 12.
4 Eg PCT 16/3/49, 12, 59; 22/3/49, 15-17; 23/3/49, 43.
but the ultimate issue still seemed to be one of Parliament's bona fides. In retrospect it seemed a clear error of judgment for Evatt not to reduce his formula to more conventional terms. He could for example have drawn analogies from the objective tests developed for testing purpose under s51(vi) and or s51(xxxix). He did not and Barwick's point stood.

Barwick's positive propositions in support of an individual liberty theory (and Evatt's responses thereto) were these.

First Barwick submitted that the individual liberty theory was right because it was obviously what the words of s92 meant. From what was freedom being granted? Obviously, from governmental action. To whom was freedom to trade being guaranteed by s92? Obviously, to traders.\(^1\)

Associated with this argument was the point that s92 guarantees freedom to "trade, commerce and intercourse". "Intercourse" is an activity which in its nature is carried on by individuals. If freedom here means freedom for individuals in intercourse, surely it must also mean freedom for individuals when applied to trade.\(^2\)

Evatt did not deal with either of these related simple points particularly well,\(^3\) although there were simple answers readily available for both. Although inevitably s92 is a guarantee of freedom to individuals while engaged in inter-State trade or intercourse, nothing in the language impels one to conclude that the freedom guaranteed to individuals is to individuals qua individuals. Evatt came closest to this issue when he pointed out that the mere fact that individuals had succeeded in s92 challenges did not give any

\(^{\text{1}}\) PCT 28/4/49, 26-33.


\(^{\text{3}}\) Cf PCT 29/5/49, 12-14.
indication that s92 created individual freedom. In relation to the free trade, free intercourse connection Evatt should have had no difficulty in saying that in either case the dominant concern was freedom from restrictions imposed on account of an inter-State aspect of the activity.

Another element of Barwick's case based on the language of s92 itself concentrated on the word "free". For Barwick government control and freedom were mutually exclusive concepts. How could you say you were freeing an activity by cluttering it with bothersome regulation and administrative discretions? Evatt did not really attempt to counter the emotional appeal associated with this point until the closing stages of proceedings before the Privy Council. Then he gave their Lordships a lecture on the eighteenth and nineteenth century writings on the concept of freedom and asked their Lordships to accept as historical fact that well before the end of the nineteenth century the _laissez-faire_ doctrine had been abandoned and been replaced with the notion that

"freedom must be a social freedom, and ... you cannot have any true freedom in a society unless conditions in it are satisfactory from the community point of view, and from the point of view of the conscience of the community."  

1 PCT 23/3/49, 51ff; 31/3/49, 52.  
2 Compare a 1972 address by Barwick when Chief Justice entitled "The Lot of the Director Today" published in 1973 Australian Director Vol 3 No 1 at p 51. There the Chief Justice exhorted directors to set up their own code of discipline so as to forestall legislative interference. Barwick CJ considered there was "too much tendency to rush in with legislative interference". (Id. 53) "Legislators do not always see the end point of legislative interference" and might lay "pitfalls for the unwary". Id. 51)  
3 PCT 26/5/49, 48-51; 30/5/49, 5-8.  
4 PCT 26/5/49, 49.
Where Evatt failed in pressing this point was in drawing attention to the matters of conscience, the social improvements at which the banking legislation was aimed. At the start of proceedings before the High Court he did adduce a lot of expert evidence on the relevance of banking control to general economic management. Somewhat naively, however, from then on he presented the virtue of the banking legislation as being its elimination of the pursuit of private profit (by bankers).

In another line of attack on Barwick's individual liberty proposition Evatt made these points.

Everyone accepted that certain persons - bankrupts, lunatics, infants, barristers - could be excluded from inter-State trade without offence to s92. These individuals apparently had no constitutional right to engage in inter-State trade.

Furthermore in the case of Home Benefits v Crafter the High Court upheld a law which completely stopped inter-State trade in trading coupons. Similarly, could anyone doubt that inter-State trade in animals which were in fact diseased could be absolutely prohibited?

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1 (1948) 76 CLR 1.
2 PCT 31/5/49, 7; HCT 16/3/48, 149.
3 HCT 15/3/48; PCT 21/3/49, 48; 24/3/49, 58; 30/5/49, 10-11.
4 (1939) 61 CLR 701.
5 HCT 15/3/48, 1456.
6 PCT 30/5/49, 11-12; 24/3/49, 20-40.
How could one argue that s92 gave a freedom to individuals to engage in inter-State trade when the examples given indicated that certain persons could be excluded from all inter-State trade and all persons could be excluded from certain inter-State trade? How could one argue that s92 gave a freedom to individuals when these examples demonstrated that public interest must prevail over the interests of individuals.

At first Barwick was inclined to take an extreme position. To a surprised High Court, Barwick had submitted that inter-State trade in diseased stock could not be prohibited.\(^1\) By the time the matter reached the Privy Council Barwick had modified his position. He expressly adopted and endorsed\(^2\) the discussion of "ordered liberty" contained in the (dissenting) judgment of Barton J in Duncan's Case.\(^3\) In doing so Barwick mentioned, "just by the way", that, according to his biographer, Barton who had been so prominent in fostering the Constitution, had taken the majority decision in Duncan "very much to heart" as representing "a great wrong upon s92".\(^4\)

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1 HCT 18/2/48, 346-347A.

2 PCT 27/4/49, 27. "... that judgment, if I may say so, is a very great judgment in relation to this subject." Also at greater length at 28/4/49, 56-58; 29/4/49, 3.

3 (1916) 22 CLR 556, 592-593.

4 PCT 29/4/49, 6. Barton's biographer quoted this passage commenting on the decision in Duncan from a letter which Barton had written to his wife. "I seldom take to heart the fact that a majority of the Bench is against my views, but on this occasion my sorrow is very real, for the meaning of the decision is that each State will have almost uncontrolled power of tampering and restricting trade between the States, and their citizens - a power the abolition of which was among the chief reasons for federation." John Reynolds, Sir Edmund Barton - 1849-1920 193. The biography had first been published in 1948. It was reissued in 1979 with a foreword by Barwick in addition to the original foreword of RG Menzies.
Barwick explained the ordered liberty freedom thus:

If one had to approach this section freed of authority ... One would be bound to say that freedom is the freedom of men who live together, and you express the living together by a rule of law in adjusting their relationships to each other ... there is an idea of freedom in an ordered society which pre-supposes some regulations ... 1

But was not this notion subject to the same criticism that Barwick had levelled at Evatt's theory? Was it not vague and unworkable? Barwick was confident the Courts could manage.

"However, difficult it is to draw that line in particular cases, there is an idea or a notion which we have which we can recognise, though perhaps not define." 2

and

"It is not a philosophical or metaphysical concept, it is a practical concept." 3

As for Evatt's examples of universally acceptable laws, they did not demonstrate, according to Barwick that public interest or Parliament's perception of public interest must always override the individual will. Rather they provided examples of the kind of ordering of a society which could be recognised as being no derogation of individual freedom.

1 PCT 28/4/49, 54.


This notion of acceptable regulation even provided an answer for the irony (pointed out by Evatt) involved in the theory of "individual right" being called in aid by large and powerful banking corporations, while no one apparently saw any problem with the provision in the banking legislation which prohibited all natural persons from being bankers. 1 Barwick responded that the contrast was between constituted authority and legal persons. 2 The exclusion of natural persons from running banks could be regarded as mere regulation given the disruption that would follow the "death" of a bank constituted by a natural person. 3

In any case, once one accepted that the ordered liberty approach was proper, one need not for the purposes of the law in issue attempt to define the limits of acceptable regulation. No one could believe (and Evatt did not even submit in the alternative) that a law which set out to exclude all non-government persons from the trade of banking could be said to be a mere accommodation of individuals.

Moreover once one accepted Barwick's proposition as to the kind of freedom involved, then it was not necessary for the purposes of the case to decide whether one characterised a law according to its purpose or according to its effect.

1 HCT 15/3/48, 1441. PCT 21/3/49, 48. Cf Barwick in argument HCT 17/2/48, 325A "When I speak of an individual's freedom ... I mean the freedom of the banking corporation".

2 HCT 17/2/48, 327-378, 18/2/48, 334; PCT 28/4/49, 31. At 6/4/49, Lord Porter suggested that Barwick use the word "person" to cover both natural persons and corporations. Barwick responded "If I lapse into the word 'individual' it will be my infirmity." The word 'individual' of course, carries significant overtones which Barwick would not have wanted lost.

If the test was purpose, the purpose of the law was to stop private banking.\(^1\) If the test was effect, the effect of the law was to stop private banking.\(^2\) If the test was effect, there was no need to decide whether practical effect could be taken into account or whether the inquiry was confined to legal operation, as this legislation in its terms prohibited all of a trading activity.\(^3\) Although it was not necessary to do so Barwick indicated his belief that a law could offend because of its practical effect.

The discussion hitherto has concentrated on the arguments that Barwick drew from the language of s92 itself. There were two other main strands of reasoning supporting his theory - the American background and the general nature of the Australian Constitution. These strands can be seen basically as counters to a series of points Evatt made about the incongruity of Barwick's proposed individual rights.

Why, asked Evatt, would the Constitution create such a large gap in the totality of government power? Why if the Constitution was going to create a significant individual right would it be confined to individuals engaged in inter-State trade and why would it be created in indirect language not mentioning individuals.\(^4\) Why if the Constitution was going to create a significant individual right would it have conditioned it on the introduction of uniform customs - that is, why if this matter was considered so important were individuals to be unprotected until the introduction of uniform customs?\(^5\)

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1 HCT 17/2/48, 279.
2 Id. 21.
3 HCT 17/2/48, 280A.
4 PCT 24/3/49, 57; 30/5/49, 6.
5 PCT 24/5/49, 14; 30/5/49, 8.
Barwick submitted that the individual liberty theory for traders was implied into the American Constitution and the American Constitution had provided the model for the Australian Constitution. Section 92 had been intended to cover what was in America left to implication.² (No evidence was given to support this assertion.) That was the agreement and it should be enforced no matter how inconvenient it might be.³

Next Barwick submitted that the individual right theory was compatible with what he perceived to be a significant characteristic of the Constitution – the dominance of the will of the people. The Constitution was a bargain between the peoples of the different States effected by the Imperial legislature. There should be no presumption that there was to be a full parcelling out of the legislative powers that might be exercised in a unitary system. The presence of the power of amendment in section 128 (with no parallel in the Canadian Constitution for example) indicated the reservation of some power by the people and indicated the presence of gaps in Parliamentary power that the people might see the need to reduce. In this context it was also emphasised by Barwick that s92 was not the only provision in the Constitution which denied legislative power. Sections 116 and 117 were mentioned as areas of power also withheld by the people from their Parliaments.⁴

These related points – the American background and the general people versus government nature of the Constitution received an impatient rebuttal from Evatt. In America the immunity of inter-State traders from State action was a corollary of the grant to the Federal legislature of power over inter-State commerce. That aspect of the American context provided, in Evatt's submission, a significant basis

² PCT 6/4/49, 33-34.
³ PCT 6/4/49, 45.
for distinguishing Australia's s92 which had been held to bind the Commonwealth as well as the States.¹

Another distinguishing feature of the American background was the theory developed there of popular sovereignty underlying a Constitution having its origins in the revolution against British parliamentary authority. The Australian Constitution depended on and should be understood against the notion of sovereignty of Parliament.² There were, furthermore, express guarantees of individual right in the American Constitution. The Australian Constitution has nothing like the American Bill of Rights. Barwick seemed to want both the implications drawn from the commerce clause and the laissez-faire content of express guarantees.³ (The reference to express guarantees was presumably a reference to due process.)⁴ At this level Evatt's arguments were more convincing than Barwick's.

(i) The Decision in the Privy Council⁵

The Privy Council decided that it did not have jurisdiction to entertain the appeal on the s92 related issue but considered it appropriate given the amount of time that had been spent arguing the

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1  HCT 16/3/48, 1476.
3  PCT 24/5/49, 37. Contrast Attorney-General (Commonwealth) Ex rel McKinlay v Commonwealth (1975) 135 CLR 1, 23-24 where Barwick as Chief Justice emphasised the same distinctions between the American and the Australian situations as Evatt had in BNC.
4  Above p313.
s92 points to indicate how it would have decided the issue if it could have.²

On the issue of the kind of freedom guaranteed by s92, their Lordships declared for the freedom of individuals and rejected the flow theory. Their Lordships' stated reasons for this conclusion were very weak. First they stated that the Privy Council decisions in the James Cases had established the individual liberty theory. How could the individual liberty content of s92 be denied when "James was an individual and James vindicated his freedom in hard-won fights?"³ During argument Evatt had explained to their Lordships and apparently got them to understand that nothing followed from saying that individuals could invoke s92. The issue was not whether individuals could invoke s92 but whether individuals could invoke s92 on account of being individuals.⁴

Their Lordships continued by asserting that the James Cases were in "direct conflict" with the flow theory.⁵ It is not clear exactly what facts their Lordships were assuming to support the latter proposition. They stated that

² The understanding of Professor Geoffrey Sawer who had been involved in the case on the Commonwealth's side, is that the Privy Council took this action at the urging of the Commonwealth and with the consent of the respondent banks. (Personal conversation.) There is some evidence in the transcript of Evatt's urging the Privy Council to settle the issue once and for all. Eg 25/3/49, 43; 31/5/49, 26. It is difficult to see what the Commonwealth hoped to gain by obtaining this advisory opinion. It is inconceivable that the Privy Council could have been so mischievous as to say that it would have overturned the High Court's decision on s92 if it could have. It should have been obvious that the Privy Council would only have felt able to comment on the substance of s92 issues it could not decide if it were in agreement with the High Court.

³ Id. 305; 635.

⁴ PCT 31/3/49, 52.

⁵ Id. 305; 635.
"there the section [s92] was infringed though it was not the passage of dried fruit in general, but the passage of the dried fruit of James from State to State that was impeded."\(^1\)

This was with respect to their Lordships, a very strange thing to say. In both cases the power of acquisition was used against James' fruit for the purpose of forcing fruit off the Australian market. It is no doubt true to say that the James Cases were consistent with the individual liberty theory. Given however, that the Australian market for dried fruit was such that surplus producing States such as James' home State of South Australia exported their surplus to other States, the decisions were just as consistent with the flow theory.

The Privy Council's second major basis for rejecting the flow test was that it was "unreal and unpractical, for it is unpredictable whether by interference with the individual flow the total volume will be affected and it is incalculable what might have been the total volume but for the individual interference."\(^2\) Evatt had not submitted that the Court had to decide what would in fact be the effect of challenged government action on the total flow. He had submitted that the governing principle was whether the government action imposed a burden because of the inter-State aspect of the activity and that the flow test only provided evidence and was not in itself conclusive.\(^3\) (This involved a change from the theory of Evatt J which had seemed to treat the flow criterion as the principle and had not confined s92's prohibition to discrimination.) The concern in Evatt's theory was not whether government action would in fact reduce the general flow of inter-State trade but whether it was aimed at reducing that flow. Their Lordships were to go on to reject the possibility of an inquiry into legislative purpose and in

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1 Id. 305; 635.
2 Id. 305-306; 635.
3 PCT 29/3/49, 37.
anticipation of that part of their discussion seem at this stage to have been answering a flow theory that was not even put to them.

The Privy Council's third major point for rejecting the flow theory was to draw attention to the word intercourse in s92. "...it has not been suggested what freedom of intercourse among the States is protected except the freedom of an individual citizen ...".¹

And that was just about all their Lordships were willing to offer to justify their conclusion on the general issue of s92's freedom. There was no comment on Evatt's historical background of intercolonial trade war nor on Barwick's arguments based on the inherent meaning of the words in s92 nor on Barwick's reference to the American background.

The Privy Council did accept Barwick's exhortation to assert the role of the judiciary in maintaining the Constitution and rejected Evatt's equally fervent exhortation to give weight to Parliament's perception of public interest.

"For where the dispute is, as here, not only between Commonwealth and intervening States on the one hand and citizens and States on the other, it is only the Court that can decide the issue. It is vain to invoke the voice of Parliament."²

Their Lordships did not, however, comment on Barwick's proposal to go the further step and describe the Constitution as being dominated by the notion of the people versus government.

¹ Id. 306; 635.
² Id. 310; 639-640.
On the major issue of the relevance of legislative purpose their Lordships took this position. The references to "object" and "intention" by the Privy Council in *James v Cowan* were admittedly "open to misconception". Whatever the range of proper inquiry when examining executive action, the only "purpose", "object" or "intention" of legislation which could be examined was "purpose", "object" or "intention in the sense of "necessary legal effect". That is, their Lordships seemed to be saying politely that if the dicta of the Privy Council in *Cowan* did mean to authorise an inquiry into the legislature's purpose, then that Privy Council had been in error.

On the question of other statements in the Privy Council seeming to support Evatt's theory —

The formula that had been offered in *James v The Commonwealth*, "freedom as at the frontier" was not really a statement of general principle after all.

"These words must (as must every word of every judgment) be read secundum subjectam materiam. They were appropriate to their context and must be read in their context."  

Nor should anyone go on thinking that the Privy Council's statements in *James v The Commonwealth* apparently approving Evatt's judgment in *Vizzard's Case* were an approval of the whole of Evatt's reasoning in that case.  

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1 Id. 307; 636-637.

2 Id. 308, 637-638. Barwick had suggested this solution. PCT 29/4/59, 19-20.

3 Id. 310; 639. Similarly at 313; 642.
As for Evatt's examples of the accepted categories of persons who can be excluded from inter-State trade and of the activities of inter-State trade which can be prohibited, without offending s92, the Privy Council followed Barwick's lead.

"...the conception of freedom of trade commerce and intercourse in a community regulated by law presupposes some degree of restriction upon the individual." ¹

The distinction between regulation and burden might be difficult to define but it was nevertheless a real distinction. ² Apart from "dealing" with Evatt's case and settling the issue on which the case turned - the kind of freedom involved - their Lordships declined to enter upon the task of setting out a precise formula for dealing with s92 problems. They emphasised that "In this labyrinth there is no golden thread" ³, that the problem was not susceptible to a high degree of definition. ⁴

"But it seems that two general propositions, may be accepted: (1) that regulation of trade commerce and intercourse among the States is compatible with its absolute freedom and (2) that s92 is violated only when a legislative or executive act operates to restrict such trade commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote." ⁵

¹ Id. 310; 639.
² Id. 312; 641.
³ Id. 310; 639.
⁴ Id. 313; 642.
⁵ Id. 310; 639. Similarly at 313; 642.
This two pronged formula closely resembled that which Barwick had offered in argument. Barwick had put it thus:

"The two problems which arise would be, one, has the particular activity of the man ceased to be free; that is to say, has whatever happened to him gone in mere adjustment or accommodation or has it invaded his freedom? The second problem one would have to ask oneself is, is that produced by the law? Is it ... within the operation of the law, or is it but a consequence or a repercussion?"¹

In these crucial matters the Privy Council echoed Barwick's submissions. Only one aspect of Evatt's case was reflected in their Lordship's discussion. Towards the end of his final comments on s92 when querying the workability of Barwick's burden/regulation concept which Barwick freely acknowledged involved questions of degree and would have to take account of "all the circumstances at the time",² Evatt said:

"The line between 'burden' and 'regulation' changes with economic and social conditions and cannot be ascertained by legal considerations."³

This submission's two elements - the notion that the line between burden and regulation changes - the relevance of general economic and social conditions - were both picked up by the Privy Council. First, their Lordships said:

1 PCT 28/4/49, 54-59. Also PCT 29/4/49, 26 "...one, what is the operation of the law, where did the operation stop and consequence begin, and, two, is the law merely a regulation, or accommodation, or does it impair the freedom."


3 PCT 30/5/49, 12ff.
The problem to be solved will often be not so much legal as political, social or economic. Yet it must be solved by a court of law.¹

And later their Lordships, having just declared that exclusion of competition was not a valid regulatory consideration for prohibiting non-government banking, added this proviso—

Yet about this, as about every other proposition in this field, a reservation must be made. For their Lordships do not intend to lay it down that in no circumstances could the exclusion of competition so as to create a monopoly either in a State or Commonwealth agency or in some other body be justified. Every case must be judged on its own facts and in its own setting of time and circumstances, and it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation and that inter-State trade commerce and intercourse thus prohibited and thus monopolised remained absolutely free.”²

The acceptance (implicit in these passages) of the two elements of Evatt's comments, was of no significance for the generation after BNC. Eventually these aspects of the Privy Council discussion in BNC were developed as the basis for an attempt to reduce significantly the force of the principle of individual right declared by BNC.³ The ultimate irony was that the comment of Evatt which is reflected in the key passages was peripheral and unconnected with his main line of argument.

2 11950] AC 235, 310; (1949) 79 CLR 497, 639.
2 Id. 311; 640-641.
3 Below pp389ff.
(ii) Barwick's Victory or Evatt's Loss?

It does not involve one in any great cynicism to suggest that the submissions of Barwick and Evatt probably had little significance for the outcome of BNC in the High Court. There most of the judges through familiarity with s92 had no doubt already sorted out most of their ideas on the topic before Barwick and Evatt rose to put their respective submissions. In the Privy Council there was, however, no such familiarity. That fact in itself changed the nature of the problem for counsel. Add to that fact the position of the Privy Council in the judicial hierarchy and it becomes plain what an opportunity there was for a counsel to put his mark on constitutional doctrine.

The BNC has been hailed as a great personal triumph for Barwick. There is no doubt that the Privy Council statement echoes his own submissions on most significant points. Indeed what he offered was quite attractive. He offered a general formula which was couched in terms reminiscent of, and avowedly proceeding by analogy with, traditional legal formulations.¹ Evatt was trying to get their Lordships to commit themselves to an unconventional formula to cover all cases that might arise. Evatt was insensitive to their Lordships' uneasiness about his purpose approach and failed to offer a more conventional notion of legislative purpose. By way of contrast Barwick covered himself by pointing out that even if the Privy Council should accept Evatt's emphasis on inter-State discrimination, government monopoly was still offensive because of the opportunities it created for inter-State discrimination to go undetected,²

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(echoing Dixon J in dissent in Vizzard's Case.)¹

A significant omission in Evatt's Case was the lack of any submission for overruling James v The Commonwealth and excluding the Commonwealth from the reach of s92.² Evatt had of course in the past presented the subjection of the Commonwealth to s92 as being a corollary of the narrow kind of freedom for which he was arguing. James v The Commonwealth had seemed to tie the two matters. At the end of BNC the tie was broken and Evatt representing the Commonwealth had the worst of both matters.

In terms of style Barwick's advocacy was much more likely to persuade. Whereas Evatt seemed anxious to point out to their Lordships how ignorant they were of Australia and its problems, Barwick played to the local audience with references to traffic regulation in Whitehall³ and free speech in Hyde Park.⁴ Evatt took twice as long to put his s92 submissions as did Barwick.⁵

¹ (1933) 50 CLR 30, 59. See also McArthur's Case (1920) 28 CLR 530, 545 where Knox CJ, Isaacs and Starke J refer to the possibility of outwardly neutral laws having a protectionist effect.

² Starke J offered some encouragement to this line of argument at HCT 18/2/48, 352. "I agree that the Privy Council made an awful mess of the Constitution by subjecting the whole Constitution to s92." and HCT 12/3/48, 12/3/48, 1379. "It is very unfortunate that s92 bound the Commonwealth. It has been a great misfortune I think."


⁵ This was due in part to the content of their submissions. Evatt sought to widen the inquiry to demonstrate that public interest had to come into s92 problems. Barwick was seeking to narrow the inquiry by arguing that whatever weight public interest might have in hypothetical cases it was not relevant to the legislation in issue.
In the end, therefore, one must conclude that although Barwick presented a case notable for its simplicity and clarity, his task was undoubtedly made easier by the failures of his opponent.

(iii) The issues after BNC

The problem after BNC was to refine and explore the distinctions inherent in the Privy Council's framework - the distinction between regulation and burden - the distinction between indirect and direct effects. The discussion turns first to the regulation/burden question.

The exploration of the concept of regulation was complicated by the question of what authority should be accorded to pre BNC decisions affected by propositions rejected or discredited in BNC. In particular there was the question of the authority of the 1930's Transport Cases.¹

G. The 1950's Transport Cases and Licensing as Regulation

In BNC Barwick had criticised the Transport Cases.² All he managed to elicit from the Privy Council in BNC was a statement³ that the Privy Council's approving reference in James v The Commonwealth to Evatt J's judgment in Vizzard was not to be taken as

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¹ HCT 17/3/48, 1572. During argument in the High Court this exchange had taken place between Evatt and Starke J. Evatt "...Your Honour, Mr Justice Starke discusses in the [Airways Case] the old Transport Cases. These ogres come up in every case. Starke J "Like King Charles' head." Evatt "Yes, your Honour but the head is still on. It has not yet been removed." Starke J "I hope it soon will be." Evatt "Your Honour did your best in the [Airways Case]; I submit in direct opposition to the decision of the Privy Council in James v The Commonwealth".


an approval of the "whole" of Evatt J's reasoning.\textsuperscript{1} The implication seemed to be that some of what Evatt J had said in \textit{Vizzard} was to be taken as approved.

In \textit{McCarter v Brodie}\textsuperscript{2} the High Court was asked in the light of \textit{BNC} to reconsider the transport co-ordination legislation which had been upheld in the \textit{Riverina Transport Case}.\textsuperscript{3} By majority\textsuperscript{4} the Court decided to follow the 1930's decisions. Dixon and Fullagar JJ dissented on the basis that those cases were inconsistent with \textit{BNC}.\textsuperscript{5}

In \textit{Hughes \& Vale Pty Ltd v New South Wales (No 1)}\textsuperscript{6} the Court was asked to review the legislation upheld in \textit{Vizzard's Case}\textsuperscript{7} itself. The decision was 4/3 in favour of following \textit{Vizzard}.\textsuperscript{8} The majority depended, \textit{inter alia}, on the vote of Dixon who had not changed his view of the merits of transport legislation of the kind in issue but who considered that \textit{stare decisis} required him to follow the recent decision in \textit{McCarter}.\textsuperscript{9} The case reached the Privy Council where it was held that \textit{Vizzard} should be overruled and that a law prohibiting road carriage without a licence could not apply to

\textsuperscript{1} Even this echoed one of Barwick's submissions. PCT 28/4/49, 21-22; 79 CLR 497, 566.

\textsuperscript{2} (1950) 80 CLR 432.

\textsuperscript{3} (1937) 57 CLR 327 Above pp329-330.

\textsuperscript{4} Latham CJ, McTiernan, Williams and Webb JJ.

\textsuperscript{5} \textit{Id.} 465-468 per Dixon J, 487-499 per Fullagar J.

\textsuperscript{6} (1953) 87 CLR 49.

\textsuperscript{7} (1933) 50 CLR 30.

\textsuperscript{8} Dixon CJ, McTiernan, Williams and Webb JJ with Fullagar, Kitto and Taylor JJ dissenting.

\textsuperscript{9} \textit{Id.} 70.
inter-State carriage when the grant of the licence was at the discretion of an administrative officer and the licence was subject to payment calculated as this one was.¹

Barwick appeared in the appeal to the Privy Council but had no discernible influence on the judgment. Their Lordships proceeded by quoting and endorsing large sections from the judgments of Dixon and Fullagar JJ in McCarter and from the judgments of Dixon CJ and (to a lesser extent) Taylor J in Hughes & Vale (No 1) itself.² Their Lordships explained that they took this course to put beyond any doubt at all that they were in agreement with the McCarter minority's view that none of the reasons given for upholding the legislation offered in the 1930's Transport Cases were valid after BNC and that the actual decisions in the 1930's cases were inconsistent with the principles established by BNC.³ Barwick of course, made points similar to those taken by the dissentients in McCarter v Brodie. He went further, however, and proposed an approach to "regulation"⁴ on which the Privy Council made no comment.⁵

The decision in Hughes & Vale (No 1) gave rise to a flurry of cases involving transport legislation. By the early sixties quite an intricate set of rules had been developed relating to the taxes that could be imposed on road users engaged in inter-State trade, without offence to s92. Barwick was not significantly involved in that development.⁶

2 Id. 294–305, 307; 21–31, 33.
3 Id. 305–308; 31–34.
4 Id. 280.
5 That submission is discussed Below pp372–373.
6 He did appear to challenge successfully a road use tax provision in Pioneer Express Pty Ltd v South Australia (1958) 99 CLR 227 on the grounds that the tax although perhaps sufficiently connected with road use discriminated against inter-State trade.
The decade also saw the development of principles of general application and refinements of the concept of regulation. The following propositions had emerged.

Regulation could be in the form of an absolute prohibition on trading without a licence so long as the licensing system had the following features.

First, the applicant for a licence to trade had a right to the licence unless there were grounds relevant to the ordering of freedom for withholding a licence from him.\(^1\)

Secondly, although the question of whether or not there were in fact acceptable grounds for withholding a licence might initially be committed to an administrative officer it was ultimately open for decision by a Court. (This requirement of a judicial connection was imposed because the compatibility of a law with s92 was (in this regard at least) a question of constitutional fact.)\(^2\)

Thirdly, the authorised grounds for withholding a licence were set out clearly and precisely. (This requirement was based on the idea that vagueness in the grounds for withholding a licence was in itself a burden on the trader. Vagueness made it difficult for a trader to challenge a decision to withhold and increased the possibility of a decision to withhold being made on a basis not compatible with ordered freedom.)\(^3\)

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2. Hughes & Vale Pty Ltd v New South Wales (No 2) (1955) 93 CLR 127, 162-163, 165-166 per Dixon CJ, McTiernan and Webb JJ.

3. Hughes & Vale Pty Ltd v. New South Wales (No 2) (1955) 93 CLR 127, 157-159 per Dixon CJ, McTiernan and Webb JJ.
Fourthly, there were no practical impediments to obtaining a licence such as limited office hours and/or geographical distribution of licensing authorities.\(^1\)

Barwick may be allowed some credit for these developments as he foreshadowed them in his submissions in BNC when he suggested that inter-State trade could validly be regulated by prohibition operating on appropriate conditions or by a licensing system so long as the grant of the licence was conditioned on relevant matters such as safety standards and so long as applicants had a right to a licence on satisfying the standards.\(^2\)

In these developments Dixon J/CJ was very much in the forefront and much of what he said and did in both the 1930's and the 1950's *Transport Cases* received the approval of the Privy Council.\(^3\) It is to be noted, however, that not everything that Dixon J/CJ said in these cases received the approval of the Privy Council. In particular, his theory of when a law would be said to be directly affecting inter-State trade\(^4\) did not receive Privy Council comment.

These rules about the required connection between acceptable bases for regulation and the operation of licensing provisions, were fairly precise. They did not, however, go to the question of identifying acceptable bases for regulation.

