HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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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

10

SUBMISSIONS OF THE PLAINTIFFS

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PART I: CERTIFICATION

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

PART II: ISSUES

2 Section 7(1) of the *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic) (**Charge Act**) requires the registered operator of an electric, plug-in hybrid electric or hydrogen vehicle (a "**ZLEV**")[1] to "pay a charge for the use of the ZLEV on specified roads". That charge is defined by the Act as the "**ZLEV charge**".[2]

3 The Plaintiffs' case is that s 7(1) of the Charge Act is invalid on the ground that it imposes a "duty of excise" within the meaning of s 90 of the Constitution and is therefore beyond the power of the Victorian Parliament. That case is founded on the propositions that the ZLEV charge is a tax on the "consumption" of goods (namely, ZLEVs), and that such a tax is a duty of excise. The proceeding raises two questions for the Court's determination: (i) is an inland tax imposed on the consumption of goods a duty of excise within the meaning of s 90 of the Constitution; and (ii) is the ZLEV charge such a tax?

4 The Plaintiffs submit that both questions should be answered "yes".

PART III: SECTION 78B NOTICE

5 The Plaintiffs have given notice pursuant to s 78B of the *Judiciary Act 1903* (Cth).[3]

PART IV: RELEVANT FACTS

6 Upon the commencement of the Charge Act on 1 July 2021,[4] the First Plaintiff was the "registered operator", within the meaning of the *Road Safety Act 1986* (Vic), of an "electric vehicle" and the Second Plaintiff was the registered operator of a "plug-in hybrid electric vehicle".[5] By s 10(1)(b) of the Charge Act, each Plaintiff was obliged to lodge an "initial declaration" within 14 days of 1 July 2021. That declaration was required to set out the odometer reading of the ZLEV: s 10(2)(a).[6] Each Plaintiff complied with the stated obligation to lodge an "initial declaration".[7]

7 Section 11(1)(b) of the Charge Act required each Plaintiff to lodge a subsequent declaration within 14 days of the last day of the relevant registration period. That declaration was

1 Charge Act, s 3 (paras (a)-(c) of the definition of "ZLEV").
2 Charge Act, s 3.
3 **ASCB 18**.
4 Charge Act, s 2.
5 **ASCB 37 [5]-[6], 39 [22]-[23]**.
6 As well as any other information required by the Secretary: s 10(2)(c).
7 **ASCB 37 [8]-[9]**, **39 [24]-[25]**.

required to set out the odometer reading of the ZLEV as at the time the declaration was lodged and set out the distance, if any, travelled by the ZLEV since the previous declaration that was not on specified roads: s 11(3)(a)-(c).[8] Each Plaintiff complied with the stated obligation.[9] The Secretary then issued to each Plaintiff, under s 18 of the Charge Act, an invoice for payment of the ZLEV charge, which, under s 19(1), each Plaintiff was obliged to pay.[10] Each Plaintiff did so.[11] The Second Plaintiff has followed the same process on a second occasion.[12]

PART V: ARGUMENT

A INTRODUCTION

8 Since Federation, three interrelated issues concerning the operation of s 90 of the Constitution have been the subject of extensive consideration by this Court: (i) the meaning of the expression "duties … of excise"; (ii) the purpose of the section; and (iii) whether the character of a particular charge is to be determined only by reference to the statutory "criterion of liability", or also by reference to the practical operation of the law.[13]

9 Shortly after Federation, in *Peterswald v Bartley*,[14] the Court gave an initial answer to the first issue. The Court said that, for the purpose of s 90, a duty of excise was "a duty analogous to a customs duty imposed upon goods either in relation to quantity or value when produced or manufactured, and not in the sense of a direct tax or personal tax".[15] That initial answer to the first issue has been "expanded, or perhaps eroded, by later decisions".[16]

10 In 1938, in *Matthews v Chicory Marketing Board (Vic)*, the Court invalidated a levy for infringing s 90, notwithstanding that it was not in relation to the quantity or value of the good produced.[17] In a judgment that is foundational to the modern understanding of s 90, Dixon J said that a "duty of excise" was simply a tax levied "upon goods" and that a tax would have that character if it bore a "close relation to the production or manufacture, the

8 As well as any other information required by the Secretary: s 11(3)(d).
9 **ASCB 38 [11]-[12], 40 [27]-[28]**.
10 **ASCB 38 [13], 40 [29]**.
11 **ASCB 38 [15]-[16], 40 [31]-[32]**.
12 **ASCB 40 [33]-[37]**.
13 See *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 615 (Gibbs CJ).
14 (1904) 1 CLR 497.
15 *Peterswald* (1904) 1 CLR 497 at 509 (Griffiths CJ for the Court).
16 *Dickenson's Arcade* (1974) 130 CLR 177 at 218 (Gibbs J).
17 (1938) 60 CLR 263 at 281 (Rich J), 286 (Starke J), 303-304 (Dixon J).

sale or the consumption of goods and must be of such a nature as to affect them as the subject of manufacture or production or as articles of commerce".[18]

11 In 1949, a majority of the Court in *Parton v Milk Board (Vic)*[19] built on the reasoning of Dixon J in *Matthews*, and held that a levy calculated by reference to the quantity of goods sold or distributed was within the scope of s 90. Rich and Williams JJ expressly applied Dixon J's statement of principle from *Matthews* (being that set out in the paragraph immediately above).[20] So too did Dixon J, although his Honour modified his statement in *Matthews* to exclude taxes on consumption,[21] a step discussed in paragraphs 31 to 35 below. Further, and critically, Dixon J articulated the purpose of s 90 (the second issue):[22]

> In making the power of the Parliament of the Commonwealth to impose duties of customs and of excise exclusive it may be assumed that it was intended to give the Parliament a real control of the taxation of commodities and to ensure that the execution of whatever policy it adopted should not be hampered or defeated by State action.

