HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

B E T W E E N:

CHRISTOPHER VANDERSTOCK
First Plaintiff

KATHLEEN DAVIES
Second Plaintiff

10

AND

THE STATE OF VICTORIA
Defendant

SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

PART I: SUITABILITY FOR PUBLICATION

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

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PART II: BASIS OF INTERVENTION

2. The Attorney General for Western Australia intervenes pursuant to section 78A of the *Judiciary Act 1903* (Cth) in support of the orders sought by the defendant.

PART III: ARGUMENT

3. The ZLEV charge imposed by section 7 of the *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic) ("**ZLEV Act**") is an annual charge imposed upon the registered operator of a zero and low emission vehicle ("**ZLEV**"). It is calculated by reference to distance travelled by the ZLEV upon specified roads, whether in or out of Victoria. The plaintiffs and the Commonwealth contend that the ZLEV charge is an excise, and outside the legislative power of the Victorian Parliament to enact.

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4. WA contends that the ZLEV charge is a particular type of consumption tax, which may be described as a "usage consumption tax", ie a tax which applies to the activity of "using" goods or "destroying them by use",[1] as opposed to a consumption tax imposed by reference to the value of goods. It relates to the use of a ZLEV after delivery into the hands of the consumer. It does not relate to a step

[1] *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 187 (Barwick CJ) ("***Dickenson's Arcade***").

in the manufacture, production, distribution or sale of a good, nor is it calculated by reference to the production or retail value of a ZLEV. There is no authority that such a "usage consumption tax" is an "excise" for the purposes of section 90 of the *Constitution*. There is no reason in principle why it should be.

5. In any event, to hold that a consumption tax (of any type) is a constitutional excise would require the Court to overrule *Dickenson's Arcade Pty Ltd v Tasmania* ("***Dickenson's Arcade***").[2] That should not occur.

EXISTING AUTHORITY

6. On existing authority:

10 (a) the purpose of section 90 is "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".[3] In this context, "real control of taxation of commodities" appears to mean control over the economic policy affecting the supply and price of goods,[4] ie tariff policy, rather than control over the national economy;[5] and

(b) the Commonwealth Parliament has exclusive power to impose duties upon a step in relation to the manufacture, production, distribution or sale[6] of any goods (locally produced or imported) "before they reach the hands of consumers".[7]

20 7. It is no purpose of section 90 to vest exclusive power in the Commonwealth to impose taxes upon goods after they have reached the consumer.

8. In *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* ("***Capital Duplicators (No 2)***") and *Ha v New South Wales* ("***Ha***"), a majority in each case

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2 (1974) 130 CLR 177.

3 *Parton v Milk Board (Vict)* (1949) 80 CLR 229 at 260 (Dixon J) ("***Parton***").

4 *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* (1993) 178 CLR 561 at 586 (Mason CJ, Brennan, Deane and McHugh JJ) ("***Capital Duplicators (No 2)***"). Whereas Gibbs CJ considered that the purpose of controlling tariff policy was potentially something different to a purpose of controlling taxation of commodities: *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 616 ("***Hematite***"). The Commonwealth submissions in this case equate real control of taxation and control of tariff policy: CS [11(b)].

5 This distinction is elaborated by Gibbs CJ in *Hematite* at 616-617.

6 *Capital Duplicators* at 590 (Mason CJ, Brennan, Deane and McHugh JJ); *Ha v New South Wales* (1997) 189 CLR 465 at 490, 499 (Brennan CJ, McHugh, Gummow and Kirby JJ) ("***Ha***").

