HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:	**CHRISTOPHER VANDERSTOCK**
	First Plaintiff
	KATHLEEN DAVIES
	Second Plaintiff
AND:	**THE STATE OF VICTORIA**
	Defendant

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SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

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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 the Commonwealth (**Commonwealth**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) in support of the plaintiffs.

PART IV — ARGUMENT

A SUMMARY

3. Duties of excise within s 90 of the Constitution are "taxes on goods, that is to say, they are taxes on some step taken in dealing with goods".[1] The essence of an excise is the existence of a sufficient connection between a tax and a good, such that the tax is properly viewed as being imposed "on" that good. The existence of such a connection hinges upon the legal and practical operation of the law imposing the tax. The two principal indicia developed in the cases (which are not exhaustive) are: (i) that liability to pay the impost is triggered by the taking of some step in dealing with the goods; (ii) that the amount of the tax relates to the quantity or value of the goods (eg the amount manufactured, sold or used). Conversely, a tax might lack a sufficient connection to goods if it is properly characterised as a fee for a privilege or it has a much wider field of operation than upon dealings in goods. **(Part C)**

4. There is no reason of principle or authority to exclude taxes on the use or consumption of goods from s 90. Although a majority in *Dickenson's Arcade*[2] held to the contrary, the majority reached that decision reluctantly even on the then prevailing law, which was itself confirmed to be erroneous in *Capital Duplicators (No 2)*[3] and *Ha*. In those circumstances, *Dickenson's Arcade* should be re-opened and overruled. **(Part D)**

5. The Court should not grant leave to re-open *Capital Duplicators (No 2)* and *Ha*, in which (relevantly) a majority rejected the proposition that s 90 captures only taxes that fall upon, and discriminate against, locally produced or manufactured goods. Unlike the position with *Dickenson's Arcade*, the single majority judgments in each of those cases are carefully reasoned and consistent with what was recognised in *Ha* to be the "overwhelming" weight of authority.[4] There is no warrant now for re-opening those decisions, which have brought

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1 ***Ha*** *v New South Wales* (1997) 189 CLR 465 at 499 (Brennan CJ, McHugh, Gummow and Kirby JJ).

2 ***Dickenson's Arcade*** *Pty Ltd v Tasmania* (1974) 130 CLR 177.

3 *Capital Duplicators Pty Ltd v Australian Capital Territory [No. 2]* (1993) 178 CLR 561 (***Capital Duplicators (No 2)***).

4 *Ha* (1997) 189 CLR 465 at 488-489 (Brennan CJ, McHugh, Gummow and Kirby JJ).

certainty and stability to the construction of s 90, merely to re-agitate arguments that did not prevail in those cases. **(Part E)**

6. The *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic) (**ZLEV Charge Act**) imposes a tax on goods: specifically, on zero and low emission vehicles (**ZLEVs**). The tax (**ZLEV charge**) is calculated by reference to the quantity of the consumer's usage of a ZLEV. It imposes an excise, and is therefore invalid. **(Part F)**

B SECTION 90: FOUNDATIONAL PROPOSITIONS

7. The following core propositions about s 90 are well established. *First*, the word "excise" had "no clearly established meaning" at federation,[5] and has no "certain connotation" or "exact application" in "popular, political or economic usage".[6]

8. *Second*, the expression "dut[y] … of excise" in s 90 extends to "an inland tax on a step in production, manufacture, sale or distribution of goods", "whether of foreign or domestic origin".[7] However, for the reasons further explained at [15] below, that statement of the steps to which an excise may attach is non-exhaustive.

9. *Third*, applying orthodox principles of constitutional interpretation (and having regard to the presence of s 52(iii) of the Constitution), the term "excise" in s 90 ought to be construed with all the generality that the word permits, and should not be read down or narrowly construed to preserve concurrent State power.[8]

10. *Fourth*, the "purpose which [s 90] is thought to serve" and the "relationship of the section with other provisions of the Constitution"[9] are the best guide to its interpretation. A central purpose of Ch IV (and s 90 within Ch IV) was "to provide for the financial transition of the Colonies into the States of the Commonwealth and for the revenues required by the Commonwealth".[10] Indeed, as the majority pointed out in *Ha*, the Colonies understood at federation that "in becoming States what had been their principal sources of revenue would

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5 *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 584 (Mason CJ, Brennan, Deane and McHugh JJ); see also *Ha* (1997) 189 CLR 465 at 493 (Brennan CJ, McHugh, Gummow and Kirby JJ).

6 ***Matthews*** *v Chicory Marketing Board (Vic)* (1938) 60 CLR 263 at 293 (Dixon J); see also at 284 (Starke J).

7 *Ha* (1997) 189 CLR 465 at 490, 499 (Brennan CJ, McHugh, Gummow and Kirby JJ), citing in support ***Dennis Hotels*** *Pty Ltd v Victoria* (1960) 104 CLR 529 at 559 (Kitto J); see also at 494 (Brennan CJ, McHugh, Gummow and Kirby JJ).

8 *Allders International Pty Ltd v Commissioner of State Revenue (Vict)* (1996) 186 CLR 630 at 638 (Brennan CJ), 673 (McHugh, Gummow and Kirby JJ); *New South Wales v Commonwealth* (2006) 229 CLR 1 at [185], [194]-[195] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

9 *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 584 (Mason CJ, Brennan, Deane and McHugh JJ).

10 *Ha* (1997) 189 CLR 465 at 491 (Brennan CJ, McHugh, Gummow and Kirby JJ).

be withdrawn".[11] Any complaint about a restriction of the States' and Territories' ability to raise revenue through taxation[12] is really a complaint about s 90 having its intended effect as part of the constitutional compact.

11. *Fifth*, the purpose of s 90 is not limited to facilitating revenue raising by the new central government. Having regard to the section's place within Ch IV (Finance and Trade), it also has the following broad, and interrelated, purposes:

(a) To "creat[e] and maintain … a free trade area throughout the Commonwealth",[13] that being an objective that "could not have been achieved if the States had retained the power to place a tax on goods within their borders".[14]

(b) "[T]o give the Parliament a real control of the taxation of commodities"[15] – or, put another way, over "economic policy affecting the supply and price of goods throughout the Commonwealth".[16] Section 90 works – in conjunction with ss 51(ii) and (iii), 86, 88 and 92 of the Constitution – to make the Commonwealth Parliament the "single legislative authority to impose taxes on goods", to require the power to impose such taxes to be "exercised uniformly",[17] and to ensure that the execution of whatever policy the Parliament adopts with respect to the taxation of goods is "not … hampered or defeated by State action".[18] Exclusive control over duties of excise and customs gives the Parliament power to "protect and stimulate home production by fixing appropriate levels of customs and excise duties".[19] By contrast, "[i]f the

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11 *Ha* (1997) 189 CLR 465 at 493-494 (Brennan CJ, McHugh, Gummow and Kirby JJ).

12 Such as one based on loss of the franchise fee revenues: see Amended Special Case (**ASC**) [60], [62] (Amended Special Case Book (**ASCB**) **44-45**).