12 In 1956, the Court in *Bolton v Madsen* reached a unanimous position on the first issue.[23] Consistent with Dixon J's statement in *Matthews*, as modified in *Parton*, a duty of excise was held to be any tax "directly related to goods imposed at some step in their production or distribution before they reach the hands of consumer".[24] The Court also held that the character of the charge depended only on the criterion of liability (the third issue).[25]

13 Over the following decades, disputes arose in relation to all three issues.[26] Those disputes were resolved by Mason CJ, Brennan, Deane and McHugh JJ in *Capital Duplicators v Australian Capital Territory* (***Capital Duplicators [No 2]***).[27]

13.1 As to the **first issue**, their Honours held that the expression "duties of customs and of excise" in s 90 must be construed as "exhausting the categories of taxes on goods".[28] That left the further question of whether a "tax on goods should be classified as a duty of customs to the extent to which it applies to imported goods and

[18] (1938) 60 CLR 263 at 304 (our emphasis); see also at 300 ("in respect of commodities"), 302 ("on or connected with commodities").
[19] (1949) 80 CLR 229.
[20] *Parton* (1949) 80 CLR 229 at 252-253 (Rich and Williams JJ).
[21] *Parton* (1949) 80 CLR 229 at 261 (Dixon J).
[22] (1949) 80 CLR 229 at 260.
[23] (1963) 110 CLR 264.
[24] (1963) 110 CLR 264 at 271 (the Court).
[25] *Bolton* (1963) 110 CLR 264 at 271 (the Court).
[26] See generally Hanks, "Section 90 of the Commonwealth Constitution: Fiscal Federalism or Economic Unity?" (1986) *Adelaide Law Review* 365 (**Hanks**).
[27] (1993) 178 CLR 561.
[28] *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 590.

a duty of excise to the extent to which it applies to goods of local production or manufacture".[29] In answering that question, and consistent with "the very substantial weight of judicial opinion since *Parton*",[30] their Honours said that "the preferable view is to regard the distinction between duties of customs and duties of excise as dependent on the step which attracts the tax: importation or exportation in the case of customs duties; production, manufacture, sale or distribution — inland taxes — in the case of excise duties".[31]

13.2 That view was based on their Honours' conclusion on the **second issue**: that the "high constitutional purpose" of s 90 was that identified by Dixon J in *Parton*.[32]

13.3 As to the **third issue**, their Honours held that, in determining the character of a charge, the "criterion of liability" is not the "exclusive determinant" and that it is necessary to look to the "practical or substantial operation of the statute as well as its legal operation".[33]

14 Shortly afterwards, in *Ha v New South Wales*, Brennan CJ, McHugh, Gummow and Kirby JJ affirmed the correctness of *Capital Duplicators [No 2]* on all three issues.[34] Taken together, *Capital Duplicators [No 2]* and *Ha* authoritatively resolved those issues, subject to one qualification: whether a tax on the consumption of goods[35] is a duty of excise for the purposes of s 90. That question was expressly left unanswered in both cases.[36]

15 On the Plaintiffs' case, the answer to that question is the issue of constitutional principle that is to be resolved in this proceeding. We address it in Section B below.[37] We then analyse the character of the ZLEV charge in Section C below.

[29] *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 590 (Mason CJ, Brennan, Deane and McHugh JJ).
[30] *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 588 (Mason CJ, Brennan, Deane and McHugh JJ).
[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 586 (Mason CJ, Brennan, Deane and McHugh JJ).
[33] See *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 583.
[34] (1997) 189 CLR 465 at 495, 499-500.
[35] Being "the act of the person in possession of the goods in using them or in destroying them by use, irrespective of the manner or means by which that possession was obtained": *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 187 (Barwick CJ). See also *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 80 (Jacobs J): "I use [consumption] to cover not only physical consumption but also consumption by the continuing use of chattels privately or in business".
[36] *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 590 (Mason CJ, Brennan, Deane and McHugh JJ); *Ha* (1997) 189 CLR 465 at 499-500 (Brennan CJ, McHugh, Gummow and Kirby JJ).
[37] The Plaintiffs anticipate that the Defendant will seek leave for the Court to reconsider the answers given by the majorities in both *Capital Duplicators [No 2]* and *Ha* and argue for an understanding of s 90 that was definitively rejected in both of those decisions: see Defence at [43(c)] (**ASCB 27**). The Plaintiffs will respond to that argument in reply.

B CONSTITUTIONAL PRINCIPLE: TAXES ON CONSUMPTION

16 In short, the Plaintiffs' argument on the question of constitutional principle is that a tax imposed on the consumption of goods is a tax "upon goods", and therefore a duty of excise for the purpose of s 90. The key steps in that argument are as follows:

16.1 the word "excise" can include a tax imposed on the consumption of goods;

16.2 authority establishes that the purpose of s 90 was that identified by Dixon J in *Parton*;

16.3 the exclusion from s 90 of taxes imposed on the consumption of goods is anomalous, because it is inconsistent with the proposition that s 90 exhausts the categories of taxes on goods and undermines the purpose of s 90;

16.4 the origin of the anomaly lies in unwarranted deference being afforded to a decision of the Privy Council concerning the *British North America Act 1867*;

16.5 to the extent that the decision in *Dickenson's Arcade Pty Ltd v Tasmania*[38] is against the Plaintiffs' argument, it should be overruled.

17 Each step is developed below.

The word "excise"

18 The word "excise" has "never possessed, whether in popular, political or economic usage, any certain connotation and has never received any exact application".[39] That explains why "[t]here is no common use of the term 'excise' in the Convention Debates which might illuminate its meaning, save that it does not include the fees for a licence to carry on a business".[40] Despite the lack of exact historical meaning, use of the word "excise" historically has included reference to a tax imposed on the consumption of goods. Thus, Blackstone identified an excise duty as "an inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption".[41] And, as noted above, in *Matthews*, Dixon J understood a tax on consumption to fall within the conception of a "duty of excise", and that understanding was adopted by Rich and Williams JJ in *Parton*.[42] For the reasons that follow, a construction of s 90 which includes such a tax is to be preferred.

38 (1974) 130 CLR 177.
39 *Matthews* (1938) 60 CLR 263 at 293, see also at 299 (Dixon J).
40 *Ha* (1997) 189 CLR 465 at 493 (Brennan CJ, McHugh, Gummow and Kirby JJ).
41 *Ha* (1997) 189 CLR 465 at 493 (Brennan CJ, McHugh, Gummow and Kirby JJ).
42 (1949) 80 CLR 229 at 252-253. See also *Matthews* (1938) 60 CLR 263 at 277 (Latham CJ); *Commonwealth Oil Refineries Ltd v South Australia* (1926) 38 CLR 435 at 435 (Higgins J).

The purpose of s 90: real control of the taxation of goods

19 That the meaning of s 90 is to be ascertained by reference to the purpose of that section was accepted by all Justices in *Ha*.[43] As noted above, the purpose of s 90 is now settled, being the purpose identified by Dixon J in *Parton*.[44] In adopting that purpose, the Court explicitly rejected the proposition that s 90 has the "more modest purpose of protection of the integrity of the tariff policy of the Commonwealth".[45] The Court reached that position having regard to the place of s 90 within Ch IV of the Constitution, including its relationship with s 92.[46] The Court acknowledged that an objective of the movement to Federation was "inter-colonial free trade on the basis of a uniform tariff",[47] which objective was ultimately enshrined in s 92.[48] That objective "could not have been achieved if the States had retained the power to place a tax on goods within their borders".[49]

20 That understanding of ss 90 and 92 (and Ch IV more generally) reflects the notion that the "creation and fostering of national markets would further the plan of the Constitution for the creation of a new and federal nation and would be expressive of national unity".[50] Together, the sections "ordain that the Commonwealth be an economic union, not an association of States each with its own domestic economy".[51] That economic union would be imperilled if the Commonwealth Parliament did not have exclusive power over all taxes on goods. It is through that power that the Commonwealth Parliament can "protect and stimulate home production by fixing appropriate levels of customs and excise duties", as well as lowering the "level of domestic prices by lowering customs and excise duties".[52]

[43] (1997) 189 CLR 465 at 494-498 (Brennan CJ, McHugh, Gummow and Kirby JJ), 506 (Dawson, Toohey and Gaudron JJ).