7 *Bolton v Madsen* (1963) 110 CLR 264 ("***Bolton***") at 271 (the Court). Sale was not specifically mentioned in the formulation adopted by the High Court in *Bolton*.

approved parts of the following passage from the judgment of Dixon J in *Parton v Milk Board (Vict)* (“***Parton***”) concerning the purpose of section 90:[8]

> “In making the power of the Parliament of the Commonwealth to impose duties of customs and of excise exclusive it may be assumed that it was intended to give the Parliament a real control of the taxation of commodities and to ensure that the execution of whatever policy it adopted should not be hampered or defeated by State action. 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 upon its manufacture or production.”[9] (underlining added)

10 9. This statement (the “*Parton* statement”) has been relied upon in justifying the application of section 90 in respect of all goods, rather than just locally produced goods.[10] This affirms that the purpose of section 90 is not only to permit the Commonwealth to take over the State’s excises to raise revenue for itself, but also to give the Commonwealth Parliament the exclusive ability to control taxation of commodities which may affect free trade.[11]

10. There was pointed criticism by the minority in *Ha*[12] of the historical or constitutional accuracy of the assumption made by Dixon J about the purpose of section 90 in the *Parton* statement, but even accepting it to be correct, it is expressly limited to “any point in the course of distribution before it reaches the consumer”.

20 11. That limitation is correct in principle, if the purpose of section 90 is to provide the Commonwealth Parliament with exclusive control over economic policy affecting the supply and price of goods. A tax (such as a “usage consumption tax”) imposed after the last sale of goods, by reference to matters which occur in the use of such goods after the last sale, does not distort the market for the goods at all, or at least does not do so in the same way as a tax imposed during or before the last sale.

12. The market distortions caused by taxes imposed during or before the last sale, and their effect upon the purpose of section 90, are expressly mentioned by the majority in *Capital Duplicators (No 2)*. They said, immediately before affirming the *Parton*

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8 *Parton* at 260.

9 *Ha* at 495 (Brennan CJ, McHugh, Gummow and Kirby JJ) (approved the first sentence of the quote); *Capital Duplicators (No 2)* at 586 (Mason CJ, Brennan, Deane and McHugh JJ) (approved the quote from “… was intended”).

10 *Parton*; *Capital Duplicators (No 2)* at 584 (Mason CJ, Brennan, Deane and McHugh JJ), *Ha* at 495 (Brennan CJ, McHugh, Gummow and Kirby JJ).

11 *Capital Duplicators (No 2)* at 586 (Mason CJ, Brennan, Deane and McHugh JJ), quoting *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)* (1992) 177 CLR 248 at 277-278 (Brennan, Deane and Toohey JJ); *Ha* at 494, 497 (Brennan CJ, McHugh, Gummow and Kirby JJ).

12 *Ha* at 510-511 (Dawson, Toohey and Gaudron JJ).

statement, that the purpose of sections 90 and 92, considered together with sections 51(ii) and (iii):[13]

> "… 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. Of course, trade and competition are affected by a variety of factors but the imposition of a tax on goods is a particular way by which a government may attract or discourage trade and distort competition. If taxes on the distribution of goods were excluded from the operation of s. 90, the purpose which uniformity of customs, excise and bounties was intended to
10 achieve would be prejudiced and the Parliament would not have effective control of economic policy affecting the supply and price of goods throughout the Commonwealth." (underlining added)

These market distortions do not occur where a tax is imposed by reference to the activity of using a good by a consumer. A consumer may purchase the goods in one market area, and use them in another market area. Taxation by reference to use does not directly affect the market for sale in the same way as taxation which affects the price of goods in that market, ie, in a simple calculable manner. Hence, the NSW and Victorian markets for ZLEVs (and the price paid by a purchaser upon buying a ZLEV) are unaffected by the Victorian ZLEV charge, whether the purchaser is in
20 NSW, and then registers the ZLEV for use in Victoria; or whether the purchaser is in Victoria and proceeds to register the ZLEV in Victoria.

"USAGE CONSUMPTION TAX" NOT AN EXCISE

13. An excise must be "directly related to goods".[14] However, not all taxes directly related to goods constitute excises, eg a tax upon ownership.[15] To qualify as an excise, the relationship of a tax to the goods must be sufficiently direct or proximate to a step in manufacture, production, distribution or sale of the goods, ie, in bringing the goods to a point of receipt by a consumer.[16] A tax is not an excise if it has no relation to the quantity or value (however measured) of goods.[17]

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[13] *Capital Duplicators (No 2)* at 585-586 (Mason CJ, Brennan, Deane and McHugh JJ). See also *Ha* at 494-495, 497 (Brennan CJ, McHugh, Gummow and Kirby JJ).

