HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 17 Mar 2023 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	M61/2021
File Title:	Vanderstock & Anor v. The State of Victoria
Registry:	Melbourne
Document filed:	Form 27C - Intervener's submissions- Cth's Supplementary su
Filing party:	Defendant
Date filed:	17 Mar 2023

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

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

10

20

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

30

40

PART I — CERTIFICATION

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

PART II — ARGUMENT

2. At the hearing on 16 February 2023, Kiefel CJ stated that the Court would not reopen *Ha*[1] or *Capital Duplicators (No 2)*,[2] but sought submissions from the Commonwealth as to the operation of s 90 on the basis that those decisions were reopened for a broader consideration of the case: T11986-11990. The Commonwealth interprets that request as inviting submissions addressing: (a) why *Ha* and *Capital Duplicators (No 2)* were correct to hold that duties of customs and excise exhaust the categories of taxes on goods, and to reject the argument that a "duty of excise" is confined to a tax that falls selectively on locally produced goods; and (b) the test that should be applied to identify a "duty of excise". So as to avoid circularity, the submissions that follow develop those two points substantially without reference to either *Ha* or *Capital Duplicators (No 2)*.

A SUMMARY

3. The Commonwealth submits as follows:

(a) **Section B (Text and historical usage)**: The dictionary definitions and historical usage of the term "excise" do not support the claim that, at the time of Federation, the phrase "duty of excise" had a settled meaning that was confined to taxes that fell selectively on locally produced goods. Historically the term excise had long been used in England in a way that included all inland taxes of goods irrespective of their place of production. While at the time of Federation the term was sometimes used more narrowly, the wider usage continued in parallel with the narrower usage, and there had not been any legal need to chart the metes and bounds of the term. In those circumstances, while the phrase "duty of excise" was clearly used in s 90 to refer to an inland "tax on goods", such taxes were exemplified – but not defined – by the particular taxes on goods that some colonies had commenced collecting in the last decades of the nineteenth century. The "delimitation of the precise scope and effect" of s 90, like s 92, "was left as an unresolved task for the future".[3]

(b) **Section C (Convention Debates)**: The Convention Debates do not reveal any settled

---

1 ***Ha*** *v New South Wales* (1997) 189 CLR 465.
2 ***Capital Duplicators*** *Pty Ltd v Australian Capital Territory* ***[No. 2]*** (1993) 178 CLR 561.
3 *Cole v Whitfield* (1988) 165 CLR 360 at 391 (the Court).

understanding of the metes and bounds of the word "excise". They do, however, disclose that the Framers understood s 90 to be a critical provision that existed to respond to at least two challenges: first, the need to harness the revenue-raising potential of taxes on goods to give all the polities comprising the new Commonwealth (State and federal) a secure financial foundation; and second, the desire to advance economic union by preventing State taxes from distorting national markets for goods. As to the former, s 90 embodied the colonies' agreement to transfer to the Commonwealth what had hitherto been their primary revenue source, subject to arrangements concerning the distribution of surplus revenue. As to the latter, the creation of a free trade area within Australia depended upon the colonies having ceded "real control of the taxation of commodities",[4] with the power to impose taxes on goods thereafter to be exercised by the Commonwealth uniformly and without discrimination.

(c) **Section D (Constitutional context and purpose)**: Section 90 was a "necessary part of the constitutional mechanism for achieving an essential objective of the federal compact: the creation and maintenance of a free trade area throughout the Commonwealth".[5] Its purpose was to ensure that revenue from taxes on goods could be collected only in a manner effectuating the overriding purpose of Ch IV of the Constitution, being "the creation and fostering of national markets" in order to "further the plan of the Constitution for the creation of a new federal nation".[6]

(d) **Section E (The correct test)**: A duty of excise is any inland tax on goods, meaning any tax that – as a matter of substance rather than form – is payable by a person as a result of that person having engaged in some dealing with goods. Determining whether a law imposes a tax "on goods" involves an evaluative enquiry into whether a sufficient connection exists between a tax and goods of the relevant class. The enquiry directs attention to whether the tax is of such a nature as to have a tendency to affect goods of that class as subjects of manufacture or production or as articles of commerce. The characterisation of a tax as an excise, or not, is ultimately a legal question the answer to which does not require evidence, although if evidence of the practical effect of a law is available then it may be considered.

---

4 ***Parton*** *v Milk Board (Vic)* (1949) 80 CLR 229 at 260 (Dixon J).

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

6 ***Betfair*** *v Western Australia* (2008) 234 CLR 418 at [12] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

B TEXT AND HISTORICAL USAGE

B.1 Dictionary definitions

4. The relevant definitions of "excise" in the *Macquarie Dictionary Online* (2023) are broad and flexible. They are consistent with the Commonwealth's submission that the concept as reflected in s 90 boils down to an inland tax sufficiently connected to goods:

> [noun – excise]
>
> … 1. a tax or duty on certain commodities, as spirits, tobacco, etc., levied on their manufacture, sale, or consumption within a country.
> …
> [verb (t) – excised, excising]
> 4. to impose an excise on.[Middle Dutch *excijs*, from Old French *acceis* a tax, from Late Latin *accēnsāre* tax]

5. As to historical meaning, the word "'excise' has never possessed, whether in popular, political or economic usage, any certain connotation and has never received any exact application".[7] Victoria and some interveners submit that, at Federation, the term "excise" did have an established definition: a "tax on locally produced goods" (**VS [41]; NT [29]**). But the claim that s 90 had some pellucidly clear meaning in 1901 is aspirational rather than real.[8] Indeed, the authors of the Wollaston Report, cited by Sir Isaac Isaacs in the Convention Debates, confessed that they had "found some difficulty in determining what 'excise' includes".[9] The word had attained the degree of definition necessary for the limited needs of that time but no more. A review of the historical materials concerning s 90 bears out, to a remarkable extent, Maitland's observation in a different context that: [10]

> Too often we allow ourselves to suppose that, could we but get back to the beginning, we should find that all was intelligible and should then be able to watch the process whereby simple ideas were smothered under subtleties and technicalities. But it is not so …. As we

---

7 ***Matthews*** *v Chicory Marketing Board (Vic)* (1938) 60 CLR 263 at 293 (Dixon J); see also at 284 (Starke J); *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 606 (Dawson J).

