HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M61 of 2021

BETWEEN:

CHRISTOPHER VANDERSTOCK
First Plaintiff

and

KATHLEEN DAVIES
Second Plaintiff

and

THE STATE OF VICTORIA
Defendant

SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

PART I: Internet publication

1. These submissions are in a form suitable for publication on the Internet.

PART II: Basis of intervention

2. The Attorney-General for Queensland (**Queensland**) intervenes in this proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth), in support of the defendant.

PART IV: Submissions

SUMMARY OF ARGUMENT

4. A long line of authorities from *Parton* through to *Capital Duplicators [No 2]* and *Ha* establishes that a duty of excise has three key characteristics: it is a tax on goods as articles of commerce, imposed at a step before the point of consumption, and which is generally an indirect tax because it tends to enter the price of the goods (**Part A**).

5. The charge (**ZLEV charge**) imposed by s 7(1) of the *Zero and Low Emission Vehicle Distance-based Charge Act* 2021 (Vic) (**Act**) is not an excise because it does not have any of these characteristics. Further, the Court should not expand the meaning of excise based on unevidenced assertions about economic effects (**Part B**).

6. Alternatively, if the Court re-opens *Dickenson's Arcade*, then *Capital Duplicators [No 2]* and *Ha* should be also re-opened and overruled. The Court should hold that an 'excise' is a tax that is in substance on production and manufacture (**Part C**).[1]

7. Queensland adopts paragraphs [8]-[15] of Victoria's submissions.

STATEMENT OF ARGUMENT

A. The proper understanding of the meaning of excise

8. A duty of excise is a 'tax on goods, that is to say, they are taxes on some step taken in dealing with goods'.[2] The 'relationship'[3] that gives a tax the character of a tax on a

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1 To the extent that Queensland's alternative submissions require separate leave to reopen *Parton v Milk Board (Vic)* (1949) 80 CLR 229 ('***Parton***'), Queensland seeks that leave for the same reasons.

2 *Ha v New South Wales* (1997) 189 CLR 465, 499 (Brennan CJ, McHugh, Gummow and Kirby JJ) ('***Ha***'). See also *Parton* (1949) 80 CLR 229, 259 (Dixon J); *HC Sleigh Ltd v South Australia* (1977) 136 CLR 475, 491 (Gibbs J) ('***HC Sleigh***'); *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59, 63 (Gibbs J) ('***Logan Downs***').

dealing with goods has been developed in a long line of authority. From *Parton*[4] through to the majority reasons in *Capital Duplicators [No 2]* and *Ha*, this Court has consistently applied three key characteristics of a duty of excise:

(a) *First*, an excise is a tax on goods as articles of commerce.[5] It is a 'trading tax'[6] or a tax on 'dealing with the goods'[7] in the sense of trading or 'commercial dealings'.[8]

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(b) *Second*, an excise is a tax on goods 'imposed at some step in their production or distribution before they reach the hands of consumers'.[9]

(c) *Third*, an excise tends to be 'passed on' to the consumer by entering into the price of goods. For that reason, a duty of excise tends to be an indirect tax.[10]

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3 *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529, 554-555 (Fullagar J) ('***Dennis Hotels***'); *Logan Downs* (1977) 137 CLR 59, 77 (Mason J); *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599, 628 (Mason J) ('***Hematite***'); *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561, 601-602 (Dawson J) ('***Capital Duplicators [No 2]***').

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4 Dixon J described an excise as a 'trading tax' (at 12), that 'should be a tax on goods before they reach the consumer' (at 260) and it was an indirect tax (at 259). Rich and Williams JJ held that an excise 'affects the goods … as articles of commerce' (at 253). All of the Justices conceived of an excise as an indirect tax: (1949) 80 CLR 229, 244 (Latham CJ), 252 (Rich and Williams JJ), 259 (Dixon J), 264, 268 (McTiernan J).

5 See, eg, *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263, 304 (Dixon J) ('***Matthews***'); *Parton* (1949) 80 CLR 229, 253 (Rich and Williams JJ); *Bolton v Madsen* (1963) 110 CLR 264, 271 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ) ('***Bolton***'); *Ha* (1997) 189 CLR 465, 497 (Brennan CJ, McHugh, Gummow and Kirby JJ).

6 *Parton* (1949) 80 CLR 229, 259 (Dixon J); *Dennis Hotels* (1960) 104 CLR 529, 540 (Dixon CJ).

7 *Ha* (1997) 189 CLR 465, 499 (Brennan CJ, McHugh, Gummow and Kirby JJ); *Capital Duplicators [No 2]* (1993) 178 CLR 561, 597 (Mason CJ, Brennan, Deane and McHugh JJ). See also *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353, 381-2 (Owen J) ('***Anderson's***').

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8 *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177, 231 (Stephen J) ('***Dickenson's Arcade***'); *Macquarie Dictionary*, definition of 'dealing', sense 1: 'relations; trading: business dealings'; See also *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 173 CLR 450, 467 (Dawson, Toohey and Gaudron JJ, Mason CJ, Brennan and McHugh JJ agreeing) ('***Mutual Pools***').

9 *Bolton* (1963) 110 CLR 264, 271 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ). See also *Dennis Hotels* (1960) 104 CLR 529, 540-1 (Dixon CJ), 559-60 (Kitto J), 573 (Taylor J), 589-90 (Menzies J), 556 (Fullagar J); *Dickenson's Arcade* (1974) 130 CLR 177, 185-6 (Barwick CJ), 209 (Menzies J), 223 (Gibbs J), 229-230 (Stephen J), 238 (Mason J); *MG Kailis Pty Ltd v Western Australia* (1974) 130 CLR 245, 253 (Menzies J), 258-259 (Gibbs J), 260 (Stephen J) ('***MG Kailis***'); *Hematite* (1983) 151 CLR 599, 615, 619 (Gibbs CJ dissenting), 628 (Mason J), 657 (Brennan J), 665 (Deane J); *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 369, 377-8 (Gibbs CJ), 387 (Murphy J), 399 (Wilson J), 404 (Brennan J), 412, 419 (Dawson J) ('***Gosford Meats***'); *Philip Morris v Commissioner of Business Franchises* (1989) 167 CLR 399, 436 (Mason CJ and Deane J), 445 (Brennan J), 473 (Dawson J), 480 (Toohey and Gaudron JJ), 488, 492 (McHugh J) ('***Philip Morris***'); *Mutual Pools* (1992) 173 CLR 450, 453 (Mason CJ, Brennan and McHugh JJ); *Capital Duplicators [No 2]* (1993) 178 CLR 561, 582 (Mason CJ, Brennan, Deane and McHugh JJ); *Ha* (1997) 189 CLR 465, 490 (Brennan CJ, McHugh, Gummow and Kirby JJ).

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10 See, eg, *Matthews* (1938) 60 CLR 263, 300-302 (Dixon J); *Parton* (1949) 80 CLR 229, 244 (*Latham* CJ), 252 (Rich and Williams JJ), 259 (Dixon J), 264, 268 (McTiernan J); *Browns Transport Pty Ltd v Kropp* (1958) 100 CLR 117, 129 (the Court) ('***Browns Transport***'); *Dennis Hotels* (1960) 104 CLR 529, 546 (Dixon CJ), 590 (Menzies J), 559-560 (Kitto J), 593 (Windeyer J); *Anderson's* (1964) 111 CLR 353, 365 (Barwick CJ), 369-370 (McTiernan J), 373 (Kitto J), 376 (Taylor J), 378 (Menzies J), 382 (Owen J);

9. The ZLEV charge has none of these three key characteristics. The plaintiffs' and the Commonwealth's submissions require them to be cast aside.