13 *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 586 (Mason CJ, Brennan, Deane and McHugh JJ), quoting from *Capital Duplicators Pty Ltd v Australian Capital Territory [No. 1]* (1992) 177 CLR 248 (***Capital Duplicators (No 1)***) at 277 (Brennan, Deane and Toohey JJ); see also *Ha* (1997) 189 CLR 465 at 494-495 (Brennan CJ, McHugh, Gummow and Kirby JJ).

14 *Ha* (1997) 189 CLR 465 at 494 (Brennan CJ, McHugh, Gummow and Kirby JJ).

15 *Ha* (1997) 189 CLR 465 at 495 (Brennan CJ, McHugh, Gummow and Kirby JJ), quoting from ***Parton*** *v Milk Board (Vict)* (1949) 80 CLR 229 at 260 (Dixon J); see also at 252-253 (Rich and Williams JJ); *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 586 (Mason CJ, Brennan, Deane and McHugh JJ); *Capital Duplicators (No 1)* (1992) 177 CLR 248 at 277 (Brennan, Deane and Toohey JJ); *Dickenson's Arcade* (1974) 130 CLR 177 at 185 (Barwick CJ), 199 (McTiernan J), 219 (Gibbs J), 238 (Mason J).

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

17 *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 585 (Mason CJ, Brennan, Deane and McHugh JJ); see also *Capital Duplicators (No 1)* (1992) 177 CLR 248 at 278 (Brennan, Deane and Toohey JJ); *Ha* (1997) 189 CLR 465 at 497 (Brennan CJ, McHugh, Gummow and Kirby JJ).

18 *Ha* (1997) 189 CLR 465 at 495 (Brennan CJ, McHugh, Gummow and Kirby JJ), quoting from *Parton* (1949) 80 CLR 229 at 260 (Dixon J).

19 ***Hematite Petroleum*** *Pty Ltd v Victoria* (1983) 151 CLR 599 at 631 (Mason J).

States had power to impose excise duties then the Commonwealth Parliament's power to protect and stimulate home production and influence domestic price levels might be compromised".[20]

In those ways s 90, in conjunction with ss 51(ii) and 92 of the Constitution, made possible "[t]he creation and fostering of national markets", which in turn served to "further the plan of the Constitution for the creation of a new federal nation".[21] Section 90 contributes to that plan in part by preventing the fragmentation of the national market into as many as eight different markets with separate and competing taxes on goods. It thereby assists to create and sustain "a Commonwealth economic union, not an association of States each with its own separate economy".[22]

12. *Sixth,* in identifying whether a tax is an excise, the Court "has regard to matters of substance rather than form", drawing on "a variety of factors" to reveal the law's practical as well as legal operation.[23] Thus, while the fact that a tax is calculated by reference to the quantity or value of goods supports the conclusion that it is an excise,[24] the key determinant is the impost's "substantive effect".[25] Were it otherwise, s 90 would be susceptible to "evasion by easy subterfuges and the adoption of unreal distinctions".[26]

C AN EXCISE IS A TAX WITH A SUFFICIENT CONNECTION TO GOODS

13. Against the backdrop of these accepted propositions, the essence of a "duty of excise" can be seen to be that it is a tax that has a sufficient connection with goods,[27] such that, as a

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20 *Hematite Petroleum* (1983) 151 CLR 599 at 631 (Mason J).

21 ***Betfair*** *Pty Ltd v Western Australia (No 1)* (2008) 234 CLR 418 at [12] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

22 *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 585 (Mason CJ, Brennan, Deane and McHugh JJ).

23 *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 583, 586 (Mason CJ, Brennan, Deane and McHugh JJ); *Ha* (1997) 189 CLR 465 at 498 (Brennan CJ, McHugh, Gummow and Kirby JJ), 514 (Dawson, Toohey and Gaudron JJ).

24 *Matthews* (1938) 60 CLR 263 at 304 (Dixon J); *Parton* (1949) 80 CLR 229 at 253 (Rich and Williams JJ); *Dennis Hotels* (1960) 104 CLR 529 at 556 (Fullagar J); *Hematite Petroleum* (1983) 151 CLR 599 at 634 (Mason J), 657 (Brennan J), 665 (Deane J).

25 *Ha* (1997) 189 CLR 465 at 498 (Brennan CJ, McHugh, Gummow and Kirby JJ).

26 *Matthews* (1938) 60 CLR 263 at 304 (Dixon J), approved in *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 586 (Mason CJ, Brennan, Deane and McHugh JJ); see also *Ha* (1997) 189 CLR 465 at 498 (Brennan CJ, McHugh, Gummow and Kirby JJ).

27 See *Ha* (1997) 189 CLR 465 at 504 (Brennan CJ, McHugh, Gummow and Kirby JJ), stating that the "no closer connexion" test articulated by Kitto J in *Dennis Hotels* (1960) 104 CLR 529 at 560, as endorsed by Brennan J in ***Philip Morris*** *Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 445-446, was "maintained". At 446, Brennan J had endorsed an earlier description of that test by Owen J as involving "whether there was a sufficiently close connexion between the duty imposed and … the goods".

matter of substance, it is properly characterised as being imposed "on goods".

14. That submission is strongly supported by *Ha* and *Capital Duplicators (No 2)*, in both of which the majority held that duties of customs and duties of excise are "taxes on goods, that is to say, they are taxes on some step taken in dealing with goods".[28] The latter part of that statement reflects the reality that "[g]oods … cannot pay taxes".[29] Thus, to speak of a tax "on goods" is to refer to a tax imposed on a person who is "charged by reason of, and by reference to, some specific relation subsisting between [him or her] and particular goods" – whether that be as "owner, importer, exporter, manufacturer, producer, processor, seller, purchaser, hirer or consumer of" the goods.[30]

15. While the majority in both *Ha* and *Capital Duplicators (No 2)* did refer to excises as taxes on the "production, manufacture, sale or distribution" of goods, those references cannot be read as excluding other types of relations with goods. So much is clear from the majority's statement in *Capital Duplicators (No 2)* that the expression "duties and customs and of excise" exhausts the categories of taxes on goods.[31] Read in context, the point their Honours were making was that an inland tax on many different types of dealings with goods can constitute an excise, whether or not it applies equally to imported and locally produced goods, and whether or not it is imposed directly on production or manufacture. The applicable sub-category of tax on goods simply hinges upon whether the step in the life cycle of the goods that "attracts the tax"[32] is importation or exportation (in which case it is a duty of customs), or whether it is <u>any other step</u> (in which case it is a duty of excise).

16. The conception of an excise as a tax "on goods" in *Ha* and *Capital Duplicators (No 2)* is consistent with authority and principle. In *Browns Transport*, a unanimous High Court held that the "essential distinguishing feature" of an excise is that it is "imposed 'upon' or 'in respect of' or 'in relation to' goods".[33] Indeed, the concept of a tax "on goods" forms

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28 *Ha* (1997) 189 CLR 465 at 499 (Brennan CJ, McHugh, Gummow and Kirby JJ); see also 493, 494, 495, 497, 502, 503 (Brennan CJ, McHugh, Gummow and Kirby JJ); *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 583, 585-586 (Mason CJ, Brennan, Deane and McHugh JJ).

29 *Dennis Hotels* (1960) 104 CLR 529 at 554 (Fullagar J).

30 *Dennis Hotels* (1960) 104 CLR 529 at 554 (Fullagar J). As to "consumers", see Section D below.

