HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY No M61 of 2021

BETWEEN: **CHRISTOPHER VANDERSTOCK**

First Plaintiff

KATHLEEN DAVIES

Second Plaintiff

and

THE STATE OF VICTORIA

Defendant

INTERVENER'S SUBMISSIONS
(NORTHERN TERRITORY OF AUSTRALIA)

Part I: Certification

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

Part II: Intervention

2. The Attorney-General of the Northern Territory of Australia (**Territory**) intervenes pursuant to s 78A(1) of the *Judiciary Act 1903* (Cth) in support of the State of Victoria.

Part III: Argument

A. SUMMARY

3. The Territory generally adopts the submissions of Victoria (**VS**). Section 7(1) of the *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic) (**ZLEV Act**) does not contravene s 90 of the *Constitution* because:

   (a) it imposes a tax on an activity, rather than on goods (**Part B**);

   (b) alternatively, it is a consumption tax (**Part C**); and

   (c) it is not a tax that falls selectively on locally produced or manufactured goods (**Part D**).

4. The first question in the Amended Special Case should be answered "no".

B. THE ZLEV CHARGE IS A TAX ON AN ACTIVITY, NOT ON GOODS

5. Whatever its outer limits, an excise must at least be a tax on "goods".[1] The charge imposed by s 7(1) of the ZLEV Act falls outside that conception because it is not a tax on goods but on the activity of driving a zero or low emission vehicle (**ZLEV**) on specified roads.

6. The purpose of the Act is to require "registered operators of [ZLEVs] to pay a charge for *use* of the vehicles on certain roads": s 1.[2] No impost is levied on the manufacture, distribution or sale of ZLEVs. Rather, by s 7(1), a charge is levied directly on the "registered operator"[3] of a ZLEV "for *use* of the ZLEV on specified roads". "Specified roads" are defined in a way to capture only public roads: s 3.

7. The charge is fixed at a rate per kilometre travelled on specified roads in a financial year (s 8(1)), being the difference between (a) the total distance travelled by the ZLEV in the period to which the determination relates and (b) the distance (if any) travelled by the ZLEV that was not on specified roads, multiplied by (c) the rate of the ZLEV charge: s 15(1).

8. The determination of whether a tax imposes an excise requires a variety of factors be taken into account, including the indirectness of the tax, its immediate entry into the cost of the goods, the proximity of the transaction it taxes to the manufacture or production or movement of the goods into consumption and the form and content of the legislation imposing the tax.[4] Four aspects of the statutory scheme demonstrate the tax imposed by s 7(1) is upon an activity, rather than upon any goods.

9. ***First***, liability for the charge does not accrue by the mere purchase of a ZLEV. The charge only accrues when an activity (driving) is undertaken. Moreover, the charge does not accrue whenever a ZLEV is driven. It only accrues when the ZLEV is driven on "specified roads". Thus, the relevant criterion or discrimen for

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1 *Capital Duplicators Pty Ltd v Australian Capital Territory (No. 2)* (1993) 178 CLR 561 (***Capital Duplicators No. 2***), 601-2 (Dawson J) ("everyone is agreed that an excise duty is a tax upon goods") and ***Ha*** *v New South Wales* (1997) 189 CLR 465, 499 (Brennan CJ, McHugh, Gummow and Kirby JJ).

2 A ZLEV is an "electric vehicle", a "hydrogen vehicle", or a "plug-in hybrid electric vehicle": s 3. The common feature of those vehicles is that they are propelled or fuelled, wholly or partly, using sources other than a combustion engine: s 3.

3 The "registered operator" is the person who is or was the registered operator, of the ZLEV when it is or was used on the road (s 3), being the person recorded on the register of motor vehicles as the person responsible for the vehicle: *Road Safety Act 1986* (Vic), s 3(1) ("registered operator").

4 *Capital Duplicators No. 2* (1993) 178 CLR 561, 583 fn 99 (Mason CJ, Brennan, Deane and McHugh JJ).

the law's operation is not the goods themselves but the undertaking of a specified activity.[5]

10. ***Secondly***, there is no correspondence between the value (or quantity) of the ZLEV and the charge imposed.[6] The charge is calculated by reference to the distance travelled, which may bear a relationship with the energy used, but not the value (or quantity) of the ZLEV itself. In *Hematite Petroleum*, a majority of this Court said it was not necessary for there to be a *direct* relationship between the quantum of the charge and the value and quantity of the goods.[7] However, the large and fixed sum tax in that case was "explicable only on the footing that it is imposed in virtue of the quantity and value of the hydrocarbons produced…"[8] There is no analogy here.

11. ***Thirdly***, the charge is levied on persons with no necessary connection with the manufacture, distribution or sale of a ZLEV. For example, the charge is imposed on "registered operators", which includes the registered operator of a second-hand ZLEV.[9] It is well accepted that an excise does not extend to a tax on the purchase of used goods, such as second-hand cars.[10]

12. ***Fourthly***, characterising the impost as a tax on activity coheres with the mischief to which the ZLEV Act is directed. The purpose of the Act is to establish a "fairer and more sustainable framework for *road users* to contribute to the maintenance and expansion of Victoria's road network."[11] Most drivers pay fuel excise when they purchase petrol, diesel or liquefied petroleum gas, some of which is then redistributed to the States through infrastructure grants for building and maintaining roads. However, "ZLEV owners pay little or no fuel excise *but they*

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5 The criterion of liability remains a relevant, but not exclusive, determinant of whether an exaction is an excise: *Capital Duplicators No. 2* (1993) 178 CLR 561, 583 (Mason CJ, Brennan, Deane and McHugh JJ).