[44] *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586 (Mason CJ, Brennan, Deane and McHugh JJ); *Ha* (1997) 189 CLR 465 at 495 (Brennan CJ, McHugh, Gummow and Kirby JJ).

[45] See *Betfair v Western Australia* (2008) 234 CLR 418 (***Betfair [No 1]***) at [13] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

[46] *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 585-586 (Mason CJ, Brennan, Deane and McHugh JJ); *Ha* (1997) 189 CLR 465 at 491-495 (Brennan CJ, McHugh, Gummow and Kirby JJ).

[47] (1997) 189 CLR 465 at 494 (Brennan CJ, McHugh, Gummow and Kirby JJ). See also *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 585 (Mason CJ, Brennan, Deane and McHugh JJ).

[48] *Cole v Whitfield* (1988) 165 CLR 360 at 392 (the Court).

[49] *Betfair [No 1]* (2008) 234 CLR 418 at [22] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

[50] *Betfair [No 1]* (2008) 234 CLR 418 at [12] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ). See also *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 548 at 277-278 (Brennan, Deane and Toohey JJ); *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586 (Mason CJ, Brennan, Deane and McHugh JJ).

[51] *Philip Morris Ltd v Commissioner of Business Franchises (Vic)* (1989) 167 CLR 399 at 426 (Mason CJ and Deane J), cited in *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 585 (Mason CJ, Brennan, Deane and McHugh JJ).

[52] *Hematite* (1983) 151 CLR 599 at 631 (Mason J).

21 Further, there are at least three aspects of Commonwealth economic policy "in which the level and impact of commodity taxes can play a critical role":[53]

> First, because commodity taxes add to the price of commodities, they can contribute to the rate of domestic inflation as measured by the consumer price index and stimulate demands for wage and salary increases which, in turn, would contribute to inflation so that the economy could become locked into a "wages/prices spiral". Secondly, the level of government taxes can affect credit and monetary conditions: relatively low tax revenues would lead to a higher deficit in government accounts which in turn would place greater pressure on credit and interest rates; and higher tax revenues could restrict the money supply. Thirdly, because commodity taxes cannot discriminate between taxpayers on the basis of their incomes, they will be regressive in their impact: even allowing for different consumption patterns, low income earners will pay a higher proportion of their disposable income in tax than would high income earners.

The anomaly: language and purpose

22 The exclusion of consumption taxes from s 90 is anomalous in two respects.

23 *First*, as *Capital Duplicators* and *Ha* establish, once Dixon J's statement of purpose is accepted, the term "duties of customs and excise" in s 90 "must be construed as exhausting the categories of taxes on goods".[54] In other words, there can be no taxes on goods that are not within the scope of s 90.[55] Simply as a matter of language, there is no basis to conclude that a tax imposed on the consumption of goods is not a "tax upon goods".[56]

24 *Second*, the exclusion of consumption taxes from the scope of s 90 does not serve the purpose that underlies the section. To the contrary, if taxes on the consumption of goods were excluded from the operation of s 90, the "purpose which uniformity of customs, excise and bounties was intended to achieve would be prejudiced and the Parliament would not have effective control over economic policy affecting the supply and price of goods throughout the Commonwealth".[57] By its nature, a tax on the consumption of goods increases the cost borne by the consumer in relation to the goods, albeit following the point of purchase. But a consumer can naturally be expected to account for any future cost that may be borne by them and, in that way, a tax on consumption "diminishes or tends to diminish demand for the goods".[58] And, once it is accepted that "the reason why a tax upon

[53] See Hanks at 383.
[54] *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 590 (Mason CJ, Brennan, Deane and McHugh JJ); *Ha* (1997) 189 CLR 465 at 488 (Brennan CJ, McHugh, Gummow and Kirby JJ).
[55] See also *Ha* (1997) 189 CLR 465 at 511. Cf *Logan Downs* (1977) 137 CLR 59 at 63 (Gibbs J), 69 (Stephen J).
[56] See Crommelin, "Sections 90 and 92 of the Constitution: Problems and Solutions" in Saunders, et al (eds) *Current Constitutional Problems in Australia* (1982) (**Crommelin**) at 48.
[57] See *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586 (Mason CJ, Brennan, Deane and McHugh JJ). See also *Hematite* (1983) 151 CLR 599 at 631 (Mason J).
[58] See *Hematite* (1983) 151 CLR 599 at 632 (Mason J).

any step in the production, manufacture, sale or distribution of goods is held to be a duty of excise is that such a tax has 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",[59] it is illogical to exclude a tax on goods that is directly imposed on the ultimate consumer themselves.

25 That second point was recognised by Barwick CJ in *Dickenson's Arcade*. His Honour shared Dixon J's understanding of the purpose of s 90.[60] No doubt informed by that understanding, his Honour said there was "no logical reason … for ending at the point of entry into consumption the area which might yield a duty of excise".[61] Mason J recognised the same point. His Honour also shared Dixon J's understanding of the purpose of s 90.[62] After noting that a duty of excise included a tax on the sale of goods, his Honour said:[63]

> If the absence of a power to control taxes on the sale of goods deprives the Commonwealth Parliament of a real power to control the taxation of commodities, the absence of a power to control taxes on the consumption of goods might be thought perhaps to constitute an unacceptable limitation on the power of control which it was the purpose of the section to repose in the Parliament.

26 In a similar vein, Gibbs J recognised that, if a tax on the sale of goods "can be regarded as a method of taxing their production or manufacture, it is difficult to see why a tax on their consumption should not be similarly regarded".[64] After referring to Dixon J's statement of purpose in *Parton*, his Honour further observed that, "if it is permissible to consider the economic effect of the tax, it is impossible, in my opinion, to draw a line between the last retail sale and the act of consumption".[65] His Honour said:[66]

> A tax on consumption might produce exactly the same economic effect on production and manufacture as would a tax on the last retail sale. 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.

[59] *Philip Morris* (1989) 167 CLR 399 at 436 (Mason CJ and Deane J). See also *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586 (Mason CJ, Brennan, Deane and McHugh JJ).

[60] *Dickenson's Arcade* (1974) 130 CLR 177 at 185. See also *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1 at 17 (Barwick CJ); *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 365 (Barwick CJ).