8 See **Quick and Garran**, *Annotated Constitution of the Australian Commonwealth* (1901) at 837 ("the definition of the term excise is not so clear and well established as that of customs"); and generally the confusion about the meaning of the term in the Convention Debates: Coper, "The High Court and Section 90 of the Constitution" (1976) 7 *Federal Law Review* 1 at 21 ("the debate was characterised by extraordinary confusion"). See also ***Dickenson's Arcade*** *Pty Ltd v Tasmania* (1974) 130 CLR 177 at 230 (Stephen J); ***Philip Morris*** *Ltd v Commissioner of Business Franchises (Vic)* (1989) 167 CLR 399 at 425 (Mason CJ and Deane J), 488 (McHugh J).

9 Accountants Committee, 'Report upon the financial proposal of the Bill to constitute the Commonwealth of Australia' (1897) (**Wollaston Report**) at 10. That page wrongly characterises the original 1643 excise as a duty on the manufacture of commodities, when it fact it was a duty on sale (see fn 12 below).

10 FW Maitland, *Domesday Book and Beyond. Three essays in the early history of England* (CUP, 1897, 1987 re-issue) at 9.

go backwards the familiar outlines become blurred; the ideas become fluid and instead of the simple we find the indefinite.

6. The dictionary definitions Victoria and others invoke (**VS [43]; Qld [46]**) do not paint a clear picture. For instance, the ninth edition of the *Encyclopaedia Britannica* defines an excise as a "duty charged on home goods, either in the process of their manufacture or before their sale to the home consumers",[11] that being the definition adopted by the First Edition of the *Oxford English Dictionary* in 1897 (**1897 OED**). The definition is equivocal as to whether "home goods" means goods produced at home, or goods which are present in the home jurisdiction when the tax is imposed. The latter possibility is consistent with the definition's syntax, noting that the passage links the home goods to "their" sale to "the home consumers". The history of excise legislation also supports that view, as taxes on goods of local and foreign production were both termed "excises" in English statutes going back to 1643.[12] Indeed, between the late 1700s and the mid-1800s, many taxes were transferred from the Commissioners of Customs to the Commissioners of Excise, and then back again: a practice quite inconsistent with the notion that an "excise" is confined to a tax on locally produced goods.[13] At least in that period, characterisation as an excise depended upon who collected the tax, rather than on any characteristic of the good taxed.[14] The use of the term "excise" to include "internal or inland duties on articles of consumption", irrespective of the place of production or manufacture, remained a current usage of the word at the time of Federation.[15] Thus, while the selection of secondary sources and extracts relied upon by Victoria point to the existence of a narrower usage of "excise",

---

11 *Encyclopedia Britannica*, (9th ed, Vol 8, 1878) at 797.

12 In 1643, the first English tax to be termed an "excise" was imposed on the sale of both local goods (eg. "soape made within the realm") and imported goods (eg. "Grocery ware imported"): *An Ordinance for the speedy Raising and Leavying of Moneys by way of Charge and New-Impost, upon the severall Commodities, in a Schedule hereunto annexed* (enacted 8 September 1643), Sch 1: CH Firth and RS Raith (eds) *Acts and Ordinances of the Interregnum, 1642-1660* (Vol 1, 1911; 1978 reprint), 274ff, esp 277 ("soape"), 276 ("Grocery"). Similarly, both during the Interregnum and after the Restoration, sales taxes called "excises" were charged on both local and imported goods: ibid (Vol 2) at 1186-1223; Dowell, *A History of Taxation and Taxes in England* (2nd ed, Vol II, 1884) at 10-15, 26.

13 See Smith, *Something to declare: 1000 years of customs and excise* (1980) at 73-74, 81-82, 85.

14 A proposition strongly supported by Charles Knight's *English Cyclopaedia* (6th ed, 1860 "Arts and Sciences- Vol III"), def "excise".

15 When Mr Isaacs said during the 1897 debates (in the passage quoted in paragraph 12 below) that "In modern times, excise is used as a very wide term", he was actually (unbeknownst to him) attesting to the continued survival of the older, wide usage of the word. The modern development was actually the emergence of a narrower sense of "excise" to compete with the older, wider sense. Isaacs was probably misled into thinking it was the other way around by the unreliable history in the 1897 report: see fn 9 above. Examples of the older usage are also included in *Matthews* (1938) 60 CLR 263 at 296 (Dixon J, referring to taxes on plate, coaches and wheel carriages).

they fall far short of establishing that any view, let alone the "narrow view", commanded general acceptance in 1901.

7. Further, a comparison of the 1897 OED with the Eleventh Edition of the *Encyclopedia Britannica* (1910) (**1910 EB**) casts doubt on Victoria's related proposition – that the etymology of the word "excise" signifies "something cut off", per the Latin "excido" (**VS [31]**). The 1910 EB notes that the word "owes something to a confusion with excisum, cut out".[16] As reflected in the current *Macquarie Dictionary* (see above), and as recognised in the cases,[17] the word's etymology actually signifies nothing more specific than "tax".

10 8. Victoria also invokes a passage in Quick and Garran which, after noting the uncertainty of the term, identifies that the "fundamental conception" of an excise is a "tax on articles produced or manufactured in a country" (**VS [42]**).[18] However, read in context, the authors' concern was to explain that s 90 was not "intended to take from the States those miscellaneous sources of revenue, improperly designated as 'excise licences' in British legislation".[19] There is nothing to indicate that Quick and Garran turned their minds to the classification of a tax, unknown at that time in the Australian colonies, which applied
20 indiscriminately to local and imported goods.

B.2 Contemporaneous usage of the word "excise" in colonial legislation

9. Victoria also submits that the term "excise" was used "uniformly in colonial legislation at Federation to describe taxes on the production of goods within the colony" (**VS [44]**). Victoria cites no colonial excise statute before 1880,[20] so the history on which it relies is far from longstanding. The history "does not disclose any very solid ground" to conclude that an essential part of the connotation of "excise" in s 90 is that the tax must be confined
30 to goods of domestic manufacture or production.[21] More fundamentally, examples of usage in colonial legislation cannot establish the boundaries of the word "excise", because the fact that some forms of tax were described as "excises" does not logically establish that the word could not also be used to describe other forms of tax.[22] (Indeed, that logic would

---

16 *Encyclopedia Britannica* (11th ed, Vol X, 1910) at 58 (emphasis added).

17 *Matthews* (1938) 60 CLR 263 at 293 (Dixon J); ***Hematite*** *Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 663 (Deane J).

