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 OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

PART I: PUBLICATION OF SUBMISSIONS

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

PART II: INTERVENTION

2. The Attorney-General for the State of South Australia (**South Australia**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

PART III: LEAVE TO INTERVENE

3. Not applicable.

PART IV: SUBMISSIONS

4. To succeed in their challenge to the validity of the Victorian road user charge introduced under the *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic) (**ZLEV Act**),[1] the Plaintiffs must establish that: (a) the road user charge is a tax on consumption or use of goods; and, (b) a tax on consumption or use of goods is an excise within the meaning of s 90 of the *Commonwealth Constitution*. South Australia's submissions address the second proposition. For reasons of authority and principle that proposition should be rejected.

5. As to authority, since *Bolton v Madsen*, decided in 1963, a majority of this Court has endorsed the proposition articulated by Justice Dixon in *Parton v Milk Board (Vic)*,[2] in 1949, to the effect that "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."[3] That proposition was authoritatively applied, in 1974, in *Dickenson's Arcade Pty Ltd v Tasmania*.[4] The proposition was not disturbed by the decisions in *Capital Duplicators v Australian Capital Territory (No 2)*[5] and *Ha v New South Wales*.[6] The Plaintiffs and the Commonwealth now seek leave to reopen this long-standing proposition. Those applications should be rejected, with the consequence that the Plaintiffs' challenge must fail.

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1 South Australia has enacted the *Motor Vehicles (Electric Vehicle Levy) Amendment Act 2021* (SA) which is broadly similar to the ZLEV Act. The legislation applies to distance travelled on roads and road related areas (whether within or outside of the State). The South Australian Government has introduced the *Motor Vehicles (Electric Vehicle Levy) Amendment Repeal Bill 2022* (SA). The Bill has not yet passed as at the time of writing these submissions.

2 (1949) 80 CLR 229, at 260 (Dixon J) ("*Parton*").

3 *Bolton v Madsen* (1963) 110 CLR 264, 271 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ) ("*Bolton*").

4 (1974) 130 CLR 177, 186 (Barwick CJ), 209 (Menzies J), 221-222 (Gibbs J), 229-231 (Stephen J), 239 (Mason J) ("*Dickenson's Arcade*").

5 *Capital Duplicators (No 2)* (1993) 178 CLR 561 ("*Capital Duplicators (No 2)*").

6 *Ha v New South Wales* (1997) 189 CLR 465 ("*Ha*").

6. As to principle, in the event that leave is granted to reopen this Court's long-standing authority concerning s 90, then the Court should now hold that the purpose of s 90 is to effectuate a national uniform tariff. Informed by that purpose, the meaning of "duties of … excise" should be understood to have a correlative meaning to "duties of customs", namely a tax on a step by which an inland good passes into the Australian economy. Understood as such, taxes on manufacture or production of goods must be understood to be excise taxes. Further, it is possible that taxes on goods prior to their receipt by the consumer should also be considered to be excises. However, informed by the true purpose of s 90, the meaning of "duties of … excise" cannot be understood to mean any tax on inland goods.

A. AUTHORITY: THE MEANING OF EXCISE DOES NOT EXTEND TO A TAX ON CONSUMPTION

7. There has never been a decision of the Court in which a State tax upon the act of consumption or use of a good has been held to be a duty of excise within the meaning of s 90 of the *Constitution*.

8. As initially explained by the Court in *Peterswald v Bartley*,[7] the fundamental conception of the term "excise" was that of a tax on articles of local manufacture or production, analogous to a customs duty imposed upon goods in relation to their quantity or value when produced or manufactured. On that construction, it is clear that a tax on consumption could not be an excise.[8]

9. *Parton* concerned a levy imposed upon owners of dairies in respect of the volume of milk sold. The Court held that a tax need not be levied upon the producer or manufacturer, or at the point of production or manufacture, to be an excise.[9] The Court held that the tax upon goods at the point of sale was an excise. It was Justice Dixon's judgment and discussion as to the meaning of excise and constitutional purpose of s 90 of the *Constitution* that was subsequently adopted by the Court and formed the touchstone for its treatment of these issues. After discussing earlier decisions and dictionary definitions of what constitutes an excise, Justice Dixon stated that: "What probably is essential is that it should be a tax upon goods before they reach the consumer."[10]

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7 (1904) 1 CLR 497, 508-509 (Griffith CJ, Barton, O'Connor JJ) ("*Peterswald*").
8 See *Dickenson's Arcade* (1974) 130 CLR 177, 218 (Gibbs J).
9 *Parton* (1949) 80 CLR 229.
10 *Parton* (1949) 80 CLR 229, 260-261 (Dixon J).

10. This proposition has been expressly endorsed on no less than 40 occasions by members of this Court.[11]

11. In *Bolton v Madsen*, the Court comprised of Chief Justice Dixon and Justices Kitto, Taylor, Menzies, Windeyer and Owen unanimously upheld the validity of a 'permit fee' imposed on owners of vehicles, at the rate of three pence per mile travelled multiplied by the load capacity of the vehicle. The Court held that:[12]

> 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.