[61] *Dickenson's Arcade* (1974) 130 CLR 177 at 185 (Mason J).

[62] *Dickenson's Arcade* (1974) 130 CLR 177 at 238. See also *MG Kallis (1962) Pty Ltd v Western Australia* (1974) 130 CLR 245 at 265 (Mason J), which was handed down on the same day as *Dickenson's Arcade*.

[63] *Dickenson's Arcade* (1974) 130 CLR 177 at 238-239 (Mason J); see also 196 (McTiernan J). See further *Hematite* (1983) 151 CLR 599 at 631-632 (Mason J).

[64] *Dickenson's Arcade* (1974) 130 CLR 177 at 218.

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

[66] *Dickenson's Arcade* (1974) 130 CLR 177 at 219 (Gibbs J).

27 Stephen J also recognised that it is "no doubt true" that the "economic effect" of a tax on consumption is, "like that of acknowledged duties of excise, reflected back upon the manufacturer or producer".[67]

28 Later, in *Capital Duplicators [No 2]*, Dawson J said that, on the approach of Dixon J in *Parton*, the exclusion from the scope of s 90 of a tax on consumption "introduces an illogicality since the effect of a tax upon consumption is as much upon manufacture or production as is the effect of a tax upon distribution".[68] In the same case, Toohey and Gaudron JJ repeated their earlier observation that, on Dixon J's view of the purpose of s 90, "it is difficult to see any basis for distinction between taxes imposed during the course of production or manufacture and those imposed at any subsequent point, including the point of consumption".[69] In *Ha*, Dawson, Toohey and Gaudron JJ noted the "somewhat illogical[]" continuation of the exception.[70] For their Honours, that illogicality was a reason to return to a narrower understanding of the scope of s 90. But the Court having authoritatively rejected such a return in *Ha*, their Honours' observations regarding the logic of that anomalous distinction now provide a persuasive explanation of why taxes on consumption should not be excluded from s 90.

The origin of the anomaly

29 To understand why taxes on consumption have been excluded from the scope of s 90, it is necessary to identify how the exclusion came to be accepted in the first place.

30 The starting point is the judgment of Dixon J in *Matthews*. At that time, Dixon J was able to say that there was "no direct decision inconsistent with the view that a tax on commodities may be an excise although it is levied not upon or in connection with production, manufacture or treatment of goods or the preparation of goods for sale or for consumption, but upon sale, use or consumption and is imposed independently of the place of production".[71] Thus, Dixon J had no difficulty in formulating his Honour's statement of principle (being that set out in paragraph 10 above) to include taxes on consumption.

67 *Dickenson's Arcade* (1974) 130 CLR 177 at 230.

68 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 602; see also at 610 and his Honour's earlier remarks to similar effect in *Philip Morris* (1989) 167 CLR 399 at 468, 471-472. See further *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368 at 388 (Murphy J); *Hematite* (1983) 151 CLR 599 at 538 (Murphy J).

69 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 628.

70 *Ha* (1997) 189 CLR 465 at 510. See also Crommelin at 49.

71 (1938) 60 CLR 263 at 300. See also *Commonwealth Oil Refineries* (1926) 38 CLR 435 at 437 (Rich J).

31 However, as noted above, in *Parton*, Dixon J modified his earlier position in light of *Atlantic Smoke Shops Ltd v Conlon*,[72] a decision of the Privy Council (on appeal from the Supreme Court of Canada) that had been decided in the intervening period. His Honour said that it is "probably a safe inference" from that decision that a "tax on consumers or upon consumption cannot be an excise" and that it "perhaps makes it necessary to that extent now to modify the statement" from *Matthews*.[73] Notwithstanding the tentativeness with which those views were expressed, his Honour in fact modified his *Matthews* statement by removing the reference to "consumption".

32 Closer analysis suggests that it was not sound for Dixon J to infer that *Atlantic Smoke Shops* meant that "excise" within the meaning of s 90 does not include a tax on consumption. That case concerned the *Tobacco Tax Act 1940* (New Brunswick, Canada). The Privy Council analysed the relevant provisions as having four different operations. Relevantly for present purposes, the first operation was the imposition of a tax "to be paid by anyone who purchases tobacco … for his own consumption (or for the consumption of other persons at his expense) from a retail vendor in the province".[74] The tax was to be paid by the "consumer" to the retail vendor upon making the purchase.[75]

33 The Privy Council concluded that the tax was "direct" because it was paid by the last purchaser and therefore could not be "passed on to any other person by subsequent dealing".[76] Thus, the law, in its first operation, was prima facie within the legislative power of the New Brunswick Legislature (being the legislature with the exclusive power to make laws in relation to "Direct Taxation within the Province").[77] That being so, it was necessary for the Privy Council also to consider whether the law, in its first operation, was an "Excise Law". If it had that character, it would have been beyond the power of New Brunswick Legislature (the power to alter existing "Customs and Excise Laws" in the Province being reserved exclusively for the Federal Legislature).[78] The Privy Council concluded that the law, in its first operation, was not an excise law because it imposed a "direct" rather than an "indirect" tax.[79] It was therefore valid in that operation.

[72] [1943] AC 550.
[73] *Parton* (1949) 80 CLR 229 at 261.
[74] *Atlantic Smoke Shops* [1943] AC 550 at 561 (Viscount Simonds LC).
[75] *Atlantic Smoke Shops* [1943] AC 550 at 561 (Viscount Simonds LC).
[76] *Atlantic Smoke Shops* [1943] AC 550 at 563 (Viscount Simonds LC).
[77] *Atlantic Smoke Shops* [1943] AC 550 at 563 (Viscount Simonds LC).
[78] *Atlantic Smoke Shops* [1943] AC 550 at 564 (Viscount Simonds LC).
[79] *Atlantic Smoke Shops* [1943] AC 550 at 565-566 (Viscount Simonds LC).

34 That reasoning does not support the conclusion that "excise" in s 90 does not include taxes imposed upon consumption. At the most, it suggests the meaning of "excise" in a different constitutional context does not include such taxes. On that point, the reasoning of the Privy Council turned on the distinction between "direct" and "indirect" taxes. Even at the time that *Parton* was decided, it was doubted that that distinction was of any utility in the context of s 90.[80] By 1960, Fullagar J was able to say that the distinction was "discredited among economists". His Honour thought it a pity that the distinction "was ever raised or mentioned in relation to s 90" and, moreover, that the Canadian cases were "irrelevant".[81] In *Ha*, it was accepted that the distinction was "economically unsound".[82] Further, the Privy Council was not concerned with a tax imposed on the step of consumption of tobacco. Rather, properly understood, the tax was one imposed on the sale of the tobacco. Such taxes are excises within the scope of s 90. Indeed, a tax with a very similar operation was invalidated in *Dickenson's Arcade* (see paragraph 37 below).[83]

35 In summary, Dixon J's deference to *Atlantic Smoke Shops* was not warranted and, indeed, has been described as "somewhat inexplicabl[e]".[84] Even if that deference may have been thought to have been defensible at the time, subsequent analysis no longer supports it.