18 Quick and Garran (1901) at 837.

40 19 Quick and Garran (1901) at 837; see *Matthews* (1938) 60 CLR 263 at 298 (Dixon J).

20 VS [44], fn 68.

21 *Matthews* (1938) 60 CLR 263 at 299 (Dixon J).

22 *Matthews* (1938) 60 CLR 263 at 299 (Dixon J); *Commonwealth* ***Oil Refineries*** *v South Australia* (1926) 38 CLR 408 at 437 (Rich J).

require the word "excise" to be read as only including taxes on the production of alcohol and tobacco, because those were the types of excise in existence at Federation.) This is particularly so given colonial legislatures had not sought to explore the outer limits of the conception of an excise, their revenues being derived overwhelmingly from customs.[23]

10. The Commonwealth's examination of usage in colonial statutes is entirely consistent with the proposition that the phrase "duties of customs and of excise" in s 90 covered all existing colonial taxes on goods at Federation. That supports the construction adopted in *Ha* and *Capital Duplicators (No 2)*, which recognises that the power to impose the universe of taxes on goods then in existence was yielded to the Commonwealth in order to realise the Framers' vision for the new economic union.

C CONVENTION DEBATES

11. The Convention Debates provide little assistance in resolving the meaning of "duties of excise". The light they do shed is at a general level, concerning the "objectives of the movement towards federation from which the compact of the Constitution finally emerged".[24] That backdrop supports the Commonwealth's construction of s 90.

C.1. Discussion of the meaning of "excise"

12. As Victoria and various interveners acknowledge, there was "limited discussion of the meaning of the term ['excise']" in the Debates (**VS [44]; NT [33]-[34]; Qld [47]**). There were only three occasions where the delegates engaged in any significant debate on that issue,[25] all of which revealed a divergence of views. For example, in the 1891 debate at Sydney, Mr Douglas expressed uncertainty as to what the term "excise" means, noting that "[i]n different colonies the word is interpreted in different ways".[26] Four delegates appeared to agree that it meant "taxation on local productions",[27] but Mr Gordon considered

---

[23] Customs duties made up over 96% of the income of the smaller colonies (South Australia, Western Australia, Tasmania and Queensland), and even for Victoria and New South Wales, income derived from customs duties was "seven to eight times greater than that derived from excise duties": Williams, '"Come in Spinner": Section 90 of the Constitution and the Future of State Government Finances' (1999) 21(4) *Sydney Law Review* 627 at 637. See also Peter Lloyd, "The first 100 years of tariffs in Australia: the colonies" (2017) 57 *Australian Economic History Review* 316 at 331.

[24] *Cole v Whitfield* (1988) 165 CLR 360 at 385 (the Court).

[25] *Official Report of the National Australasian Convention Debates*, Sydney, (1891) at 346-371; *Official Report of the National Australasian Convention Debates*, Adelaide, (1897) at 835-843; *Official Record of the Debates of the Australasian Federal Convention*, Sydney, (1897) at 1065-1068.

[26] *Official Report of the National Australasian Convention Debates*, Sydney (1891) at 346.

[27] *Official Report of the National Australasian Convention Debates*, Sydney (1891) at 347 (Thynne), 347 (Munroe), 349 (Marmion and Forrest).

that it might include licence fees.[28] Mr Donaldson thought it "would also include a stamp duty".[29] The debate was not resolved, because the intention of the 1891 Convention was not to descend into detail, that being a matter better left to the drafting committees.[30] In the 1897 debate at Sydney, Mr Isaacs made a statement that might appear to support the narrow view:[31]

> What we intend by excise would be covered by the definition in this report, 'a duty chargeable on the manufacture and production of commodities'. The word is variously defined in standard dictionaries. We should give attention to this matter, so as not to be carried further than we intend to go. In modern times, excise is used as a very wide term.

13. As already explained, it was not just in "modern times" that excise was used as a "very wide term". However, despite Mr Isaacs' suggestion that attention be given to the meaning that was intended (a suggestion that clearly did not see his own statement as the last word on the topic), no such definition was included in the constitutional text. Further, it is dangerous to parse statements made in the Convention Debates in order to apply them to forms of taxation that were not under consideration. So much is illustrated by the fact that, although Mr Isaacs as a delegate at the Convention thought that an excise was (at least) a duty "chargeable on the manufacture and production of commodities", 29 years later as a Justice of this Court he accepted that s 90 encompasses a sales tax on the first sale of motor spirit in the jurisdiction.[32] That example serves as a reminder that the Court should not substitute for the words of s 90 the "scope and effect … which the [Framers] subjectively intended the section to have",[33] even if a consistent subjective intention could be identified (which it cannot be). Nor is it accurate to assume that the Framers were "simply collecting past conventional usages and hoarding them in the Constitution".[34] To construe s 90 on that basis would be impermissibly to "confine the legislative power of the Parliament to making the kind of laws then in existence".[35]

---

28 *Official Report of the National Australasian Convention Debates*, Sydney (1891) at 349, 354.
29 *Official Report of the National Australasian Convention Debates*, Sydney (1891) at 349
30 *Official Report of the National Australasian Convention Debates*, Sydney (1891) at 358 (McMillan), 359 (Griffith), 362 (Parkes).
31 *Official Record of the Debates of the Australasian Federal Convention*, Sydney (1897) at 1065.
32 *Oil Refineries* (1926) 38 CLR 408 at 430 (Isaacs J).
33 *Cole v Whitfield* (1988) 165 CLR 360 at 385 (the Court).
34 Schoff, "The High Court and History: It still hasn't found(ed) what it's looking for" (1994) 5(4) *Public Law Review* 253 at 269.
35 *Lansell v Lansell* (1964) 110 CLR 353 at 369 (Menzies J), 363 (Kitto J), 366 (Taylor J), 370 (Windeyer J).