[14] *Bolton* at 271 (the Court).

[15] *Ha* at 510 (Dawson, Toohey and Gaudron JJ).

[16] *Dickenson's Arcade* at 239 (Mason J), *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 365 (Barwick CJ) ("***Anderson's Case***").

[17] *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 277 (Latham CJ) ("***Matthews***"). Cf at 304 (Dixon J).

14. The crucial point from *Browns Transport Pty Ltd v Kropp* ("***Kropp***")[18] and *Bolton v Madsen* ("***Bolton***")[19] is that there cannot be a duty of excise unless the tax is imposed "by reason of and by reference to a relation between the taxpayer and the goods".[20] Where the relation is between the amount of tax and the amount of goods sold or produced, as is often the case, "by reference to" may not require a precise correlation between these amounts. In *Matthews v Chicory Marketing Board (Vict)* ("***Matthews***") the amount of tax was based upon the area of land where chicory was planted, not the amount of chicory which was actually produced or sold.[21]

15. *Kropp* and *Bolton* (which are not challenged in these proceedings) illustrate a situation where there was an insufficiently proximate relationship between a tax and goods for there to be an excise. The tax in these cases was levied upon a carrier of goods,[22] calculated by reference to the cost of the transportation services (*Kropp*) or the distance goods were transported prior to retail sale (*Bolton*). The additional cost of the tax for the goods was simply calculable and could have been added to the ultimate cost of the goods passed on to a consumer. However, in *Bolton*, the Court made plain that this consideration was insufficient alone to make the tax sufficiently proximate to the goods to constitute an excise.[23] In substance,[24] the tax was payable by reference to the use of the roads, rather than by reference to any step in the manufacture, production, distribution or sale of the goods carried by the vehicles.[25]

16. In this case, the ZLEV charge is even more remotely connected to the manufacture, production, distribution or sale of a ZLEV. While the charge is equally for the use of roads, it is imposed after retail sale, rather than before sale.

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[18] *Browns Transport Pty Ltd v Kropp* (1958) 100 CLR 117 ("***Kropp***").

[19] *Bolton v Madsen* (1963) 110 CLR 264.

[20] *Western Australian v Chamberlain Industries Pty Ltd* (1969) 121 CLR 1 at 23 (Kitto J) ("***Chamberlain Industries***"). See also at 28 (Windeyer J), 40 (Walsh J).

[21] *Matthews* at 303 (Dixon J).

[22] In *Bolton* the tax was imposed upon Turner, who was both the owner of the goods (in that case wool), and the charterer of the truck. However, the tax was imposed upon Turner in his capacity as the charterer of the vehicle (ie carrier), not the owner of the goods.

[23] *Bolton* at 271-272 (the Court). See especially at 271: "[T]o establish no more than that [the tax's] imposition has increased the cost of putting goods upon the market by a calculable amount falls short of establishing the directness of relation between the tax and the goods that is the essential characteristic of a duty of excise".

[24] Although the court referred to the "criterion of liability" (at 271), it applied this practically or substantively. That is consistent with authority: see *Dickenson's Arcade* at 239 (Mason J); *Anderson's Case* at 365 (Barwick CJ); *Capital Duplicators (No 2)* at 583 (Mason CJ, Brennan, Deane and McHugh JJ), *Ha* at 498-499 (Brennan CJ, McHugh, Gummow and Kirby JJ).

[25] *Bolton* at 273 (the Court). See also *Kropp* at 129-130 (the Court).