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4 Below pp423ff.
H. Distinguishing Regulation from Burden - The Theory

In BNC the Privy Council gave some examples of what would be acceptable grounds for excluding individuals from inter-State trade

"regulation of trade may clearly take the form of denying certain activities to persons by age or circumstances unfit to perform them or of excluding from passage across the frontier of a State creatures or things calculated to injure its citizens." 1

It was not necessary for their Lordships to explore the concept of acceptable regulation any further as they did not consider (and it had not been suggested) that it was compatible with any freedom of individuals to trade, to exclude individuals from trading just to stop them competing with the government bank 2. Their Lordships warned against the futility of trying to give the concept of regulation "a higher degree of definition than it will admit". 3 The problem was to be approached as a matter of fact and degree. 4

Despite that warning against attempting too high a degree of definition, a joint judgment of Dixon CJ, McTiernan and Webb JJ in Hughes and Vale Pty Ltd v New South Wales (No 2) 5 revived a definition of regulation that was part of the dissent of Dixon J in Gilpin's Case. 6

In Gilpin's Case Dixon J had suggested that the identification of a law as being a burden depended on whether the law operated "in virtue of" any of the

2 Id. 311; 640.
3 Id. 313; 642.
4 Id. 312; 641.
5 (1955) 93 CLR 127, 163.
6 Above p317.
"essential qualities which are connected by the description 'trade, commerce and intercourse among the States'."\(^1\)

If a law did so operate then it was imposing an unacceptable burden. On this basis laws discriminating against inter-State trade would offend s92 because of their operation "in virtue" of the inter-State aspect of the activity, and laws prohibiting the carrying on of a road carriage business by reference to the effect of the road carriage on competing rail systems offend s92 because of their operation on the trading activity "in virtue" of its being trade.

In Hughes and Vale (No 2) Dixon CJ, McTiernan and Webb JJ developed this theory for distinguishing acceptable regulation from unacceptable burden.

The matter in hand is the contrast between the central or essential attributes of an inter-State transaction ... and the incidents of the transaction which do not necessarily give it the character of trade commerce or intercourse or of an inter-State transaction.\(^2\)

Their Honours then listed, in this context of inter-State road haulage, things which they considered to be mere incidents. Included in their Honours' list of mere incidents were the hours during which a journey is made, the axle-weight of the vehicle, the dimensions of the load, the crowding of vehicles and the keeping of records.\(^3\)

"Laws for the government of such incidents 'regulate' the inter-State transportation of goods by motor vehicle and are likely to be consistent with the freedom of trade commerce and intercourse among the States."\(^4\)

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1 (1935) 52 CLR 189, 206.
2 (1955) 93 CLR 127, 163.
3 Id. 160.
4 Id. 163.
It was acknowledged that this test only raised a presumption of validity.

"... for a law which under the guise of regulating an incident of inter-State transport by road creates a real destruction or impediment to carrying it on does impair the freedom which s92 guarantees ... it would be rash to deny antecedently that any legislative step that may be imagined could not in some circumstances form part of some device by which the imposition of a restriction upon inter-State commerce might be accomplished." \(^1\)

(The appearance of the words "guise" and "device" reminds one that Evatt had been rebuffed by the Privy Council in his proposition that purpose is a dominant concern under s92.)

This was all rather fancy. The formula did not indicate which of the many criteria of operation of a law (which was ex hypothesi operating, inter alia, by reference to either "trade" or "inter-State") was the relevant one. The formula did not indicate when the legislature's interest in an incident of trade would be sufficient to offset the fact that the law was also directly on trade. \(^2\)

Whatever its merits and demerits, the Dixon definition of regulation has not provided a focus for discussion in the High Court. It has simply fallen into desuetude. \(^3\)

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1 Id. 163-164


3 It can just be discerned in the judgment of Gibbs J in Permewan Wright Consolidated Pty Ltd v Trewhitt (1979) 54 ALJR 98, 102.
The question which was important and which did involve Barwick as counsel and barrister related to the question—whose interests could be taken into account to justify the restriction of inter-State traders. That issue arose in this way. As has been noted, the Privy Council in BNC felt no need to elaborate on what would distinguish acceptable regulation from offensive burden. No one doubted, however, that their Lordships had in mind some concept of "ordered liberty".

The general statements of ordered liberty have changed little since Barton J set out his understanding of the concept in his dissenting judgment in Duncan's Case in 1916.

"[Freedom] means immunity from all restrictions except such as may be placed upon the rights of a free citizen to the extent necessary to guard against infringement of the rights of his neighbours."  

In setting out this theory Barton J went further than he needed to hold the legislation involved invalid. (The case concerned a prohibition on removing goods from a State and might have been decided on a free trade rather than an ordered liberty theory of s92's freedom.) In a foreword to a re-publication of Barton's biography in 1979 Barwick CJ referred to Barton J's dissent in Duncan as "a judgment of great quality and of lasting significance" and as containing the accepted formula for dealing with s92.  

In Hughes & Vale (No 2) the joint judgment of Dixon CJ, McTiernan and Webb JJ put it thus

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1 (1916) 22 CLR 556, 593.
2 The majority's reasons for upholding the provision are discussed above p321.
3 J Reynolds, Edmund Barton v, viii–ix.
"...the freedom which is postulated by s92 for inter-State trade commerce and intercourse is freedom enjoyed in an ordered society where the relations between man and man and government and man are determined by law."

and later

"In conception the distinction is clear between laws interfering with the freedom to effect the very transaction or to carry out the very activity which constitutes inter-State trade commerce or intercourse and laws imposing upon those engaged in such transactions or activities rules of proper conduct or other restraints so that it is done in a due and orderly manner without invading the rights or prejudicing the interests of others ...".

At times, both as counsel and Chief Justice, Barwick seemed to take the extreme position that if, as BNC established, s92 is concerned to guarantee to individuals freedom to engage in inter-State trade, then the only consideration which can justify the restriction of one inter-State trader is the protection of the freedom of other inter-State traders. There was, indeed, some logical force in this idea.

It seems Barwick first put forward this proposition when briefed to appear before the Privy Council for the (successful) appellant in Hughes & Vale (No 1).

1 (1955) 93 CLR 127, 159. Echoing Dixon J in BNC (1948) 76 CLR 1, 389. "The freedom of inter-State trade commerce and intercourse which s92 assures supposes an ordered society where the mutual relations of man and man and man and government are regulated by law."

2 Id. 160. emphasis added.
"'Regulation' may be defined as the making of rules by which people who are by hypothesis free to carry on trade are enabled to do so."¹

Not content with letting this proposition stand or fall on its own logical merit, Barwick found a way to put before their Lordships some evidence of what the drafters of the Constitution "really meant" by s92. He informed their Lordships that

"In the draft convention which preceded the framing of the Constitution the phrase was used 'free from the payment of customs duties and from all restrictions whatsoever except such regulations as may be necessary for the conduct of the business'."²

¹ [1955] AC 241, 254. (No report of argument in (1954) 93 CLR 1.) Similarly, in reply, "with regard to the regulatory test, the laws in question must fundamentally relate to the carrying on of the trade and must be fundamentally concerned with the trade, in the sense of made in the interests of the trade." Id. 280. This proposal of Barwick to limit regulation to matters relevant to facilitating inter-State trade echoed a submission which he had put in the Airways Case to resolve what some saw as the contradiction in the Commonwealth being subject to s92 while having an express head of power under s51(i) to make laws with respect to inter-State trade. Barwick suggested the contradiction be resolved by treating s51(i) as only giving the Commonwealth power to facilitate and protect inter-State trade. (1945) 71 CLR 29, 33-34. (Compare Duncan's Case (1916) 22 CLR 556, 558 per Barton J and 618 per Isaacs J.). The Court did not have to determine the worth of that submission as it found the prohibition of inter-State trade which was under discussion to be offensive to s92. The general thrust of the judgments was, however, to emphasise the width of the power in s51(i). As Chief Justice Barwick accepted that s51(i) included power to prohibit overseas trade. Murphyores Incorporated Pty Ltd v Commonwealth (1976) 136 CLR 1, 5 concurring with Stephen J who affirmed the existence of that power. Id. 11.

Barwick avoided having to justify the introduction of such material by referring to it, not as evidence, but rather as providing a convenient statement of his own understanding of s92. It is to be hoped that their Lordships did not put too much reliance on this "early" version of s92 to indicate what was subsumed by the words "absolutely free". It was glorifying the context in which the phrase appeared to describe it as "the draft convention". The phrase had in fact been prepared by Parkes as one of a set of resolutions which he proposed to move at the 1891 Convention. After an informal meeting of Parkes, some Premiers and other interested parties, this draft was abandoned.¹ La Nauze argues persuasively that even in its original form the reference to "all restrictions whatsoever" was a reference to charges which were not definable as customs duties but had a similar effect, and that the reference to "such regulations as may be necessary for the conduct of business" was an attempt to allow charges for the execution of inspection laws.² The Privy Council decided the case in Barwick's favour without making any comment on Barwick's proposal to confine regulation to such a narrow ambit.

Barwick took up the matter again on his appointment to the High Court. As Chief Justice in Harper v Victoria he put it thus:

"The basic nature of the permissible limitations on the trader's activities so far as inter-State trade and commerce is concerned must be the mutual accommodation of the rights and actions of those engaged in that trade and commerce so that each is free in respect of such trade and commerce though none have licence."³

² Op cit 64-67.
The idea reappeared in *Samuels v Readers' Digest Associated Pty Ltd*

"It is the concept of freedom in a civilized society in contrast with unbridled licence in a lawless state which itself involves the necessity for laws of the land which accommodate one man's activities to those of another so that each is free to trade within the society organized under and controlled by law."\(^2\)

in *Clark King & Co Pty Ltd v Australian Wheat Board*

"The accommodation of the relationship of free men in trade and commerce each to other in an ordered society ...";\(^3\)

and in *Permewan Wright Consolidated Pty Ltd v Trewhitt*

"[Section 92's] clear constitutional purpose is that that individual freedom to trade inter-State is itself paramount and not required to yield to some actual or supposed public interest by a law or executive action which is in its nature incompatible with that freedom".\(^1\)

in *Uebergang v Australian Wheat Board*

"...the acceptable regulation' must be in the nature of an accommodation of the rights of man and man in a society where after the operation of the 'regulatory' law, each remains free in the proper sense of that word, free in his trade, commerce or intercourse"\(^2\)

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3 (1978) 140 CLR 120, 152. There are many similar statements on the same and succeeding page.

1 (1979) 27 ALR 182, 187.

At this stage it is relevant to mention a distinction which Barwick CJ considered significant. In the Readers' Digest Case and again in NEDCO, his Honour emphasised the approach to the application of s92 should be to ask — to what is s92 giving freedom — rather than — from what is s92 guaranteeing freedom.¹

One can more readily see the point of this distinction in relation to the topic "direct/indirect". There the distinction tends to support Barwick's proposition that as s92 is guaranteeing freedom to inter-State trade, the practical effect of any kind of law on inter-State trade is a relevant inquiry.² Barwick CJ seemed to offer the distinction, however, as having relevance both to direct/indirect and to regulation/burden.

In reference to the latter topic the only point to the distinction can be that the issue regulation/burden can be decided according only to the effect of the law on inter-State trade and regardless of the effect of the law on other matters and regardless of the effect of inter-State trade on other matters. If that was the point of the comments of Barwick CJ then it can be dealt with as being subsumed by the larger proposition that it is the accommodation of the rights of inter-State traders inter se, and nothing else, which gives a law its character of acceptable regulation.

As I commented at the outset this proposition has a certain logical force. If carried to its logical conclusion, however, the proposition would be totally unacceptable.³ If carried to its

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² Direct/Indirect discussed Below pp422ff.
³ Unless offset by a theory of "direct" which limited s92's reach. Cf Isaacs J in Exp Nelson [No 1] (1928) 42 CLR 209, 237-238.
logical conclusion truck drivers would be entitled, while on an inter-State journey, to run over pedestrians. The latter, not being engaged in inter-State trade have no interest which could make their protection by an interruption to the inter-State journey a mutual accommodation of the rights and actions of those engaged in inter-State trade. Similarly inter-State traders would be entitled to sell goods likely to injure the health of local citizens not engaged in inter-State trade. Again the victims would not have an interest which would make their protection a mutual accommodation of the conflicting rights of inter-State traders.

Surely Barwick did not mean to allow such behaviour immunity from government control? Yet the statements extracted above tend to that unacceptable conclusion. Indeed, in his first submissions to the High Court in BNC on the topic of curtailing the individual's right to trade inter-State Barwick did take an extreme position submitting that s92 did not allow the prohibition of the passage of persons or goods across State borders even if the persons or goods were in fact carrying disease.\(^1\) On the other hand in his reply before the High Court, Barwick acknowledged that unsafe ships might be excluded from inter-State navigation\(^2\) and that groups of individuals might be excluded from inter-State trade on account of their status as, for example, bankrupts, infants, or even perhaps aliens or on account of their membership of a professional group voluntarily entered.\(^3\) No rationale was offered for allowing these exclusions.

On other occasions Barwick spoke of regulation in terms of adjusting the rights of individuals to accommodate the rights of other individuals without expressly limiting the concept to the mutual

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1 HCT, 18/2/48, 346-347.
2 HCT, 13/4/48, 2221.
3 HCT 13/4/48, 2225.
accommodation of individuals engaged in inter-State trade.\textsuperscript{1} Even in Harper's Case where Barwick CJ argued so strongly that s92 is only concerned with the rights of inter-State traders\textsuperscript{2} his Honour also cited with approval a discussion of the problem by Kitto J in Hughes & Vale (No 2). In the course of that discussion Kitto J talked of regulatory laws as being laws of "the kind by which an individual's latitude of conduct is circumscribed in the interests of fitting him into a neighbourhood - a society, membership of which entails, because of its nature, acts and forbearances on the part of each actor and by which room is allowed for the reasonable enjoyment by each other of his own position in the same society."\textsuperscript{3}

Barwick CJ acknowledged furthermore that guaranteeing wholesomeness in food stuffs,\textsuperscript{4} excluding diseased persons or goods,\textsuperscript{5} protecting all road users ("including pedestrians"), requiring honesty in commercial dealing,\textsuperscript{6} requiring tubs of margarine to be labelled as such\textsuperscript{7} and suppressing restrictive trade

\textsuperscript{1} BNC PCT 6/4/49, 4-5; Wilcox Mofflin Ltd v New South Wales (1952) 85 CLR 488, 502; Uebergang v Australian Wheat Board (1980) 32 ALR 1, 8-9.

\textsuperscript{2} (1966) 114 CLR 361, 375. Above p374.

\textsuperscript{3} Hughes & Vale Pty Ltd v New South Wales [No 2] (1955) 93 CLR 127, 128. Barwick CJ may of course, have understood the reference by Kitto J to the "society" of which the individual trader is a member as being a reference to the "society" of inter-State traders.

\textsuperscript{4} NEDCO (1975) 134 CLR 559, 578-579. (See also the reservation of health and safety matters in Harper (1966) 115 CLR 361, 373.

\textsuperscript{5} Clark King v Australian Wheat Board (1978) 140 CLR 120, 152; Permewan Wright Consolidated Pty Ltd v Trewhitt (1979) 27 ALR 182, 186; Uebergang v Australian Wheat Board (1980) 32 ALR 1, 8.

\textsuperscript{6} Uebergang v Australian Wheat Board (1980) 32 ALR 1, 9; Permewan Wright Consolidated Pty Ltd v Trewhitt (1979) 27 ALR 182; Clark King & Co Pty Ltd v Australian Wheat Board (1978) 140 CLR 120, 152.

\textsuperscript{7} O'Sullivan v Miracle Foods (SA) Pty Ltd (1965) 115 CLR 177, 184.
practices are all acceptable regulatory grounds. And yet it would be difficult to explain all these matters in terms of protecting traders, let alone in terms of protecting inter-State traders.

How could Barwick CJ justify allowing these laws to inhibit inter-State traders merely to protect persons not engaged in inter-State trade? As his Honour himself argued so forcefully if s92 is concerned with inter-State traders what is there in s92 itself which allows the interests of individuals who are not in inter-State trade to be taken into account?

If one reads again the extracts set out above where Barwick CJ is arguing most strongly that regulation be considered from the point of view of inter-State traders, one will note the ambiguity of the surrounding references to freedom but not licence, freedom in a society under law, freedom in an ordered society and freedom in the proper sense. On the first reading of these passages one is left with the impression that these references corresponded to the expression "the mutual accommodation of inter-State traders". On reading those passages, however, in light of the knowledge that Barwick CJ did allow laws to operate on inter-State traders even though the laws were not protecting inter-State traders, then it seems that Barwick CJ accepted there was a general category of laws necessary for civilization, perhaps overlapping but not exhausted by "regulation", and that these were inherent in the concept of freedom.

1 Samuels v Readers' Digest Association Pty Ltd (1969) 120 CLR 1, 19-20; Mikasa v Festival Stores (1972) 127 CLR 617; Clark King & Co Pty Ltd v Australian Wheat Board (1978) 140 CLR 120, 152.
3 Readers' Digest Case (1969) 120 CLR 1, 15.
4 Clark King Case (1978) 140 CLR 120, 152; Permewan Wright (1979) 27 ALR 182, 187.
in a civilized society and were compatible with s92. It is also pertinent at this stage to note that statement extracted from Harpers Case only says that the mutual accommodation of inter-State traders is basic to the nature of permissible regulation. It does not say that the mutual accommodation of inter-State traders exhausts the scope of permissible regulation.

Towards the end of his Chief Justiceship Barwick was part of a Court which was asked directly in Permewan Wright to accept that the only kind of permissible regulation is law to protect the trade of inter-State traders. This proposition was rejected by the Court. Even though Barwick CJ dissented from the Court's decision upholding the legislation, he did not accept the narrow theory of regulation

1 Compare these extracts from an address given by Barwick CJ to Queensland Branch of the AMA in 1970, published in its journal of November 1970 at 863 ff and entitled "Whither the Society?" "We are mostly concerned, I think, with - and certainly we hear much about - the freedom of the individual - and rightly so ... But it is personal freedom in a society of free men and women. It is freedom under and through law - the law of the society ... When I speak of the society, I do not refer to the abstraction which we call the State with a capital 'S'. It is the community of individuals living together in a civilized fashion ... living involves a balance between the freedom of the individual and the proper claims of the society ... a balance which forms a large part of the content of civilization itself. (Id. 863) And later "[freedom of expression of opinions about public matters] is a freedom and not a licence. All our freedoms are freedoms under law. They derive both their sanction and their limitations from law. There is no freedom from law. To assert that there is a freedom from law is to assert privilege which ultimately may lead to tyranny of one form or another." (Id. 864) And later "For all these freedoms are mutual. The other fellow has his freedom. Freedom itself, as distinct from licence, involves the accommodation of one man's conduct to that of another." (Id. 865)

2 Similarly the passage from Permewan Wright above makes the freedom to engage in inter-State trade the paramount, but not the only consideration.

3 (1979) 27 ALR 182.
proposed. His Honour referred instead to the restraints inherent in the concept of freedom in a civilized society.¹

It was no doubt quite sensible to conclude that s92 does allow laws basic to civilization. Barwick CJ never, however, attempted to offer any framework for identifying these laws. The laws allowable within this category were according to Barwick CJ laws "inherent" in the concept of freedom.

The fact, however, that Barwick CJ failed, indeed refused, to offer any guidance as to what would bring a law (other than a law to protect other inter-State traders) within the concept of regulation, enabled others to establish propositions in this regard which had, by the end of Barwick's Chief Justiceship dramatically destabilized s92. These propositions had affected the outcome in some of the cases discussed in the next section. Before outlining those propositions and thus completing the discussion of the theory for distinguishing regulation from burden, I will demonstrate how Barwick CJ's notion of freedom was applied.

I. Distinguishing Regulation from Burden - The Practice

The undefined category of laws inherent in the concept of civilization was a significant qualification to Barwick CJ's emphasis on the rights of inter-State traders. That emphasis on the rights of inter-State traders was, however, a real emphasis borne out by Barwick CJ's decisions in the cases, as the ensuing discussion illustrates.

In the cases discussed in this section the outcome is often affected by the individual judges' approaches to direct/indirect as

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¹ Id. 186.
well as their approaches to burden/regulation. This section is only concerned with the latter topic. Direct/indirect is discussed below.¹

At an early stage in his Chief Justiceship Barwick was involved in the case of O'Sullivan v Miracle Foods (SA) Pty Ltd². The case is notable for the fact that Barwick CJ held a restriction of inter-State traders to be valid regulation. This case involved South Australian legislation relating to the sale of margarine which was challenged by a company bringing margarine into the State for sale. One section of the Act required all margarine sold to have the word margarine printed in black letters of a certain dimension, on its container. Barwick CJ³ joined the other members of the court⁴ in holding this provision compatible with s92. Barwick CJ did add the reservation that an attempt to require labelling of clearly identifiable products might not be acceptable.⁵

The Court divided, however, over another provision which prohibited the sale or possession for sale of margarine unless it contained 0.1% arrowroot. The presence of arrowroot in a foodstuff can be detected by a simple test. In dissent Windeyer J would have allowed this provision to operate as valid regulation because it made the passing off of margarine as butter more difficult.⁶ The other dissent that of Menzies J, was on the basis that His Honour did not consider the law to be directly affecting inter-State trade.⁷

¹ Below pp422ff.
² (1965) 115 CLR 177.
³ Id. 184.
⁴ Id. 191 per Taylor and Owen JJ, 194 per Menzies J 1968, per Windeyer J.
⁵ Id. 184.
⁶ Id. 198.
⁷ Id. 195.
Barwick CJ in the majority emphasised his theory that the Constitution is based on people versus government. On the assumption that regulation is based on "the adjustment of the respective rights of people each to the other", the mere convenience of an official in the detection of breaches of an Act can rarely, if ever, be regarded as a proper subject matter of a regulatory provision in reference to inter-State trade".1 The point that Barwick CJ seemed to overlook was that the ease of testing was a matter affecting not only the convenience of officials but also the likelihood of a breach of an Act (protecting individuals) being detected.2

In Harper in 19663 and again in Permewan Wright Consolidated Pty Ltd v Trehwitt in 19794 when the Court was asked to reconsider Harper the suspect Victorian legislation prohibited the sale of eggs unless they had first been submitted to a government board for grading, testing and marking. A fee was charged for the grading. Barwick CJ in dissent on both occasions would have held that s92 prevented the law applying to sales of eggs brought into Victoria from New South Wales.

In Permewan Wright the legislation seems to have been considered as having two aspects relevant to indicating a regulatory character — "one aspect relates to that area of public health concerned with the fixing and enforcement of standards for perishable foodstuffs, the other to an elementary form of consumer protection and fair dealing in trade, requiring fair weights and measures and accurate labelling


2 The other majority judges, Taylor and Owen JJ seemed to consider that the goal of preventing the passing off of margarine as butter, did not justify the law's drastic interference with inter-State trade. Id. 190.

3 (1966) 114 CLR 361.

4 (1979) 27 ALR 182.
as to weights and quantities.¹ In Harper the question of public health was reserved and it was only in the latter aspect, consumer protection, that the legislation was considered.²

There was a bench of only five in Harper. Of the four majority judges, only one, Menzies J rested his decision on regulation. His Honour considered the provision to be prima facie valid because it related to standard fixing.³ In Permawan Wright there was a bench of six. Murphy J upheld the law because it contained no offence to his discriminatory fiscal impost theory of s92.⁴ The other three majority judges, Gibbs, Stephen and Mason JJ considered the law to be acceptable regulation.⁵ Aickin J found the law offensive for reasons similar to those of Barwick CJ.⁶

Barwick CJ did not deny that a requirement of sales according to prescribed grades might be an acceptable basis for restricting inter-State trade.⁷ Nor did his Honour deny that a law might exclude

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1 (1979) 27 ALR 182, 197 per Stephen J.
2 (-1966) 114 CLR 361, 373.
3 Id. 378. McTiernan, Taylor and Owen JJ considered there was no direct effect. Id. 377, 377, 382 respectively. Below p449. In between the Harper and Permawan Wright decisions a bench of five which did not include Barwick CJ divided on the question of the validity of a New South Wales law which prohibited the sale of eggs that had been transported for more than three hundred miles until they had been tested and graded by a government board. Windeyer, Owen and Walsh JJ, with McTiernan and Menzies JJ dissenting upheld the law in its application to sales of eggs brought into New South Wales. Cantarella v Egg Marketing Board (NSW) 124 CLR 605.
4 (1979) 27 ALR 182, 208.
5 Id. 189-192, 192-202, 202-208 respectively. The judgment of Mason J was affected by his opposition to the individual liberty basis of s92 Below pp389ff.
6 Id. 208-228.
unwholesome eggs from inter-State trade. The offence of this legislation was, for Barwick CJ, contained in the means chosen for pursuing those goals. The inconvenience and expense afforded the trader by having to submit this produce to a government board for grading was what gave the offence. The State could have punished sales made in an offensive way and left the grading and testing to the producers themselves.

Barwick CJ reasoned that a law restricting inter-State trade could not be saved just because it was intended to achieve some worthy social goal. His Honour did not refer to the 1950's Transport Cases but he could well have done so to support his position at this stage. The notion that a law would be redeemed merely because it was intended to achieve some worthy social goal was central to Evatt J's theory of s92 and to the 1930's Transport Cases. Both Evatt J's theory and the 1930's Transport Cases had clearly been rejected by BNC and the 1950's Transport Cases.

In 1969 Barwick CJ was part of a Court which considered in Samuels v Readers' Digest Association Pty Ltd a provision in a South Australian Act, the Trading Stamp Act, prohibiting the issue or delivery in connection with the sale or advertising of any goods of any writing promising that the purchaser will be entitled to any gift dependent on the purchase of such goods. The Readers' Digest company was said to have breached this provision by sending a letter from New South Wales to a person in South Australia promising a free record to that person in South Australia if he ordered other records to be sent from New South Wales.

1 Permewan Wright (1979) 27 ALR 182, 187.
3 Above pp318ff.
Barwick CJ was the only member of the Court to hold that s92 prevented the legislation applying to Readers' Digest's action. ¹ McTiernan and Taylor JJ² adopted the language of Latham CJ in the Home Benefits Case³ and relied on the supposed distinction between stopping trade and stopping a trading practice. It was not clear whether this point went to "direct" or "regulation". The point taken by McTiernan and Taylor JJ was brushed aside by Barwick CJ, as it deserved to be as being question-begging. As Barwick CJ pointed out, it is "quite beside the point to say that the trader may make his offer shorn of the inducement. That is not the offer he wants to make. To prevent his making it at least prima facie impairs his freedom to trade."⁴

To support his opinion that the provision was regulation, Menzies referred to the long history of "legislative animadversion to this kind of practice".⁵ This history did not impress Barwick CJ who pointed out that it is in the nature of constitutional guarantees to create gaps in legislative power.⁶ If all States were to adopt the same restrictive measures that would mean only that more harm was being done to national trade.⁷

In the end although convincingly debunking the majority judgments, Barwick CJ did not offer any positive reasoning to support his conclusion that this provision was not allowable regulation. Barwick CJ allowed that the suppression of fraudulent or deceptive practices

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1 Kitto J considered that the law was not operating directly on inter-State trade. Id. 31-32 Below pp461-462.
2 Id. 23, 35.
3 Home Benefits Pty Ltd v Crafter (1939) 61 CLR 701, 711-712.
4 (1969) 120 CLR 1, 18.
5 Id. 40.
6 Id. 14-15.
7 Id. 20.
could be described as actually securing "freedom of trade and commerce as that freedom is understood in organized and civilized societies".\(^1\) Barwick CJ also acknowledged that it could well be compatible with s92 "in a society based on free competition in trade" to prevent monopolisation especially if acquired by disproportionate strength.\(^2\) Barwick CJ considered that the actions of Readers Digest were not analogous to either (relevant) category of allowable regulation.

In SOS Mowbray Pty Ltd v Mead the Court got another opportunity to consider s92 and margarine.\(^3\) Section 6 of the Tasmanian Dairy Product Act made it an offence to sell cooking margarine containing any prohibited colouring or flavouring substance. The prohibited substances were the substances giving margarine its appetising colour and palatable flavour.

Four out of the seven judges who sat decided that s92 did not prevent the Tasmanian provision from applying to the sales of margarine brought into Tasmania from New South Wales.\(^4\) Only two of the majority judges, McTiernan and Windeyer relied on a decision that the provision was regulatory.\(^5\)

McTiernan J regarded the provision as acceptable regulation

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1 Id. 19.

2 Id. 19 a view which Barwick CJ and the Court as a whole were to confirm in Mikasa v Festival Stores (1972) 127 CLR 617.

3 (1971) 124 CLR 529.

4 Of these four majority judges two, Menzies and Gibbs JJ considered that the law was not directly affecting inter-State trade. (1971) 124 CLR 529, 557-558, 559-600 respectively.

5 Id. 555, 578 respectively, Windeyer J tended to assimilate the two questions of direct and regulation Id. 579.
because it prevented margarine being mistaken for butter. Windeyer J accepted the provision on the wider basis that it prevented the adulteration of food. It was apparently immaterial to his Honour whether the adulteration was being forbidden to protect health, to prevent passing off or indeed to protect (Tasmanian) dairy farmers from the competition of (inter-State) producers of margarine.

The minority judges, Barwick CJ (with the concurrence of Owen J) and Walsh J, exposed the circularity of the point taken by Windeyer J. As the dissentients pointed out, margarine without the prohibited additives was not in a commercial sense, margarine anymore. Margarine had long been understood to be a substance with a butter-like colour and flavour. Barwick CJ and Walsh J considered that given the difference in character between yellow flavoursome margarine and the pale insipid tasteless substance which margarine was without the additive, the Tasmanian provision was really an absolute prohibition on the sale of margarine. Such a drastic curtailment of trade could not be justified merely for the sake of preventing confusion of margarine with butter. Barwick CJ reinforced his conclusion on this matter by the quite valid point that margarine could not ordinarily be confused with butter as margarine is sold packaged and labelled.

The preceding discussion has illustrated that, operating within his individual liberty framework, Barwick CJ was willing to allow to inter-State traders a wide immunity from governmental control.

The discussion now turns to the challenge made to the assumption of individual liberty freedom and Barwick CJ's response thereto.

1 Id. 555.
2 Id. 578.
3 Id. 573-574.
4 Id. 542 per Barwick CJ, 595-596 per Walsh J.
5 Id. 542-543 per Barwick CJ, 596 per Walsh J.
J. The 1970's attack on the individual right basis to s92

In the last years of Barwick's Chief Justiceship three judges challenged the individual right basis to s92. They were Mason, Jacobs and Murphy JJ.

Murphy J took the openly radical course of espousing and applying the view that s92 is only concerned with discriminatory financial imposts.\(^1\) There is a good case for this interpretation. It faced, however, the significant problem that generations of precedent implicitly and at times expressly rejected it.\(^2\) To the extent that this interpretation determined (and continues to determine) the vote of Murphy J it was (and is) important. It has had, however, no discernible effect on other members of the Court.

Barwick CJ made some attempt to answer Murphy J's case on its merits. Such a theory would, according to Barwick CJ leave s92 with very little function. Section 90 already prohibits the States from imposing customs duties.\(^3\) (This assumption about the function of s90 is rather dubious. What authority there is on the point would indicate that when s90 refers to customs duties it is referring solely to duties on importation from abroad.)\(^4\) For Barwick CJ it was impossible to believe that s92 was merely designed to prevent the Commonwealth imposing duties on movement from one State to another.

\(^1\) Buck v Bavone (1975) 135 CLR 110, 135; H C Sleigh Ltd v South Australia (1977) 136 CLR 475, 527.

\(^2\) McArthur's Case (1920) 128 CLR 530, 553-554 per Knox CJ, Isaacs and Starke JJ. In BNC the Privy Council said "Forty years of controversy upon these words [the words of s92] have left one thing at least clear. It is no longer arguable that freedom from Customs or other monetary charges alone is secured by the section." (1949) 79 CLR 497, 829.