6 cf. ***Matthews*** *v Chicory Marketing Board* (1938) 60 CLR 263, 302-4 (Dixon J) ("the basis adopted for the levy has a natural, although not a necessary, relation to the quantity of the commodity produced") and ***Logan Downs*** *Pty Ltd v Queensland* (1977) 137 CLR 59, 78 (Mason J, Barwick CJ agreeing) ("the tax has a natural relation to the quantity or value of the commodity ultimately produced").

7 ***Hematite Petroleum*** *Pty Ltd v Victoria* (1983) 151 CLR 599, 632 (Mason J), 665 (Deane J).

8 Ibid, 634 (Mason J).

9 A person may become the registered operator of a ZLEV by original registration or by transfer of registration: *Road Safety Act 1986* (Vic), ss 5AB(1)(c) and 9(1).

10 *Commissioner for Australian Capital Territory Revenue v* ***Kithock*** *Pty Ltd* (2000) 102 FCR 42, special leave refused in *Kithock v Commissioner of Australian Capital Territory Revenue* [2001] HCATrans 374.

11 Victoria, *Parliamentary Debates*, Legislative Assembly, 18 March 2021, 1182 (Pallis MLA, Treasurer).

still use the roads."[12] The purpose of the ZLEV Act is thus to ensure "all motorists contribute their fair share to the cost of funding Victorian roads and road-related infrastructure." And, by adopting a per-kilometre charge, the Act "ensures vehicle owners who *use the roads less* pay less in distance-based charges."[13]

13. Properly construed, the charge imposed by s 7(1) is "completely divorced from the manner or time" of the ZLEV's production, distribution or purchase and is unlike any tax that this Court has characterised as an excise.[14] It is no more a tax upon goods than a charge levied upon a person filling a particular description or engaging in an activity or a given pursuit.[15] The Plaintiffs' claims can be dismissed on this ground without the disturbance of any prior authority.

C. A TAX ON CONSUMPTION IS NOT AN EXCISE

14. If those submissions are not accepted and s 7(1) of the ZLEV Act is properly characterised as a tax on goods, it does not offend s 90 of the *Constitution* because it is a tax on consumption. Almost fifty years ago, in *Dickenson's Arcade*, this Court held by a 5:1 majority that a tax on consumption does not constitute an excise.[16] Accordingly, the Plaintiffs require leave to reopen that decision, which should be refused for the reasons in **VS[21]-[29]**. If leave is granted, *Dickenson's Arcade* should be affirmed for the following reasons.

Dickenson's Arcade accorded with long-standing authority

15. The decision cohered with long-standing authority for the proposition that an excise does not include a tax on consumption: **cf PS[39]**.

16. In ***Peterswald*** *v Bartley*, the Court unanimously held that an excise was a tax imposed upon goods *while they are in the hands of the manufacturer or producer*.[17] In *Matthews*, Dixon J noted in obiter that no prior decision was "inconsistent with the view" that an excise might include a tax on consumption.[18]

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12 Ibid, 1183.
13 Ibid, 1184.
14 ***Dickenson's Arcade*** *Pty Ltd v Tasmania* (1974) 130 CLR 177, 186 (Barwick CJ).
15 *Brown Transport Pty Ltd v Kropp* (1958) 100 CLR 117, 130 (the Court), quoting from *Matthews* (1938) 60 CLR 263, 300 (Dixon J). See also *Capital Duplicators No. 2* (1993) 178 CLR 561, 630-1 (Toohey and Gaudron JJ), distinguishing between taxes on commodities rather than on the process of producing commodities.
16 *Dickenson's Arcade* (1974) 130 CLR 177, 185-6 (Barwick CJ), 209 (Menzies J), 221 (Gibbs J), 230-1 (Stephen J), and 239 (Mason J).
17 *Peterswald* (1904) 1 CLR 497, 509. See also *R v Barger* (1908) 6 CLR 41, 73-5 and 77 (Griffiths CJ, Barton and O'Connor JJ), 101 (Isaacs J) and 117 (Higgins J).
18 *Matthews* (1938) 60 CLR 263, 300 (Dixon J).

However, that possibility was rejected in ***Parton*** *v Milk Board (Vic)*.[19] *Parton* expanded the concept of "excise" in *Peterswald* to include a tax upon a commodity "at any point in the course of distribution *before it reaches the consumer*", but only on the basis that such a tax "produces the same effect as a tax upon its manufacture or production."[20]

17. In ***Dennis Hotels*** *Pty Ltd v Victoria*, Kitto J adopted the holding in *Parton* and said that an "excise" extended to the process of "bringing goods into existence or *to a consumable state*" or "passing them down the line… *to the point of receipt by the consumer*."[21] That formulation was unanimously endorsed in ***Bolton*** *v* *Madsen*[22] and said be the "definitive exposition" of an "excise" in ***Anderson's*** *Pty Ltd v Victoria*.[23] In the latter case, Barwick CJ explained the outer limit as being that "the step which puts goods into consumption is still in the line, albeit *at the end of the line*".[24]