RESPONSE TO COMMONWEALTH SUBMISSIONS

17. The Commonwealth advances four matters in support of the proposition that the legal and practical operation of the ZLEV charge shows a sufficient connection with a ZLEV to be described as an excise upon a ZLEV.[26] None of these address the critical question about the proximate relationship between the tax and the manufacture, production, distribution or sale of ZLEVs.

18. First, the Commonwealth submits that "liability is attracted by reference to, or by reason of, a step taken in dealing with goods, namely, a registered operator's use of a ZLEV" (underlining added).[27] This submission elides the meaning of a "dealing" with goods for the purposes of section 90 (ie a step upon manufacture, production, distribution or sale) with "using" goods. As previously explained,[28] the concept of "dealing" with goods for the purposes of section 90 is, at its widest, for the purposes of controlling the taxation of commodities to ensure free trade, before they reach the consumer. The purpose of section 90 does not extend beyond controlling the taxation of commodities after they reach the first consumer on any presently accepted view.

19. Secondly, the Commonwealth apparently submits that if a tax is upon use of a good, the relevant connection to establish that it is an excise is demonstrated by the calculation of the amount of the tax by reference to use: "… where the step that attracts a tax is the use of goods, it is a strong indicator that the tax is imposed 'on' those goods if the amount of the tax is calculated by reference to the amount the goods are used."[29] However, that submission assumes that a tax upon use is an excise.

20. Thirdly, the Commonwealth submits that the ZLEV charge is a tax upon ZLEVs because it only applies to ZLEV registered users, as opposed to all cars upon the specified roads.[30] Nevertheless, the ZLEV charge is a tax upon the activity of ZLEV registered users, as opposed to a tax upon the ZLEVs themselves. The fact

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[26] CS [13], [44]-[49]. The "sufficient connection" required by Owen J in *Chamberlain Industries* at 30 – as endorsed by Brennan J in *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 446 ("***Philip Morris***") – was "whether there was a sufficiently close connexion between the duty imposed and a sale of the goods in the course of their passage from producer to consumer to justify the conclusion that the duty was a duty of excise".

[27] CS [45].

[28] See paras [6]-[12] above.

[29] CS [46].

[30] CS [48].

that only the road use of ZLEV users is the basis for the tax, notwithstanding that there were other road users, does not establish that the tax is directly related to, or upon, ZLEVs. Although not precisely identical, a tax only upon the road use of commercial transportation vehicles, notwithstanding that other vehicles also used the roads, did not make the tax an excise upon the goods transported by these vehicles.[31]

21. Fourthly, the Commonwealth says that the ZLEV charge is not a fee for service. That may be accepted.[32] However, that does not mean that it is a tax directly on ZLEVs, for the reasons discussed above.

10 **RESPONSE TO PLAINTIFFS' SUBMISSIONS**

22. The plaintiffs raise similar points. They say that the ZLEV charge is not a licence fee or fee for service.[33] This is not decisive in any way, as this does not necessarily mean that the ZLEV charge is a tax directly upon ZLEVs. *Kropp* and *Bolton* illustrate similar taxes which were not fees for service, but neither were they excise duties.

23. The plaintiffs also say that the ZLEV charge is imposed by reference to a step in consumption.[34] However, a charge imposed by reference to the use of a vehicle is not itself enough to ensure a sufficient connection with the production, manufacture, distribution or sale of the vehicle to say that there is a tax directly
20 upon the vehicle. This may also depend upon the nature of the calculation of the tax. Here, the nature of the ZLEV charge is not calculated by reference to the production or retail value of the ZLEV. The calculation by reference to use of specified roads,[35] which may or may not be within Victoria, confirms that the ZLEV charge does not impose any tax upon the goods themselves, but upon the activity of using a ZLEV after the purchase of the vehicles.

24. In other words, the ZLEV charge does not contribute to the retail cost of ZLEVs or directly affect the market for the sale of ZLEVs, by taxing a step in production,

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31 See *Kropp* and *Bolton*, discussed at [14]-[15] above.
32 CS [49].
33 PS [47]-[48].
34 PS [49].
35 Compare PS [56]-[61].

manufacture, distribution or sale, and imposing a charge on such a step which is then passed on to a ZLEV purchaser.[36]

25. For these reasons, in principle, the ZLEV charge is not an excise upon the basis advanced either by the Commonwealth or the plaintiffs.

