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

KATHLEEN DAVIS
Second Plaintiff

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and

THE STATE OF VICTORIA
Defendant

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

PARTS I, II and III: CERTIFICATION AND INTERVENTION

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

2. The Attorney-General of Tasmania (**Tasmania**) intervenes pursuant to s 78A of the *Judiciary Act 1903 (Cth)* (**Judiciary Act**) in support of the Defendant.

PART IV: ARGUMENT

A: Summary

3. Tasmania submits that s 7(1) the *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic) (**the Act**) is not invalid on the basis that it imposes a duty of excise within the meaning of s 90 of the Constitution.

4. The answer to the first question arising for the opinion of the Full Court[1] should be answered in the negative for the following reasons:

(a) First, the charge imposed by s 7(1) of the Act (**charge**) is not a duty of excise as that phrase was construed by the majority of this Court in *Ha v New South Wales*[2] because:

i. it is directed to an activity (driving on "specified roads" as defined by s 3 of the Act); and

ii. it is not directed to goods. In particular, it is not directed to the production, manufacture, sale or distribution of a zero or low emission vehicle (**ZLEV**)).

(b) Alternatively, if the charge is properly understood to constitute a tax on ZLEVs it is not a tax on their production, manufacture, sale or distribution so as to fall within the meaning of a duty of excise set down in *Ha*. Rather, it is a tax on consumption or use of ZLEVs and is therefore a law within the competence of a State legislature in accordance with *Dickenson's Arcade Pty Ltd v The State of Tasmania*.[3]

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1 Amended Special Case Book (**ASCB**) 49 [81].
2 (1997) 189 CLR 465 at 499 (Brennan CJ, McHugh, Gummow and Kirby JJ).
3 (1974) 130, at 185-186 (Barwick CJ), 209, 213 (Menzies J), 217-223 (Gibbs J), 229-231 (Stephen J), 238-239 (Mason J).

5. The construction of "excise" should not be extended to consumption of goods. There is no convincing reason to disturb the certainty established by *Dickenson's Arcade*. There is no occasion for it to be re-opened and over-ruled.

6. However, if the Court grants leave to re-open *Dickenson's Arcade*:

   (a) it ought to be affirmed; and

   (b) Tasmania supports the Defendant's application for leave to re-open the decisions in *Ha v New South Wales*[4] and *Capital Duplicators v Australian Capital Territory (No 2)*[5](DS [51]).

B: The charge is not an excise

B.1 The charge is not directed to goods but to an activity

7. In *Ha*, with regard to the meaning of a duty of excise, the majority held that:

> We reaffirm that duties of excise are taxes on the production, manufacture, sale or distribution of goods, whether of foreign or domestic origin.[6]

8. The charge imposed by s 7(1) of the Act, properly characterised, is directed to an activity disassociated from the "production, manufacture, sale or distribution of goods". It is not directed to any step taken in dealing with goods in that sense. Rather, it is directed to a ZLEV vehicle only to the extent that it is driven a distance of kilometres on a specified road. That is, it is the activity of driving that is central.

9. The question of whether a statute imposes a duty of excise is a matter of substance rather than form.[7] That approach involves looking to the practical or substantial operation of the statute as well as its legal operation.[8]

10. It is readily apparent, when considering the provisions of the Act, that the Act operates, in both a practical and legal sense, to levy a charge for distance travelled on roads by ZLEVs. In other words, the Act is directed at the use of public roads by certain operators.

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4 (1997) 189 CLR 465, at 508 , Griffith CJ
5 (1993) 178 CLR 561
6 (1997) 189 CLR 465 at 499, (Brennan CJ, McHugh, Gummow and Kirby JJ).
7 *Dickenson's Arcade Pty Ltd v The State of Tasmania* (1974) 130 at 186 (Barwick CJ); *Ha v New South Wales* (1997) 189 CLR 465 at 498 (Brennan CJ, McHugh, Gummow and Kirby JJ), 514 (Dawson, Toohey and Gaudron JJ).
8 *Capital Duplicators Capital Duplicators v Australian Capital Territory No 2* (1993) 178 CLR 561 at 583 (Mason CJ, Brennan, Deane, McHugh JJ).

