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

10

and

THE STATE OF VICTORIA
Defendant

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DEFENDANT'S SUPPLEMENTARY SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ARGUMENT

A. SUMMARY

2. Victoria has previously submitted, amongst other things, that the Court should re-open *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]*[1] and *Ha v New South Wales*,[2] in order to find that an excise is a tax that falls selectively on locally produced goods.[3] The Commonwealth's supplementary submissions (**CSS**) are framed, in substantial part, as a response to that submission (CSS [4]-[20], [27]-[31]).

10 3. In the course of the hearing of this matter, Kiefel CJ indicated that the Court was "not minded" to re-open *Capital Duplicators* or *Ha*. Nonetheless, the Chief Justice invited supplementary submissions on "the operation of [s] 90 on the basis that they were reopened for a broader consideration of the case[s]" (T267 L11986-11990). Victoria understands that request to have invited submissions on the principled basis for the majority decisions in *Capital Duplicators* and *Ha*, for the purpose of assisting the Court to resolve the question of whether the meaning of excise includes taxes on the consumption of goods — a question which was unnecessary to decide in those cases.

4. Accordingly, Victoria submits that an excise is defined exhaustively as a tax "on the production, manufacture, sale or distribution of goods, whether of foreign or domestic
20 origin".[4] In determining whether a tax is "on" one of those steps, it is necessary to consider "the practical or substantial operation" of the Act imposing the tax, as well as "its legal operation".[5] Victoria advances that submission for the following reasons:

    4.1. The **purpose** of s 90 of the Constitution is, as Dixon J identified in *Parton v Milk Board (Victoria)*, "to give the [Commonwealth] Parliament a real control of the

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[1] (1993) 178 CLR 561.

[2] (1997) 189 CLR 465.

[3] See VS [38]-[59] and T218-237 L9722-10616. Without repeating them, Victoria continues to rely on those submissions. It also continues to rely on its submissions that the ZLEV charge is not a tax on goods (VS [10]-[15]; T134-151 L5955-6764), that *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 should not be re-opened (VS [16]-[29]; T151-199 L6765-8938), and that, if it is re-opened, *Dickenson's Arcade* should be affirmed (VS [30]-[37]; T199-218 L8939-9720). These supplementary submissions are put in the alternative to the first and second of those submissions and supplement the third submission.

[4] *Ha* (1997) 189 CLR 465 at 499 (majority); *Capital Duplicators* (1993) 178 CLR 561 at 590 (majority).

[5] *Capital Duplicators* (1993) 178 CLR 561 at 583 (majority).

taxation of commodities".[6] As explained in subsequent decisions of this Court, that "real control" refers to control over the use of the economic levers referred to in s 90 — duties of customs, duties of excise and bounties — to influence home production. Duties of excise influence home production through their tendency to enter into the price of goods. Taxes on the production, manufacture, sale or distribution of goods burden home production in this way. A consumption tax does not. (**Part B.1**).

The wider view of the purpose of s 90 advanced in the Commonwealth's supplementary submissions — to prevent "distortions in the national market" (CSS [22]) — should not be countenanced. It does not follow from the free trade objective of Federation and is not supported by the authorities. Once that wider view is dismissed, the Commonwealth's extraordinarily broad test of what constitutes an excise — "any inland tax on goods" (CSS [3](d)) — must also be rejected (**Part B.2**).

4.2. Victoria's approach is also consistent with the **text and context** of s 90. Even if excise had no single or unified meaning in 1901 (CSS [5]), matters of text and context indicate that the core, or essential, aspects of its meaning were that an excise is a tax on goods that: (i) is connected to production and manufacture; and (ii) has a tendency to enter into the price the consumer pays for the good. Both of those aspects are central to the understanding of excise advanced by Victoria (**Part C**).

4.3. Finally, on Victoria's approach, the **identification of an excise** involves looking to the practical and legal operation of the statute, consistently with the rejection of the criterion of liability methodology in *Capital Duplicators* and *Ha*. In many cases, including the present case, the application of that approach will be straightforward. The Commonwealth's objections to the approach do not withstand scrutiny (**Part D**).

5. The Attorneys-General of New South Wales, South Australia, the Northern Territory, Tasmania and Queensland have authorised Victoria to convey their agreement with the substance of these submissions.

[6] (1949) 80 CLR 229 at 260 (Dixon J).

B. PURPOSE

B.1 Real control of the taxation of commodities

The meaning of "real control" of the taxation of commodities

6. It has been accepted for almost 75 years that the purpose of s 90 of the Constitution is "to give the [Commonwealth] Parliament a *real control of the taxation of commodities* and to ensure that the execution of whatever policy it adopt[s] should not be hampered or defeated by State action".[7] This purpose was first articulated by Dixon J in *Parton* and has since been repeatedly affirmed by Justices of this Court,[8] including by the majorities in *Capital Duplicators* and *Ha*.[9] As the plaintiffs have accepted, that purpose should now be treated
10 as "settled" (PS [16.2], [19]).

7. The only detailed explanation in the authorities of what is meant by giving the Commonwealth Parliament "a real control of the taxation of commodities" appears in the judgment of Mason J in *Hematite Petroleum Pty Ltd v Victoria*.[10] There, Mason J observed that the purpose of s 90 must be understood by reference to the fact that the provision confers "exclusive power to impose duties of excise in conjunction with a like power to impose customs duties, in a Constitution which frequently refers to the two duties" together.[11] His Honour explained that duties of custom and of excise (as well as bounties) are levers given exclusively to the Commonwealth which allow it to "protect and stimulate home production" in *particular* ways.[12] As such, the "real control of the taxation of
20 commodities" referred to by Dixon J in *Parton* is control over the use of those levers to pursue the Commonwealth's chosen economic policy with respect to home production.[13]

8. The *particular* ways that the levers referred to in s 90 — duties of custom and of excise — allow the Commonwealth to pursue its chosen economic policy with respect to home

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[7] *Parton* (1949) 80 CLR 229 at 260 (Dixon J) (emphasis added).