A.1 Characteristic 1: taxes on goods as articles of commerce

10. A duty of excise is fundamentally a tax on goods 'as articles of commerce'.[11] As Dixon J observed in *Parton*, it is a 'trading tax' on 'commodities'.[12] This conception can be traced through to *Capital Duplicators [No 2]*, where the majority described an excise as 'taxes upon other inland dealings with goods as integers of commerce'.[13]

11. It is the trading relationship between a tax and goods (and the person who trades or adds value to the goods) which attracts the definition of excise. Hence in *Browns Transport v Kropp*, the High Court unanimously held that a tax was not 'on goods' if the person taxed was not 'taxed by reference to, or by reason of, any relation between himself and any commodity as producer, manufacturer, processor, seller or purchaser'.[14] The references to 'commodity', and to the subjects of commerce and trade, are repeated throughout the case law. An 'excise' has been described, for example, as a tax:

(a) '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';[15]

(b) on an act that contributes 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';[16]

Dickenson's Arcade (1974) 130 CLR 177, 186 (Barwick CJ), 231 (Stephen J), 243 (Mason J); *Logan Downs* (1977) 137 CLR 59, 69 (Stephen J); *Hematite* (1983) 151 CLR 599, 630 (Mason J), 666-669 (Deane J); *Philip Morris* (1989) 167 CLR 399, 435-436 (Mason CJ and Deane J), 473 (Dawson J); *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 507, fn 3 (Mason CJ, Brennan, Deane and Gaudron JJ); *Capital Duplicators [No 2]* (1993) 178 CLR 561, 583, fn 99, 586 (Mason CJ, Brennan, Deane and McHugh JJ).

11 See fn 5 above.

12 *Parton* (1949) 80 CLR 229, 259. 'Commodity' is not a synonym for 'good' in this context. It means 'an article of trade or commerce.': *Macquarie Dictionary*, definition of 'commodity', sense 2.

13 *Ha* (1997) 189 CLR 465, 497 (Brennan CJ, McHugh, Gummow and Kirby JJ).

14 *Browns Transport* (1958) 100 CLR 117, 129 (the Court).

15 *Anderson's* (1964) 111 CLR 353, 364 (Barwick CJ), see also 368; *Dennis Hotels* (1960) 104 CLR 529, 559 (Kitto J); *Bolton* (1963) 110 CLR 264, 273 (the Court); *Hematite* (1983) 151 CLR 599, 630 (Mason J), 655 (Brennan J), 668 (Deane J); *Phillip Morris* (1989) 167 CLR 399, 436 (Mason CJ and Deane J).

16 *Anderson's* (1964) 111 CLR 353, 374 (Kitto J, Taylor J agreeing); *Logan Downs* (1977) 137 CLR 59, 77 (Mason J); *Hematite* (1983) 151 CLR 599, 657 (Brennan J).

(c) expressly related to, or imposed in respect of 'transactions in goods';[17]

(d) affecting goods 'as the subjects of manufacture or production or as articles of commerce';[18] and

(e) 'imposed in respect of commercial dealings in commodities and are, in their essence, trading taxes'.[19]

12. The majority in *Capital Duplicators [No 2]* and in *Ha* understood a duty of excise to be a trading tax on goods as articles of commerce. That is why the majority in those cases held that duty of excise is a tax on 'dealing with goods'.[20] 'Dealing with' refers to a trading or commercial relationship with the goods.[21] To use a good is not to deal with it (cf **CS [14]**, **[19]**). The ZLEV charge does not tax any dealing with a ZLEV.

13. The trading and commercial relationship that transforms a tax on goods into an excise explains several important features of s 90 jurisprudence.

14. *First*, it explains why the authorities require a sufficiently close relationship between the tax and the production or distribution of goods in order for the tax to be characterised as an excise. A tax which has 'no closer connection' with production or distribution than that it is a fee for carrying on a business lacks that connection.[22] A tax on the use of property is even more remote from production and manufacture.

15. *Second*, it explains why a tax imposed by reference to the quantity and value of goods is relevant to whether a tax is an excise.[23] That yardstick focuses on goods as commodities or as traded *items* that can be quantified and valued. Contrary to **CS [19]**, that test cannot be comfortably extrapolated to mean the 'amount of use' of a good. The ZLEV charge does not depend on the quantity or value of a ZLEV.

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17 *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1, 29 (Windeyer J) ('***Chamberlain Industries***').

18 *Matthews* (1938) 60 CLR 263, 304 (Dixon J). See also *Dennis Hotels* (1960) 104 CLR 529, 547 (Dixon CJ).

19 *Dickenson's Arcade* (1974) 130 CLR 177, 231 (Stephen J).

20 See, eg, *Capital Duplicators [No 2]* (1993) 178 CLR 561, 597 (Mason CJ, Brennan, Deane, McHugh JJ); *Ha* (1997) 189 CLR 465, 496, 499 (Brennan CJ, McHugh, Gummow and Kirby JJ).

21 *Macquarie Dictionary*, definition of 'deal with', sense 8: 'a business transaction'; definition of 'dealing', sense 1: 'relations; trading: business dealings'.

22 *Ha* (1997) 189 CLR 465, 501, 594 (Brennan CJ, McHugh, Gummow and Kirby JJ) citing *Dennis Hotels* (1960) 104 CLR 529, 560 (Kitto J) and *Philip Morris* (1989) 167 CLR 399, 463 (Brennan J).

23 See, eg, *Matthews* (1938) 60 CLR 263, 304 (Dixon J); *Parton* (1949) 80 CLR 229, 253 (Rich and Williams JJ), 259 (Dixon J); *Dennis Hotels* (1960) 104 CLR 529, 556 (Fullagar J); *Hematite* (1983) 151 CLR 599, 657 (Brennan J); *Capital Duplicators [No 2]* (1993) 178 CLR 561, 589, 597 (Mason CJ, Brennan, Deane and McHugh JJ); *Ha* (1997) 189 CLR 465, 503 (Brennan CJ, McHugh, Gummow and Kirby JJ).

16. *Third*, it explains why the authorities focus on taxes that tend to increase the price of goods paid by a purchaser.[24] Again, the focus on the effect of a tax *on price* draws attention to its direct effect on trade and commerce. Taxes on distribution and sale entered the expanded definition of excise because their tendency to increase the price of goods was said to cause a 'similarity in effect' to taxes on production and manufacture.[25] The ZLEV charge does not enter into the price of goods paid by the first purchaser of a ZLEV. A person who does not use a ZLEV on specified roads (and therefore does not pay the ZLEV charge) will pay the same price for a new ZLEV as a person whose use of the ZLEV does attract the charge. Owners of second-hand ZLEVs also must pay the ZLEV charge for its use on specified roads.[26]

17. *Fourth*, and importantly, it explains the second key characteristic of an excise.