Dickenson's Arcade

36 It remains necessary to consider *Dickenson's Arcade*. Relevantly for present purposes, the Court there considered a challenge to Pt II of the *Tobacco Act 1972* (Tas).[85] In its terms, Pt II imposed a tax on "the consumption of tobacco".[86] A person who consumed tobacco, and within 7 days did not pay the tax, was guilty of an offence.[87]

36.1 In separate reasons, Menzies J, Gibbs J, Stephen J and Mason J held that Pt II did not infringe s 90. Each did so on the basis that Pt II imposed a tax on the consumption of tobacco and that such a tax was not within the scope of s 90.

[80] *Matthews* (1938) 60 CLR 263 at 285 (Starke J).
[81] *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 554-555.
[82] *Ha* (1997) 189 CLR 465 at 509 (Dawson, Toohey and Gaudron JJ).
[83] See especially *Dickenson's Arcade* (1974) 130 CLR 177 at 194 (Barwick CJ).
[84] *Philip Morris* (1989) 167 CLR 399 at 468 (Dawson J). See also *Dickenson's Arcade* (1974) 130 CLR 177 at 18, 194 (Barwick CJ), 202, 204 (McTiernan J); Opeskin, "Section 90 of the Constitution and the Problem of Precedent" (1986) 16 *Federal Law Review* 170 at 190.
[85] The Court also considered a challenge to Pt III, which concerned a "licence fee". On that issue, the decision stands only as authority "for the validity of the impost[] considered therein": *Ha* (1997) 189 CLR 465 at 504 (Brennan CJ, McHugh, Gummow and Kirby JJ).
[86] *Tobacco Act 1972* (Tas), s 3(1), which was defined to mean the "smoking or the chewing of tobacco by any person" (s 2(2)).
[87] *Tobacco Act 1972* (Tas), s 3(4).

36.2 Barwick CJ would have held Pt II invalid on the basis it imposed a tax on the sale of tobacco and that such a tax was within the scope of s 90.[88] His Honour expressed doubt about the correctness of the exclusion of consumption taxes from s 90, but in "deference to the views expressed by the other Justices" — which he understood to have been adopted under "what was considered to be the constraint" of *Atlantic Smoke Shops* — he "accepted the limitation".[89]

36.3 McTiernan J would have held Pt II invalid on the basis it imposed a tax on the consumption of tobacco and that such a tax was within the scope of s 90.

37 The way the tax imposed by Pt II was to be collected was dealt with in the *Tobacco Regulations 1972* (Tas).[90] The Regulations allowed a purchaser of tobacco to pay to the retailer the tax that the purchaser would otherwise be liable to pay upon the consumption of the tobacco.

37.1 Because of their Honours' views about the validity of Pt II, Barwick CJ and McTiernan J held that the Regulations were inoperative.[91]

37.2 Mason J also held that the Regulations were invalid. His Honour reasoned that the practical operation of the Regulations was to convert the tax imposed by Pt II into a tax on the sale of tobacco and therefore into a duty of excise. The regulation-making power could not validly be exercised to have that effect.[92]

37.3 Menzies J, Gibbs J and Stephen J were of the view that the Regulations did not affect the character of the tax imposed by Pt II, and were therefore of the view that the Regulations were authorised by the Act.

38 The result was that the Court divided 3:3 on whether the Regulations were valid. The opinion of the Chief Justice therefore prevailed,[93] but the reasoning as to the validity of the Regulations is not binding.[94] Nonetheless, the reasoning of the majority on Pt II of the Act may stand as authority against acceptance of the argument that consumption taxes are within the scope of s 90, albeit that it is not clear that the broader proposition now advanced by the Plaintiffs was advanced in *Dickenson's Arcade*. Stephen J noted that "counsel for

88 *Dickenson's Arcade* (1974) 130 CLR 177 at 194.
89 *Dickenson's Arcade* (1974) 130 CLR 177 at 185-186.
90 Made under s 7 of the *Tobacco Act 1972* (Tas).
91 See *Dickenson's Arcade* (1974) 130 CLR 177 at 195 (Barwick CJ), 204-205 (McTiernan J).
92 *Dickenson's Arcade* (1974) 130 CLR 177 at 243.
93 Judiciary Act, s 23(2)(b). It appears that several attempts were made to remake the regulations, but those attempts were suspended, and then ultimately rescinded: see *Tobacco (Recission) Regulations 1974* (Tas).
94 See *Perera-Cathcart v The Queen* (2017) 260 CLR 595 at [76] (Gageler J), [160] (Gordon J).

the plaintiff did not ultimately urge that all consumption taxes … should be regarded as duties of excise".[95] That is important because "[i]f a point is not in dispute in a case, the decision lays down no legal rule concerning that issue".[96] However, to the extent it is necessary to do so, the Plaintiffs seek leave to re-open the decision in so far as it concerns consumption taxes. The factors identified in *John v Federal Commissioner of Taxation* support the grant of leave.[97]

39 *First*, the decision did not rest on a principle carefully worked out in a significant succession of cases. As Gibbs J correctly observed, by 1974, the question "whether a duty imposed on the consumption of goods is a duty of excise ha[d] never been the subject of any direct decision by this Court".[98] The reasoning of the majority on Pt II was, in essence, simply an application of Dixon J's statement in *Matthews*, as modified in *Parton* to exclude consumption taxes. That modification was not "carefully worked out in a significant succession of cases", but rather was the result, on a single occasion, of an unwarranted deference being afforded to *Atlantic Smoke Shops*.

40 *Second*, the Justices who formed the majority on the validity of Pt II adopted reasoning which differed in important respects.

40.1 Mason J adopted a different approach to that of Menzies J, Gibbs J and Stephen J as to the relevance of the "criterion of liability", holding that it was not the exclusive determinant (an approach shared with Barwick CJ and seemingly McTiernan J). That difference explains his Honour's different conclusion on the validity of the Regulations.

40.2 Mason J also adopted Dixon J's view of the purpose of s 90 (an approached shared with Barwick CJ and McTiernan J), which was different from that of Menzies J who expressly rejected that view[99] (and arguably Gibbs J, who later expressly rejected that view[100]).