Dickenson's Arcade resolved the question

18. It was against that background of decided cases that, in *Dickenson's Arcade*, Menzies J described as "established quite definitely" the proposition that an "excise" does not include a tax on consumption.[25] To similar effect, Mason J regarded it as established that a "tax on consumption of goods is not an excise."[26] Gibbs J noted that, since *Parton*, "no member of the Court has dissented from, and almost every member who has had occasion to discuss the matter has expressly affirmed, the proposition that a tax imposed on consumption is not a duty of excise".[27] Further, "the very greatest weight should be given to the fact that on this issue unanimity has been reached after a fluctuation of judicial opinion."[28] Finally, Stephen J said that "[n]o convincing reasons ha[d]… been advanced" to conclude that the phrase "duty of excise" included a tax on

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19 *Parton* (1949) 80 CLR 229, 259 and 261 (Dixon J).
20 Ibid, 260 (Dixon J).
21 *Dennis Hotels* (1960) 104 CLR 529, 559.
22 *Bolton* (1963) 110 CLR 264, 271 (the Court).
23 *Anderson's* (1964) 111 CLR 353, 364-5 (Barwick CJ). See also 373 (Kitto J, Taylor J agreeing), and 377 (Menzies J); Western *Australia v Hamersley Iron Pty Ltd (No. 1)* (1969) 120 CLR 42, 62 (Kitto J) and 64-5 (Menzies J); *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1, 22 (Menzies J) and 35-6 (Walsh J).
24 *Anderson's* (1964) 111 CLR 353, 365 (Barwick CJ).
25 *Dickenson's Arcade* (1949) 130 CLR 177, 209 (Menzies J).
26 Ibid, 239 (Mason J).
27 Ibid, 221 (Gibbs J).
28 Ibid, 221 (Gibbs J).

consumption.[29] There was no relevant difference of opinion on that point: **cf PS[40]**.

Dickenson's Arcade has been confirmed or followed on several occasions

19. There has been no departure from that proposition in the almost 50 years since *Dickenson's Arcade* was decided, despite this Court being invited to reconsider its correctness on several occasions. As Brennan J said in ***Philip Morris** Ltd v Commissioner of Business Franchises (Vic)*, "[i]f there be any rock in the sea of uncertain principle, it is that a tax on a step in the production or distribution of goods *to the point of receipt by the consumer* is a duty of excise."[30]

10 20. Leave to reopen *Dickenson's Arcade* was refused in *Evda Nominees Pty Ltd v Victoria*[31] and *Philip Morris*.[32] In *Capital Duplicators No. 2*, the majority said that there were "very strong practical reasons why the rule of stare decisis should be observed in relation to" *Dickenson's Arcade*[33] and confirmed the "proposition that a tax in respect of goods at any step in the production or distribution of goods *to the point of consumption* is an excise."[34] Similarly, in *Ha*, the High Court was invited to overrule *Dickenson's Arcade*[35] but confirmed that the decision remained authoritative for what it decided.[36]

21. In this connection, **PS[23]** reads the majority judgments in *Ha* and *Capital Duplicators No. 2* out of context. In each case, the majority said that s 90 must be
20 construed as "exhausting the categories of taxes on goods".[37] However, in those passages, the majority was considering the argument (addressed in Part D below) that s 90 is only engaged by a tax that discriminates between local and imported goods. Their Honours could not have included within that proposition taxes on

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29 Ibid, 230 (Stephen J).
30 *Philip Morris* (1989) 167 CLR 399, 445, quoted with approval in *Ha* (1997) 189 CLR 465, 490 (Brennan CJ, McHugh, Gummow and Kirby JJ).
31 (1984) 154 CLR 311, 316 (Gibbs CJ, Mason, Murphy, Wilson, Brennan and Dawson JJ, Deane J agreeing).
32 *Phillip Morris* (1989) 167 CLR 399, 409 (Mason CJ for the Court, other than Deane J).
33 *Capital Duplicators No. 2* (1993) 178 CLR 561, 591-2 (Mason CJ, Brennan, Deane and McHugh JJ).
34 Ibid, 583 (Mason CJ, Brennan, Deane and McHugh JJ), cf. 590, noting that it was unnecessary to consider "taxes on the consumption of goods." See also 629 (Toohey and Gaudron JJ).
35 *Ha* (1997) 189 CLR 465, 470 (D Jackson QC, *arguendo*).
36 Ibid, 504 (Brennan CJ, McHugh, Gummow and Kirby JJ),
37 Ibid, 488 (Brennan CJ, McHugh, Gummow and Kirby JJ); *Capital Duplicators No. 2* (1993) 178 CLR 561, 589-90 (Mason CJ, Brennan, Deane and McHugh JJ).

consumption because they elsewhere expressly stated that whether s 90 extended to consumption taxes was unnecessary to decide.[38]

22. Consistent with that, lower courts have adhered to the proposition identified in *Dickenson's Arcade*. In *Commissioner for Australian Capital Territory Revenue v Kithock Pty Ltd* (2000) 102 FCR 42, the Full Court of the Federal Court held that stamp duty on the sale of used vehicles was not an "excise" because the duty was imposed *after goods had entered into consumption*.[39] Similarly, in *Caltex Australia Petroleum Pty Ltd v Commissioner of Taxation*, Sundberg J said that it is "by now clear that consumption taxes are not excises."[40]