C.2 Discussion of the free trade objective

14. In contrast to their divergent understandings of the metes and bounds of an "excise", the delegates were united in the view that s 90 was directed to the objective of ensuring intercolonial free trade. That aim was expressed, during the debate about excise at the 1891 Convention, as one for "free-trade between the colonies … united action in commercial matters",[36] "a customs union and perfect harmony of trade",[37] "to place all colonies absolutely, or as nearly as possible, upon the same basis as to trade and commerce",[38] "inter-colonial free-trade",[39] and "free-trade between all the colonies, and especially for home products".[40] Mr Munro warned that unless the Commonwealth had exclusive power over excise, it would "allow some colonies to take advantage of others" by undercutting their excise duties. Thus, "we intend to apply the same law to every colony", for "if the excise duties are not to go with the customs duties the whole thing will break down".[41]

15. This theme was again picked up in the 1897 debate at Adelaide concerning the provision that became s 90, with the delegates variously describing the object of the Constitution being to ensure "equality of trade",[42] an "absolute and complete system of intercolonial free-trade",[43] a "symmetrical and just system of intercolonial free-trade"[44] and "that freedom of trade between the colonies which we are anxious to achieve".[45] As noted above, while the Framers recognised that the colonies yielding up their power to impose taxes on goods would have serious implications for their future finances, they recognised the necessity of doing so in order to attain their vision for the federation.[46] That is why, rather than confining s 90 to a narrow class of taxes on goods, they instead made detailed provision for the distribution of surplus revenue.

16. Following *Cole v Whitfield*, the Court has drawn on the Convention Debates in order to reveal the objectives which drove Federation. In *Cole v Whitfield* itself, this Court identified from the Debates that the purpose of s 92 was to "create a free trade area throughout the

---

[36] *Official Report of the National Australasian Convention Debates*, Sydney (1891) at 354-355 (Gordon).
[37] *Official Report of the National Australasian Convention Debates*, Sydney (1891) at 360 (MacDonald-Paterson).
[38] *Official Report of the National Australasian Convention Debates*, Sydney (1891) at 363 (Gordon).
[39] *Official Report of the National Australasian Convention Debates*, Sydney (1891) at 364 (Kingston).
[40] *Official Report of the National Australasian Convention Debates*, Sydney (1891) at 366 (McIlwraith).
[41] *Official Report of the National Australasian Convention Debates*, Sydney (1891) at 347.
[42] *Official Report of the National Australasian Convention Debates*, Adelaide (1897) at 840 (Holder).
[43] *Official Report of the National Australasian Convention Debates*, Adelaide (1897) at 840 (McMillan).
[44] *Official Report of the National Australasian Convention Debates*, Adelaide (1897) at 842 (Symon).
[45] *Official Report of the National Australasian Convention Debates*, Adelaide (1897) at 843 (Trenwith).
[46] *Official Report of the National Australasian Convention Debates*, Sydney (1897) at 138, 141 (Reid).

Commonwealth and to deny to the Commonwealth and the States alike a power to prevent or obstruct the free movement of people, goods and communications across State boundaries".[47] Section 90 shares that broader objective.[48] Thus, the Court's recourse to the Convention Debates has confirmed Dixon J's "assumption" as to the purpose of s 90 in *Parton*, and provided the important context that the real control was given to the Parliament to ensure that revenue-raising from taxes on goods could not fragment or distort the national market in goods.

D CONSTITUTIONAL CONTEXT AND PURPOSE

D.1 Constitutional context

17. Section 90 forms part of a scheme of provisions, primarily found in Ch IV, having the following core elements. First, the creation of a free trade area (or economic and customs union) embracing the whole of the geographical territory of the uniting colonies (ss 90 and 92).[49] Secondly, vesting in the Commonwealth Parliament the exclusive powers to impose external tariffs and duties of excise (important sources of revenue) and (subject to s 91) to grant bounties on the production and export of goods (ss 86, 88, 90 and 91).[50] Thirdly, limiting the exercise of those powers by the Commonwealth Parliament so as to guarantee to the people of the Commonwealth equality in respect of the burden of customs and excise duties and the benefit of bounties (ss 51(ii), 51(iii) and 99).[51] A central objective of this scheme is the free circulation of persons and commodities throughout the geographical area of the Commonwealth, subject only to Commonwealth and State regulatory powers exercised in a non-discriminatory manner.[52]

18. That is not to deny that s 90 also had a significant revenue-raising purpose. As already noted, it was well recognised at Federation that s 90 would have the immediate and permanent effect of depriving the colonies of their "principal sources of revenue".[53] That

---

47 *Cole v Whitfield* (1988) 165 CLR 360 at 391 (the Court).

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

49 *Cole v Whitfield* (1988) 165 CLR 360 at 390, 392 (the Court).

50 *Hematite* (1983) 151 CLR 599 at 660 (Deane J).

51 *Hematite* (1983) 151 CLR 599 at 660 (Deane J); *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 (***Capital Duplicators (No 1)***) at 275 (Brennan, Deane and Toohey JJ), 289-290 (Gaudron J).

52 The powers and restrictions in respect of the circulation of persons and commodities include those found in ss 51(i), (ii), (iii), (ix), 90, 92, 98-104, 106-109, 112, 113, 117.

53 Moore, *The Constitution of the Commonwealth of Australia* (1910) at 530. See the table of colonial revenues from customs and excise set out in Williams, "Come in Spinner: Section 90 of the Constitution and the Future of State Government Finances" (1999) 21(4) *Sydney Law Review* 627 at 637.

was done not because the new States did not need that revenue, but because the Framers understood that they could not maintain those taxing powers consistently with the Framers' economic vision for the Federation. As Mr Reid put it:[54]

> The federal parliament takes away from each of the five colonies its almost sole source of revenue. This is all done in the interests of federal union. It is done because we cannot retain this source of taxation and have federal union.

19. The constitutional scheme described above explains why the power to impose customs and excise duties only became exclusive "[o]n the imposition of uniform duties of customs". That was not because s 90 concerns only duties on local manufacture and production (cf **VS [50]; NT [47]**). It was because s 90 was intended to operate contemporaneously, and harmoniously, with the other provisions of Ch IV which commenced operation at that time.

20. Thus, the Constitution reposed in the Commonwealth the exclusive power to impose customs and excise duties, but required that, for the first 10 years after Federation, the Commonwealth could only apply one quarter of its revenue for its own expenditures (s 87). The surplus was to be distributed to the States, in three stages:[55]

    20.1. **Until the imposition of uniform customs duties**: At Federation, the Commonwealth took over administrative responsibility for the collection of customs and excise (s 86). The Commonwealth debited its expenditures on a per capita basis, and otherwise paid to each State the balance of revenue collected in that State (s 89).

    20.2. **For five years after uniform customs duties**: the same arrangements applied (s 93(ii)), subject to a "book-keeping" adjustment that revenues received in one State in respect of goods passing into another State for consumption should be treated as being collected in the latter State for the purpose of determining credits (s 93(i)).