40.3 Menzies J alone thought it relevant that the tax was to fall on "all consumption in Tasmania whether of tobacco of Australian or overseas manufacture".[101] That factor

[95] *Dickenson's Arcade* (1974) 130 CLR 177 at 230; see also at 180 (Deane QC), 181 (Hulme QC).
[96] *Coleman v Power* (2004) 220 CLR 1 at [79] (McHugh J).
[97] (1989) 166 CLR 417 at 438-439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).
[98] *Dickenson's Arcade* (1974) 130 CLR 177 at 217, see also at 220.
[99] *Dickenson's Arcade* (1974) 130 CLR 177 at 213.
[100] See *Hematite* (1983) 151 CLR 599 at 616-617.
[101] *Dickenson's Arcade* (1974) 130 CLR 177 at 210.

is irrelevant to whether a charge is characterised as a duty of excise.[102] And Stephen J alone placed significance on the (now discarded) distinction between direct and indirect taxes.

41 *Third*, the decision has achieved no useful result. To the contrary, in light of subsequent authority and for the reasons explained above, the decision has caused the existence of an anomaly in s 90. The decision "not only stands isolated but has proven to be incompatible with the ongoing development of constitutional jurisprudence".[103]

42 *Fourth*, there is no material before the Court that suggests the decision in *Dickenson's Arcade* has been independently acted on in a manner which militates against reconsideration. That may be because, at least historically, a tax on consumption which is not also a tax on sale of goods is a phenomenon infrequently encountered".[104] Consistent with that observation:

42.1 The *Tobacco Act 1972* (Tas) was replaced by the *Tobacco Business Franchise Licences 1980* (Tas), which did not contain an equivalent to Pt II. That development was to be expected, given that members of the Court anticipated that, absent the Regulations, the tax under Pt II would likely be "difficult to collect, easy to evade and inordinately troublesome to pay".[105]

42.2 There is extensive material in the Amended Special Case concerning the events following the decision in *Ha*, but none relating to any inconvenience that may occur if *Dickenson's Arcade* were to be overruled in so far as it concerns taxes on consumption.

42.3 There is no decision of this Court in which the reasoning on Pt II has been applied to uphold the validity of a consumption tax.[106]

[102] See *Ha* (1997) 189 CLR 465 at 499 ("whether of foreign or domestic origin").

[103] *Wurridjdal v Commonwealth* (2009) 237 CLR 309 at [71] (French CJ).

[104] *Dickenson's Arcade* (1974) 130 CLR 177 at 239 (Mason J). See also Crommelin at 48, suggesting in 1982 that the "exception in favour of consumption taxes may have little practical application".

[105] See (1974) 130 CLR 177 at 232 (Stephen J), see also at 191-192 (Barwick CJ), 209 (Menzies J). In the wake of the decision, it was noted that "the States' difficulty with a consumption tax lies in its collection. It is exceedingly cumbersome and probably uneconomic to collect such a tax from the multitudinous consumers, to say nothing of the electoral reaction": Lane, "Recent Cases" (1974) 48 *Australian Law Journal* 212 at 212.

[106] Cf *Commissioner for Revenue (ACT) v Kithock Pty Ltd* (2000) 102 FCR 42, which did not concern a tax on consumption, but a tax imposed on the second-hand sale of goods. In refusing special leave, the Court said that the "general question reserved by the majority in *Ha* ... about whether a tax on the consumption of goods is a duty of excise would not require decision in this case": [2001] HCATrans 506 at 541-544.

43 If leave to re-open *Dickenson's Arcade* is required and granted, it should be overruled in so far as it stands as authority for the proposition that consumption taxes are not within the scope of s 90. To do otherwise "would be to maintain what was an error in basic constitutional principle and to preserve what subsequent events have rendered an anomaly".[107]

Conclusion on constitutional principle: s 90 extends to consumption taxes

44 A duty of excise for the purpose of s 90 is a "inland" tax "upon goods". It should now be recognised that a tax will satisfy that description where the "relevant step on dealing with goods" is the production, manufacture, sale, distribution or consumption of goods. The Court should answer the question expressly left undetermined in *Capital Duplicators [No 2]* and *Ha* to that effect.

C CHARACTERISATION: ZLEV CHARGE IS AN EXCISE

45 There are two steps involved to determine whether the ZLEV charge is a duty of excise and therefore invalid by reason of s 90.

45.1 Is the ZLEV charge an inland tax? If the ZLEV charge is not a "tax", then it cannot be an excise.[108]

45.2 Is the tax "in substance" a tax upon a relevant step in relation to goods (which on the Plaintiffs' case is the step of "consumption")?[109] If the ZLEV charge is, in substance, imposed upon the step of consumption, there will exist "the necessary relation between the tax and the goods to give the tax the character of an excise".[110]

46 The ZLEV charge is an inland tax on the consumption of ZLEVs. In short: (a) the Defendant concedes that the ZLEV charge is an inland tax; (b) it is apparent from the terms (the "criterion of liability") of the Charge Act that the tax is imposed upon the consumption of goods; and (c) so much is confirmed by its practical operation.

Section 7(1) imposes an inland tax, not a licence fee or a fee for service

47 The Defendant has now conceded that the ZLEV charge is an inland tax.[111] The concession was correctly made. It is imposed "inland", not at the border. And it has the essential characteristics of a tax: it is a "compulsory exaction of money by a public authority for public purposes, enforceable by law".[112] Further, by conceding that the ZLEV charge is a

[107] *Wurridjdal* (2009) 237 CLR 309 at [189] (Gummow and Hayne JJ).
[108] *Philip Morris* (1989) 167 CLR 399 at 427-428 (Mason CJ and Deane J).
[109] See *Anderson's* (1964) 111 CLR 353 at 365 (Barwick CJ).
[110] *Philip Morris* (1989) 167 CLR 399 at 434 (Mason CJ and Deane J).
[111] See Amended Defence at [43]: **ASCB 27**.
[112] *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 466-467 (the Court).

tax, the Defendant has necessarily (and correctly) conceded that the ZLEV charge has no characteristic that would deny it the character of a tax. It has thus conceded that the ZLEV charge is neither a "fee for a privilege", nor a "fee for service".[113]

48 As to the latter possibility, that concession amounts to a recognition that the ZLEV charge is not a charge that "ensure[s] all motorists contribute their fair share to the cost of funding Victorian roads and road-related infrastructure".[114] Putting to one side the fact that the ZLEV charge is payable in relation to roads that are not even located in Victoria (see paragraph 53 below), the Victorian Government retains complete discretion as to whether the revenue raised by the ZLEV charge is to be expended on road infrastructure, or some
10 entirely unrelated purpose.[115] That reinforces the proposition that the charge is imposed to raise revenue as opposed, for example, to recover the cost of providing services or facilities. That is a significant factor in favour of a charge being characterised as a tax.[116]