DICKENSON'S ARCADE PTY LTD V TASMANIA

26. Further or alternatively, as a matter of authority, a tax based upon the consumption or use of goods is not an excise. This was established in *Dickenson's Arcade*. This case should not be re-opened.

27. In *Dickenson's Arcade*, Part II of the *Tobacco Act 1972* (Tas) ("***Tobacco Act***")
10 imposed a tax of 7.5% upon the value of tobacco consumed. The consumer was liable to pay the tax, but regulations permitted the Tasmanian Commissioner of Taxes to make arrangements to collect the tax in advance of consumption from the tobacco vendor at the point of sale.

28. Barwick CJ, and Menzies, Gibbs, Stephen and Mason JJ, considered that a domestic or inland consumption tax was not an excise.[37] McTiernan J dissented on this proposition.[38] As these judges (apart from Barwick CJ) considered that the *Tobacco Act* intended to impose liability upon the basis of consumption, Part II of the *Tobacco Act* was valid. Barwick CJ considered that, in substance, the *Tobacco Act* intended to impose liability "upon the movement of tobacco into consumption",
20 and therefore created an excise.[39]

29. A corollary of the position of Barwick CJ and McTiernan J was that Part II of the *Tobacco Act* was invalid. Mason J also considered that when the operation of the regulations made under Part II was considered in conjunction with the provisions

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[36] See paragraphs [11]-[12] above.

[37] *Dickenson's Arcade* at 186 (Barwick CJ): "… a tax upon act of consuming goods, completely divorced from the manner or time of their acquisition by purchase, must now be regarded as outside the scope of s. 90 and within the competence of a State legislature"; at 209 (Menzies J): "A tax upon consumption is … not a duty of excise"; at 221-222 (Gibbs J): "… it seems to me that established usage (notwithstanding some divagations) favours the conclusion that a tax on the consumption of goods is not a duty of excise within the meaning of that expression as used in s. 90 of the Constitution. … Upon its proper construction s. 90 stops short of denying power to the States to impose taxes on consumption"; at 230-231 (Stephen J): "Since [*Bolton*] … the subsequent judgments of this Court have reflected the view that what is for constitutional purposes a duty of excise stops short of a tax imposed upon the act of consumption"); and at 239 (Mason J): "These statements [in *Bolton* and other cases] must, I think, be regarded as establishing at this time that a tax on consumption of goods is not an excise".

[38] *Dickenson's Arcade* at 204 (McTiernan J).

[39] *Dickenson's Arcade* at 192-194 (Bawick CJ).

of Part II, the effect of the regulations was to convert the inland consumption tax provided by Part II into a tax upon a step of sale and make it an excise.[40] Hence, Mason J regarded the regulations as outside power.[41]

30. Consequently:

    (a) five of six judges accepted that a consumption tax was not an excise;

    (b) four of six judges considered that the provisions of Part II of the *Tobacco Act* imposed a consumption tax, and thus these provisions did not impose an excise and were not contrary to section 90 of the *Constitution*;

    (c) three of six judges (including the Chief Justice) considered the regulations
10 to be invalid.

31. The first two points form part of the ratio as to why the majority (Menzies, Gibbs, Stephen and Mason JJ) allowed a demurrer to the claim that Part II unconstitutionally imposed an excise. In other words, these paragraphs are integral to the decision that Part II was constitutionally valid. The third point in the last paragraph explains why the demurrer was overruled in relation to the claim that the regulations made under Part II were invalid. The regulations were invalid because, in the view of Barwick CJ and McTiernan J, Part II was unconstitutional, and in the view of Mason J, the regulations were ultra vires by altering the character of the tax imposed by Part II from an inland consumption tax into a tax upon sale of
20 tobacco (and consequently an excise).