    20.3. **After five years from uniform customs duties**: the Parliament could provide, on "such basis as it deems fair", for payment to the States of all surplus revenue (s 94).

21. Once the context of s 93(i) is understood, it clearly does not assist Victoria (cf **VS [50]; NT [52]**). Section 93(i) operated solely as a "book-keeping adjustment" that was "necessitated

---

[54] *Official Report of the National Australasian Convention Debates*, Sydney (1897) at 138, 141 (Mr Reid).

[55] Moore, *The Constitution of the Commonwealth of Australia* (1910) at 531-533. Subject to the special provision made in s 95 in respect of Western Australia.

by intercolonial free trade".[56] It functioned, within the second stage described above, to protect the interests of States whose imports were not direct from foreign countries but that came through a distribution hub, such as Sydney or Melbourne, and who otherwise would not receive customs duties in respect of purchases in their jurisdictions.[57] It thereby applied to a subset of customs and excise duties – those imposed on importation, production or manufacture in one State in respect of goods passing into another State – so as to credit them to the State in which consumption occurred for the purposes of determining Commonwealth grants. Section 93 was directed to one temporary accounting problem arising out of the duties then in force. It reveals no deeper truth about s 90. The majority in *Ha* was correct to so conclude.[58]

10

D.2 The purpose of s 90

22. Section 90 effectuates the federal compact's "essential objective"[59] of intercolonial free trade, by preventing the distortions in the national market that would arise if the State were permitted to impose tax on goods traded between the people of the Commonwealth. A useful (albeit recent) encapsulation of these ideas is that economic harmonisation in a single market "improve[s] the efficiency of exchange and reduce[s] incentives for tax-base snatching, ie setting low excise duty rates to attract consumers from other states"; and, where taxed goods are used in the production process, harmonisation of the related excises also reduces interstate "distortions from excise-induced differences in cost structures".[60] A century earlier, a report cited by Mr Isaacs in the Convention Debates expressed similar concerns, stating that the imposition of uniform customs duties without uniform excise duties would be "disastrous" to trade and revenue, as:[61]

20

> commodities would be made in those states in which the excise was the lowest, or in which it did not exist, whilst the manufacturers in those states in which the Excise Duties were highest would be ruined.

30

23. Without s 90, differential taxes on goods could fragment the national market into a

---

56 Quick and Garran (1901) at 861.

57 Moore, *The Constitution of the Commonwealth of Australia* (1910) at 532.

58 *Ha* (1997) 189 CLR 465 at 493.

59 *Capital Duplicators (No 1)* (1992) 177 CLR 248 at 277 (Brennan, Deane and Toohey JJ). See also *Cole v Whitfield* (1988) 165 CLR 360 at 392 (the Court).

40

60 Cnossen, "Economics and Politics of Excise Taxation" in Cnossen (ed), *Theory and Practice of Excise Taxation: Smoking, Drinking, Gambling, Polluting, and Driving* (OUP, 2005), 1 at 7.

61 Wollaston Report at 11, cited in *Official Report of the National Australasian Convention Debates*, Sydney (1897) at 1065 (Isaacs).

congeries of eight separate markets, each with divergent and competing taxes on goods.[62] The powers of taxation which the States retained under s 107 of the Constitution would thereby become a "Trojan horse available to destroy a central objective of the federal compact".[63] Thus, s 90 and s 92 together (and in conjunction with ss 51(ii) and (iii)) "ordain that the Commonwealth be an economic union, not an association of States each with its own domestic economy",[64] and "further the plan of the Constitution for the creation of a new federal nation" which was "expressive of national unity".[65]

24. The objective of intercolonial free trade is not concerned solely with an absence of intra-State market distortions manifesting only in changes to the price of goods. Whilst variable State taxes on goods that produce differential impacts on the price of goods is one way that national markets for goods may be distorted, it is not the only one. Taxes on goods that artificially concentrate their distribution and sale in particular States, for example, may also distort free trade, even if the effect of those taxes is not passed down to consumers: see further at [41]-[44] below.

25. The purpose of s 90 identified above builds on, but is consistent with, that articulated by Dixon J in *Parton*. His Honour stated that, in making those powers exclusive to the Commonwealth:[66]

> it may be assumed that it was intended to give the Parliament a real control of the taxation of commodities and to ensure that the execution of whatever policy it adopted should not be hampered or defeated by State action.

26. Justice Dixon's recognition that the Commonwealth's control over the taxation of commodities must be "a real control" was directed towards guarding against the evasion of s 90 by "easy subterfuges" and the adoption of "unreal distinctions".[67] That points strongly against a construction of s 90 that would confine the concept of an "excise" to a tax on the steps of local production and manufacture, because if confined in that way s 90 would be so easily avoided that it would have "only a formal significance".[68]

---

62 *Hematite* (1983) 151 CLR 599 at 660 (Deane J); *Western Australia v* ***Chamberlain*** *Industries Pty Ltd* (1970) 121 CLR 1 at 17 (Barwick CJ).

63 See *Capital Duplicators (No 1)* (1992) 177 CLR 248 at 279 (Brennan, Deane and Toohey JJ).

64 *Philip Morris* (1989) 167 CLR 399 at 426 (Mason CJ and Deane J); *Hematite* (1983) 151 CLR 599 at 631 (Mason J), 660-662 (Deane J).

65 *Betfair* (2008) 234 CLR 418 at [12] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

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

67 *Matthews* (1938) 60 CLR 263 at 304 (Dixon J).