10 *Dickenson's Arcade* reflects the constitutional text

23. The proposition in *Dickenson's Arcade* reflects the constitutional text. Section 90 collocates three distinct concepts (excises, customs and bounties) and emphasises the "*production*" of goods. Similarly, s 91 allows Parliament to authorise the States to grant bounties on "the *production* or export of goods."[41] No mention is made of consumption in either section. That distinction is then picked up in s 93(i), which provides that, for "duties of excise paid on goods *produced or manufactured* in a State and afterwards passing into another State for *consumption*", duty shall be taken to have been collected in the latter State.[42] Those textual indicators are consistent with the proposition that a consumption tax
20 is not an excise because it is not sufficiently proximate to the manufacture or production of goods.[43]

Dickenson's Arcade agrees with broader s 90 principles

24. *Dickenson's Arcade* also coheres with broader principles concerning the scope of s 90. In characterising a tax as an excise, it is relevant to consider the indirectness

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

39 *Kithock* (2000) 102 FCR 42, [23], [31]-[32] (Spender, Mathews and Sundberg J), cited with approval in *Eclipse Resources Pty Ltd v Minister for Environment (No. 2)* (2017) 223 LGERA 313 (WASCA), [252(n)] (Buss P, Newnes and Murphy JJA) and followed in *Eclipse Resources Pty Ltd v Minister for Environment (No. 4)* (2016) 307 FLR 221, [714]-[717] (Beech J). Special leave was refused in *Kithock v Commissioner of Australian Capital Territory Revenue* [2001] HCATrans 374.

40 *Caltex Australia Petroleum Pty Ltd v Commissioner of Taxation* (2008) 173 FCR 359, [81]. See similarly *Knight v State of Victoria* (2014) 221 FCR 561, [94] (Mortimer J).

41 See, similarly, s 51(iii), referring to bounties "on the *production* or export *of goods*."

42 *Dennis Hotels* (1960) 104 CLR 529, 582 (Menzies J); *Ha* (1997) 189 CLR 465, 505-6 (Dawson, Toohey and Gaudron JJ), citing *Dennis Hotels* (1960) 104 CLR 529, 555 and *Capital Duplicators No. 2)* (1993) 178 CLR 561, 585.

43 *Dickenson's Arcade* (1949) 130 CLR 177, 239 (Mason J).

of the tax, its immediate entry into the cost of the goods, and the proximity of the transaction it taxes to the manufacture or production or the movement of the goods into consumption.[44] Those matters have no resonance to consumption taxes, which cannot be passed on[45], do not enter into the price at which the goods are sold in the market, and are not sufficiently proximate to the manufacture or production or movement of the goods.[46]

A tax on consumption is a tax on ownership

25. A tax on the act of consumption is in reality a tax on the exercise of certain rights bestowed upon the ultimate owner of the good. An owner has the right to destroy a good by consuming it (in the case of e.g. an apple) or the right to use it (in the case of a durable good, e.g. a vehicle). Likewise, the owner is the only person with the right to authorise someone else to destroy the apple by consumption or to use the vehicle. It may be accepted that a taxed producer, manufacturer, wholesaler or distributor would usually also be the owner of the good, but an excise duty is not imposed on them because they consume or use the goods in the above sense, but because they are "dealing"[47] with, or "taking a step"[48] in respect of, the good. A tax on mere ownership is not an excise.[49]

The taxed good is no longer subject to market forces

26. The principle that a tax on the production, manufacture, sale or distribution of a good up to the point of consumption incorporates the notion that the good in its taxed state will be subjected to the forces of the market. However, a consumption tax is by definition imposed after the good has left the market. This means that any effect of the tax on production and manufacture may operate differently and much more subtly than a tax imposed before the good reaches the consumer.

27. For example, a consumption tax leaves it to the consumer to predict the additional future taxation expenditure that will be incurred as a result of the purchase of the good. The effect on demand would depend on the consumer's willingness to undertake that assessment and the consumer's ability to accurately predict the

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44 *Anderson's* (1964) 111 CLR 353, 365 (Barwick CJ), quoted in *Capital Duplicators No.2* (1993) 178 CLR 561, 583 fn 99 (Mason CJ, Brennan, Deane and McHugh J). See also *Logan Downs* (1977) 137 CLR 59, 77 (Mason J, Barwick CJ agreeing) and *Dennis Hotels* (1960) 104 CLR 529, 560 (Kitto J).

45 *Dickenson's Arcade* (1949) 130 CLR 177, 230-1 (Stephen J).

46 Ibid, 239 (Mason J).

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

48 Ibid, 489-90 (Brennan CJ, McHugh, Gummow and Kirby JJ).

49 *Logan Downs* (1977) 137 CLR 59, 69 (Stephen J), 78 (Mason J, Barwick CJ agreeing).

future taxation expenditure. Further, in the case of a durable good, such as a vehicle, a consumer may, because of the tax, adjust the extent to which the good is being used, but will nonetheless still choose to purchase the good. The decrease in the demand for the good would then be in the form of prolonging the period before the consumer replaces the good by a second purchase.