It is not a tax, either in substance or form, on the production, manufacture, sale or distribution of a ZLEV. Nor can it be said to be a charge which has a natural tendency to be passed on to purchasers and to thereby increase the price of ZLEVs.[9]

11. The ZLEV charge is imposed upon registered operators of ZLEVs.[10] The rate of the charge is for distance travelled on specified roads[11] during the financial year[12].

12. The charge is levied as a consequence of the requirement to lodge an initial declaration showing the odometer reading for the registered operator's ZLEV[13], followed by subsequent declarations as required by s 11 of the Act setting out the subsequent odometer reading or a declaration of the distance travelled on specified roads since the previous declaration.

13. The Act expressly describes its purpose in s 1 as being "to require registered operators or zero and low emission vehicles to pay a charge for use of the vehicles on certain roads". The Second Reading Speech for the *Zero and Law Emission Vehicle Distance-Based Charge Bill 2021*[14] refers to the purpose of the Bill being to provide for "a fairer and more financially sustainable way to fund the road network" in circumstances where revenue from the Commonwealth fuel excise is in relative decline due to improvements in fuel efficiency and the uptake of electric vehicles and Victoria's investment in the road network exceeds revenue raised from taxes and charges relating to road usage. Reference is made to: the rising demand for investment in the public road network; and, to introducing the charge for road use before take-up of ZLEVs increases substantially to ensure a future sustainable revenue base for road investment and certainty to drivers.

14. The charge is not disguised in the Act by verbiage or smuggled in as something it is not. It is, in substance and form, a charge for the activity of using public roads and not a tax on a good. The charge is set by reference to the use of public roads by each registered operator. The charge falls differentially on the registered operators of ZLEVs rather than the operators of other vehicles, not because it is a tax on ZLEV, but because users of

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9 *Capital Duplicators Capital Duplicators v Australian Capital Territory No 2* (1993) 178 CLR 561 at 586 (Mason CJ, Brennan, Deane, McHugh JJ).
10 The Act, s 7(1).
11 The Act, s 3.
12 The Act, s 8(1).
13 The Act, s 10.
14 Tim Pallas, Second Reading, *Zero and Law Emission Vehicle Distance-Based Charge Bill 2021,* Hansard, Legislative Assembly, Victoria, 18 March 2021 at 1183.

traditional fuel vehicles contribute to paying for public road infrastructure by other means and because the Act is made with a view to the future, when the bulk of road use is anticipated to involve ZLEVs.

15. The present circumstances bear some resemblance to the facts in *Bolton v Madsen*.[15] In that case, the fee amount for a permit to carry goods on a Queensland road was calculated by reference (in part) to the distance travelled and was found, by a unanimous decision of the Court, not to constitute a duty of excise. It offers support to the proposition that the activity of driving does not attract a duty of excise as it does not involve any relevant step in a process of bringing goods to the point of consumption[16].

10 ***B.2 The charge is not an excise because it is a tax on consumption***

16. If the charge is not found to be a charge for the activity of driving on public roads, but a tax on goods, then it cannot be regarded as anything other than a tax on the use or consumption of a ZLEV as opposed to a tax on its production, manufacture, sale or distribution. The Plaintiffs do not contend otherwise and their case is founded on the proposition that the charge is a tax on the consumption of goods (PS [3]).

17. That a tax upon consumption is not a duty of excise has been authoritatively decided by the Court in *Dickenson's Arcade*. Menzies J clearly stated the position as follows[17]:

> …the unanimous decision of the Court in *Bolton v Madsen* has established quite definitely that "for constitutional purposes duties of excise are taxes directly related
20 to goods imposed at some step in their production or distribution before they reach the hands of consumers". This decision was applied in *Anderson's Pty Ltd v Victoria*. The correctness of the decision in *Bolton v Madsen* was accepted in *Western Australia v Chamberlain Industries Pty Ltd*. A tax upon consumption is, therefore not a duty of excise.