[8] See, eg, *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1 at 17 (Barwick CJ); *Dickenson's Arcade* (1974) 130 CLR 177 at 219 (Gibbs J), 238 (Mason J); *MG Kailis (1962) Pty Ltd v Western Australia* (1974) 130 CLR 245 at 265 (Mason J); *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 631 (Mason J).

[9] *Capital Duplicators* (1993) 178 CLR 561 at 586 (majority); *Ha* (1997) 189 CLR 465 at 495 (majority).

[10] (1983) 151 CLR 599.

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

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

[13] *Capital Duplicators* (1993) 178 CLR 561 at 585-587 (majority).

production were explained by Mason J in *Hematite Petroleum*, in a passage which was later endorsed by the majority in *Capital Duplicators*. In particular:[14]

8.1. If the Commonwealth's policy was to *protect* home production, it could fix higher customs duties or lower excise duties, which in turn could be expected to decrease the price of local goods relative to imported goods.

8.2. If the Commonwealth's policy was to *exert pressure* on home production (for example, in order to make it more competitive), it could fix lower customs duties or higher excise duties, which in turn could be expected to increase the price of local goods relative to imported goods.

10 8.3. If the Commonwealth's policy was to influence the price of all goods in the domestic market (regardless of whether they are local or imported), it could alter duties of custom and excise *uniformly*. Fixing higher duties of customs and excise could be expected to increase the price of all goods in the domestic market, and fixing lower duties of customs and excise could be expected to decrease the price of all goods in the domestic market.

9. This explanation demonstrates that s 90 gives the Commonwealth exclusive control over levers that allow it to pursue its chosen economic policy with respect to home production by imposing duties which have a tendency to enter into the price of goods.[15] As the duties tend to "increase[ ] the price of the goods to the ultimate consumer, and thereby diminish[ ]
20 or tend[ ] to diminish demand for the goods", they are "a burden on production".[16] The legislative power of the States and Territories to impose taxes on commodities which enter into the price of goods is "correspondingly confined".[17] It is in that sense that Dixon J explained in *Parton* that the purpose of s 90 included ensuring that whatever policy the Commonwealth Parliament adopted "should not be hampered or defeated by State action".[18]

[14] *Hematite Petroleum* (1983) 151 CLR 599 at 631 (Mason J); *Capital Duplicators* (1993) 178 CLR 561 at 586-587 (majority).

[15] See *Hematite Petroleum* (1983) 151 CLR 599 at 631 (Mason J); see also CSS [41].

[16] *Hematite Petroleum* (1983) 151 CLR 599 at 632 (Mason J). See also *Capital Duplicators* (1993) 178 CLR 561 at 586 (majority).

[17] *Philip Morris Ltd v Commissioner of Business Franchises (Vic)* (1989) 167 CLR 399 at 426 (Mason CJ and Deane J).

[18] *Parton* (1949) 80 CLR 229 at 260 (Dixon J).

Production, manufacture, sale or distribution

10. Once the purpose of s 90 is accepted to be that articulated by Dixon J in *Parton*, it follows that a tax is an excise if it is in substance on the production, manufacture, sale or distribution of goods.[19] That proposition also emerges from the judgment of Mason J in *Hematite Petroleum*: as his Honour explained, a tax on any of those four steps places a burden on home production because of its tendency to enter into the price of goods; "the person who is liable to pay it naturally seeks to recoup it from the next purchaser", increasing the price paid for the goods by the ultimate consumer.[20] The same proposition was then affirmed by the majority in *Capital Duplicators*.[21]

10 11. The notion that an excise is a tax which burdens production because of its tendency to enter into the price of goods did not emerge for the first time in *Hematite Petroleum* — it has consistently underpinned the case law on s 90:

11.1. In *Peterswald v Bartley*, Griffith CJ said that "[n]obody disputes" that the person primarily liable to pay an excise duty imposed upon goods during the process of manufacture, having paid the duty, "adds it to the selling price and so passes it on to be ultimately paid by the consumer".[22]

11.2. Similarly, in *Commonwealth Oil Refineries Ltd v South Australia*, Higgins J observed that "whatever may be the difference in English and in American usage, 'customs and excise' are correlative words" for taxes which "enter at once into the

20 price of the taxed commodity".[23]

11.3. In *Matthews v Chicory Marketing Board (Victoria)*, that critical notion led to the rejection of the requirement that an excise be calculated by reference to the quantity or value of goods.[24] Dixon J held that a levy calculated by reference to "area planted" was just as much a tax on the production of chicory as a levy calculated by reference to the weight or quantity of goods because a levy of any of those kinds was "so closely connected with the … production … of commercial goods that it

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[19] *Ha* (1997) 189 CLR 465 at 499 (majority); *Capital Duplicators* (1993) 178 CLR 561 at 590 (majority). See also *Hematite Petroleum* (1983) 151 CLR 599 at 632 (Mason J).

[20] *Hematite Petroleum* (1983) 151 CLR 599 at 632 (Mason J).

[21] *Capital Duplicators* (1993) 178 CLR 561 at 586 (majority).

[22] (1904) 1 CLR 497 at 511-512 (Griffith CJ).

[23] (1926) 38 CLR 408 at 435 (Higgins J).

[24] (1938) 60 CLR 263 at 304 (Dixon J).

forms an element naturally incorporated in the price".[25]

11.4. In addition, it justified the extension of the concept of excise, in *Parton*, to taxes on sale and distribution. As Dixon J said in that case, "[a] tax upon a commodity at any point in the course of distribution before it reaches the consumer produces the *same effect* as a tax on its manufacture or production".[26] The "same effect" that his Honour was referring to was, evidently, what the majority in *Capital Duplicators* described as the "natural tendency" that a tax on sale or distribution has, like a tax on production or manufacture, "to be passed on to purchasers down the line of distribution and thus to increase the price of, and to depress the demand for, the

10 goods on which the tax is imposed".[27]

12. It follows from the foregoing that, both as a matter of principle and as a matter of authority, it is the tendency of a tax on goods to enter into the *purchase price* of those goods that is critical. The authorities do not support the proposition that a tax on goods will be an excise because it has, in some way that is independent from the price of a good, the potential to influence *demand* for the good (contra CSS [41]-[43]). To the extent that the authorities refer to the concept of demand, they do so in the specific context of the potential impact on demand of an increase in the price of a good.[28] Having regard to the purpose of s 90, and the particular levers given to the Commonwealth Parliament to achieve that purpose (see paragraphs 8-9 above), that is unsurprising.