10 12. In *Dickenson's Arcade* the Court was divided over the issue of the validity of a tax payable by consumers on their consumption of tobacco.[13] The legislation imposed the tax directly on consumers, including requirements to make returns on tobacco consumed, but authorised regulations to be made for convenient methods of collecting the tax.[14] The Regulations made under the legislation provided that payment could be made at the time of purchase, in anticipation of consumption.[15] Chief Justice Barwick and Justices Menzies, Gibbs, Stephen and Mason accepted that the effect of the authorities was that a tax on consumption lay outside the scope of an excise.[16] A majority comprised of Justices Menzies, Gibbs, Stephen and Mason held that the legislation imposed a tax on consumption and was not invalid as a duty of excise under
20 s 90. Chief Justice Barwick dissented on the basis that, on the proper construction of the legislation, it was not merely a tax on consumption; its intent and operation was

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11 See *Parton* (1949) 80 CLR 229, 259-261 (Dixon J); *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529, 540-541 (Dixon CJ), 559-560 (Kitto J), 573 (Taylor J), 588-590 (Menzies J); *Bolton* (1963) 110 CLR 264, 271, 273 (The Court); *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353, 364, 368 (Barwick CJ), 373-375 (Kitto J), 376 (Taylor J), 377 (Menzies J), 379 (Windeyer J); *Western Australia v Hamersley Iron Pty Ltd (No 1)* (1969) 120 CLR 42, 62-63 (Kitto J, McTiernan J agreeing), 64-65 (Menzies J), 71 (Owen J); *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1, 12-13 (Barwick CJ), 17 (McTiernan J), 22 (Kitto J), 25 (Menzies J), 28 (Windeyer J), 35 (Walsh J); *Dickenson's Arcade*(1974) 130 CLR 177, 185-187, 193-194 (Barwick CJ), 209 (Menzies J), 218-222 (Gibbs J), 229-231 (Stephen J), 239 (Mason J); *HC Sleigh Ltd v South Australia* (1977) 136 CLR 475, 520-521 (Jacobs J); *Logan Downs* (1977) 137 CLR 59, 63-65 (Gibbs J), 69-70 (Stephen J), 80 (Jacobs J); *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599, 615, 619-621 (Gibbs CJ), 628, 632 (Mason J), 644, 649 (Wilson J), 655, 657-658 (Brennan J), 663-666 (Deane J); *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368, 377-378 (Gibbs CJ), 400, 403 (Wilson J), 412, 414 (Dawson J); *Philip Morris Ltd* (1989) 167 CLR 399, 429-431, 436 (Mason CJ and Deane J), 444-445 (Brennan J), 488-492 (McHugh J); *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 173 CLR 450, 453 (Mason CJ, Brennan and McHugh JJ).

12 *Bolton* (1963) 110 CLR 264, 271.

13 *Dickenson's Arcade*(1974) 130 CLR 177.

14 *Tobacco Act 1972* (Tas).

15 *Tobacco Regulations 1972* (Tas).

16 *Dickenson's Arcade*(1974) 130 CLR 177, 185-187 (Barwick CJ), 209 (Menzies J), 218-222 (Gibbs J), 229-231 (Stephen J), 239, 242 (Mason J).

that a purchaser would pay tax at the time of purchase, that it was "essentially connected with that purchase" and that it was "a tax upon a step in the movement of the tobacco into consumption" rather than a tax on consumption itself.[17]

13. The Commonwealth correctly submits[18] that there were doubts expressed by some of the members of the Court in *Dickenson's Arcade* about the correctness of Justice Dixon's statement in *Parton* that it "probably is essential" that an excise must be a "tax upon goods before they reach the consumer".[19] For the reasons advanced in Part B of this submission, South Australia contends that the limitation identified by Justice Dixon was sound. Yet, the fact that doubts were expressed in *Dickenson's Arcade*, but that the Court nonetheless considered itself to be bound by the earlier precedent of *Bolton v Madsen*, decided 11 years earlier, rather emphasises why it is that this Court should not now countenance the reopening of the principle applied in *Dickenson's Arcade*, 73 years after it was first enunciated, 59 years after it first unequivocally commanded majority support, and 48 years after it was first authoritatively applied. Despite Chief Justice Barwick being of the opinion that "[t]here was no logical reason … for ending at the point of entry into consumption", his Honour said that:[20]

> in deference to the views expressed by other Justices, I have accepted the limitation … [that] a tax upon the act of consuming goods, completely divorced from the manner or time of their acquisition by purchase, must now be regarded as outside the scope of s 90 and within the competence of a State legislature.

14. In *Philip Morris Ltd v Commissioner of Business Franchises (Vic)*, Justice Brennan, after tracing the evolution or refinement of the Court's approach to an excise, observed of the 'criterion of liability' formulation of excise adopted in *Bolton v Madsen* that:[21]

> This formulation has been divided into two propositions: one, that a tax on the taking of a step of the stated kind ["from the earliest stage in production to the point of receipt by the consumer"] is a duty of excise; the second, that, to ascertain the character of a statutory impost, one looks exclusively to the statutory criterion of liability. The former proposition has commanded majority assent; the latter has not.