18. The meaning of a duty of excise applied by the majorities in *Ha* and *Capital Duplicators,* among other decisions, does not extend to consumption or use of goods[18]. The majority in *Ha* did not go so far as to find, as the Commonwealth may suggest (CS [3], [21]), that duties of excise are taxes on some step taken in dealing with goods. The phrase from the

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15 (1963) 110 CLR 264.
16 *Bolton v Madsen* (1963) 110 CLR 264 at 273 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ).
17 *Dickenson's Arcade Pty Ltd v The State of Tasmania* (1974) 130 at 209 (footnotes omitted).
18 *Ha v New South Wales* (1997) 189 CLR 465 at 499 (Brennan CJ, McHugh, Gummow and Kirby JJ); *Capital Duplicators v Australian Capital Territory (No 2)* (1993) 178 CLR 561 at 590 (Mason CJ, Brennan, Deane, McHugh JJ).

majority in *Ha* quoted by the Commonwealth leaves out the preceding sentence, limiting the meaning of excise to manufacture, sale or distribution of goods, and the sentence immediately after, which clarifies that it was not necessary for the majority to consider whether a tax on consumption was an excise. The Commonwealth's assertion (CS [13]) that the essence of a duty of excise is that it is "a tax that has a sufficient connection with goods" simply goes too far. That plainly is not the test on any view of authority. It also disregards the steps or dealings referred to in the majority view in *Ha*: "production, manufacture, sale or distribution". Not all steps in relation to goods are capable of attracting a duty of excise.

10 19. In *Capital Duplicators*, the majority accepted, in discussing the distinction between customs duties and excise duties, that excise duties were referable to "production, manufacture, sale or distribution".[19] The majority mentioned that, in *Bolton v Madsen*[20], it was decided unanimously that a tax on the taking of step in the process of the production or distribution of goods "before they reach the consumer" is an excise[21], further stating that the "fundamental proposition" for which *Bolton v Madsen* stands as authority is that "a tax in respect of goods at any step in the production or distribution to the point of consumption is an excise".[22]

20. Subject to re-opening *Dickenson's Arcade* (and, in consequence, *Ha* and *Capital Duplicators*), it therefore remains clear that, on the present state of the law, a duty of
20 excise does not extend beyond the point of reaching the consumer.

B.3 Leave to re-open Dickenson's Arcade should not be granted

21. The Plaintiffs ask the Court to re-open and overrule *Dickenson's Arcade* (PS [16.5]). However, the Court does not depart from its previous decisions lightly.[23] Factors justifying departure are: first, where the earlier decision does not rest on principle

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19 *Capital Duplicators v Australian Capital Territory (No 2)* (1993) 178 CLR 561 at 590 (Mason CJ, Brennan, Deane, McHugh JJ), although observing that it was unnecessary in that case to consider taxes on the consumption of goods.

20 *Bolton v Madsen* (1963) 110 CLR 264.

21 *Capital Duplicators v Australian Capital Territory (No 2)* (1993) 178 CLR 561 at 587 (Mason CJ, Brennan, Deane, McHugh JJ).

22 *Capital Duplicators v Australian Capital Territory (No 2)* (1993) 178 CLR 561 at 583 (Mason CJ, Brennan, Deane, McHugh JJ).

23 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

carefully worked out in a succession of cases; secondly, differences between the justices constituting the majority; thirdly, that earlier decisions have resulted in considerable inconvenience; and, fourthly that earlier decisions have not been independently acted on.[24] None of these factors are present in the case of the exclusion of consumption or use of goods from the concept of excise as held in *Dickenson's Arcade.*

22. This is not the first time that the Court has been asked to reconsider *Dickenson's Arcade.* The request was made and refused in *Capital Duplicators* which also discusses two other instances where the Court declined to reconsider the correctness of *Dickenson's Arcade*.[25] The majority in *Ha* also decided not to overrule *Dickenson's Arcade*.[26]

10 23. To consider the first factor. Apart from the comment of Dixon J in *Matthews v Chicory Marketing Board (Vic)*,[27] a case whose facts did not concern consumption and which his Honour later thought better of,[28] there is no authority supporting the proposition that the reference to excise in s 90 of the Constitution includes a tax on the consumption of goods. The majorities in *Ha* and *Capital Duplicators* expressly declined to comment on the issue as it was not necessary to do so.[29]

24. The question of whether a tax on consumption is a duty of excise for the purposes of s 90 of the Constitution was directly at issue in *Dickenson's Arcade Pty Ltd v Tasmania*.[30] Five of the six Justices considering the matter found that a tax on consumption is not an excise for the purpose of s 90.[31] They did so well aware that the
20 departure by Dixon J from his comment in *Matthews* was based on *Atlantic Smoke Shops v Conlon*[32] when that case related to provisions which differed from s 90 and rested on a

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24 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

25 *Capital Duplicators* v *Australian Capital Territory (No 2)* (1993) 178 CLR 561 at 591-593 (Mason CJ, Brennan, Deane and McHugh JJ).