\(^3\) Clark King (1978) 140 CLR 120, 151. KH Bailey had made the same point in "Interstate Free Trade. The Meaning of 'Absolutely Free'." (1933) 7 ALJ 103, 103-104.

\(^4\) Commonwealth and Commonwealth Oil Refineries Ltd v South Australia (1926) 38 CLR 408, 435, 438.
The Commonwealth is already constrained by s51(ii) and s99 anyway. Even if we accepted Barwick CJ's proposition that State duties imposed on the movement of goods from one State to another are caught by s90, that would not necessarily reduce s92 to the scope ascribed to it by Barwick CJ. Section 92 could be understood as intended to catch discriminatory imposts disguised so as not to resemble conventional customs duties. Even if one accepted the very narrow scope ascribed to s92 by (Barwick's interpretation of) the Murphy proposal, that such a narrow scope was intended, is only incredible if one knows or assumes that s92 was intended to be a very important provision. If one follows Barwick CJ's principle that the text is the test then there is nothing on the face of s92 to indicate that it is any more significant than any other section of the Constitution. If one looks to the Convention Debates it soon appears that s92 was intended to be important. Barwick CJ, however, while acknowledging that the reasons for the choice of particular language in parts of the Constitution might be relevant in case of ambiguity saw no need to go to such material as his Honour did not consider s92 ambiguous.

The attack by Mason J and Jacobs J on individual right was more complex and more successful than that presented by Murphy J. The case of Pilkington v Frank Hammond Pty Ltd was the first s92 decision for Mason and Jacobs as Justices of the High Court. Both took the opportunity to argue that s92 was concerned with some public principle. Admittedly individuals might obtain rights through s92. Those private rights were, however, merely incidental effects of the

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1 Clark King (1978) 140 CLR 120, 151.
2 Appendix.
3 Uebergang (1980) 32 ALR 1, 18.
If individual liberty was not the freedom declared by s92 then what was? What was the public principle declared by the section?
The proposition that private rights were merely incidental effects of a public principle echoes statements made in the American situation when the issue is the extent to which inter-State trade is freed from State action. In that context the "public principle" is that a free trade can be preserved from "particularistic or eccentric State policies" because of the national interest in trade being able to flow freely subject only to uniform controls by the central authority. Was that the public principle their Honours had in mind?  

In *Pilkington* itself Mason J seemed to accept that the meaning of "absolutely free" in s92 had been correctly discussed "in the decided cases". One would have thought that the "decided cases" had attributed to "absolutely free" the individual liberty theory which Mason J repudiated in his next breath. Jacobs J saw s92 as having the purpose and effect of creating "a common area of trade commerce and intercourse among the States of Australia" and of creating and preserving from fragmentation the economic and social

1 *Id.* 185-186 per Mason J, 199 per Jacobs J.


3 *Id.* 185-186.

4 *Id.* 198.
entity. Barwick CJ would have had no great difficulty in accepting this vague general description of s92's purpose. In time both Mason and Jacobs JJ were directly to invite a challenge to the accepted interpretation of s92 and were to indicate sympathy for a theory of an anti-protection basis to s92.

Mason J said in Finemores Transport Pty Ltd v New South Wales

"I have always doubted whether s92 was intended to do more than protect inter-State trade from burdens of a discriminatory kind of which North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW provides a convenient example."

In his judgment in Bartter's Farms Pty Ltd v Todd delivered a few months after Finemore, Jacobs J stated that he understood s92 to be part of the scheme to create a common market by inter alia, prohibiting "attempts by one unit of a federation by legislative prohibition to give itself and its residents economic advantages over

1 Id. 198-199. The language used by Jacobs J is remarkably similar to that used by Beasley in the concluding paragraph of his article "The Commonwealth Constitution: Section 92 - Its History in the Federal Conventions" (1948-1950) 1 Annual Law Review 97, 273, 433, 440 "... it is submitted that an examination of the Commonwealth Constitution, in all its implications will reveal ample evidence within the four corners of the document itself of the true ambit of, and the restrictions upon, the trade and commerce power, that section 92, read correctly in its context, does no more than reinforce the conversion of six separate economic units into one and ensure the operation therein of the contemporary concept of free trade; and that its prohibition of interference with that concept extends solely to such measures, federal or State, as would necessarily or deliberately threaten that economic unity which the founders of federation in Australia had resolved to establish." Emphasis added.

2 Below pp393-395.

3 (1978) 139 CLR 338, 352.

other units of a federation ...”. Mason and Jacobs JJ never committed themselves to the proposition that s92 is to be taken as only giving freedom from discriminatory burden, that is, from protectionist action. By the time a Court of seven received, in u. e. rfgang v Australian Wheat Board, an opportunity to review the basis of s92, Jacobs J had left the Court and Mason J contented himself with the development of “Plan B”, the second level of his and Jacobs J’s attack on the individual right framework.

In between the Pilkington decision in 1974 and the Finemore and Bartter’s Farms decisions in 1978, Mason and Jacobs JJ developed their second level of attack. The propositions were first that the line between regulation and burden will vary according to the circumstances of the case and secondly that general public interest is relevant to s92. (This second vague proposition had grown out of their statements in Pilkington to the effect that s92 declared a public principle.)

The case in which these propositions were introduced was the NEDCO Case. According to Mason J the concept of freedom guaranteed by s92 was not intended to be frozen and defined according to the doctrines of political economy prevailing in 1900. Rather the section should be understood as allowing the regulation of inter-State trade in the interests of the public. This would involve the operation of the section fluctuating and new categories of acceptable regulation appearing “as the community develops and as the need for new and different modes of regulation of trade and commerce become apparent”. To support this approach to regulation Mason J

2 North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales (1975) 134 CLR 559.
3 Id. 615.
seized\(^1\) on the proviso in BNC coming after their Lordships' endorsement of the individual right theory.\(^2\)

The terms of this important passage are now set out again.

"For their Lordships do not intend to lay it down that in no circumstances could the exclusion of competition so as to create a monopoly either in a State or Commonwealth agency or in some other body be justified. Every case must be judged on its own facts and in its own setting of time and circumstance, and it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation and that inter-State trade commerce and intercourse thus prohibited and thus monopolized remained absolutely free."\(^3\)

Jacobs J argued to the same effect that although the meaning of s92 might be constant the operation of the section would vary according to the facts surrounding particular suspect laws. The implication was that previous decisions need seldom be overruled. Inconvenient decisions could simply be confined to their facts.\(^4\)

\(^1\) Id. 615.
\(^2\) Above p360.
\(^3\) [1950] AC 235, 311; (1949) 79 CLR 497, 640-641.
\(^4\) (1975) 134 CLR 559, 621. This is a time-honoured device for judicial saboteurs. Compare Dixon J in Gratwick v Johnson (1945) 70 CLR 1, 19. "In questions concerning the application of s92 of the Constitution, I think that it has become desirable for the Court to avoid as far as possible the statement of general propositions and in each case to decide the matter, so far as may be, on the specific considerations or features which it presents."

And the Privy Council in BNC commenting on James v The Commonwealth's "freedom as at the frontier" formula. "These words must (as must every word of every judgment) be read secundum subjectam materiam." [1950] AC 235, 308; (1949) CLR 497, 637-638.
The State legislation involved in NEDCO involved a clear and unjustifiable discrimination against the products of another State and Mason J and Jacobs J joined in the majority decision that such an operation offended s92. The threat presented to the status quo by the comments of Mason J and Jacobs J was not therefore carried into action in NEDCO itself.

In 1978 the case of Clark King & Co Pty Ltd v The Australian Wheat Board came before the Court. There were only five judges on the bench, Barwick CJ, Stephen, Mason, Jacobs and Murphy JJ. In issue was co-ordinated Commonwealth State legislation prohibiting certain dealings with wheat and empowering the compulsory acquisition of nominated parcels of wheat. The ultimate purpose of the scheme was the stabilisation of wheat growers' incomes.

Barwick CJ and Stephen J in dissent would have held the legislation offended s92 in its application to inter-State trade in wheat. Mason, Jacobs and Murphy JJ upheld the legislation. Murphy J based his decision on his discriminatory imposts theory.

Mason and Jacobs JJ referred to the BNC exposition without committing themselves to an acknowledgement of its authority. They noted however, that that exposition included the proviso, emphasised by Mason J in NEDCO, which conceded that a prohibition with a view to State monopoly might in some circumstances be the "only practical and reasonable manner of regulation".

1 Id. 607, 616 per Mason J, 632 per Jacobs J.
2 (1978) 140 CLR 120.
3 Id. 193-194. Above p389.
4 Id. 185.
5 (1949) 79 CLR 497, 641.
Mason and Jacobs JJ considered that the circumstances were such as to justify the challenged legislation. Their Honours reviewed the history of the Australian wheat industry, the experience of widely fluctuating prices and in particular the 1930's experience of a very low price for wheat with its consequent hardship for wheat producers. Against that background their Honours identified a need for stability in returns to wheat growers. Their Honours considered that the guarantee of a minimum return to farmers was basic to such stability. It further appeared to their Honours that the supplying of that fund from the returns on wheat sales in good years was also basic. The scheme to smooth out fluctuations by using the returns in good years to make up shortfalls in bad years could only work if all growers were required to submit to the scheme in good years as well as benefit from it in bad years. Thus their Honours concluded that the scheme was, in the terms of the BNC proviso, the only reasonable and practical manner of regulation of the wheat industry.¹

The striking feature of the joint judgment of Mason and Jacobs JJ was the complete absence of any direct reference to the nature of the prima facie freedom which they found sufficiently rebutted by the public interest in ordered marketing. It must be remembered that Clark King was handed down just after Finemore and just before Bartter's Farms, the cases where their Honours stated their suspicion that the decided cases had misconstrued s92 in extending its freedom beyond freedom from protectionist action. In these cases, their Honours also stated that they would follow the decided cases until a review of their basis was sought.² Consistently with that stance Mason and Jacobs JJ in Clark King, claimed to be applying the BNC formula with its proviso, according to their understanding of what the Privy Council meant thereby³ (rather than applying their

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1 (1978) 140 CLR 120, 188-193.
2 Finemore's case (1978) 139 CLR 338,352 per Mason J, 35 per Jacobs J.
3 Id. 185 - 186, 188.
own understanding of s92). Still their Honours failed to give a positive statement of the freedom that they took the Privy Council to have found in s92. Did their conclusion of validity mean that the public interest was sufficient to offset even an individual liberty freedom? Or did it mean (bearing in mind their statements in Pilkington and NEDCO Above that they took the decided cases to have established a freedom derived from a great (but as yet undefined) public principle of s92 with which this legislation was compatible? The ambiguity could well have been deliberate.

Although Mason and Jacobs JJ claimed to be applying the BNC formula according to its terms, the reality of their action was a large shift in the operation of s92. The essence of the individual liberty theory is the recognition of a privileged class, inter-State trader, within society. The essence of the argument of Mason and Jacobs JJ in Clark King was that fairness to growers generally required that inter-State traders not be privileged. Their Honours comment that this "Australia-wide wheat pooling scheme" involving coordinated Commonwealth State legislation was acceptable whereas a single State's scheme involving the same prohibitions and acquisitions would be difficult to uphold, revealed a preoccupation with some approach to s92 other than individual liberty. As Barwick CJ had pointed out in Readers Digest once one accepted the individual liberty basis to s92 then the wider the adoption of an offensive provision the wider the breach of s92.

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1 Finemore's case (1978) 139 CLR 339, 340 per Barwick CJ.
2 Id. 193.
3 Id. 192.
5 Also Clark King (1978) 140 CLR 120, 158; Uebergang (1980) 32 ALR 1, 17.
No one had paid much attention to the BNC proviso until it was thus injected with life by Mason and Jacobs JJ.¹ It seemed to be no more than a recognition by the Privy Council that it is difficult to devise a s92 formula which will meet all cases which may arise. Nevertheless, as Mason and Jacobs JJ pointed out, the terms of the BNC proviso recognize the relevance of the current "stage of social development" and recognize that such general considerations may justify the exclusion of individuals from inter-State trade even if the exclusion is to stop them competing with a government trading body.

(i) Barwick's defence of individual right.

After Mason and Jacobs JJ declared in Pilkington their willingness to re-examine the basis of s92, Barwick CJ vigorously defended the individual right theory in general and his own version of the individual right theory in particular. He set out his defence in the cases of NEDCO in 1975², Finemores Transport Pty Ltd v New South Wales³, and Clark King & Co Pty Ltd v Australian Wheat Board⁴ in 1978, Permewan Wright Consolidated Pty Ltd v Trewhitt in 1979⁵ and in Uebergang v Australian Wheat Board in 1980 shortly before his retirement.⁶ (Barwick CJ sat on seven other s92 cases during this

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¹ R Anderson had noted the destabilising potential of the proviso in his note on BNC in (1950) 1 UQLJ 65, 67. An attempt to found a argument on the proviso had been rejected by the Privy Council in Hughes and Vale Pty Ltd v New South Wales [No 1] (1954) 93 CLR 1, 34 on the basis that no facts had been proved to support such an argument.

² (1975) 134 CLR 559.

³ (1978) 139 CLR 338.

⁴ (1978) 140 CLR 120.

⁵ (1979) 27 ALR 182.

period where he found no occasion to review the basis for the section.)

Many of the points in the defence of his individual liberty theory had been already made by him when developing his theory of regulation before the attack commenced, and before that, in his submissions in BNC and other cases as counsel.

On the question of whether s92 is concerned to create an individual right or some other kind of freedom Barwick CJ made these points.

The words of s92 make it plain that the intention is to create an individual right. First, because the section also protects intercourse and intercourse must mean exclusively intercourse by persons, individuals and corporations. This was a point taken by the Privy Council in BNC echoing Barwick's submissions and receives comment above.

Secondly, because trade and commerce are both carried on by persons. Even though some activities engaged in by government executives or agencies closely resemble trading activities, such activities are not really trading activities. This proposition was inconsistent with authority and with Barwick's own statements for the purposes of 51(xx) and is discussed below.


2 Uebergang v Australian Wheat Board (1980) 32 ALR 1, 14.

3 Above p345-346, 356.

4 Clark King Pty Ltd v Australian Wheat Board (1978) 140 CLR 120, 192; Uebergang v Australian Wheat Board (1980) 32 ALR 1, 14.

5 Below pp414-419.
Thirdly, if it matters, this large gap in the totality of legislative powers was deliberately created.¹

As for the introduction by Mason and Jacobs JJ of the propositions that the operation of s92 will vary with the circumstances of each case - Barwick CJ agreed with that proposition, but drew the standard distinction between connotation and denotation.² The connotation of the words in the Constitution could not be changed by the High Court. They could only be changed by constitutional amendment under s128.³ The line between connotation and denotation is arbitrary. Barwick CJ's point had some force on this occasion, however, as Mason J had come close to wandering from the orthodox jargon when he had said in NEDCO that the word "free" was not intended to be frozen to doctrines of political economy prevailing to 1900 but was intended to allow new needs to be taken into account.⁴

As for the introduction of the proposition that public interest can offset s92's prima facie freedom - Barwick CJ steadfastly refused to acknowledge any indication of regulation other than the inherent meaning of freedom.⁵ Barwick CJ took the rebels to task for their vague talk about the public aspect of s92. Section 92 was a limitation on legislative power. To say that its principle could be offset by some public interest perceived by the legislators was to subject the legislative limitation to legislative power. That was to rewrite the Constitution.⁶ It was also inappropriate for a court of law to enter into inquiries about whether a law was good for the

¹ Clark King (1978) 140, CLR 120, 153.
⁴ (1975) 134 CLR 559, 615 Above p393.
⁵ Above pp379-381.
⁶ Uebergang v Australian Wheat Board (1980) 32 ALR 1, 16-17.
community. "The decision whether or not a community or some part of it benefits from legislation involves social and political theory and must inevitably involve passage down a slippery path, better suited to the feet of legislators than to those of judges."¹

To meet both the inference contained in Mason J's discussion that his (Barwick CJ's) interpretation of "free" was frozen to a 1900 doctrine and to meet the attempt to bring in general public interest, Barwick CJ made this unequivocal declaration.

"Nothing I have ever written, nor, as far as I am aware, nothing that has been said in the decided cases, on the operation of s92 has depended on any other consideration than the words of the Constitution itself."²

This was a new emphatic version of the familiar - the text is the test. Its vehemence is undercut, when one reads back over Barwick CJ's discussions of "free" and sees that Barwick CJ's conclusion about what the test meant was reinforced by his Honour's belief that his interpretation was good for the people of the federation.³

¹ Clark King (1978) 140 CLR 120, 153-154.
² Uebergang's case (1980) 32 ALR 1, 18-19. After his retirement Barwick J pursued a similar theme in his review, discussed above p3-4, of Professor LR Zines' The High Court and the Constitution.
³ The emphatic statement in the quoted passage is a little hard to reconcile with statements made by Barwick CJ in an address given at a luncheon on 6 April 1979 organized by the Australian National University Law Society. I attended that luncheon. According to my recollection confirmed by notes I made at the time, Barwick CJ said that the High Court was sensitive to the social implications of cases before it. His Honour referred to the then current controversy over road taxes and said that no court sensitive to the social implications of inserting costs in the form of taxes into the base of the cost structure would uphold the validity of such taxes. Discussed above p4.
And what of the proviso to the BNC formula? In 1980 in *Uebergang v Australian Wheat Board*¹ a wheat grower sought a re-examination of *Clark King*.² While the case was still at the pleading stage, Barwick CJ stated questions for the Full Court. The first and most important of these questions was whether the validity of the legislation depended on the establishment of any fact, and if so, what was the fact to be established.

This brought the Court up against the basic question of the significance of BNC proviso. According to Barwick CJ the BNC proviso was incompatible with the "correct" individual liberty theory of s92.³ Its inclusion by the Privy Council was a mere matter of caution. The Court should declare "outright and unequivocally", that it could never apply. That was the "logic of the Constitution". If his brethren could not see that then they should at least recognize that the proviso could only apply in extremely rare occasions. The circumstances in *Uebergang* were not greatly different from the circumstances surrounding other cases decided before BNC.⁴ It was therefore, impossible to believe that there was anything in the circumstances surrounding *Uebergang* which would come within the extremely rare category.⁵ In any case the proviso would have to be strictly complied with and a heavy onus would lie on those affirming its applicability.⁶

That then was Barwick CJ's case.

2  (1978) 140 CLR 120.
3  Id. 10.
4  Id. 11.
5  Id. 11-12.
6  Id. 12.
(ii) The outcome of the 1970's attack - Uebergang's Case

The case of Uebergang presented, in the manner described above, the opportunity for a bench of seven to re-examine the nature of s92's freedom.

Murphy J continued his discriminatory fiscal impost theory. The wheat marketing legislation was therefore valid and there was no possibility of any facts being proved which could change that result. His Honour did add, that his second preference was for the formulation of Stephen and Mason JJ.1

The joint judgment of Stephen and Mason JJ made no mention of the discrimination theory which Mason J had proposed in Finemore. The judgment did, however, represent a weakening of the individual liberty theory.

The mere fact that Stephen J joined in this judgment with Mason J, a clear opponent of the individual liberty theory, was itself significant. Stephen J had previously been a supporter of the individual right framework.

In NEDCO in 1975 he had concurred2 with the judgment of Barwick CJ which contained a discussion of the Chief Justice's concept of regulation and freedom dominated by the rights of the individual.3 In the Clark King case4 the dissent of Stephen J was vigorous in its disagreement with the conclusion reached by Mason and Jacobs JJ

1 Id. 28-32.
2 (1975) 134 CLR 559, 601.
3 (1975) 134 CLR 557, 581-582. Also Mikasa (NSW) Pty Ltd v Festival Stores (1972) 127 CLR 617, 652-661.
4 (1978) 140 CLR 120, 162ff.
that it was an appropriate case for the application of the BNC proviso.

The change in the attitude of Stephen J was first apparent in the case of Permewan Wright in 1979.1 The particular issue, the validity of egg grading and testing requirements, has been discussed above.2 Gibbs, Stephen and Mason JJ (Barwick CJ and Aickin J dissenting) held the law to be acceptable regulation. (Murphy J held the law to be valid because it was not a discriminatory fiscal impost.) Gibbs J did not see any need to review the basic issues. Stephen J, however, did examine the basic issues and took points which Mason J had made in previous cases and was making in Permewan itself.

In rejecting a submission (based on statements from Barwick CJ through the cases) that the only acceptable regulation was the mutual accommodation of inter-State traders, Stephen J stated his beliefs:

(a) that general community interest could justify restriction of inter-State traders;3

(b) that general public interest was what justified the well-accepted example of regulatory laws protecting public health;4

(c) that the categories of regulation are not closed.5

1 (1979) 27 ALR 182.
2 Above pp383ff.
3 Id. 198.
4 Id. 196-198.
5 Id. 198.
Stephen J volunteered that although in Clark King he had applied the BNC proviso strictly according to its terms and required that the monopoly provisions be shown to be "the only practical and reasonable manner of regulation", his Honour would not always require such a strict compliance with a neat formula. His Honour now preferred to adopt a general test

"If a law which bears upon inter-State trade is nevertheless to be valid because regulatory the restrictions which it imposes must be no greater than are reasonably necessary in all the circumstances. ...Any attempt at greater elaboration of analysis than is afforded by the quite general standard of reasonableness in all the circumstances appears to me to be as unprofitable as it is unnecessary."\(^1\)

Any possible ambiguity in Stephen J's attitude to the BNC proviso which might have been drawn from the context in Permewan was removed by his position in Uebergang. In their joint judgment in Uebergang Stephen and Mason JJ stated that the general test suggested by Stephen J in Permewan Wright should be applied in all cases and that no special rule should be developed for laws such as that in issue in Uebergang involving prohibitions with a view to State Government monopoly.\(^2\) In all cases the inquiry should be "whether or not the restrictions which the legislation imposes upon inter-State trade are no greater than are reasonably necessary in all the circumstances."\(^3\)

Their Honours would not require strict compliance with the BNC proviso in cases of prohibition with a view to State monopoly. It was not appropriate to convert the proviso into a "conclusive formula".\(^4\)

1 Id. 201.
3 Id. 28.
4 Id. 27.
Their Honours could not see any reason to require State monopoly which was practical and reasonable regulation to be also the sole practical and reasonable regulation.\textsuperscript{1} The division of the Court in the Clark King case, (with Stephen J and Mason J reaching opposite conclusions as to whether or not that case was an appropriate one for the application of the BNC proviso,) may well have been in mind, however, in their joint judgment in Uebergang when Stephen and Mason JJ commented that any prospect of certainty from applying the BNC proviso strictly would be illusory.\textsuperscript{2} The availability of alternative feasible means of regulation need only concern the Court if raised by those attacking the legislation.\textsuperscript{3}

There is no doubt that the approach of Stephen and Mason JJ, by making the BNC proviso more readily available, made the prima facie freedom declared by s92 more vulnerable. As with the joint judgment of Mason and Jacobs JJ in Clark King,\textsuperscript{4} however, the joint judgment of Stephen and Mason JJ in Uebergang failed to give any positive statement of the underlying principle of s92 or of the nature of the freedom granted by s92.

Mason J cannot be said to have developed any coherent alternative to the individual liberty freedom before Uebergang. In Finemore in 1978 Mason J had expressed sympathy for a discrimination test.\textsuperscript{5} Before and after Finemore, however, Mason J identified features other than discrimination which would be likely to result in legislation being held invalid and held legislation invalid without connecting his decisions to a discrimination framework.

\begin{itemize}
\item \textsuperscript{1} \textit{Id.} 26.
\item \textsuperscript{2} \textit{Id.} 27.
\item \textsuperscript{3} \textit{Id.} 28.
\item \textsuperscript{4} Above pp395ff.
\item \textsuperscript{5} (1978) 139 CLR 338, 352.
\end{itemize}
Mason J did provide some link for these propositions with a discrimination based theory where he said that Commonwealth controls of trade were more likely to be held to be regulatory because the Commonwealth was less likely to seek to prefer one State over another.\(^1\) His Honour did not say, however, that Commonwealth provisions would automatically be upheld.

All of this was coloured by Mason J's statement in *Finemore* to the effect that although he suspected discrimination to be the true indicator of invalidity, he would keep applying the decided cases until an appropriate occasion for review arose. Did Mason J regard prohibition and expropriation as being *prima facie* invalid because the cases said so, or because, he understood s92 to say so? When the opportunity to examine the basic freedom of s92 was presented in *Uebergang*, Mason J made no attempt to declare for a discrimination basis to s92.\(^1\) Indeed the test which he and Stephen J adopted, expressly acknowledged that the adverse effect of a challenged law upon traders was directly relevant to the question of whether it could be accepted as reasonable regulation.\(^2\)

The acknowledgement that adversity of effect upon traders can spell invalidity was quite compatible with an individual liberty freedom for s92. (It would have been surprising if Stephen J, whose earlier judgments had acknowledged that s92 is a declaration of a *prima facie* individual liberty, had subscribed to an incompatible formula without explaining that shift.) The discussion was, however, loose enough to be reconciled with other theories of s92 including, for example, a modified version of Evatt J's fuzzy free trade theory

\(^{1}\) In *Permewan Wright Consolidated Pty Ltd v Trewhitt* (1979) 27 ALR 182, 206 Mason J suggested that Commonwealth regulations of trade might be upheld more readily than State controls because it was less likely that the Commonwealth would seek to prefer one State to another. This falls short of an unequivocal commitment to a discrimination only basis to s92. The individual liberty formula accepts that discrimination was one of the actions outlawed by s92. *Clark King* (1978) 140 CLR 120, 147 per Barwick CJ.

\(^{2}\) (1980) 32 ALR 1, 27.
or a model parallel to America's balancing of national and local interests. Whatever the compatibility of the joint Stephen/Mason judgment in *Uebergang* with alternatives to a *prima facie* individual liberty, no alternative *prima facie* freedom was enunciated. The significance of the Stephen/Mason joint judgment in *Uebergang* lay in its assertion that public interest and administrative considerations could outweigh the adversity of a law's effects on traders and in its loosening of the BNC proviso.

The other three judges in *Uebergang*, Gibbs, Aickin and Wilson JJ joined Barwick CJ to reaffirm unequivocally the authority of BNC and the individual liberty basis of s92. None of them would, however, join Barwick CJ's proposal to declare that the BNC proviso could never apply. These judges did accept that the proviso would have to be strictly applied and could only apply in exceptional circumstances.

They considered that it was, therefore, open for the defenders of the wheat marketing legislation in issue to try to prove facts which would bring the legislation within the BNC proviso.

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1 Compare LR Zines, *The High Court and the Constitution*, 116-122, 126-130. (Written before the *Uebergang* decision was handed down.) See also DJ Rose, "Federal principles for the Interpretation of Section 92 of the Constitution" (1972) 46 ALJ 371. Supporting the inference that Mason J was moving towards a federal theory of s92 were his statements in *Clark King* (1978) 140 CLR 120, 192 (jointly with Jacobs J) and *Permewan Wright* (1979) 27 ALR 182, 206 to the effect that prohibition or expropriation by the Commonwealth, or by joint Commonwealth/State action was easier to reconcile with s92 than was action by a single State, because the Commonwealth was less likely to seek to prefer one State to another. The American model is briefly outlined above pp312-313.

2 (1980) 32 ALR 1, 22 per Gibbs and Wilson JJ, 35-36 per Aickin J.

3 *Id.* 23-24 per Gibbs and Wilson JJ, 44 per Aickin J.

4 *Id.* 24-25 per Gibbs and Wilson JJ, 45 per Aickin J.
On the issue of what considerations justify restrictions on traders, Aickin J agreed with Barwick CJ that general public interest was irrelevant\(^1\) and adopted Barwick CJ's theory of regulation in terms of the mutual accommodation of individuals.\(^2\) Gibbs and Wilson JJ, however agreed with Stephen and Mason JJ that general public interest could be taken into account and could outweigh the *prima facie* individual liberty.\(^3\)

K. The Kind of Freedom Guaranteed by s92 — Summary

This then was the state of the art when Barwick CJ left the Court in 1981. The *BNC* declaration to the effect that s92 erects a *prima facie* freedom for individuals to engage in inter-State trade, won by Barwick KC over thirty years before, was entrenched after its review in *Uebergang* by an unequivocal endorsement by Barwick CJ and three of his brethren with the only developed alternative theory, that of Murphy J, receiving no support. Mason J and Jacobs J had threatened to find an alternative freedom in s92 but Jacobs J had left the Court and Mason J had not defined any new principle.

The key to the entrenchment was, of course, the authority of *BNC*.\(^4\) The *BNC* discussion, however, recognized the possibility of exception to its general principle and the Privy Council statement that its general principle was subject to exception was just as authoritative as its statement of general principle. Barwick CJ tried to keep the general principle while ignoring the exception but none of

\(^1\) Id. 44.

\(^2\) Id. 41.

\(^3\) Id. 21-23.

\(^4\) Although the discussion in *BNC* was in the nature of an advisory opinion, the authority of the discussion can be found, if need be, in the adoption of that discussion by the Privy Council in its decision in *Hughes and Vale Pty Ltd v New South Wales [No 1]* (1954) 93 CLR 1.
his brethren were willing to engage in a similar exercise in approbating and reprobating. Thus those intent on weakening the individual liberty theory of s92 successfully turned on Barwick CJ one of his own strengths—the authority of BNC.

Interacting with the issue of the status of the BNC proviso, was the question of what interests might justify a restriction of the liberty of individual inter-State traders. While acknowledging that there were a variety of restrictions which could be imposed without offence to s92, Barwick CJ refused to give any rationale beyond the inherent meaning of "free" to explain those restrictions which did not amount to an accommodation of inter-State traders inter se. In the absence of a rationale from Barwick CJ, other members of the Court endorsed an inquiry into general public interest. The difficulty for Barwick CJ was, of course, that a most attractive limitation—that which would preclude any inquiry into the general economic effects on others of the activities of inter-State traders—seemed to be precluded by the terms of the BNC proviso.

To say that the prima facie individual right created by s92 can be qualified because of general public need does not directly undermine the individual right basis to s92. A judge can accept that such a qualification is possible, but then find that on the facts before him the public interest is not sufficient to override the individual rights. The associated proposition introduced by the opponents of the individual liberty theory that each case depends on its own facts does not directly undermine the individual liberty theory either. That proposition could be used by those bent on downgrading the individual liberty theory to ignore earlier cases where similar laws have been held invalid. The proposition could equally be used, however, by supporters of the individual liberty theory to ignore earlier cases where similar laws have been held valid.
The direct weakening of the individual liberty theory that the proposition involves is, however, in the discouragement it provides to individuals to go to Court to enforce their right. The prospect for an individual trader of taking a State or the Commonwealth (or both) to the High Court to resolve issues of fact involving inter alia, general economic and social issues, would be, to say the least, daunting - especially when, according to Stephen and Mason JJ, the individual can only complain about the particular means chosen for pursuing a worthwhile goal if he can suggest a feasible alternative means.\textsuperscript{1} Uebergang apparently found the exercise too costly and withdrew.\textsuperscript{2}

Such issues were involved in BNC itself but were carried by large powerful corporations.\textsuperscript{3} Again this weakening of the individual liberty theory involves a turning on Barwick CJ on one of his own strengths. Barwick CJ used, and used successfully, the proposition that the compatibility of a law with s92 is not confined to an examination of the terms of a law but depends also on the surrounding facts. Barwick CJ used that proposition to extend the notion of "direct" (and thus the reach of s92) beyond that allowed it by Dixon CJ.\textsuperscript{4} The proposition was turned on Barwick CJ to enable an expansion in the categories of allowable regulation to take place without any need for a direct repudiation of the assumption of individual liberty.