Atlantic Smoke Shops did not control the outcome in *Dickenson's Arcade*

28. Finally, the decision in ***Atlantic Smoke Shops*** *Ltd v Conlon* [1943] AC 550 exercised no controlling influence on the decision in *Dickenson's Arcade*: **cf PS [29]-[35]**. That case concerned the distinction between direct and indirect taxation in the *British North America Act 1867* (Imp). Before referring to *Atlantic Smoke Shops* in *Parton*, Dixon J had already said that it is "probably essential" for a tax to constitute an excise is that "it should be a tax upon goods *before they reach the consumer*": **cf PS[31]**.[50] Similarly, in *Dickenson's Arcade*, Barwick CJ accepted that a tax on consumption could not constitute an "excise" but said this did not mean a State could enact the same legislation as was considered in *Atlantic Smoke Shops*.[51] Gibbs J said that he was not influenced by the distinction between direct and indirect taxation in affirming that consumption taxes are not excises.[52] Each of Stephen, Gibbs and Mason JJ gave independent reasons why s 90 ought not be understood as extending to consumption taxes: **cf PS[25]-[27]**.[53]

D. THE PROPER CONSTRUCTION OF SECTION 90

29. If leave to reopen the long-standing principle in *Dickenson's Arcade* is granted, leave should also be granted to reopen the more recent decisions in *Capital Duplicators No. 2* and *Ha* insofar as they held that an excise is a tax "on the production, manufacture, sale or distribution of goods, whether of foreign or domestic origin."[54] This Court should adopt the minority view in those cases, that State and Territory taxation will only offend s 90 if it discriminates between imported and locally produced goods.[55] That view, which has long "maintained a

50 *Parton* (1949) 80 CLR 229, 260 (Dixon J).
51 *Dickenson's Arcade* (1974) 130 CLR 177, 186 (Barwick CJ).
52 Ibid, 222-3 (Gibbs J).
53 Ibid, 222-3 (Gibbs J), 230-1 (Stephen J) and 239 (Mason J).
54 *Ha* (1997) 189 CLR 465, 499 (Brennan CJ, McHugh, Gummow and Kirby JJ); *Capital Duplicators No. 2* (1993) 178 CLR 561, 590 (Mason CJ, Brennan, Deane and McHugh JJ).
55 *Ha* (1997) 189 CLR 465, 514 (Dawson, Toohey and Gaudron JJ); *Capital Duplicators No. 2* (1993) 178 CLR 561, 617 (Dawson J) and 629-30 (Toohey and Gaudron JJ).

voice in this Court"[56], better coheres with the intention of the framers of the *Constitution*, the true purpose of s 90, and the text and structure of Ch IV as a whole.

The meaning of "excise" in the Convention Debates

30. It may be accepted, as the majority said in *Ha*, that the word "excise" was capable of a variety of meanings in 1901.[57] However, the Convention Debates considered those meanings and identified that a confined concept was intended.[58]

31. The Conventions proceeded on the basis that "excise duties are confined in all the colonies, and to only three articles – beer, spirits and tobacco".[59] As Victoria has demonstrated, those taxes were on the production of goods within the colony itself: **VS[44] fn 68**.

32. That is consistent with the later view of three members of the Court who participated in the Conventions (Griffiths CJ, Barton and O'Connor JJ) that "the Constitution was framed in Australia by Australians" and that the word "excise" had a "distinct meaning in the popular mind",[60] being a "tax on articles produced or manufactured in a country… 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 or personal tax."[61]

33. Contrary to what was said in *Ha*[62], an understanding of the meaning of the term may be drawn from the Convention Debates. At the 1891 Convention in Sydney, Deakin moved that the word "excise" be inserted into an early precursor to s 90.[63] In response, Douglas suggested that there ought to be some explanation of what would fall under the term "excise".[64] Marmion said he thought "an excise was a

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56 *Ha* (1997) 189 CLR 465, 512 (Dawson, Toohey and Gaudron JJ). See *Parton* (1949) 80 CLR 229, 264-7 (McTiernan J); *Dennis Hotels* (1960) 104 CLR 529, 555-6 (Fullagar J); *Hematite Petroleum* (1983) 151 CLR 599, 616 (Gibbs CJ), 638 (Murphy J), 661 (Deane J); *Phillip Morris Ltd* (1989) 167 CLR 399, 480 (Toohey and Gaudron JJ).

57 *Ha* (1997) 189 CLR 465, 493 (Brennan CJ, McHugh, Gummow and Kirby JJ).

58 See, generally, M Coper, "The High Court and Section 90 of the Constitution" (1976) 7(1) *Federal Law Review* 1, 21-25; J Williams, "'Come in Spinner': Section 90 of the Constitution and the Future of State Government Finances" (1999) 21(4) *Sydney Law Review* 627, 636-7.

59 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 1891, 366 (McIlwraith).

60 *Peterswald* (1904) 1 CLR 497, 509. See also the authorities in *Capital Duplicators No. 2* (1993) 178 CLR 561, 607 fn 99 (Dawson J).

61 *Peterswald* (1904) 1 CLR 497, 508-9.

62 *Ha* (1997) 189 CLR 465, 493 (Brennan CJ, McHugh, Gummow and Kirby JJ).

63 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 1891, 346.

64 Ibid.

duty imposed upon internal, and not upon external, productions" and he had "never read of an excise duty referring to productions outside of the country in which the duty was levied."[65] Forrest responded that an excise is "generally understood to be a duty levied upon home productions". Similarly, Gordon noted that, in England, "excise" had come to be used for a broad range of taxes, that this embraced "a good deal more than the local parliaments will give up", and that "the definition, which I have no doubt every member of the Convention intends, is simply duties upon articles of home production".[66]

34. This understanding was continued in later sessions. At the 1897 Convention in Sydney, Isaacs referred to a report prepared by the Victorian Accountants Committee that, amongst other things, considered the meaning of "excise".[67] He noted that the word "excise" in the United Kingdom included matters such as auctioneers' licences, gun licences, other licences, and taxes on carriages and said that this was a "very much wider meaning than we intend in this bill". After being asked by Barton what the term included, Isaacs said that "[w]hat we intend by excise would be covered by the definition in this report, 'a duty chargeable on the manufacture and production of commodities.'"[68] Barton said that if there was any "doubt" as to that meaning, it would take the "comparatively easy" task of defining it to resolve it.[69] The fact that this option was not taken up suggests there was little doubt.[70]