26 *Ha v New South Wales* (1997) 189 CLR 465 at 504 (Brennan CJ, McHugh, Gummow and Kirby JJ).

27 (1938) 60 CLR 263 at 304.

28 *Parton v Milk Board (Vic)* (1949) 80 CLR 229 at 261.

29 *Ha v New South Wales* (1997) 189 CLR 465 at 499 (Brennan CJ, McHugh, Gummow, Kirby JJ); *Capital Duplicators Pty Ltd* v *Australian Capital Territory (No 2)* (1993) 178 CLR 561 at 590 (Mason CJ, Brennan, Deane, McHugh JJ).

30 (1974) 130 CLR 177.

31 *Dickenson's Arcade Pty Ltd v The State of Tasmania* (1974) 130 CLR 177 at 185-186 (Barwick CJ), 209, 213 (Menzies J), 217-223 (Gibbs J), 229-231 (Stephen J), 238-239 (Mason J), McTiernan J disagreeing at 196 and 204.

32 *Atlantic Smoke Shops v Conlon* [1943] AC 550.

distinction between direct and indirect taxes which did not apply to s 90.[33] For example, Gibbs J considered Dixon J's modified opinion, but then based his view about the exclusion of taxes upon consumption upon definitions of the word "excise", established usage and by consideration of the federal nature of the Constitution[34]. Mason J mentioned Dixon J's modified opinion and then said:

> Whatever differences may be detected in the judgment of members of this Court in recent decisions, they all agree in defining or describing an excise duty in such terms as would exclude a tax imposed on goods after they have passed into the hands of a consumer (see *Bolton v Madsen; Anderson's Pty Ltd v Victoria; Western Australia v Hammerley Iron Pty Ltd* [No 1]; *Western Australia v Chamberlain Industries Pty Ltd*). These statements must, I think, be regarded as establishing at this time that a tax on consumption of goods is not an excise. The limitation which they place on the concept necessarily involves a restriction on the power of the Commonwealth to control the taxation of commodities. However, as a tax on consumption which is not also a tax on sale of goods is a phenomenon infrequently encountered, the restriction concedes to the Commonwealth a large measure of control. The justification of the restriction is evidently based on the notion that consumption is not sufficiently proximate to the production and manufacture of goods- a concept of proximity which it devise from the reference in s 93 to "taxes paid on the production and manufacture of goods" and from the circumstance that s 90 deals with bounties on production as well as duties of excise.[35]

25. Contrary to the Plaintiffs' submissions, the decision to exclude consumption or use of a good from the concept of excise in s 90 in *Dickenson's Arcade* was not the result of "unwarranted deference" (PS [39]) to *Atlantic Smoke Shops*. Instead, the decision is based on carefully considered principle, with regard to the line of authorities preceding the decision and in circumstances where a different view was the subject of submission and due consideration.

26. As to the second factor, it is true that the five Justices in *Dickenson's Arcade* deciding (among other things) that a tax on consumption was not an excise tax all wrote separate opinions. In consequence, there are variations in expression and emphasis among the opinions as well as differences in rationale on some matters. However, the differences between the Justices, so far as the consumption question is concerned, are not of great note. The differing reasoning relied upon by the Plaintiffs (PS [40]) relate to other

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33 *Dickenson's Arcade Pty Ltd v The State of Tasmania* (1974) 130 CLR 177 at 180 (Submissions for the Plaintiffs) 185, 194 (Barwick CJ), 220-222 (Gibbs J), 230-231(Stephen J), 238-239 (Mason J).

34 *Dickenson's Arcade Pty Ltd v The State of Tasmania* (1974) 130 CLR 177 at 180 at 222 (Gibbs J).