\textsuperscript{1} Uebergang's case (1980) 32 ALR 1, 27-28.

\textsuperscript{2} The Financial Review of 20 May 1981 reported that Uebergang had withdrawn his action. In May 1982, however, Uebergang wrote to Commonwealth Parliamentarians asking them to support his application to the Commonwealth Attorney-General's Department for financial assistance to continue the action.

\textsuperscript{3} This lends a new irony to the statement made by Barwick in argument in BNC (1948) 76 CLR 1 "when I speak of an individual's freedom ... I mean the freedom of the banking corporation". HCT 17/2/48, 325A; 76 CLR 1.

\textsuperscript{4} Below pp422ff.
The discussion now turns to the other issues which determine the reach of s92 - what is inter-State trade, commerce and intercourse? - and - when will legislative or executive action be said to be affecting "trade, commerce and intercourse among the States"?

L. What is inter-State trade, commerce and intercourse? -

To a degree, but only to a degree, this question can be divided into separate issues - what is trade (commerce and intercourse) - when is trade inter-State? These are problems of definition. Logic cannot indicate the content of the definition. In the ensuing discussion I do not intend to review all these issues of definition. I merely propose to outline the main propositions established and issues which have arisen and to indicate Barwick's position in relation to those matters.

(i) What is trade?

An important general discussion on this problem is to be found in the judgment of Dixon J in BNC.\(^1\) That discussion was adopted with approval by the Privy Council.\(^2\) Dixon J considered "trade, commerce and intercourse" to be dominated by a notion of "Transportation, traffic, movement, transfer, interchange, communication...".\(^3\) Dixon J could not reduce that six word composite notion to one word. The element common to the six is movement\(^4\) and that was the word to which Dixon J's discussion kept returning.

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1 (1948) 76 CLR 1, 380-383.
3 (1948) 76 CLR 1, 381.
4 Dixon J was concerned with the meaning of the word "trade" for the purposes of s92. Trade which did not involve movement could not often be inter-State.
Both Barwick KC\(^1\) and Evatt A-G had accepted that movement is within the centre of the concept of trade.\(^2\) There was disagreement, however, on the question whether trade in s92 only refers to dealings with tangibles. Evatt A-G submitted that the section was so limited,\(^3\) Barwick KC that it was not.\(^4\) (In the Privy Council Evatt conceded that banking is trade and concentrated on his alternative submission that banking is not an inter-State activity.) The majority of the High Court and then the Privy Council agreed with Barwick KC that trade includes movement of intangibles. (Thus banking, which is the moving of money or credit is trade, and inter-State transmission of credit is inter-State trade protected by s92.\(^5\))

It is also clear that certain contracts can be within the concept of trade. Contracts for the sale of goods are the most frequently encountered examples. The difficulties that arise in this area are more to do with identifying contracts as being inter-State than with identifying them as trade.

These then are the two main kinds of trade relevant to s92 —

- movement (of the kinds referred to by Dixon J)
- contracts.

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2 HCT 12/3/48, 1391.


4 See earlier reference to Barwick's submissions.

(ii) Does the word "trade" include non-commercial activities?

The question can be broken down into specific problems. Can a non-profit making activity be trade? Can a non-revenue raising activity be trade? Can a government activity be trade?

In BNC Dixon J seemed to treat the three words "trade, commerce and intercourse" in s92 as being interchangeable synonyms which had been grouped together for emphasis revealing "an intention to include all forms and variety of inter-State transaction whether by way of commercial dealing or of personal converse or passage".1 Dixon J considered indeed that the activities covered by the phrase "trade and commerce" in s51(i) were the same as those covered by the phrase "trade commerce and intercourse" in s92.2 On this approach movement is trade (or commerce or intercourse, which ever synonym one prefers) for the purposes of s92 (and for that matter for the purposes of s51(i)) even if the movement is not being carried on for reward.3

In contrast with the approach of Dixon J, Barwick KC had argued that financial reward is an essential part of the notion of trade.

"Of course, trade is not the passage of goods nor is the passage of goods trade. Until you have got the exchange of goods for money, until you have got some relationship between persons in relation to goods and to money mostly, you have not got trade".4

1 Id. 383.

2 Id. 381.

3 Cf Airways Case (1946) 71 CLR 29, 82 where Dixon J had reserved the question whether inter-State transportation not for reward would be within s51(i).

That approach to the concept of trade was related to Barwick's submission in the alternative that even if the Court considered banking itself not to be trade, it should bear in mind the use made by traders of banking facilities and should for the purposes of s92, take account of the effect on the freedom of inter-State traders of restricting their choice of banking facilities.¹ That submission went to the question of directness and is dealt with under that heading.²

An assumption that revenue raising is essential to the notion of trade seems to underlie an argument used by Barwick CJ in NEDCO. There Barwick CJ was developing his proposition that the first sale after import is part of inter-State trade.³ To emphasize the relationship between the first sale after import and import itself, Barwick CJ stated that the purpose of sale after import was what gave the import its commercial character.⁴ This statement can only have any point if Barwick CJ was assuming that "commerce" means activities carried on for reward.

In argument before the Privy Council Barwick submitted that although the concept of "intercourse" might well overlap the concept (treated as a composite at this stage) of "trade and commerce", it was a different concept.

"When one speaks of freedom of intercourse one has really to paraphrase it as being freedom to move and communicate. You cannot abstract that; that means for persons to move and to communicate".⁵

¹ HCT 17/2/48, 332-335; 14/4/48, 2252, 2285.
² Below pp423-424.
³ Discussed below p451.
⁴ (1975) 134 CLR 559, 579.
⁵ PCT 28/4/49, 26-27; 79 CLR 497, 566.
In *Pilkington v Hammond* 1 Barwick CJ expressly reserved the question of whether carriage other than carriage for reward could be trade and the question of what area the word intercourse might cover.

The issue whether movement other than movement for reward is trade has not arisen for decision. Such an issue is not likely to arise in the context of a s92 problem given the decision in the case of Gratwick v Johnson, Barwick's first s92 brief. There it was held that even if the words trade and commerce do not include "non-commercial" movement, the word intercourse does. 2

As Chief Justice Barwick has held that an activity which in fact makes a profit, even if it is only intended to earn enough money to cover its costs, is a trading activity for the purposes of s51(xx). 3 In the course of holding the inter-State transportation activities of a non-profit making airline service to be within s51(1), Barwick CJ commented "In my opinion, neither the gaining of profit nor the intention or purpose to gain profit is an indispensable ingredient of a commercial operation". 4

The exact relationship between the concept of "trading" in s51(xx) and "trade" in ss51(1) and 92 has not been discussed by the Court. In his leading judgment in *Strickland v Rocla Concrete Pipes Ltd* Barwick CJ seemed to assume that the word "trading" in s51(xx) had a meaning corresponding to the word "trade" in ss51(1) and 92. There Barwick CJ cited the BNC discussion of trade for the purposes of s51(xx). 5

2 (1945) 70 CLR 1.
If the interconnection between these terms is to be assumed then some of the things Barwick CJ said in the context of s92 are in conflict with his decisions in the context of s51(xx).

To reveal their inconsistency one needs to start with the 1945 Airways Case. In that case Barwick KC argued that the notion of trade was such that an activity by a government body could not be trade within the meaning of the term in s51(i).\(^1\) This argument was dismissed and the Court held s51(i) supported legislation setting up a government instrumentality to engage in inter-State trade.\(^2\)

Unchastened by the unequivocal rebuff that his submission received in the Airways Case, Barwick continued to reason from it both as Counsel and Chief Justice. The proposition that trade can only mean trade by individuals, that is, by non-government legal persons, seemed often to be the starting assumption in Barwick's argument that s92 must be a guarantee of freedom to individuals qua individuals. Right at the end of his judicial career in the case of Uebergang v Australian Wheat Board, Barwick CJ developed the submission he had first put in the Airways Case.

"Commerce necessarily involves the participation of persons, again natural or corporate - not as a matter of economic policy or theory - but as a matter of language. Commercial activity is the antithesis of governmental or Executive activity. Intergovernmental arrangements are not properly described as

\(^1\) (1945) 71 CLR 29, 34.

\(^2\) In BNC (1948) 76 CLR 1 Barwick KC pressed a parallel argument that the subject matter of banking in s51(xiii) only covers transactions between subject and subject and does not include transactions where a Government body takes the role of banker. HCT 16/2/48, 214-249, 24/3/48, 1887 ff. Again the argument was rejected.
commercial, however much they have commodities as their subject matter. In my opinion, the same may be said of the word 'trade', though we have become, perhaps increasingly, aware of Executive participation in activities which bear a close resemblance to the trading activities of persons. But, in my opinion, what the Executive or government agencies do in this respect ought not properly to be described as 'trading'. This, I think, is particularly true of the activities of an agency of the Executive which has a monopoly of acquisition and disposal of a commodity. Buy or sell governments and government agencies may, but their buying and selling is not truly a trading activity within the concept of trade, commerce and intercourse as found in s92.1

This passage completely ignored that aspect of the decision in the Airways Case which, despite the submissions of Barwick KC, held that an activity by a government instrumentality can be trade within the meaning of the term in s51(i).

The flat statement in Uebergang that for the purposes of s92, activity by a government agency can not be a trading activity (and the implications that that statement carries about Barwick CJ's attitude to the Airways decision), is to be contrasted with comments made by Barwick CJ in the Concrete Pipes Case and with his decision in the St George CC Case.

In the Concrete Pipes Case Barwick CJ said that corporations formed under State or Commonwealth powers could be corporations of the kind described in s51(xx).2 In an apparent3 reference to the

2. (1971) 124 CLR 468, 488. My thanks to G J Lindell for this point.
3. I say "apparent" as Barwick CJ cited Airways [No 2] (1945) 71 CLR 115 which was not authority for his proposition. This was presumably an error.
Barwick CJ commented "Section 51(i) for instance has been found a source of power to create a trading corporation." Barwick CJ held that a County Council, although a government agency, was a trading corporation within the meaning of s51(xx) of the Constitution and that its character as a trading corporation was derived from its activity of buying and selling electricity.

Barwick's definition of trade seemed to vary throughout these cases so as to serve his abhorrence of restrictive trade practices.

(iii) When is Movement Inter-State?

The movement from a point in one State to a point in another is not only inter-State at the point of the crossing of the border, but is also inter-State from its beginning in the one State to its end in the other. The difficulties arise in distinguishing mere preliminary steps from the start of the inter-State movement and in distinguishing the "concluding acts" of the inter-State movement from later dealings with goods that were once in inter-State movement.

(iv) When is a contract for the sale of goods inter-State?

Much of what was said by the Court in McArthur's Case has received criticism and modification in later judgments. So much, however, of the leading judgment as went to the issue of whether the contracts involved for the sale of goods were part of inter-State trade has

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1 (1945) 72 CLR 29.
2 (1971) 124 CLR 468, 488.
3 (1974) 130 CLR 533, 543-544; See also his comments on the St George CC Case in Adamson's Case (1979) 143 CLR 190, 209.
4 McArthur's Case (1920) 28 CLR 530, 546 per Knox CJ, Isaacs and Starke JJ.
5 (1920) 28 CLR 530, 559-560.
been regularly reaffirmed by subsequent High Courts.\footnote{1}{Eg Wragg v New South Wales (1953) 88 CLR 53; \textit{HC Sleigh Ltd v South Australia} (1977) 136 CLR 475.}

The principle established was that a contract for the sale of goods will be inter-State trade and will only be inter-State trade if it contains a term requiring inter-State delivery. If the contract does not contain a stipulation for inter-State delivery then it is not part of inter-State trade even if the parties to the contract are in different States and even if the performance of the contract could be (or even was likely to be) by inter-State movement of goods.\footnote{2}{The McArthur decision related to sale of unascertained goods by description. The Court has yet to consider how to characterise a contract for the sale of specific goods which are to be delivered to the purchaser in one State and which are in fact in another State at the time of contracting.}

In relation to the positive aspect of this principle - that a stipulation for inter-State delivery will \textit{suffice} to fix a contract with the character of inter-State trade, Barwick KC/CJ offered the further proposition, that the presence in a contract of a term stipulating for inter-State delivery would \textit{suffice} to give a contract the character of inter-State trade even if the party who had the right to require inter-State delivery was never likely to do so (as might be the case with hedging contracts).\footnote{3}{BNC HCT 14/4/48, 2261; 76 CLR'1, 144; PCT 28/4/49, 50; (1948) 76 CLR 1; [1950] AC 235; (1949) 79 CLR 497; \textit{Clark King Case} (1978) 140 CLR 120, 139-140}

\footnote{4}{Below pp445ff.}

\footnote{5}{\textit{HC Sleigh Ltd v South Australia} (1977) 136 CLR 475, 479-480.}
suggested, however, that in *dicta* in the case of *Smith v Capewell* Barwick CJ (with Aickin J's concurrence) was proposing that it would suffice if inter-State delivery was within the "mutual contemplation" of the parties to a contract even if they had no contractual obligation for inter-State delivery. I acknowledge that the crucial passage might be so construed. I, however, understand Barwick CJ to have been discussing, at the crucial point, the problem of characterising movement of goods and the significance to that problem of associated contractual and other arrangements rather than the problem of characterising contracts.

(v) What else is inter-State trade?

The case of *McArthur* provides some of the more sweeping explanations of the notion of inter-State trade.

"Trade and commerce' between different countries — we leave out for the present the word "intercourse" — has never been confined to the mere act of transportation of merchandise over the frontier. That the words include that act is, of course, a truism. But that they go far beyond it is a fact quite as undoubted. All the commercial arrangements of which transportation is the direct and necessary result form part of 'trade and commerce'. The mutual communings, the negotiations, verbal and by correspondence, the bargain, the transport and the delivery are all, but not exclusively, parts of that class of relations between mankind which the world calls 'trade and commerce'."

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2 (1979) 142 CLR 509, 512-513. There were also some ambiguous aspects to the judgment of Gibbs J who might be read as proposing a qualification to the *McArthur* principle. Mason J (*id.* 527) unequivocally affirmed the *McArthur* principle.

3 The case of *Smith v Capewell* is discussed further below pp435-436 for its relevance to the problem of characterising movement.

4 (1920) 28 CLR 530, 546-547 per Knox CJ, Isaacs & Starke JJ.
And later

"But all the commercial dealings and all the accessory methods in fact adopted by Australians to initiate, continue and effectuate the movement of persons and things from State to State are also parts of the concept, because they are essential for accomplishing the acknowledged end."¹

The discussion has proceeded about as far as it can outlining in the abstract the significant features of the definition of inter-State trade. That problem of definition is frequently inextricably entangled with the problems of distinguishing direct from indirect effects. The discussion will now turn to outlining the main issues under that heading. After that outline specific areas will be discussed to demonstrate the interaction of issues of definition with issues of direct/indirect.

M. Direct or Indirect - When is a law on inter-State trade?

Within Evatt J's framework the question had been not whether a law was directly on inter-State trade, but whether it was directed at inter-State trade. This formula subsumed an inquiry into the substance of a law. That approach had for a period enjoyed the support of judges who disagreed with Evatt J's starting assumption about the kind of freedom guaranteed by s92.² In BNC the Privy Council declared that such an approach which seemed to import an inquiry into the purpose of a law was quite inappropriate.³ Their Lordships considered the issue to be whether a suspect law was directly on inter-State trade.

¹ Id. 549 per Knox CJ, Isaacs and Starke JJ.
² Above p326.
³ Above p357.
Reference has been made to the dissenting judgment of Dixon J in Gilpin's Case in 1935 setting out the elements of his Honour's theory of s92.\(^1\) According to Dixon J a law could only be said to be directly on inter-State trade if it operated on an activity (which was in fact inter-State trade) by reference to its inter-State character or by reference to its character as trade.

In argument in BNC Barwick referred to Dixon J's discussion in Gilpin. Barwick thought it could be explained as an attempt to find a formula which would represent the decided cases. It was decided before James v. The Commonwealth and gave s92 an operation which was too wide. Barwick believed that Dixon J had abandoned it and he, Barwick, did not support it.\(^2\) Barwick submitted that direct meant the opposite of remote/consequential and involved a question of fact and degree and of the practical effect of a law on an individual's trade. Barwick illustrated this perception in BNC by drawing an analogy with the problem of assessing proximity in damages.\(^3\)

On the facts in BNC the difference between the Barwick and Dixon concepts of direct would only have been important if the Court had held banking not to be part of the inter-State trade protected by s92. To cover that possible Court position, Barwick had submitted that s92 was bought into operation by the effect that closing down banks would have on inter-State traders as users of private banking facilities.\(^4\) As the Privy Council agreed with the High Court majority that banking was itself trade there was no need to choose between the Dixon and Barwick notions of direct.

\(^1\) (1935) 52 CLR 189, 204-206. Above pp317-318.
\(^2\) BNC PCT 29/4/49, 26-27.
On balance there was more in the Privy Council discussion to support the Barwick theory of direct than there was to support the Dixon J theory. The Privy Council, echoing Barwick's submission, contrasted direct effects with remote or merely incidental effects.\(^1\) The Privy Council regarded the distinction between direct and indirect as being similar to the distinction between regulation and burden\(^2\) and seemed to regard both as "fact and degree" issues,\(^3\) "political social or economic" as much as legal in their solution.\(^4\) Their Lordships also considered that "direct" was not susceptible to a high degree of definition.\(^5\) These statements were not only supportive of Barwick's theory of direct - they were against Dixon J's. There was nevertheless a crumb of encouragement for Dixon J in one aspect of the Privy Council discussion. In the course of rejecting Evatt's invitation to inquire into the object of Parliament their Lordship's adopted and approved\(^6\) the comments of Isaacs J in James v Cowan.\(^7\) Isaacs J there stated that the only relevant "object" of legislation is its necessary legal effect. Ulterior economic or social effects were not relevant. These comments made by Isaacs J in 1930 are similar to those in his judgment in Duncan's Case in 1916. The different approaches to direct manifested by Barton J\(^8\) and Isaacs J\(^9\) in that case foreshadowed the differences between Barwick

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1 \([1950] AC 235, 245, 309, 312, 313; (1949) 79 CLR 497, 637, 639, 641, 642.\)
2 \(Id. 309; 639.\)
3 \(Id. 312, 641.\)
4 \(Id. 310; 639.\)
5 \(Id. 313; 642.\)
6 \(Id. 307; 636-637.\)
7 \((1930) 43 CLR 386, 409.\)
8 \((1916) 22 CLR 556, 598. "The practical effect is the test".\)
9 \(Id. 620-621.\)
(following Barton J) and Dixon J (following Isaacs J).  

Whatever the evolution of his theory, Dixon J took advantage of the instability after BNC to revive his Gilpin theory of direct and managed to attract to it a good deal of support from his brother judges. Two of the clearest victories for Dixon - direct were also rebuffs for the submissions of Barwick QC.

In Wragg v New South Wales Barwick QC argued that a price-fixing law could not apply to the first sale of goods after their import into the State either because such a sale was to be regarded as part of inter-State trade or, if the first sale was held to be merely intra-State trade, because controlling the price of such an intra-State sale would directly (albeit practically and economically and not by any reference in the terms of the legislation) affect the preceding inter-State trade of importing goods. The Court held first sale after import not to be part of inter-State trade and held that the economic effects on inter-State trade of a law fixing intra-State prices did not give such law the character of law directly on inter-State trade.

In Grannall v Marrickville Margarine Pty Ltd Barwick QC was briefed by a margarine producer to challenge a law prohibiting such production because it wished to produce margarine for export to another State. Barwick QC made no attempt to argue that production is part of inter-State trade. Indeed on this point he seemed to desert his leader who had submitted that production is an inseparable part of inter-State trade. Barwick QC submitted that the

1 Above p321.
3 (1955) 93 CLR 55.
4 MacFarland QC at 60.
practical effect on inter-State trade of prohibiting this production showed the prohibition of this production was directly on inter-State trade. The Court held that production was itself not part of inter-State trade and that this law was not directly on inter-State trade. In a fairly direct reprimand to Barwick the joint judgment of Dixon CJ, McTiernan, Webb and Kitto JJ commented –

"Two tendencies have grown manifest of late. One is to press the operation of s.92 beyond the subject matter of trade, commerce and intercourse among the States so that it denies to the legislatures of this country the power to impose any prohibition, restriction or burden if its consequences could be seen in what was done or not done in the course of inter-State commerce. The other is to seek to extend the freedom which s.92 guarantees to trade, commerce and intercourse among the States to antecedent or subsequent transactions on the plea that they are incidental, ancillary or conducive to inter-State transactions or necessarily consequential upon them."  

Both tendencies were, according to their Honours, to be deprecated.

These and other judgments in the 1950's and early 1960's seemed to establish the Dixon theory of direct. The Dixon scheme was vulnerable at some points. First the Dixon theory had a proviso that even if not Dixon-direct a law which was a circuitous device might be brought down. 4 This proviso implicitly recognised that the inquiry

1 Id. 68-69.
2 Id. 79.
3 Hospital Provident Fund Pty Ltd v Victoria (1953) 87 CLR 1; R v Anderson; Exp. Ipec-Air Pty Ltd (1965) 113 CLR 177.
4 Grannall v Marrickville Margarine Pty Ltd (1955) 93 CLR 55, 78.
under s92 could not and should not be blocked by cunning drafting. The presence of this proviso detracted significantly from the certainty which the Dixon theory of direct otherwise provided.\(^1\)

Secondly, judges who endorsed Dixon-direct, even Dixon himself, in Grannall and Wragg and other cases were a little erratic in the application of the theory. In Fish Board v Paradiso the Court held to be directly on inter-State trade a provision operating on a sale after import and offered no convincing basis for distinguishing Wragg.\(^2\)

In Mansell v Beck Dixon CJ and others considered that a law prohibiting receipt of money was not directly on inter-State trade or intercourse in its application to the receipt of money for inter-State transmission even though their Honours accepted that the receipt was part of inter-State trade.\(^3\)

Despite these weaknesses in the Dixon theory, as late as 1967 in Freightlines & Construction Holding Limited v New South Wales the Privy Council took the acceptance of the Dixon notion of direct for granted.\(^4\) It is to be noted, however, that neither the Privy Council in Freightlines nor earlier Privy Councils in the Hughes and Vale decisions which had approved much of what Dixon had said about transport regulation, had ever chosen between Dixon J's narrow notion of direct and Barwick's practical effect approach. As has been noted the weight of the indications in BNC itself supported Barwick's approach.\(^5\) It was against this background that Barwick set out as Chief Justice to supplant "Dixon-direct" with "Barwick-direct."

\(^1\) DK Singh, "'Circuitous Means' or 'Concealed Design' and Section 92 of the Australian Constitution" (1962) 36 ALJ 95

\(^2\) (1956) 95 CLR 443.

\(^3\) (1956) 95 CLR 550, 563-568 per Dixon, CJ and Webb, J, 579-581 per Fullagar J. Contra 584-586 per Kitto J. Other members of the Court, McTiernan, Williams and Taylor JJ, upheld the law on other grounds.

\(^4\) [1968] AC 625,669.

\(^5\) Above p424.
Barwick CJ accepted that a law which was directly on inter-State trade according to Dixon J's *Gilpin* theory was therefore, directly on inter-State trade for the purposes of the BNC formula. Barwick CJ argued that Dixon-direct effects did not, however, exhaust the category of effects which might show a law to be directly on inter-State trade. Barwick CJ did not believe that Dixon CJ had ever intended his description of direct effects to be exhaustive.\(^1\) Barwick CJ argued further that it would be illogical to confine direct to Dixon-direct.

As mentioned before, inevitably the problem of direct/indirect becomes entangled with the problem of defining inter-State trade. Barwick CJ introduced a *non sequitur* under cover of that entanglement in the *Readers' Digest* case. Having made the unobjectionable statement that trade and commerce is a broad practical concept\(^2\) his Honour then used that statement as support for his proposition that the practical operation of a law is relevant to its classification as direct or indirect.\(^3\) The second proposition does not follow from the first.

Barwick CJ had some better arguments for his approach to direct. There were, of course, the indications in *BNC* itself.\(^4\) There was also the fact that s92 is a constitutional guarantee of freedom and is a guarantee of freedom to engage in trade and commerce. Surely the guarantee was not confined to a guarantee of freedom from laws in a particular form? Surely the economic effects of a law are relevant to the freedom of the (economic) activities, trade and commerce?\(^5\)

\(^1\) *SOS Mowbray Pty Ltd v Mead* (1971) 124 CLR 529, 549-550; *NEDCO* (1975) 134 CLR 559, 587-588.

\(^2\) (1969) 120 CLR 1, 15, 17.

\(^3\) *Id.* 17. Similarly in *Associated Steamships Pty Ltd v Western Australia* (1969) 120 CLR 92, 102.

\(^4\) *SOS Mowbray Pty Ltd v Mead* (1971) 124 CLR 529, 551; *NEDCO* (1975) 134 CLR 559, 584.

\(^5\) *NEDCO* (1975) 134 CLR 559, 589.
These ideas were sound enough. They stood, however, in contrast with Barwick CJ's attitude to economic effects in other areas. Under s92 itself under the topic of regulation, Barwick CJ set his face against the idea that the economic effects of inter-State traders' activities on intra-State traders could justify (give validity to) the restriction of inter-State traders.\(^1\) And yet his Honour considered the economic effect on inter-State trade of a law dealing with something other than inter-State trade could show the invalidity of a law.

One should also contrast Barwick CJ's attitude to economic effects in the incidental area of the Commonwealth's power under s51 (1) to make laws with respect to trade and commerce among the States. There Barwick CJ resolutely defended\(^2\) the doctrine authored by Dixon J/CJ which denied that the economic effects of intra-State trade on inter-State trade could justify Commonwealth control of intra-State trade.\(^3\) This doctrine was supported by the reasoning that the Constitution makes a division between inter-State trade (in relation to which the Commonwealth is given legislative power) and intra-State trade (in relation to which the Commonwealth is not given any legislative power.) Since the Constitution has made that division, so the doctrine continues, the Court must attempt to maintain it and must prevent economic effects blurring the distinction no matter how interrelated inter-State and intra-State trade may be in fact.

The Dixon Court had made a similar (though not exactly parallel) distinction in Grannall v Marrickville Margarine Pty Ltd. Dixon's Court accused Barwick QC of trying to introduce into s92's limitation

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\(^1\) Above p402.


\(^3\) R v Burgess; exp. Henry (1936) 55 CLR 608, 671-672; Wragg v New South Wales (1953) 88 CLR 353, 385-386.
on legislative power, an "incidental area" of operation analogous to the area of power incidental to the grant of power under s51.\footnote{1} If one treats s92 as a mere limitation on power then this criticism of Barwick's position seems to have some validity and Barwick's willingness to observe the constitutional distinction under s51 (i) makes his willingness to "blur the distinction" under s92 seem a little incongruous. Barwick CJ never bothered to reconcile his position on the two matters. If we recall, however, Barwick CJ's point that s92 is a constitutional guarantee of freedom (as against Dixon CJ's limitation on power) then it makes sense to look to economic and practical effects under s92. If anything it is Barwick CJ's decision to exclude economic (though not other practical) effects under s51(i) which seems to lack logical support.

At first Barwick CJ found little support for his attack on Dixon CJ's definition of direct. The main upholder of the Dixonian faith was Sir Frank Kitto. When the make-up of the Court was changed by the departure from the Court of Kitto J and others around 1970, Barwick's theory made some headway. By the end of his term as Chief Justice, Barwick CJ had gathered a good deal of support for his theory of direct. Indeed in the NEDCO case Barwick CJ's theory of direct was expressly supported by three others - Stephen, Mason and Jacobs JJ - to give, with Barwick CJ's own vote, an endorsement by a majority of the Court.\footnote{2} The other two judges McTiernan and Gibbs JJ made no comment on the issue on this occasion.

1 \footnote{(1955) 93 CLR 55, 71-72, 77-80 per Dixon CJ, McTiernan, Webb and Kitto JJ, jointly. It is to be noted that the constitutional division into inter- and intra-State trade did not in Dixon's scheme of things have exactly correlative operations under s51(i) and s92. Under s51(i) economic effects are excluded but practical effects are not. Under s92 (subject to the proviso for "circuitous devices") all practical effects, including economic effects, are excluded.}

2 \footnote{(1975) 134 CLR 559, 581, 589 Barwick CJ set out his theory with Stephen J concurring id 602. Also 606, 622 to like effect per Mason and Jacobs JJ respectively. Menzies J had been involved in the case but died before judgments were delivered.}
Indeed, of the Justices who made up the Court on the retirement of Barwick CJ there was only one, Gibbs J who had ever expressly declared for Dixon-direct and against Barwick-direct.¹

The discussion will now turn to some specific subjects of legislation to demonstrate the interaction of definitions of inter-State trade with the distinction between direct and indirect and to demonstrate the relative position of Barwick CJ in this structure.

It should be borne in mind that Barwick CJ's willingness to look to the practical effects, as well as the terms of reference, of a law, precludes the precise division of issues which may occur with Dixon J/CJ's concept of direct/indirect. With Barwick CJ's theory there is not the same necessity to know the exact beginning and end of inter-State trade. With Barwick's theory an inquiry into how much a law affects inter-State trade goes to both direct/indirect and regulation/burden.

(i) Movement and Carriage

In the 1930's Transport Cases some judges drew a distinction between the movement of goods or persons inter-State and the use of a vehicle to move goods or persons inter-State. The use of a vehicle for such carriage was considered not to be itself part of inter-State trade. This conclusion was rejected by discussion in the Airways² and BNC³ decisions and completely deprived of authority by the

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¹ Although silent on the issue in NEDCO, in an earlier case, Gibbs J had accepted the Dixon theory as authoritative and had expressly rejected Barwick's theory. SOS Mowbray v Mead (1971) 124 CLR 529, 598-604.

² (1945) 71 CLR 29.

³ (1948) 76 CLR (High Court); [1950] AC 235; (1949) 79 CLR 497 (Privy Council).
decisions in the Hughes and Vale cases. After these cases it seemed to be established that the carriage of goods or persons inter-State was itself inter-State trade.

Cases involving laws dealing with inter-State carriage have provided guidance on the general problem of distinguishing regulation from burden and on the specific problem of using licences to regulate. These cases have been discussed above.

Most of the other cases involving laws dealing with movement and carriage have been concerned with characterising particular movement or carriage as inter-State movement or carriage. This issue breaks down into two questions - whether a State border has been or will be crossed - whether the movement or carriage involved is sufficiently connected with that border crossing.