20 ***Consumption or usage***

13. In *Capital Duplicators* and *Ha*, it was "unnecessary" to consider taxes on the consumption of goods.[29] Nonetheless, once the purpose of s 90 articulated by Dixon J in *Parton* is accepted — as it was by the majorities in *Capital Duplicators* and *Ha*[30] — it becomes plain that consumption taxes are not excises. Analysed as a class, consumption taxes do not have a general or natural tendency to enter into the price of goods, and so do not burden home production in the way contemplated by Mason J in *Hematite Petroleum* and the majority

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[25] *Matthews* (1938) 60 CLR 263 at 301, 303 (Dixon J). See also *Hematite Petroleum* (1983) 151 CLR 599 at 632-633 (Mason J).

[26] *Parton* (1949) 80 CLR 229 at 260 (Dixon J) (emphasis added).

[27] *Capital Duplicators* (1993) 178 CLR 561 at 586 (majority). See also *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 69 (Stephen J).

[28] See *Hematite Petroleum* (1983) 151 CLR 599 at 632 (Mason J); *Philip Morris* (1989) 167 CLR 399 at 436 (Mason CJ and Deane J); *Capital Duplicators* (1993) 178 CLR 561 at 586 (majority); see also T213 L9503-9525; cf CSS [41]-[42].

[29] *Capital Duplicators* (1993) 178 CLR 561 at 590 (majority); *Ha* (1997) 189 CLR 465 at 499-500 (majority).

[30] *Capital Duplicators* (1993) 178 CLR 561 at 586 (majority); *Ha* (1997) 189 CLR 465 at 495 (majority).

in *Capital Duplicators*. Both orally and in writing, Victoria has already advanced a number of submissions as to why that is the case.[31] However, the most obvious reason is that, unlike taxes on the production, manufacture, sale or distribution of goods, consumption taxes are imposed at a point subsequent to the sale of goods to consumers. While consumption taxes are therefore capable of affecting the overall financial burden of owning or using goods, they cannot be said to have a general or natural tendency to enter into their price. The ZLEV charge provides a helpful illustration of this point: because it is imposed on the consumption of a non-perishable good at different points in its life cycle by reference to how much it is used over that period, the economic burden of the tax is unascertainable
10 at the point of sale. It therefore cannot enter into the price of a ZLEV.

B.2 The Commonwealth's wider view of purpose

14. The linchpin of the Commonwealth's supplementary submissions is that the "essential objective" of the federal compact was the creation and maintenance of a free trade area throughout the Commonwealth (CSS [22]; see also [3](c), [14]-[16]). Section 90 is said to "effectuate[ ]" that objective by preventing "the distortions in the national market that would arise if the State[s] were permitted to impose tax[es] on goods traded between the people of the Commonwealth" (CSS [22]; see also at [3](b)-(c), [23], [28], [35], [43], [47]). That articulation of the purpose of s 90 is then deployed to justify a meaning of "excise" of extraordinary breadth: "any inland tax on goods, meaning any tax that — as a matter of
20 substance rather than form — is payable by a person as a result of that person having engaged in some dealing with goods" (CSS [3](d); see also [32], [47]).

15. This is not the first time the Commonwealth has sought to significantly expand the meaning of excise in this way. It made materially the same argument in *Capital Duplicators*.[32] Despite the vigour with which the Commonwealth's argument is repeated, it still should not prevail.[33] To explain why that is so, it is necessary to address both the free trade objective of Federation and the assertion that the purpose of s 90 is to prevent distortions in the national market.

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[31] See especially VS [32] and T214 L9557-T215 L9625.

[32] (1993) 178 CLR 561 at 565-566 (Griffith QC): "[t]he *Dennis Hotels Case* should be treated as a limited exception to the *general rule* that *an excise is any tax which is, in substance, a tax on goods*" (emphasis added).

[33] See *Ha* (1997) 189 CLR 465 at 499 (majority).

The free trade objective of Federation

16. Consistently with observations made by this Court in *Ha*[34] and *Betfair Pty Ltd v Western Australia*,[35] Victoria accepts that *an* important objective of Federation was the creation and maintenance of free trade throughout the Commonwealth.[36] Acceptance of that proposition does not, however, assist in discerning the purpose of s 90. That is so for two reasons.

17. *First*, identifying that Ch IV of the Constitution, or specific sections within Ch IV, are concerned with "free trade" (see, eg, CSS [14]-[16], [22]-[26]) proceeds at too high a level of generality to be helpful in ascertaining the purpose of s 90. The purpose of sections of the Constitution, like statutes, "can be described at different levels of generality";[37] the level of generality at which purpose is best described will depend on the analytical task to be undertaken.[38] Proceeding at the level of generality encouraged by the Commonwealth invites disengagement from the critical questions of *how* Ch IV pursues free trade and *what* work s 90 was intended to do in pursuit of that objective. This Court has answered those questions by consistently affirming the purpose of s 90 identified by Dixon J in *Parton*, and by explaining that purpose in a very different way to that advanced by the Commonwealth (see Part B.1 above).

18. *Second*, insofar as free trade was an important objective of Federation, s 92 was the "chief means" by which it was effected.[39] Section 92 prohibits discriminatory burdens of a protectionist kind on interstate trade and commerce,[40] and discriminatory burdens on interstate intercourse.[41] It goes no further. For example, it does not prohibit States from regulating their internal markets through laws that do not discriminate between interstate

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[34] *Ha* (1997) 189 CLR 465 at 494 (majority), citing *Cole v Whitfield* (1988) 165 CLR 360 at 386 (the Court).