35 *Dickenson's Arcade Pty Ltd v The State of Tasmania* (1974) 130 CLR 177 at 239.

aspects of the excise question such as "criterion of liability" and their views on the purpose of s 90.

27. As to the third factor, the agreement between the five Justices in *Dickenson's Arcade* together with the Justices that went before them in "defining or describing an excise duty in such terms as would exclude a tax imposed on goods after they have passed into the hands of a consumer" has not caused considerable inconvenience. The only inconvenience identified by the Plaintiffs is what they label the "anomaly". Tasmania does not accept that the so called anomaly is the kind of practical difficulty envisaged by the phrase "considerable inconvenience". As pointed out by Gibbs J in *Hematite Petroleum Pty Ltd v Victoria*[36], there are many taxes and other measures that are not excises which have a tendency to affect the production and manufacture of goods. Market forces also cause price variation between States and within States. If the "anomaly" refers to a notion that the purpose of s 90 is to allow the Commonwealth to make the price of goods uniform within the Commonwealth which is defeated by limiting the concept of "excise" in s 90 to the point that goods reach the consumer, then such purpose is an unrealistic one.

28. As to the fourth factor, the Act itself is an example of a legislative action based on the understanding that duties of excise are taxes on the production, manufacture, sale or distribution of goods, but not extending to consumption or use of such goods.

B.4. If Dickenson's Arcade is reopened

29. If leave is granted to re-open *Dickenson's Arcade*, that authority ought to be affirmed. To allow a tax on consumption to be recognised as a duty of excise would wreak havoc on the federal balance and allow the Commonwealth Parliament exclusive power to intrude into the daily activities of Australians in a manner which would not have been envisaged at federation. It finds no foundation in the Constitution and serves no federal purpose. The broad ramifications of recognising a tax on the consumption of goods as a duty of excise to be exercised exclusively by the Commonwealth Parliament ought not be understated. It could conceivably lead to the Commonwealth Parliament having

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36 *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 617; see also *Ha v New South Wales* (1997) 189 CLR 465 at 508 (Dawson, Toohey and Gaudron JJ); *Capital Duplicators* v *Australian Capital Territory (No 2)* (1993) 178 CLR 561 at 612 (Dawson J).

exclusive power to tax all manner of daily pursuits in such manner as to upset the ability of State Parliaments to effectively exercise their legislative powers for the peace, order and good government of their respective States[37] whilst simultaneously further eroding the ability of States to pass revenue laws directed to matters of local concern. There is no federal imperative to justify such a broad interpretation of the Commonwealth's exclusive power to impose duties of excise.

30. As Stephen J recognised in *Dickenson's Arcade*:

> The degree of certainty which has been conferred upon the phrase, at least in relation to that point on the journey of goods from producer to consumer beyond which a tax is no longer viewed as an excise, has been hard won and should not lightly be disturbed in this important aspect of constitutional law concerned with the delineation of the boundary between State and federal legislative competence in the taxation of the citizen.[38]

31. As such, there are very good reasons to narrowly construe the limit on the State's power provided in s 90. The maintenance of the powers of the States to make laws for the peace and good governance of the States is a consideration when interpreting the exclusive power granted to the Commonwealth in s 90 of the *Constitution*. It has been said that, where by the one Constitution separate and exclusive governmental powers have been allotted to two distinct organisms, neither is intended, in the absence of distinct provision to the contrary, to destroy or weaken the capacity or functions expressly conferred on the other[39]. Similarly:

> The federal character of the Australian Constitution carries implications of its own. As I have said before, "the government of Australia is a dual system based upon a separation of organs and of powers. The maintenance of the States and their powers is as much the object of the Constitution as the maintenance of the Commonwealth and its powers".[40]

32. The Commonwealth's power to tax is conferred by s 51(ii) of the Constitution and is not exclusive. The taxation power of the Commonwealth is only relevantly exclusive to the extent that the States are denied the power to impose duties of customs and excise by s 90 of the Constitution. Maintaining the balance between Commonwealth and State legislative power supports construing the reference to duties of excise in s 90 such that

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37 For Tasmania: *Constitution Act 1934* preamble; *Australian Constitution Act 1850 (Imp)*, s 14; *Australia Act 1986 (Cth)* s 2

38 *Dickenson's Arcade Pty Ltd v The State of Tasmania* (1974) 130 at 230 (Stephen J).