One might have expected a distinction to be drawn between movement or carriage before any border has been crossed and movement or carriage after a border has been crossed. In the latter case one has the objective fact of inter-State movement or carriage having occurred. When dealing with movement or carriage before any border crossing there is a difficult problem of showing that the movement or carriage in issue was destined to involve a border crossing. One might expect it, therefore, to be easier to show the inter-State character of movement after the border has been crossed. On the other hand all movement and carriage towards the border is essential to the crossing of the border. The border cannot be crossed until it is reached. This might lead one to expect it to be easier to show the inter-State character of movement or carriage before the border crossing. No such distinctions have been made. The assumption seems to be that the characterisation of movement or carriage before the

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1 Hughes & Vale Pty Ltd v NSW [No 1] (1954) 93 CLR 1 (Privy Council); Hughes & Vale Pty Ltd v NSW [No.2] (1955)93 CLR (High Court).

2 Above pp363ff.
border crossing, is governed by the same considerations as is the characterisation of movement or carriage after the border crossing. Similarly the assumption seems to be that the question of whether movement or carriage was destined to involve a border crossing, is governed by the same factors that determine the sufficiency of connection of movement or carriage with a border crossing.

(a) Movement

There have not been many cases where the suspect law operated by reference to movement. Only three such cases involved Barwick as counsel.

One of these, Gratwick v Johnson\(^1\) was decided before BNC. In post-BNC terms the issue was one of regulation/burden. The case is discussed under that topic.\(^2\) In the second, Carter v Potato Marketing Board\(^3\) Barwick KC proposed a radical approach to the direct/indirect problem. The law in question was ancillary to an acquisition scheme and Barwick's submissions, which were affected by that fact are discussed under that topic.\(^4\)

Barwick KC's third and last case involving a law operating by reference to movement was Exp. Brazell Garlick and Coy.\(^5\) The movement involved in the case was movement before the border had been crossed. This case turned on the characterisation of movement as inter-State movement.

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1 (1945) 70 CLR 1.
2 Above p332 note 4.
3 (1951) 84 CLR 460.
4 Below pp468-470.
5 (1951) 85 CLR 467.
As Chief Justice Barwick had only one case Perre & Perre v Pollitt\(^1\) where a suspect law dealt with movement. There were other cases, however, when Barwick CJ considered how to characterise movement of goods, as a preliminary to characterising the carriage of the goods moving. Only one of these cases, Holloway v Pilkington\(^2\) dealt with carriage of goods after the border crossing. In the case no one doubted that the goods being carried were on an inter-State journey.\(^3\)

The discussion will turn now to the cases where Barwick, as counsel and judge, gave consideration to the characterisation of movement before the border crossing. All judges seemed to accept that a journey within a State could be regarded as inter-State trade if it were part of a larger journey from a point in one State to a point in another.

In Pilkington v Frank Hammond Pty Ltd two members of the Court, McTiernan and Stephen JJ, took the view that as the total journey in that case was from one State to an overseas destination via another State the intra-State component was part of an overseas journey and not part of an inter-State journey.\(^4\) Menzies J regarded the journey as being divisible into three journeys - one intra-State, one inter-State and one overseas.\(^5\) Barwick CJ, Gibbs, Mason and Jacobs JJ\(^6\)

\(^1\) (1976) 135 CLR 139.

\(^2\) (1972) 127 CLR 391.

\(^3\) The contentious issue involved in the case was the question of how that fact affected the position of the carrier carrying out an intra-State section of the overall inter-State movement. That issue is discussed under the heading carriage below pp441-442.


\(^5\) Id. 162.

\(^6\) Id. 152, 175-176, 196, 201 respectively.
considered that the ultimate overseas destination did not deprive the intermediate journey from one State to another of its character as inter-State trade and did not prevent the intra-State journey being regarded as part of that inter-State journey. The intra-State journey might well be part of overseas trade. It was also, however, part of inter-State trade even if that inter-State trade were also part of overseas trade. The important consideration for these judges was that the journey, whatever its ultimate destination involved movement from one State to another. In concentrating on that fact their Honours' approach seemed to be more in accord with the BNC discussion of inter-State trade\(^1\) than did the approach of McTiernan, Menzies and Stephen JJ.

A more difficult question was how the inter-State destiny might be established.

Barwick CJ asserted that the inter-State destiny of goods can be drawn either from the presence of a contractual obligation to move goods inter-State (whether arising from the sale of specific goods or from the sale of unascertained goods followed by the appropriation of particular goods to the contract)\(^2\) or from the contemplation of the owner that the goods move 'inter-State. Barwick CJ asserted further that although a past course of dealings would greatly assist in the ascertainment of the contemplation of the parties, if the contemplation of the parties could be made out by other means, the absence of a past course of dealings would be irrelevant.\(^3\)

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1 Above pp412-413.


These propositions seemed quite reasonable. Other judges had expressly acknowledged that the presence of a contractual obligation to move goods inter-State would demonstrate that the movement of those goods had an inter-State destiny.¹

When Chief Justice, Barwick claimed, in dicta in the case of Smith v Capewell,² that Exp Brazell, Garlick & Coy³ (in which he had appeared as counsel) was an example of a case where a transaction was part of inter-State trade because of the "mutual contemplation" of the parties to the transaction that goods would go inter-State even though there was, in the opinion of Barwick CJ looking back to the facts of the case, no contractual obligation to transport the goods inter-State. In fact, four members of the Brazell Court had expressly held that there was a contractual obligation to transport the goods inter-State⁴ and the case could not be (and was not) claimed by Barwick CJ as clear authority for the sufficiency of "mutual contemplation" to establish inter-State character. Nevertheless Barwick CJ's proposition has been accepted by some judges and not expressly

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¹ eg Exp. Brazell, Garlick & Coy (1951) 85 CLR 467, 479-480 per Dixon, McTiernan, Fullagar and Kitto JJ; Deacon v Mitchell (1965) 112 CLR 353, 361 per Taylor J.
² (1979) 142 CLR 509, 513.
³ (1951) 85 CLR 467.
⁴ Id. 479-480 per Dixon, McTiernan, Fullagar and Kitto JJ.
rejected by any.\textsuperscript{1}

Barwick CJ found himself in dissent in a series of cases, the Tasmanian Timber cases, involving characterisation of movement of goods, not because of any difference of opinion between Barwick CJ and other judges about how to determine the destiny of goods, but because of a difference of opinion on the issues -

(i) whether the goods being carried were the same goods as those that would eventually go inter-State;

(ii) whether, even if the goods being carried were destined to go inter-State, the carriage in issue was too remote from the eventual border crossing to be part of that inter-State trade;

(iii) whether the likely practical effect, flowing from the restriction on carriage, on the possible inter-State movement of the goods was a direct effect.

\textsuperscript{1} That proposition did indeed receive express support in Exp Brazell, Garlick & Coy (1951) 85 CLR 467, 483, 486 per Williams J and Webb J respectively and in Deacon v Mitchell (1965) 112 CLR 353, 370 per Windeyer J. Compare Wilcox Mofflin Ltd v New South Wales (1952) 85 CLR 488, 820 where Dixon, McTernan & Fullagar JJ, seemed to be of the opinion that a mere intention on the part of the owner to put goods (currently not moving) into inter-State trade would not be enough to support a conclusion that the goods were inter-State trade. Their Honours would have at least required an objective manifestation of that intention. That requirement was probably affected by the fact that the person claiming to be an inter-State trader was trying to avoid having to comply with a State law. In the Clark King case (1978) 140 CLR 120, 142-143 Barwick CJ took an extreme position when he said in a situation where someone had made an offer to sell unascertained goods by description to an inter-State purchaser, and had in mind either particular goods, or a particular stock of goods from which to draw, to fill the contract should it be made, then those goods were \underline{all} in inter-State trade. Discussed further below pp472ff.
Some of Barwick CJ's brethren considered that the treatment that the timber was to receive after the carriage in question, changed it into a different commodity. Thus the timber being carried could not be said to be on its way inter-State.¹ Some of Barwick's brethren considered that, whether or not the timber which would eventually leave the State was the same timber as the timber being carried, the carriage was too remote from the inter-State trade to be itself part of the inter-State trade.²

Barwick CJ acknowledged that interruptions to a journey could make the early movement of goods destined to go inter-State too remote from the inter-State movement to be itself part of that inter-State trade. Barwick CJ just did not consider that the interruptions involved in these cases — drying, dressing and standing in a timber yard for months — were enough to break the continuity of the inter-State movement.³ In the Clark King case Barwick CJ held that a "pause" of some months in the inter-State movement of wheat from the point of purchase in one State to the point of use by gristing in another State did not break the continuity of the inter-State trade, and that the wheat was still in inter-State trade whether stored in a silo in its State of origin or in a silo in the importing State.⁴ Barwick CJ's conclusion in relation to this wheat is much more convincing than his conclusion in relation to the timber. The wheat was stored not to change its characteristics but because it was a seasonal crop which was only available at certain times.

¹ Webb v Stagg (1965) 112 CLR 374, 377, 384 per Taylor J and Owen J respectively. Also, though not as unequivocally Deacon v Mitchell (1965) 112 CLR 366 per Menzies J Webb v Stagg (1965) 112 CLR 374, 380 per Menzies J and Tamar Timber Trading Co Pty Ltd v Pilkington (1968) 117 CLR 353, 368 per Kitto J. This point is discussed below pp456-459.


³ Deacon v Mitchell (1965) 112 CLR 353, 359; Webb v Stagg (1965) 112 CLR 374, 376.

⁴ (1978) 140 CLR 120, 140-141.
In the *Tamar Timber* case, Barwick CJ introduced an interesting distinction.\(^1\) In issue was the carriage of timber by one company in a group of companies to the parent company's timber yard within the State. The evidence was that the parent company sent inter-State 99% of timber brought to its yard.

Barwick CJ was in the uncomfortable position of having already been in the minority in two very similar cases where the majority held that timber being carried was not in inter-State trade. In an apparent attempt to distinguish those cases Barwick CJ stated that the carriage in issue was entitled to protection not because the goods being carried were on an inter-State journey but because

"the inter-State trade of a merchant in a commodity [is] being hindered or burdened by a prohibition upon the taking of a step in that trade."\(^2\)

It is not clear whether Barwick CJ's point (in *Tamar*) was that the carriage was itself inter-State trade (even though not a stage in inter-State movement) or whether he considered that prohibiting this carriage directly affected inter-State trade. As for the possibility that Barwick CJ was dealing with the definition of inter-State trade - to say that an activity is essential to inter-State trade does not mean that it is inter-State trade. As for the possibility that his comment went to "directness" - Barwick CJ did not identify the inter-State trade of the merchant which was being burdened. His Honour almost seemed to be sliding into equating the business of an inter-State trader with inter-State trade. The two are obviously not the same - in the course of his business an inter-State trader may do many things which are not inter-State trade. If Barwick CJ were referring to the merchant's trade in moving goods inter-State or in entering contracts to move goods inter-State, then there is logic in Barwick's

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1 *Tamar Timber Trading Co Pty Ltd v Pilkington* (1968) 117 CLR 353.
2 *Id.* 363.
conclusion. Or, at least, there is logic in Barwick CJ's conclusion so long as one also accepts his Honour's basic proposition that a practical effect can be a direct effect. To prevent a step which is an essential preliminary to moving goods inter-State, prevents their inter-State movement (which is inter-State trade in itself) and strongly discourages the entering into of contracts for inter-State movement of goods (which is also inter-State trade).

If this line of reasoning were implicit in Barwick CJ's statement in Tamar Timber then the case is notable for being the only area other than first sale after import\(^1\) where Barwick CJ actually found in the practical effect of a suspect law an invalidity which could not be found in the law's criteria of operation.

(b) **Carriage**

Although the 1930's Transport Cases distinction\(^2\) between the inter-State movement of goods (protected by s92) and the use of vehicles to move goods inter-State (not protected by s92) had been exploded by the Hughes & Vale decisions, a similar distinction confused the problem of assessing laws dealing with carriage.

In Hughes v Tasmania\(^3\) it had been held that a Tasmanian carrier who regularly carried fruit from northern Tasmanian ports to Hobart for clients who had imported that fruit from other States, was not immune from a law requiring carriers to obtain a permit and pay a fee. The Court did not question that the goods were still on their inter-State journey, when the carriage in issue took place. The decision was rested on the reasoning that the carrier's activity of

\(^1\) Below pp445ff.

\(^2\) Above p326.

\(^3\) (1955) 93 CLR 113.
intra-State carriage was not itself part of inter-State trade.\(^1\) In some ways this conclusion seemed to be the logical extension of the proposition that s92 is concerned with the position of the individual and not with the overall flow of goods. That is, however, to take that proposition going to the kind of freedom guaranteed by s92 out of context.

In Russell v Walters on the other hand it was held that a merchant who carried his own fruit on similar routes was immune from the carriage permit requirement.\(^2\) One would have thought that the carriage in Hughes was just as closely connected with the actual movement of goods inter-State as was the carriage in Russell.

Later cases, distinguishing but not overruling Hughes v Tasmania allowed carriage to come within s92 protection according to two different lines of reasoning. First, if the intra-State carrier were party to a contract of inter-State carriage then his intra-State carriage was inter-State trade and entitled to the protection of s92. Secondly, apart from any such contractual connection available to the carrier, his carriage could be entitled to immunity because of the effect, of burdening such carriage, on the inter-State trade of the owner of the goods being moved.\(^3\) It seemed to be implicit that a carrier might have to bear a burden on his carriage, (in the absence of an overall contract of inter-State carriage) because the effect on the inter-State trade of the owner of the goods was not sufficient to constitute a direct effect.

In Holloway v Pilkington\(^4\) a Court of five including Barwick CJ gave a brief joint judgment holding immune from a requirement of a permit, carriage of imported goods from a port in Tasmania to a

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1 Id. 124.
2 (1957) 96 CLR 177.
3 Simms v West (1961) 107 CLR 157; Bell Bros Pty Ltd v Rathbone (1963) 109 CLR 225.
4 (1972) 127 CLR 391.
destination within Tasmania. The case could have been rested on the ground, compatible with Hughes v Tasmania, that the carrier was agent of a carrier who was party to a contract to carry from Melbourne to the ultimate Tasmanian destination. Their Honours, however, indicated that they perceived some wider basis for decision by relying, inter alia, on Russell v Walters and by reserving the question of the correctness of Hughes v Tasmania.

The case of Pilkington v Frank Hammond Pty Ltd involved the road carriage of frozen lamb from a depot in Tasmania to a port. The goods were on their way to Melbourne and thence to London. There were a number of companies involved in the operation. Barwick CJ was the only member of the Court, to find that the carrier whose road carriage was in issue was under a contractual obligation to transport the goods from the Tasmanian depot to Melbourne. The presence of such an obligation distinguished Hughes v Tasmania but as other members of the Court found no such obligation present Barwick CJ joined in the discussion of principle. Hughes v Tasmania, was finally declared by a majority including Barwick CJ to have been wrongly decided. Five judges, Barwick CJ, Gibbs, Stephens, Mason and Jacobs JJ decided that the carriage in issue in Pilkington was part of inter-State trade. Mason and Jacobs JJ preferred to go straight to the point that the carriage was a necessary part of the inter-State movement of the goods. Barwick CJ and Gibbs J spoke in the jargon of the cases, of the carriage being part of a larger transport operation which was inter-State trade. It seemed, however, that their Honours found the inter-State character of the larger transport operation in the fact

2 Id. 129, 132, 143.
3 Id. 151 per Barwick CJ, 175 per Gibbs J, 179-180 per Stephen J, 193 per Mason J, 201 per Jacobs J. McTiernan J did not comment on Hughes v Tasmania. Menzies J seemed to accept the decision in Hughes v Tasmania. Id. 163-164.
4 McTiernan and Menzies JJ dissenting.
5 Id. 186, 198-200 respectively.
that the goods being carried were moving inter-State. For these four judges, the ultimate overseas destination did not deprive the carriage of its character as inter-state trade which it derived from the State to State movement of which it was also part.

Stephen J who joined the majority to hold the carriage involved immune from the permit requirement, did so on a different basis. His Honour considered that the overseas destination prevented the application of the larger inter-State operation concept. In this opinion he was joined by the dissidents McTiernan and Menzies JJ. Stephen J considered, however, that the inter-State trade of the company which was contractually obliged to arrange the transport of the goods from the Tasmanian depot to Melbourne was being directly affected by the restraint on the road carriage of the carrier whose case was before the Court.

In summary then, despite a certain indirectness of language, after this case it would seem that intra-State carriage which is part of the movement of goods across State borders is directly entitled to the protection of s92.

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1 Id. 137-143; 175-176.
2 Id. 153-154 per Barwick CJ 177-178 per Gibbs J, 196-197 per Mason J, 200-201 per Jacobs J.
3 Id. 180-181.
4 Id. 156-157, 166-167 respectively.
5 Id. 181-184.
6 The position of Stephen J and even the dissents of McTiernan and Menzies JJ would only qualify that proposition to the extent of adding - so long as the movement of the goods starts in one State and ends in another. This qualification would be of relevance to movements which crossed State borders (so as to come within the majority's notion of inter-State trade) but had their commencement or termination overseas or in a Commonwealth Territory.
Whatever the merits of the distinction taken in *Hughes v Tasmania* between the carrier's activity of carrying goods (intra-State) and the goods' owner's activity of inter-State trade, and whatever the merits of the distinctions taken in later cases in trying to distinguish *Hughes v Tasmania*, the majority approach in *Pilkington v Frank Hammond Pty Ltd* has the attraction that it simplifies the task of assessing whether or not laws dealing with carriage are directly on inter-State trade and it does so by the quite reasonable approach of focusing attention on an activity within the centre of the concept of inter-State trade, the inter-State movement of goods.

It only remains, under the heading of "carriage" to mention border-hopping – activities whereby goods are transported from point A in one State across the border with another State then back across the border to point B in the State in which the transport commenced.

Dixon's High Court had held that transportation activities between two points in one State could not be brought within S92's protection simply by the introduction into a journey of a detour across a State border.1 Barwick CJ (and his court) accepted the authority of the Dixon-Court's decision on that point.2

In *Jackson v Horne*, however, Barwick CJ and the other four members of the Court involved in the case (Kitto, Taylor, Menzies and Windeyer JJ) took a technical approach to an arrangement whereby pursuant to a contract to deliver a bulldozer from Brisbane in Queensland to Aramac in Queensland a carrier employed an independent company to carry the bulldozer just across the border to a point in New South Wales whence the bulldozer was shifted to a different truck and carried by an employee of the carrier to Aramac in Queensland. Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ were all agreed

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1 *Harris v Wagner* (1959) 103 CLR 452, 458-459 per Dixon CJ, 466 per Fullager J.

2 *Jackson v Horne* (1965) 114 CLR 82, 89.
that the journey from the point in New South Wales to Aramac was protected by s92. Barwick CJ expressly stated that this protection applied even though the sole purpose of transporting the bulldozer via New South Wales was to attract s92.¹

This arrangement was apparently to be distinguished from the case of a simple artificial detour across a border, because of the introduction of an independent sub-contractor for one leg. An anonymous contributor (Bennett QC?) to the Australian Law Journal asked why it should be that the Court declined to take account of the place of an inter-State leg of a journey in the overall intra-State journey in the same way that it does when dealing with an intra-State leg as part of an overall inter-State journey.² Why, asked Anon, should it be that the part should take its character from the whole in the latter case but not in the former?

In two other cases during Barwick's Chief-Justiceship, Barwick and the other members of the Court except, in each case, McTiernan J, held to be protected, carriage of goods from a point in one State to a point in the same State via another State. In each case there were bona fide commercial reasons for crossing the border.³ In the case of Boyd v Carah Coaches all members of the court assumed that running tours across State borders was protected by s92 even though the tours were round trips terminating in the same State as that in which they had commenced.⁴

(ii) First Sale After Import

In Wragg v New South Wales Barwick QC had submitted that the first contract for the sale of potatoes in New South Wales after their

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1 Id. 89.
2 "Section 92 and the Carriage of Goods: Did the High Court take a Wrong Turning" (1969) 43 ALJ 306.
3 Roadair Pty Ltd v Williams (1968) 118 CLR 644; Ward J & J Pty Ltd v Williams (1969) 119 CLR 318.
4 (1979) 27 ALR 161.
import from Tasmania was part of inter-State trade. It may have come as something of a surprise to Barwick to lose this point. He seemed to have support in the COR and Vacuum Oil decisions. In both those cases the suspect law was limited in its operation to the first sale of commodities, petroleum products, within the State. In both cases the legislation was held to offend s92.

Barwick drew to the attention of the Court in Wragg statements in the earlier cases to the effect that the sales after import in question were part of inter-State trade. Barwick also referred the Court to a statement from Dixon J in Vacuum Oil. There Dixon J said "The very essence of commerical intercourse between the States is importation or exportation from a State for purposes of sale." The Court in Wragg distinguished the COR and Vacuum Oil cases by pointing out that in those cases the legislation was limited in its operation to the first sale of goods within the State. As in the nature of things the first sale would be by a producer or by an importer, those

1 (1953) 88 CLR 353, 371, 373.
2 Dixon CJ, McTiernan, Williams, Fullagar and Kitto JJ agreed with the leading judgment of Taylor J. Webb J did not make a decision on this point.
3 Commonwealth Oil Refineries v South Australia (1926) 38 CLR 408.
4 Vacuum Oil Co Pty Ltd v Queensland (1934) 51 CLR 108.
5 In the COR case the law operated by reference to the first sale within the State whether made after entry of goods into the State or after production. (1926) 38 CLR 408. In Vacuum Oil the legislation was not expressed as directly but meant exactly the same thing. It operated by reference to all sales unless someone who had sold the goods before had been subject to the law (1934) 51 CLR 108.
6 (1953) 88 CLR 353, 373.
7 COR (1926) 38 CLR 426, 427 per Isaacs J; Vacuum Oil (1934) 51 CLR 108, 134 per Evatt J.
8 (1953) 88 CLR 353, 373-374.
9 (1934) 51 CLR 108, 128, Emphasis added.
cases could be rested on the basis that importation is part of inter-State trade.\textsuperscript{1} It is difficult to see the magic of this distinction. Surely any sale will, in the nature of things, be made either by an importer or by a producer or someone who can trace his possession back to import or production.\textsuperscript{2}

In Grannall v C Geo Kelleway & Sons Pty Ltd the Court applied Wragg, despite Barwick's submissions to the contrary, to hold that sales of goods within a State by an agent for inter-State principals after the import of the goods from another State was not part of inter-State trade.\textsuperscript{3}

As Chief Justice Barwick was to take up the reality recognised in Dixon J's statement in Vacuum Oil - the first sale after inter-State movement is closely connected with inter-State movement because it is usually the prospect of that first sale which provides the motive to move the goods across the border. By the end of his Chief Justiceship Barwick was to see this point accepted by other members of the Court and the authority of Wragg whittled away to nothing.

The task of undermining Wragg was eased considerably by the fact that the Dixon Court handed down a decision shortly after Wragg which was very hard to reconcile with Wragg. The case was Fish Board v

\textsuperscript{1} Id. 396–397 per Taylor J.

\textsuperscript{2} A law dealing with sale is always operating on goods which were either
(a) produced within the State or
(b) brought into the State
   (i) from abroad or
   (ii) from another State
It was never suggested that such a general law dealing with sale is always Dixon - directly on inter-State trade in aspect b(ii) of its general criterion of operation. Compare Western Australia v Chamberlain Industries Pty Ltd (1970) 121 CLR 1, 15–17 per Barwick CJ.

\textsuperscript{3} (1954) 93 CLR 36, 51–52 per joint judgment of Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ. On this occasion the Court decided in favour of Barwick's client on other grounds.
The law in question prohibited the sale of fish unless they had previously been sold in the government controlled fish market. The charge before the Court involved the sale outside the market of fish imported from another State. The law was held to offend s92 in its application to that sale of imported fish. The decisions in Wragg and Paradiso could be reconciled if one abandoned the Dixon Court notion of direct or if one accepted that the first sale after import could be, but was not always, part of inter-State trade or if one acknowledged that in essence the legislation was limited to controlling the first sale within the State and that the case was therefore covered by COR and Vacuum Oil.

Barwick CJ was not in any mood for leaving Wragg even the authority of a "distinguished" decision. Through the cases of Harper v State of Victoria, O'Sullivan v Miracle Foods (SA) Pty Ltd, SOS Mowbray Pty Ltd v Mead, NEDCO, Smith v Capewell and Permewan Wright Consolidated Pty Ltd v Trewitt, Barwick CJ continued to repeat the propositions that he had had rejected by the Court in Wragg. It is the prospect of sale after import that provides the incentive to import goods. This practical connection should lead to the conclusion that the first sale after import is part of inter-State trade. If a first sale is so regarded then a law operating on first sale by reference to it being a sale is Dixon-direct (and

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1 (1956) 95 CLR 443.
2 Various other "reconciliations" were suggested through the cases, (eg SOS Mowbray Pty Ltd v Mead (1971) 124 CLR 529, 566 per Menzies J, 578-579 per Windeyer J, 602-604 per Gibbs J.
6 (1975) 134 CLR 559, 571.
7 (1979) 142 CLR 509, 514.
therefore also Barwick-direct). In the alternative, even if first sale is not regarded as being itself part of inter-State trade, the practical effect on inter-State trade (import of goods) of a law regulating first sale after import revealed that such a law was Barwick-(though not Dixon-) direct.

In Harper's case, Barwick CJ's first first sale case, his Honour could gather no support for his attack on the decision and supporting reasoning in Wragg. His was the sole dissent with the other four judges, McTiernan, Taylor, Menzies and Owen JJ willing to allow a Victorian law prohibiting the sale of eggs until they had been graded and stamped, to apply to the sale of eggs brought from New South Wales. Even though the law seemed, with its one-off requirement essentially focussing on first sales, to be similar to the law held to be directly on inter-State trade in Paradiso, McTiernan, Taylor and Owen JJ treated the case as covered by Wragg.1 Menzies J also relied on his opinion that the law was merely regulatory.2

In the Miracle Foods case, Barwick CJ's second first sale case, his Honour found himself in a three to two majority holding that a South Australian provision prohibiting the sale of margarine unless it contained arrowroot (a substance detectable by a simple test) could not apply to the first sale within the State of margarine brought from another State.3 One of the other majority judges was Taylor J who had given the leading judgment in Wragg. Now in Miracle Taylor J in his joint judgment with Owen J, found the law dealing with sale to be directly on import because of its practical effect of stopping import.4

1 (1966) 114 CLR 361, 377, 377-378 and 382 respectively.
2 Id. 378.
3 (1965) 115 CLR 177.
4 Id. 189-190. In dissent, Menzies J considered there was no direct effect on inter-State trade 195; Windeyer J considered the provision to be regulatory 198.
SOS Mowbray Pty Ltd v Mead provides one of the best examples of the tradition amongst High Court judges of expressing independent individual viewpoints.¹ The suspect Tasmanian law prohibited the sale of margarine containing certain prescribed substances which were in fact the substances that give margarine its colour and flavour. In issue was the application of that law to retail sale within Tasmania of margarine imported from another State. There were different ways in which the law could be held valid in that application. The following table charts the routes taken by the different judges to reach their conclusions.

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Thus Barwick CJ found that although he was in a majority on each of the sub-issues, he was in the minority on the ultimate issue of validity. (About the only possible route to validity which was not

¹ (1971) 124 CLR 529.
used was that which would have held this first sale not to be part of inter-State trade, and which, while accepting that practical effect can be a direct effect, would have concluded that this practical effect was insufficient.)

In NEDCO, the decision of Barwick CJ that a law operating on the first sale of goods after import was directly on inter-State trade received the support of Gibbs, Stephen, Mason and Jacobs JJ. Barwick CJ gave his usual reasons.¹ Stephen J concurred.² Gibbs and Jacobs JJ distinguished Wragg and held that the particular sales involved in NEDCO were part of inter-State trade even if those in Wragg were not. The sales in NEDCO were sales in New South Wales of milk produced in Victoria and brought across the border by a Victorian company. The sales were effected by the company’s agents selling door to door and through supermarket outlets. Gibbs and Jacobs JJ did not think that Wragg had anything to say to such sales where the vendor had such a connection with the exporting State. In Wragg the sales seemed to have been simply those of New South Wales produce merchants attempting to sell in New South Wales potatoes purchased from Tasmania.³ Mason J expressly reserved the question of whether first sale is part of inter-State trade⁴ and rested his finding of directness on the practical effect of the suspect law in putting an end to the inter-State movement of goods.⁵ In this case Barwick CJ also found himself in the majority on the ultimate issue of validity, as the same judges that considered the law was directly on inter-State trade also considered the law was not acceptable regulation.⁶

¹ (1975) 134 CLR 559, 571.
² Id. 602.
³ Id. 600, 627-630 respectively.
⁴ Id. 605.
⁵ Id. 606-607.
⁶ Only McTiernan J considered the law to be regulatory. Id. 593. McTiernan J did not deal with the direct point.
Again in *Permewan Wright* (which involved a review of *Harper*)¹ Barwick CJ found that, by one or the other of the routes available, the majority of his brethren agreed with him that a law prohibiting the sale of eggs unless they had first been graded and stamped by a government authority was directly on inter-State trade in its application to the sale of eggs brought in from another State.² Despite the agreement at this level, Barwick CJ eventually found himself in the minority with Aickin J because Gibbs, Stephen, Mason and Murphy JJ found a law of this kind compatible with the kind of freedom they considered s92 to be guaranteeing.³

(iii) **Use after import**

The question of whether the use made of a commodity in one State after its import from another State is or can be part of inter-State trade received some comment in *Clark King & Co Pty Ltd v Australian Wheat Board.*⁴ The direct issue was whether a quantity of wheat was in inter-State trade when it was compulsorily acquired. The wheat had been purchased from growers in New South Wales by a Victorian miller. The wheat had been brought into Victoria and was being held in a store until needed at the mill, when it was acquired.

Mason and Jacobs JJ held that the transportation of the wheat inter-State had concluded, that the intended use of the wheat could not be regarded as part of inter-State trade and therefore that the wheat was not in inter-State trade.⁵ Strangely enough their Honours

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1 Above p383.

2 (1979) 27 ALR 182, 193 per Stephen J, 203 per Mason J, 225 per Aickin J. Gibbs and Murphy JJ found no need to decide this question.

3 Above pp384-385.

4 (1978) 140 CLR 120.

The wheat of Victorian Oatgrowers Pool and Marketing Co. Limited *Id.* 182-183.

5 *Id.* 187.
reinforced this conclusion with reference to the decision in Wragg's case, a case for which they had displayed no great enthusiasm in the NEDCO decision.\(^1\)

Barwick CJ and Stephen J considered that this wheat was still in inter-State trade when acquired.\(^2\) Stephen J's decision was based on the idea that this wheat was in inter-State trade because the movement of the wheat from New South Wales to the destination in Victoria, the mill, was inter-State trade.\(^3\) The period of storage was necessitated by the fact that wheat is a seasonal crop and did not therefore, break the continuity of the inter-State trade.\(^4\) His Honour indicated that the case could well have been different if the wheat had already reached the mill when acquired.\(^5\) (The difference, one supposes, would be that the destination having been reached, the inter-State movement would be over.) Stephen J expressly reserved the questions of whether the gristing of wheat in the mill was itself inter-State trade and whether the business of the miller as a whole was inter-State trade.\(^6\)

Barwick CJ did not rest his decision on the simple notion of movement from a point in one State to a destination in another. He spoke more generally of the miller's business as being inter-State trade.\(^7\) It was a mistake, according to Barwick CJ to try to separate the miller's business "into two separate intra-State transactions, one of purchase and one of use, accidentally joined by

\(^1\) Above p451.
\(^2\) Id. 140, 165-166 respectively.
\(^3\) Id. 165
\(^4\) Id. 165-166.
\(^5\) Id. 166.
\(^6\) Id. 166
\(^7\) Id. 140-142. Compare the discussion in Tamar Timber Trading Co Pty Ltd v Pilkington (1968) 117 CLR Above pp439-440.
inter-State transportation, so as to regard that transportation as the only element of inter-State trade and commerce".¹ This seems to imply that purchase, transportation and use were all inter-State trade. Barwick CJ however, did not say unequivocally that the gristing would itself be part of inter-State trade. His Honour said that the feed into which grain is converted would not be in inter-State trade, and that the grain up till gristing was in inter-State trade² but he did not directly comment on the gristing stage itself.