A.2 Characteristic 2: a tax before it reaches consumers

18. It is 'long established'[27] that 'a tax in respect of goods at any step in the production or distribution to the point of consumption is an excise'.[28] That definition received unanimous acceptance in *Bolton v Madsen*:[29]

> It is now established that for constitutional purposes duties of excise are taxes directly related to goods imposed at some step in their production or distribution before they reach the hands of consumers.

19. The definition is 'settled doctrine'[30] and has been described as 'no longer open to question'.[31] In *Dickenson's Arcade*, five out of six Justices expressly held that the consumption tax in that case did not offend s 90.[32] And the exclusion of a consumption tax from the meaning of excise has been consistently endorsed by

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24 See paragraphs [22]-[26] below.

25 *Capital Duplicators [No 2]* (1993) 178 CLR 561, 585 (Mason CJ, Brennan, Deane and McHugh JJ). See also *Ha* (1997) 189 CLR 465, 496 (Brennan CJ, McHugh, Gummow and Kirby JJ); *Hematite* (1983) 151 CLR 599, 632 (Mason J). See also paragraphs [22]-[26] below.

26 See *Commissioner for ACT Revenue v Kithock* (2000) 102 FCR 42, 50 [31]-[32] (Spender, Mathews and Sundberg JJ) ('***Kithock***').

27 *Ha* (1997) 189 CLR 465, 490 (Brennan CJ, McHugh, Gummow and Kirby JJ).

28 *Capital Duplicators [No 2]* (1993) 178 CLR 561, 582 (Mason CJ, Brennan, Deane and McHugh JJ) (emphasis added).

29 *Bolton* (1963) 110 CLR 264, 271 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ) (emphasis added).

30 *Anderson's* (1964) 111 CLR 353, 364 (Barwick CJ); *Chamberlain Industries* (1970) 121 CLR 1, 13 (Barwick CJ).

31 *Chamberlain Industries* (1970) 121 CLR 1, 25 (Menzies J).

32 (1974) 130 CLR 177, 185-6 (Barwick CJ), 209 (Menzies J), 223 (Gibbs J), 229-30 (Stephen J), 238 (Mason J).

majorities of this Court since *Bolton*.[33]

20. The conception of duty of excise as a tax on a step from production until a good reaches consumers is founded in its relationship with trade and commerce. Only taxes on processes that bring goods to the market fall within the constitutional concept of an excise. Accordingly, as the Full Court of the Federal Court observed in *Commissioner for ACT Revenue v Kithock Pty Ltd*,[34] the reference to a tax on goods 'before they reach the hands of consumers' in *Bolton* was a reference to the first consumer.

21. It therefore is not anomalous to exclude taxes on a consumer's use of goods from the meaning of excise. A tax on a second-hand good is not an excise.[35] Likewise, a tax on gift of a chattel could never be a duty of excise.[36]

A.3 Characteristic 3: generally, an indirect tax

22. The third key characteristic of a duty of excise is that it has 'a tendency to enter into the price obtained for the [goods]'.[37] It is normally 'passed on' to a consumer.[38] In other words, it is generally an indirect tax. As Stephen J explained in *Logan Downs*:[39]

> It is not simply the taxing of goods that distinguishes the incidence of an excise duty from that of other taxes; it is rather the taxing of goods during the process by which they are first brought into existence and then ultimately pass to the consumer or user. A tax upon the ownership of goods after that process is at an end, the goods having come to the hands of the ultimate user, is no duty of excise. Once out of the stream of production and distribution, goods cease to be apt subject-matter for duties of excise and it is this that accounts for the character of an excise as an indirect tax; being imposed upon goods in the particular way it is, its incidence will tend to be passed on in the price of the goods, as they flow along the stream of production and distribution to the end user. But a tax upon goods which have reached the hands of the ultimate consumer will, on the contrary, impose a quite direct form of taxation upon their owner.

23. Contrary to **PS [34]** and **CS [26]**, the notion of an 'indirect tax' is highly relevant to

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33 See fn 10 above.

34 (2000) 102 FCR 42, 48 [21]-[22] (Spender, Mathews, Sundberg JJ) ('***Kithock***'). Special leave was refused on the basis that there were insufficient prospects of success: [2001] HCATrans 374.

35 See *Kithock* (2000) 102 FCR 42, 50 [31]-[32] (Spender, Mathews, Sundberg JJ).

36 (1977) 137 CLR 59, 65 (Gibbs J). Similarly, a tax on waste that was not to be used in any process of manufacture or production is not an excise: *Eclipse Resources Pty Ltd v The Minister for Environment [No 2]* (2017) 223 LGERA 313, 393-4 [303]-[304] (Buss P, Newnes and Murphy JJA).

37 *Parton* (1949) 80 CLR 229, 259 (Dixon J).

38 See, eg, *Matthews* (1938) 60 CLR 263, 278 (Latham CJ); *Logan Downs* (1977) 137 CLR 59, 69 (Stephen J); *Philip Morris* (1989) 167 CLR 399, 436 (Mason CJ and Deane J); *Capital Duplicators [No 2]* (1993) 178 CLR 561, 586 (Mason CJ, Brennan, Deane and McHugh JJ).

39 (1977) 137 CLR 59, 69 (emphasis added). See also *Dennis Hotels* (1960) 104 CLR 529, 559-60 (Kitto J); *Hematite* (1983) 151 CLR 599, 630 (Mason J).

the concept of an excise in s 90.[40] It coheres with the proper understanding of an excise as a tax on articles of commerce. It remains a useful dichotomy in economics.[41]

24. The notion that taxes on sale and distribution would form 'an element naturally incorporated into the price of every article' was at the heart of Dixon J's reasoning in *Matthews* and *Parton* as to why such taxes were excises.[42] Subsequently, in *Browns Transport*, a unanimous Court observed that ordinarily an excise is an indirect tax:[43]

> 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. 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. … An indirect tax is one which is demanded from one person in the expectation and with the intention that he shall indemnify himself at the expense of another.

25. This reasoning appears throughout s 90 jurisprudence including in the most recent cases.[44] In *Capital Duplicators [No 2]*, the majority held that the indirectness of a tax is one factor relevant to whether a tax is an excise.[45] And, like Dixon J in *Parton*, their Honours described taxes on distribution in terms which identified them as indirect:[46]

> A tax on distribution, like a tax on production or manufacture, has a natural tendency to be passed on to purchasers down the line of distribution and thus to increase the price of, and to depress the demand for, the goods on which the tax is imposed.

26. As explained below, the reference to 'demand' in this passage describes the way an excise may affect the price of goods and make them more expensive. It does not describe other less direct ways that taxes may affect demand. A general effect of a tax on 'demand', severed from directly entering into the price, is insufficiently precise to distinguish an excise from every other tax (see Part B.2 below).

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[40] *Capital Duplicators [No 2]* (1993) 178 CLR 561, 583 n 99 (Mason CJ, Brennan, Deane and McHugh JJ). The relevance of the concept of indirect taxes was not questioned by the majority in *Ha*.

[41] AB Atikinson and JE Stiglitz, 'The design of tax structure: direct versus indirect taxation' (1976) 6 *Journal of Public Economics* 55; Philip Hemmings and Annamaria Tuske, 'Improving Taxes and Transfers in Australia' (OECD Economics Department Working Paper No 1199, 27 March 2015) 10: https://doi.org/10.1787/5js4h5lz07r4-en; The distinction also appears to be still useful to the Commonwealth: see, eg, Australian Government, Department of the Treasury, 'Re:think' (Tax Discussion Paper, March 2015) pp 7, 21, 157-166: https://treasury.gov.au/sites/default/files/2019-03/c2015-rethink-dp-TWP_combined-online.pdf.