[35] (2008) 243 CLR 418 at [22] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

[36] To the extent that CSS [22] is intended to suggest that the only, or most important, objective of Federation was free trade (cf CS [3(c)]), that submission is at odds with both pre-Federation materials and with authority, and should be rejected: *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120 at 140 (Stephen J) ("*one* great aim of [F]ederation"); *Cole v Whitfield* (1988) 165 CLR 360 at 392 (the Court) ("the *principal goals* of the movement towards the federation of Australian colonies *included*…"); *Capital Duplicators Pty Ltd v Australian Capital Territory [No 1]* (1992) 177 CLR 248 at 277 (Brennan, Deane and Toohey JJ) ("*an* essential objective"); *Ha* (1997) 189 CLR 465 at 494 (majority) ("*an* objective") (emphasis added to each quote).

[37] *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at [103] (Gageler J).

[38] See *Alexander* (2022) 96 ALJR 560 at [104] (Gageler J).

[39] *Ha* (1997) 189 CLR 465 at 506 (minority). See also *Cole* (1988) 165 CLR 360 at 391 (the Court).

[40] *Cole* (1988) 165 CLR 360 at 394 (the Court); *Palmer v Western Australia* (2021) 272 CLR 505 at [30] (Kiefel CJ and Keane J), [85] (Gageler J), [184] (Gordon J); cf [250]-[252] (Edelman J).

[41] *Palmer* (2021) 272 CLR 505 at [47] (Kiefel CJ and Keane J), [92], [114] (Gageler J), [181] (Gordon J), [215] (Edelman J).

and intrastate trade and commerce.[42] Consistently with VS [49.1], the fact that s 92 gives effect to free trade in a particular, confined way suggests that s 90 was not intended to achieve the even broader free trade objective posited by the Commonwealth. This is not to deny that ss 90 and 92 "perform complementary roles in Ch IV", nor to "assume that ss 90 and 92 cannot share the same objective but have different fields of operation" (cf CSS [28]). Rather, it is to observe that on the Commonwealth's preferred view of Ch IV, ss 90 and 92 have both the same objective and somewhat *overlapping* fields of operation, rendering the Constitution's most important provision for the protection of free trade otiose in respect of State and Territory taxes on goods.

10 ***The posited purpose of s 90: preventing distortions in the national market***

19. The more specific purpose of s 90 which the Commonwealth seeks to extract from the Constitution's broader free trade objective is the prevention of distortions in the national market that would arise from differential State and Territory taxes on goods (CSS [22]-[24]). At the outset, it is important to note that the Commonwealth does not identify what it means by "preventing distortions in the national market", and that precise phrase does not seem to be drawn from the authorities. What it appears to be referring to is the imposition of differential taxes on goods in different States and Territories, which may affect the price of goods and create artificial incentives for relocation (see CSS [24], [30]).

20. There are at least three reasons why the Commonwealth's posited purpose cannot be
20 accepted.

21. *First*, and most significantly, it does not follow logically from the broader free trade objective of Federation. An unstated premise of the Commonwealth's submissions is that *any* market distortion could undermine the maintenance of free trade within the Commonwealth, which is said to justify the position that *any* State tax on goods will contravene s 90 (CSS [24]). The only apparent support for that premise identified by the Commonwealth is the preference that individual framers expressed during the Convention Debates for, among other things, "perfect harmony of trade" and the application of "the same law to every colony" (see CSS [14]-[15]). However, the Court does not substitute the words of a section of the Constitution for the effect the framers "subjectively intended the
30 section to have".[43] That is especially the case where, as here, many of the passages relied

[42] *Cole* (1988) 165 CLR 360 at 394, 399 (the Court).

[43] *Cole* (1988) 165 CLR 360 at 385 (the Court). See also CSS [13].

upon by the Commonwealth reflect isolated views which were not ultimately given effect in the Constitution: many of the comments from the 1891 Convention Debates in Sydney cited at CSS [14] were made in relation to a proposed amendment to s 90 by Mr Gordon which was not ultimately adopted;[44] and many of the comments from the 1897 Convention Debates in Adelaide cited at CSS [15] were made in the context of discussing bounties, not duties of excise, and so were addressed primarily to the issue of States directly subsidising local goods.[45] The Debates therefore do not suggest that *any* market distortion could undermine free trade.

22. A related difficulty for the Commonwealth is that s 90, by its *terms*, only provides for Commonwealth exclusivity over a relatively narrow range of economic levers: customs duties, excise duties and bounties.[46] The Commonwealth does not dispute that payroll taxes are within the legislative power of States (T100 L4441-4449). Nonetheless, as the Commonwealth appears to accept (CSS [29]), such taxes could distort the national market for goods. Without attempting to be exhaustive, the same might be said of land taxes, income taxes, production quotas, and concessions.[47] As State and Territory laws concerning each of these economic measures are not nationally uniform, divergences in the market for goods in each State are not only possible (cf CSS [23]), but inevitable. Rather than indicating that the Constitution contains a "Trojan horse" which risks "destroy[ing] a central objective of the federal compact" (cf CSS [23]), it instead indicates that the free trade objective of Federation did not require, nor seek to secure, the elimination of all "economic distortions".[48] As Stephen J explained in *Seamen's Union of Australia v Utah Development Co*, "[i]t was no part of the federal compact that this vital function of colonial governments, the development of the economies of their respective communities, should pass, on [F]ederation, to the Commonwealth";[49] an economic union is not to be equated with a unitary state (cf CSS [18]).[50]

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44 See, eg, *Official Report of the National Australasian Convention Debates*, Sydney (1891) at 352 (Gordon), 370.

45 See, eg, *Official Report of the National Australasian Convention Debates*, Adelaide (1897) at 839-840 (Holder), 842 (Symon), 843 (Trenwith).

46 *Hematite Petroleum* (1983) 151 CLR 599 at 616-617 (Gibbs CJ); *Capital Duplicators* (1993) 178 CLR 561 at 612 (Dawson J); *Ha* (1997) 189 CLR 465 at 508 (minority).

47 See *Capital Duplicators* (1993) 178 CLR 561 at 612 (Dawson J); *Ha* (1997) 189 CLR 465 at 508 (minority).

48 *Capital Duplicators* (1993) 178 CLR 561 at 613 (Dawson J).

49 (1978) 144 CLR 120 at 140-141 (Stephen J); see also at 133 (Gibbs J), 148-149 (Mason J).

50 *Capital Duplicators* (1993) 178 CLR 561 at 613 (Dawson J).