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17 *Dickenson's Arcade* (1974) 130 CLR 177, 191-194 (Barwick CJ).
18 Commonwealth's Submissions, [26] – [28].
19 *Parton* (1949) 80 CLR 229, 260 (Dixon J).
20 *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177, 185-186 (Barwick CJ); see also 218-22 (Gibbs J).
21 (1989) 167 CLR 399, 444 (Brennan J) ("*Philip Morris*").

Justice Brennan went on to state that:[22]

> If there be any rock in the sea of uncertain principle, it is that a tax on a step in the production or distribution of goods to the point of receipt by the consumer is a duty of excise.

To similar effect, Justice McHugh observed that:[23]

> Since the decision in *Parton*, all judges of the Court except Fullagar and Murphy JJ have accepted that for the purposes of s 90 of the Constitution a duty of excise is a tax directly related to goods imposed at some step in their production or distribution before they reach the consumer …

15. In *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* three of the majority judges, Chief Justice Mason and Justices Brennan and McHugh, expressly re-iterated the established position, stating that:[24]

> Since *Parton v Milk Board (Vict.)*, it has been accepted that a duty of excise is a tax directly related to goods, imposed on some step in their production or distribution before they reach the consumer.

Capital Duplicators (No 2)* and *Ha

16. In *Capital Duplicators (No 2)*, the majority, comprised of Chief Justice Mason and Justices Brennan, Deane and McHugh, observed that the rejection of the criterion of liability test, "has not disturbed general acceptance of the proposition that a tax in respect of goods at any step in the production or distribution to the point of consumption is an excise."[25]

17. The Plaintiffs and the Commonwealth[26] rely on the statement of the majority in *Capital Duplicators (No 2)*, quoted in *Ha*, that "duties of customs and of excise" in s 90 exhaust the categories of taxes on goods".[27] That observation cannot be regarded as implicitly overturning the understanding that the relevant steps or dealings with goods in respect of which a tax constitutes an excise does not extend beyond receipt by the consumer. To interpret the observation as doing so, as the Plaintiffs and Commonwealth invite the Court to do, the majority must necessarily have had to consider the continuing role

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22 (1989) 167 CLR 399, 445 (Brennan J).
23 (1989) 167 CLR 399, 488 (McHugh J).
24 (1992) 173 CLR 450, 453.
25 *Capital Duplicators (No 2)* (1993) 178 CLR 561, 590 (Mason CJ, Brennan, Deane and McHugh JJ).
26 Plaintiffs' Submissions, [23]; Commonwealth's Submissions, [15], [23]; cf Defendant's Submissions, [35]-[36].
27 *Capital Duplicators (No 2)* (1993) 178 CLR 561, 589-590 (Mason CJ, Brennan, Deane and McHugh JJ); *Ha* (1997) 189 CLR 465, 487-490 (Brennan CJ, McHugh, Gummow and Kirby JJ).

of consumption. Yet, the majority expressly stated that it was "unnecessary in this case to consider taxes on the consumption of goods".[28]

18. The observation in *Capital Duplicators (No 2)*, followed a discussion of *Parton* and subsequent cases as to a 'narrow' and 'broad' view of what constituted an excise, and in which it was noted that consumption was accepted as the dividing line on the broad view. The observation was directly responsive to submissions that a tax applying a duty "indifferently on all goods (whether imported or locally produced or manufactured)" was outside the scope of s 90.[29] The majority relied on the purpose attributed to s 90 by Justice Dixon in *Parton*. It is clear that Justice Dixon in accepting "consumption" as the limit did not take the view that its exclusion as a relevant step in relation to goods was inconsistent with or undermined that purpose; the attempt by the Plaintiffs and the Commonwealth to marshal Justice Dixon in support of the proposition that duties of excise and customs are exhaustive of all duties relating to goods is misplaced.

19. The Plaintiffs rely on remarks of the majority in *Ha*[30] in support of their argument that a tax on consumption or use of goods amount to an excise.[31] In *Ha*, Chief Justice Brennan and Justices McHugh, Gummow and Kirby, after a review of a number of the authorities following from *Parton*,[32] held that:[33]

> [T]he correctness of the doctrine they establish must now be affirmed. Therefore we reaffirm that duties of excise are taxes on the production, manufacture, sale or distribution of goods, whether of foreign or domestic origin. Duties of excise are inland taxes in contradistinction from duties of customs which are taxes on the importation of goods. Both are taxes on goods, that is to say, they are taxes on some step taken in dealing with goods. In this case, as in *Capital Duplicators [No 2]*, it is unnecessary to consider whether a tax on the consumption of goods would be classified as a duty of excise.