[42] *Matthews* (1938) 60 CLR 263, 301; *Parton* (1949) 80 CLR 229, 259. See also *Dennis Hotels* (1960) 104 CLR 529, 539-40 (Dixon CJ); *Ha* (1997) 189 CLR 465, 509 (Dawson, Toohey and Gaudron JJ).

[43] *Browns Transport* (1958) 100 CLR 117, 129 (the Court), citing *Attorney-General for Manitoba v Attorney-General for Canada* (1925) AC 561, 566 (Lord Haldane).

[44] See fn 10 above.

[45] *Capital Duplicators [No 2]* (1993) 178 CLR 561, 583 n 99, 586 (Mason CJ, Brennan, Deane and McHugh JJ).

[46] *Capital Duplicators [No 2]* (1993) 178 CLR 561, 586 (Mason CJ, Brennan, Deane and McHugh JJ).

A.4 The text and purpose of s 90

27. The three key characteristics of a duty of excise (a tax on goods as articles of commerce, before the goods reaches the consumer, and generally an indirect tax) are supported by the text and structure of the Constitution. The trading focus of Chapter IV 'Finance and Trade' (including ss 86, 90, 91, 92 and 93) is obvious.

28. The broad purpose of s 90 identified by Dixon J in *Parton* and adopted by the plaintiffs also supports the three key characteristics of an excise:[47]

> [T]o give the Parliament a real control of the taxation of commodities and to ensure that the execution of whatever policy it adopted should not be hampered or defeated by State action. 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 or production.

29. The reference to taxation of 'commodities' – and not the broader term 'goods' – is deliberate. A 'commodity' is 'an article of trade or commerce'.[48] Further, Dixon J's statement was part of his Honour's explanation for why it 'probably is essential that [an excise] should be a tax upon goods before they reach the consumer'.[49] Contrary to **PS [23]**, it does not support characterising consumption taxes as excise duties.

B. The plaintiffs' case must fail

B.1 The ZLEV charge lacks the three key characteristics of an excise

30. The ZLEV charge is not a tax on goods as articles of commerce before they reach the hands of consumers. The ZLEV charge is not imposed on trade in ZLEVs or commercial transactions involving ZLEVs. It is not imposed on a trader and passed onto a consumer. It does not enter into the price of a new ZLEV.[50] It is a direct and personal tax, whereas excises are generally indirect taxes.

Dickenson's Arcade and consumption taxes

31. *Dickenson's Arcade* thus sits coherently with the long line of authority on s 90 ending in *Capital Duplicators [No 2]* and *Ha*. For the reasons above, and those given by Victoria, leave should not be given to re-open it and if it is re-opened it should be reaffirmed. Two further points should be made.

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47 *Parton* (1949) 80 CLR 229, 260 (Dixon J).
48 *Macquarie Dictionary*, definition of 'commodities', sense 2.
49 *Parton* (1949) 80 CLR 229, 260.
50 Indeed, the age of the ZLEV, the number of owners it may have previously had, are irrelevant to the charge.

32. *First*, the principal basis for the attack on *Dickenson's Arcade* is Dixon J's reference to *Atlantic Smoke* in *Parton*.[51] *Atlantic Smoke* did not form a 'shaky foundation' for the exclusion of consumption taxes from the meaning of excise. No doubt it concerned terms in the *British North America Act* 1867. But Dixon J's reliance on it, as well as his Honour's reliance on *Attorney-General for British Columbia v Kingcome Navigation Co* in *Parton* and *Matthews*,[52] was bound up with his acceptance of the relevance of indirect taxes to the meaning of an excise.[53] It is therefore not surprising that his Honour considered it a 'safe inference' from those cases that consumption taxes were not within the scope of s 90.[54] From *Parton* through to *Ha*, indirect taxes have ongoing relevance to the meaning of excise in s 90.

33. *Second*, and in any event, Justices since *Parton* have reasoned to the exclusion of consumption taxes without reliance on *Atlantic Smoke*. As Mason J observed in *Dickenson's Arcade*, the true 'justification for the restriction [of consumption taxes] is evidently based on the notion that consumption is not sufficiently proximate to the production and manufacture of goods'.[55] As Stephen J observed, 'direct taxes are inherently less closely related to goods than are indirect taxes' and 'a tax on consumption cannot, of course, be passed on'.[56] That reasoning remains persuasive.

34. *Third,* it is no answer to point to the majority's statements in *Capital Duplicators [No 2]* that the expression 'duties of customs and of excise' exhausts the categories of taxes on goods.[57] The majority expressly excluded consumption taxes from their reasoning.[58] In any event, in *Ha* the majority explained that the phrase meant taxes 'on

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51 *Parton* (1949) 80 CLR 229, 261 citing *Atlantic Smoke Shops Ltd v Conlon* [1943] AC 550 ('***Atlantic Smoke***').

52 *Matthews* (1938) 60 CLR 263, 300-1 (Dixon J) citing *Attorney-General for British Columbia v Kingcome Navigation Co* [1934] AC 45. See also *Parton* (1949) 80 CLR 229, 259 (Dixon J).

53 In *Matthews* (1938) 60 CLR 263, Dixon J considered that a distinction which 'resembled' that in the *British North America Act* 1867 arose for s 90, because 'to be an excise the tax must be imposed in respect of commodities', but 'a tax imposed upon a person filling a particular description or engaged in a given pursuit does not amount to an excise': at 300.

54 *Parton* (1949) 80 CLR 229, 261. Eg, in *Atlantic Smoke*, the Privy Council observed that the tax there was 'to be paid by the last purchaser of the article, and, since there is no question of further re-sale, the tax cannot be passed on to any other person by subsequent dealing': [1943] AC 550, 563.

55 *Dickenson's Arcade* (1974) 130 CLR 177, 239 (Mason J).

56 *Dickenson's Arcade* (1974) 130 CLR 177, 231 (Stephen J).

57 *Capital Duplicators [No 2]* (1993) 178 CLR 561, 590 (Mason CJ, Brennan, Deane and McHugh JJ).

58 *Capital Duplicators [No 2]* (1993) 178 CLR 561, 590 (Mason CJ, Brennan, Deane and McHugh JJ); *Ha* (1997) 189 CLR 465, 499-500 (Brennan CJ, McHugh, Gummow and Kirby JJ).

some step taken in dealing with goods':[59] that is, on goods as articles of commerce.

B.2 The imprecise notion of demand

35. The plaintiff and the Commonwealth seek to expand the concept of an excise by reference to a vague assertion that the ZLEV charge could affect 'demand' for ZLEVs (**PS [24], CS [22]**). The expansion should be rejected for several reasons.

36. *First*, where majorities of this Court have referred to the effect of an excise on demand, the reference has always been tethered to its effect on the purchase price of goods and not some broader general economic effect of a tax on demand.[60] A tax on use is not 'passed on'; it does not enter into the initial purchase price of goods.