The purpose of s 90

35. The Debates are also consistent with the minority view in *Ha* that the purpose of s 90 was to protect Commonwealth tariff policy, rather than to give the Commonwealth complete control over the taxation of commodities.[71]

36. The withdrawal from the States of the power to levy duties of excise was seen as a minor issue at the Conventions, the focus instead being on the erection of a

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65 Ibid, 349.
66 Ibid, 354.
67 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 1897, 1065.
68 Ibid. See, also, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1898, 937 (Deakin): "The duty on imported beer is always balanced by an excise duty on beer which is the produce of the colony."
69 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 1897, 1067-8.
70 J Williams, "'Come in Spinner': Section 90 of the Constitution and the Future of State Government Finances" (1999) 21(4) *Sydney Law Review* 627, 637.
71 *Ha* (1997) 189 CLR 465, 506-7 (Dawson, Toohey and Gaudron JJ); *Capital Duplicators No. 2* (1993) 178 CLR 561, 627 (Toohey and Gaudron JJ); *Hematite Petroleum Pty Ltd* (1983) 151 CLR 599, 616-7 (Gibbs CJ); *Parton* (1949) 80 CLR 229, 264-5 (McTiernan J).

uniform tariff.[72] Indeed, the initial 1891 resolutions advanced by Parkes included a resolution to the effect that the power to impose duties of customs should be exclusively vested in the Commonwealth but made no mention of excises at all.[73] Nevertheless, Barton said that the power to impose customs duties "coveys the power to impose duties of excise corresponding."[74]

37. The necessary relationship between duties of customs and of excise was explained at the 1891 Convention by Munro:[75]

> It will be absolutely impossible to give the import duties to the federal government without the excise duties, unless we are to allow some colonies to take advantage of others. Take, for instance, the case of an article which I do not use. If the federal parliament is allowed to put an import duty on whiskey for the whole of the colonies, and one colony puts an excise duty on the local manufacture, and another colony does not do so, the result will be that the colony which does not tax the local whiskey will get the local article produced to the largest extent, and it will be passed on to other places, because being a local manufacture it will not be liable to any duty. I understand, whatever we may do, we intend to apply the same law to every colony, consequently we cannot allow the excise duties to go without the customs duties, for otherwise the whole thing will be bound to go wrong.

38. In a similar vein, Burgess said that it was "very necessary indeed that this [exclusive] power should be possessed by the federal government, particularly in view of the way in which the customs duties as a whole would be affected if proper care were not taken to provide for this at the outset."[76] When asked why a State should not be able to levy taxes on its own production, Isaacs said that it "would interfere with the commerce as between the commonwealth and other countries, or as between the state and other states".[77] Consistent with that understanding, Solomon said at the 1897 Adelaide Convention that "excise is definitely dealt with in the proposals as to Customs duties; the imposition of uniform tariffs and dealing with excise *come under the same head*."[78] Similar comments were then made concerning the precursors to s 55 of the *Constitution*, which prohibits laws

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72 M Coper, "The High Court and Section 90 of the Constitution" (1976) 7(1) *Federal Law Review* 1, 21.

73 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 1891, 23.

74 Ibid, 89.

75 Ibid, 347.

76 Ibid, 348. See also 365-6 (McIlwraith) and 366-7 (Deakin) and *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1898, 978 (Barton).

77 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 1897, 1067.

78 *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 1897, 265. See also 134 (Higgins): "If you say uniform duties of customs, you must also include excise; otherwise a state, by imposing excise duties, could avail itself of a system of protection by catering its excise duties to a serious extent."

introducing both duties of customs and of excises,[79] and to s 91, which generally prohibits the States from granting any aid or bounty on the production or export of goods.[80]

39. The majority in *Ha* acknowledged that the "original purpose in mind during the 1891 Convention" was no more than to "protect the integrity of the tariff policy of the Commonwealth".[81] Their Honours only considered the Conventions departed from that purpose in 1897 when the precursor to s 90 was amended so that an excise need not be "upon goods the subject of customs duties."[82] This, their Honours said, denied "any necessary linkage between the exclusivity of the power to impose duties of excise and Commonwealth tariff policy".

40. However, that conclusion does not flow from the premise. The purpose of the amendment was to ensure the preservation of Commonwealth tariff policy even where there is no customs duty on a particular good; the "absence of a customs duty upon particular goods [being] as much an aspect of Commonwealth tariff policy as is the presence of a customs duty".[83] Further, the inference drawn by the majority in *Ha* is not safe because the insertion and deletion of the words was motivated by the (mistaken) understanding on the part of some delegates that s 90 conferred a power on the Commonwealth Parliament, rather than being concerned with the exclusivity of power (to impose excises) already conferred by s 51(ii).[84] The amendment was made following a debate between three members of the 1897 Convention that was "conclusive of very little."[85]

41. This error led the majority in *Ha* to adhere uncritically to the view of Dixon J in *Parton* that the purpose of s 90 is to ensure the Commonwealth has "real control of the taxation of commodities and to ensure that the execution of whatever policy [the Commonwealth] adopted should not be hampered or defeated by State action."[86] That view is overbroad, reads too much into the single word "excise",

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79 *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 1897, 601-3.