20. What is immediately apparent is that the Court did not decide that a tax on consumption was an excise. Nor did the Court find that earlier authorities to the effect that consumption did not fall within the scope of an excise were wrongly decided. Intermediate appellate courts have not regarded those remarks as having the effect of

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28 *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).
29 *Capital Duplicators (No 2)* (1993) 178 CLR 561, 589-590 (Mason CJ, Brennan, Deane and McHugh JJ).
30 *Ha* (1997) 189 CLR 465, 499-500 (Brennan CJ, McHugh, Gummow and Kirby JJ).
31 Plaintiffs' Notice of Constitutional Matter, para [7];
32 *Ha* (1997) 189 CLR 465, 488-498 (Brennan CJ, McHugh, Gummow and Kirby JJ).
33 *Ha* (1997) 189 CLR 465, 499-500 (Brennan CJ, McHugh, Gummow and Kirby JJ).

including "consumption" within the constitutional meaning of "excise".[34] The question of the status of "consumption" in respect of the constitutional meaning of "excise" has not arisen for consideration in this Court since *Ha*.[35]

Tax on mere ownership of goods

21. In addition to the authorities on the question of consumption generally, the Plaintiffs' submission that a tax on the consumption of goods is an excise tax is also inconsistent with the proposition established in *Logan Downs Pty Ltd v Queensland*.[36] That case established that taxes on dealings with goods that are in the hands of the consumer — that is, goods that are not themselves articles of commerce or used to produce such goods — are not excises within the meaning of s 90.

22. In *Logan Downs*, a tax imposed in respect of ownership of various stock animals, was held to be an excise insofar as it applied to stock animals used for the production of meat, milk, wool or for breeding purposes, but was not an excise insofar as it applied to stock (there, horses) not themselves used for such production.[37] Justices Gibbs and Jacobs agreed that the tax in its application to stock horses was not an excise. However, their Honours dissented in that they would also have found that the other stock animals were not sufficiently connected with production of commodities; consequently, they considered the tax as a whole to be one simply on ownership, and therefore not an excise.[38]

23. As Justice Gibbs observed in *Logan Downs*, "in the many cases in which s 90 of the *Constitution* has been discussed it has never been held that a tax imposed on the ownership of goods without more is a duty of excise".[39] His Honour gave the example of a tax on domestic furniture. Another common example is that of a tax imposed on ownership of dogs.[40]

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34 *Commissioner for Australian Capital Territory Revenue v Kithock Pty Ltd* (2000) 102 FCR 42, 48-50 [20]-[31] (Spender, Mathews and Sundberg JJ); *Eclipse Resources Pty Ltd v Minister for Environment (No 2)* [2017] WASCA 90; (2017) 223 LGERA 313, 377-378 [252] (Buss P, Newnes and Murphy JJA).

35 During the hearing in *Ha* (1997) 189 CLR 465, McHugh J commented that 'I must say that the limitation about consumption may be something that has got to be re examined' *Ha & Anor v NSW & Ors S45/1996* [1997] HCATrans 95 (11 March 1997)

36 (1977) 137 CLR 59 ("*Logan Downs*").

37 See *Logan Downs* (1977) 137 CLR 59, 61 (Barwick CJ, agreeing with Mason J) 69-70 (Stephen J), 78-79 (Mason J).

38 *Logan Downs* (1977) 137 CLR 59, 65 (Gibbs J), 80-83 (Jacobs J). Justice Murphy would have upheld the validity of the tax as a whole, on the basis of the absence of discrimination between local and other production.

39 *Logan Downs* (1977) 137 CLR 59, 65 (Gibbs J); *Ha les* (1997) 189 CLR 465, 510 (Dawson, Toohey and Gaudron JJ).

40 See e.g. *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263, 300-301 (Dixon J), quoting *Attorney-General (British Columbia) v Kingcome Navigation Co* [1934] AC 45, 59; *Parton* (1949) 80 CLR 229, 244-245 (Latham CJ), quoting *Atlantic Smoke Shops Ltd v Conlon* [1943] AC 550, 564-565.

Historical road user charges

24. Before leaving the topic of relevant authority, it must also be noted that imposition of road use charges calculated by distance travelled is no constitutional novelty in Australia. Every State has in the past imposed a road use charge of that kind.[41] State road use charges calculated on the basis of distance travelled by road, and not by reference to any particular goods carried in a vehicle, have never been considered to fall within the concept of an excise for the purposes of s 90. It would seem a necessary incident of the propositions put by the Plaintiffs and the Commonwealth that such charges were invalid under s 90.

10 25. In *Hughes & Vale Pty Ltd v New South Wales*,[42] this Court upheld the validity under s 90 of mileage charges imposed on the basis of a charge per mile of 3 pence per ton of the combined weight of a vehicle and its maximum carrying capacity. That conclusion reflected earlier and subsequent decisions of the Court concluding that various distance-based road use charges were not invalid under s 90 of the *Constitution*.[43] No later decision of this Court has doubted the correctness of that result. The relief the Plaintiffs seek necessarily invites the Court to depart from an additional conclusion of constitutional validity of road use charges that has itself stood unchallenged for 70 years.[44]

***Dickenson's Arcade* and *Ha* should not be re-opened**

20 26. For the reasons advanced by Victoria, leave is required to re-open *Dickenson's Arcade* in order to agitate the Plaintiffs' and the Commonwealth's argument as to the status of a tax on consumption.[45] South Australia agrees with Victoria's submissions that the

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See also *Browns Transport Pty Ltd v Kropp* (1958) 100 CLR 117, 129 (The Court); *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368, 413 (Dawson J).