39 *Pirrie v McFarlane* (1925) 36 CLR 170, 191 (Isaacs J).

40 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 70 (Starke J).

it does not include a tax imposed on the consumption of goods. As Gibbs J said in *Dickenson's Arcade*, when the distribution of power to impose taxation between the Commonwealth and the States imposed by the Constitution is considered, properly construed, "section 90 stops short of denying power to the States to impose taxes on consumption".[41]

C. Re-opening Ha and Capital Duplicators

C.1 If Dickenson's Arcade is re-opened a broader consideration is necessary

33. If the Court grants leave to re-open *Dickenson's Arcade*, Tasmania supports and adopts the position of the Defendant (DS [51]-[59]) that it would be appropriate to revisit the treatment of s 90 in a broader sense by also re-opening *Ha* and *Capital Duplicators*. The attempt to broaden the understood meaning of s 90 to encompass consumption taxes necessarily involves a return to fundamental considerations. That exercise may be frustrated if a review of *Ha* and *Capital Duplicators* is not also permitted.

C.2 The text, context and purpose of s 90 supports the minority construction of the meaning of a duty of excise

34. If the Court grants leave to re-open *Ha* and *Capital Duplicators*, Tasmania supports and adopts the submissions of the Defendant (DS [38]-[50]) regarding the proper construction of the reference to duties of excise in s 90 as meaning a tax on the local production or manufacture of goods. The following additional submissions are made.

35. A view in favour of construing excise in s 90 as meaning a tax imposed on the local production or manufacture has persisted in various judgments since *Peterswald v Bartley*[42]. The history is detailed in the minority in *Ha*[43] and by Dawson J in *Capital Duplicators*[44] and it therefore seems unnecessary to repeat it here. The view has stubbornly held on as a "voice in the Court"[45] because there are real difficulties with the majority positions in *Ha* and *Capital Duplicators* as outlined in the Defendant's submissions and above. If the Court grants leave to re-open *Dickenson's Arcade,* then

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41 *Dickenson's Arcade Pty Ltd v The State of Tasmania* (1974) 130 at 222 (Gibbs J).
42 (1904) 1 CLR 497 at 508
43 *Ha v New South Wales* (1997) 189 CLR 465, 505-515 (Dawson, Toohey and Gaudron JJ).
44 *Capital Duplicators* v *Australian Capital Territory (No 2)* (1993) 178 CLR 561, 600-605 (Dawson J).
45 *Ha v New South Wales* (1997) 189 CLR 465, 512 (Dawson, Toohey and Gaudron JJ).

Ha and *Capital Duplicators* should be re-opened and over-turned for the reasons given by the Defendant (DS [51]-[59]).

36. The purpose of s 90 relied upon by the Plaintiffs (PS [11], [19]-[21]) and the Commonwealth (CS [11(b)]) is that articulated by Dixon J in *Parton v Milk Board (Vic)*[46] being to give the Commonwealth "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". Dixon J goes on to say that the reason for this is 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 or production".

10 37. The purpose identified by Dixon J and the consequent extension of the meaning of excise such that it means an inland tax on any step in the distribution of goods before they reach the consumer, pays insufficient regard to the text of s 90, read in light of its context and the understanding of the meaning of excise at the time the Constitution was written (DS [41]-[45]). The text of the Constitution, both the section in question and its surrounding provisions, must be the anchor for any meaning derived from those provisions. The meaning of "excise" in Australia when the Constitution was drafted as described in the Defendant's submissions (DS [41]-[46]) is also a relevant consideration and an important control on the possibility of exceeding the limits of judicial power and frustrating the requirements for altering the Constitution provided in s 128.[47]

20 38. As found by the minority in *Ha*, the purpose of s 90 was to protect the integrity of Commonwealth tariff policy such that there was a common external tariff, or in other words, no differences within Australia as to the duties levied on goods imported into Australia, and such that customs duties at State borders were eliminated.[48] It is this purpose which makes sense of the fact that the word "excise" appears together with the word "customs" in the Constitution[49] and the telling reference in s 93 to "duties of excise paid on goods produced or manufactured in a State".

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46 *Parton v Milk Board (Vic)* (1949) 80 CLR 229 at 261.