(i) Dickenson's Arcade – Reasons why a Consumption Tax is Not an Excise

32. Three of the majority of four judges who upheld the validity of Part II of the *Tobacco Act* in *Dickenson's Arcade* (Menzies, Gibbs and Stephen JJ) gave two main reasons why a domestic or inland consumption tax was not an excise. The first related to the effect of precedent, while the second concerned the language and purpose of section 90.

33. First, previous precedent established that a domestic consumption tax was not an excise.[42] In particular, the unanimous decision in *Bolton* established that "for

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40 *Dickenson's Arcade* at 242-243 (Mason J): "Once the provisions of the regulations are taken into account, the effect of the tax … is that it is an excise. It is a levy on the sale of goods calculated by reference to their value and imposed before they pass into the hands of the consumer in circumstances where the amount of tax is paid by the ultimate purchaser."

41 *Dickenson's Arcade* at 243 (Mason J).

42 *Dickenson's Arcade* at 209 (Menzies J), 221-222, 223 (Gibbs J), 229-230 (Stephen J), 239 (Mason J).

constitutional purposes duties of excise are taxes directly related to goods imposed at some step in their production or distribution before they reach the hands of consumers."[43] No case had directly decided that a duty imposed upon consumption was a duty of excise.[44]

34. Secondly, the *Constitution* uses the term duties of "excise" to correspond with duties of "customs", and an "excise" is confined to a tax directly related to goods imposed at some step of their production or distribution. The constitutional words "duty of excise" are not certain in their popular, political or economic usage, and they do not contain a term of art which conceals an ultimate truth to be discovered by a "judicial fossicker".[45] The constitutional words of section 90 do not warrant any generalization that the *Constitution* gives exclusive power to the Commonwealth over all indirect taxation imposed immediately upon or in respect of goods.[46] Section 90 does not refer to taxes on goods, but to duties of custom and excise.[47] The subject matter of section 90 is not indirect taxation nor control of the Australian economy.[48] The economic effect of a tax is not useful or relevant in determining the existence of an excise, as the words of section 90 must control the legislative power to impose a tax and a consumption tax will (no doubt) always have an economic effect reflected back upon the manufacturer or producer.[49]

35. Mason J was the fourth judge in the majority who upheld the validity of Part II of the *Tobacco Act*. He accepted that the effect of precedent was against an inland consumption tax being an excise.[50] He observed that this limitation meant that the Commonwealth had a restricted power to control the taxation of commodities[51] (although valid Commonwealth taxation legislation in respect of commodities would still prevail over State taxation on the same subject matter due to section 109 of the *Constitution*). Nevertheless, even if precedent required this limitation, Mason J did not regard it as a large restriction as "a tax on consumption which is not also a tax on the sale of goods is a phenomenon infrequently encountered"[52]

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43 *Bolton* at 271 applied in *Anderson's Case* and accepted in *Chamberlain Industries*.
44 *Dickenson's Arcade* at 217, 220 (Gibbs J).
45 See especially *Dickenson's Arcade* at 230 (Stephen J).
46 See especially *Dickenson's Arcade* at 212 (Menzies J).
47 See especially *Dickenson's Arcade* at 222 (Gibbs J).
48 *Dickenson's Arcade* at 212-213 (Menzies J), 222 (Gibbs J).
49 *Dickenson's Arcade* at 218-219, 222-223 (Gibbs J), 230 (Stephen J).
50 *Dickenson's Arcade* at 239 (Mason J).
51 *Dickenson's Arcade* at 239 (Mason J).
52 *Dickenson's Arcade* at 239 (Mason J).