41 The various State schemes gave rise to a substantial number of s 92 challenges in this Court. As re-designed following *Hughes & Vale Pty Ltd v New South Wales (No 2)* (1955) 93 CLR 127, their general validity was upheld. It is not necessary to discuss those cases here. The various State road maintenance charges were abolished in 1975. Most States subsequently imposed fuel franchise schemes, following the decision in *HC Sleigh Ltd v South Australia* (1977) 136 CLR 475 that had upheld their validity.

42 (1953) 87 CLR 49, 75 (Dixon CJ), 76 (McTiernan J), 87 (Williams J), 90 (Webb J). The appeal to the Privy Council in *Hughes & Vale Pty Ltd v New South Wales* (1954) 93 CLR 1 concerned only the validity under s 92 of the *Commonwealth Constitution*. Under such schemes, drivers of relevant vehicles were required submit returns with details such as the distance travelled within the State.

43 See e.g. *O Gilpin Ltd v Commissioner for Road Transport and Tramways (NSW)* (1935) 52 CLR 189, 199, 214; *Duncan v Vizzard* (1935) 53 CLR 493, 503-504, 508, 509; *Browns Transport Pty Ltd v Kropp* (1958) 100 CLR 117; *Bolton* (1963) 110 CLR 264.

44 In *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599, 620-621, Gibbs J observed of *Browns Transport Pty Ltd v Kropp* (1958) 100 CLR 117 and *Bolton* (1963) 110 CLR 264 that "the correctness of the actual results reached has, so far as I am aware, never been doubted."

45 Defendant's Submissions, [18]-[20].

Court should not re-open *Dickenson's Arcade* and its holding that a tax on consumption is not a duty of excise for the purposes of s 90 of the *Constitution*.[46]

27. This Court has declined to re-open that decision on a number of occasions, including in *Capital Duplicators v Australian Capital Territory (No 2)*[47] and *Ha*.[48] There is no more compelling reason for the Court to depart from it now after the passage of a further 25 years or to broaden the definition in the manner sought by the Plaintiffs and the Commonwealth.[49]

28. Those circumstances point to the powerful considerations cogently expressed by Justice Mason in *HC Sleigh Ltd v South Australia*, where his Honour observed that:[50]

> Generally speaking, the Court should be slow to depart from its previous decisions, especially in constitutional cases where the overturning of past decisions may well disturb the justifiable assumptions on which legislative powers have been exercised by the Commonwealth and the States and on which financial appropriations, budget plans and administrative arrangements have been made by governments. This comment applies with more force to excise cases for, as a result of the contraction of the financial powers of the States in consequence of s 105A of the Financial Agreement and the *Uniform Tax Cases*, any expansion in the constitutional concept of excise has a marked effect on the capacity of the States to raise revenue for government.

29. Acceptance of the propositions put forward by the Plaintiffs and the Commonwealth would result in a very substantial expansion of the accepted understanding of an excise (and a corresponding diminution of the States' capacity to raise revenue). Contrary to the suggestion that this represents little more than a logical extension of accepted principles, it amounts to a radical re-imagining of the concept of excise.

30. In the event that *Dickenson's Arcade* is re-opened, South Australia agrees with Victoria that leave should also be granted to re-open *Capital Duplicators (No 2)* and *Ha*.[51]

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46 Defendant's Submissions, [21]-[29].
47 *Capital Duplicators (No 2)* (1993) 178 CLR 561, 583, 591-593593 (Mason CJ, Brennan, Deane and McHugh JJ).
48 (1997) 189 CLR 465, 499, 504 (Brennan CJ, McHugh, Gummow and Kirby JJ).
49 Plaintiffs' Submissions, [44], Commonwealth's Submissions [13].
50 (1977) 136 CLR 475, 501 (Mason J) (footnotes omitted).
51 Defendant's Submissions, [7], [38]-[59].

B. PRINCIPLE: THE MEANING OF EXCISE SHOULD NOT EXTEND TO CONSUMPTION

31. The paramount object of Federation was the establishment of "inter-colonial free trade on the basis of a uniform tariff".[52] Section 92 secured free trade.[53] Section 90 secured a uniform tariff.[54] As explained by Justices Dawson, Toohey and Gaudron in their dissenting judgement in *Ha*, when s 90 is understood as serving that purpose, the notion of "duties of …excise" should be understood to bear a meaning that is correlative to that of "duties of customs".[55] Appreciating that correlation is critical to understanding the meaning (and limits) of the term "duties of … excise".