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

D.3 The narrower purpose for which Victoria contends

27. Victoria advances a construction of s 90 which would make exclusive to the Commonwealth only taxes which "fall selectively" on locally produced or manufactured goods (**VS [39]**) – a construction rejected in *Ha* and *Capital Duplicators* and not re-opened by the Court for consideration in this case. It is not clear whether that conception encompasses a tax which is neutral on its face as to whether it applies to locally produced and imported goods, but which in practice falls only on locally produced goods (for example, because there are no imported goods of the relevant kind).[69] Victoria has also not explained why, if a tax is an excise only if it falls selectively on locally produced goods, it would not follow that a tax is only a duty of customs if it falls selectively on imported goods. After all, s 90 uses the compendious expression "duties of customs and of excise".[70] So viewed, a State or Territory tax imposed equally on imported and locally produced goods would escape s 90. As Dixon CJ observed in *Dennis Hotels*, that "would be ridiculous".[71]

28. The suggestion that s 90 is confined to taxes that "fall selectively" on locally produced or manufactured goods ascribes to s 90 a very modest purpose, being "to reserve for the Commonwealth alone the power to determine the extent to which a common external tariff would be used to either protect Australian industry or promote free trade" (see, eg, **VS [47]**). Victoria submits that the presence of s 92 means that s 90 cannot have the broader purpose identified above, because: (i) the fact that s 92 pursues the free trade objective in a "particular, confined" way militates against the view that s 90 was intended to achieve the free trade objective (**VS [49.1]**); and (ii) a broad operation of s 90 "means that the sphere of operation of s 92 is artificially confined" and that it duplicates the function of s 92 (**VS [48], [49.2]**). The flaw in both of these arguments is that they assume that ss 90 and 92 cannot share the same objective but have different fields of operation. But that assumption cannot be squared with *Betfair*, where six Justices of this Court accepted that ss 90 and 92 perform complementary roles in Ch IV.[72] Section 90 is needed, despite the existence of s 92, because the internal market could otherwise be distorted by taxes on goods that do not have a protectionist purpose. The imposition of a State tax on goods is no less destructive

---

[69] In *Ha* (1997) 189 CLR 465 at 514, the minority said that a tax of that kind would not be an excise.

[70] See *Dennis Hotels* (1960) 104 CLR 529 at 600-601 (Windeyer J); *Philip Morris* (1989) 167 CLR 399 at 431 (Mason CJ and Deane J).

[71] *Dennis Hotels* (1960) 104 CLR 529 at 540 (Dixon CJ).

[72] *Betfair* (2008) 234 CLR 418 at [12] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

of free trade in the national market for goods of the relevant kind because it is imposed for a revenue-raising purpose.

29. The final reason proffered by Victoria as to why the orthodox purpose of s 90 is wrong is that taxes other than taxes on goods can affect the market for goods (**VS [49.3]**). That is true. But to say that is merely to recognise that s 90 does not pursue its objective at all costs. Section 90 pursues its purposes only to the extent of prohibiting differential taxes on goods, which are a particular and significant way in which national market could otherwise be distorted.[73] The fact that it did not also withdraw from the States all power to do anything that might impact the market for goods reflects the balance that was struck between the Commonwealth and States, but the existence of that balance does not deny that s 90 withdrew the power the exercise of which was most apt to distort the national market for goods.

30. The national market in goods, and intercolonial free trade in those goods, involves both local and imported goods. Taxes which apply indiscriminately to both, but differentially from State to State, would risk fragmenting the national market. They could create competitive advantages or disadvantages for interstate producers or sellers according to comparative levels of taxes and other costs. Without border controls (which s 92 would forbid), they could induce the transaction of business in States having the lowest incidence of taxation, leading to artificial relocation and transportation. Accordingly, recognition of the undoubted desire at Federation to foster national markets points inexorably to the rejection of the proposition that duties of excise are confined to taxes that "fall selectively" on locally produced or manufactured goods.

31. Finally, even if s 90 were thought to have the more modest objective of preserving Commonwealth tariff policy (**VS [47]**), it could not achieve that purpose if it were held to cover only taxes falling selectively on locally produced goods. That follows because a State tax which applies equally to local and imported goods can readily undermine Commonwealth tariff policy. A Commonwealth tariff is designed to raise the price of imported goods and thereby to confer protection and stimulus on local producers. Such a tariff could be undermined, for example, by a State sales tax on both imported and locally produced variants of the commodity (which will reduce demand for all goods in the relevant

[73] As the majority recognised in *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 585 (Mason CJ, Brennan, Deane and McHugh JJ).

market, counteracting the desired stimulus of the tariff to local production); components used to make a commodity (eg a tax on glass jars used by the canning industry), or economic substitutes for the commodity.[74]

E THE IDENTIFICATION OF AN EXCISE

E.1 An excise is an inland tax on goods

32. A duty of excise within s 90 of the Constitution is an inland tax on goods. Of course, "[g]oods … cannot pay taxes".[75] Thus, to speak of a tax "on goods" is to refer to a tax that is imposed on a person by reason of a relationship between that person and a class of goods. It is a tax that – as a matter of substance rather than form – is payable by reason of a person having engaged in some dealing with goods within the specified class. The assessment of whether a law imposes a tax "on goods" calls for an evaluative enquiry into whether a sufficient connection exists between a tax and the relevant class of goods.[76] As Dixon J explained in *Matthews*:[77]

> To be an excise the tax must be levied "upon goods", but those apparently simple words permit of much flexibility in application. The tax must bear a close relation to the production or manufacture, the sale or the consumption of goods and must be of such a nature as to affect them as the subjects of manufacture or production or as articles of commerce.

33. Much is bound up in that statement. First, Dixon J included "consumption" within the list of dealings with goods that, if taxed, will constitute an excise. That reflects the fact that a tax on that step in dealing with goods is no different in principle from any other step.

34. Secondly, Dixon J's explanation constitutes an early recognition of the necessity to undertake an evaluative enquiry to determine whether a tax is "on goods". Thus, the relationship between the tax and the selected dealing with goods must be "a close relation". That inquiry, like the "no closer connection" test in the licence fee cases, "postulates a question of degree, to be answered not by reference merely to the form of the statute but by reference to its operation", and taking account of "diverse factors".[78]

---

74 Rose, 'Excise' in Coper and Williams (Eds) *The Cauldron of Constitutional Change* (1997) at 41-43.

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

76 See *Palmer v Western Australia* (2021) 95 ALJR 229 at [147]-[149] (Gageler J). Matters relevant to that evaluation may include that (i) the criterion of liability to pay a tax falls on a dealing with goods; (ii) the tax is referable to the quantity or value of a dealing in the goods (eg where it is calculated by reference to the amount of the good produced, distributed, sold or consumed); or (iii) the tax is, in operation and effect, a revenue-raising tax on goods rather than part of a comprehensive scheme regulating a particular activity.

77 *Matthews* (1938) 60 CLR 263 at 304 (Dixon J).

78 *Philip Morris* (1989) 167 CLR 399 at 436 (Mason CJ and Deane J); *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 583 (Mason CJ, Brennan, Deane and McHugh JJ).