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

32 *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 590 (Mason CJ, Brennan, Deane and McHugh JJ); see also *Ha* (1997) 189 CLR 465 at 496 (Brennan CJ, McHugh, Gummow and Kirby JJ).

33 ***Browns Transport*** *Pty Ltd v Kropp* (1958) 100 CLR 117 at 129 (the Court).

the core of all of the definitions of an excise that have been accepted by this Court.[34] As Dawson J acknowledged in his dissenting judgment in *Capital Duplicators (No 2)*, "everyone is agreed that an excise duty is a tax upon goods", and the only dispute is whether there is a "sufficient relationship" between the tax in question and the goods.[35]

17. Once it is accepted that a tax will answer the description of an excise if there is a sufficient connection between the tax and goods, it is neither necessary nor useful to seek further definition or rigidity. So much is illustrated by the failure of the attempt to fashion a more prescriptive test through the "criterion of liability" doctrine, which was "shown through experience to produce neither predictability nor transparency but only confusion".[36] "[E]valuative judgment is inescapable in constitutional adjudication", and it should not be avoided.[37] The task for the Court in applying s 90 is to evaluate the legal and practical operation of a tax to determine whether it has a sufficient connection to goods to meet the description of a "tax on goods".

18. It follows from the above that an impost cannot be an excise if it is not a "tax",[38] for example because it is a fee for service which has a proportionate relationship with the cost of the provision of those services.[39] Further, even if an impost is a tax, it will not be an "excise" if it is a fee for a privilege having "no closer connection" with a relevant dealing in goods than that it is "exacted for the privilege of engaging in the process at all".[40] A modest lump sum fee may readily be characterised as a fee for a privilege, particularly if it is an element in an overall scheme regulating the particular activity.[41]

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34 Eg ***Peterswald*** *v Bartley* (1904) 1 CLR 497 at 509 (Griffith CJ); *Matthews* (1938) 60 CLR 263 at 302-304 (Dixon J); *Dennis Hotels* (1960) 104 CLR 529 at 540 (Dixon CJ); ***Bolton*** *v Madsen* (1963) 110 CLR 264 at 271 (the Court); *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 373-374 (Kitto J).

35 *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 601-602.

36 *Palmer v Western Australia* (2021) 95 ALJR 229 at [147] (Gageler J); see also at [149], quoting Sir Kenneth Jacobs, "The Successor Books to 'The Province and Function of Law' – Lawyers' Reasonings: Some Extra-judicial Reflections" (1967) 5 *Sydney Law Review* 425 at 428. Making the same point, see Coper, "The High Court and Section 90 of the Constitution" (1976) 7 *Federal Law Review* 1 at 19.

37 *Palmer v Western Australia* (2021) 95 ALJR 229 at [147] (Gageler J).

38 *Matthews* (1938) 60 CLR 263 at 276 (Latham CJ); *Browns Transport* (1958) 100 CLR 117 at 129 (the Court).

39 *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 467 (the Court); *Harper v Victoria* (1966) 114 CLR 361 at 377 (McTiernan J), 378 (Taylor J), 378 (Menzies J), 382 (Owen J); *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 63 (Gibbs J).

40 *Dennis Hotels* (1960) 104 CLR 529 at 560 (Kitto J); cited in *Ha* (1997) 189 CLR 465 at 501-503 (Brennan CJ, McHugh, Gummow and Kirby JJ); *Capital Duplicators (No 2)* at 582-583 (Mason CJ; Brennan, Deane and McHugh JJ).

41 *Philip Morris* (1989) 167 CLR 399 at 428 (Mason CJ and Deane J), 462-463 (Brennan J), 501 (McHugh J); *Capital Duplicators (No 2)* at 593, 596-597 (Mason CJ; Brennan, Deane and McHugh JJ); *Ha* (1997) 189 CLR 465 at 501-503 (Brennan CJ, McHugh, Gummow and Kirby JJ).

19. Otherwise, the evaluation that is required being one of substance rather than form, it is not possible to state exhaustively the features of a tax that are relevant to whether it is a tax "on goods".[42] The most that can be done is to identify relevant indicia. One relevant indicium that a tax is "on goods", and is therefore an excise, is that liability to pay the impost is triggered by the taking of some step in dealing with goods.[43] Another relevant indicium of a sufficient connection to goods is that the amount of the tax relates to the quantity or value of the relevant dealing in the goods (whether that be the manufacture, sale or use of the goods).[44] An indicium that points against a tax being an excise is that the tax has a much wider field of operation than just dealings in goods, because such a tax has a weaker connection to goods than one that falls solely or primarily upon dealings in goods.[45] However, care is required in applying that indicium, because the Court has accepted that taxing statutes can be given a differential operation, with the result that it is not the case that "unless a tax by an Act is in all the circumstances to which the Act is intended to apply a duty of excise, it cannot be a duty of excise in any of those circumstances".[46]

D TAXES ON THE USE OF GOODS ARE WITHIN SECTION 90

20. Victoria argues that the ZLEV Charge Act does not impose a "duty of excise" because, as a matter of principle, an inland tax on the consumption or use of goods falls outside the scope of s 90.[47] For the following reasons, that proposition should be rejected.

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42 *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 583 (Mason CJ, Brennan, Deane and McHugh JJ); *Ha* (1997) 189 CLR 465 at 498 (Brennan CJ, McHugh, Gummow and Kirby JJ), 514 (Dawson, Toohey and Gaudron JJ); *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 365 (Barwick CJ), 382 (Owen J); *Hematite Petroleum* (1983) 151 CLR 599 at 633 (Mason J), 658–659 (Brennan J), 666 (Deane J).

43 *Ha* (1997) 189 CLR 465 at 499 (Brennan CJ, McHugh, Gummow and Kirby JJ); *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 583, 590 (Mason CJ, Brennan, Deane and McHugh JJ).

44 *Peterswald* (1904) 1 CLR 497 at 509 (Griffith CJ); *Matthews* (1938) 60 CLR 263 at 304 (Dixon J); *Parton* (1949) 80 CLR 229 at 253 (Rich and Williams JJ), 259 (Dixon J); *Dennis Hotels* (1960) 104 CLR 529 at 556 (Fullagar J); *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 589 (Mason CJ, Brennan, Deane and McHugh JJ); *Ha* (1997) 189 CLR 465 at 503 (Brennan CJ, McHugh, Gummow and Kirby JJ).

45 *Browns Transport* (1958) 100 CLR 117 at 128-129 (the Court); *Hematite Petroleum* (1983) 151 CLR 599 at 634 (Mason J), 640 (Murphy J), 659 (Brennan J), 667 (Deane J).

46 *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1 at 15-16 (Barwick CJ); see also at 26 (Menzies J), 30-31 (Owen J), 40 (Walsh J); *Western Australia v Hamersley Iron Pty Ltd [No. 1]* (1969) 120 CLR 42 at 52, 56 (Barwick CJ), 68 (Windeyer J), 70-71 (Owen J); *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 71 (Stephen J), 78 (Mason J, Barwick CJ agreeing).