10 32. As Justice Fullagar said in *Dennis Hotels Pty Ltd v Victoria*:[56]

> The duties of customs and duties of excise contemplated by the Constitution are, I think, alike duties … [on] the entry of particular goods into general circulation in the community… When once they have passed into that general mass, they cease, I think, to be proper subject-matter for either duties of customs or duties of excise.

33. Justice Stephen, drawing upon a similar principle, stated in *Logan Downs* that:[57]

> [I]t is not every tax upon goods which will be an excise. It is not simply the taxing of goods that distinguishes the incidence of an excise duty from other taxes; it is rather the taxing of goods during the process by which they are
20 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.

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52 *Cole v Whitfield* (1988) 165 CLR 360, 386, (Citing the 1891 Report of the South Australian Royal Commission on Inter-Colonial Free Trade, p vi); *Ha* (1997) 189 CLR 465, 492, 494 (Brennan CJ and McHugh, Gummow and Kirby JJ), 506 (Dawson, Toohey and Gaudron JJ).

53 *Cole v Whitfield* (1988) 165 CLR 360; *Palmer v Western Australia* [2021] HCA 31.

54 *Ha* (1997) 189 CLR 465, 506 (Dawson, Toohey and Gaudron JJ).

55 In *Peterswald* (1904) 1 CLR 497, 509 Griffith CJ stated that "the word 'excise' … is intended to mean a duty analogous to a customs duty". *Philip Morris* (1989) 167 CLR 399, 425-426, 429-431, 436 (Mason CJ and Deane J); *Capital Duplicators (No 2)* (1993) 178 CLR 561, 585-587 (Mason CJ, Brennan, Deane and McHugh JJ); *Ha* (1997) 189 CLR 465, 497 (Brennan CJ, McHugh, Gummow and Kirby JJ), 505-508 (Dawson, Toohey and Gaudron JJ).

56 *Dennis Hotels* (1960) 104 CLR 529, 556. Justice Fullagar went on to conclude that a tax at the stage of sale or distribution which did not directly affect manufacture or production was not encompassed within the concept of an excise. For the reasons advanced below, his Honour's remarks as quoted above are not dependent on acceptance of that proposition.

57 (1977) 137 CLR 59, 69 (Stephen J).

34. Drawing upon this conception, South Australia submits that an excise tax should be understood to be a tax upon a step by which an inland good passes into the Australian economy.

The narrow view: manufacture and production

35. Applying this meaning of excise, a good may be understood to pass into general circulation upon its production or manufacture. The purpose of s 90 referred to above, together with textual consideration of the meaning of the term "excise" at the time of Federation and contextual considerations arising from s 93, was called upon to support the conclusion arrived at by the minority judges in *Ha* that an excise tax is a tax on the manufacture or production of goods.[58]

36. Victoria invites the Court to adopt that reasoning in the present case.[59] South Australia agrees that, in the event that leave is granted to reopen *Capital Duplicators (No 2)* and *Ha*, then for the reasons advanced by Victoria, it is open to the Court to endorse the narrow conclusion arrived at by the minority justices in *Ha* consistently with the purpose of s 90 identified above.

The intermediate view: before reaching the hands of the consumer

37. However, South Australia notes that adopting the meaning of an excise tax as a tax upon a step by which a good passes into the Australian economy is also capable of a yielding a broader meaning than that arrived at by the minority justices in *Ha*. It is possible that a good may not be considered to have passed into the Australian economy up until the moment that it passes to the ultimate consumer.

38. It is arguable that defining an excise tax as a tax on a step of production, manufacture, sale or distribution, before reaching the hands of the consumer may be more closely aligned to the related concept of "duties of custom" and may more comprehensively effectuate the purpose of s 90. That is because the purpose of a custom tax is to impose an impost on imported goods so as to increase the *price to the consumer* of those goods and thereby reduce demand. The critical correlative work that s 90 performs in granting exclusivity with respect to the imposition of excise taxes, is to exclude the imposition of State taxes on goods that may be passed on in the *price to the consumer*. Such taxes, of course, include taxes on manufacture and production, but may extend, as Justice

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58 *Ha* (1997) 189 CLR 465, 514-515 (Dawson, Toohey and Gaudron JJ); see also *Capital Duplicators (No 2)* (1993) 178 CLR 561, 609 (Dawson J), 629 (Toohey and Gaudron JJ).