Criterion of liability: use of ZLEVs

49 The "criterion of liability" remains an important aspect of assessing whether a law infringes s 90, albeit not the exclusive determinant. The critical aspect of the criterion of liability in s 7(1) of the Charge Act is the "use" of ZLEVs. That is, the ZLEV charge is imposed by reference to the "step" of consumption of ZLEVs. It is not possible for a registered operator to be liable to pay the ZLEV charge unless the ZLEV is used. The Charge Act thereby "itself discloses a relationship" with the goods.[117]

20 50 The focus of the criterion upon the "use" of "ZLEVs" is confirmed by two further textual matters. *First*, the rate of the ZLEV charge varies depending on the type of ZLEV. In the words of the Explanatory Memorandum, the different rates depend on the "characteristics of the vehicle".[118] *Second*, the amount of the ZLEV charge is linked to the amount that the ZLEV is used.[119] It is not a fixed amount,[120] nor calculated by reference to some external

[113] *Air Caledonie* (1988) 165 CLR 462 at 467 (the Court).
[114] Victoria, *Parliamentary Debates*, Legislative Assembly, 18 March 2021 at 1183 (Mr Pallas, Treasurer).
[115] For example, there is no special "fund" into which revenue must be deposited: cf *Logan Downs* (1977) 137 CLR 59 at 63 (Gibbs J), 78 (Mason J); *MG Kallis (1962) Pty Ltd v Western Australia* (1974) 130 CLR 245 at 258-259 (Gibbs J), 266 (Mason J). Compare also *Armstrong v Victoria [No 2]* (1957) 99 CLR 28.
[116] See *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 596-597 (Mason CJ, Brennan, Deane and McHugh JJ); *Ha* (1997) 189 CLR 465 at 502-503 (Brennan CJ, McHugh, Gummow and Kirby JJ). See further *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at [91]-[92] (Gleeson CJ and Kirby J), [133] (Gaudron J), [291] (McHugh J).
[117] *Hematite* (1983) 151 CLR 599 at 635 (Mason J).
[118] Explanatory Memorandum, Zero and Low Emission Vehicle Distance-based Charge Bill 2021, at 3.
[119] Leaving aside those circumstances where the amount is determined "by way of estimate": see Charge Act, s 17. That occurred in relation to the second invoice issued to the Second Plaintiff: see **ASCB 41 [36]**.
[120] See *Hematite* (1983) 151 CLR 599 at 634 (Mason J), 656-657 (Brennan J), 668-669 (Deane J); *Philip Morris* (1989) 167 CLR 399 at 428 (Mason CJ and Deane J).

factor[121] — those being factors that might tend towards a charge being characterised as a "fee for a privilege" or a "fee for service".

Relevance of concept of "specified road"

51 Of course, the criterion of liability in s 7(1) of the Charge Act is qualified by the requirement of use "on specified roads". The Defendant appears to rely on that qualification to suggest that the charge is not a tax on goods, but, instead, a tax on the activity of using ZLEVs only on specified roads.[122] It is not immediately apparent how that submission can be reconciled with the concession discussed above that the ZLEV charge is not a "fee for a privilege", nor a "fee for service". The Plaintiffs will address any such argument in reply.

10 For present purposes, the Plaintiffs' case is that the "specified roads" qualification does not affect the conclusion that the ZLEV charge is imposed on the consumption of ZLEVs for at least three reasons.

52 *First*, the Charge Act operates only upon ZLEVs, being a subset of "motor vehicles" that may be registered under the *Road Safety Act 1986* (Vic). That is relevant because all motor vehicles may travel on "specified roads" in Victoria, so long as they are registered (which requires the payment of a fee).[123] Yet, under Victorian law, no other type of motor vehicle is subject to an equivalent of the ZLEV charge.[124] ZLEVs have thus been singled out for discriminatory treatment by the Victorian legislature (and by the Charge Act in particular). Indeed, if the ZLEV charge is not paid in relation to a ZLEV, its registration is liable to

20 suspension or cancellation.[125] That discriminatory treatment reinforces that the character of the ZLEV charge as being on the use of ZLEVs.[126]

53 *Second*, "specified roads" include roads that are outside of Victoria. Indeed, s 6(2) of the Charge Act, without any reference to "specified roads", declares that "this Act extends to the use of ZLEVs outside Victoria".[127] The Victorian Parliament has no legislative power to regulate activity on those roads, absent some connection between the subject matter of the legislation and the State.[128] Here, the connection is provided by the registration of the

[121] Cf *Harper v Victoria* (1966) 114 CLR 361 at 377 (McTiernan J), 378 (Taylor J), 382 (Owen J).
[122] Amended Defence at [43(b)]: **ASCB 27**.
[123] See Road Safety Act, ss 3(1) (definitions of "highway", "road", "road related area"), 6, 7, 9(2).
[124] Cf *Browns Transport Pty Ltd v Kropp* (1958) 100 CLR 117 at 129, where the tax (held not to be an excise) was imposed "without mention of, and without regard to, any commodity or class of commodity".
[125] See Charge Act, Pt 3. See also Road Safety Act, s 5(d), which was inserted by s 79 of the Charge Act.
[126] See *Hematite* (1983) 151 CLR 599 at 634 (Mason J), 659 (Brennan J), 667-668 (Deane J).
[127] See also Charge Act, s 3 (para (d) of definition of "specified road").
[128] *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at [48] (Gaudron, Gummow and Hayne JJ); *DRJ v Commissioner of Victim's Rights* (2020) 103 NSWLR 692 at [23] (Bell P), [128]-[134] (Leeming JA).

ZLEV under Victorian law, which reinforces the proposition that the true focus of the criterion is the use of ZLEVs.

54 *Third*, while the reference to "specified roads" in s 7(1) suggests that only some "use" of ZLEVs is taxed, being use on roads that have been "specified", that is mere "verbiage" that "disguises" the true operation of the provision.[129]

54.1 There is no "specification" of a subset of roads that constitute "specified roads". Rather, the expression is defined by reference to multiple overlapping common law and statutory concepts, which, once deciphered, reveal a concept of extraordinary breadth.

54.2 Further, even if circumstances exist in which a ZLEV can be used other than on a "specified road", the terms and practical operation of the Charge Act are such that the prospect that the ZLEV charge will be calculated other than by reference to the total distance travelled by the ZLEV will be remote.

55 We turn to elaborate upon those two matters.

Definition of "specified roads"

56 The reader of the definition of "specified roads" might reasonably assume that the ZLEV charge is payable in respect of only certain "roads" that are identified by the Act. However, once the various limbs of the definition of "specified roads" are untangled, it can be seen that the Act, in effect, identifies as a "specified road" any area of land — public or private, inside or outside Victoria — over which the public has a right of way.