35. Thirdly, Dixon J emphasised that the tax must be "of such a nature as to affect [the goods] as the subjects of manufacture or production or as articles of commerce". His Honour divined that requirement from an extensive review of usage and technical meanings of the word "excise" in Britain and in the Australian colonies.[79] It coheres with the purpose of s 90 identified in *Ha* and *Capital Duplicators (No 2)*, for it is only if a tax is capable of affecting goods as articles of commerce that it will have a tendency to distort the market for those goods. Critically, however, Dixon J's formulation does not require that a tax be payable in respect of goods at a time when those particular goods are articles of commerce. Rather, his formulation requires the tax to be "of such a nature as to affect them as … articles of commerce". Indeed, his Honour's inclusion of "consumption" as one of the relevant relations with goods evinces an acceptance that taxes imposed on goods when they are no longer articles of commerce may nevertheless affect the relevant class of goods as articles of commerce. The Commonwealth refers to, without repeating, its oral submissions as to why that is correct as a matter of principle.[80]

E.2 The significance of the "steps" in dealing with goods

36. After identifying that customs and excise duties exhausted the categories of taxes on goods, the respective majorities in *Capital Duplicators (No 2)* and *Ha* distinguished customs duties – those imposed on importation or exportation – from excise duties – namely those imposed on "production, manufacture, sale or distribution – inland taxes".[81] However, their Honours did not state that those steps are exhaustive of the relationships with goods on which an excise might be imposed. Nor can they have intended the list to be exhaustive, given they explicitly reserved their position with respect to consumption taxes.[82]

37. The "steps" their Honours identified are those that have been progressively recognised in the case law in response to attempts by States and Territories to "lengthen[] the connective chain"[83] by imposing taxes on later stages in the life cycle of goods in an attempt to avoid the operation of s 90. For example, in *Oil Refineries*, a tax on the "first sale" of motor-spirit after production or importation – which Isaacs J described as an "experiment to test

---

79 Culminating in his finding that the primary sense in which the term is used in s 90 is a "tax directly affecting commodities": *Matthews* (1938) 60 CLR 263 at 303 (Dixon J).

80 *Vanderstock & Anor v State of Victoria* (transcript, 14 February 2023) at lines 4045-4279; *Vanderstock & Anor v State of Victoria* (transcript, 16 February 2023) at lines 11577-11910.

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

82 *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 590 (Mason CJ, Brennan, Deane and McHugh JJ); see also *Ha* (1997) 189 CLR 465 at 488 (Brennan CJ, McHugh, Gummow and Kirby JJ).

83 *Oil Refineries* (1926) 38 CLR 408 at 423 (Isaacs J).

the limits of State power"[84] – was held to be an excise because the tax was in substance indistinguishable from a tax on production.[85] The next State "experiment" was the levy on milk "sold or distributed" by vendors and distributors of milk considered in *Parton*, which catalysed the Court's recognition that s 90 must encompass taxes on the later steps of sale and distribution to avoid having "only a formal significance".[86] As Professor Sawer explained,[87] the tax on the consumption of tobacco considered in *Dickenson's Arcade* was yet another such experiment, albeit on that occasion one that was partially successful having regard to the then prevailing determinative status of the criterion of liability test.

38. There is no reason why this history of incremental development of the Court's conception of s 90, undertaken to meet new factual scenarios as they arise, should be at an end. The "steps" listed in *Capital Duplicators (No 2)* and *Ha* are merely steps that have been selected by States and Territories in the past as the targets of their attempts to derive revenue by taxing dealings with goods. It would revive the now discarded preference for form over substance to hold that a tax on a dealing with goods is not an excise, even if it has a tendency to distort the national market for those goods, simply because that tax is imposed by reference to a dealing in the good other than production, manufacture, distribution or sale. Those steps do not represent "settled contours" of an excise (**VS [19]**), but archetypes of the relationships with goods that the States have historically attempted to tax.

39. The States have complained that the Commonwealth's evaluative test is too broad in sweep (**VS [19]**). That is incorrect, because the need to assess all relevant factors holistically in a given case will provide appropriate boundaries. A tax purportedly on goods may have no conceivable connection with that class of goods as articles of commerce – for example, a tax on the gift of chattels.[88] Further, the indicia of a sufficient connection include the nature of the relationship with goods which triggers liability to pay the tax and the means by which its quantum is calculated (**CS [19]**). An examination of a statutory fee for a driver's licence, if it is indeed a tax at all,[89] is likely to reveal that it is connected much more closely to the permission to drive on all public roads than to any good or class of good.[90] Similarly, an

---

84 *Oil Refineries* (1926) 38 CLR 408 at 421 (Isaacs J).

85 *Oil Refineries* (1926) 38 CLR 408 at 419-421 (Knox CJ), 425, 430 (Isaacs J), 435 (Higgins J), 436 (Powers J), 437 (Rich J), 439 (Starke J).

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

87 Sawer, "The Future of State Taxes: Constitutional Issues" in Mathews, *Fiscal Federalism: Retrospect and Prospect* (1974) 193 at 201-202.

88 See *Logan Downs v Queensland* (1977) 137 CLR 59 at 65 (Gibbs J).

89 An impost is not an excise if it is not a tax, including because it is a fee for service: see **CS [18]**.

90 For example a Victorian driver's licence "authorises a person to drive on a highway any categories of motor vehicle indicated in the licence": *Road Safety Act 1986* (Vic), s 19(3), whether or not the person owns a vehicle.

examination of a genuine road user charge might show a closer connection with roads than cars, for example, if it applies to all road users (rather than selectively targeting ZLEVs: **CS [48]**), and if it was calculated by reference to the weight of the vehicle (demonstrating a connection to wear and tear on roads) or congestion (for example, charging more for CBD roads, or for use of roads at particular times).

40. Another relevant part of the inquiry, which is illuminated more clearly in the absence of a fixation on the pre-identified "steps", is the statutory context of the tax. The cases show that, if a tax forms part of a genuine scheme comprehensively regulating an activity or trade in the public interest,[91] it is less likely to be characterised as an excise.[92] The fact that a tax belongs to such a scheme (cf a licensing system that is but "an adjunct to a revenue statute"[93]) indicates that the object of the tax is the activity the subject of regulatory control. Thus, the fee for car registration in Victoria is distinguishable from the ZLEV Charge: it is one component of the broader regulatory scheme with the objects described at **CS [49]**. Of course, the terms and operation of the law would need to be examined in any case where these issues arise. But an evaluative test is a more accurate means of calibrating these boundaries than the blunt instrument of rigid rules operating by reference to the step in the life-cycle of goods to which a tax is directed.