59 Defendant's Submissions, [38]-[59].

Dixon acknowledged in *Parton v Milk Board* to taxes on sale and distribution.[60] In this manner, the intermediate view guards against "evasion and subterfuge".[61]

39. The intermediate view is consistent with the notion found in many of the s 90 authorities that a duty of excise is in the nature of a "trading tax",[62] "duties which are imposed in respect of commercial dealings in commodities",[63] duties in respect of "articles of commerce or things … the subject of trading or commercial transactions",[64] and "dealings with goods as integers of commerce".[65] By contrast, once a good has reached the ultimate consumer and thereby (at least on one conception) passed into the Australian economy, it will no longer be a good the subject of trading or commercial dealing within the domestic market.[66] It has left the market as an article of commerce or commodity. A tax on a consumer is not a tax on goods. Determining exactly when a good has passed through the market and into consumption may involve questions of fact and degree, to be approached as a matter of substance rather than any particular legal form.[67]

40. For these reasons, South Australia submits that the *reasoning* of the minority justices in *Ha*, that the purpose of s 90 is to give effect to a national uniform tariff, is capable of supporting the *conclusion* arrived at by the majority justices in that case. It might also be observed that if the Court was to confirm the conclusion arrived at by the majority justices in *Ha*, but for reasons that draw upon the purpose identified by the minority, the result of a series of earlier authorities of this Court would not be impugned.[68]

The broad view: any tax on goods

41. Whilst the purpose of s 90 identified above, namely the effectuation of a uniform national tariff, is consistent with both the narrow and the intermediate meanings of "duties of … excise" set out above, it is inconsistent with the broad view urged by the

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60 (1949) 80 CLR 229, 260.
61 *Matthews v Chicory Marketing Board (Victoria)* (1938) 60 CLR 263, 304 ("*Matthews*").
62 *Parton* (1949) 80 CLR 229, 259 (Dixon J).
63 *Matthews* (1938) 60 CLR 263, 301 (Dixon J).
64 *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 173 CLR 450, 467 (Dawson, Toohey and Gaudron JJ).
65 *Ha* (1997) 189 CLR 465, 497 (Brennan CJ, McHugh, Gummow and Kirby JJ).
66 See *Dickenson's Arcade*(1974) 130 CLR 177, 231 (Stephen J). It is unnecessary to consider the status of a good that 're-enters' the market as a second-hand good.
67 See *Dickenson's Arcade* (1974) 130 CLR 177, 186 (Barwick CJ); *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353, 365 (Barwick CJ), quoted approvingly in *Capital Duplicators(No 2)* (1993) 178 CLR 561, 583 fn 99 (Mason CJ, Brennan, Deane and McHugh JJ).
68 This may be distinguished from acceptance of the submission put by New South Wales in *Ha* (1997) 189 CLR 465, 489-90, citing *Capital Duplicators (No 2)* (1993) 178 CLR 561, 587.

Plaintiffs and the Commonwealth.[69] Once a good is in the hands of the consumer, a tax that may be imposed on use or consumption must be met (directly) by the owner, it will not be passed through to the consumer (indirectly) in the price of the good. Accordingly, a tax on use or consumption will not undermine the Commonwealth's custom policy.

42. Contrary to the submissions of the Commonwealth,[70] there is no need for the Commonwealth to retain exclusive taxing power of goods once passed into the hands of consumers because discriminatory taxes will offend s 92. Non-discriminatory taxes on the use or consumption of goods, on the other hand, will not distort either free trade or the uniform tariff and will therefore not be offensive to the purpose of ss 90 and 92.

43. It may be accepted that the imposition of a tax on consumption or use of a good may in some instances diminish demand for goods, and may therefore have a comparable economic effect to the imposition of a duty of excise or a duty of custom.[71] However, it is not the case that general taxes on use or consumption of goods, whether imposed by the Commonwealth or the States, must be characterised as duties of excise or customs. A non-discriminatory tax on consumption, even if it might affect demand, does not share the same structure as a custom tax; it does not increase the price of the good to the consumer. Rather, it constitutes a direct tax on the consumer.

44. Whilst the distinction between direct and indirect taxes has been criticised as a matter of economic theory,[72] concepts of these kinds are bound into the notions of "duties of customs", and correspondingly "duties of … excise", found in s 90 of the *Constitution*. This outcome does not promote form over substance. Rather, it acknowledges that considerations of practical effect are relevant to discerning whether a tax falls within the lines delineated by s 90 itself. The pursuit of substance over form must only be pressed in the service of adherence to constitutional rules; it should not be pursued so far as to redraw constitutional limits.

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69 Plaintiffs' Submissions, [44]; Commonwealth's Submissions, [13].
70 Commonwealth's Submissions, [23].
71 Plaintiffs' Submissions, [24].
72 Commonwealth's Submissions, [28]; see *Capital Duplicators (No 2)* (1993) 178 CLR 561, 602 (Dawson J); see also *Dennis Hotels* (1960) 104 CLR 529, 553 (Fullagar J), 590 (Menzies J), 593-594 (Windeyer J); *Philip Morris* (1989) 167 CLR 399, 429, 435 (Mason CJ and Deane J), 470-471 (Dawson J).

Parton v Milk Board

45. The judgment of Justice Dixon in *Parton v Milk Board* underpins two propositions that are foundational to the submissions of the Plaintiffs and the Commonwealth. First, it is argued that Justice Dixon embraced a broad purpose of s 90 as serving to strengthen Commonwealth economic control by conferring exclusive control over all taxes on goods.[73] Second, that broad purpose is then called in aid of the proposition that the terms "duties of custom and excise" in s 90 "must be construed as exhausting the categories of taxes on goods".[74]

46. The frequently cited passage relied upon by the Plaintiffs and Commonwealth is that:[75]

> In making the power of the Parliament of the Commonwealth to impose duties of customs and excise exclusive it may be assumed that it was intended to give the Parliament 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.