80 Ibid, 845-51 and 857-8. As to the connection between bounties and excises, see *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1898, 937 (Barton), noting there is no difference between the protectionist effects of bounties and duties on local production.

81 *Ha* (1997) 189 CLR 465, 495 (Brennan CJ, McHugh, Gummow and Hayne JJ).

82 Ibid, 496 (Brennan CJ, McHugh, Gummow and Hayne JJ).

83 Ibid, 514 (Dawson, Toohey and Gaudron JJ).

84 Ibid. See also M Coper, "The High Court and Section 90 of the Constitution" (1976) 7(1) *Federal Law Review* 1, 26.

85 J Williams, "'Come in Spinner': Section 90 of the Constitution and the Future of State Government Finances" (1999) 21(4) *Sydney Law Review* 627, 633.

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

and finds no textual or structural basis in Ch IV.[87] However, more importantly, Dixon J expressed the view before this Court's decision in *Cole v Whitfield* and therefore without the benefit of recourse to the Convention Debates.[88] For the reasons above, those Debates do not suggest a purpose of that breadth.[89]

42. Further, that sweeping purpose cannot be reconciled with the accepted capacity of the States and Territories to levy taxes that do affect the price of commodities.[90] For example, land tax, payroll tax or income tax levied on producers or distributors of goods will be passed on to consumers, but they are not (on current case law) excises. Similarly, the States and Territories may influence the manufacture and production of commodities through tax concessions or the provision of infrastructure, either of which will encourage production. There are numerous other steps the States and Territories can take which may affect the price, supply or demand for an article. The existence of those indisputable capacities is inconsistent with the broad purpose of s 90 relied on in *Parton* and *Ha*.

43. It must also be remembered that a tax can serve either or both of the purposes of influencing behaviour in a market and of raising revenue. The text of the *Constitution* suggests that the purpose of the powers in s 90 is to influence behaviour in the market rather than revenue raising. This is borne out by the references to customs duties and bounties on production in s 90 itself (being measures traditionally aimed at affecting the relative competitiveness of local or overseas goods) and the conferral of the more general taxation power by s 51(ii) which undeniably includes the power to raise revenue by customs and excise duties. This makes it unlikely that the reference to excise in s 90 was intended to confer a general power to tax commodities.

44. Finally, there is no obvious purpose served in granting exclusive power on the Commonwealth Parliament to tax commodities and not at the same time conferring a like power in respect of the taxation of services. If the object of s 90

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87 *Ha* (1997) 189 CLR 465, 507-8 (Dawson, Toohey and Gaudron JJ); *Capital Duplicators No. 2* (1993) 178 CLR 561, 611 (Dawson J).

88 *Cole v Whitfield* (1987) 165 CLR 360, 385 (the Court).

89 This "broad ranging objective would be implausible if s 90 were seen as reflecting the intentions of those who drafted the Constitution": Hanks, Gordon and Hill, *Constitutional Law in Australia*, 4th ed, 2018, [6.106].

90 *Ha* (1997) 189 CLR 465, 508 (Dawson, Toohey and Gaudron JJ); *Capital Duplicators No. 2* (1993) 178 CLR 561, 612-3 (Dawson J); *Hematite Petroleum Pty Ltd* (1983) 151 CLR 599, 616-7 (Gibbs CJ).

is control of the economy or of an economic union via taxation, then it is clumsy to confine the power to goods. This suggests the purpose of s 90 lies elsewhere.

The Constitutional context

45. The minority view in *Ha* sits much more comfortably with the text and structure of Ch IV. The accepted doctrine of this Court is that Ch IV was relevantly intended to achieve two complimentary purposes, being (a) the creation of a customs union and (b) the creation of a common market.[91] Sections 90 and 92 achieved those purposes, respectively.

46. Upon the establishment of the Commonwealth, the collection and control of duties of customs and of excise, and control of the payment of bounties, passed to the Executive Government of the Commonwealth: s 86, and also ss 69 and 85(i). The grant of the general taxation power (including to impose customs duties and excises: s 55) was limited to exclude any power to discriminate between States or parts of States (s 51(ii)) and the power to grant bounties was limited by a requirement of uniformity throughout the Commonwealth: s 51(iii). The Commonwealth was then obliged by s 88 to impose uniform duties of customs within two years of federation.

47. As the introductory words of s 90 make clear, it was only upon "the imposition of uniform duties of customs" that the power of the Parliament to impose duties of customs and of excise became "exclusive": see also ss 93 and 94. Prior to that time, the Commonwealth held only a concurrent power to make laws with respect to taxation. That strongly suggests that the purpose of the exclusivity required by s 90 was to protect the integrity of the uniform customs tariff required by s 88.[92]

48. It is conspicuous that the same temporal element was adopted in s 92. The evident purpose of both provisions was to effectuate a common market whereby, upon the imposition of uniform duties of customs, State producers would lose the benefit of local protectionist measures (such as bounties on production and manufacture) but would gain access to the whole of the Commonwealth market on equal terms

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91 *Cole v Whitfield* (1987) 165 CLR 360, 385-387 (the Court); *Hematite Petroleum Pty Ltd* (1983) 151 CLR 599, 660 (Deane J).

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

as producers in the other States.[93] In that scheme, s 92 would operate to strike down any protectionist burden on interstate trade or commerce within the Commonwealth. Section 90 prevented the States from impairing the uniform customs tariff by discriminating between locally produced and international goods. A State or Territory tax which falls indiscriminately on those goods does not affect the difference or parity in their price as set by the Commonwealth tariff policy.