57 The definition of "specified roads" includes any "common law highway" in Victoria and outside Victoria.[130] The "characteristic" of a common law highway is "simply that it is a way over which all members of the public are entitled to pass and repass on their lawful occasions".[131] That land may be publicly or privately owned; the distinguishing feature is the public's right of passage. Consistent with that understanding, the guidance published by VicRoads indicates that <u>all</u> travel outside of Victoria will be subject to the ZLEV charge.[132]

[129] See *Commonwealth Oil Refineries* (1926) 38 CLR 435 at 423 (Isaacs J), quoted in *Ha* (1997) 189 CLR 465 at 498 (Brennan CJ, McHugh, Gummow and Kirby JJ).

[130] Charge Act, s 3 (paras (c)-(d) of definition of "specified road").

[131] *City of Keilor v O'Donohue* (1971) 126 CLR 353 at 363 (Windeyer J). See also *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [119] (Gaudron, McHugh and Gummow JJ).

[132] See **ASCB 37 [10], 39 [26], 42-43 [52]-[54]**.

58 The definition in relation to areas within Victoria includes two additional categories: "public road" and "road related area".[133] A "public road" is a "road" within the meaning of the Road Management Act,[134] and is therefore the subject to the "rights of passage" conferred upon members of the public by s 8 of that Act. By their nature, "road related areas" are areas of land open to the public.[135] It includes, for example, any "area that is not a road and that is open to or used by the public for driving, riding or parking motor vehicle".[136]

Practical ability to claim an exemption

59 The registered operator bears the burden of establishing that any particular use of a ZLEV, during the relevant period, was not on a "specified road". By s 15(3) of the Charge Act, if a registered operator does not provide any evidence about any distance travelled by the ZLEV that was not on specified roads, the Secretary may assume that that distance, for the purpose of the formula in s 15(1), is zero. In that event, in the words of the Explanatory Memorandum, s 15(3) "entitles the Secretary, in determining the amount of ZLEV charge, to assume that all distances travelled by a ZLEV are travelled on specified roads (and therefore subject to the ZLEV charge) where there is no evidence to the contrary".[137]

60 The registered operator thus bears the legal and practical burden of identifying when their ZLEV has been used otherwise than on "specified roads". That requires the registered operator to be able to: (a) identify a "gap" in the "specified roads" definition; and (b) record evidence that the ZLEV has been used in that way, in a form that will be satisfactory to the Secretary. That onus remains on the registered operator if they object to an invoice on the basis that "the ZLEV did not travel the distances subject to the ZLEV charge for which the invoice was issued", and in any review proceeding before VCAT.[138]

[133] Charge Act, s 3 (paras (a)-(b) of definition of "specified road"). The definition also includes any "road within the meaning of the **Road Management Act 2004**, other than a private road, prescribed by the regulations". No such roads have been prescribed. Nor is it apparent that there would ever be any utility in doing so, for it is difficult to identify any scenario in which a "road" within the meaning of the Road Management Act will not satisfy para (a), (b) or (c) of the definition of "specified road".

[134] See Road Management Act, s 17.

[135] See Road Safety Act, s 3(1).

[136] Road Safety Act, s 3(1) (para (d) of definition of "specified road"), subject to any declaration made under s 3(2)(a). In this definition, "road" is defined by reference to the definition of that term in s 3 of the Road Management Act.

[137] Explanatory Memorandum, Zero and Low Emission Vehicle Distance-based Charge Bill 2021, at 7 (our emphasis).

[138] See Charge Act, ss 40(1)(a), 49, 54-55.

61 It is enough to refer to various authorities that have considered, for example, whether a particular piece of land is a "common law highway"[139] or the meaning of the expression "open to or used by the public" (being part of para (c) of the definition of "road related area) in other legislative schemes[140] to show the complexities and uncertainties that can arise. And because the registered operator bears the onus of displacing the assumption, any complexity or uncertainty will work against the registered operator.[141] As a matter of practical reality, the prospect that a registered operator will be charged otherwise than by reference to the total distance travelled by the ZLEV is remote.

Conclusion: the ZLEV charge is a duty of excise

10 62 In its terms and substance, s 7(1) imposes a "ZLEV charge", not a "specified roads charge". The "specified roads" qualification is of "no importance" either because its effect is "theoretical and not real" or because it is "too trivial to matter".[142] It does no more than introduce an "unreal distinction" between use of ZLEVs on "specified roads" and other use.[143] The operation of s 90 cannot be avoided by such drafting devices. The ZLEV charge is a tax imposed on the step of consuming goods. It is therefore a tax "upon goods" and a duty of excise for the purposes of s 90.

PART VI: ORDERS SOUGHT

63 The questions arising in the proceeding for the opinion of the Full Court,[144] should be answered: (1) "Yes"'; (2) "The Defendant".[145]

20 ## PART VII: ESTIMATE OF TIME

64 The Plaintiffs estimate that 3 hours will be required for their oral argument.

Date: 19 September 2022

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[139] See, eg, *Anderson v City of Stonnington* [2017] VSCA 229 at [81]-[99] (Warren CJ, Maxwell P and Kyrou JA).
[140] See, eg, *Ryan v Nominal Defendant* (2005) 62 NSWLR 192 at [49]-[94] (Santow JA, McColl JA agreeing); *Zerella Holdings Pty Ltd v Williams* (2012) 113 SASR 573 at [28]-[45] (Kourakis CJ and Blue J).
[141] See, by analogy, *Brown v Tasmania* (2017) 261 CLR 328 at [77]-[78] (Kiefel CJ, Bell and Keane JJ).
[142] *Dennis Hotels* (1960) 104 CLR 529 at 539 (Dixon CJ).
[143] *Matthews* (1938) 60 CLR 263 at 304 (Dixon J).
[144] **ASCB 49-50 [81]**.
[145] See orders sought at **ASCB 14 [45].**

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

CHRISTOPHER VANDERSTOCK
First Plaintiff

KATHLEEN DAVIES
Second Plaintiff

THE STATE OF VICTORIA
Defendant

ANNEXURE TO THE SUBMISSIONS OF THE PLAINTIFFS

Pursuant to Practice Direction No 1 of 2019, the Plaintiffs set out below a list of the constitutional provisions, statues and statutory instruments referred to in these submissions.

10

No.	Description	Version	Provisions
	Constitutional provisions		
1.	*Commonwealth Constitution*	Current	Ch IV
	Statutory provisions		
2.	*Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic)	As enacted	All
3.	*Tobacco Act 1972* (Tas)	As enacted	Pt II
4.	*Tobacco Act 1940* (New Brunswick)	As enacted	All
5.	*Tobacco (Recission) Regulations 1974* (Tas)	As made	All
6.	*Tobacco Regulations 1972* (Tas)	As made	All
7.	*Road Safety Act 1986* (Vic)	Current (Version 126)	ss 3(1), 5, 6, 7, 9.
8.	*Tobacco Business Franchise Licences 1980* (Tas)	As enacted	All