47 Amended Defence [41](b), [43](c) (**ASCB 26-27**).

21. *First*, as noted above, the majority in *Ha* held that an excise is in essence a tax "on some step taken in dealing with goods".[48] That conception of an excise is repeated throughout the judgment.[49] A tax upon the use of goods when they are in the hands of a consumer is as much a tax on "dealing with goods" as a tax on production, manufacturing, distribution or sale of goods. Indeed, given that the expression "duties of customs and of excise" exhausts the category of taxes on goods,[50] a tax on the use (including consumption) of goods logically must fall within s 90. Accordingly, while it was formally unnecessary for the majorities in *Ha* and *Capital Duplicators (No 2)* to decide whether the term "dut[y] … of excise" in s 90 includes such a tax,[51] the logic of the reasoning of the majority in both cases necessarily includes them. So much was recognised by the minority in *Ha.*[52]

22. *Secondly,* to conclude that taxes on the use or consumption of goods are not duties of excise would undermine the capacity of s 90 to achieve its purposes (see above at [11]). Such a tax has the potential to affect the level of demand for the goods in respect of which it is imposed in much the same way as a tax on the sale or distribution of goods.[53] Just as sales or distribution taxes have a "general tendency to be passed on to persons down the line to the consumer and will prejudice the demand for the goods burdened by the imposition of the tax",[54] a tax on the use or consumption of goods equally tends to increase the costs to the consumer of goods over their life cycle (which is apt to reduce the level of demand for, and the level of production of, those goods). For that reason, if s 90 were interpreted so as to permit States to impose taxes on the use or consumption of goods, the Commonwealth Parliament's real control over the taxation of commodities, and free trade throughout the Commonwealth, could well be "hampered or defeated by State action".[55] Consistently with that submission, once the purposes of s 90 are accepted as being those set out above,

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

49 *Ha* (1997) 189 CLR 465 at 493, 494, 495, 496, 497, 499, 502, 503 (Brennan CJ, McHugh, Gummow and Kirby JJ).

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

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

52 *Ha* (1997) 189 CLR 465 at 510 (Dawson, Toohey and Gaudron JJ); see also *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 602, 610 (Dawson J), 628 (Toohey and Gaudron JJ).

53 That is consistent with the orthodox position that the legal incidence of a tax is irrelevant to its economic incidence or effect: *Ha* (1997) 189 CLR 465 at 509 (Dawson, Toohey and Gaudron JJ); Landsburg, *Price Theory and Applications* (9th ed, 2014) at 20-22.

54 *Philip Morris* (1989) 167 CLR 399 at 436 (Mason CJ and Deane J); see also at 493 (McHugh J).

55 *Parton* (1949) 80 CLR 229 at 260 (Dixon J).

there is no logical reason to exclude such taxes from the reach of s 90.[56]

23. *Thirdly*, even if s 90 were thought to have only the narrower purpose of ensuring that the Commonwealth has control over tariff policy,[57] that purpose could still be undermined by taxes targeting use or consumption.[58] To take a simple example, in circumstances where product X is substitutable for product Y, a State could protect a local manufacturing industry for product X by imposing a significant tax on the use of product Y. Such a tax would reduce the demand for product Y relative to product X, and in doing so would undermine any Commonwealth policy for free trade in products of the relevant kind. Conversely, if the Commonwealth imposed a tariff on the importation of product Y to protect the manufacturers of product X, a State could undermine that tariff by imposing a tax on the use of product X. Those examples demonstrate the arbitrariness of drawing a line at the point when goods are received by the consumer. In truth, on every suggested purpose of s 90, it can achieve that purpose only if the Commonwealth has exclusive control of the taxation of goods at all stages of the life cycle of those goods.

24. *Fourthly*, as s 90 is a constitutional limitation on power, it should not be able to be "circumvented by mere drafting devices".[59] While to date consumption taxes have been a "phenomenon infrequently encountered",[60] modern technology means that there are now, and there may continue to develop, new ways to track the consumption of goods. In light of that development, to interpret s 90 as not including taxes on use or consumption would undermine the scope and purposes of s 90,[61] as it would facilitate the evasion of s 90 "by easy subterfuges" and "the adoption of unreal distinctions".[62]

25. *Fifthly*, to the extent that prior authority of the Court may suggest that consumption taxes fall outside s 90, that authority rests on an unsatisfactory footing. As it happens, the seminal

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56 *Ha* (1997) 189 CLR 465 at 510 (Dawson, Toohey and Gaudron JJ); *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 610 (Dawson J), 628 (Toohey and Gaudron JJ); *Philip Morris* (1989) 167 CLR 399 at 480 (Toohey and Gaudon JJ); *Dickenson's Arcade* (1974) 130 CLR 177 at 218 (Gibbs J).

57 *Ha* (1997) 189 CLR 465 at 506-507, 511, 514 (Dawson, Toohey and Gaudron JJ), cf 495 (Brennan CJ, McHugh, Gummow and Kirby JJ); *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 586-587 (Mason CJ, Brennan, Deane and McHugh JJ).

58 *Ha* (1997) 189 CLR 465 at 494-495 (Brennan CJ, McHugh, Gummow and Kirby JJ). See Rose, 'Excise' in Coper and Williams (Eds) *The Cauldron of Constitutional Change* (1997) at 41-43.

59 *Ha* (1997) 189 CLR 465 at 498 (Brennan CJ, McHugh, Gummow and Kirby JJ).

60 *Dickenson's Arcade* (1974) 130 CLR 177 at 239 (Mason J).

61 *Ha* (1997) 189 CLR 465 at 499 (Brennan CJ, McHugh, Gummow and Kirby JJ); *Betfair* (2008) 234 CLR 418 at [12] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

62 *Matthews* (1938) 60 CLR 263 at 304 (Dixon J), approved in *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 586 (Mason CJ, Brennan, Deane and McHugh JJ).

definition of an excise propounded by Dixon J in *Matthews* included consumption taxes, his Honour stating that an excise "must bear a close relation to the production or manufacture, the sale or the consumption of goods".[63] Latham CJ relevantly agreed that there was nothing in principle to distinguish taxes on consumption from taxes imposed on production, manufacture or sale.[64] Those views were correct.

26. The origin of the contrary view is found in *Parton*, where Dixon J said that it "probably is essential" to vary his formulation in *Matthews* by adding that an excise must be a "tax upon goods before they reach the consumer".[65] His Honour considered that variation probably to be necessary[66] because of the Privy Council's decision in *Atlantic Smoke Shops Ltd v Conlon*.[67] That decision concerned the *British North America Act 1867* (Imp), which relevantly vested in the Canadian Parliament the power to make laws with respect to "customs and excise" (s 122), and an exclusive power in provincial parliaments to impose "direct taxation" (s 92(2)). In this context, a "direct tax" is a tax which is imposed on the person who will bear the ultimate burden of the tax.[68] The Privy Council held that a 10 per cent tax on the retail price of tobacco, which was imposed on the consumer at the point of sale if the tobacco was purchased "for his own consumption", was a "direct tax" within s 92(2) and therefore was not an "excise" within s 122.[69] Properly characterised, that was a sales tax, not a tax on consumption. Further, the decision reflected the dichotomy in the *British North America Act* between a "direct tax" and an "excise".[70] That dichotomy is, of course, entirely absent from the Australian Constitution. On that basis, several Justices have expressed regret that the distinction "should ever have been thought to be relevant or useful in relation to s 90",[71] and some have doubted whether *Atlantic Smoke Shops* actually

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63 *Matthews* (1938) 60 CLR 263 at 304 (Dixon J) (emphasis added).