37. *Second*, it should be rejected because any number of measures squarely within the ambit of State legislative power could equally affect demand. The concept of demand is too imprecise to distinguish an excise from a permissible State tax.[61]

38. *Third*, the expansion should be rejected because there are no facts in the special case from which this Court could infer that a tax on use has a natural tendency to affect demand. A tax imposed before reaching consumers may tend to enter the purchase price of goods (and because of that affect demand). The effect of a tax after it reaches consumers is less clear. It will depend on several factors including the size of the tax, the price of the goods, future supply of the goods, consumer preferences, the regulatory environment (including taxes affecting substitutable goods) and the nature of the goods (including their elasticity). A tax on use, for example, might be so small in comparison with the price of the good that it would not affect demand for the goods. A tax on use might be on highly inelastic goods such that the tax does not alter demand at all. The nearest substitutable good might be subject to similar or higher taxes such that the tax does not affect demand for the goods or their substitutes.

39. The plaintiffs' case rests on assertions of the minority in *Capital Duplicators [No 2]* and *Ha* that a tax on use has the same effect as a tax imposed before it reaches the hands of a consumer. The Court should not accept those assertions for the reasons

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59 *Ha* (1997) 189 CLR 465, 499 (Brennan CJ, McHugh, Gummow and Kirby JJ).

60 See paragraphs [16], [22]-[26] above.

61 For example, land tax, payroll tax and taxes on services may equally affect demand by making business operations more expensive. State regulations such as workplace health and safety regulations and licensing or labelling requirements could all affect demand for goods.

given above at [36] to [38]. Further, the special case discloses no basis for concluding that a tax on use, such as the ZLEV charge, would likely affect demand for ZLEVs.[62]

C Alternatively, *Capital Duplicators* and *Ha* should be reopened and overruled

40. Alternatively, if the Court grants leave to re-open *Dickenson's Arcade*, Queensland supports Victoria's application for leave to re-open *Capital Duplicators [No 2]* and *Ha*. Queensland adopts Victoria's submissions as to the satisfaction of the *John* criteria (**VS [52]-[59]**).

41. If re-opened, *Capital Duplicators [No 2]* and *Ha* should be overruled. The majorities in those cases attributed to s 90 purposes related to the creation of a single national economy, in which the Commonwealth would have 'effective control over economic policy affecting the supply and price of goods', and in which competition would not be 'distort[ed]'.[63] Those purposes have no foundation in constitutional text, history or economic analysis. They could never be achieved by giving the Commonwealth exclusive control over taxation of goods. Moreover, they conflict with settled principles concerning s 92 and the scope of Commonwealth legislative power. As those purposes do not withstand analysis, they provide no support for the conclusion that an 'excise' is any inland tax on goods.

42. History, context and principle call for the conclusion that the purpose of s 90 was to protect Commonwealth tariff policy – but not absolutely. In a federation, tariff policy could never be immunised from the indirect effects of the States' economic and fiscal policies. The purpose of s 90 was, instead, to protect the tariff from being directly undermined by State taxes on imports, State taxes on the production and manufacture of goods, and State bounties that directly subsidised particular goods. These were the 'counter-weights' by which tariff policy was set.[64] The conclusion that s 90 must include any tax on sale or distribution, because such taxes have the same economic

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62 See, eg, *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 270-1 [54]-[56] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 274-5 [70] (Heydon J). See also *Wilcox Mofflin Ltd v New South Wales* (1952) 85 CLR 488, 507 (Dixon, McTiernan and Fullagar JJ); *Tamar Timber Trading Co Pty Ltd v Pilkington* (1968) 117 CLR 353, 358 (Barwick CJ); *Chapman v Suttie* (1963) 110 CLR 321, 325 (Dixon CJ).

63 *Capital Duplicators [No 2]* (1993) 178 CLR 561, 585-6 (Mason CJ, Brennan, Deane and McHugh JJ); *Ha* (1997) 189 CLR 465, 497 (Brennan CJ, McHugh, Gummow and Kirby JJ).

64 See *Dennis Hotels* (1960) 104 CLR 529, 600 (Windeyer J). As to the relevance of bounties to tariff policy, see *Ha* (1997) 189 CLR 465, 506 (Dawson, Toohey and Gaudron JJ); *Hematite* (1983) 151 CLR 599, 616 (Gibbs CJ); *Dickenson's Arcade* (1974) 130 CLR 177, 212-3 (Menzies J).

effect as a tax on production is 'inextricably tied up' with the classification of an excise as an indirect tax.[65] Yet the distinction between direct and indirect taxation is one which the Commonwealth now urges this Court to reject as unsound, 'because market forces, rather than the legal incidence of a tax, determine the extent to which its economic burden will be passed on' (**CS [26]**).

43. It should now be accepted that a duty of excise is a tax which in substance and practical operation is a tax on production or manufacture. Where the Commonwealth wishes to control other aspects of national fiscal and economic policy, it may do so to the extent it has a relevant legislative power.

C.1 Text and historical context

44. The surest guide to the meaning of a constitutional provision is its text read in context, including the circumstances of its making.[66] While 'purpose' is central to the attribution of meaning, it cannot be identified separately from the text and context.[67] In the case of s 90, contemporary materials do indicate a clear meaning of the term 'excise'. To the extent the term was ambiguous, that ambiguity is removed by attention to the text and context.[68] In other words, the history reveals 'the subject to which [the] language [of 'excise'] was directed'.[69]

45. It is trite to observe that, '[i]n the economic sphere, the paramount object of Federation was inter-State free trade with a uniform tariff'.[70] Section 90 was 'a necessary ingredient' of the constitutional mechanisms for achieving that objective.[71] The historical record denies that the purposes of s 90 went further.

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65 See Arndt, 'Judicial Review under Section 90 of the *Constitution*: An Economists View' (1952) 25 *Australian Law Journal* 667, 674.

66 Cf *Tasmania v Commonwealth* (1904) 1 CLR 329, 359; *Re Canavan* (2017) 263 CLR 284, 301-4 [27]-[36].

67 Cf *Thiess v Collector of Customs* (2014) 250 CLR 664, 672 [23] (French CJ, Hayne, Kiefel, Gageler and Keane JJ); *Certain Lloyds Underwriters v Cross* (2012) 248 CLR 378, 389 [25] (French CJ and Hayne J).

68 For s 90, ambiguity, if it exists, cannot be resolved by reference to the principle that the term 'excise' should be construed 'with all the generality that the word permits' **(CS [9]).** For the reasons given by Victoria (**VS [17.4]**), that principle has no application to restrictions on legislative power. Further, given that the Commonwealth's power with respect to duties of excise preceded the coming into operation of s 90, s 52(iii) can require no different conclusion. Cf *Ha* (1997) 189 CLR 465, 506 (Dawson, Toohey and Gaudron JJ).

69 *Cole v Whitfield* (1988) 165 CLR 360, 385 (the Court).

70 *Ha* (1997) 189 CLR 465, 492 (Brennan CJ, McHugh, Gummow and Kirby JJ) (citing Mills, *Taxation in Australia* (McMillan & Co, 1925), 201. See also W Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910), 528.

71 *Hematite* (1983) 151 CLR 599, 661-2 (Deane J).