E.3 The relevance of an impact on price

41. Inland taxes on goods in Australia have normally been imposed upon some step in manufacture, production, distribution or sale of goods.[94] The mechanism by which such taxes distort the national market is through a general tendency to enter into the price paid for the goods. However, any inquiry into the tendency of a tax to affect price is not an end in itself. Instead, such an inquiry is a proxy for the tendency of a tax to affect demand for, or the production of, the relevant goods. As Mason J explained in *Hematite*:[95]

> A tax on goods sold, like a tax on goods produced, is a burden on production, though less immediate and direct in its impact. It is a burden on production because it enters into the price of the goods - the person who is liable to pay it naturally seeks to recoup it from the next

---

91 See *Dennis Hotels* (1960) 104 CLR 529 at 576 (Taylor J); *Philip Morris* (1989) 167 CLR 399 at 452 (Brennan J).

92 The regulatory nature of a scheme has been accepted to be relevant to its characterisation as an excise: *Philip Morris* (1989) 167 CLR 399 at 439 (Mason CJ and Deane J), 452, 456, 459, 463 (Brennan J); *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 592, 596-597 (Mason CJ, Brennan, Deane and McHugh JJ); *Ha* (1997) 189 CLR 465 at 501-502 (Brennan CJ, McHugh, Gummow and Kirby JJ).

93 *Dennis Hotels* (1960) 104 CLR 529 at 576 (Taylor J).

94 Taxes imposed after the receipt of the goods by a consumer being "a phenomenon infrequently encountered": *Dickenson's Arcade* (1974) 130 CLR 177 at 239 (Mason J).

95 *Hematite* (1983) 151 CLR 599 at 632 (Mason J) (emphasis added).

> purchaser. As the tax increases the price of the goods to the ultimate consumer, and thereby diminishes or tends to diminish demand for the goods, it is a burden on production.

42. That aligns with the majority's explanation in *Capital Duplicators (No 2)* that a tax on distribution has a "natural tendency 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 goods".[96]

43. Accordingly, even if a tax does not have a tendency to enter into the purchase price of goods, if it increases the cost to the consumer of owning or using those goods then it might nevertheless have a tendency to distort the market by "depress[ing] the demand for" those goods. Indeed, once it is recognised that the purpose of s 90 is to prevent distortions in the national markets for goods arising from differential taxes on those goods, there is no warrant for confining s 90 to taxes that distort those markets as a result of a tendency to affect the price of goods. For that reason, while factors such as the "indirectness 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 movement of the goods into consumption"[97] might well be relevant to taxes imposed on production, manufacture, distribution and sale – because they will demonstrate a general tendency to affect the sale price, and therefore the demand, for the goods – those same facts are not of much assistance in determining whether taxes on goods that are payable after sale are excises. That follows because taxes of that latter kind might distort the market for those goods through mechanisms other than an effect on price.

44. In any event, for the reasons addressed in oral argument,[98] the ZLEV charge has a tendency to affect the price of ZLEVs that have not yet been sold, even though it is not payable until after sale, because a rational consumer will be aware before purchasing a ZLEV of the ongoing cost associated with using it, and that will have a natural tendency to reduce the price they are prepared to pay.

E.4 Characterisation

45. The characterisation of a tax as an excise, or not, is a legal question. As such, an impost's status does not depend upon economic evidence as to its effect. The Court can conclude that an impost has a natural or general tendency to affect supply or demand for goods of

---

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

97 *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 365 (Barwick CJ), cited in *Hematite* (1983) 151 CLR 599 at 629 (Mason J), 658 (Brennan J), 666 (Deane J); *Philip Morris* (1989) 167 CLR 399 at 448 (Brennan J), 492 (McHugh J); *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 583 (Mason CJ, Brennan, Deane, McHugh JJ).

98 *Vanderstock & Anor v State of Victoria* (transcript, 16 February 2023) at lines 11642-11730.

the relevant class based on logic and common experience, without needing to draw on evidence to that effect.[99] A tax that applies to the overwhelming majority of uses of a vehicle, and which is calculated by reference to the extent of that use, plainly has such a tendency (albeit that the size of the effect may be unquantified). As a matter of law, such a tax is properly characterised as an excise, and if imposed by a State or Territory is invalid.

F CONCLUSION

46. For the above reasons, *Ha* and *Capital Duplicators (No 2)* were correctly decided. In particular, they correctly identified the purpose served by s 90 within the scheme of Ch IV of the Constitution. The proposition that "duties of customs and of excise" in s 90 exhausts the category of taxes on goods naturally follows from acceptance of that purpose. While neither case decided whether a tax on the use of goods is an "excise", once it is accepted that the relevant inquiry is one of substance and not form, such taxes cannot be categorically excluded. To hold otherwise would be to give determinative significance to the criterion of liability (ie to the fact that liability was imposed by reference to use or consumption).

47. The proper approach is to recognise that a tax that is imposed by reference to some dealing with goods, and which has a general tendency to distort the market for goods of that class (and therefore to affect those goods as articles of commerce) will ordinarily properly be characterised as an excise, irrespective of the particular dealing with goods that enlivens the liability to pay that tax (be it production, manufacture, distribution, sale, consumption, use, or some other dealing with goods). The question is, however, evaluative in character, and each case will depend upon an assessment of all the considerations identified above.

Dated: 17 March 2023

Stephen Donaghue
Solicitor-General of the Commonwealth

David Thomas
T: (02) 9232 4478
dthomas@sixthfloor.com.au

Celia Winnett
T: (02) 8915 2673
cwinnett@sixthfloor.com.au

Michael Maynard
Attorney-General's Department

[99] See, eg, *Philip Morris Ltd* (1989) 167 CLR 399 at 436 (Mason CJ and Deane J); *Chamberlain* (1970) 121 CLR 1 at 13 (Barwick CJ); *Dennis Hotels* (1960) 104 CLR 529 at 546 (Dixon CJ), 594, 597 (Windeyer J); *Capital Duplicators (No 2)* (1993) 178 CLR 561 at 586 (Mason CJ, Brennan, Deane, McHugh JJ). See also *Herald and Weekly Times v Commonwealth* (1966) 115 CLR 418 at 436-437 (Kitto J, Taylor, Menzies, Windeyer and Owen JJ agreeing), having regard to "ordinary experience" when characterising a law.