64 *Matthews* (1938) 60 CLR 263 at 277 (Latham CJ). Dixon J at 289-290 also emphasised that it was not essential that an excise be an "indirect" tax. See also *Commonwealth Oil Refineries Ltd v South Australia* (1926) 38 CLR 408 at 435 (Higgins J), 437 (Rich J).

65 *Parton* (1949) 80 CLR 229 at 260 (Dixon J).

66 *Parton* (1949) 80 CLR 229 at 261 (Dixon J).

67 [1943] AC 550 (***Atlantic Smoke Shops***).

68 The dichotomy between "direct taxes" and "indirect taxes" is based on the writings of John Stuart Mill around the time of the passage of the *British North America Act 1867* (Imp): *Atlantic Smoke Shops* [1943] AC 550 at 563 (Viscount Simon LC).

69 *Atlantic Smoke Shops* [1943] AC 550 at 563-566 (Viscount Simon LC).

70 *Atlantic Smoke Shops* [1943] AC 550 at 560-561 (Viscount Simon LC).

71 *Dickenson's Arcade* (1974) 130 CLR 177 at 222-223 (Gibbs J); also 185-186 (Barwick CJ), 202 (McTiernan J), 238-239 (Mason J); see also *Matthews* (1938) 60 CLR 263 at 285 (Starke J); *Dennis Hotels* (1960) 104 CLR 529 at 553-554 (Fullagar J), 593-594 (Windeyer J).

required any modification of *Matthews*.[72] Furthermore, the distinction between indirect and direct taxes "has been long since discredited as an economically justifiable basis for distinguishing between types of taxes"[73] because market forces, rather than the legal incidences of a tax, determine the extent to which its economic burden will be passed on.[74] For that reason, the distinction has no relevance in the interpretation of s 90.[75]

27. Nevertheless, Dixon J's tentative qualification in *Parton* of his earlier view in *Matthews* – being a qualification proffered in a case that did not involve a tax on use or consumption, and without any analysis of the differences between the Canadian and Australian Constitutions that made *Atlantic Smoke Shops* distinguishable – was accepted without discussion in *Dennis Hotels*[76] and in *Bolton*,[77] and was thereafter applied until *Capital Duplicators (No 2)* and *Ha*.[78] The statements in the authorities to the effect that s 90 applies only to steps prior to goods reaching their ultimate consumer depend entirely upon that shaky foundation.

28. *Dickenson's Arcade* is the only High Court decision in which all Justices considered the validity of a tax on the consumption of goods. The case was concerned, in part, with Part II of the *Tobacco Act 1973* (Tas), which imposed a tax on the consumption of tobacco. Regulations were made effectively requiring retailers to offer to collect the tax from consumers before consumption, and these regulations were also challenged on the ground that they were contrary to s 90 (that challenge being upheld by a statutory majority[79]). For present purposes, however, the relevant point is that four Justices (Menzies, Gibbs,

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72 See, eg, *Dickenson's Arcade* (1974) 130 CLR 177 at 185-186 (Barwick CJ), 202 (McTiernan J).

73 *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 602 (Dawson J); see also *Dennis Hotels* (1960) 104 CLR 529 at 553 (Fullagar J), 590 (Menzies J), 593-594 (Windeyer J); *Philip Morris* (1989) 167 CLR 399 at 429, 435 (Mason CJ and Deane J), 470-471 (Dawson J).

74 *Ha* (1997) 189 CLR 465 at 509 (Dawson, Toohey and Gaudron JJ); *Dennis Hotels* (1960) 104 CLR 529 at 593-594 (Windeyer J).

75 *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 602 (Dawson J); *Dennis Hotels* (1960) 104 CLR 529 at 553 (Fullagar J), 590 (Menzies J), 593-594 (Windeyer J); *Philip Morris* (1989) 167 CLR 399 at 429, 435 (Mason CJ and Deane J), 470-471 (Dawson J).

76 (1960) 104 CLR 529 at 540-541 (Dixon CJ), 549 (McTiernan J), 559 (Kitto J), 573 (Taylor J), 589 (Menzies J), 601 (Windeyer J).

77 (1963) 110 CLR 264 at 271 (the Court).

78 See, eg, *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 364 (Barwick CJ), 373 (Kitto J, with whom Taylor J agreed), 377 (Menzies J); *Western Australia v Hamersley Iron Pty Ltd [No. 1]* (1969) 120 CLR 42 at 62 (Kitto J) and 64-65 (Menzies J); *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1 at 22 (Kitto J), 25 (Menzies J), 35-36 (Walsh J).

79 Barwick CJ held that the tax was imposed "upon the movement of the tobacco into consumption" as distinct from a tax on consumption (at 193-194). Mason J held the tax imposed by Pt 2 was not an excise, but that the regulations were invalid because they had the effect of converting it into an excise (at 243). The last member of the statutory majority, McTiernan J, held that consumption taxes were excises (at 204).

Stephen and Mason JJ) upheld Tasmania's demurrer insofar as it related to Pt II of the Tobacco Act. They did so because prior decisions of the Court concerning the meaning of "excise", being decisions made under the influence of *Atlantic Smoke Shops* and not actually concerning consumption taxes, drew a line at the point when goods reached the consumer.[80] Nevertheless, both Mason J[81] and Gibbs J[82] expressly doubted that the exclusion of consumption taxes from s 90 was logical in view of its purposes. Further, Gibbs J accepted that, if a tax on the sale of goods is an excise, it is "difficult to see why a tax on their consumption should not be similarly regarded", and pointed out that the holding in *Parton* "could have been regarded as leading logically to the conclusion that a tax on consumption is an excise" had it not been qualified in reliance on "doubtful" authority.[83] In dissent as to the validity of Pt II, Barwick CJ likewise expressed the view that there was "no logical reason" for excluding consumption taxes from the reach of s 90,[84] while McTiernan J alone embraced the logic of that conclusion and actually held that a consumption tax was a duty of excise.[85]

29. The result was that, while four Justices upheld the validity of Pt II, for two members of that majority that occurred only because of precedents that their Honours doubted, but did not overrule. In so far as their own views were concerned, four of the six Justices who sat in *Dickenson's Arcade* recognised that the logic of the Court's authorities on s 90 meant that a consumption tax was an excise.

30. In those circumstances, while leave may be required to re-open *Dickenson's Arcade*, that leave should readily be granted. For two reasons, its authority is weak. First, as the reasoning in *Dickenson's Arcade* summarised above recognised, the exclusion of consumption taxes from the reach of s 90 was illogical, and resulted from applying precedents that gave undue deference to *Atlantic Smoke Shops*. Secondly, all of the majority judgments turned upon the criterion of liability test.[86] That test having been

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80 *Dickenson's Arcade* (1974) 130 CLR 177 at 209 (Menzies J), 230-231 (Stephen J).

81 *Dickenson's Arcade* (1974) 130 CLR 177 at 238-239 (Mason J).

82 *Dickenson's Arcade* (1974) 130 CLR 177 at 219 (Gibbs J), stating that the "power of the Commonwealth Parliament to tax commodities would be incomplete, and its fiscal policies possibly liable to some frustration, if the power did not extend to taxes on consumption".