47 *SGH v Federal Commissioner of Taxation* (2002) 210 CLR 51, 75 [44], (Gummow J); *Singh v The Commonwealth* (2004) 222 CLR 322 at 385 (Gummow, Hayne and Haydon JJ).

48 *Ha v New South Wales* (1997) 189 CLR 465 at 506-507, (Dawson, Toohey and Gaudron JJ); See also *Capital Duplicators* v *Australian Capital Territory (No 2)* (1993) 178 CLR 561, 609 (Dawson J).

49 See DS [50].

39. As the minority in *Ha* point out, the purpose of protecting Commonwealth tariff policy is achievable in practice when excise is understood to mean a tax which falls on goods produced or manufactured locally. It is duties on production and manufacture of goods within a State that have the capacity to raise the price of a local product compared to imported products. Duties which apply to both local and imported goods do not so interfere, because the products are affected equally.[50]

40. By contrast, the broader asserted purpose for s 90 of real control over commodities to be delivered by the expanded interpretation of excise such that it relates to taxes on the production, manufacture, sale or distribution of goods, whether of foreign or domestic origin does not seem to be entirely achievable in practice. As referred to by the minority in *Ha*[51] and the Defendant (DS 49.3), there are numerous ways that the cost of manufacture and production of goods can be affected by State laws including taxation (other than customs or excises) and policy. As said by Dawson J in *Capital Duplicators* "it is not possible to eliminate all economic distortions in a federation".[52]

41. The federal character of the Constitution supports construing excise to mean a tax on locally produced or manufactured goods, as opposed to the broader constructions arrived at in the decisions of *Ha*[53] and *Capital Duplicators.*[54] Section 90 is not a grant of power to the Commonwealth, but is a restriction on the States. Construing the conferral of exclusive power upon the Commonwealth Parliament in relation to imposing duties of excise widely reduces the ability of the States to respond to local conditions and needs. As said by Gibbs CJ in *Hematite*, albeit not with respect to narrowing the construction of excise to locally produced or manufactured goods, consideration of the hampering effect of s 90 on the capacity of the States to conduct their financial affairs without the conferral of any benefit on the Commonwealth means "there is no good reason for give a wide and loose construction" to s 90.[55]

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50 *Ha v New South Wales* (1997) 189 CLR 465, 508-509 (Dawson, Toohey and Gaudron JJ); *Capital Duplicators* v *Australian Capital Territory (No 2)* (1993) 178 CLR 561, 601 (Dawson J), 627 (Toohey and Gaudron JJ).

51 *Ha v New South Wales* (1997) 189 CLR 465, 508 (Dawson, Toohey and Gaudron JJ); See also *Capital Duplicators* v *Australian Capital Territory (No 2)* (1993) 178 CLR 561, 612 (Dawson J) and the judgments referred to therein.

52 *Capital Duplicators* v *Australian Capital Territory (No 2)* (1993) 178 CLR 561, 613 (Dawson J).

53 (1997) 189 CLR 465.

54 (1993) 178 CLR 561.

55 *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 618.

PART V: ESTIMATE OF TIME

42. Tasmania estimates that it will need 10 minutes for oral argument.

Dated 7 November 2022

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Sarah Kay SC
Solicitor-General of Tasmania
T: (03) 6165 3614
F: (03) 6233 2510
E:solicitor.general@justice.tas.gov.au

Emily Warner
T: (03) 6165 3614
F: (03) 6233 2510
E:emily.warner@justice.tas.gov.au

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Defendant

ANNEXURE TO THE ATTORNEY-GENERAL OF TASMANIA'S SUBMISSIONS

Pursuant to paragraph 3 of *Practice Direction No 1 of 2019*, Tasmania sets out below a list of
20 the particular constitutional provisions, statutes and statutory instruments referred to in its submissions.

No.	Description	Version	Provisions
1.	Commonwealth Constitution	Current	ss 51(ii), 90, 93(i)
2.	*Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic)	Current	Whole Act
3.	*Constitution Act 1934* (Tas)	Current	Preamble
4.	*Australian Constitution Act 1850 (Imp)*	As enacted	s 14
5.	*Australia Act 1986 (Cth)*	Current	s 2