23. It would be quite unexpected if, despite the foregoing, the purpose of s 90 was the prevention of distortions in the national market. If that were the case, s 90 would have an objective which it "does not pursue … at all costs" (CSS [29]) and could never fully achieve. In stark contrast, the purpose identified by Dixon J in *Parton* avoids any disparity between the objective and the operation of the provision. Section 90 makes exclusive the Commonwealth Parliament's power to impose customs duties, excise duties and bounties, which is closely tailored to the aim of ensuring that State action does not undermine the Commonwealth's use of those three levers to pursue its chosen economic policy with respect to home production: see paragraphs 6 to 9 above. It is far more likely that s 90 has
10 the purpose articulated by Dixon J in *Parton*, which it pursues completely, than the wider purpose posited by the Commonwealth, which it is incapable of ever achieving.

24. *Second*, the Commonwealth's purpose is not supported by the authorities. Far from "building upon" the purpose identified by Dixon J in *Parton*,[51] the posited purpose seeks to supplant that purpose. On any reading, *Parton* is inconsistent with an interpretation of an excise that includes *all* taxes on goods. Justice Dixon's formulation explicitly only encompassed a tax on a good at any point "*before* it reaches the consumer", because such a tax produced the same effect as a tax upon production or manufacture;[52] his Honour clearly intended to thereby exclude (at least) taxes on ownership, possession and consumption.[53] Nor can the Commonwealth draw support from *Capital Duplicators* and
20 *Ha*. The majority in *Capital Duplicators* did observe that the purpose of ss 51(ii) and (iii), 86, 88, 90 and 92 of the Constitution, taken together, was "to ensure that differential taxes on goods and differential bonuses on the production or export of goods should not divert trade or distort competition".[54] However, immediately following that observation, the majority went on to explain the specific contribution of s 90 to that purpose, saying that s 90 was "intended to achieve … effective control" for the Commonwealth Parliament "over economic policy affecting the supply and price of goods throughout the Commonwealth".[55] Referring to the reasoning of Mason J in *Hematite Petroleum*, their

[51] For completeness, the Commonwealth also suggests that its purpose is consistent with *Parton* because Dixon J's emphasis on *real* control was directed towards guarding against the evasion of s 90 by "easy subterfuges" and "unreal distinctions" (CSS [25]-[26]). However, whether the operation of s 90 can be easily avoided does not advance the proper analysis of its purpose.

[52] *Parton* (1949) 80 CLR 229 at 260 (Dixon J) (emphasis added).

[53] Dixon J's exclusion of taxes on goods *after* they reach the consumer from the meaning of excise is correct as a matter of principle for the reasons explained at paragraphs 6 to 13 above.

[54] (1993) 178 CLR 561 at 585 (majority).

[55] *Capital Duplicators* (1993) 178 CLR 561 at 586.

Honours then made clear that this effective control was achieved by enabling the Commonwealth alone to "protect and stimulate home production by fixing appropriate levels of customs and excise duties" [56] — because, as explained in Part B.1 above, those measures would impact upon domestic price. So understood, *Capital Duplicators* does not support the Commonwealth's account of purpose. Nor, for completeness, does *Ha*.[57]

25. *Third*, the disjunct between the purpose of s 90 advanced by the Commonwealth and its purported scope of operation (so as to include consumption taxes) provides a further reason to doubt the correctness of that articulation of purpose. As noted above, the kind of distortion that appears to be contemplated by the Commonwealth is the creation of "competitive advantages or disadvantages … according to comparative levels of taxes and other costs", which might lead to "artificial relocation and transportation" to facilitate "the transaction of business in States having the lowest incidence of taxation" (CSS [30], see also [22]). Taxes on production, manufacture, sale and distribution could arguably fall foul of that articulation, because the location in which each of those steps takes place may well be immaterial to the ultimate consumer.[58] But the same logic does not apply to taxes on consumption. Most consumers either could not, or would not, *consume* a good interstate simply to avoid incurring a tax. It would be fanciful to suggest that a Victorian smoker would travel to South Australia each time they wanted to smoke a cigarette, so as to avoid a hypothetical tax on the consumption of tobacco. It would be equally fanciful to suggest that a Victorian ZLEV owner would permanently relocate to another State and register their ZLEV in that State, so as to avoid the ZLEV charge.

C. TEXT AND CONTEXT

26. The text and context of s 90 reinforce the view that a tax is only an excise if it is in substance on the production, manufacture, sale or distribution of goods. Several textual and contextual matters were important in the formulation and subsequent endorsement of the purpose identified by Dixon J in *Parton*, and have therefore been addressed in Part B.1

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[56] *Capital Duplicators* (1993) 178 CLR 561 at 586-587 (majority).

[57] It is worthwhile noting that the majority in *Ha* said that, if it were not for historical peculiarities which arose in the franchise cases, *Ha* could and would have been decided "by reference simply to the line of authority following *Parton* and culminating in … *Capital Duplicators*": *Ha* (1997) 189 CLR 465 at 499 (majority).

[58] Indeed, the passage of the Wollaston Report cited by the Commonwealth at CSS [22] refers to the impact of differential taxation on "manufacturers".

above. Victoria does not repeat those matters here.[59] However, there are additional textual and contextual matters which must also be considered.

27. In addressing those matters, Victoria proceeds on the basis that, even if excise had no single, unified meaning in 1901 (cf CSS [5]),[60] the text of s 90 cannot entirely be put to one side in the task of constitutional interpretation. The word "excise" is used in s 90 to convey meaning, with that meaning being "anchored in [the term's] *essence*, at the appropriate level of generality, by the contemporary understanding at Federation".[61] An examination of the contemporaneous sources previously cited by Victoria reveals that the core, or essential, aspects of the meaning of excise are that it is a tax on goods: (i) with

10 *some* connection to home production and manufacture; and (ii) which forms part of the price paid by the consumer for the goods. Both of those aspects are central to the understanding of excise advanced by Victoria (see Part B.1 above).

Connection to production and manufacture

28. The first core, or essential, aspect of the meaning of excise is that it is a tax on goods that is connected to production and manufacture.