46. There was little discussion concerning the meaning of 'excise' in the Convention Debates. One obvious explanation for the paucity of debate is that the role of s 90 was conceived to be less significant to the nation than the current authorities suggest. An additional explanation is that the intended meaning of 'excise' was uncontroversial. Contemporary secondary materials support that view. The *Encyclopedia Britannica*,[72] *McCulloch's Commercial Dictionary*,[73] and the *Oxford English Dictionary*,[74] all provide definitions which indicate that an excise is a tax on home production. John Stuart Mill adopted that definition in his *Principles of Political Economy*.[75]

47. As has been repeatedly observed,[76] what discussion occurred at the Convention Debates tends to support the conclusion that the word 'excise' was directed to the relatively narrow subject of taxes 'chargeable on the manufacture and production of commodities'. At the 1897 Convention in Sydney, the Hon Isaac Isaacs was able confidently to assert that '[w]hat we intend by excise would be covered by the definition in this report, "a duty chargeable on the manufacture and production of commodities"'.[77] Isaacs and other framers were aware, however, of 'excise' having a broader English usage. The Report to which Isaacs referred[78] (**Wollaston Report**) observed that the Adelaide Convention 'evidently intended the word to mean duties on the manufacture or production of commodities and nothing more', and that this definition was 'supported by standard dictionaries'. However, the use of the word in 'British law' introduced ambiguity. In that regard, the Wollaston Report noted that '[i]n the earliest English Excise ordnance … the excise duty imposed was on the

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72 Robert Somers, *Encyclopaedia Britannica*, 9th ed (1878) Vol 8, 797 ('Excise').
73 *McCulloch's Commercial Dictionary* (London, 1880) 599.
74 *Oxford English Dictionary*, 1st ed (1897) Vol 3, 379 ('Excise', sense 2).
75 Cf JS Mill, *Principles of Political Economy*, Vol II (1848), 404, 421. Mill classed excises as taxes on commodities, and therefore as indirect taxes. However, Mill did not consider that the word 'excise' encompassed all taxes on commodities, rather an excise was a tax 'on production within the country': at 421.
76 John M Williams, '"Come in Spinner": Section 90 of the Constitution and the Future of State Government Finances' (1999) 21(4) *Sydney Law Review* 627, 637-8; Geoffrey Sawer, 'The Future of State Taxes: Constitutional Issues' in R L Matthews (ed), *Fiscal Federalism: Retrospect and Prospect* (1974) 199; Peter Hanks, 'Section 90 of the Commonwealth Constitution: Fiscal Federalism or Economic Unity?' (1986) 10(3) *Adelaide Law Review* 365, 373-4.
77 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 22 September 1897, 1065.
78 'Report upon the Financial Proposals of the Bill to Constitute the Commonwealth of Australia', prepared by an Accounts Committee headed by HNP Wollaston, and presented on 12 July 1897 to the Acting Victorian Treasurer, then Sir George Turner: Accounts Committee, Report Upon the Financial Proposals of the Bill to Constitution the Commonwealth of Australia (12 July 1897) in *Papers on Federation Circulated on Consideration of Draft Federal Constitution 1897, by Legislature of Victoria* (Government Printer, Melbourne, 1897) ('**Wollaston Report**'). See page 10.

manufacture of commodities, but …[t]he tax was subsequently extended from the manufacturers to the dealers, and a class of persons came into existence called "Excise Traders" who were compelled to take out licences, the fees for which were excise'. The Report therefore suggested the definition to which Isaacs referred.

48. Responding to Isaacs, the Hon Edmund Barton opined that the word in the Bill would have the 'same meaning' as that suggested in the Wollaston Report, but 'if on consideration we find there is any doubt about that' the clause could be amended.[79] No amendment was, in the end, considered necessary.

49. Consistently with that history, Quick and Garran expressed the view that in the Australian Constitution, 'excise' was intended to mean 'a tax on articles produced or manufactured in a country'.[80] That meaning was adopted by this Court in 1904.[81]

50. In light of the Convention Debates, it is doubtful that Quick and Garran's view was founded *only* on 'the circumstance that in Australia taxes called excises were in fact confined to goods produced in the colony', as Dixon J suggested in *Matthews*.[82] For the reasons given by Victoria (**VS [46]**), the principal strands of Dixon J's reasoning toward a broad meaning of 'excise' in *Matthews* should no longer be accepted.

51. The conclusion of the majority in *Ha*, that the history of s 90 'denies any necessary linkage between the exclusivity of the power to impose duties of excise and Commonwealth tariff policy',[83] does not withstand analysis. Their Honours drew that conclusion from an amendment to a resolution agreed at the 1891 Convention. The resolution provided that 'the power and authority to impose customs duties and duties of excise upon goods the subject of customs duties and to offer bounties shall be exclusively lodged in the federal government'.[84] At the 1897 Convention in Adelaide, Sir George Turner moved that the clause be amended so that the exclusive power of the federal Parliament would extend to 'excise duties on an article which was not

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79 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 22 September 1897, 1067-8.
80 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Australian Book Company, 1901) 837.
81 In *Peterswald v Bartley* (1904) 1 CLR 497, 509, by a court constituted by Justices who had been framers: cf John M Williams, '"Come in Spinner": Section 90 of the Constitution and the Future of State Government Finances' (1999) 21(4) *Sydney Law Review* 627, 639.
82 *Matthews* (1938) 60 CLR 263, 299.
83 *Ha* (1997) 189 CLR 465, 496.
84 *Ha* (1997) 189 CLR 465, 495-6.

subject to Customs duty'.[85] The majority in *Ha* reasoned that the amendment enabled the Commonwealth to impose excise duties for purposes unrelated to either 'protectionism' or 'free trade'.[86]

52. That reasoning was, with respect, unsound. Even if the amendment had conferred a 'free-standing power' (which it did not[87]), the power to impose an excise duty on an article that does not attract a customs duty is still a power to determine tariff policy. And, as the minority in *Ha* observed, the exclusivity of the de-coupled power 'ensure[d] the preservation of Commonwealth tariff policy even where no relevant customs duty was imposed'.[88] Further, the contemporary understanding contradicts the majority in *Ha* because the Wollaston Report described Turner's amendment as having 'made plain' that excise was intended to mean 'duties on the manufacture or production of commodities and nothing more'.[89]

53. Examination of the constitutional text leads to the same conclusion. *First*, s 90 treats 'duties of customs and of excise' as correlatives, because, for the purposes of tariff policy, they are.[90] 'Excise' and 'customs' are consistently collocated.[91] *Second*, s 93 identifies the meaning of 'excise' by referring to 'duties of excise paid on goods produced or manufactured in a State'.[92] *Third*, the references in ss 90 and 91 to 'bounties on the production or export of goods' reinforce the conclusion that the intention was to remove State measures directly affecting production.[93] *Fourth*, s 55 'distinguishes sharply'[94] between laws imposing customs and laws imposing excise.[95] The distinction between duties imposed on production or manufacture and duties imposed on imports supplies the necessary criterion for s 55.[96]

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85 *Official Record of the Debates of the Australasian Federal Convention,* Adelaide, 19 April 1897, 835.
86 *Ha* (1997) 189 CLR 465, 496 (Brennan CJ, McHugh, Gummow and Kirby JJ).
87 *Ha* (1997) 189 CLR 465, 514 (Dawson, Toohey and Gaudron JJ). See also Michael Coper, 'The High Court and Section 90 of the Constitution' (1976) 7 *Federal Law Review* 1, 23.
88 *Ha* (1997) 189 CLR 465, 514 (Dawson, Toohey and Gaudron JJ).
89 Wollaston Report, 10.
90 *Dennis Hotels* (1960) 104 CLR 529, 600 (Windeyer J).
91 See ss 55, 86, 87 and 93.
92 In *Ha*, the majority pointed to no contextual circumstance to support their conclusion that s 93 concerned a particular class of excise duty only.
93 *Dickenson's Arcade* (1974) 130 CLR 177, 212-3 (Menzies J).
94 *Carmody v FC Lovelock Pty Ltd* (1970) 123 CLR 1, 12 (Menzies J).
95 The test now proposed by the Commonwealth (which eschews 'definition or rigidity' beyond an 'evaluative' question of whether there is a 'sufficient connection between the tax and goods' (**CS [19]**)) fails to distinguish excises from other taxes, not 'on goods'.
96 Cf *Ha* (1997) 189 CLR 465, 496-7 (Brennan CJ, McHugh, Gummow and Kirby JJ).