(although the present case is just such a situation). Mason J also observed that the justification for this restriction was that consumption was not sufficiently proximate to the production and manufacture of goods to enable a consumption tax to be described as an "excise".[53]

36. While Barwick CJ dissented as to the validity of Part II of the *Tobacco Act*, due to the way he characterised the tax which was imposed, the Chief Justice still accepted that an inland consumption tax was not an excise.[54] This was due to the effect of the precedent in *Bolton*, the Privy Council decision in *Atlantic Smoke Shops Ltd v Conlon* ("***Atlantic Smoke Shops***")[55] and "in deference to the views expressed by other Justices".[56] However, Barwick CJ did not think that *Atlantic Smoke Shops* required this outcome. While *Atlantic Smoke Shops* was referenced[57] in the judgments of Gibbs J[58] and Stephen J,[59] it does not appear to have played a decisive role in the outcome. It is mentioned so as to explain the later qualification in *Parton*[60] by Dixon J of the expansive views he earlier expressed in *Matthews*.[61] Those expansive views of Dixon J were not accepted by the majority in *Dickenson's Arcade* in any event.

37. It is fair to say that Barwick CJ and Mason J placed their decision that an inland consumption tax was not an excise upon the basis of precedent, rather than fully embracing the analysis of the language and purpose of section 90 adopted by Menzies, Gibbs and Stephen JJ. That adherence to precedent, and "deference to the views expressed by other Justices", occurred in circumstances where Barwick CJ thought that logical analysis would lead to a different conclusion on this point of principle.[62] Further, as Mason J explained, any restriction on Commonwealth power created by the precedent was not a large one.

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[53] *Dickenson's Arcade* at 239 (Mason J).

[54] See *Dickenson's Arcade* at 186 (Barwick CJ): "… a tax upon act of consuming goods, completely divorced from the manner or time of their acquisition by purchase, must now be regarded as outside the scope of s. 90 and within the competence of a State legislature".

[55] [1943] AC 550 ("***Atlantic Smoke Shops***").

[56] *Dickenson's Arcade* at 185-186 (Barwick CJ).

[57] McTiernan J also referred to *Atlantic Smoke Shops* in *Dickenson's Arcade* at 202, but his Honour was dissenting in any event.

[58] *Dickenson's Arcade* at 220-221.

[59] *Dickenson's Arcade* at 230.

[60] *Parton* at 261.

[61] *Matthews* at 300.

[62] *Dickenson's Arcade* at 185 (Barwick CJ). Arguably, Barwick CJ's logical analysis should not have led to a different logical conclusion, as it wholly depended upon the economic effect of the tax rather than upon the words used.

(ii) Cases Subsequent to Dickenson's Arcade

38. There is no case subsequent to *Dickenson's Arcade* which decides that a domestic consumption tax on goods should be classified as a duty of excise. This question was specifically not decided in *Ha*,[63] as it was unnecessary to consider it there or in the preceding decision of *Capital Duplicators (No 2)*.

(iii) No Leave to Re-Open Dickenson's Arcade Should Be Granted

39. Leave to re-open *Dickenson's Arcade* has previously been refused,[64] and *Dickenson's Arcade* was not overruled in *Ha* and *Capital Duplicators (No 2)*. No leave to re-open *Dickenson's Arcade* should now be granted to argue against the
10 proposition that a consumption tax is not an excise.

40. This is predominantly for the following reasons: (a) the term "excise" is textually uncertain; (b) the arguments based upon the purpose of section 90, Commonwealth control of taxation of commodities and free trade, do not apply to justify the imposition of a consumption tax after the ultimate point of sale; (c) in an area where there has been significant fluidity of principle and decision-making, there has been one constant over the last half-century[65] and that is a consumption tax is not an excise. The plaintiffs and the Commonwealth have not demonstrated that this principle should be re-opened for reconsideration. There is no certain textual meaning or purposive construction which justifies re-opening.

20 41. Expressed in terms of the factors set out in *John v Federal Commissioner of Taxation*:[66] (a) whatever the differences of view as to the purpose and operation of section 90 in previous cases, *Dickenson's Arcade* rests upon a long-accepted principle that there can be no excise tax imposed upon goods where the tax is imposed by reference to matters arising after goods have been brought into the hands of a consumer;[67] (b) on the particular point of principle, five of six judges accepted that a consumption tax was not an excise. The view of the remaining judge (McTiernan J) depends upon rejecting Dixon J's own qualification to his statements in *Matthews* which occurred in *Parton*, and misreading *Kropp*;[68] (c)

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[63] *Ha* at 499-500 (Brennan CJ, McHugh, Gummow and Kirby JJ).