29. This aspect emerges most clearly from the Convention Debates and secondary sources cited at VS [43]-[44]. Indeed, after reviewing many of those sources, the Court in *Peterswald* observed that "when used in the Constitution [the word "excise"] is used in connection with the words 'on goods produced or manufactured in the States'".[62]

20 30. That an excise is a tax on goods that is connected to production and manufacture is also reinforced by the duties of excise contained in colonial statutes at the time of Federation cited at VS [44] fn 49. The only duties of excise contained in those statutes were taxes on the *production* of alcohol and tobacco; leaving aside duties of customs, there were no other taxes on goods (CSS [10]). That, again, indicates that at Federation, an excise was a tax

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[59] See, in particular, paragraphs 7 to 9 to above in relation to the collation of the term "excise" with the terms "customs" and "bounties", and paragraph 18 above in relation to the respective fields of operation of ss 90 and 92.

[60] See *Capital Duplicators* (1993) 178 CLR 561 at 584 (majority); see also *Matthews* (1938) 60 CLR 263 at 293 (Dixon J); *Ha* (1997) 189 CLR 465 at 493 (majority). In circumstances where the Court has indicated that is "not minded" to re-open *Capital Duplicators* and *Ha* (T267 11986), Victoria assumes that the Court does not accept its previous submission that the "established meaning" of excise at the time of Federation was "a tax on locally produced goods" (VS [41]-[46]; cf CSS [4]-[8]).

[61] See *Alexander* (2022) 96 ALJR 560 at [188] (Edelman J) (emphasis added). See also *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at [20] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), citing *Attorney-General (NSW) v Brewery Employes Union of NSW* (1908) 6 CLR 469 at 610 (Higgins J); *Singh v The Commonwealth* (2004) 222 CLR 322 at [159] (Gummow, Hayne and Heydon JJ).

[62] (1904) 1 CLR 497 at 509 (Griffith CJ).

connected to the production or manufacture of goods.[63] It is clearly the case, as the Commonwealth submits, that the "examples of usage in colonial legislation cannot establish the boundaries of the word 'excise'" (CSS [9]). But that does not mean that "the power to impose the universe of taxes on goods" was yielded to the Commonwealth at Federation (CSS [10]). Instead, it indicates that the term "excise" was at its core directed to production (and manufacture), and invites consideration of what else might be caught in the penumbra of its meaning.

31. The decisions of this Court since *Peterswald* reveal considerable difficulty in identifying the precise *nature* of the connection which must exist between a tax on goods and production or manufacture for that tax to constitute an excise. It is clear that the connection is not so strict that the tax must be *on* the steps of production or manufacture.[64] But to suggest, as the Commonwealth does, that an excise is "any inland tax on goods" (CSS [3](d)) is to entirely unmoor the meaning of "excise" from its long-established connection to production or manufacture. In contrast, the purpose identified by Dixon J in *Parton* coheres with the core meaning of excise at Federation by maintaining that connection. By encompassing only taxes which are in substance on the production, manufacture, sale or distribution of goods, the term "excise" only includes within it taxes on classes of dealings with goods which might undermine Commonwealth economic policy with respect to home production.

Tendency to enter into the purchase price

32. The second core, or essential, aspect of the meaning of excise is that it is something which has a tendency to enter into the purchase price of a good.

33. This aspect of the meaning follows principally from the etymology of the word excise, explained in detail at VS [31]-[32]. The Commonwealth takes issue with Victoria's submission that the word "excise" derives from the Latin *excido* and signifies something "deducted", "subtracted" or "excised" from the price paid.[65] It does so principally through reliance upon the 1910 *Encyclopedia Britannica*, which provides that "the word [excise]

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[63] For completeness, Victoria assumes that its previous submission that the uniform, narrow usage of "excise" in the colonies supported a *narrow* reading of the term in the Constitution — namely, "a tax on locally produced goods" (VS [41], [44]) — has not been accepted by the Court.

[64] *Parton* (1949) 80 CLR 229 at 260 (Dixon J). See also *Capital Duplicators* (1993) 178 CLR 561 at 590-591 (majority); *Ha* (1997) 189 CLR 465 at 499-500 (majority).

[65] T266 11939-11954; the Commonwealth's **Note on Etymology** dated 16 February 2023; and CSS [4], [7].

owes something to a confusion with *excisum*, cut out".[66] Orally, the Commonwealth also submitted that the verb "excise" in fact derived from the middle Dutch word "accensare", meaning "to tax". Two points may be made in response.

33.1. *First*, as explained at paragraph 27 above, the understanding of the term "excise" at the time of Federation is centrally relevant.[67] Several of the nineteenth century dictionaries previously cited by Victoria (VS [31] fn 46) indicate that, at that time, the prevailing understanding was that the term had the Latin derivation outlined in VS [31], even if it also had a more recent middle European derivation.[68]

33.2. *Second*, and more significantly, each of those dictionaries indicates that, regardless of its derivation, the word "excise" then signified an amount subtracted or excised from the price paid to obtain the good.[69] That concept is also arguably implicit in the 1910 *Encyclopedia Britannica* passage upon which the Commonwealth relies.[70] It should not be controversial to observe that, as the temporal focus of the inquiry is on the meaning of excise at Federation, definitions contained in *current* dictionaries are not relevant (cf CSS [4]).[71]

34. The second essential aspect of the meaning of excise also finds support in the terms of s 93(i) of the Constitution, referred to at VS [34]. The words of that provision plainly contemplate a distinction between "duties of excise" on one hand, and the act of consumption on the other. Contrary to the Commonwealth's submission, the fact that s 93(i) was included in Ch IV of the Constitution as a "book-keeping adjustment" does not make good its more specific proposition that s 93 dealt with "a subset of customs and

[66] *Encyclopedia Britannica* (11th ed, 1910) vol X, "excise"; see also the Note on Etymology.

[67] See also, by way of example, *R v Commonwealth Conciliation & Arbitration Commission; Ex parte Association of Professional Engineers (Aust)* (1959) 107 CLR 208 at 267 (Windeyer J); *Eastman v The Queen* (2000) 203 CLR 1 at [142]-[143] (McHugh J).