(iv) Production for inter-State trade

Reference has already been made to Grannall v Marrickville Margarine Pty Ltd³ where Barwick QC was briefed to challenge a law prohibiting production of margarine. Barwick's client intended to sell its product in inter-State trade. Barwick QC was led by MacFarland QC who submitted that manufacture with an intention to send the product into inter-State trade is protected by s92 because it is itself inter-State trade or is inseparably connected with inter-State trade.⁴ Barwick QC giving the address in reply abandoned his leader's submission on this point and conceded that manufacture precedes inter-State trade.⁵ In its judgment the Court declared unequivocally that although manufacture and production might be essential to inter-State trade those activities are not part of inter-State trade.⁶ The Court also rejected Barwick's proposition that

¹ Id. 141.
² Id. 140.
⁴ Id. 60.
⁵ Id. 69.
⁶ Id. 71-72 per Dixon CJ McTiernan, Webb and Kitto JJ jointly; 82 per Fullagar J.
this particular law prohibiting manufacture was directly affecting inter-State trade.¹

The Court in Grannall did not make it clear whether manufacture and production are not to be regarded as inter-State trade because they are not trade or because they are not inter-State or because they lack either character.²

In a sequel to Grannall, Marrickville Margarine Pty Ltd arranged its business so that it received orders requiring it to appropriate particular ingredients to an inter-State contract, process those ingredients, which were to be the property of the inter-State purchaser at all stages of production, and then deliver the finished product across State borders. In this case of Beal v Marrickville Margarine Pty Ltd³ the Court again held the activity was not inter-State trade but again did not specify to which half of the concept of inter-State trade to attribute this conclusion.

As Chief Justice Barwick stated that he understood the Grannall decision to be based, inter alia, on the "fundamental decision that manufacture is not itself trade or commerce within the meaning of s92 of the Constitution." Barwick CJ stated that he agreed with that "fundamental decision".⁴

Although Barwick CJ accepted the fundamental decision that manufacture is not trade his Honour considered that the proposition was not relevant to any of the s92 cases which came before him. In

¹ Above pp425-426.
² The last alternative had been submitted by counsel defending the legislation. Id. 64-65.
³ (1965) 114 CLR 283. (McTiernan, Kitto, Menzies, Windeyer and Owen JJ, Barwick CJ did not sit.)
five of Barwick's s92 cases other judges sitting found the proposition was applicable and in three of these cases the difference of opinion contributed to Barwick CJ being in the minority in the decision.

In the case of Tamar Timber Trading Co Pty Ltd v Pilkington\(^1\) Barwick CJ outlined his concept of manufacture. The ultimate issue in the case was whether a particular instance of carriage of timber within Tasmania was inter-State trade.\(^2\) The carriage was of green timber from a sawmill to a timber yard. The timber would eventually be sent inter-State after it had been dressed and dried at the timber yard. One of the arguments against the carriage to the yard being regarded as part of inter-State trade was that the green timber arriving at the yard was a commodity different to the dried dressed timber which eventually went inter-State. If the drying and dressing were regarded as activities producing a new commodity to go into inter-State trade, and were, therefore, activities preceding and not part of inter-State trade, the activity of carriage of the production input (green timber) was \textit{a fortiori} an activity preceding and not part of inter-State trade.

Very similar issues had arisen before during Barwick's Chief Justiceship in other cases involving carriage of timber within Tasmania. In Deacon v Mitchell the intra-State carriage was of timber which was only to be dried and packed but not otherwise altered before eventually going inter-State.\(^3\) In Webb v Stagg the carriage was of timber which was to be dried and dressed as architraves before eventually going inter-State\(^4\)

In these cases, as in Tamar Timber, Barwick CJ was in dissent in his conclusion that the carriage was part of inter-State trade. It

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1 \((1968) 117\ CLR 353.\)
2 Above pp439-440.
3 \((1965) 112\ CLR 353.\)
4 \((1965) 112\ CLR 373.\)
was not until Tamar Timber that Barwick CJ explained his understanding of manufacture.

Manufacture, according to Barwick CJ is the assembly of components to create a new and different product. One can agree with Barwick CJ that manufacture involves the creation of new and different products. There is difficulty, however, in accepting that an activity is only manufacture if it involves the assembly of components. This requirement would exclude from the concept of "manufacture" a whole range of activities which created "new and different products". For example, processes of separation of mixed goods or processes of heat or cold treatment can create new and different products. Surely those who convert grain to flour are in a manufacturing process? Surely those who obtain liquid oxygen from air are engaged in a manufacturing process? On Barwick CJ's definition of manufacture they are not, as they do not assemble components. Barwick CJ did not explain why he introduced this element to the definition of "manufacture". The OED does not suggest any such limitation. Nor does the context "manufacture precedes trade".

Barwick CJ did not, however, rest his dissent in these three cases on the point that there was no assembly of components. Rather his Honour took the more basic point that manufacture involves the creation of new and different products. For Barwick CJ green timber straight from the sawmill was the same commodity as timber dried for

1 (1968) 117 CLR 353, 362.
2 Homebush Flour Mills Case (1937) 57 CLR 390 above pp220-221.
Barwick CJ considered that these dealings with timber were analogous to dealings in fruit and vegetables. Barwick CJ posed himself the questions — does the merchant who assembles green unpacked fruit in one State for sale as ripe packed fruit in another State carry on two separate trades — an intra-State trade in green unpacked fruit and an inter-State trade in ripe packed fruit? — does the merchant who sells apples inter-State carry on a separate trade when he brings apples to his depot to be cleaned of spray, sized, wrapped and cased? — Barwick CJ answered, surely not. In this conclusion Barwick CJ was in conflict with Latham CJ who in Hartley v Walsh had said packing fruit is analogous to manufacture and is not trade. In 1976 in Perre v Pollitt Gibbs, Stephen, Mason and Murphy JJ rejected Latham CJ’s approach and agreed with Barwick CJ that the packing of fruit destined for inter-State sale is part of, and not a mere antecedent of, inter-State trade.

Accepting, as one can without difficulty, that packing does not change the character of fruit, one can not so readily accept that architraves are the same commodity as green timber. Barwick CJ

1 Deacon v Mitchell (1965) 112 CLR 353, 359 with the agreement of Windeyer J 367. Contra 366 per Menzies with Taylor and Owen JJ not commenting on this point but deciding the carriage was not part of inter-State trade on other grounds. 361-363, 372 respectively. Webb v Stagg (1965) 112 CLR 374, 376 with the agreement of Windeyer J 384. Contra 378 per Taylor J and 384 per Owen J. Query whether Menzies J 379-382 was also taking this point or merely relying on the idea that the intra-State movement of the timber was as a matter of fact and degree separated from its inter-State movement. Tamar Timber Trading Co Pty Ltd v Pilkington (1968) 117 CLR 353, 362. Taylor, Menzies and Owen JJ treated the case as covered by Deacon v Mitchell 374, 380, 381 respectively. Menzies J added a reference to Webb v Stagg. Kitto J said simply that the carriage preceded inter-State trade 366-367.

2 (1937) 57 CLR 372, 379.

3 (1975) 135 CLR 139, 145.

4 Id. 150, 152, 154, 157 respectively. Only Jacobs J (at 155) disagreed with this conclusion. Murphy J upheld the legislation by applying his discriminatory fiscal impost theory.
argued that commercial reality rather than legal technicality should guide the application of s92. Surely the commercial reality is that architraves are different to green timber? (And, therefore, surely it follows that the change in character which takes place somewhere between the carriage of green timber in Tasmania and the arrival of architraves in Victoria makes it impossible to say that the green timber was on its way to Victoria).

In another pair of cases Barwick CJ was able to display his unusual concept of "manufacture". These cases Damjanovic & Sons Pty Limited v Commonwealth\textsuperscript{1} and Bartter's Enterprises v Todd\textsuperscript{2} required a decision as to the character of keeping hens, the eggs from which were sold inter-State trade. Most of the other members of the Court in the cases considered that keeping hens was very similar to production and therefore covered by the Grannall and Beal decision that manufacture precedes inter-State trade\textsuperscript{3}.

Barwick CJ said there was no analogy between keeping (egg-producing) hens and manufacture and could therefore not see that the decisions in Grannall and Beal had any relevance to the issues in Damjanovic\textsuperscript{4} and Bartter's Enterprises\textsuperscript{5}. This refusal by Barwick CJ to acknowledge the relevance to cases dealing with ownership of productive livestock, of decisions about production, is quite unaccountable.

2. (1978) 139 CLR 495.
3 Damjanovic (1967) 117 CLR 383, 397, 400, 404 and 410 per Kitto, Taylor, Menzies and Windeyer JJ respectively, though in the case of Windeyer J it was only after His Honour had decried the tendency of some to replace the text of the Constitution with precedent Id. 407-408. Apart from Barwick CJ the only judges who did not apply Grannall and Beal were McTiernan J in Damjanovic who concurred with the Chief Justice (1967) 117 CLR 383, 397 and Murphy J in Bartter's Enterprises whose theory of s92 allowed him to decide without considering the matter.
5 (1978) 139 CLR 499, 509.
In Damjanovic Barwick CJ went to some trouble to criticise the tendency he perceived in others to make logical extensions from the reasoning in decided cases to determine the outcome in cases with different circumstances. "Always the Constitution remains the text".  

1 (It is interesting to recall that a similar position was taken by Dixon J when faced with precedent with which he was dissatisfied.)

2 Somewhat inconsistently, Barwick CJ then went on to base his decision on an analogy he drew from the conclusion that an expropriation of the hens involved would not offend s92 according to his understanding of the accepted principles relating to expropriation.

3 Surely the only relevant way in which such principles could be "accepted" would be in the reasoning of earlier judgments? In Bartter's Enterprises v Todd, Barwick CJ's judgment seemed to demand a citation of Grannall and Beal. His Honour said:

"The supposed contract may amount to a promise by the vendor to keep the specified hens and harvest the eggs and thereafter to sell and deliver the eggs or egg products inter-State. But it is at least doubtful if there could be trade in eggs which do not exist. As commodities, the earliest time at which they could be the subject of sale would be the moment they were new laid. The antecedent obligation of the plaintiff to keep these hens and harvest the eggs would not itself, in my opinion, be an operation of inter-State trade and commerce." 

Barwick CJ treated Grannall and Beal as being based on exactly the same point. Why did he deny their relevance?

1 Id. 396
2 Gratwick v Johnson (1945) 70 CLR 18 above pp332-333.
3 (1967) 117 CLR 383, 397.
4 (1978) 139 CLR 495.
In summary, the position of Barwick CJ on production was distinctive given his conclusions on the facts in the Tasmanian Timber cases and given the very narrow definition of manufacture he propounded (in the Tamar Timber case), but never tested. Apart from those qualifications, Barwick CJ not only paid lip service to the authority of Grannall and Beal as establishing the principle that laws dealing with production are outside the reach of s92. His Honour also, despite his claims of originality in Damjanovic and Bartters Enterprises, acted accordingly.

(v) Solicitation of business

In the case of Samuels v Readers' Digest Association Pty Ltd, Barwick CJ was part of a Court asked to consider a law which prohibited the issue or delivery in connexion with the sale or advertising of goods of any writing promising a gift dependent on purchase of the goods. Readers' Digest had been charged with breaching the law by sending material from Sydney to Adelaide offering to make a contract to send goods from Sydney to Adelaide and promising a free record if such contract were made. Only Barwick CJ and Kitto J gave any thorough consideration to the question of whether the action of Readers' Digest which attracted the law's operation was inter-State trade.

Both Barwick CJ and Kitto J looked to the proposed contract for the sale of goods (which would come into existence if and when a recipient accepted Readers' Digest's proposal) and the inter-State movement of goods which would be involved in performance of such a contract. Neither doubted that a contract requiring inter-State delivery of goods and the actual movement of goods inter-State is part of inter-State trade. Kitto J considered, however, that Readers' Digest's actions were not themselves part of that inter-State trade.

1 (1969) 120 CLR 1.
in goods but were rather merely preparatory and accessory to that proposed inter-State trade.  

Barwick CJ referred to what he called a clear principle generally accepted and endorsed by the highest authority:

"that the trade and commerce of which freedom is predicated is to be identified by applying a broad practical concept so as to include at least all the 'mutual communings, the negotiations, verbal and by correspondence' and, as I would think, the endeavours which lead up to a transaction of a commercial nature which by its terms express or implied involves in its performance of completion a movement of things tangible or intangible across State lines".  

No citation was given for the quote but it is taken from McArthur's Case. Barwick CJ considered "offering and soliciting an offer" were relevant "mutual communings" and therefore part of inter-State trade.

Barwick CJ did not identify the "high authority" which endorsed this principle. Later in his judgment he went out of his way to distinguish between, on the one hand, Privy Council decisions which were, in the Chief Justice's opinion, authoritative and binding and, on the other hand, High Court decisions which were merely a helpful aid. The Privy Council can hardly be said to have

1 Id. 31-32.  
2 Id. 15-16.  
3 (1920) 28 CLR 530, 547.  
4 (1969) 120 CLR 1, 18.  
5 Id. 17.  
6 Id. 18.  
7 Id. 18.
unequivocally endorsed McArthur's Case on this particular principle. The width of this principle was associated with the now exploded proposition that the Commonwealth is not bound by s92.\(^1\) Despite the weak almost careless discussion with which Barwick CJ supported his conclusion, there is nothing unreasonable about his conclusion. It is just a little surprising that Barwick CJ took such a long route. Why did his Honour not simply go to the discussion of Dixon J in BNC which had been approved by the "highest authority", the Privy Council, and which regarded inter-State movement, and communication as being activities within s92's ambit?\(^2\) Surely the inter-State delivery of documents could be treated as inter-State trade in its own right without having to derive its status from its connection with any proposed inter-State contract or movement of goods? That route was undoubtedly open.\(^3\) Barwick CJ may, however, have been anxious to establish this wider principle which would give protection to solicitations to engage in inter-State trade which were not themselves made by inter-State intercourse.

(vi) Import from abroad

In R v Anderson; exp Ipec-Air Pty Ltd\(^4\) a Court not including Barwick CJ upheld Commonwealth action to prevent the import from abroad of aircraft. The Commonwealth's avowed purpose was to prevent the aircraft being used in inter-State trade. Despite this purpose the Court held the import restriction was not directly on inter-State trade. Barwick CJ approved the Ipec decision.\(^5\)

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1 Above pp326-330.
2 Above pp412-413.
3 Cf McGraw-Hinds (Aust) Pty Ltd v Smith (1978) 24 ALR 175, 191 per Mason J.
4 (1965) 113 CLR 179.
5 Ansett Transport Industries (1977) 139 CLR 54, 61. Aickin J also approved Ipec at 112-113. Other members of the Court did not have to express a concluded opinion on Ipec.
(vii) Possession/Ownership/Acquisition

Laws dealing with the possession or ownership of goods and laws providing for the compulsory acquisition of goods are affected by similar considerations. Cases on acquisition provided a significant part of the background to BNC. The original proposition derived from the 1915 Wheat Case that acquisitions could never offend s92 was rejected by the Privy Council decisions James v Cowan and James v Commonwealth holding s92 was offended by the acquisitions in those cases.

It can readily be accepted within the BNC notion of direct and even within the Dixon notion of direct that the ownership or possession of goods is inseparable from the carrying on of inter-State trading activities in relation to those goods. It therefore can readily be accepted that any interference (whether by direct legislation or by executive action) with the ownership of possession of goods which are in fact the subject of an inter-State trading activity, would be directly on inter-State trade. As Chief Justice, Barwick accepted that the character of "directly on inter-State trade" would be accorded to acquisitions operating on goods in inter-State trade and no judge has disagreed with this proposition. In parallel with this approach to acquisitions, it is well established that a law operating by reference to the ownership of vehicles is, in its application to vehicles used solely in inter-State

1 Above pp320ff.
2 Commonwealth v New South Wales (1915) 20 CLR 54.
3 [1932] AC 542; 1932 47 CLR 386.
5 Wilcox Mofflin Ltd v New South Wales (1952) 85 CLR 488, 519 per Dixon, McTiernan, Fullagar JJ.
6 Damjanovic & Sons Pty Ltd v Commonwealth (1967) 117 CLR 383, 397; Tamar Timber Trading Co Pty Ltd v Pilkington (1968) 117 CLR 353, 364; NEDCO (1975) 134 CLR 559, 580; Clark King Pty Ltd v Australian Wheatboard (1978) 140 CLR 120, 140, 143-144, 148-149.
carriage, Dixon—directly on inter-State trade\textsuperscript{1} and therefore, a \textit{a fortiori}, Barwick—directly on inter-State trade.\textsuperscript{2}

The issue which received some exploration during Barwick's years and which cannot yet be said to be resolved is whether an acquisition can be shown to be directly on inter-State trade by something, (such as purpose or practical effect) other than the fact that particular goods acquired were in inter-State trade.\textsuperscript{3}

Just before BNC was argued in the High Court, the acquisition case of Field Peas Marketing Board (Tas) v Clements & Marshall Pty Ltd was argued.\textsuperscript{4} Barwick KC representing the State of South Australia intervening to attack the acquisition, argued that it should be seen as sufficient to offend s92 that an acquisition in fact restricted inter-State trade.\textsuperscript{5} In the alternative Barwick KC submitted that if it were necessary to demonstrate that the acquisition attacked was directed at inter-State trade then that character was sufficiently revealed here by fact that the acquisition was of all of the commodity and was thus necessarily directed at so much of the commodity as would ordinarily go into inter-State trade. The situation was, in any case, similar to that dealt with in the Peanut Case and should according to

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\textsuperscript{1} Hughes Vale Pty Ltd v New South Wales [No 1] [1955] SC 247; (1954) 93 CLR 1. A Dixon led Court also held that a law operating by reference to the possession of goods was directly on inter-State trade in its application to the possession by the importer of goods taken from one State into another at least until the completion of the inter-State movement of the goods. Fergusson v Stevenson (1951) 84 CLR 421. See Mason J's comments on this case in Pilkington v Frank Hammond Pty Ltd (1974) 131 CLR 124, 196.

\textsuperscript{2} Pilkington v Frank Hammond Pty Ltd (1974) 131 CLR 124.

\textsuperscript{3} This issue was foreseen early by Geoffrey Sawer in his commentary on the High Court decision in the Bank Nationalisation Case before the Privy Council appeal (1948) 22 ALJ 213,215.

\textsuperscript{4} BNC (1948) 76 CLR 1 was argued in the High Court through February, March and April of 1948. Field Peas (1948) 76 CLR 414 had been argued in September and October 1947.

\textsuperscript{5} Argument is not reported in the CLR. This discussion is based on the report at [1948] 2 ALR 261, 268 ff.
Barwick KC be treated as covered by the authority of the decision in that case.\footnote{The Peanut Case (1933) 48 CLR 266 is discussed above p325.}

Only two members of the Court, Dixon J and Williams J, made comment on the appropriate manner for assessing acquisitions. Williams J had granted an interlocutory injunction which was under appeal when Barwick KC put his submissions.\footnote{The case had come before the Full Court in an unusual way. Originally an interlocutory injunction had been sought by the merchant attacking the legislation. Williams J had granted that interlocutory injunction ((1948) 76 CLR 401) and the State Board defending the legislation had then appealed against the grant of the injunction. In the result Williams J could not sit on the appeal and as it turned out the four Justices involved divided equally with Latham CJ and McTiernan J considering there was no offence to s92 and Starke and Dixon JJ considering there was. Rich J who had been involved was prevented by illness from participating in the conclusion of the case. Id. 417.} Williams J, following the lead of Dixon J in the Peanut Case, considered that whether the test were directness of operation, purpose or subject matter, this acquisition of the entire crop of a commodity most of which was exported from the State, the acquisition being made for the admitted purpose of limiting inter-State sales,\footnote{Id. 404, 407.} offended s92.\footnote{Id. 409.}

On the appeal from Williams J's grant of an interlocutory injunction, the Court heard the argument in the case, and then waited until the High Court had heard argument in BNC and delivered its judgments in BNC before delivering judgment in Field Peas. Dixon J found, however, that BNC gave him no guidance to the resolution of the Field Peas issue.\footnote{Id. 420.} Acquisition was a "special case" and this acquisition was of an entire crop. Even though the acquisition took place before particular goods were committed to inter-State trade,\footnote{Id. 419, 423, 429.}
"That State legislation of this kind dealing with a commodity predominantly sold as an export from a State necessarily involved an invasion of the freedom which s92 constitutionally preserves is a proposition which I remain unable to doubt."¹

That his Honour was "unable to doubt" the correctness of this conclusion is not a particularly informative statement.

It was not at all clear whether Dixon J considered that this proposition depended on the practical effect of acquisition in such circumstances, of preventing inter-State trade being commenced,² or on the purpose of such acquisition being to reduce the volume of inter-State trade³ or on the purpose of such acquisition being to prevent individuals engaging in any trade (including inter-State trade) in the commodity.⁴ It must be remembered that the Privy Council judgments in James v Cowan and James v The Commonwealth had yet to be re-examined and discussed by the Privy Council in BNC. It is difficult, however, to reconcile Dixon J's attitude here to an acquisition of goods being produced, with his later decision that laws controlling production were not directly on inter-State trade because production precedes inter-State trade.⁵

For Evatt AG arguing before the Privy Council in BNC, the compatibility of acquisitions with s92 turned on one question only—the purpose of the acquisition. So much indeed, seemed to be established by the James' Cases. Barwick did not have to explain how acquisitions would be dealt with in his framework.

¹ Id. 423.
² Id. 424.
³ Ibid.
⁴ Ibid.
⁵ Above p425-426.
In its discussion in BNC the Privy Council did not address itself specifically to the problem of acquisitions. Their Lordships did, however, comment that despite the possibility of "misinterpreting" what had been said by the Privy Council in the James' Cases, and whatever might be the field of inquiry when examining executive actions the only "purpose" or "object" which was relevant when examining the "purpose" or "object" of an Act was purpose or object in the sense of "the necessary legal effect, not the ulterior effect economically or socially."¹

In the cases of Carter v Potato Marketing Board² and Wilcox Mofflin Ltd v New South Wales,³ Barwick had the opportunity to give the High Court his thoughts on the problem. His most sweeping submission was to argue that an acquisition of any goods (except those irrevocably committed to intra-State trade) directly affected inter-State trade because it deprived the owners of the option to commit the goods to inter-State trade.⁴

The Court could not accept that the mere existence of two facts - ownership of goods and the possibility to send those goods into inter-State trade - was sufficient to indicate that an acquisition of those goods was directly on inter-State trade. Something more was required.⁵

² (1951) 84 CLR 460.
³ (1952) 85 CLR 488.
⁴ Carter v Potato Marketing Board (1951) 84 CLR 460, 464; Wilcox Mofflin Ltd v New South Wales (1952) 85 CLR 488, 493. Also Williams J's summary of Barwick's submission at 529-531.
⁵ Carter's case (1951) 84 CLR 464, 485-486 per Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ; Wilcox Mofflin's case (1952) 85 CLR 488, 519 per Dixon, McTiernan, Fullagar JJ, 530-532 per Williams J.
In an alternative submission which looked to the nature of the acquiring law rather than to the circumstances of particular individuals whose goods were subject to the acquisition law, Barwick submitted that acquisitions made for the purposes of marketing schemes were directly on inter-State trade. One would have thought, legislative purpose more relevant to the burden/regulation issue than to the direct/indirect issue. The Court did not, however, reject Barwick's submission.

Kitto J stated unequivocally, in agreement with Barwick that purpose was the determinant of the direct or indirect issue for legislative acquisitions. Other members of the Court did not conclusively accept or reject Barwick's submission as they considered that whatever the relevance of legislative purpose, an acquisition law could not be held to be directly on inter-State trade in a particular application without some examination of the facts of the particular application and that on the facts of the cases in which the submission was put there was no direct application to inter-State trade.

In Carter's case the goods in issue had been sold in intra-State trade with an expectation of a re-sale in intra-State trade and with

1 *Carter v Potato Marketing Board* (1951) 84 CLR 460, 474. A similar submission put by Barwick in *Grannall v Marrickville Margarine* (1955) 93 CLR 55, 69 was the basis for an analogy and did not require or receive direct comment from the Court. Compare his submission in *BNC* (PCT 7/4/49, 51) to the effect that an acquisition of oats to feed the King's horses would be acceptable while an acquisition of oats to sell would offend s92.

2 *Wilcox Mofflin's case* (1952) 85 CLR 488, 539-540.

3 The joint judgment of Dixon, McTiernan, Fullagar JJ in *Wilcox Mofflin* having just stated (in an apparent reference to the direct and indirect issue) the need to ascertain the bearing of a marketing plan upon inter-State transactions then set about discussing the *James* cases in purpose terms. (1952) 85 CLR 488, 516.
no suggestion of any connection with inter-State trade. In Wilcox Mofflin the Court considered that a provision which exempted from acquisition any goods "the subject of trade, commerce or intercourse between States or required or intended by the owners of the hides for the purpose of trade commerce or intercourse between States" was sufficient to avoid conflict with s92. Some members of the Court indicated that this exception might go further than was required by s92 but none would commit themselves to an exhaustive statement of when an acquisition would be directly on inter-State trade.

Nevertheless those cases left well alive the possibility that even if particular goods are not actually committed to inter-State trade, their acquisition may be directly on inter-State trade, because of the strength of the possibility of them going into interstate trade. Indeed rather than just reserve the matter, Webb J stated that he considered s92 would necessarily catch acquisitions of the stock of traders who engaged in both inter and intra-State trade, and who would not know until they received orders how much or which part of their stock was required for inter-State trade. This approach clearly extended s92 to goods not committed to inter-State trade. To say that some acquisitions of goods not committed to inter-State trade can be held to be directly on inter-State trade is quite consistent with Barwick's theory of direct which looks to practical effect and treats

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1 (1951) 84 CLR 460, 485 per Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ.
2 (1952) 85 CLR 488, 518-520 per Dixon, McTiernan and Fullagar JJ, 532 per Williams J, 537 per Webb J, 539-541 per Kitto J.
3 Id. 520 per Dixon, McTiernan and Fullagar JJ, 532 per Williams J.
4 Carter's case (1951) 84 CLR 460, 485-486 per Dixon, McTiernan, Williams, Webb, Fullagar, Kitto JJ. Wilcox Mofflin's case (1952) 85 CLR 488, 519-520 per Dixon, McTiernan and Fullagar JJ, 532 per Williams J.
5 Wilcox Mofflin's case (1952) 85 CLR 488, 537.
the direct/remote issue as one of degree. Kitto J also seemed to give support to the relevance of practical effect in his judgment which suggested that the test of validity could be whether an acquisition "would in practice diminish inter-State trade".

These then were the ways which had been suggested before Barwick CJ's appointment that an acquisition could be directly on inter-State trade.

First, when the goods acquired were committed to inter-State trade. This was uncontroversial.

Secondly, when the goods acquired were not committed to inter-State trade but could have gone into inter-State trade.

Thirdly, in the case of an acquisition of all of a product, when the past course of dealings indicates that the product is predominantly exported from the State.

Fourthly, when the acquisition was made with the purpose of taking over trade (including inter-State trade) and a fortiori, when the acquisition was made with the purpose of discriminating against inter-State trade. References to purpose are uncontroversial when referring to executive action, but are very controversial when used in relation to legislation.

1 It can also be brought within Dixon's formula if classified as a circuitous device. This would seem necessarily to involve an inquiry into legislative purpose or practical consequence anyway and therefore rebuts Dixon's claim to be engaged in a purely legalistic analysis of the terms of operation of the law. LR Zines, The High Court and the Constitution, pp 97-100.

2 Wilcox Mofflin's case (1952) 85 CLR 488, 541.
Barwick CJ found no occasion to comment on the third possibility. As already noted, Barwick CJ accepted the first situation as clearly being one where the acquisition was directly on inter-State trade.

The discussion in the preceding sections from "What is inter-State trade, commerce and intercourse" on, indicate how wide was the content that Barwick CJ gave to the concept "in inter-State trade". Perhaps, his Honour's comments in the Clark King case provide the most striking example of the wide content he was willing to give to the concept "in inter-State trade".¹

There Barwick CJ set out a passage from the joint judgment of Dixon, McTiernan and Fullagar JJ in the Wilcox Mofflin case. In the course of explaining their conclusion that the acquisition legislation there in issue was compatible with s92, their Honours emphasised the width of the provision which exempted from acquisition goods in a wide range of situations. They considered that whether or not required by s92, the legislation even exempted from acquisition a stock of hides when the

"owner of [the] hides ... has made an offer, which is outstanding and is as yet unaccepted, to sell hides by description for delivery into another State if he contemplated the delivery of the particular hides, or if he needed a portion of his stock of hides, to perform the contract should his offer be accepted."²

Barwick CJ in commenting on this passage drew no distinction between the cases of the owner having particular goods in mind and the owner having a particular stock in mind from which to draw (but not exhaust). Barwick CJ stated that in such a case s92 would protect the goods. His Honour set out the wide statements from McArthur's

¹ Clark King & Co Pty Ltd v Australian Wheat Board (1978) 140 CLR 120, 142-143.
² (1952) 85 CLR 488, 520.
case which have been extracted above\(^1\) describing the concepts of inter-State trade and said that those statements covered the example.\(^2\)

An outstanding offer is, of course, a lot more than just a wish or a hope. It has the potential to become a binding contract. To say that the fact of an outstanding offer to sell goods by description to an inter-State offeree coupled with an intention in the seller to use particular goods, brings the situation within the concept of inter-State trade takes the concept of inter-State trade a long way. Ordinarily a good deal more is needed to appropriate goods to a contract than just the intention of the seller.\(^3\) To say that the fact of an outstanding offer to sell goods by description to an inter-State offeree coupled with an intention to draw on (but not exhaust) a particular stock of goods is also a situation within the concept of inter-State trade is to take the concept of inter-State trade a good deal further.

It is difficult to reconcile Barwick CJ's conclusion that such stock would be in inter-State trade with the High Court decision in *Swift Australian Co Pty Ltd v Boyd Parkinson*.\(^4\) In that case the issue was whether all the slaughtering of poultry carried on by a slaughterer whose poultry were sold both locally and overseas, could be said to be "slaughtering for export" within the meaning of Commonwealth regulations.

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1 Above pp461-462.

2 *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120, 143.


To see the constitutional significance of that question we must first go back to the case of O'Sullivan v Noarlunga Meat Limited where these regulations had been held to be reasonably incidental to s51(1).\(^1\) The judgments expressly noted that the regulations were limited to the control of slaughter "for export" and stated that that fact was relevant to the decision of the sufficiency of Commonwealth power.\(^2\) The issue of construction in Swift, therefore gave indirect guidance to the scope of the Commonwealth incidental power in this area.