47. As to the first proposition which the Plaintiffs and the Commonwealth seek to extract from this passage, South Australia submits that the statement of Justice Dixon is consistent with the more modest purpose of s 90 identified by the minority justices in *Ha*, namely the maintenance of a uniform tariff. The reference to "taxation on commodities" is important. It is clear from the context of the decision, including the reliance on the *Atlantic Smoke Shops Case*, that "taxation on commodities" was not being used to refer to any tax on goods, but was rather being used to refer to "trading taxes" (indirect taxes) in contrast to "consumption tax" (direct taxes). Understood in this way, the "real control" that Justice Dixon identified as being necessary for the Commonwealth to possess was not over any taxes on goods, but on those forms of indirect tax that might compete with "whatever [tariff] policy" the Commonwealth might choose to adopt.

48. As to the second proposition, no support can be drawn from this passage for the proposition that the terms "duties of customs and of excise" in s 90 "must be construed as exhausting the categories of taxes on goods".[76] That proposition is flatly denied by

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73 Plaintiffs' Submission, [11], [19]-[21]; Commonwealth's Submissions, [11(b)] see*Capital Duplicators (No 2)* (1993) 178 CLR 561, 590 (Mason CJ, Brennan, Deane and McHugh JJ).

74 Plaintiffs' Submissions, [23]; see *Capital Duplicators (No 2)* (1993) 178 CLR 561, 590 (Mason CJ, Brennan, Deane and McHugh JJ); *Ha* (1997) 189 CLR 465, 488 (Brennan CJ, McHugh, Gummow, and Kirby JJ).

75 *Parton* (1949) 80 CLR 229, 260 (Dixon J).

76 *Capital Duplicators (No 2)* (1993) 178 CLR 561, 589 (Mason CJ, Brennan, Deane and McHugh JJ).

the important correction that his Honour highlighted in this very judgment, that a tax on consumers or upon consumption cannot be an excise.[77]

49. Whilst Justice Dixon concluded that manufacture and production was too narrow, that was not because he considered that the Commonwealth requires exclusive taxing power over all goods. Rather, it was because it was necessary to serve the purpose of s 90 that the Commonwealth be granted exclusive power to tax any step up to the hands of the consumer.

50. Justice Dixon's reliance on *Atlantic Smoke Shops Ltd v Conlon* was not unsound.[78] It provided a principled distinction between customs and excise taxes, on the one hand, and taxes on consumption, on the other.[79] Whilst the reliance by Justice Dixon on *Atlantic Smoke* has been queried by members of this Court,[80] frequently such doubts have been called in aid of a return to the narrow view identified above, rather than suggestive that the notion of "excise" does not contain any constraint upon the notion of a tax on goods.

51. Drawing the line at consumption is not arbitrary or "anomalous".[81] Rather, it can be seen to reflect the intermediate view referred to above as to when goods can be understood to have passed into the Australian economy.

Conclusions on principle

52. For the above reasons, the notion of an excise should be understood to be a tax upon a step by which an inland good passes into the Australian economy. Understood as such, a duty of excise may be a tax on production or manufacture. Alternatively, passage into the Australian economy may be understood to occur upon the final step upon which a good passes into "the hands of consumers."[82] However, there is no warrant to construe the term "duty of … excise" so widely as to constitute any tax on goods.

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77 *Parton* (1949) 80 CLR 229, 260 (Dixon J).
78 Plaintiffs' Submissions [16.4], [32] and [35]; Commonwealth's Submissions, [27].
79 *Atlantic Smoke Shops Ltd v Conlon* [1943] AC 550, 566. The distinction was acknowledged by Justice Mason in *Dickenson's Arcade* (1974) 130 CLR 177, 238-239.
80 See the authorities referred to in the Commonwealth's Submissions, at footnotes 71-72.
81 Plaintiffs' Submission, [16.3], [22].
82 *Bolton* (1963) 110 CLR 264, 271 (The Court).

PART V: TIME ESTIMATE

53. It is estimated that 20 minutes will be required for the presentation of South Australia's oral argument.

Dated: 7 November 2022

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

CHRISTOPHER VANDERSTOCK
First Plaintiff

KATHLEEN DAVIES
Second Plaintiff

THE STATE OF VICTORIA
Defendant

ANNEXURE

PROVISIONS REFERRED TO IN THE SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

No.	Description	Date in Force	Provision
Constitutional Provisions			
1.	*Commonwealth Constitution*	Current	
Statutes			
2.	*Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic)	Current	Whole
3.	*Motor Vehicles (Electric Vehicle Levy) Amendment Act 2021* (SA)	Current	ss 2, 8
4.	*Tobacco Act 1972 (Tas*)	As enacted	
5.	*Tobacco Regulations 1972* (Tas)	As enacted	