[68] In addition to Palgrave (**JBA V9 T64**), which was cited at VS [31], see also *Beeton's Dictionary of Universal Information* (1828) 751 (**JBA V9 T50**) ("(Du. *accys*, Ger. *accise*), is derived from the Latin *excisa* … and properly signifies that part of the profits of the manufacturer or producer which is *cut off* for the support of the government, before the commodity is sold") (emphasis in original); Bateman, *The Laws of Excise* (1843) 6 ("from the Belg. *Acciisse*, Tributum … or from the Latin *Excisum*, to cut off, as part of the profit cut from the whole") (**JBA V9 T49)**; Bateman, *The Excise Officer's Manual* (1852) 1 (in very similar terms) (**JBA V9 T48**).

[69] See Bateman, *The Laws of Excise* (1843) 6 (**JBA V9 T49)** (as above); Bateman, *The Excise Officer's Manual* (1852) 1 (**JBA V9 T48**) (as above); *Beeton's Dictionary of Universal Information* (1828) 751 (**JBA V9 T50**) (as above); Palgrave, *Dictionary of Political Economy* (1894) 786 (quoted in VS [31]) (**JBA V9 T64**).

[70] The *Encyclopedia Britannica* indicates that an excise is "a duty charged on home goods, either in the process of their manufacture, or before their sale to the home consumers", which necessarily suggests that it is capable of forming part of the purchase price.

[71] The same observation applies to the Commonwealth's attempt to supplement the intention of the framers of the Constitution with current economic commentary: cf CSS [22].

excise duties" (CSS [21]). The more likely position is that s 93 refers to *all* duties of custom and excise. The textual distinction drawn between "duties of excise" and "consumption" can then be explained by the fact that the former refers to taxes on goods which have a tendency to enter into the purchase price, and the latter refers to the consumer's act of "using [goods] or destroying them by use", which necessarily follows purchase.[72]

D. IDENTIFICATION OF AN EXCISE

35. It follows from the submissions above that an excise is, in substance, a tax "on the production, manufacture, sale or distribution of goods, whether of foreign or domestic origin".[73] A tax is "on" the production, manufacture, sale or distribution of goods if the
10 requisite connection exists between the *tax* and one of those four *dealings* with goods.[74] That approach, as the majority recognised in *Capital Duplicators*, "looks to the practical or substantial operation of the statute as well as to its legal operation".[75]

36. Victoria accepts that in determining whether a given tax is, as a matter of substance, on the production, manufacture, sale or distribution of goods, "a variety of factors" may be taken into account.[76] Those considerations include: "[i] [t]he 'indirectness' of the tax, [ii] its immediate entry into the cost of the goods, [iii] the proximity of the transaction it taxes to the manufacture or production or movement of the goods into consumption, [and] [iv] the form and content of the legislation imposing the tax" (see T13 L527-533). Such considerations were identified by Barwick CJ in *Anderson's Pty Ltd v Victoria* and
20 endorsed by a majority of this Court in *Capital Duplicators*.[77] While the list is not mandatory or exhaustive, it provides a clear indication of the kinds of considerations this Court has accepted to be useful in assessing whether a tax is sufficiently connected to a relevant dealing with a good to constitute an excise.

37. The Commonwealth submits that these considerations "might well be relevant" to taxes imposed on production, manufacture, sale and distribution, but "are not of much assistance" in determining whether a tax imposed on consumption is an excise (cf CSS [43]). The inaptness of those considerations for assessing consumption taxes does

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[72] *Dickenson's Arcade* (1974) 130 CLR 177 at 187 (Barwick CJ).

[73] *Ha* (1997) 189 CLR 465 at 499 (majority); *Capital Duplicators* (1993) 178 CLR 561 at 590 (majority).

[74] Victoria recognises that "[g]oods … cannot pay taxes", and that duties of excise are necessarily imposed on persons: CSS [32]; *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 554 (Fullagar J).

[75] *Capital Duplicators* (1993) 178 CLR 561 at 583 (majority).

[76] *Capital Duplicators* (1993) 178 CLR 561 at 583 (majority).

[77] *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 365 (Barwick CJ), cited in *Capital Duplicators* (1993) 178 CLR 561 at 583 (majority).

not signal a sudden need for the creation of a new list of relevant considerations (cf CSS [32] fn 76). Rather, it underscores the extent to which the Commonwealth's approach constitutes a radical departure from the present state of the authorities. As is apparent from the previous paragraph, Victoria's concern is not with the introduction of an evaluative approach (cf CSS [32], [39]), but rather with a test which will lead to real practical uncertainty as to what constitutes an "excise" (T165 7390-7398). There is an obvious imperative to ensure that States and Territories are capable of making such determinations in advance, and legislating on that basis.[78]

***Rejection of the criterion of liability approach in* Capital Duplicators *and* Ha**

10 38. Recognition that a tax is only an excise if it is in substance on the production, manufacture, sale or distribution of goods does not give determinative significance to the criterion of liability methodology (cf CSS [38], [46]). The Commonwealth's suggestion to the contrary fails to recognise the distinction between doctrine and methodology. To say that an excise is a tax on the production, manufacture, sale or distribution of goods is to identify the prevailing doctrine. The criterion of liability approach, on the other hand, was the previously accepted methodology by which the Court assessed whether any particular tax was properly characterised as *on* one of those four dealings with goods. That methodology has now been replaced with a substance over form assessment of the kind described in *Capital Duplicators* and *Ha*. In both cases, the majority was at pains to distinguish between
20 methodology and doctrine. Indeed, in *Capital Duplicators*, the majority said expressly that "[t]he rejection of the criterion of liability as an exclusive test has not disturbed general acceptance of the proposition that a tax in respect of goods at any step in the production or distribution *to the point of consumption* is an excise".[79]

Taxes on goods as "commodities" or "articles of commerce"

39. The position that an excise is, in substance, a tax that falls on the production, manufacture, sale or distribution of goods is also reinforced by the frequent descriptions of an excise as

[78] See generally *HC Sleigh Ltd v South Australia* (1977) 136 CLR 475 at 501 (Mason J).