The majority in Swift decided that the slaughtering in issue could not all be held to be "for export".\(^3\) Owen J in dissent considered that given the nature of this business where stock was held and goods were only appropriated to overseas or domestic destinations on receipt of orders, all the stock was subject to the same possibility of going overseas and therefore all slaughtering was for export.\(^4\)

Of the majority judges, Kitto J took the opposite extreme to Owen J. For Kitto J it seemed that no particular act of slaughtering could be said to be slaughtering for export within the meaning of the Commonwealth regulations. Rather, all the slaughtering was for a pool to supply the domestic or overseas market according to what orders came in. "Slaughtering for export" meant, for Kitto J, "slaughtering such as is characterized by a purpose of exportation objectively manifested as actually formed and existing, although not necessarily unalterable and did not mean slaughtering "for possible export".\(^5\)

\(^1\) (1954) 92 CLR 565 per Dixon CJ, McTiernan, Fullagar, Kitto JJ, Webb and Taylor JJ expressing no opinion.

\(^2\) Id. 581 per McTiernan and 596-598 per Fullagar J who received the concurrence of Dixon CJ and Kitto J.

\(^3\) (1962) 108 CLR 189. Dixon CJ, McTiernan, Kitto, Taylor, Menzies and Windeyer JJ.

\(^4\) Id. 286 Compare Webb J in the Wilcox Mofflin case (1952) 85 CLR 488, 537 Above p470.

\(^5\) Id. 208-209. Emphasis added.
If this kind of reasoning were applied to the hypothetical hide dealer considered by Barwick CJ in *Clark King*, then no particular hide in stock would be in inter-State trade until at least an intention had been formed to send that particular hide inter-State.

The other majority judges in *Swift* seemed to believe that the stock of birds and thus the acts of slaughtering which built up that stock, could be notionally divided with each bird having a predetermined destiny and with, therefore, some of the particular acts of slaughtering being slaughtering for export (within the Commonwealth legislation) and some being slaughtering other than for export (not within the Commonwealth legislation). ¹

This conclusion was, with respect, difficult to defend in logic and is therefore difficult to use as a basis for analogy for Barwick CJ's hypothetical hide dealer. Nevertheless, I make this attempt. If the stock of hides were notionally divided into hides for inter-State trade and hides not for inter-State trade then how could it be said, as Barwick CJ seemed to say, that the whole stock was in inter-State trade?

Admittedly the *Noarlunga* and *Swift* decisions were about the incidental area of s51(i). The cases do nevertheless make Barwick CJ's propositions about the meaning of inter-State trade, rather difficult to accept. One would have thought that the hypothetical hide dealer could have been more convincingly dealt with in terms of the practical effect of the acquisition. Why did not Barwick CJ simply say that the practical effect of acquisition in the hypothetical case(s) would be direct and not merely remote? (Compare the second possible route to declaring an effect direct and his sweeping submission in *Carter's* case.) ²

¹ Id. 198 per Dixon CJ, 202-203 per McTiernan J, 212-214 per Taylor J, 222 per Menzies J, 223-224 per Windeyer J.

² Above p468.
A fortnight after the Clark King judgments were delivered, the Court handed down its decision in Bartters Farms Pty Ltd v Todd. In this case Barwick CJ seemed to exclude practical effects of acquisitions (the second possible route supra) when he said:

"To deprive a producer of his product before it has become part of interstate trade and commerce has long been held, and in my opinion correctly held, not to be an infringement of s92 unless the act of deprivation is established as having been done to prevent the introduction of the product into interstate trade and commerce."

Apart from production interferences, it is difficult to think of a situation other than acquisition which can have such a dramatic effect on inter-State trade and not be classified Dixon - direct. Yet here Barwick CJ unequivocally ruled out inquiry into the practical effect of acquisition.

N. Definition of inter-State trade - the Direct/Indirect Issue

Summary

By the end of Barwick's Chief Justiceship, the High Court had come around to Barwick's position on direct/indirect. Practical effects could be direct effects. As always, however, that issue interacted with the definition of inter-State trade and it is difficult to find any category of laws for which the question of validity depended clearly on a choice between Dixon-direct and Barwick-direct. The distinction was important for laws operating on first sales after import but even there the extension of s92 to such sales has involved the extension of the definition of inter-State trade. Even for Barwick it is difficult to identify decisions which were rested solely on a willingness to look to the practical effect on inter-State trade of a law operating on something which was not inter-State trade. Of course, Barwick CJ frequently avoided such a decision by pushing out the definition of inter-State trade. (Barwick CJ's exclusion of

1 (1978) 139 CLR 499.
practical effects from acquisition inquiries was greatly offset by his notions of when goods were "in" inter-State trade.) And yet in the significant areas of controls on production and import from abroad (activities outside Barwick CJ's definition of inter-State trade) Barwick CJ would not hold drastic practical effects on inter-State trade to be direct effects.

Why was it that Barwick CJ fought against Wragg so resolutely and accepted Grannall (and Ipec)? In the case of production and import prohibitions the practical effect on inter-State trade was greater than was the price control on the sale of goods after import in Wragg. Prohibit production and there can be no inter-State trade in that commodity. Prohibit the import of planes from abroad and there can be no inter-State air transportation using those planes. Impose price control and there can still be inter-State trade - it just may happen that there is not as much economic incentive as there was previously to engage in inter-State trade.

Why was it that Barwick CJ made no attempt to bring production (and import) controls within the reach of s92. Was it that Barwick the freedom fighter, had to acknowledge the necessities of judicial office and bowed to the need for certainty in the law? This answer is difficult to accept given the frequency of Barwick CJ's statements criticising those who looked to the case law on s92 rather than the text of the section itself.

If we were to treat s92 as being concerned only with outlawing inter-State protectionism then there might seem no offence in allowing a State to prohibit production for inter-State trade and thus injure its own producers. At one stage Barwick CJ had argued that s92 is in fact based on the purpose of ending the "barbarism of borderism". Barwick's tolerance of production controls might be interpreted therefore as a recognition of the discrimination basis to s92. Such an interpretation is, however, difficult to sustain given that Barwick CJ went on to postulate and generally applied a concept of freedom much wider than a free-trade concept.
No rationale can be found in the individual liberty framework for drawing the line at production (and import) controls. One might say that a line has to be drawn somewhere, but if, as Barwick CJ says, its all a question of the practical effect of the law, why draw that line rigidly?

0. Section 92 - The overview of Barwick's behaviour

As counsel, Barwick won from the Privy Council in the Bank Nationalisation Case the declaration that s92 guarantees individuals as individuals a freedom to trade. That the freedom postulated by s92 was freedom in the sense of ordered liberty, was an assumption which stood unchallenged until the mid 1970's. In 1980 in Uebergang shortly before his retirement from the Court, Barwick CJ and three of his brethren reaffirmed the individual liberty basis to s92 with only Murphy J expressly repudiating that basis. By the time of Uebergang there were signs that the Court was becoming more willing to find the circumstances of particular cases to be sufficient to displace the prima facie freedom for individuals. Barwick CJ was, as he had been throughout his entire Chief-Justiceship, remarkably unwilling to allow restraints on inter-State trade. The only two restraints on inter-State trade which he actually held to be compatible with s92 were (1) a requirement that margarine not be sold unless it were labelled in a prescribed manner as margarine, and (2) a prohibition of restrictive trade practices.

This broad view of the kind of freedom guaranteed by s92 was paralleled by Barwick CJ's attitude to the definition of inter-State trade and to the characterisation of government action as being directly on inter-State trade. Through those issues Barwick CJ allowed some checks to be placed on s92. Controls on production and controls on import from abroad were accepted by Barwick CJ as being beyond the reach of s92. The facts, however, which are conspicuous and eloquent above all others are (1) that in the large sample of cases depending on s92 during his Chief-Justiceship Barwick CJ held s92 operated to prevent government action validly applying to the
facts before the Court about five times as often as he held s92 did not apply while in the same sample of cases the majorities held s92 to be inapplicable slightly more often than they held it to be applicable, and; (ii) that in no case did any member of the Court hold that s92 applied when Barwick CJ held that it did not.¹

On his retirement from the Court, Sir John Latham said, "When I die, s92 will be found written on my heart."² Sir John went on to propose something be done about s92 to make its meaning clearer.³ Barwick CJ never gave the slightest sign of dissatisfaction with s92. On the contrary in an extra-judicial statement Barwick CJ stated his belief in the unifying force of s92.⁴ If the anguish caused by s92 to Sir John Latham was appropriately represented by saying that the terms of the section were written on his heart, then we might examine closely the knuckles of Sir Garfield Barwick to see whether the terms of s92 are tattooed thereon. Barwick used s92 like a blunt instrument.

¹ Appendix.  
² (1952) 85 CLR ix.  
³ Ibid.  
⁴ (1969) 28 Public Administration 2, 3.
Conclusion

AN OVERVIEW OF BARWICK AND THE CONSTITUTION
Conclusion: An overview of Barwick and the Constitution

Barwick and the High Court

When Barwick started appearing before the High Court in constitutional cases, Sir John Latham was the Chief Justice. Already, however, the Court was, in some senses, being led by Sir Owen Dixon. Much of Dixon's judgment in the Bank Nationalization Case was approved by the Privy Council. Dixon J wrote a main majority judgment in the Communist Party Case with Latham CJ in dissent. Through the 1950's, especially after Dixon became Chief Justice, joint unanimous or strong majority judgments were frequent.

It is not within the scope of this thesis to identify the key to the relative solidity and likemindedness of the Dixon Court. ¹ Perhaps that homogeneity derived from some inherent quality in Dixon's jurisprudence. Perhaps it derived from the fact that most of the Dixon Court puisne judges were selected and appointed by the government of Robert Menzies, an ardent admirer of Dixon. Perhaps that homogeneity was a product of there being a Commonwealth government in office, which was less adventurous in testing the Constitution than had been its predecessors. (It is notable in this respect that when Barwick as Attorney-General led the Commonwealth into testing its powers under s51 (xxi), the High Court divided and Chief Justice Dixon took a relatively narrow view of Commonwealth power). ²

Whatever the reason or reasons for the solidity of Dixon's Court, that solidity meant that Dixon's claim that High Court judges applied "strict and complete legalism" ³ to the interpretation of the

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1 Cf C Howard, "Sir Owen Dixon and the Constitution" (1973) 9 MULR 5.
2 Marriage Act Case (1962) 107 CLR 529.
3 On the occasion of his appointment as Chief Justice (1952) 85 CLR xi, xiv.
Constitution was quite credible. If nothing else, the divisions within the High Court during Barwick's Chief Justiceship make it all the more readily apparent that there is seldom any fixed objective meaning ascertainable by mechanical application of logic, when the issue is the interpretation of a provision of the Constitution. Undoubtedly by the reiteration of the maxim - The text is the test - Barwick CJ undercut whatever fixed objective meaning there was in precedent (so, for that matter, did the Engineers Case.) If anything, that there was division within the Court in the Barwick years was typical of the pattern of High Court behaviour through the history of the federation and it was the Dixon Court pattern of joint unanimous or strong majority judgments which was the aberration.

The shadow of Dixon fell long over Barwick's Court. For the first half of Barwick's Chief Justiceship, there was continuity in the make-up of the Court. Justices McTiernan, Kitto, Taylor, Menzies, Windeyer and Owen who all sat with Chief Justice Barwick for substantial periods had also all been on Dixon's Court for some years.

The make-up of the Court changed in the 1970's. Suddenly Barwick CJ had a Court a generation younger than him. Of the judges appointed in the 1970's, Gibbs, Stephen, Mason, Jacobs, Murphy, Aickin and Wilson JJ, only Gibbs J had been admitted to practice when Barwick had taken silk in 1941. Barwick had been the phenomenon of the bar in the 1950's when they were getting established. Some of them had appeared with him in the 1950's but, their main contact with him had been when they were putting submissions to his Court.

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1 Consider for example the polarisation within the early Courts over the doctrine of intergovernmental immunity and within the current Court over the scope of the external affairs power.

2 Gibbs was admitted in 1939 but served in the armed forces in the Second World War

3 Walsh J who was appointed in 1969 and died in 1973, had been admitted in 1934.
It is difficult to find many constitutional issues where Barwick CJ's thinking dominated or led the Court. On issues of intergovernmental immunity and in his interpretation and application of s92, Barwick CJ was, compared to his brethren, an extremist. Barwick CJ was party to the establishment of the Fairfax and Murphyores principles of characterisation. Those cases represented, however, the vindication of the work of Sir Owen Dixon. Barwick CJ did not even write judgements of his own in Fairfax and Murphyores. He proceeded by adopting the fuller discussions of other members of the Court.

Perhaps the s90 receipts duty cases can be scored as Barwick victories. Even there, however, Barwick acknowledged that his judgment in the first receipts duty case had been prepared by Taylor J before that judge's death. Barwick also saw some of his views on s92 issues prevail over those supported by members of the Dixon Court, but those victories were offset by the lack of support for Barwick's idea of "freedom" under s92.

The powerfully expressed views of Barwick CJ and (and Windeyer J) in Bonser v La Macchia, may as it were, have turned the tide of judicial opinion on the issue of the seaward limits of States (albeit by developing ideas put forward by D P O'Connell). Even though the potential of the corporations power was suggested by Sir John Latham, Barwick is entitled to the credit for the inflation of the power.

Apart from those areas the members of the "Barwick Court" were apparently uninfluenced by their Chief Justice.

Themes and Patterns in Barwick CJ's behaviour on constitutional issues

There are two related crude hypotheses which can be disposed of. First, Barwick CJ was affected by a desire to vindicate views,
which he had put as counsel and seen rejected by the Court, because they were such views.1

Secondly, that Barwick CJ rejected things Dixonian because they were Dixonian.

As for the first hypothesis:

Barwick as counsel had important losses in Lowenstein (separation of powers), the Communist Party Case (constitutionality), the State Banking Case and the Bank Nationalisation Case (on the issues of characterising a law as being with respect to a subject matter, though Barwick won the cases on other issues), the Second Uniform Tax Case (on Commonwealth power to use s96 to subordinate States), Wragg (on the application of s92 to first-sales after import), and Grannall (on the application of s92 to production controls).

The arguments which Barwick had put unsuccessfully in Lowenstein, were in their essence accepted in the Boilermakers Case. Barwick CJ indicated his dissatisfaction with the outcome in the Boilermakers Case and showed no enthusiasm for a subtle and technical doctrine of separation of powers such as that which his submissions in Lowenstein had proposed. They were, of course, Dixon's arguments in Barwick's mouth which were rebuffed by the majority in Lowenstein and were taken up in the Boilermakers Case and Barwick's attitude to separation of powers might be seen as supporting the second hypothesis.

Barwick's unsuccessful submissions in the Communist Party Case to the effect that the Court should defer to the opinion of Parliament and the Executive on political matters were not echoed in the judgments of Barwick CJ. The contrary was rather the case. In Fairfax and Murphyores Barwick CJ accepted the principles which underlay the rejection of his submissions in the State Banking Case and the Bank Nationalisation Case about characterising laws as being

1 Compare D Marr, Barwick 131.
with respect to subject matters of Commonwealth power. Barwick as Chief Justice did revive (and revive successfully) the arguments which had been rejected in Wragg but he did not challenge Grannall. There is, therefore, no pattern of Barwick using his position as Chief Justice to reverse losses as counsel.

Nor is there any pattern of Barwick CJ opposing the ideas of Sir Owen Dixon merely for the sake of opposition. Undoubtedly, Barwick CJ's maxim - the text is the test, was Barwick CJ's way of saying that he would not accept previous High Court judges' expositions of constitutional provisions regardless of his own view of the provisions' true meanings and there were some areas where Barwick CJ rejected positions taken by Sir Owen Dixon.

Barwick CJ did reject Dixon's scheme (and Rich J's and Starke J's schemes) for dealing with Commonwealth interference with States. And, as just noted, Barwick indicated his dissatisfaction with the decision based on Dixon's notion of the separation of powers doctrine, in the Boilermakers Case.

Barwick CJ also rejected Sir Owen Dixon's view in relation to whether the first-sale of goods after their import from another State was part of inter-State trade and Sir Owen Dixon's view of what were "direct" effects for the purposes of s92. Those two issues merged, however, and Barwick CJ did not push his view of "direct" effect out to bring any other activities under the protection of s92.

There is a substantial list of areas where Barwick and Dixon took similar approaches. Barwick and Dixon had a similar perception of the kind of freedom guaranteed by s92. Barwick supported Dixon's exclusion of economic effects from the incidental area of s51(1) and sought to carry that exclusion into s122 issues. Barwick accepted, albeit with some reservation and some ambiguity, Dixon's general principles of characterisation. Barwick supported Dixon's proposition that there is inherent immunity from State interference for the Commonwealth.
Barwick's performance on s90 had parallels with Dixon's. Both went through a phase of seeking to give the section a wide operation and than retreated from that position. Although accepting the majority decision in Dennis Hotels upholding a time-lagged tax Barwick expressed preference for the reasoning of the minority amongst whom had been Dixon CJ. Barwick's conflict in this area was with Sir Frank Kitto rather than with Dixon.

There is no one-line formula to capture the essence of Barwick CJ's behaviour on constitutional issues. It is possible, however, to disentangle some of the major constitutional tensions and conflicts from one another and to give an overview of Barwick CJ's attitude to these broad issues.

(i) Barwick CJ's perception of the Federation as a federation

When ascertaining the limits of Commonwealth powers, Barwick CJ endorsed the Engineers Case explosion of the reserved powers doctrine and acted accordingly on s51(xx) and s51(xxix) issues but seemed to allow considerations of preserving certain areas exclusively for State control, to affect his attitude to s81, national implied power, s51(xxi) and the incidental aspect of S51(i). Barwick CJ's attitude of containing s51(i) stands in contrast with his proposition that s90 recognizes a principle that the Commonwealth was to have powers of national economic management.

Although Barwick CJ pursued no consistent line when federal arguments were raised to determine limits on Commonwealth power, Barwick did have a consistent approach for problems of intergovernmental immunity and had another consistent approach for issues relating to Federal Parliament.

On issues of intergovernmental immunity Barwick CJ accorded to the Commonwealth a dominating position. The Commonwealth sphere did, and the State sphere did not, have immunity from the other sphere of
government on account of its place in the federation and its status as a body politic. The Commonwealth's position of strength in intergovernmental relations was complemented by Barwick CJ's endorsement of Commonwealth use of s96 grants to subordinate State government action.

That behaviour, favouring national over State interests, is to be contrasted with Barwick CJ's attitude to issues concerning Federal Parliament. There Barwick CJ took the view that the house of the nation, the House of Representatives, did not dominate Parliament and that the Senate had a structure and a status to enable it to protect State interests.

There is contrast between Barwick CJ's attitude to the two topics—intergovernmental immunity and Parliament. That contrast does not necessarily indicate conflict. The composite perception may well have been that State interests are sufficiently represented in Federal Parliament and do not therefore require further protection through doctrines of intergovernmental immunity and that strong representation for State interests in Federal Parliament is one of the reasons why those acting under the authority of the Commonwealth and answerable to the Federal Parliament should have intergovernmental immunity. Barwick did not, however, expressly relate these two different problems of balancing national and State interests in this way.

(ii) Barwick CJ's perception of the relationship between the individual and government

Barwick showed no interest in the doctrine of separation of powers, a doctrine lauded by some as a protection of individual liberty. Barwick rejected arguments based on notions of democracy when considering voting rights. Although Barwick did not support the individual against government in those contexts he did support the individual trader on some issues.

Barwick CJ's attitude to s92 was redolent with a simplistic faith in the worth of trade by individuals. His decision holding Senator
Webster was not disqualified from sitting in Parliament by his trading activities was consistent with belief in the worth of such activity. Barwick CJ's early enthusiasm for pushing out the operation of s90 to protect dealings with goods from State taxes, was consistent with Barwick CJ's support for freedom of traders from government control. The correlative attitude - a low regard for the trade of government supported activities - was also clear through Barwick CJ's s92 cases and was an attitude consistent with Barwick CJ's decision in the Port Hedland Case narrowing the range of activities which the Commonwealth airline could undertake.

Barwick CJ gave very little weight to the interests of individuals other than traders when s92 was in issue. Consumer protection was not for Barwick CJ a very compelling reason to allow Government control of inter-State trade. At least Barwick CJ would allow governments to control restrictive trade practices but that could be accepted because it protected the freedom to trade of other individuals.

I have not been able, within the confines of the word length of this thesis, to discuss the large collection of cases, involving Barwick CJ, relating to s51(xxxv) of the Constitution. My observation there has been, however, that Barwick CJ consistently held to be unconstitutional that which unions sought to bring before the Conciliation and Arbitration Commission and which employers opposed, and consistently held to be constitutional that which employers sought to bring before the Commission, or which the Commonwealth enacted, and which unions opposed.

Barwick did not push out his support for traders as far as he might have. He held to be compatible with s90 a wide range of State taxation of commercial transactions. His decision in Murphyores allowing the Commonwealth to control export from the country by reference to environmental considerations cannot simply be brushed aside as being affected by his involvement in the conservation movement.¹ He accepted that the Commonwealth could prohibit export

¹ Barwick was President of the Australian Conservation Foundation from 1965 to 1970.
by reference to any consideration. He also accepted that the Commonwealth could control imports so as to stop private traders going into competition with the air transport activities of the government airline and the private airline, which had shared out the market after Barwick's victory as counsel in the Airways case.

It may ultimately turn out to be the case that Barwick's success in establishing Commonwealth power under s51(xx) to control the trading activities of trading corporations will ultimately have greater importance for the capacity of the Commonwealth to regulate private persons than did any of his other positions on constitutional matters. Barwick put forward the proposition that s51(xx) allows the control of the trade of trading corporations - as a basis for supporting Commonwealth power to prevent restrictive trade practices by trading corporations. The power, however, could possibly be used to nationalise or at least rigorously control all intra-State activities of such corporations. That potential if realised in whole or in part would make increasingly incongruous the special laissez-faire freedom for inter-State traders which Barwick helped to maintain for so long.

(iii) Barwick CJ's perception of the relationship of the High Court to government

Barwick CJ was consistent across a range of issues in his readiness to review the validity of government action.

On the question of compliance with s57 Barwick had no reluctance to examine and restrain proceedings within parliament. With s92, Barwick CJ saw no problem either in adopting an interpretation of the section's guarantee which required the testing of government action against an impressionistic subjective criterion, or in applying the section to invalidate action supported by democratically elected governments, even when Commonwealth and State governments were cooperating in the course of action and there was no offence to federal principles in the action.
Barwick CJ's high regard for the position of the High Court, of which he was Chief Justice, went beyond his attitude to the review of government action under challenge. In the nature of judicial review the High Court cannot initiate action. There were however, some issues which Barwick CJ would not allow to go past without becoming involved.

In a discussion which was not necessary to his decision in Bonser v La Macchia, Barwick went to some trouble to argue that the States territories end at low-water mark. In the Rocla Concrete Pipes Case Barwick who decided that the legislation before him was inseverably invalid, gave what was in effect an advisory opinion that the law would have been valid if it could have been limited in its operation to s51(xx) corporations. Barwick having been in the minority in the First Territories Representation Case invited States to re-open that issue.

Those cases of judicial initiative were bold enough. Barwick's advice to the Governor-General, however, leaves them rather in the shade. True enough Barwick did not initiate that transaction. The Governor-General approached Barwick. Barwick's decision that he could and should advise, the fact that his advice went beyond questions of law into political matters of constitutional conventions, and the fact that Barwick's advice was so loosely almost casually argued indicate that Barwick CJ was operating on the assumption that the esteem associated with his office would of itself justify his action and provide authority for his opinions. Ironically his action rattled the very foundation of the authority of pronouncements of the Chief Justice of Australia, the principle of constitutionality, by causing some people, albeit a small minority, to ask why they should accept the opinions of the Chief Justice of Australia.
It is generally accepted that Barwick never quite achieved the pre-eminence amongst constitutional law judges that he had had amongst constitutional law advocates. Perhaps the difference is that success as an advocate requires mastery of oral argument while success as a judge depends on mastery of written exposition. My impression after reading transcript of Barwick's oral argument in the Bank Nationalisation Case and reports of his submissions in many other cases and after reading many of his judgments, is that what was a virtue in the barrister - the ability to simplify - was a shortcoming in the judge. The reasoning of Chief Justice Barwick was often shallow, little more than assertion. (Being Chief Justice of Australia can, of course, be rather demanding of one's time)

Perhaps the difference is that success as an advocate requires sensitivity to the attitudes and values of the bench, while success as a judge (in a Court not subject to appeal) requires the individual to have, amongst other things, a coherent and complete philosophy of his own. It may be that the reason why Barwick may not be mentioned in the same breath as Dixon when great Australian constitutional judges are being discussed, is that Barwick's faith in hard work and market forces was not by itself a broad enough framework with which to resolve the constitutional issues of Australia in the second half of the twentieth century.


Appendix I

Sir Garfield Barwick's letter of advice to the Governor-General, Sir John Kerr

"Dear Sir John,

In response to Your Excellency's invitation I attended this day at Admiralty house. In our conversation I indicated that I considered myself, as Chief Justice of Australia, free, on Your Excellency's request, to offer you legal advice as to Your Excellency's constitutional rights and duties in relation to an existing situation which, of its nature, was unlikely to come before the Court. We both clearly understood that I was not in any way concerned with matters of a purely political kind, or with any political consequences of the advice I might give.

In response to Your Excellency's request for my legal advice as to whether a course on which you had determined was consistent with your constitutional authority and duty, I respectfully offer the following.

The Constitution of Australia is a Federal Constitution which embodies the principle of ministerial responsibility. The Parliament consists of two Houses, the House of Representatives and the Senate, each popularly elected, and each with the same legislative power, with the one exception that the Senate may not originate nor amend a money bill.

Two relevant constitutional consequences flow from this structure of the Parliament. First, the Senate has constitutional power to refuse to pass a money bill; it has power to refuse Supply to the Government of the day. Second, a Prime Minister who cannot ensure Supply to the Crown, including funds for carrying on the ordinary services of Government, must either advise a general election (of a kind which the constitutional situation may then allow) or resign. If, being unable to secure Supply, he refuses to take either course, Your Excellency has a constitutional authority to withdraw his commission as Prime Minister."
There is no analogy in respect of a Prime Minister's duty between the situation of the Parliament under the Federal Constitution of Australia and the relationship between the House of Commons, a popularly elected body, and the House of Lords, a non-elected body, in the unitary form of government functioning in the United Kingdom. Under that system, a Government having the confidence of the House of Commons can secure Supply, despite a recalcitrant House of Lords. But it is otherwise under our Federal Constitution. A Government having the confidence of the House of Representatives, but not that of the Senate, both elected houses, cannot secure supply to the Crown.

But there is an analogy between the situation of a Prime Minister who has lost the confidence of the House of Commons and a Prime Minister who does not have the confidence of the Parliament, i.e. of the House of Representatives and the Senate. The duty and responsibility of the Prime Minister to the Crown in each case is the same: if unable to secure Supply to the Crown, to resign or to advise an election.

In the event that, conformably to this advice, the Prime Minister ceases to retain his commission, Your Excellency's constitutional authority and duty would be to invite the Leader of the Opposition, if he can undertake to secure Supply, to form a caretaker Government (i.e. one which makes no appointments or initiates any policies) pending a general election, whether of the House of Representatives, or of both houses of Parliament, as that Government may advise.

Accordingly, my opinion is that, if Your Excellency is satisfied in the current situation that the Present Government is unable to secure Supply, the course upon which your Excellency has determined is consistent with your constitutional duty.

Yours respectfully,

(Garfield Barwick)
Appendix II

The Menzies J distraction in the Receipts Tax Cases

Menzies J in the statutory minority in Western Australia v Hammersley Iron Pty Ltd [No 1] took a rather nice point. Under s101A when a supplier complied with the law and made the required acknowledgement, he had to pay a tax quantified by reference to the amount of the acknowledged payment for the goods. If the supplier breached the law, however, then there was no tax liability. He had committed an offence and was subject to a fine. As there was no tax liability unless an acknowledgement was actually given, Menzies J concluded that the tax was on the acknowledgement of payment, not on the payment itself. (Menzies J did not say that a tax on the purchase price of goods would not be an excise.)

This point is altogether too nice. Just about any tax could be saved from s90 by being coupled with an "option" for the taxpayer to pay a fine instead. The fine here was a flat fine but the reasoning should apply equally to a fine which was quantified by reference to the amount of payment received. A fine is not a tax no matter how it is quantified.

As expressed, the conclusion of Menzies J makes the case look similar to Dennis Hotels Pty Ltd v Victoria. In Dennis Hotels the decision of Kitto, Taylor and Menzies JJ to the effect that the fee for a permanent licence was not an excise duty on the purchase of the goods by reference to which it was quantified had been influenced

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1 Discussed pp277ff.
2 (1969) 120 CLR 42.
3 Id. 67.
by the fact that there was no liability to pay any tax unless the licence was renewed. The tax was on renewal. It is quite a jump, however, from that proposition (which had only received the support of three judges in Dennis anyway) to the Hamersley [No 1] facts. In Dennis the State had not imposed any legal obligation on the taxpayer to do the act, renewal, which would attract the tax liability.

Menzies J considered the question in Western Australia v Chamberlain Industries Pty Ltd to be "entirely different" to the question in Hamersley [No 1]. "There the tax\(^1\) was imposed upon the making of a document and, if there were no document, there was no tax."\(^2\) In Hamersley [No 1] Menzies J concentrated on what happened if the taxpayer breached s101A and failed to make a receipt. The consequence was "Penalty: Twenty Dollars". That meant for Menzies J, that there was no tax only a penalty if no receipt was made, that s101A was taxing the making of receipts not the payment of money. In Chamberlain, if a taxpayer who had opted to make a monthly return under ss99A and 99B omitted to do so, the consequence was

"Penalty: Two hundred dollars and in addition to that penalty the person is liable to pay double the amount of the duty that would have been payable by him if he had complied ..." (s99C)

Menzies J commented

"Failure to submit statements exposes a taxpayer, who has so elected, to double duty as well as a penalty."\(^3\)

If the difference in the penalty provisions were the basis for the distinction that Menzies J saw between the two taxes, then the

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1 Under s101A.
3 Id. 24.
States could easily remove double tax penalty provisions. There must, however, be doubt as to whether Menzies J really did rest the distinction on that fine point.

First there is difficulty in describing the "double tax" as a "tax".¹ In Re Dymond² Dixon CJ, Fullagar, Kitto, Taylor and Windeyer JJ had decided that a similar provision providing for double taxation on breach of an Act was, despite its label, not a tax but rather a penalty. Those judges considered that if a pecuniary liability was imposed on the occasion of a breach of an Act, then the exaction took the character of a penalty rather than a tax.³ (Menzies J also sat in Re Dymond but found he could decide the case without considering that question.)

The second difficulty with reconciling the decision of Menzies J in Chamberlain with his decision in Hamersley [No 1] by reference to the differences in penalty provisions, is that his Honour did not confine his reasoning in Hamersley [No 1] to the validity of a tax payable on a monthly statement.