[64] *Philip Morris* at 424 (Mason CJ and Deane J).

[65] Indeed the constancy goes back to Dixon J's *Parton* statement in 1949. See also *Bolton* at 271 (the Court); *Anderson's Case* at 364 (Barwick CJ), 373 (Kitto J), 377 (Menzies J).

[66] (1989) 166 CLR 417 at 438-439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

[67] *Philip Morris* at 445 (Brennan J).

[68] *Dickenson's Arcade* at 204 (McTiernan J).

there has been no considerable inconvenience in over a century since federation in holding that a consumption tax is not an excise; and (d) the view that a consumption tax cannot be an excise has been acted on by State Governments for over a century, in working out there taxation arrangements.[69]

RE-OPENING *HA* AND *CAPITAL DUPLICATORS (NO 2)*

42. Victoria contends that if *Dickenson's Arcade* is re-opened, the correctness of *Ha* and *Capital Duplicators (No 2)* should be reconsidered. WA adopts Victoria's submissions on this point and makes a short supplementary submission below.

43. It is evident that the term "excise" is textually and historically ambiguous. As well, there is no certain purpose which can be attributed to the inclusion of section 90 in the *Constitution*.[70] These points are evident from the debates which have continued over many decades. They have continued precisely because there is no decisive method of constitutional construction which can be applied to choose between competing feasible constructions of section 90.

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44. Where two or more views can be reasonably held,[71] to avoid the interpretation of section 90 becoming simply a matter of judicial choice rather than constitutional method,[72] it is appropriate to choose the narrowest available supportable construction of section 90. This is the construction in line with the submissions made by Victoria.[73]

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69 The many cases litigating section 90 demonstrate this.

70 See *Philip Morris* at 425 (Mason CJ and Deane J), 442 (Brennan J), *Capital Duplicators (No 2)* at 593 (Mason CJ, Brennan, Deane and McHugh JJ), *Ha* at 524 (Brennan CJ, McHugh, Gummow and Kirby JJ).

71 Cf remarks of Brennan CJ upon swearing in: (1995) 183 CLR at xi, cited in James Stellios, *Zines and Stellios's the High Court and the Constitution* (Federation Press, 7th ed, 2020) at 767 ("***Zines***").

72 *Zines* at 733-734, 745-746, 767-769, 788-789.

73 Victoria's Submissions [39]: an excise is "a tax that falls selectively on locally produced or manufactured goods, in the sense that it falls on such goods rather than imported goods or falls on all goods indiscriminately. In this context, "locally" refers to goods produced within the State or Territory levying the tax, or within Australia more broadly, taxes on either of which may undermine the Commonwealth's tariff policy" to impose a common external tariff which would be used to either protect Australian industry or promote free trade.

PART IV: LENGTH OF ORAL ARGUMENT

45. It is estimated that the oral argument will take 15-20 minutes.

Dated: 7 November 2022

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

B E T W E E N:

CHRISTOPHER VANDERSTOCK
First Plaintiff

KATHLEEN DAVIES
10 Second Plaintiff

AND

THE STATE OF VICTORIA
Defendant

ANNEXURE TO SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

20 Pursuant to paragraph 3 of Practice Direction No. 1 of 2019, the Attorney General for Western Australia sets out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in the submissions.

	Description	Version	Provision
	Constitutional Provisions		
1.	*Commonwealth Constitution*	Current	ss 51(ii), (iii), 90, 92, 109
	Statutory Provisions		
2.	*Judiciary Act 1903* (Cth)	Current	s 78A
3.	*Tobacco Act 1972* (Tas)	As enacted	Pt II
4.	*Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic)	Current	Whole Act