83 *Dickenson's Arcade* (1974) 130 CLR 177 at 218 (Gibbs J).

84 *Dickenson's Arcade* (1974) 130 CLR 177 at 185 (Barwick CJ).

85 *Dickenson's Arcade* (1974) 130 CLR 177 at 204 (McTiernan J)

86 See *Bolton v Madsen* (1963) 110 CLR 264 at 271 (the Court), cited by all four Justices as part of their reasoning on this issue: *Dickenson's Arcade* (1974) 130 CLR 177 at 209 (Menzies J), 221 (Gibbs J), 231 (Stephen J), 239 (Mason J).

discarded as an exclusive determinant of an excise in *Ha*, this Court has already discarded the pillar upon which *Dickenson's Arcade* rested. Indeed, it is difficult to see how the Court's rejection of the criterion of liability test did not necessarily entail a repudiation of the categorical exclusion of consumption taxes from the reach of s 90 that was upheld in that case. Consumption taxes – which are defined in this context by the fact that their "criterion of liability" is the act of consumption[87] – could only be categorically excluded if the criterion of liability test remains determinative. Those two reasons likely explain why the majority in *Ha* expressly left open "whether a tax on the consumption of goods would be classified as a duty of excise",[88] rather than treating that question as having been answered by *Dickenson's Arcade*.

31. In addition to the above, the Commonwealth adopts the plaintiffs' submissions[89] in relation to the application of the four factors approved in *John v Federal Commissioner of Taxation*[90] to the re-opening of *Dickenson's Arcade*.

E *HA* AND *CAPITAL DUPLICATORS (NO 2)* SHOULD NOT BE RE-OPENED

32. In the alternative to its argument that s 90 does not include taxes on the use or consumption of goods, Victoria contends that the ZLEV Charge Act falls outside s 90 because a "duty of excise", properly construed, captures only the class of taxes that fall upon "locally produced goods" and discriminate against those goods in favour of "imported goods" (those not being features of the ZLEV charge).[91] "Locally produced" appears to mean produced in Australia.[92]

33. In order to advance this submission Victoria requires leave to re-open *Capital Duplicators (No 2)* and *Ha*, in which this Court rejected materially the same argument. Applying the *John* factors,[93] this is a clear case where leave to re-open should be refused (there being no analogy to the position with *Dickenson's Arcade*, which involves re-opening a point that the Court has itself doubted, but that it has not since revisited).

34. The first *John* factor – whether the challenged decision rests on a principle carefully

87 *Dickenson's Arcade* (1974) 130 CLR 177 at 187 (Barwick CJ).
88 *Ha* (1997) 189 CLR 465 at 499-500 (Brennan CJ, McHugh, Gummow and Kirby JJ);.
89 Plaintiff's submissions dated 19 September 2022 at [39]-[43].
90 (1989) 166 CLR 417 (***John***) at 438-439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).
91 Amended Defence at [41](c), [43](d).
92 ASC [56]-[58] (**ASCB 44**).
93 (1989) 166 CLR 417 at 438-439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

worked out in a significant succession of cases – could not point more strongly against re-opening. The weight of authority against Victoria's argument was thought in *Ha* to be "overwhelming".[94] As the majority explained in *Capital Duplicators (No 2)*, in the cases "since *Parton*, there has been little support for the view that an excise is confined to a tax on, or by reference to, the local production or manufacture of goods".[95] Further, the now-settled view that an "excise" within s 90 is not limited to a tax exclusively directed towards locally produced goods emerged in a succession of cases decided over many decades. It was accepted by Rich and Williams JJ in the majority in *Parton*.[96] It is consistent with the broad purpose of s 90 identified by Dixon J, who was the other majority Justice in *Parton*.[97] Subsequently, in *Dennis Hotels*, Dixon CJ (in a passage endorsed in *Ha*[98]) said that it "would be ridiculous to say that a State inland tax upon goods of a description manufactured here as well as imported here was not met by s 90, excluding as that section does both duties of customs and duties of excise, because the duty was not confined to goods imported and so was not a duty of customs and was not confined to goods manufactured at home and so was not a duty of excise".[99] That observation highlights the extent to which acceptance of Victoria's argument would allow s 90 to be easily sidestepped, defeating its constitutional purpose.[100]

35. The case for re-opening is particularly weak because the narrow construction of s 90 that Victoria seeks to advance is the same as that advanced and rejected in *Capital Duplicators (No 2)* and *Ha.*[101] In both of those cases, leave was sought to re-open existing s 90 authorities including *Parton*. In both cases, as part of the majority's analysis, it considered whether an "excise" means only taxes attaching to locally produced or manufactured goods, or discriminating against such goods, and concluded that it did not (in *Ha* after granting leave to re-open *Parton*, before affirming that decision[102]). There is no

94 *Ha* (1997) 189 CLR 465 at 488-489 (Brennan CJ, McHugh, Gummow and Kirby JJ).

95 *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 587 (Mason CJ, Brennan, Deane and McHugh JJ).

96 (1949) 80 CLR 229 at 252 (Rich and Williams JJ), approving *John Fairfax & Sons Ltd v New South Wales* (1927) 39 CLR 139 at 146 (Rich J, stating that an excise duty is "an inland imposition" rather than only "duties upon or in respect of goods of local production").

97 (1949) 80 CLR 229 at 260-261 (Dixon J). See [11](b) above.

98 *Ha* (1997) 189 CLR 465 at 488 (Brennan CJ, McHugh, Gummow and Kirby JJ).

99 *Dennis Hotels* (1960) 104 CLR 529 at 540 (Dixon CJ).

100 See generally Rose, 'Excise' in Coper and Williams (Eds) *The Cauldron of Constitutional Change* (1997).

101 *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 567-568, 570-571, 573-574, 576 (in argument); 584-587, 589-591 (Mason CJ, Brennan, Deane and McHugh JJ); *Ha* (1997) 189 CLR 465 at 473-474, 476-478, 480 (in argument); 487-499 (Brennan CJ, McHugh, Gummow and Kirby JJ).

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

justification for re-opening those two decisions, 25 years later, to allow the same arguments to be re-agitated.

36. The second *John* factor – whether there were differences in the reasoning of the Justices constituting the majority – likewise points strongly against re-opening, as there were single majority judgments in both *Capital Duplicators (No 2)* and *Ha*. Indeed, far from there being differences in the majority reasoning, the majority in each case drew together unsettled elements of the jurisprudence and produced a simple answer to the meaning of "excise" grounded in the purposive analysis summarised at [11] above. To adapt Sir Anthony Mason's statement concerning *Cole v Whitfield* (1988) 165 CLR 360, the judgments in *Capital Duplicators (No 2)* and *Ha* thereby "brought an element of certainty and stability to a question which was a source of confusion over a long period of time."[103] Judgments of that kind, which have "helped to shape the life of the nation", should not be re-opened merely to re-agitate arguments that did not prevail in earlier decisions.[104]

37. As to the third *John* factor, it cannot be said that *Capital Duplicators (No 2)* and *Ha* have "led to considerable inconvenience". Victoria's argument to the contrary is not established by the fact that the States and Territories ceased to impose significant franchise taxes following the decision in *Ha*.[105] Properly understood, any inconvenience of that kind was already a necessary result of earlier decisions. The States and Territories had been proceeding on the assumption that a "tax imposed in accordance with the *Dennis Hotels* formula was necessarily cloaked with immunity from an attack under s 90",[106] but that view had already been "rejected in *Philip Morris* by six members of the Court".[107]

38. Moreover, any inconvenience was immediately ameliorated by the Commonwealth's agreement to negotiate[108] and then its enactment[109] of a "safety net arrangement" whereby the Commonwealth imposed taxes on petroleum products, tobacco and liquor and passed the revenue back to the States and Territories. The States and Territories agreed that that

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103 Mason, 'Foreword' in Chordia, *Proportionality in Australian Constitutional Law* (2020) v at vi.