"I do not think any distinction is to be drawn between duty imposed upon a particular receipt and duty imposed upon a statement of receipts and propose, therefore, to consider the question whether a duty, imposed inter alia upon a receipt given by a manufacturer for so much of the price of goods manufactured in Australia as is from to time paid, is to that extent, a duty of excise."⁴

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¹ Id. 24.
² (1959) 101 CLR 11.
³ Id. 22 per Fullagar J.
⁴ Id. 24.
The provision which required the issuing of receipts for payments received within the State had a penalty provision which was indistinguishable from the penalty provision considered in Hamersley [No 1] in that it was at a flat rate. There was no "double taxation" penalty.

What then is the key to the distinction perceived by Menzies J? His Honour contrasted the Hamersley [No 1] and Chamberlain situations thus:

"There [Hamersley [No 1]] the tax was imposed upon the making of a document and, if there were no document, there was no tax. Here the tax falls upon the receipt of money and the giving of a receipt or returning a statement is but machinery for tax collection." ¹

Is this to be taken as indicating that the distinction lay in the purpose of the provisions? If that is what Menzies J meant, it is a totally unconvincing basis for distinction. Menzies J described the receipt in Chamberlain as being merely "machinery for tax collection". Surely the receipt considered in Hamersley [No 1] was merely "machinery" to aid the "machinery for tax collection" considered in Chamberlain?

In short there is no satisfactory explanation for the behaviour of Menzies J. The only recourse is to take these decisions into his framework under the "non-principle" that it is all a question of the substance of the law with each case depending on its own facts. ²

Even on this view, Menzies J chose to emphasise facts, consisting of aspects of the legislation, which seemed to have little to do with the substance of the legislation.

¹ Id. 24.

² Above pp241-242.
Appendix III

Did the Moore v Commonwealth point about the "purpose" of compulsory exactions cover the legislation in Dickenson?¹

In Moore v The Commonwealth it was accepted that it was important when characterising a compulsory exaction (as being or not being a tax) to see how it had been labelled by the legislature. This was because it was accepted that even if one compulsory exaction could reduce a liability under a separate compulsory exaction both exactions might be held to be taxes.² Thus the "purpose" argument to support validity in Dickenson would have been significantly hindered by the fact that the legislation described payments made purchases as "tax".

In Moore v The Commonwealth³ the "purpose" of the exaction was ascertained by examining the legislation involved to see what the legislation directed should happen to the money exacted. The legislation directed that the money be applied either to discharge future tax liability or to discharge provisional tax (which was, despite its name, not tax but payment in anticipation of tax liability) or if those applications did not exhaust the money to return it to the taxpayer. In Dickenson⁴ neither the Act nor the regulations said expressly that money paid at the time of purchase was to be applied to discharge liability to consumption tax when and if arising. That seemed to be, however, what the legislation impliedly intended. There was no provision for regular assessment of how much liability to pay consumption tax the taxpayer had in fact incurred.

¹ Discussed pp295ff.
² (1951) 82 CLR 547, 568-569 per Dixon J; 576 per Webb J; 577 per Fullagar J; 581-582 per Kitto J.
³ (1951) 82 CLR 547.
⁴ (1974) 130 CLR 177.
That should not, however, distinguish Moore v The Commonwealth as the tax liability "expected" to arise in that case depended on the enactment of the annual tax act. What may provide a basis for distinction is the comparison of the provisions relating to repayment should actual tax liability exceed the anticipatory payments. In Dickenson the relevant provision, s3(5) of the Act provided

Where the tax has been paid in respect of the consumption of any tobacco and, on application being made to him within three months of that tax being paid, the Commissioner is satisfied that that tobacco has not been, and will not be, consumed, he shall refund the amount of that tax to the person by whom it was paid or, if he has died, his legal personal representatives.

This provision seemed to contemplate the possibility of repayment only when the Commissioner was satisfied that the "tobacco has not been, and will not be, consumed...". If it were implied that the subsection meant that there could be repayment on the Commissioner's satisfaction that "the tobacco has not been, and will not be, consumed" by the person who made the anticipatory payment, then the case would seem to be covered by Moore v Commonwealth. Persons acquiring tobacco could pay an amount equal to the amount of their tax liability that would arise when and if they consumed the tobacco. Persons making such anticipatory payment could recover it or any part of it upon demonstrating that they had not and were not going to incur any consumption tax liability. On that construction payments received at the point of purchase were not "for" government purposes and were, therefore, not taxes. If they were not taxes they could not be excises.

The difficulty is that on its face, the subsection meant consumed by anybody. That is to say the purchaser who had made anticipatory payment would not be entitled to a refund even if he could show that the tobacco had been consumed by somebody else who had thus become subject to a liability to pay consumption tax. In such a situation
the person who had made the anticipatory payment would be permanently deprived of his money even though he did not consume the goods. It is impossible to describe a permanent deprivation of the money in such circumstances as a tax on consumption. Whether or not such a deprivation should be described as a tax on goods is, however, a more difficult question.

It will be recalled that although regulation 3 gave a general power to appoint collectors the power was said to be subject to these regulations. Regulation 4 contained detailed provisions relating to the making of arrangements with the occupiers of premises where a retail tobacco business was carried on "for the collection of the tax payable in respect of the consumption of tobacco that is sold on those premises in the course of that business ...". (reg 4(1)). Mason J implied from this that people could only be made collectors in respect of particular premises and in respect of consumption tax in respect of tobacco sold from those premises. If it is so implied, is it to be further implied that the only people who could make anticipatory payments to such collectors were people purchasing tobacco from the premises for which the collector was responsible?

If that string of implications were made then we would have a law which provided (albeit, at some points, impliedly) that although all people who consumed tobacco should be liable to pay tax, a further exaction was to be made in the following circumstances. Purchasers of tobacco could make a payment at the time of purchase equal to the amount which would arise by way of consumption tax when an if they consumed the tobacco. Purchasers making such payments would be permanently deprived of this money unless they could satisfy the Commissioner that no person had or would consume the tobacco. That is to say the provisions depriving advance payers operated by reference to the fact that these persons had purchased tobacco. Even within the formula of Kitto J it would be difficult to say that the criterion of liability was not "purchase".

1 Id. 243.
Appendix IV

Voting behaviour in relation to taxes considered by the Court including Barwick CJ

Does s90 prevent the tax applying to the taxpayer?
(Only cases on which Barwick sat are included.)

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(i) The number of times the judge held that s90 prevented the tax applying to the taxpayer (Yes) against the number of times he held s90 did not prevent the Tax applying to the taxpayer (No).
(ii) The number of times the judge agreed with Barwick CJ's vote (A)/ disagreed (D).
(iii) Whether the majority held s90 applicable (Yes) or inapplicable (No).
(iv) Whether Barwick CJ was in majority (M) or dissent (D) and what the division of the Court was.

* In this case Taylor J heard argument but died before judgment. Barwick CJ said that his judgment had been prepared by Taylor J as their joint judgment.
2.

Tax - in chronological order.

1. Andersons Pty Ltd v Victoria (1964) 111 CLR 353.
   Tax on consumer credit.

   Tax on land.

3. Western Australia v Hamersley Iron Pty Ltd [No 1] (1969) 120 CLR 42.
   Tax on payments outside a State for goods supplied within the State.

   Tax on payments received within a State.

   (a) Time-lagged tax on retailers of tobacco
   (b) Flat tax on retailers of tobacco
   (c) Tax on consumption of tobacco

6. HC Sleigh Pty Ltd v South Australia (1977) 136 CLR 475.
   Time-lagged tax on petrol sales.

7. Logan Downs Pty Ltd v Queensland (1977) 137 CLR 59.
   Tax on ownership of livestock.

In Harper v Victoria (1966) 114 CLR 361 McTiernan, Taylor, Menzies and Owen JJ held legislation did not offend s90 or s92. Barwick CJ in dissent held the legislation did offend s92 and did not have to decide the s90 point.
Both Beasley, a lawyer, and La Nauze, an historian, have traced the drafting of s92. I do not propose to go again over their ground and review the amendments to the terms of s92 which were suggested at various stages - nor do I propose to detail as they have done the indications in the Convention Debates of the Founders' understanding of the provision.

It is sufficient for my purposes to make the following points about what the debates reveal about s92. First, inter-State free trade was regarded as being basic to federation. The topic of inter-State free trade was introduced by Sir Henry Parkes at a very early stage of the 1890 Australasian Federation Conference in Melbourne.

The second of the four basic principles of federation moved by Parkes at the commencement of the 1891 National Australasian Convention in Sydney dealt with this topic in these terms:

"That the trade and intercourse between the federated colonies, whether by means of land carriage or coastal navigation, shall be absolutely free."  

Appendix V
The purpose of s92 - The Evidence of the Convention Debates

2 JA La Nauze "'A Little Bit of Lawyers Languade' The History of Absolutely Free" 1890-1900 in A Martin (Ed) Essays in Australia Federation 1968.
3 Australasian Federation Conference, 1890 (hereinafter, Melbourne 1890).
4 National Australasian Convention 1891 (hereinafter, Sydney 1891). The first principle was the continuity of the powers and territories of the existing colonies. The third principle was that power to impose customs duties be "exclusively lodged in the Federal Government and Parliament". The fourth principle was the entrusting to federal forces of the military and naval defence of Australia.
At the next meeting of colonial representatives in Adelaide in 1897, proceedings again commenced with the endorsement of basic principles before the discussion of detail commenced. The principle of free trade, slightly altered, now appeared as the fifth principle.¹

That the trade and intercourse between the Federated Colonies, whether by land or sea, shall become and remain absolutely free.²

In the translation of the general principle to a specific provision, little change of form occurred. The first draft of the Constitution submitted to the 1891 Convention by the drafting Committee incorporated a specific provision (as cl 8 of Chapter IV) in these terms

So soon as the Parliament of the Commonwealth has imposed uniform duties of Customs, trade and intercourse throughout the Commonwealth, whether by means of internal carriage or ocean navigation, shall be absolutely free.³

The Convention approved the clause with little discussion⁴. Various minor changes took place in the form of this provision over the years before it appeared as s92. The suitability of the formula "absolutely free" was queried at some stages and some alternative formulae were proposed. None were accepted and no change took place at any stage in the key words "absolutely free". The apprehensions

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¹ There were now five instead of four principles as the 1891 first principle about State continuity had been divided into two principles, one about continuity of State territory, one about continuity of State power.

² Australasian Federal Convention 1897 (First Session) (hereinafter, Adelaide 1897), 17. Also, 395.

³ Sydney 1891, 802.

⁴ Id. 802.
that were expressed about the suitability of these words were that they were too wide. No change was made to allay these apprehensions. The amendments that were proposed were directed to limiting s92 expressly to the abolition of (various kinds of) fiscal imposts. Sharwood suggests that because nothing was done to allay the apprehensions expressed and because the attempted amendments were unsuccessful, it might be inferred that s92 was intended to have a very wide operation.¹

It is apparent, however, when one reads the debates or follows their outline in Beasley and/or La Nauze that the majority had a similar perception of s92's function to that of the minority which sought to amend the provisions. The disagreement between the two groups lay in whether or not the provision was sufficiently clear as it stood. The failure of the founders to approve any of the proposals to replace "absolutely free" with a more specific phrase, seems to be attributable to the matters of timing of moving amendments, confusion of the general principle with side issues such as liquor control and railway rates, personality clashes and in the end the weariness of delegates and their impatience to get the job finished.

What then was the clear meaning of "absolutely free"? It seems fairly clear that the Founders did not intend to incorporate the philosophy of laissez-faire as a constitutional principle governing inter-State trade. On my survey of the debates there are only two or three delegates who equated absolute freedom of inter-State trade with anything like laissez-faire freedom. All three were New South Welshmen.

¹ RL Sharwood, "Section 92 in the Federal Conventions: A Fresh Appraisal" (1958) 1 MULR 331.
In 1891 while discussing Draft Clause 11 of Chapter IV (a provision similar to s99 of the final), Dibbs stated "The clear object of inter colonial free trade is to simplify trade in every possible shape...".¹

Next came McMillan, sometime New South Wales Treasurer, who was a member of the Finance Committee in 1891² and its Chairman from 1897 on.³ In brief statements and interjections he spoke of the freedom as being a freedom from the annoyance of government controls.⁴

The third was Reid. His comments were made in this context. At Melbourne in 1898, Isaacs moved that the words "from taxation or restriction" be added after the word "free".⁵ Reid amongst others had opposed the amendment on the basis that it was unnecessary and undesirable to clutter up this little bit of "laymen's language" (absolutely free) with legal technicalities when everyone knew it was a guarantee of "freedom from government interference with equality of intercourse."⁶ There was at this stage no hint of laissez-faire.

Isaacs' amendment was defeated. Isaacs indicated his disappointment and continued to argue the matter. He made the clear tactical error of trying to illustrate the dangers of the formula by reference to the question of railway rates.⁷ This topic was only

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¹ Sydney 1891, 835.
² La Nauze Op Cit 72-73.
³ La Nauze Op Cit 78-79.
⁴ Adelaide 1897, 877, 1148; Australasian Federal Convention (Second Session) 1897 (hereinafter Sydney 1897, 1021-1022.
⁵ Australasian Federal Convention (Third Session) 1898 (hereinafter Melbourne 1898) Volume II, 2365.
⁷ Melbourne 1898 Volume II, 2368ff.
of direct concern to New South Wales and Victoria in their competition for the trade of southern parts of New South Wales which were closer to Melbourne than Sydney. The topic had already taken up a great deal of time and to reintroduce this parochial issue around midnight at the end of a long day was not the best way to move delegates to re-examine this provision. It was at this stage that Reid made his relevant comment. He was answering Isaacs' point that as s92 stood it might catch any attempts by Victoria to lure New South Wales trade across the border by setting low railway rates from southern New South Wales to Melbourne but allow New South Wales to discourage trade from leaving the State by setting low rates from southern New South Wales to Sydney. Reid defended the right of a State to provide cheap even free railway transport to keep trade within the State.

"It may be very hard on you but certainly we cannot call it foreign to the spirit of a clause which was designed to make trade and intercourse as easy as possible. When the ordinary rules of human competition are being interfered with, they cannot be interfered with under a clause which is designed to make them as free and as untrammelled as possible."¹

This statement represents the strongest statement anywhere in the Debates that s92 was intended to free traders from government restriction per se. There is no need to analyse this dictum from Reid.² The point is that it was an isolated statement, as were the statements of Dibbs and McMillan.

²[Melbourne 1898 Volume II, 2371.]

²In its pure form laissez-faire would not allow governments to subsidise private traders. The passage is also difficult to reconcile with Reid's own statement that s92 is concerned with equality of trade.
There was undoubtedly support for the general tenets of *laissez-faire* amongst some of those present at the Convention. The clearest example is provided by an outburst of rhetoric by Parkes at the 1891 Convention. Under consideration at the time was the Commonwealth's taxation power. Parkes offered this comment to defuse opposition to federation on the grounds that it would mean double taxation.

Now, I am tempted, at the risk of possible being accused of performing an unnecessary task, to ask what really is government? Government, I apprehend, on any just, honest, not to say any philosophical basis, is a contrivance which is found necessary in a community of men to protect their rights, and property, and their liberty, to enforce their laws, and to repress crime; and whatever form this government assumes, the true principle is to call upon the people for whom this government is necessary, in the form of taxation, for just such sacrifices as may be necessary to support it. I am one of those who hold it to be a fundamental wrong to impose burdens upon a free people for any purpose whatever than the purpose of sustaining necessary institutions under a settled government; and in that case the taxes should be raised in the manner most consistent with liberty, the manner which will least interfere with the free activity of the citizens, and the manner which will be least oppressive as a pecuniary burden.¹

Whether or not this recital of the libertarian's creed was met with thunderous applause or embarrassed silence does not appear from the record of the debates. Parkes was in the habit of launching into grandiloquent generalities. Professor Geoffrey Sawer reports that in argument before the Privy Council, Barwick informed their Lordships

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¹ Sydney 1891, 315. Emphasis added.
that Parkes had named his son Cobden.\(^1\) (Cobden was a prominent libertarian who had extended his hospitality to Parkes during Parkes' lecture tour of Britain in 1860-1861).\(^2\) The mere fact that Parkes hoped the Commonwealth would be guided by libertarianism does not mean that the Convention as a whole or even Parkes himself intended the Constitution to incorporate such a nebulous doctrine as a permanent limitation on government action, and does not mean, in particular, that s92 was intended to incorporate such a doctrine.

Well then what exactly did the delegates have in mind when they agreed to absolute freedom of inter-State trade? The delegates often used the expression "free trade" when talking about bounties and railway rates. In those contexts it was used inter-changeably with "equality of trade" and seemed to mean that the position of traders in one State relative to traders in other States was to be free from artificial distortions of competitive relationships.

In the specific context of s92 the introduction of inter-State free trade and the abolition of border customs duties were frequently treated as being synonymous. La Nauze argues with force that the freeing of inter-State trade from fiscal imposts was all that some delegates, including Sir Samuel Griffith, intended by s92.\(^3\) La Nauze argues that in the usage of the times the phrase absolute freedom meant a freedom from all taxes on entry of goods into a State and was to be contrasted with a mere freedom from protectionist taxes which would allow States to tax the entry of goods for which there was no local competitor.

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2 A Martin, *Henry Parkes* (Great Australians), 12.
3 Op Cit 76.
There are, on the other hand, clear indications that some of the delegates considered that the formula "absolutely free" would catch non-fiscal restrictions on entry of goods into a State as well. Beasley concludes after his review of the Conventions and compatibly with that review of the Conventions,

"that section 92, read correctly in its context, does no more than reinforce the conversion of six separate economic units into one and ensures the operation therein of the contemporary concept of free trade; and that its prohibition of interference with the concept extends solely to such measures, federal or State, as would necessarily or deliberately threaten that economic unit which the founders of federation in Australia had resolved to establish."

Beasley does not limit s92 to fiscal imposts. Indeed the economic union of the nation would be fairly vulnerable if States could simply prohibit the producers of other States from competing with the local producers. My own impression is similar to that of Beasley's. Section 92 was not confined to fiscal imposts. Fiscal imposts on inter-State movement were the main mischief sought to be remedied by s92 but most delegates also clearly had in mind the abolition of artificial impediments to inter-State competition. This also explains the failure of the attempted amendments, none of which were appropriate to maintain such a principle.

1 Op Cit 440. Emphasis added.
Appendix VI

Barwick's record as counsel in s92 cases

From his first appearance in a case depending on the meaning of s92 in Gratwick v Johnson (1945) 70 CLR 1, until his last appearance in a s92 case in Pioneer Express Pty Ltd v South Australia (1958) 99 CLR 227, Barwick was involved in fourteen such cases in the High Court. He went to the Privy Council for the appeals against two of these High Court decisions and in another case where he had not been involved before the High Court he appeared in the Privy Council appeal.

In every one of these cases Barwick supported the submission that s92 prevented the legislation validly operating. The argument prevailed in all of the appearances except for four in the High Court. The cases are listed below. That list shows that the High Court decided unanimously no less than ten times.

The only case where Barwick was associated with defending legislation subject to attack on the basis of s92 was the Communist Party Case in 1950 (1950) 83 CLR 1, where the Commonwealth legislation Barwick was defending was held invalid on grounds unrelated to s92. Apart from the Communist Party Case which did not turn on s92, the cases which involved Commonwealth legislation, were Gratwick, Airways and the Bank Nationalisation Case (Barwick's first three s92 cases), the Privy Council appeal for the Bank Nationalisation Case and Wilcox Mofflin involving co-operative Commonwealth/State legislation.

Barwick's successes were, in chronological order,

Gratwick v Johnson (1945) 70 CLR 1 where Barwick was with Maughan KC who presented the argument to the Court. 5/0 (the division of the Court). In all other cases in the list of successes, Barwick presented the argument to the Court.
Australian National Airways Pty Ltd v Commonwealth of Australia (The Airways Case) (1945) 72 CLR 29; 5/0.

Bank Nationalisation Case (High Court) (1948) 76 CLR 1; 4/2.

Field Peas Marketing Board (Tasmania) v Clements and Marshall Pty Ltd (1948) 76 CLR 414; The Court divided 2/2 with the result that the decision of Williams J which had been appealed from stood.

Bank Nationalisation Case (Privy Council) (1949) 79 CLR 497.

Cam & Sons Pty Ltd v Chief Secretary of New South Wales (1951) 84 CLR 442; 5/1.

Queen v Wilkinson; Exp. Brazell, Garlick and Coy (1952) 85 CLR 467; 6/0.


Hughes & Vale Pty Ltd v State of New South Wales [No 1] (1954) 93 CLR 1; [1955] AC 241; Privy Council (Barwick not appearing in the High Court (1953) 87 CLR 40.)

Antill Ranger & Company Pty Ltd v Commissioner for Motor Transport (1955) 93 CLR 83; 7/0.


Pioneer Express Pty Ltd v State of South Australia (1958) 99 CLR 227; 6/0.
Barwick's losses were, in chronological order,

Carter v The Potato Marketing Board (1951) 84 CLR 460; 6/0.

Wilcox Mofflin Limited v State of New South Wales (1952) 85 CLR 488; 4/2 (in relation to requirement that hides be submitted for appraisal and to compulsory acquisition of all hides other than those intended or required for inter-State trade).

Wragg v State of New South Wales (1953) 88 CLR 353; 7/0.

Grannall v C Geo Kelleway & Sons Pty Ltd (1955) 93 CLR 36 where the argument was apparently presented by JK Manning QC. The s92 submission was rejected 5/0 but the Court held for Manning's (and Barwick's) client on other grounds.
Appendix VII

Voting patterns on s92 issues in Barwick's High Court

The table set out below shows the voting on decisions turning on s92, in cases on which Barwick sat. Barwick CJ held s92 to be applicable 25 times and inapplicable 5 times (a ratio of 5 to 1). In the same sample, the Court as a whole (including Barwick CJ) held s92 to be applicable 14 times and inapplicable 16 times (a ratio of approximately 1 to 1).

Barwick CJ and the majority

Barwick CJ was in the majority on 19 occasions and in dissent on 11 occasions (a ratio of almost 2 to 1). Only 8 of the 30 decisions were unanimous. (Compare Appendix VI dealing with issues which Barwick argued as counsel before the High Court. Two thirds of those decisions were unanimous).

When the Barwick Court divided, Barwick was in the minority as often as he was in the majority (11 times each). On 7 of the occasions when Barwick CJ was in the majority in a divided court there was only one dissenter. McTiernan J was the sole dissenter 4 times and Murphy J thrice. On the other side, of the 11 occasions when Barwick CJ was in the minority he was the sole dissenter 4 times. These three were the only sole dissenters in the sample.

Barwick's vote only determined the outcome twice. On issue 5(b) his vote was needed for a 3/2 majority. On issue 25 with the Court divided 3/3, his casting vote as Chief Justice determined the outcome. (It might also be said that his vote determined the outcome of issue 19(a) where Barwick was in a 4/2 majority. If he had voted with the dissenters to make a 3/3 split his vote would have determined the result.

These results indicate that Barwick CJ was not closely identified with the mood of the Court as a whole. A comparison of Barwick's voting with the voting of individual judges makes the point clearer.
Barwick and individual judges

The point has already been made that Barwick CJ, McTiernan and Murphy JJ were the specialist dissenters. There were 11 issues on which both Barwick CJ and McTiernan J were involved. McTiernan J held s92 to be inapplicable in every case. Barwick CJ held s92 to be applicable for 9 of those issues. There was an identical pattern for issues on which both Barwick CJ and Murphy J voted.

McTiernan and Murphy JJ are clearly identified by these figures as extreme in their consistent pattern of voting against s92's application. Barwick CJ was at the opposite extreme. Except for Walsh and Aickin JJ, every other judge in this sample voted for s92's application less frequently (on the issues on which both they and Barwick CJ voted) than did Barwick CJ. The two exceptions, Walsh and Aickin JJ, each agreed with Barwick CJ on each issue on which they voted in the sample. There was no occasion through the sample when any judge voted for s92's application when Barwick CJ did not also.

Whose Court was it?

Taylor J (never in dissent in 10 cases) and Menzies J (2 dissents out of 17 cases) dominated the majorities in the first half of Barwick's judicial career. Taylor J disagreed with Barwick CJ more often than he agreed with him and Menzies J disagreed with Barwick CJ almost as often as he agreed with him.

In the second half of Barwick's Chief Justiceship Gibbs J (never in dissent for for 14 issues) and Mason J (once in dissent in 12 decisions) dominated the majorities. The bare agree/disagree figures tend to indicate that Barwick was more in agreement with these judges. Gibbs J agreed with Barwick four times as often as not and Mason J agreed more often than disagreed with Barwick. (The bare figures do not reveal the fundamental disagreement between Barwick CJ and Mason J on the kind of freedom guaranteed by s92.)
3.

Voting behaviour

Voting on the question - Does s92 prevent the legislation applying - Yes or No? (Only cases on which Barwick CJ sat are included.)

| NO* | ISS | BAR | McT | KIT | TAY | MZS | WIN | OWN | WSH | GIB | STE | MAS | JAC | MUR | AI | WSN | MAJ | BAR |
|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| 1   | YES | NO  | NO  | NO  | YES | NO  |     |     |     |     |     |     |     |     |     |     | NO  | D2/3|
| 2   | YES | NO  | NO  | NO  | YES | NO  |     |     |     |     |     |     |     |     |     |     | NO  | D2/3|
| 3   | YES | YES | YES | YES | YES | YES |     |     |     |     |     |     |     |     |     |     | YES | M5/0|
| 4   | YES | NO  | NO  | NO  | NO  | NO  |     |     |     |     |     |     |     |     |     |     | NO  | D1/4|
| 5a  | NO  | NO  | NO  | NO  | NO  | NO  |     |     |     |     |     |     |     |     |     |     | NO  | M5/0|
| b   | YES | YES | NO  | NO  | YES |     |     |     |     |     |     |     |     |     |     |     | YES | M3/2|
| 6   | YES | NO  | NO  | NO  | NO  | NO  |     |     |     |     |     |     |     |     |     |     | NO  | D1/4|
| 7   | NO  | NO  | NO  | NO  | NO  | NO  |     |     |     |     |     |     |     |     |     |     | NO  | M6/0|
| 8   | YES | NO  | YES | YES | YES | YES |     |     |     |     |     |     |     |     |     |     | YES | M4/1|
| 9   | YES | NO  | YES | YES | YES |     |     |     |     |     |     |     |     |     |     |     | YES | M4/1|

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(ii) A/ 2/4/4/9/9/7/5/11/11/7/6/2/5/0/19M/
D 9 3 6 8 4 5 0 3 3 5 4 9 0 0 11D
(i) The number of times the judge held s92 applicable (Yes), to the number of times he held s92 inapplicable (No).

(ii) The number of times the judge agreed with Barwick CJ (A) to the number of times he disagreed (D) with Barwick CJ.

(iii) Whether the majority held S92 applicable (Yes) or inapplicable (No).

(iv) Whether Barwick CJ was in majority (M) or dissent (D) and what the division of the Court was.

* Issue No

In most cases only one law is challenged on the basis of s92. For those cases only a reference to the case is given. In some cases there is more than one provision depending for validity on the effect of s92. For such cases, a brief description of the separate provisions is given, as well as the case reference, so as to be able to attribute the voting distributions.

Issue No.

1 Deacon v Mitchell (1965) 112 CLR 353.
2 Webb v Stagg (1965) 112 CLR 374.
3 Jackson v Horne (1965) 114 CLR 82.
5 O'Sullivan v Miracle Foods (SA) Pty Ltd (1966) 115 CLR 177
   (a) Labelling of Margarine as Margarine
   (b) Prohibiting sale of margarine without arrowroot.
6 Tamar Timber Trading Co Pty Ltd v Pilkington (1968) 117 CLR 353.
7 Damjanovic & Sons Pty Ltd v Commonwealth (1968) 117 CLR 390.
8 Allied Interstate (Qld) Pty Ltd v Barnes (1968) 118 CLR 581.
9 Roadair Pty Ltd v Williams (1968) 118 CLR 644.
Issue No. Cont.

12 Associated Steamships Pty Ltd v Western Australia (1969) 120 CLR 92.
13 SOS (Mowbray) Pty Ltd v Mead (1971) 124 CLR 520.
14 Brambles Holdings Limited v Pilkington (1972) 126 CLR 524.
15 Holloway v Pilkington (1972) 127 CLR 391.
16 Mikasa (NSW) Pty Ltd v Festival Stores (1972) 127 CLR 617.
18 Northeastern Dairy Co Ltd v Dairy Industry Authority (NSW) (1975) 134 CLR 559.
19 Perre v Pollitt (1975) 135 CLR 139
   (a) Packing fruit for sale
   (b) Prohibition on taking delivery of fruit.
20 Buch v Bavone (1976) 135 CLR 110.
21 HC Sleigh Pty Ltd v South Australia (1977) 136 CLR 475.
22 Finemores Transport Pty Ltd v New South Wales (1978) 139 CLR 338.
23 Clark King & Co Pty Ltd v Australian Wheat Board (1978) 140 CLR 120.
   (a) Compulsory acquisition
   (b) Prohibition of sale.
24 Bartters Farms Pty Ltd v Todd (1978) 139 CLR 499.

Commonwealth legislation was under challenge with issues 7 and 16 and co-operative Commonwealth and State action was under challenge with issues 23(a) and (b). All other issues concerned State laws.

There are three other s92 cases involving Barwick CJ which do not fit into this yes/no voting breakdown. In the case of Rogers v Jordan (1965) 112 CLR 580, Barwick CJ held regulations under challenge to be ultra vires then empowering Act and made no comment on the s92 challenge. Kitto, Taylor, Menzies, Windeyer and Owen JJ all held the regulations to be intra vires and compatible with s92.
In *Uebergang v Australian Wheat Board* (1980) 32 ALR 1, Barwick CJ was the only member of the Court in favour of holding legislation to be inconsistent with s92 at that stage of proceedings. Gibbs, Stephen, Mason, Aickin and Wilson JJ all considered that no conclusion of invalidity could be made until an opportunity to bring evidence had been given. Neither of these cases weakens the force of the comments made above on the trends in the general voting patterns. Indeed the *Uebergang* decision reinforces the description of Barwick CJ as an extremist.

In the third case, *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, Barwick CJ and Aickin J held that there was no offence to s92 in the Commonwealth exercising statutory powers, controlling the import of goods from abroad, for the purpose of preventing inter-State trade using those goods (Id: 61, 107 respectively). The case did not, however, depend on s92. The issue was whether the Commonwealth had bound itself to exercise its statutory powers to control imports in that way. Barwick CJ and Aickin J considered that it had, but the majority, Gibbs, Mason and Murphy JJ held that it had not. Mason J suggested that any attempt to subject the Commonwealth to an obligation to exercise controls over imports from abroad so as to prevent inter-State trade could run into the "shoals" of s92 (Id: 70). This reluctance, on account of s92, on the part of Mason J to countenance the existence of the obligation which Barwick CJ and Aickin J (dissenting) found to exist and found to be compatible with s92 is the nearest that we can find of any of Barwick CJ's brethren being willing to give s92 a wider operation than that which Barwick CJ supported.

(Murphy J commented that although on his view s92 would not be relevant, he was willing to make an implication into the Constitution of a freedom of movement which might be relevant to such exercises of Commonwealth power Id: 86-87.)
As a general rule, I have not attempted to examine, for the purposes of this thesis, any material becoming available after the middle of 1982.

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