54. That the constitutional text did not support a wide reading of 'excise' appears to have been recognised by Mr Owen Dixon KC, as his Honour then was, when giving evidence to the Royal Commission on the Constitution of the Commonwealth in 1927, on behalf of the Committee of Counsel of Victoria. His opinion was that:[97]

> if the power of the Commonwealth to control the economic consequences of the importation of goods is to be maintained free from the disturbing factors which may be introduced by legislation of the States, a greater area of Commonwealth power than is described in section 90 should be rendered exclusive. We suggest that a substantial provision might be inserted to the following effect: -
>
> > The power of the Parliament to impose taxes in relation to importation, production, sale, purchase, use, and consumption of goods, and to grant bounties on the production or export of goods shall be exclusive.

55. The Victorian Committee considered the scheme 'actually adopted' to have been 'inadequately expressed'.[98]

C.2 The purpose of s 90

56. History and context point to the real concern of s 90 being to achieve – in conjunction with s 92 – inter-State free trade on the basis of a uniform tariff.[99] Markets for goods would operate within a uniform external tariff controlled by the Commonwealth. State taxes and bounties which directly undermined that tariff were removed by s 90. All forms of protectionist barriers were removed by s 92. The operations of s 90 and s 92 were overlapping (but not co-extensive) and complementary. In this way the provisions pursued 'the creation and fostering of national markets', expressive of 'national unity'.[100] No wider purpose can coherently be attributed to s 90.

57. In *Ha* and *Capital Duplicators [No 2]*, majorities of this Court held that s 90 served much wider purposes. The scheme established by ss 90 and 92 (along with ss 51(ii) and (iii)) was said to be designed to ensure 'free trade', in the sense of freedom from distortions.[101] The sections were to ensure a 'national economic union', in which the Commonwealth had 'effective control over economic policy affecting the supply and

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97 Evidence to Royal Commission on the Constitution of the Commonwealth, Melbourne, 13 December 1927 (Owen Dixon) in *Royal Commission on the Constitution of the Commonwealth* (HJ Green, Government Printer, 1928) 799.

98 Ibid.

99 *Ha* (1997) 189 CLR 465, 506 (Dawson, Toohey, Gaudron JJ); W Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910), 528-31.

100 Cf *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 125 [361] (Hayne and Kiefel JJ) ('***Pape***').

101 *Capital Duplicators [No 2]* (1993) 178 CLR 561, 585 (Mason CJ, Brennan, Deane and McHugh JJ); *Ha* (1997) 189 CLR 465, 497 (Brennan CJ, McHugh, Gummow and Kirby JJ).

price of goods'.[102] Section 90 therefore gave the Commonwealth 'real control of the taxation of commodities'.[103] Those conclusions should no longer be accepted.

58. *First*, and anomalously, the conception of 'free trade' relied upon by majorities in *Capital Duplicators* and *Ha* was divorced from the concept of protectionism. *Cole v Whitfield* authoritatively determined that the 'free trade' purpose of s 92 is to remove 'discriminatory burdens of a protectionist kind.[104] Given the complementary operation of s 90 and s 92,[105] it is difficult to see why s 90 would remove all taxes which might 'divert trade or distort competition' in markets for goods, but s 92 would pursue the creation of other 'national markets' by the removal of protectionist barriers only. The Constitution did not seek to 'bring into existence a free market economy or a free trade area in the sense that restrictions on competition are unconstitutional'.[106] It certainly did not seek to do so only in relation to markets for goods.[107]

59. Accordingly, it is wrong to reason that a tax is an 'excise' if it 'could well' affect 'free trade', in the sense of competition within a market for goods (**CS [22]**). On that approach, State taxes with only a remote connection to goods would be within s 90.[108]

60. *Second*, it is impossible to accept that s 90 'ordain[ed]' the creation of an 'economic union' to the exclusion of each States' 'own domestic economy'.[109] Whilst 'the Constitution recognises that there is a national economy',[110] it does not follow that it

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[102] *Capital Duplicators [No 2]* (1993) 178 CLR 561, 585-6 (Mason CJ, Brennan, Deane and McHugh JJ).
[103] *Capital Duplicators [No 2]* (1993) 178 CLR 561, 586 (Mason CJ, Brennan, Deane and McHugh JJ); *Ha* (1997) 189 CLR 465, 495 (Brennan CJ, McHugh, Gummow and Kirby JJ); *Parton* (1949) 80 CLR 229, 260 (Dixon J).
[104] *Cole v Whitfield* (1988) 165 CLR 360, 392-395; *Betfair Pty Ltd v Western Australia (No 1)* (2008) 234 CLR 418, 451 [11] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ) ('***Betfair (No 1)***'); *Palmer v Western Australia* (2021) 95 ALJR 229, 239 [30] (Kiefel CJ and Keane J), 247-8 [85] (Gageler J), 266 [184] (Gordon J).
[105] *Betfair (No 1)* (2008) 234 CLR 418, 454 [22] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).
[106] *Barley Marketing Board v Norman* (1990) 171 CLR 182, 203-4 (the Court). See also Jeremy Kirk, 'Section 92 in its Second Century' in John Griffiths and James Stellios (eds), *Current Issues in Australian Constitutional Law – Tributes to Professor Leslie Zines* (Federation Press, 2020) 267-9.
[107] Although one consequence of s 90 is that interstate markets for goods cannot be 'distorted' by different State excise duties, it does not follow that 'duty of excise' must include any tax which might distort competition in interstate markets for goods. Especially is that so given economic analysis raises the distinct possibility that a uniform federal excise will *also* distort interstate markets for goods, and in some circumstances is 'actually more distortionary': see Jeffrey Petchey and Perry Shapiro, 'Chariot Wheels & Section 90' (Autumn 1995) *Policy* 13, 14-15; Perry Shapiro and Jeffrey Petchey, 'Shall become exclusive: An Economic Analysis of Section 90' (1994) 70 *Economic Record* 171, 181).
[108] For example, a land tax paid by a manufacturer, or a fee for a privilege of engaging in a business.
[109] *Capital Duplicators [No 2]* (1993) 178 CLR 561, 585 (Mason CJ, Brennan, Deane and McHugh JJ).
[110] *Pape* (2009) 238 CLR 1, 125 [361] (Hayne and Kiefel JJ).