104 *North Australian Aboriginal Justice Agency v Northern Territory* (2015) 256 CLR 569 at [162] (Keane J).

105 ASC [60], [62] (**ASCB 44, 45**).

106 *Ha* (1997) 189 CLR 465 at 503 (Brennan CJ, McHugh, Gummow and Kirby JJ).

107 *Ha* (1997) 189 CLR 465 at 503 (Brennan CJ, McHugh, Gummow and Kirby JJ).

108 ASC [61] (**ASCB 45**).

109 ASC [64] (**ASCB 46**).

arrangement would cease on 1 July 2000, upon the commencement of the GST.[110] It can be inferred from that agreement that the States and Territories accepted that the GST compensated them for the revenue lost following *Ha.* That is unsurprising, for the GST was designed to provide a "more robust tax base" for the States and Territories and thereby to improve their financial position.[111]

39. Nor can Victoria establish "considerable inconvenience" from the statistical ratios relating to Commonwealth payments at **ASCB 285-292**. If statistical information is to be used at all, the most relevant column to consider from 2000-2001 onwards is column H, which is a ratio of Commonwealth payments to State revenues in which GST is deemed to be part of State revenues. It is appropriate to treat GST revenue in that way because it is distributed in full to States and Territories (less administrative costs) and the revenue raised is therefore "freely available for use by [them] for any purpose".[112]

40. Reliance on the statistical information in the Amended Special Case also fails to grapple with the fact that some degree of vertical fiscal imbalance (**VFI**) is a structural feature of the Constitution. It results from a combination of: (a) the very inclusion of s 90 in the Constitution in circumstances where the majority of the former colonies' revenues came from customs and excise duties;[113] (b) the Constitution's pairing of s 90 with the moderating influence of s 87, which was evidently only a transitional response to VFI; (c) the Court's decision in the *Surplus Revenue Case*[114] that money appropriated by the Commonwealth out of the Consolidated Revenue Fund did not form part of the "surplus revenue" distributable among the States under s 94 of the Constitution; (d) the Court's decision upholding the validity of conditional funding grants under s 96 in *Victoria v Commonwealth*;[115] and (e) the Commonwealth's long-term imposition of uniform income tax schemes in practice displacing State regimes as a consequence of the decisions in the *First Uniform Tax Case*[116] and the *Second Uniform Tax Case*.[117] Against that background,

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110 ASC [68] (**ASCB 47**). That agreement is recorded in the Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations 1999 (**1999 Intergovernmental Agreement**), cl 5(iii) (**ASCB 216**).

111 1999 Intergovernmental Agreement, cl 2 (**ASCB 216**).

112 *Federal Financial Relations Act 2009* (Cth) ss 3(a), 5; 1999 Intergovernmental Agreement, cl 7 (**ASCB 217**); Intergovernmental Agreement on Federal Financial Relations 2008, cl 25 (**ASCB 241**).

113 See *Ha* (1997) 189 CLR 465 at 497, 502 (Brennan CJ, McHugh, Gummow and Kirby JJ).

114 *New South Wales v Commonwealth* (1908) 7 CLR 179.

115 (1926) 38 CLR 399.

116 *South Australia v Commonwealth* (1942) 65 CLR 373.

117 *Victoria v Commonwealth* (1957) 99 CLR 575.

Capital Duplicators (No 2) and *Ha* cannot be isolated as a significant cause of any financial dependence of the States and Territories upon the Commonwealth.

41. The final *John* factor – that the decision sought to be overruled has not been "independently acted on in a manner which militate[s] against reconsideration" – likewise points against re-opening *Ha*. Seven days after the decision was handed down in *Ha*, the Commonwealth Cabinet agreed to accelerate a tax reform process, in part because of that decision.[118] The taxation task force's review led to the 1998 White Paper[119] describing the national taxation reforms that became the GST settlement.[120] The Commonwealth's proposed tax reform plan took account of the States' loss of business franchise revenue as one of numerous matters demonstrating the need for reform, alongside the "distorting", "highly inequitable" and "inefficient" characteristics of many existing taxes.[121] To re-open *Capital Duplicators (No 2)* and *Ha* would unpick one of the strands forming part of the overall GST settlement that was agreed over 20 years ago.

F THE ZLEV CHARGE ACT IMPOSES AN EXCISE WITHIN SECTION 90

42. Applying the above principles, for the following reasons the ZLEV charge is a "duty of excise" within s 90 of the Constitution, and is therefore invalid.

43. The ZLEV Charge Act imposes an inland tax, as Victoria concedes.[122] The charge is a "compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered".[123] There is no suggestion that the ZLEV charge is a fee for the provision of "specified roads" or that the rate of the ZLEV charge bears any discernible relationship to the cost of their construction or maintenance.[124] Nor could there be, as the definition of "specified roads" includes roads outside Victoria,[125] and roads for which the authority responsible is not a "state road authority".[126] While the

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118 ASC [65] (**ASCB 46**).

119 GST policy document "Tax Reform: Not a New Tax, a New Tax System" (**GST White Paper**) at 73-74 (**ASCB 200-201**)

120 ASC [66] (**ASCB 46-47**).

121 GST White Paper at 24-25, 73-74, 77 (**ASCB 188-189, 200-201, 204**).

122 Amended Defence, [43] (**ASCB 27**).

123 *Matthews* (1938) 60 CLR 263 at 276 (Latham CJ); *Browns Transport* (1958) 100 CLR 117 at 129 (the Court); *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 467 (the Court).

124 *Harper v Victoria* (1966) 114 CLR 361; *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 470 (the Court).

125 ZLEV Charge Act, s 6.

126 "Specified roads" include roads for which the "responsible road authority" with operational functions under s 37 of the *Road Management Act 2004* (Vic) is the municipal council, the Extension corporation, the Link

States and Territories are free to introduce those kinds of genuine road user fees, that is not what the ZLEV charge does.

44. The central issue is whether the ZLEV charge is a tax on goods, namely ZLEVs. Victoria seemingly seeks to characterise the ZLEV charge as a tax, not on the use of ZLEVs, but on the "activity of using ZLEVs only on specified roads".[127] This argument draws an unreal distinction[128] between the use of ZLEVs generally and their use on specified roads which, given the Court's emphasis on substance over form (see [12] above), must be rejected. Just as a levy imposed on land planted with chicory,[129] a fee imposed on the operation of a pipeline,[130] and a fee for a licence to operate a business[131] may be, in substance, a tax on goods, so too may a tax on the use of goods (ZLEVs) on specified roads, if its legal and practical operation shows a sufficient connection to those goods.