[79] *Capital Duplicators* (1993) 178 CLR 561 at 583 (majority) (emphasis added). See also *Ha* (1997) 189 CLR 465 at 498-499 (majority). Victoria refers to, without repeating, its more detailed explanation of this proposition at T152-153 L6813-6854.

a tax on goods as "commodities"[80] or as "articles of commerce".[81] Stephen J put it particularly clearly in *Dickenson's Arcade* when his Honour said that "excise duties are duties imposed in respect of commercial dealings in commodities and are, in their essence, trading taxes".[82] Similarly, in *Ha*, the majority observed that excise duties are taxes upon "inland dealings with goods as integers of commerce".[83]

40. Taxes on the production, manufacture, sale or distribution of goods are all taxes on goods as commodities or as articles of commerce. As the Commonwealth accepts, the nexus between those taxes, and a dealing with a good as an article of commerce, is "obvious" because those taxes are imposed on goods which are being brought to the market.[84]
10 Conversely, taxes on the consumption of goods are not taxes on goods as commodities or as articles of commerce. Such taxes are imposed on goods which have left the market and can no longer be bought or sold by consumers.[85] There is therefore no nexus between a tax on consumption and a dealing with the taxed good as an article of commerce.

41. The Commonwealth's contention that a tax imposed on goods "when they are no longer articles of commerce may nevertheless affect the relevant class of goods as articles of commerce" is not to the point (cf CSS [35]). What is relevant is whether a tax is on a *dealing* with a good, where the good involved in that dealing *is* an article of commerce. That is what the majority regarded as significant in *Ha*: see paragraph 39 above. That is also what appears to have been significant for Dixon J on the most natural reading of the
20 passage from *Matthews* relied upon by the Commonwealth: "[t]o be an excise the tax must be levied 'upon goods'", meaning the tax must "be of such a nature as to affect them … *as* articles of commerce" (see CSS [35]). If Dixon J had instead meant that an excise is any tax on goods which has an "effect" on the market for "the relevant class of goods", that is

[80] See, eg, *Matthews* (1938) 60 CLR 263 at 300 (Dixon J); *Parton* (1949) 80 CLR 229 at 260 (Dixon J), cited in *Capital Duplicators* (1993) 178 CLR 561 at 586 (majority) and *Ha* (1997) 189 CLR 465 at 495 (majority); *Bolton v Madsen* (1963) 110 CLR 264 at 271 (the Court); *Dickenson's Arcade* (1974) 130 CLR 177 at 231 (Stephen J).

[81] See, eg, *Matthews* (1938) 60 CLR 263 at 304 (Dixon J); *Parton* (1949) 80 CLR 229 at 253 (Rich and Williams JJ).

[82] *Dickenson's Arcade* (1974) 130 CLR 177 at 231 (Stephen J). Of course, his Honour went on to say that "a tax on consumption is of its nature not such a tax". See also *Parton* (1949) 80 CLR 229 at 259 (Dixon J).

[83] *Ha* (1997) 189 CLR 465 at 497 (majority).

[84] T90 L4065-4070. One way of understanding the correlation between duties of customs and excise is that the former is concerned with goods brought to the market from outside the Commonwealth, and the former is concerned with goods brought to the market from within the Commonwealth: see SA [31]-[34], [37]-[40].

[85] It is not necessary to resolve the "difficult question" of goods sold on the second-hand market in this case, which would entail submissions on, and the consideration of, a different set of circumstances to first-hand sale: see T212 L9454-9476. There is no material in the Special Case suggesting that either plaintiff purchased their ZLEV second-hand, or has any intention to sell their ZLEV on the second-hand market.

what his Honour would have said. The Commonwealth's strained attempt to read that meaning into the words "of such a nature as to affect" should be rejected.

42. The logical consequence of the Commonwealth's supplementary submissions is that *all* taxes on goods are taxes on goods "as articles of commerce". That is because, on the Commonwealth's view of economic tendencies, all usage charges other than "entirely trivial impost[s]" (T94 L4245-4251) have the capacity to affect the market for goods. If that were correct, the repeated references to taxes "on commodities" and on goods "as articles of commerce" by judges of this Court would have been unnecessary; those words would add nothing to the concept of a tax on goods.

10 ***"Exhausting the categories of taxes on goods"***

43. Finally, it is no barrier to the acceptance of Victoria's conception of an excise that the majority observed in *Capital Duplicators* that the phrase "duties of customs and of excise" must be construed as "exhausting the categories of taxes on goods" (cf CSS [2], [36]-[38], [46]).[86] As explained by Victoria in oral submissions (T168-170 L7521-7625), the majority made that observation in the course of rejecting the argument that an excise is a tax imposed on "the local production or manufacture of goods".[87] In that context, the "categories" of taxes on goods the majority was referring to were: (i) taxes on the importation of goods; (ii) taxes on the local production or manufacture of goods; and (iii) taxes imposed on all goods indiscriminately.[88] The majority's "exhausting the
20 categories" observation was nothing more than a holding that the third category of taxes — taxes imposed on all goods indiscriminately — was *not* categorically "outside the scope of s 90".[89] The observation therefore falls far short of taking the Commonwealth where it needs to go.

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[86] *Capital Duplicators* (1993) 178 CLR 561 at 589-590 (majority). This passage was quoted in full by the majority in *Ha* (1997) 189 CLR 465 at 488 (majority). Thus, the *Ha* majority plainly agreed with the "exhausting the categories" observation, but did not offer any expansion or explanation of it.

[87] *Capital Duplicators* (1993) 178 CLR 561 at 589 (majority).

[88] *Capital Duplicators* (1993) 178 CLR 561 at 589-590 (majority).

[89] *Capital Duplicators* (1993) 178 CLR 561 at 590 (majority).

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M61 of 2021

BETWEEN:

CHRISTOPHER VANDERSTOCK
First Plaintiff

KATHLEEN DAVIES
Second Plaintiff

10

and

THE STATE OF VICTORIA
Defendant

ANNEXURE TO THE DEFENDANT'S SUPPLEMENTARY SUBMISSIONS

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

No	Description	Version	Provisions
1.	*Commonwealth Constitution*	Current	ss 51(ii) and (iii), 86, 88, 90, 92, 93