forbids the continued separate existence of each State economy. As Heydon J observed in *Pape*, 'it is not possible for constitutions to establish economies or prevent them from being established'.[111] The continuation of each State's separate economy is an inevitable consequence of both geography and the existence of the States as bodies politic with legislative and executive power (including powers to raise and spend money). Further, s 90 could never achieve a purpose directed to the whole economy, given it is limited to taxes 'on goods'. Section 90 leaves State legislatures free to enact innumerable measures which would affect the 'national economy'.[112] The minority in *Ha* were therefore correct to observe that s 90 'plainly is not adequate for the purpose' of establishing a 'single economy'.[113] That observation is not 'immaterial' to the identification of s 90's purpose.[114] Logically, '[i]f a measure is not an effective, appropriate or rational means of achieving the claimed end, then the measure cannot reasonably be characterised as having been made to achieve that end'.[115]

61. *Third*, for the same reason, s 90 cannot have been intended to secure to the Commonwealth Parliament 'effective control over economic policy affecting the supply and price of goods'.[116] Section 90 is not suitable to that purpose. Further, the Commonwealth lacks a general 'legislative power with respect to the national economy'.[117] It is inconsistent with that conclusion to infer that the Commonwealth has not only a power, but an exclusive power, with respect to 'economic policy affecting the supply and price of goods'.[118]

62. *Fourth*, Dixon J's reasons for concluding that s 90 gives the Commonwealth 'real control over the taxation of commodities' rested on an inaccurate premise. Dixon J reasoned that '[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

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[111] *Pape* (2009) 238 CLR 1, 149 [433] (Heydon J).
[112] Including for example taxes on services as well as health, safety and regulatory requirements: cf *Capital Duplicators [No 2]* (1993) 178 CLR 561, 612 (Dawson J); *Hematite* (1983) 151 CLR 599, 617 (Gibbs J).
[113] *Ha* (1997) 189 CLR 465, 512 (Dawson, Toohey and Gaudron JJ).
[114] Cf *Ha* (1997) 189 CLR 465, 497 (Brennan CJ, McHugh, Gummow and Kirby JJ)
[115] Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 6.
[116] *Capital Duplicators [No 2]* (1993) 178 CLR 561, 586 (Mason CJ, Brennan, Deane and McHugh JJ).
[117] *Pape* (2009) 238 CLR 1, 63 [133] (French CJ), 124-6 [359]-[366] (Hayne and Kiefel JJ), 149-50 [432], [433]-[435] (Heydon J).
[118] Cf *Seaman's Union of Australia v Utah Development* (1978) 144 CLR 120, 140-141 (Stephen J).

or production'.[119] To ensure that s 90 did not have 'a formal significance',[120] all taxes with 'the same effect' as a tax upon manufacture or production, were to be treated as excises. The majority in *Capital Duplicators [No 2]* reasoned in the same way.[121]

63. The flaw in this reasoning is that it assumes that the practical effect of a tax on a step of distribution will be the same as a tax on production. In this respect, Dixon J's reasons reflected the writings of JS Mill, who considered that 'taxes on commodities' – as 'indirect taxes' – were 'equivalent to an increase of the cost of production'.[122] But as Professor Sawer observed:[123]

> Obviously the most that can be said about [a tax on a commodity at any point in the course of distribution] is that it may have an effect for the same commodity at the manufacturing end, but its effect may be on some other commodity (beer instead of cigarettes) or on some other feature of behaviour of the person taxed on the consumer (cheaper other ingredients sought, wife goes out to work), or it may be absorbed in a real increase in gross national product through resource or technology discoveries or innovations, etc.

64. It follows that Dixon J's expansion of the meaning of excise was founded on an inaccurate premise.[124] It is 'market forces', not the legal incidences of a tax, which determine the extent to which, if at all, the economic burden of a tax is passed on. If the concept of an 'indirect tax' is now to be discarded as 'irrelevant' (as the Commonwealth urges (**CS [26]**)), it follows that the expansion of 'excise' in *Parton* can no longer be accepted, and *Parton* should be overruled.

C.3 Meaning of excise – taxes in substance on production and manufacture

65. '[W]hat characterises a duty of excise is that the taxpayer is taxed by reason of, and by reference to, his production or manufacture of goods'.[125] That definition of 'excise', which does not require that the tax be measured by reference to the quantity or value of goods, should now be accepted.

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119 *Parton* (1949) 80 CLR 229, 260 (emphasis added).
120 Ibid.
121 *Capital Duplicators [No 2]* (1993) 178 CLR 561, 586 (Mason CJ, Brennan, Deane and McHugh JJ).
122 John Stuart Mill, *Principles of Political Economy* (1848) 421.
123 Geoffrey Sawer, 'The Future of State Taxes: Constitutional Issues' in R L Matthews (ed), *Fiscal Federalism: Retrospect and Prospect* (1974) 200. See also Arndt, 'Judicial Review under Section 90 of the Constitution – An Economists View, part 1' (1952) 25 *Australian Law Journal* 667, 674. Even Mill suggested that not all taxes on commodities would necessarily enter into the value and price of the good: John Stuart Mill, *Principles of Political Economy* (1848) 421.
124 *Ha* (1997) 189 CLR 465, 509 (Dawson, Toohey and Gaudron JJ).
125 *Dennis Hotels* (1960) 104 CLR 529, 555 (Fullagar J).

66. That is not to reduce s 90 to only 'formal significance'.[126] It includes taxes which are 'in substance' upon production and manufacture. It would result in the invalidity of, for example, the taxes considered in *Commonwealth & Commonwealth Oil Refineries v South Australia* and *Matthews*. It may be accepted that s 90 should not be capable of 'evasion by easy subterfuges and the adoption of unreal distinctions'.[127] But application of that principle requires an understanding of the true scope of the constitutional restriction, as well as an appreciation of whether a said distinction is actually 'unreal'. The principle should not itself be used as a device for an ever-expanding application of the meaning of 'excise' (cf **CS [24]**).

67. Finally, to the extent that other State taxes on goods (being neither customs nor excises) are objectionable to the Commonwealth, it may seek to rely on its legislative powers to render such taxes inoperative under s 109. While it may not be able to rely on s 51(ii), it would have other heads of power upon which it could rely.[128]

PART V: Time estimate

68. It is estimated that Queensland will require 45 minutes for oral argument.

Dated: 7 November 2022

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[126] Cf *Parton* (1949) 80 CLR 229, 260 (Dixon J).
[127] *Matthews* (1938) 60 CLR 263, 304, cited by *Capital Duplicators [No 2]* (1993) 178 CLR 561, 586.
[128] Cf *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46, 55 (Dixon CJ); *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595, 624 [26] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ); *New South Wales v Commonwealth* (2006) 229 CLR 1.

Annexure 1

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M61 of 2021

BETWEEN:

CHRIS VANDERSTOCK
First Plaintiff

and

KATHLEEN DAVIES
Second Plaintiff

and

THE STATE OF VICTORIA
Defendant

ANNEXURE TO SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

Statutes and Statutory Instruments referred to in the submissions

Pursuant to *Practice Direction No. 1 of 2019*, Queensland sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions**.**

No.	Description	Version	Provisions
	Constitutional provisions		
1.	Commonwealth Constitution	Current	Ch IV
	Statutes		
2.	*Zero and Low Emissions Vehicle Distance-based Charge Act* 2021	Current	Whole Act