45. The *first* indicator that the ZLEV Charge Act imposes a tax on ZLEVs is that liability is attracted by reference to, or by reason of, a step taken in dealing with goods,[132] namely, a registered operator's use of a ZLEV. Section 7(1) of the ZLEV Charge Act imposes the ZLEV charge on the "use of the ZLEV on specified roads". Victoria accepts[133] that the definition of "specified roads" covers all roads (except certain private roads and agricultural lands) within and outside Victoria.[134] In substance, the charge is therefore imposed on the vast majority of uses of a ZLEV. There is no realistic possibility that a registered operator driving on public roads would be able to use a ZLEV without incurring the ZLEV charge. That charge is therefore readily distinguishable from toll charges,[135] which apply to the use of particular roads (and which can be avoided entirely while still using a vehicle).

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corporation, the EastLink Corporation, the Peninsula Link Freeway Corporation, the West Gate Tunnel Corporation or the North East Link State Tolling Corporation.

127 Amended Defence, [43(b)] (**ASCB 27**).

128 *Matthews* (1938) 60 CLR 263 at 304 (Dixon J), approved in *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 586 (Mason CJ, Brennan, Deane and McHugh JJ); see also *Ha* (1997) 189 CLR 465 at 498 (Brennan CJ, McHugh, Gummow and Kirby JJ).

129 *Matthews* (1938) 60 CLR 263.

130 *Hematite Petroleum* (1983) 151 CLR 599.

131 *Ha* (1997) 189 CLR 465; *Capital Duplicators (No 2)* (1993) 178 CLR 561; *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368.

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

133 ASC [52]-[55] (**ASCB 42-43**).

134 ZLEV Charge Act, s 6(2) makes clear that it applies to the use of ZLEVs outside Victoria.

135 Cf *Eastlink Project Act 2004* (Vic), s 197(1); *Melbourne City Link Act 1995* (Vic), s 72(1).

46. The *second* indicator is that the amount of the tax that is payable by the owner of a ZLEV is quantified by reference to the amount that a ZLEV is used.[136] Where the amount of a tax relates directly to the quantity or value of the production, manufacture, distribution or sale of goods, that is a strong indicator (albeit not a necessary one) that the tax is "on" goods.[137] By parity of reasoning, where the step that attracts a tax is the use of goods, it is a strong indicator that the tax is imposed "on" those goods if the amount of the tax is calculated by reference to the amount the goods are used.

47. In this case there is a direct and proportionate relationship between a consumer's use of a ZLEV (measured in kilometres travelled) and the amount of the ZLEV charge, which is calculated at a fixed rate per "kilometre travelled on specified roads" (s 8(1)). The registered operator makes a declaration of the odometer reading and subtracts travel not on specified roads (ss 10-11). The Secretary then determines the charge amount by reference to the kilometres driven on specified roads (s 15). The basis of the charge therefore "has a natural, although not a necessary, relation"[138] to the quantity of the use of the ZLEV. It is an "impost computed quantitatively"[139] on the use of ZLEVs.

48. The *third* indicator that the ZLEV charge is imposed on goods is that its legal or practical operation falls selectively on the use of ZLEVs.[140] In particular, while the ZLEV charge applies to almost all of the possible uses of a ZLEV, it is not imposed on any other vehicles that drive on specified roads.[141] The selectivity is starkly demonstrated in numerical terms. There are 14,907 ZLEVs registered in Victoria,[142] almost all of which (it can be inferred) will be subject to the ZLEV charge. However, no charge at all will be imposed for the use of specified roads by the over 6 million registered vehicles that are not ZLEVs.[143] That illustrates that the ZLEV charge is imposed as a tax on the use of ZLEVs, and not as a fee

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136 *Matthews* (1938) 60 CLR 263 at 304 (Dixon J); *Parton* (1949) 80 CLR 229 at 253 (Rich and Williams JJ), 259 (Dixon J); *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 589 (Mason CJ, Brennan, Deane and McHugh JJ); *Ha* (1997) 189 CLR 465 at 503 (Brennan CJ, McHugh, Gummow and Kirby JJ).

137 *Peterswald* (1904) 1 CLR 497 at 509 (Griffith CJ); *Matthews* (1938) 60 CLR 263 at 304 (Dixon J); *Parton* at 253 (Rich and Williams JJ), 259 (Dixon J); *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 589, 597 (Mason CJ, Brennan, Deane and McHugh JJ).

138 *Matthews* (1938) 60 CLR 263 at 303 (Dixon J).

139 *Matthews* (1938) 60 CLR 263 at 303 (Dixon J).

140 *Hematite Petroleum* (1983) 151 CLR 599 at 634 (Mason J), 640 (Murphy J), 659 (Brennan J), 667 (Deane J); see also 647-648 (Wilson J, dissenting); *Browns Transport* (1958) 100 CLR 117 (the Court) at 128-129.

141 ZLEV Charge Act, s 7(1).

142 ASC [45] (**ASCB 41**).

143 ASC [44] (**ASCB 41**).

for the use of roads.

49. The final indicator is that the ZLEV charge cannot be characterised as a fee for an element of a scheme regulating ZLEVs.[144] It is readily distinguishable from, for example, the fee paid for car registration, which in Victoria forms part of a comprehensive regulatory scheme designed in part: (i) to ensure that "the design, construction and equipment of motor vehicles and trailers … meet safety and environmental standards"; (ii) to regulate the use of vehicles and trailers "for reasons of safety, protection of the environment and law enforcement"; (iii) to provide a method of establishing the identity of vehicles on highways; and (iv) to ensure that only those who have paid fees and charges "designed to recover the costs attributable to vehicle use of road provision and road safety administration" are able to use the Victorian road network.[145] The ZLEV Charge Act is not part of any such scheme. It is a tax on goods designed to raise revenue. For that reason, it is invalid under s 90 of the Constitution.

PART V — ESTIMATE OF TIME

50. It is estimated that up to 2.5 hours will be required for the presentation of the Commonwealth's oral argument.

Dated: 4 October 2022

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144 Cf *Ha* (1997) 189 CLR 465 at 503 (Brennan CJ, McHugh, Gummow and Kirby JJ).

145 *Road Safety Act 1986* (Vic) s 5.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **CHRISTOPHER VANDERSTOCK**
First Plaintiff
KATHLEEN DAVIES
Second Plaintiff

AND: **THE STATE OF VICTORIA**
Defendant

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ANNEXURE TO ATTORNEY-GENERAL OF THE COMMONWEALTH'S SUBMISSIONS

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

No	Description	Version	Provision(s)
1.	Commonwealth Constitution	Current	ss 51(ii), 52, 87, 90, 92
2.	*Eastlink Project Act 2004* (Vic)	Current	s 197(1)
3.	*Federal Financial Relations Act 2009* (Cth)	Current	ss 3(a), 5
4.	*Melbourne City Link Act 1995* (Vic)	Current	s 72(1).
5.	*Road Management Act 2004* (Vic)	Current	ss 3, 37
6.	*Road Safety Act 1986* (Vic)	Current	s 5
7.	*Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic)	Current	Whole Act

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