49. A number of other textual indicators support this view. *First*, the *Constitution* makes no reference to duties of excise without a corresponding reference to duties of customs[94]:

(a) Section 55 provides that laws imposing duties of "customs or of excise" may only deal with one subject of taxation only.

(b) Section 69 required "the departments of customs and of excise in each State" to be transferred to the Commonwealth.

(c) Section 85(i) provided that the property of a State connected with those departments were only transferred for so long as the Governor-General in Council declared to be necessary.

(d) By s 86, the "collection and control of duties of customs and of excise" passed to the Executive Government of the Commonwealth.

(e) Section 87 then provided for the redistribution by the Commonwealth of the net revenues from "duties of customs and of excise".

(f) Section 93 provided for payments to the States in respect of duties of customs and excise during the first five years after the imposition of uniform duties of customs and thereafter until the Parliament otherwise provided.

50. It is plain from that context that the framers of the *Constitution* considered duties of customs and of excise were closely connected but logically distinct. In *Ha*, the majority dismissed the State's reliance on s 55 of the *Constitution*, referring to what it described as the dichotomy between laws imposing a tax on the importation of goods and laws imposing an inland tax on some dealing with the

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93 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1898, 912-3 (O'Connor); *Hematite Petroleum Pty Ltd* (1983) 151 CLR 599, 660 (Deane J).

94 *Ha* (1997) 189 CLR 465, 506 (Dawson, Toohey and Gaudron JJ); *Hematite Petroleum* (1983) 151 CLR 599, 615 (Gibbs CJ) and 661 (Deane J); *Dennis Hotels* (1960) 104 CLR 529, 555 (Fullagar J).

goods.[95] However, there is in fact no dichotomy on their Honours' analysis because an inland tax overlaps with a customs duty in so far as the former falls on imported goods.

51. *Secondly*, within s 90 itself, the words "bounties on the production or export of goods" are juxtaposed with "duties of customs and of excise". A bounty serves the same purpose of protecting local goods from competing overseas goods as does a duty of customs and it serves the opposite purpose of a tax on local goods.

52. *Thirdly*, s 93(i) distinguished between "duties of customs" paid "on goods imported into a State" and "duties of excise" paid "on goods produced or manufactured in a State".[96] The majority in *Ha* said that these descriptors throw "no light on the connotation of the term 'duties of excise'".[97] However, that textual indicator motivated a unanimous Court three years after the *Constitution* came into effect.[98] The description of those concepts in s 93(i) is also entirely consistent with (a) the distinction drawn between duties of customs and excise in ss 55, 69, 85(i), 86 and 87 and (b) the emphasis in ss 90 and 91 on the production of goods.

A selective tax on sale or distribution would still be an excise

53. The proposition from *Peterswald* that an excise duty is confined to a tax upon the production or manufacture of goods was accepted by Dixon J in *Parton* when his Honour held that a tax at any point in the course of distribution after production or manufacture was an excise. In particular, Dixon J explained that the rationale for treating a tax on the sale or distribution of a good as an excise was the fact that such a tax affects the production or manufacture of the good in the same way as a tax imposed at the point of production or manufacture.[99] This view was adopted by the majority in *Capital Duplicators No. 2*.[100]

54. A decision by this Court to confine excise duties to a tax that falls selectively on locally produced or manufactured goods will not disturb this principle from

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95 *Ha* (1997) 189 CLR 405, 496 (Brennan CJ, McHugh, Gummow and Kirby JJ).
96 *Ha* (1997) 189 CLR 465, 505 (Dawson, Toohey and Gaudron JJ); *Capital Duplicators No. 2* (1993) 178 CLR 561, 615 (Dawson J); *Dennis Hotels* (1960) 104 CLR 529, 555 (Fullagar J).
97 *Ha* (1997) 189 CLR 465, 493 (Brennan CJ, McHugh, Gummow and Kirby JJ).
98 *Peterswald* (1904) 1 CLR 497, 509 (Griffiths CJ for the Court).
99 *Parton* (1949) 80 CLR 229, 260 (Dixon J).
100 *Capital Duplicators No. 2* (1993) 178 CLR 561, 586-7 (Mason CJ, Brennan, Deane and McHugh JJ).

Parton. Specifically, a selective tax on the sale or distribution of a locally produced good would be an excise.

Part IV: Estimate

55. The Territory estimates that no more than 15 minutes will be required for oral submissions.

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY No M61 of 2021

BETWEEN: **CHRISTOPHER VANDERSTOCK**

First Plaintiff

KATHLEEN DAVIES

Second Plaintiff

and

THE STATE OF VICTORIA

10 Defendant

ANNEXURE TO INTERVENER'S SUBMISSIONS (NORTHERN TERRITORY OF AUSTRALIA)

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the Attorney-General for the Northern Territory sets out below a list of the constitutional, statutory and statutory instrument provisions referred to in these submissions.

No.	Description	Version	Provisions
1.	*Constitution* (Cth)	Current	ss 51(ii), 51(iii), 55, 69, 85(i), 86, 87, 90, 91, 92, 93, 94.
2.	*Road Safety Act 1986* (Vic)	Current	ss 3(1) ("registered operator"), 5AB(1)(c) and 9(1).
3.	*Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic)	Current	ss 1, 3, 7(1), 8(1).